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## Consumer Bankruptcy Reform: Debtors' Prison without Bars or "Just Desserts" For Deadbeats?

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## COMMENT

# CONSUMER BANKRUPTCY REFORM: DEBTORS' PRISON WITHOUT BARS OR "JUST DESSERTS" FOR DEADBEATS?

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### INTRODUCTION

Hailed as both long overdue reform and decried as creditor overreaching,<sup>1</sup> the Bankruptcy Abuse Prevention and Consumer

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<sup>1</sup> For over a decade bankruptcy reform has been on the agenda and a hotly contested political battle that has largely been a bipolar dispute between pro-creditor and pro-debtor oriented groups. For a discussion of the political battles over bankruptcy reform in the 1990s, see Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509 (2003). For a discussion of the politics of bankruptcy legislation generally, see Melissa Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004); Jeb Barnes, *Bankruptcy Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism*, 13 J.L. & POL. 893 (1997); Charles J. Tabb, *A Century of Regress or Progress: A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 BANKR. DEV. J. 343 (1999); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997); Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV.

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Protection Act of 2005 (BAPCPA)<sup>2</sup> was signed into law on April 20, 2005. The sweeping and controversial changes to the Bankruptcy Code<sup>3</sup> became effective, with limited exceptions,<sup>4</sup> on October 17, 2005. There has not been such a significant modification to the substantive provisions and framework of the Bankruptcy Code since its creation under the Bankruptcy Reform Act of 1978.

The substantive revisions to the Code, on the whole, are generally creditor-oriented. For example, one of the most significant revisions includes a new “means test”<sup>5</sup> as a requirement of eligibility for Chapter 7 debtors. Although not totally free from doubt, the expected consequence of this requirement will be to force many debtors who are burdened primarily with consumer debt to file under Chapter 13 (or consent to a conversion to Chapter 13).<sup>6</sup> Whether the new law will have this arguably intended effect is largely unknown. What is certain is that this new threshold test for Chapter 7 relief represents an important shift in the underlying policy of consumer bankruptcy and places a host of challenges and problems for those seeking relief. Depending on the policy viewpoint that one takes, if the statutory scheme is effective in limiting the number of Chapter 7 cases, it can be viewed as a return to debtors’ law that is harsh on debtors or as an effective way to curb the behavior of deadbeat debtors.<sup>7</sup>

This article provides an overview of current bankruptcy law and filing trends in the United States. It then provides an overview of the

801 (1997).

<sup>2</sup> BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (2005).

<sup>3</sup> 11 U.S.C. § 101 *et seq.* (2005). Unless otherwise indicated, all references to Bankruptcy Code or Code are to title 11 of the United States Code as amended by BAPCPA.

<sup>4</sup> Some provisions of BAPCPA were effective immediately upon enactment. For example, several amendments to the homestead exemptions and delay in granting a discharge in limited situations were effective immediately. See 11 U.S.C. §§ 522(o), (p), (q), 727(a)(12), 1141(d), 1228(f), 1328(f). For a complete list of the effective dates, see WILLIAM HOUSTON BROWN & LAWRENCE AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS (2005), Section II.C.

<sup>5</sup> See, e.g., Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 571, 591 (2005) (recognizing new legislation “imposes a ‘means test’ for bankruptcy relief”).

<sup>6</sup> See Michelle J. White, *Bankruptcy and Small Business*, 24 REG. 18 (2001) (recognizing that a fundamental purpose behind bankruptcy reform is to reduce the number of Chapter 7 consumer bankruptcy filings, which have continued to grow at dramatic rates each year over the last decade).

<sup>7</sup> For an example of two very different ways to view the same law, see Jonathan Alter, *A Bankrupt Way to do Business*, NEWSWEEK, April 25, 2005, at 29 (“this bill, like so many others moving through Congress, comforts the comfortable and afflicts the afflicted. Worse, it provides for no distinction between those who get unlucky in Las Vegas and those who get cancer. . . . [C]redit-card companies . . . insist the point of the bill is to restore the stigma of bankruptcy. That’s just what a seriously ill, jobless or abandoned person needs—more stigma”).

major changes to consumer bankruptcy and further analyzes several of the more controversial areas of the new law, placing them in historical context and exploring the possible ramifications of these dramatically sweeping changes. Such changes are illustrated by the journey of hypothetical debtors, Ura and Ima Broke, through the new bankruptcy maze. This illustration shows the complexity and inconsistency of the amended Bankruptcy Code. Examining the reform from the vantage point of hypothetical debtors shows how the reform can be viewed from two very different perspectives: as a return to debtors' prisons and early bankruptcy laws that treated debtors as "offenders"<sup>8</sup> or as just desserts for deadbeat debtors.

## I. CURRENT BANKRUPTCY LAW AND FILING TRENDS

### A. OVERVIEW

Bankruptcy law is a vital component of our Nation's economic fabric. The very nature of a mixed economy involves risk-taking in financial endeavors. Risky financial endeavors, whether they are starting a business or simply extending credit to a person to buy a home or car, lead to some financial failures. When the economic structure of a country embraces risk-taking and entrepreneurship, the legal system needs to provide a means to address financial failures. Bankruptcy provides a way to address financial failures and acts as a "safety valve" to add a component of social stability<sup>9</sup> in the United States.<sup>10</sup>

The basic goals of modern bankruptcy law in the United States, which are well engrained in bankruptcy jurisprudence, promote the role of bankruptcy law in adding to social stability in our society. The first goal of bankruptcy law is to provide an equitable distribution of assets among creditors; the second is to provide debtors a fresh start via a discharge of their debts.<sup>11</sup> Both goals promote stability in dealing with

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<sup>8</sup> See Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 329-30 (1991) (recognizing that early English bankruptcy laws referred to debtors as offenders who were subject to imprisonment).

<sup>9</sup> Like many areas of the law, bankruptcy provides a framework to resolve disputes. In the context of bankruptcy, it is financial disputes. Debtors and creditors both benefit from a coherent framework to resolve the problems of those in financial distress. This framework and ability to resolve these disputes provides social stability. The alternative is a lack of stability and unpredictable way to resolve these disputes.

<sup>10</sup> See Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 4-5 (1999).

<sup>11</sup> Kropp, *supra* note 10, at 6.

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the financial difficulties of people and businesses. This adds stability to financial transactions and commerce, which in turn provides stability to society as a whole.

This crucial component of our economic structure was recognized by the drafters of the Constitution in 1789 by including the authority to enact bankruptcy law as an explicit power of Congress.<sup>12</sup> The Bankruptcy Clause found in Article 1, Section 8 of the U.S. Constitution provides: "The Congress shall have power to . . . establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." Despite this express provision in the Constitution, bankruptcy law did not become a permanent fixture in the United States until the Bankruptcy Act of 1898.<sup>13</sup>

Three major bankruptcy laws were passed by Congress prior to 1898.<sup>14</sup> Each of those laws was short-lived and repealed, with all three acts lasting in the aggregate only sixteen years.<sup>15</sup> Each bankruptcy law was passed in response to a period of economic distress<sup>16</sup> and went away when the economic need for bankruptcy passed. Up until 1898, bankruptcy legislation followed a bust-boom pattern, with laws arising during economic downturns and being repealed during economic upturns.<sup>17</sup> This pattern of passing and repealing bankruptcy law led to the conventional view advocated by leading bankruptcy scholars that bankruptcy laws were passed in response to economic downturns.<sup>18</sup>

When no federal bankruptcy laws were in effect during the nineteenth century, financial failures were dealt with under state debtor-creditor laws;<sup>19</sup> however, these laws were not satisfactory.<sup>20</sup> The lack of

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<sup>12</sup> Bradley Hansen, *The Origins of Bankruptcy in the United States, 1789-1898*, at 4 (August 1995) (Ph.D. dissertation, University of Pennsylvania) (on file with authors).

<sup>13</sup> Harriet Thomas Ivy, Comment, *Means Testing Under the Bankruptcy Reform Act of 1999: A Flawed Means to a Questionable End*, 17 BANKR. DEV. J. 221, 229 (2000).

<sup>14</sup> See Dixie Burkhart, *Causes of Bankruptcy in 1997 Among Social Security Recipients in Iowa Aged 62 and Older*, at 24 (August 2002) (Ph.D. dissertation, Walden University) (on file with authors); DAVID A. SKEEL, *DEBTS DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 25 (2001) (noting that Congress passed three bankruptcy laws prior to 1898: the Bankruptcy Acts of 1800, 1841, and 1867).

<sup>15</sup> SKEEL, *supra* note 14, at 25.

<sup>16</sup> Ivy, *supra* note 13, at 229-30.

<sup>17</sup> Burkhart, *supra* note 14, at 24; SKEEL, *supra* note 14, at 24-28.

<sup>18</sup> DOUGLAS BAIRD, THOMAS H. JACKSON & BARRY E. ADLER, *CASES, PROBLEMS AND MATERIALS ON BANKRUPTCY* 27 (1st ed. 1985); Hansen, *supra* note 12, at 8-9; THERESA A. SULLIVAN, ELIZABETH WARREN & JAY L. WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 231 (1989); CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 9 (1935).

<sup>19</sup> Hansen, *supra* note 12, at 4; SKEEL, *supra* note 14, at 25.

<sup>20</sup> DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS AND REFORM* 11 (1971).

a uniform federal law to deal with financial distress was problematic for interstate commerce. With the passage of the Bankruptcy Act of 1898, uniform bankruptcy law became a permanent part of jurisprudence in the United States.<sup>21</sup> The Bankruptcy Act of 1898 is also significant because it represented a shift from bankruptcy law in the United States that protected primarily creditors to a law that protected the interests of both creditors and debtors.<sup>22</sup>

For eighty years the Bankruptcy Act of 1898, with various amendments, stayed in effect.<sup>23</sup> The Bankruptcy Reform Act of 1978, commonly referred to as the Bankruptcy Code, significantly changed bankruptcy law. Even though the Bankruptcy Code significantly changed substantive bankruptcy, it did not alter the fundamental policy in favor of debtors. In fact, some argue that it enhanced a policy in favor of debtors.<sup>24</sup> Since 1978, the Bankruptcy Code has been amended numerous times, with material amendments in 1984, 1986 and 1994.<sup>25</sup> However, none of these amendments altered the underlying policy of bankruptcy law in favor of debtors. The amendments to the Bankruptcy Code made by the enactment of BAPCPA in 2005 arguably represent a shift away from the policy of bankruptcy law favoring debtors.

## B. CURRENT FILING OPTIONS

### 1. Federal Law

The Bankruptcy Code provides five options for filing bankruptcy, with each option designed for a different type of debtor and each having different processes.<sup>26</sup> Each option is provided for in a separate chapter of the Bankruptcy Code: Chapters 7, 9, 11, 12, and 13.<sup>27</sup> Consumer debtors

<sup>21</sup> Charles J. Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23 (1995).

<sup>22</sup> Burkhardt, *supra* note 14, at 25-26.

<sup>23</sup> *Id.*

<sup>24</sup> Joseph S. Pomykala, *Wrestling with Bankruptcy – The Economics – and Politics – of Reform*, 1 MILKEN INSTITUTE REVIEW 41, 46 (1999).

<sup>25</sup> Vicki W. Travis, *Of the Latest Attempted Revisions of the Bankruptcy Code: Can They Really Change Anything?*, 16 BANKR. DEV. J. 221, 226-32 (1999). For a detailed discussion of the amendments to the Bankruptcy Code from 1978 through 1994, see Tabb, *supra* note 21, at 37-43.

<sup>26</sup> Joseph S. Pomykala, *The Division and Destruction of Value: An Economic Analysis of Bankruptcy Law*, at 1114 (April 24, 1997) (Ph.D. dissertation, University of Pennsylvania) (on file with authors).

<sup>27</sup> In addition to these chapters, BAPCPA adds an additional chapter to the Bankruptcy Code: Chapter 15. Jay L. Westbrook, *Chapter 15 and Discharge*, 13 AM. BANKR. INST. L. REV. 503, 503 n.3 (2005). Chapter 15 pertains to transnational bankruptcy cases. It incorporates the Model Law on Cross-Border Insolvency to encourage cooperation between the United States and foreign countries

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have two primary options under which to file for bankruptcy: Chapter 7 or Chapter 13.<sup>28</sup> Chapter 7 is particularly important for this article because it is commonly used by individual consumer debtors and is subject to many of the wide-scale modifications in BAPCPA.<sup>29</sup> Prior to BAPCPA, the choice between Chapter 7 and 13 was left largely to the discretion of the debtor. Despite the fact that the Code left the choice of chapter largely up to debtors,<sup>30</sup> the legal and financial consequences of each choice are quite different.<sup>31</sup>

Chapter 7 bankruptcy is sometimes referred to as liquidation bankruptcy<sup>32</sup> or “straight bankruptcy.”<sup>33</sup> Under Chapter 7, debtors generally receive a discharge of most unsecured debts; however, debtors can voluntarily pay certain debts if they wish.<sup>34</sup> Certain categories of debts, such as child support, student loans, alimony, and taxes, may not be dischargeable.<sup>35</sup> Except for a limited amount of assets that are protected from collection, Chapter 7 debtors must surrender their assets for liquidation, and the proceeds of the liquidation are distributed to

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with respect to transnational insolvency cases. For excellent discussion of the new Chapter 15, see Jay L. Westbrook, *Chapter 15 at Last*, 79 AM. BANKR. L.J. 713 (2005).

<sup>28</sup> Hung-Jen Wang & Michelle J. White, *An Optimal Personal Bankruptcy Procedure and Proposed Reforms*, 29 J. LEGAL STUD. 255, 256 (2000).

<sup>29</sup> Chapter 7 is also available to individual business debtors and non-individual business debtors such as corporations and partnerships. Chapter 13 is available only to individual debtors, which can include individual business debtors such as sole proprietorships. Consumer debtors can file for bankruptcy protection under Chapter 11, but this is not a common scenario because Chapter 11 is used almost exclusively by business debtors. See, e.g., Robert M. Lawless, Stephen P. Ferris, Narayanan Jayaraman & Anil K. Makhija, *A Glimpse at Professional Fees and other Direct Costs in Small Firm Bankruptcies*, 1994 U. ILL. L. REV. 847, 849 n.4 (1994) (discussing a study that included 27 Chapter 11 bankruptcies in its sample, where all of the cases were business or non-consumer debtors). The reforms addressed in this article pertain to perceived problems associated with Chapters 7 and 13, not with Chapter 11. The remaining two chapters of the Bankruptcy Code deal with non-consumer debtors: Chapter 9 provides bankruptcy protection for governmental units, and Chapter 12 provides protection for farmers and fishermen.

<sup>30</sup> The combination of the means test and presumption of abuse under BAPCPA makes a debtor's choice of bankruptcy chapter less subjective and much more objective, based on the application of the means test.

<sup>31</sup> SULLIVAN, *supra* note 18, at 25-6.

<sup>32</sup> The characterization of Chapter 7 as “liquidation” bankruptcy is a misnomer in light of the fact that in most Chapter 7 cases there is no liquidation of assets and no material return to creditors. See *infra* notes 33-37 and the accompanying text.

<sup>33</sup> Richard M. Hynes, *Three Essays on Consumer Bankruptcy and Exemptions*, at 14 (1998) (Ph.D. dissertation, University of Pennsylvania) (on file with authors).

<sup>34</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, Subcomm. on Commercial and Admin. Law, Comm. on the Judiciary, *PERSONAL BANKRUPTCY: METHODOLOGICAL SIMILARITIES AND DIFFERENCES IN THREE REPORTS ON DEBTORS' ABILITY TO PAY 4*, Pub. No. GAO/T-GGD-99-58, (1999) (statement of Richard M. Stana, Associate Director, Administration of Justice Issues, General Government Division).

<sup>35</sup> *Id.*

creditors under a priority scheme set forth in the Bankruptcy Code.<sup>36</sup> A debtor's future income is not subject to creditors whose claims are discharged under Chapter 7.<sup>37</sup> This process of liquidating assets, coupled with discharging debts, allows a debtor to emerge from Chapter 7 with a fresh start.

Under Chapter 13, debtors generally can keep their assets, but they are required to file a plan to repay a portion of their debts over a three to five-year period out of future income, usually wages. For that reason, Chapter 13 is often referred to as the "wage earners plan."<sup>38</sup> Under this plan, the debtor must use all disposable income, that is, income over and above necessary living expenses,<sup>39</sup> to fund the plan.<sup>40</sup> The plan must also provide that unsecured creditors will receive at least as much as they would receive if the case had been filed under Chapter 7.<sup>41</sup> At the end of the plan repayment period, the Chapter 13 debtor will receive a discharge of any remaining debts, other than secured debts.<sup>42</sup> Under Chapter 13, debtors will have to continue to make payments on secured debts or surrender the collateral securing the debt. Debtors choose Chapter 13, rather than Chapter 7, if they have assets over and above the exemptions<sup>43</sup> that they do not wish to liquidate. Often Chapter 13 is used so that people with equity in their home over and above the homestead exemption can retain their home.<sup>44</sup> As discussed below in Part II.C.2.,

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<sup>36</sup> Kropp, *supra* note 10, at 7-8.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> Hynes, *supra* note 33, at 14, 18.

<sup>39</sup> 11 U.S.C. § 1325(b)(1) (2000), amended by BAPCPA, Pub. L. No. 109-8, §§ 102(h)(1), 318(2), 119 Stat. 23, 33, 93 (2005), formerly provided that a court could not confirm a plan unless the debtor devoted his or her projected disposable income for a three-year period toward payments under the plan. Before the enactment of the BAPCPA, "disposable income" was defined as "income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C. § 1325(b)(2)(A) (2000), amended by BAPCPA, Pub. L. No. 109-8, § 102(h)(2), 119 Stat. 23, 33-34 (2005).

The BAPCPA modified the definition of "disposable income" and defines it as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation . . . ; and . . . for charitable contributions . . ." 11 U.S.C. § 1325(b)(2)(A)(i)-(ii) (2005).

<sup>40</sup> Hynes, *supra* note 33, at 18-19.

<sup>41</sup> *Id.*

<sup>42</sup> SULLIVAN ET AL., *supra* note 18, at 21-41.

<sup>43</sup> Exemptions are state laws that exclude certain assets, both personal and real property, from collection by creditors, subject to limitations as to type and value of the assets. The fundamental purpose of exemptions is to allow debtors to keep property that is necessary for life. Non-exempt assets in Chapter 7 are subject to liquidation. Non-exempt assets are not subject to liquidation in a Chapter 13 case—hence a reason a debtor with non-exempt assets may choose to file Chapter 13. For a discussion of exemptions generally, see SULLIVAN, *supra* note 18, at 27-28.

<sup>44</sup> A homestead exemption excludes a person's home or value (equity) in a home from collection by creditors. Homestead exemptions, like exemptions for personal property, vary a good



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despite the choice left largely to debtors, most bankruptcy cases fall under Chapter 7.

## 2. State Laws

Even though bankruptcy is largely governed by federal law, it operates in the context of state substantive law and state collection laws.<sup>45</sup> The amount of property that a debtor can keep in bankruptcy is largely determined by state law. Similarly, the rights of creditors are largely determined by underlying state law. Bankruptcy often modifies the rights of debtors and creditors, but the parties come to bankruptcy with the rights afforded under state law. Two important state laws that come into play in bankruptcy are exemption laws and garnishment laws.<sup>46</sup> These laws are important because they vary widely among the

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bit from state to state. SULLIVAN, *supra* note 18, at 28. Accordingly, the benefit to a debtor of the homestead exemption varies widely from state to state. *Id.* The variation in the homestead exemption is probably the most dramatic because this is often a debtor's most valuable asset. *Id.* For example, in Alabama the homestead exemption for a single person is \$5,000.00. ALA. CODE 1975 § 6-10-2 (1993). In Mississippi the homestead exemption is \$75,000.00. MISS. CODE § 85-3-21 (1991). The variation in homestead exemptions is more dramatic than this because six states (Florida, Iowa, Kansas, Oklahoma, Arkansas, South Dakota and Texas) have unlimited homestead exemptions. John P. Whittington & Christopher L. Hawkins, *Proposed Exemptions in Alabama*, at 13, 14th Annual Bankr. L. Seminar, Cumberland School of Law, Samford University (October 10, 2003) (on file with authors). This means that the entire equity in a person's home in these states is protected from creditors.

<sup>45</sup> Theresa Sullivan, Elizabeth Warren & Jay L. Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y. 801, 810 (1994) (recognizing bankruptcy is a "federalist system" and that the key aspects of bankruptcy law are federal, but property rights are largely determined by state law).

<sup>46</sup> Exemptions have been discussed generally above. *See supra* note 43. In the context of bankruptcy, debtors may be able to use state-law exemptions as described above or a set of federal exemptions that are included in the Bankruptcy Code and apply only in bankruptcy. The federal exemptions are similar to the state-level exemptions, with limited exemptions for homesteads, automobiles, and personal household property, as well as disability benefits and certain tort awards. The Bankruptcy Code expressly provides that a state can opt out of using the federal exemption scheme in bankruptcy and rely on its own state-law exemptions. *See Whittington, supra* note 44 at 7.

Garnishment laws permit a creditor to obtain a certain dollar amount or percentage of a person's wages, by having those wages withheld from the employee by the employer and paid directly to the creditor. Vincent P. Apilado, Joel J. Dauten & Douglas E. Smith, *Personal Bankruptcies*, 7 J. LEGAL STUD. 371, 379 (1978). State laws limit, or exempt, some portion or possibly all wages from garnishment. Hynes, *supra* note 33, at 9-10. In effect, this limitation on garnishment is really a variation on the exemptions. The limitation on garnishment of wages allows a debtor to have the ability to meet basic obligations. The protection afforded varies greatly from a limited-dollar amount of wages, a percentage of wages, to possibly all wages in states such as Pennsylvania and Texas. Hynes, *supra* note 33, at 10.

In the context of bankruptcy, the ability to garnish wages is curtailed greatly. Wages in Chapter 7 bankruptcy do not need any exemption or garnishment, because wages earned after the filing of bankruptcy are not subject to pre-bankruptcy creditors' claims. This is integral to the concept of a

states, and both can act as incentives or disincentives for a person to file for bankruptcy relief at all, as well as impact the chapter choice of bankruptcy relief.

### C. FILING RATES

#### 1. Nationally

Each year since 1980 to 2003, with the exception of six years, total bankruptcy filings have increased.<sup>47</sup> There has been a dramatic increase in the number of bankruptcies since 1995-1996, when total bankruptcies broke the 1.1 million mark annually.<sup>48</sup> In 1997 and 1998 the total number of bankruptcies continued to exceed 1.4 million cases each year.<sup>49</sup> Bankruptcy filings decreased marginally in 1999 and 2000. The filings increased again in 2001 to nearly 1.5 million and continued to increase in 2002 and 2003 to exceed 1.6 million, the highest level in a calendar year.<sup>50</sup> Both business and consumer filings decreased slightly, about 2%, in the calendar year of 2004, but filings increased slightly in the first quarter of 2005 in comparison to the same time period in 2004.<sup>51</sup>

This is a staggering number of filings; yet, when the numbers are put in context, the rise is even more dramatic. From 1958 to the passage of the Bankruptcy Reform Act of 1978, there were three economic recessions.<sup>52</sup> Likewise from 1978 to 1998 there were three recessions.<sup>53</sup> From 1958 to 1978, the number of filings rose from about one hundred thousand annually to about two hundred thousand.<sup>54</sup> From 1978 to 1998 the yearly filings rose from two hundred thousand to 1.4 million. With more than a million filings annually and about one hundred million households, at least 10% of U.S. households have gone through

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debtor's fresh start. SULLIVAN, *supra* note 18, at 30. Wages in Chapter 13 are protected from collection by creditors during the case, but the debtor must use wages over and above necessary living expenses to fund a Chapter 13 plan. *Id.*

<sup>47</sup> Data from various editions of the *Annual Report, Admin. Office of United States Courts*, available at <http://www.uscourts.gov/library/annualreports.htm> (last visited Dec. 10, 2005).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> The number of filings has nearly doubled from 875,202 (in 1993) to 1,660,245 (in 2003). See *Annual Report, Admin. Office of United States Courts*, available at <http://www.uscourts.gov/library/annualreports.htm> (last visited Dec. 10, 2005).

<sup>51</sup> *Id.*

<sup>52</sup> Vern McKinley, *Ballooning Bankruptcies: Issuing Blame for the Explosive Growth*, REG., Summer 1997, at 34.

<sup>53</sup> TERESA A. SULLIVAN, ELIZABETH WARREN & JAY L. WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 24 (2000)

<sup>54</sup> McKinley, *supra* note 52, at 38.

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bankruptcy.<sup>55</sup>

## 2. *Filings by Type and Chapter*

Bankruptcy filings can be categorized in various ways. One primary way is to divide the filings into consumer or business filings.<sup>56</sup> Since 1980, 95% of all filings have been consumer filings.<sup>57</sup>

A second primary way to categorize bankruptcy filings is to classify consumer filings by Chapter 7 or Chapter 13. About 70% of consumer bankruptcies are filed under Chapter 7.<sup>58</sup> The remaining consumer cases are filed under Chapter 13,<sup>59</sup> with the exception of a very few consumer Chapter 11 filings.<sup>60</sup> Under Chapter 7, most debtors are not obligated to repay anything,<sup>61</sup> and in fact, about 96% of Chapter 7 debtors do not repay anything. Thus, in most consumer bankruptcies, creditors receive nothing.<sup>62</sup>

## 3. *Filings by State*

On a state-level basis the consumer bankruptcy filing rate varies a great deal. As reflected in Table 1, the mean number of filings per thousand people in a state for 1980, 1990 and 2000 varied from less than one filing per thousand in Wisconsin to over six filings per thousand in Tennessee. Ranking the states by mean number of filings per thousand over the three time periods places Tennessee, Alabama, Georgia, Nevada and Indiana at the top and places Wisconsin, Vermont, Massachusetts, Alaska and South Carolina in the bottom five.

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<sup>55</sup> SULLIVAN, *supra* note 18, at 238.

<sup>56</sup> Pomykala, *supra* note 26, at 1115.

<sup>57</sup> *Id.* However, the validity of the data from the Administrative Office of United States Courts has been called into question. For a discussion of the problems with the data in this area, see Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743 (2005).

<sup>58</sup> Pomykala, *supra* note 24, at 44.

<sup>59</sup> This great difference in composition of cases under each chapter is largely due to the fact that unless a debtor has substantial assets to retain, the debtor will choose Chapter 7 over 13 because of the relative ease of the Chapter 7 process.

<sup>60</sup> Pomykala, *supra* note 26, at 1115-16.

<sup>61</sup> Wang & White, *supra* note 28, at 256.

<sup>62</sup> Pomykala, *supra* note 26, at 1118.

<b>TABLE 1: Consumer Bankruptcies Per 1000 Population for CY 1980, 1990 and 2000</b>		
<b>State</b>	<b>Average Filings Per 1000 Population</b>	<b>Overall Rank</b>
<b>AL</b>	5.25	<b>2</b>
<b>AK</b>	1.46	48
<b>AZ</b>	3.15	18
<b>AR</b>	3.32	14
<b>CA</b>	3.03	19
<b>CO</b>	3.31	15
<b>CT</b>	1.74	40
<b>DE</b>	1.73	41
<b>DC</b>	2.14	34
<b>FL</b>	2.52	25
<b>GA</b>	5.05	<b>3</b>
<b>HI</b>	1.67	43
<b>ID</b>	3.59	9
<b>IL</b>	3.36	13
<b>IN</b>	4.15	5
<b>IA</b>	1.82	38
<b>KS</b>	3.02	20
<b>KY</b>	3.57	10
<b>LA</b>	2.93	21
<b>ME</b>	1.64	44
<b>MD</b>	2.77	23
<b>MA</b>	1.41	49
<b>MI</b>	2.33	30
<b>MN</b>	2.27	31
<b>MS</b>	4.13	6
<b>MO</b>	2.85	22
<b>MT</b>	2.26	33
<b>NE</b>	2.34	28
<b>NV</b>	4.74	4
<b>NH</b>	1.72	42
<b>NJ</b>	2.27	32
<b>NM</b>	2.36	27
<b>NY</b>	1.93	36

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<b>NC</b>	2.07	35
<b>ND</b>	1.60	45
<b>OH</b>	3.45	11
<b>OK</b>	3.68	8
<b>OR</b>	3.45	12
<b>PA</b>	1.78	39
<b>RI</b>	2.34	29
<b>SC</b>	1.57	47
<b>SD</b>	1.59	46
<b>TN</b>	6.12	1
<b>TX</b>	1.84	37
<b>UT</b>	4.01	7
<b>VT</b>	1.20	50
<b>VA</b>	3.16	17
<b>WA</b>	3.22	16
<b>WV</b>	2.40	26
<b>WI</b>	0.53	51
<b>WY</b>	2.59	24

Sources:

Administrative Office of U.S. Courts

U.S. Census Bureau, Statistical Abstract of United States:

2003

The composition of Chapter 7 and Chapter 13 cases varies from state to state. Nationally, approximately 70% of all consumer bankruptcies are filed under Chapter 7; however, that statistic does not hold true when filing data of individual states are examined. As reflected in Table 2, some states consistently have a low percentage of Chapter 7 filings during all three time periods: Alabama, North Carolina and Tennessee have only about 40% of their consumer filings under Chapter 7. Other states show a consistent pattern of having a very high percentage of Chapter 7 filings: Wisconsin, West Virginia, North Dakota, New Hampshire and Iowa generally have more than 90% of their filings under Chapter 7.

<b>TABLE 2:</b>			
<b>Chapter 7 Filings (%) by State:</b>			
<b>1980, 1990 and 2000</b>			
	<b>1980</b>	<b>1990</b>	<b>2000</b>
	<b>Chapter 7</b>	<b>Chapter 7</b>	<b>Chapter 7</b>
<b>State</b>	<b>% of Total</b>	<b>% of Total</b>	<b>% of Total</b>

<b>AL</b>	32.51%	42.56%	39.96%
<b>AK</b>	87.74%	87.59%	90.62%
<b>AZ</b>	95.03%	77.11%	81.68%
<b>AR</b>	26.84%	55.70%	56.16%
<b>CA</b>	79.54%	77.99%	79.45%
<b>CO</b>	54.61%	73.80%	84.75%
<b>CT</b>	92.73%	86.70%	86.34%
<b>DE</b>	89.75%	75.82%	64.46%
<b>DC</b>	93.15%	53.21%	64.78%
<b>FL</b>	94.78%	88.75%	70.81%
<b>GA</b>	64.63%	43.67%	36.53%
<b>HI</b>	47.71%	90.25%	89.31%
<b>ID</b>	68.44%	67.05%	81.54%
<b>IL</b>	71.22%	75.48%	70.55%
<b>IN</b>	95.39%	90.22%	79.79%
<b>IA</b>	91.23%	91.51%	92.93%
<b>KS</b>	72.69%	81.34%	81.66%
<b>KY</b>	80.31%	78.48%	83.15%
<b>LA</b>	80.61%	72.33%	57.58%
<b>ME</b>	59.46%	76.69%	92.58%
<b>MD</b>	94.62%	66.36%	67.99%
<b>MA</b>	80.65%	81.98%	85.67%
<b>MI</b>	77.12%	75.87%	72.14%
<b>MN</b>	84.09%	71.32%	79.71%
<b>MS</b>	66.45%	61.48%	59.46%
<b>MO</b>	88.67%	72.27%	70.67%
<b>MT</b>	98.22%	90.21%	88.58%
<b>NE</b>	79.29%	64.78%	84.60%
<b>NV</b>	94.88%	72.02%	73.52%
<b>NH</b>	98.24%	90.65%	91.10%
<b>NJ</b>	73.85%	72.74%	63.44%
<b>NM</b>	93.18%	89.08%	85.27%
<b>NY</b>	79.90%	80.37%	80.42%
<b>NC</b>	28.43%	37.01%	41.44%
<b>ND</b>	97.25%	95.99%	96.80%
<b>OH</b>	72.91%	76.10%	78.62%
<b>OK</b>	96.54%	89.57%	85.83%
<b>OR</b>	87.14%	73.37%	85.82%
<b>PA</b>	77.94%	69.57%	69.31%
<b>RI</b>	79.62%	93.50%	93.22%

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<b>SC</b>	73.58%	50.53%	47.37%
<b>SD</b>	88.64%	93.39%	96.40%
<b>TN</b>	53.91%	39.87%	43.81%
<b>TX</b>	58.24%	62.30%	52.16%
<b>UT</b>	90.60%	70.96%	59.51%
<b>VT</b>	97.71%	88.87%	90.71%
<b>VA</b>	85.23%	80.42%	74.44%
<b>WA</b>	68.70%	78.10%	77.38%
<b>WV</b>	95.60%	91.42%	94.97%
<b>WI</b>	94.76%	90.97%	95.87%
<b>WY</b>	89.90%	89.16%	94.32%
<b>U.S</b>	74.55%	71.12%	69.30%

Source: Administrative Office of U.S. Courts

Recognizing the wide variation of types of filing from state to state is important in any consideration of the new reforms, particularly the means test, because the law is designed to reduce the number of Chapter 7 debtors, or at least shift debtors from Chapter 7 to Chapter 13. There may be great variation in the impact of the law depending on the historical composition of Chapter 7 and Chapter 13 cases in a state.

## II. SIGNIFICANT CONSUMER REFORM PROVISIONS

### A. OVERVIEW

The new law is a proverbial “seamless web” of interrelated amendments based on, among other things, statutory presumptions of debtor abuse and stringent debtor disclosure provisions. Many consumer debtors will be faced with extremely complicated income and expense analyses, among other new duties and responsibilities. A debtor’s prior, recent history in the bankruptcy courts also plays a significant role in his or her legal right to choose a liquidating rather than a reorganizing path to relief under the Bankruptcy Code and resulting discharge of debts.

Changes to § 707(b) dismissal provisions are among the most significant under the new amendments.<sup>63</sup> Under the prior version of § 707(b), a Chapter 7 case could be dismissed if a court found “substantial abuse of the provisions” of Chapter 7.<sup>64</sup> What constituted “substantial abuse” had been a source of much litigation because it was sufficiently

<sup>63</sup> See 11 U.S.C. § 707(b) (2005).

<sup>64</sup> 11 U.S.C. § 707(b) (2000), amended by BAPCPA, Pub. L. No. 109-8, § 102(a)(2), 119 Stat. 23, 27-32 (2005).

vague to allow courts to consider the merits of each case without rigid rules.<sup>65</sup>

Under amended § 707(b), which includes the means test discussed below, case dismissal issues for individual debtors whose obligations are primarily consumer as opposed to business debts may often be resolved in favor of the United States trustee (or bankruptcy administrator)<sup>66</sup> and/or creditors. BAPCPA eliminates prior statutory language that created a presumption in favor of granting the relief requested by the debtor<sup>67</sup> and replaces it with the creation of a presumption of abuse by the debtor based on the new means test. At its core, the presumption in favor of an honest debtor under prior law is replaced with a “dishonest debtor assumption.”<sup>68</sup> Debtors now must show they are qualified for bankruptcy relief under Chapter 7.<sup>69</sup>

Beyond the means test and the other substantive reforms, the new amendments to the Bankruptcy Code represent a philosophical and fundamental shift favoring creditors over debtors. The reform rewrites the conceptual framework and basic policy of the Bankruptcy Code.<sup>70</sup> This is arguably the largest policy shift in underlying bankruptcy law in American legal history since the Bankruptcy Act of 1898, which represented a shift in bankruptcy law from one that protected primarily creditors to a law that protected the interests of both creditors and debtors. This dramatic shift in bankruptcy policy is evidenced by the following amendments to the Bankruptcy Code made by BAPCPA:

- (1) A new “means test” and presumption of abuse.<sup>71</sup>
- (2) Pre-petition financial counseling.<sup>72</sup>
- (3) Post-petition education requirements.<sup>73</sup>

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<sup>65</sup> John E. Matejkovic & Keith Ruckinski, *Bankruptcy “Reform”: The 21st Century’s Debtors’ Prison*, 12 AM. BANKR. INST. L. REV. 473, 485-86.

<sup>66</sup> For a discussion of the United States trustee program which operates in all judicial districts other than the six judicial districts in Alabama and North Carolina, which have the United States bankruptcy administrator program, see Dan J. Schulman, *Constitutionality of the United States Trustee/Bankruptcy Administrator Programs*, 4 J. BANKR. L & PRAC. 319, 319-29 (1995); Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91 (1995).

<sup>67</sup> See 11 U.S.C. § 707(b)(1) (2005).

<sup>68</sup> *Id.* § 707(b)(2); Ann M. Olazábal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(B): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317, 359 (2003).

<sup>69</sup> Olazábal, *supra* note 68, at 359.

<sup>70</sup> Tabb, *supra* note 1, at 347.

<sup>71</sup> 11 U.S.C. § 707(b)(2) (2005). Prior versions of § 707(b) provided for dismissal upon a showing of substantial abuse. 11 U.S.C. § 707(b) (2000), *amended by* BAPCPA, Pub. L. No. 109-8, § 102(a)(2), 119 Stat. 23, 27-32 (2005). The amended statute deletes the word “substantial,” so the standard is arguably quite lower: mere abuse.

<sup>72</sup> 11 U.S.C. §§ 109(h), 521(b) (2005).



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- (4) Limiting the number of discharges in Chapters 7 and 13.<sup>74</sup>
- (5) Extending the time between Chapter 7 discharges from six to eight years.<sup>75</sup>
- (6) Expanding the scope of nondischargeability.<sup>76</sup>
- (7) Rigorous disclosures for debtors<sup>77</sup> and dismissal provisions for failure to comply.<sup>78</sup>
- (8) Expanding exceptions to the automatic stay.<sup>79</sup>
- (9) Expanding conditions under which the automatic stay is terminated.<sup>80</sup>
- (10) Domestic support obligations gaining first priority status.<sup>81</sup>
- (11) Limitations on homestead exemptions.<sup>82</sup>
- (12) Anti-modification provisions regarding most undersecured creditor purchase money security interest claims in Chapter 13 cases.<sup>83</sup>

Several of these more dramatic provisions, including the means test, are explored in the next sections of this article. Carefully examining the means test and other major provisions through a practical exercise highlights some of the challenges that lie ahead in interpreting and effectively carrying out the provisions of BAPCPA.

#### B. PRE-PETITION CREDIT COUNSELING

All individual debtors, in fact, under the new amendments are required to show proof of completing a required financial counseling and budgeting process with an accredited nonprofit credit-counseling agency. Section 109(h)(1) provides as follows:

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<sup>73</sup> *Id.* §§ 727(a)(11), 1328(g) (2005).

<sup>74</sup> *Id.* §§ 727(a)(8), 1328(f) (2005).

<sup>75</sup> *Id.* § 727(a)(8) (2005).

<sup>76</sup> *Id.* § 523(a)(2)(C) (presumption of nondischargeability for fraud in use of credit card is expanded), § 523(a)(8) (student loans are non-dischargeable in absence of undue hardship without regard to lender's identity) (2005).

<sup>77</sup> *Id.* § 521(a)(1), (c), (e)(2), (f), (g)(2) (2005).

<sup>78</sup> *Id.* § 521(i) (2005).

<sup>79</sup> *Id.* § 362(b)(2), (b)(22)-(26) (2005).

<sup>80</sup> *Id.* § 362(c)(3), (i) (prior case dismissed), § 362(c)(4) (more than one prior case dismissed), § 362(d)(4) (*in rem* relief regarding real property), § 362(h) (personal property for individual debtors) (2005).

<sup>81</sup> *Id.* §§ 101(14A) (defines domestic support obligation), 507(a)(1) (2005) (provides that it is entitled to first priority).

<sup>82</sup> 11 U.S.C. § 522(o) (reduction of homestead value for fraudulent additions), § 522(p) (limitation on new homestead additions), § 522(q) (homestead cap in limited circumstances) (2005).

<sup>83</sup> *Id.* § 1325(a)(5) (2005) (amending § 1325(a)(5) to provide that § 506 does not apply to claims based on a purchase money security interest in vehicle acquired for personal use within 910 days of the petition date or security in anything of value within one year of the petition date).

an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.<sup>84</sup>

BAPCPA provides limited exemptions to this pre-petition requirement in exigent circumstances<sup>85</sup> or if a debtor was unable to receive credit-counseling services in a timely manner.<sup>86</sup> Note, however, that although the exemptions excuse the required pre-petition counseling, a debtor must still fulfill the statutory requirement and file proof of obtaining the counseling within 30 days of filing the Chapter 7 petition.<sup>87</sup> The requirements can be fully waived if the court determines the debtor is unable to complete the requirements due to incapacity, disability, or active military duty in a military combat zone.<sup>88</sup>

The United States Trustee's Office is charged with providing a list of approved agencies and courses to the bankruptcy court clerks for distribution. The Executive Office for the United States Trustees takes applications and approves or disapproves the credit and budget agencies or providers of financial-counseling courses.<sup>89</sup>

### C. THE CHAPTER 7 MEANS TEST AND OTHER GROUNDS FOR FINDING ABUSE

#### 1. Generally

Amended § 707(b) provides for dismissal of a case if granting the

<sup>84</sup> *Id.* § 109(h)(1) (2005).

<sup>85</sup> 11 U.S.C. § 109(h)(3)(A)(i) (2005) (“Subject to paragraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that – (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1)”). Possible examples might be that the debtor is hospitalized or there is an imminent foreclosure scheduled on his or her primary residence. Case law will inevitably develop to define the parameters of what constitutes exigent circumstances.

<sup>86</sup> 11 U.S.C. § 109(h)(3)(A)(ii) (2005) (credit counseling is not required if debtor's certification “states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request”).

<sup>87</sup> 11 U.S.C. § 109(h)(3)(B) (2005).

<sup>88</sup> *Id.* § 109(h)(4) (2005).

<sup>89</sup> Bankruptcy administrators in Alabama and North Carolina perform a similar function.

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relief provided under Chapter 7 would be an abuse of that chapter.<sup>90</sup> Abuse can be found in three ways. First—and this is the most dramatic statutory change—if a debtor does not pass the new means test, a presumption of abuse arises.<sup>91</sup> If the debtor passes the means test or is able to rebut the presumption, abuse can be found based on a finding that the petition was filed in bad faith or that, under the totality of the circumstances the, “debtor’s financial situation demonstrates abuse.”<sup>92</sup> Each ground for abuse is discussed in detail below.

The means test primarily is a tool to determine whether the debtor has sufficient disposable income to preclude proceeding under Chapter 7. If the debtor has sufficient income so that a Chapter 7 case is precluded, the case will be dismissed or, if the debtor chooses, converted to a Chapter 11 or 13 case.<sup>93</sup> The key statutory provision in this determination is § 707, which in relevant part provides as follows:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of –

- (I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or
- (II) \$10,000.<sup>94</sup>

The statutory provision appears simple on its face, but in practice it is somewhat complex when it is read in conjunction with the many subsections of § 707 and relevant definitions contained in § 101.<sup>95</sup> A preliminary inquiry, before reaching the means test calculation, is whether the debtor’s current monthly income<sup>96</sup> multiplied by twelve is below the median family income in the state in which the debtor resides.<sup>97</sup> If that question is answered in the affirmative, then the debtor

<sup>90</sup> 11 U.S.C. § 707(b)(1) (2005).

<sup>91</sup> *Id.* § 707(b)(2) (2005).

<sup>92</sup> *Id.* § 707(b)(3) (2005).

<sup>93</sup> *Id.* § 707(b)(1) (2005).

<sup>94</sup> *Id.* § 707(b)(2)(A)(i), (ii) (2005).

<sup>95</sup> Section 101 provides numerous definitions used throughout the Bankruptcy Code. Many terms used in § 707 require reference back to § 101. *See* 11 U.S.C. § 707 (2005).

<sup>96</sup> Current monthly income is defined in 11 U.S.C. § 101(10A) (2005). Ironically, current monthly income is neither current nor monthly income. *Id.* Rather, it is the average monthly income of the debtor over a six-month period. *Id.*

<sup>97</sup> Median family income is defined in 11 U.S.C. § 101(39A) (2005). Median family income is based on median family income reported and calculated by the Bureau of the Census in the most recent year available. *Id.* If median family income has not been calculated and reported by the

is protected by a safe-harbor provision and will not be subject to the means test.<sup>98</sup> Ironically, falling within this safe-harbor provision of the new Chapter 7 means test is a dubious honor, for it is reserved primarily for those whose income falls below the applicable median family income. Nevertheless, even if a debtor's monthly income falls below the median income in his or her state, judges, U.S trustees and bankruptcy administrators can still prosecute motions to dismiss for general grounds of abuse such as bad faith or under a totality of the circumstances.<sup>99</sup>

Assuming a debtor is above the median income in the state, the means-test analysis is required. The "means-test" analysis is based largely on the debtor's current monthly income, less any allowed deductions.<sup>100</sup> The allowed deductions are based on National Standards and Local Standards issued by the Internal Revenue Service<sup>101</sup> and other expense items expressly provided for under § 707(b)(2)(A) and (b)(1).<sup>102</sup> Once the current monthly allowed deductions are subtracted from the monthly income, a presumption of abuse may arise in two instances. First, if the balance after subtraction of the allowed deductions is greater than \$166.67, enabling a \$10,000 payment over a 60 month-period, then granting relief is presumed to be an abuse regardless of the amount of general unsecured debt. Second, if the balance falls between \$100 and \$166.67, and multiplying the balance by 60 results in a product that is equal to at least 25% of the debtor's general unsecured claims, then granting relief is presumed to be an abuse.<sup>103</sup>

Two examples help illustrate how this works in practice. If a debtor can pay \$100 a month and has \$24,000 in unsecured debt, the bankruptcy filing will be presumed an abuse of Chapter 7. Over a 60-month period this will fund a repayment plan with \$6,000, which is 25% of the unsecured general debt. Then, on the high end, if the debtor has \$166.66

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Bureau of the Census in the current year, the most recent year is used but is adjusted to reflect the change in the Consumer Price Index for All Urban Consumers. *Id.*

<sup>98</sup> 11 U.S.C. § 707(b)(7) (2005).

<sup>99</sup> *Id.* § 707(b)(3) (2005).

<sup>100</sup> The allowed deductions set forth in 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) are complex and provide avenues for more sophisticated debtors to position themselves in a way to better attempt to avoid the means-test presumption of abuse.

<sup>101</sup> *Id.* § 707(b)(2)(A)(ii) (2005).

<sup>102</sup> The other expenses include health insurance, expenses to maintain safety from domestic violence, support for elderly and disabled family members, administrative expenses, education expenses, secured debt, priority claims and charitable contributions. *Id.* § 707(b)(1), (2)(A) (2005).

<sup>103</sup> The new statutory scheme under the means test uses 60 months because under Chapter 13 a repayment plan can run 60 months. 11 U.S.C. § 1322(d) (2005) (providing for plan lengths from three to five years). In effect, the means test is really examining the Chapter 7 case as a hypothetical Chapter 13 case. If the debtor can repay 25% of the unsecured debtors over a hypothetical 60-month plan, the statute provides that the debtor fails the means test and this is an abuse.

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a month to pay and has at least \$39,998.40 in general unsecured debt, it will also be presumed to be an abuse of Chapter 7. Over a 60-month period this will fund a repayment plan with \$9,999.60, which is 25% of the unsecured general debt.

If a debtor, after deducting all permissible expenses allowed under the new law, has disposable income meeting the aforementioned test for presumed abuse, then seeking a Chapter 7 discharge is not an option unless the debtor is able to rebut the presumption by a showing of special circumstances.<sup>104</sup> If the presumption of abuse does not arise or is rebutted, in determining whether to grant relief the court is required to consider “whether the debtor filed the petition in bad faith . . . or [if under] the totality of the circumstances . . . the debtor’s financial situation demonstrates abuse.”<sup>105</sup>

## 2. Hypotheticals

For purposes of illustration, hypothetical debtors Ura and Ima Broke file a joint Chapter 7 case. Their financial condition is summarized below:

The Brokes, a married couple in their early forties, have two children in private schools. They are residents of Memphis, Shelby County, Tennessee; their annual gross income is \$86,496. Like many debtors, the Brokes lost their home following an unsuccessful Chapter 13 case three years ago. They now rent a house for \$2,000 a month. They owe back federal taxes in the amount of \$9,000. They have secured debt on two cars with remaining balances of \$10,000 and \$6,000, and unsecured, consumer debt totaling \$28,000. They desire to seek relief under Chapter 7 of the Bankruptcy Code. Since they filed after October 17, 2005, their income will be scrutinized under the new means test to determine whether there is sufficient remaining disposable income to give rise to a statutory presumption of abuse.

The Brokes’ gross monthly income is \$7,208. After deducting taxes and other mandatory payroll deductions of \$1,509, the couple has \$5,699 in monthly income. The means test requires several further deductions from the Brokes’ gross monthly income. Section 707(b)(A)(2)(ii) provides a deduction for living and housing expenses using National

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<sup>104</sup> A debtor who is subject to the presumption of abuse can rebut the presumption by showing special circumstances that justify adjustments to current monthly income or warrant “additional expenses . . . for which there is no reasonable alternative.” 11 U.S.C. § 707(b)(2)(B)(i) (2005). Debtors must show documentation to support such adjustments and must attest to the accuracy of the information provided. *See id.* § 707(b)(2)(B)(i), (ii) (2005).

<sup>105</sup> *Id.* § 707(b)(3) (2005).

Standards and Local Standards and additional Internal Revenue Service (IRS) figures.<sup>106</sup> Allowable living expenses for a family of four in Ura and Ima Broke's income bracket, based on national standards, total \$1,564, while housing and utility figures for Shelby County, Tennessee, allow \$1,354.<sup>107</sup> In addition, there are allowable expenses for transportation. Based on IRS figures, the Brokes can subtract national ownership costs of \$475 for the first car and \$338 for the second, as well as regional operating and public transportation costs of \$242 and \$336, respectively.<sup>108</sup> They can also deduct their reasonably necessary health-insurance costs, here the sum of \$600, and \$250 a month for private school tuition.<sup>109</sup> Subtracting all these figures from the Brokes' monthly income leaves \$540.

Under § 707(b)(2)(A)(iii) the Brokes can subtract payments on secured debt. The amount contractually due on their two automobiles over the next 60 months is \$16,000. After dividing this total by 60 and rounding to the nearest dollar, the monthly allowable deduction for secured debt is \$267.<sup>110</sup> Subtracting this amount from \$540 leaves \$273.

Next come priority claim deductions. The Brokes are not subject to any child-support or alimony claims, but they do owe \$9,000 in back taxes. Again, dividing this amount by 60 yields a deductible amount of \$150.<sup>111</sup> Subtracting this from \$273 leaves \$123 in disposable monthly income. This figure would be multiplied by 60, amounting to a total of \$7,380 in disposable income over the five-year period. Abuse is thus statutorily presumed, because the debtors' current monthly income reduced by allowable amounts is not less than either \$7,000 (25% of their nonpriority unsecured claims of \$28,000) or \$6,000.<sup>112</sup> The Brokes' Chapter 7 case will therefore be dismissed (or they will be allowed voluntarily to convert their Chapter 7 case to a case under Chapter 13).

Interestingly, the Brokes' situation could improve if they owned their home rather than rented. For instance, if the \$2,000 monthly rent payment were a mortgage payment, it could be deducted as a secured debt payment under § 707(b)(2)(A)(iii). This deduction would allow the Brokes to file under Chapter 7 and eliminate any initial presumption of abuse. It is questionable whether Congress actually intended to allow

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<sup>106</sup> National Standards for Allowable Living Expenses (Feb. 1, 2006) (on file with authors).

<sup>107</sup> Tennessee – Housing and Utilities Allowable Living Expenses (June 2005) (on file with authors).

<sup>108</sup> Allowable Living Expenses for Transportation (on file with authors).

<sup>109</sup> 11 U.S.C. § 707(b)(2)(A)(ii)(I), (IV) (2005).

<sup>110</sup> *Id.* § 707(b)(2)(A)(iii) (2005).

<sup>111</sup> *Id.* § 707(b)(2)(A)(iv) (2005).

<sup>112</sup> *Id.* § 707(b)(2)(A)(i) (2005).

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both a living expense and a secured debt deduction to result in duplicative exemptions available only to homeowners.<sup>113</sup>

The aforementioned application of the means test to hypothetical debtors in no way exhausts all possible deductions but provides a quick look at the complicated statutory process that will confront individual consumer debtors under the new amendments. Beyond the statutory changes, it is important that debtors carefully consider the changes to the Bankruptcy Rules. The Judicial Conference Advisory Committee on Bankruptcy Rules has drafted interim rules<sup>114</sup> and forms for use in navigating these uncharted waters including a complicated new five-page form that provides the calculations for the means test.<sup>115</sup> Interim rules will govern until national rules are promulgated under the Rules Enabling Act, which is ordinarily a three-year process.<sup>116</sup>

## D. POST-PETITION DEBTOR EDUCATION

Satisfying the pre-petition credit-counseling requirement affects only the right to file a bankruptcy petition: it is an eligibility requirement. Post-petition, individual debtors must complete an educational course in order to obtain a discharge. A debtor will be denied a discharge if he or she “failed to complete an instructional course concerning personal financial management described in section 111.”<sup>117</sup>

Since this new provision affects the debtor’s ability to receive a discharge and the credit-counseling requirement impacts the ability to seek relief in the first place, the role of the Executive Office for United States Trustees (or bankruptcy administrators) in providing a list of

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<sup>113</sup> Norman W. Pressman & Robert A. Briedenback, *What Did Congress Mean by the “Means Test” & Does It Matter What It Meant?*, 9 NORTON BANKR. L. ADVISOR 3 (2005). The Advisory Committee on Interim Rules has addressed this issue of duplicative exemptions. Form 22A requires debtors to deduct the mortgage debt payment from the mortgage/rental expense so as to prevent this duplication for homeowners. See Committee Note, Form 22A, 22B & 22C (October 13, 2005), [http://www.uscourts.gov/rules/Revised\\_Rules\\_and\\_Forms/BK\\_Forms\\_CommNotes.pdf](http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Forms_CommNotes.pdf).

<sup>114</sup> The Interim Bankruptcy Rules modify substantially fourteen rules (Rules 1006, 1007, 1009, 1017, 1019, 2002, 3002, 4002, 4003, 4004, 4006, 4007, 4008 and 5008). Interim Rules & Official Forms Implementing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Sept. 12, 2005), <http://www.uscourts.gov/rules/interim.html>.

<sup>115</sup> See Form B22a: Statement of Current Monthly Income and Means Test Calculation (Sept. 12, 2005), [http://www.uscourts.gov/rules/Revised\\_Rules\\_and\\_Forms/BK\\_Form\\_B22A.pdf](http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Form_B22A.pdf).

<sup>116</sup> 28 U.S.C. § 2075 (2000).

<sup>117</sup> 11 U.S.C. § 727(a)(11) (2005). It is worth noting that Chapter 13 contains the same language with regard to a discharge upon completion of a plan. 11 U.S.C. § 1328(g)(1). It appears that individual Chapter 11 debtors are subject to the same post-petition debtor education requirements. *Id.* Section 1141(d)(3)(C) provides that the debtor is not entitled to a discharge if a discharge would be denied under § 727(a). § 727(a)(11) provides that the failure to complete debtor education after the filing of the petition is grounds for denial of a discharge.

legitimate services and courses is a crucial one. Frequently consumers have been faced with unscrupulous credit-counseling services that oftentimes abused their tax-exempt status by providing bad advice and charging exorbitant fees.<sup>118</sup> Even with the federal government overseeing the process, the new requirement to undergo credit counseling and debtor education will be both an added expense<sup>119</sup> and a challenging assignment for debtors.<sup>120</sup>

#### E. PRIOR DISCHARGES

In addition to the pre-petition credit-counseling and debtor-education requirements, the debtor's bankruptcy history will be carefully examined to determine if there have been prior filings and/or discharges that would eliminate current eligibility to receive a discharge. Under the prior version of the Bankruptcy Code, a debtor could not obtain a discharge in Chapter 7 if the debtor had obtained a discharge in an earlier Chapter 7 case that commenced within six years of the filing of the current case.<sup>121</sup> Amended § 727(a) provides in pertinent part: "[t]he court shall grant the debtor a discharge, unless . . . the debtor has been granted a discharge under this section . . . in a case commenced within 8 years before the date of the filing of the petition."<sup>122</sup> This expansion of

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<sup>118</sup> Amy Borrus, *A Business Rife with Bad Guys*, BUSINESS WEEK, July 11, 2005, at 85. It appears that state regulators are becoming aware of the practices of some credit-counseling agencies. *Id.* For example, the Alabama Securities Commission recently sought to enjoin numerous credit counseling agencies from doing business in the state unless those agencies comply with an old law that requires them to take custody of third-party money and register with the state. See Russell Hubbard, *Agency Sues Debt Advisory Firms*, THE BIRMINGHAM NEWS, Aug. 16, 2005, <http://www.al.com/business/birminghamnews/index.ssf?/base/business/1124183947122560.xml&col=2>. The registry will permit the state to examine the books for financial soundness and compile a database in case any company fails to comply with the terms of its agreements with consumers. *Id.*

<sup>119</sup> It is unclear what the monetary cost will be for debtors to obtain the pre-petition counseling. Even what would seem to be an otherwise *de minimis* cost, could be quite a problem for debtors who have trouble coming up with the filing fee, much less legal fees. Post-petition education will also be a cost that will need to be considered, but it should be easier to provide for that in light of the fact that debtors have been given relief and should be in a financial position to afford the training.

<sup>120</sup> Beyond the monetary cost of obtaining pre-petition credit counseling and post-petition debtor education, the cost of this training in economic terms should be considered. The opportunity cost of obtaining pre-petition credit counseling or post-petition debtor education would include the time lost doing something else, such as working, caring for family or looking for a job. If the pre-petition credit counseling and debtor education are mere formalities for debtors to meet the eligibility filing requirements or prerequisites for a discharge, it seems the opportunity cost is relatively high in relation to the benefit gained from what will likely be a perfunctory process.

<sup>121</sup> 11 U.S.C. § 727(a)(8) (2000), amended by BAPCPA, Pub. L. No. 109-8, § 312(1), 119 Stat. 23, 87 (2005).

<sup>122</sup> *Id.* § 727(a)(8) (2005).



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the time in which a second discharge may not be obtained under Chapter 7 makes it more difficult for an individual debtor to seek meaningful relief under Chapter 7.

In addition, there are now restrictions on discharge under Chapter 13 based on prior bankruptcy filings. Section 1328(f) provides:

the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge –

- (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or
- (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.<sup>123</sup>

There are additional consequences to prior filings under the amended Bankruptcy Code. Under § 362, the automatic stay<sup>124</sup> may be in jeopardy regarding, for example, secured debts and leases “if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under Section 707(b).”<sup>125</sup> Also “a case is presumptively filed not in good faith . . . as to all creditors, if . . . more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period.”<sup>126</sup> These provisions are aimed at preventing serial filings.

Our hypothetical debtors, the Brokes, have never filed a Chapter 7 petition before, so the extension from six to eight years is irrelevant to them, but they did file a Chapter 13 three years ago. There seems to be no restriction on the number of filings prior to the aforementioned one-year period, but rather on the frequency of discharges. Therefore, there will be no legal impediment in the Brokes’ case to a voluntary conversion to Chapter 13.

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<sup>123</sup> *Id.* § 1328(f)(1)-(2) (2005).

<sup>124</sup> The filing of a bankruptcy case creates an automatic stay under § 362. This stay applies to all collection and proceedings against the bankruptcy estate created at filing. *Id.* The automatic stay stops piecemeal collection of debts and so is vital to help bankruptcy meet the goal of equitable distribution of estate assets. *Id.*

<sup>125</sup> *Id.* § 362(c)(4)(A)(i) (2005).

<sup>126</sup> *Id.* § 362(c)(3)(C)(i)(I) (2005).

## F. DISCLOSURE REQUIREMENTS

Assuming that the Brokes have passed the Chapter 7 means test, have completed the requisite pre-petition credit and budget counseling, and have not violated prior filing or discharge restrictions, under the new amendments they will have a number of financial disclosure duties, as follows:

- The debtor must file a statement of “monthly net income” that shows how that amount was calculated.<sup>127</sup>
- The debtor must file a statement showing any anticipated increase in income or expenditures anticipated within the year after filing.<sup>128</sup>
- The debtor must file a certificate from the budget- and credit-counseling agency describing services provided to the debtor, and must file a copy of the debt repayment plan if one was developed.<sup>129</sup>
- The debtor must deliver to the Chapter 7 trustee a copy of the debtor’s latest tax return or a transcript of the return at least seven days prior to the meeting of creditors, or the debtor’s case “shall” be dismissed.<sup>130</sup>
- The debtor must provide a copy of the tax return or transcript to any creditor that requests a copy at the same time the debtor provides such to the trustee.<sup>131</sup> (There is an inherent conflict between this requirement and new § 112, which provides that “[t]he debtor may be required to provide information regarding a minor child involved in matters under this title but may not be required to disclose in the public records in the case the name of such minor child.”<sup>132</sup> A tax return would include the name of any minor child who is claimed as a dependent.)
- The debtor must file with the court copies of all payment advices received by the debtor in the 60 days prior to the filing.<sup>133</sup>
- The debtor may no longer retain possession of personal property if the obligation secured by that property is not

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<sup>127</sup> *Id.* § 521(a)(1)(B)(v) (2005).

<sup>128</sup> *Id.* § 521(a)(1)(B) (vi) (2005).

<sup>129</sup> *Id.* § 521(b) (2005).

<sup>130</sup> *Id.* § 521(e)(2)(A) (2005).

<sup>131</sup> *Id.* § 521(e)(2)(A)(ii) (2005).

<sup>132</sup> *Id.* § 112 (2005).

<sup>133</sup> *Id.* § 521(a)(1)(B)(iv) (2005).

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reaffirmed or the property is not redeemed within 45 days of the § 341(a) meeting of creditors.<sup>134</sup>

The aforementioned statutory duties permit interested parties such as creditors and the United States Trustee to monitor debtors and the financial condition of the debtors. Under the law prior to BAPCPA, most Chapter 7 cases were essentially an administrative process with relatively little detailed oversight in most cases and few mandatory debtor obligations to provide information beyond that provided in the bankruptcy schedules or at the meeting of creditors. This change in the law will likely be quite time-consuming for debtors and their attorneys. Nevertheless, debtors will have to comply with these new requirements. Otherwise, debtors will face serious consequences, such as case dismissal, if they fail to comply with the new provisions.

## G. MAJOR CHANGES SPECIFIC TO CHAPTER 13

Under the original hypothetical, in which Ura and Ima Broke are precluded from filing a Chapter 7 case due to an excess of disposable income, their only option is voluntary conversion to a Chapter 13 or 11, provided they want relief under the Bankruptcy Code. In several respects, Chapter 13 relief as modified by BAPCPA may detract from the benefit a debtor obtains from filing under Chapter 13. First, failure to overcome the means test will require that their Chapter 13 plan, if confirmed, run for five years.<sup>135</sup> Confirmation for a period less than three or five years is possible only if the plan provides for payment in full of all allowed unsecured claims over the shorter period.<sup>136</sup> Second, means testing standards still will be part of the Chapter 13 analysis for the Brokes. Under Chapter 13 the means testing standards must be used in determining disposable income in amounts expendable by the debtors.<sup>137</sup> Third, the ability of the debtor to bifurcate claims into secured and unsecured portions has been substantially curtailed.<sup>138</sup> Section 1325(a)(9) does not permit a debtor to use § 506 to value (1) a purchase-money security interest in a vehicle acquired for “personal use” if the debt was incurred within 910 days of the bankruptcy filing, or (2) a security interest in anything of value incurred within a year of the bankruptcy filing. The impact of this change is that a debtor must provide in a Chapter 13 plan that a secured creditor retain its lien until

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<sup>134</sup> *Id.* § 521(a)(6) (2005).

<sup>135</sup> 11 U.S.C. § 1322(d) (2005).

<sup>136</sup> 11 U.S.C. § 1325(b)(4)(B) (2005).

<sup>137</sup> 11 U.S.C. § 1325(b)(3) (2005).

<sup>138</sup> 11 U.S.C. § 1325(a) (2005).

the payment of the entire underlying debt, not simply the secured portion of the debt.<sup>139</sup> Prior to this amendment a debtor could bifurcate a secured claim. For example, on a secured claim for a car, the plan could value the secured portion of the claim and pay the secured portion in full and then pay the unsecured portion with other unsecured creditors. And, lastly, in order for the plan to be confirmed, a debtor must show that the filing of the petition was in good faith.<sup>140</sup> Under the law prior to BAPCPA the plan had to be proposed in good faith, but there was no good-faith requirement for the initial filing.

### III. PLACING THE REFORM IN A HISTORICAL CONTEXT

While there is considerable criticism of the new amendments as being too creditor-friendly, they can be viewed in the broader context as a response to laws perceived by others as too permissive and debtor-friendly. Criticisms or praise for the new amendments cannot be effectively made without putting the new amendments into proper historical perspective.<sup>141</sup> Additionally, and more importantly, considering the amendments from a historical perspective of how bankruptcy jurisprudence has developed can help provide a better framework to analyze the impact of BAPCPA in the future and, perhaps, be useful in future efforts to modify the Bankruptcy Code.

Perceptions of debtors have taken radical turns throughout history. There was a time when laws dealing with financial distress were deadly and harsh.<sup>142</sup> Under the Roman Law of the Twelve Tablets (451-450 B.C.), for example, debtors were authorized to be killed and their bodies carved up, with creditors receiving parts of the body proportionate to their respective claims.<sup>143</sup> This “pro-rata” disbursement principle has survived to the present, but with dollars rather than debtor body parts distributed to creditors equally or similarly situated.<sup>144</sup> A much kinder

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<sup>139</sup> 11 U.S.C. § 1325(a)(5)(B)(i) (2005).

<sup>140</sup> 11 U.S.C. § 1325(a)(7) (2005).

<sup>141</sup> Professor Countryman recognized the importance of understanding modern bankruptcy law and treatment of debtors over two decades ago when he examined bankruptcy law and the treatment of debtors after the passage of the Bankruptcy Reform Act of 1978. See Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 809 (1983) (“To understand modern day treatment of individual debtors in bankruptcy, some understanding of the history of bankruptcy is necessary”).

<sup>142</sup> Countryman, *supra* note 141, at 809.

<sup>143</sup> Countryman, *supra* note 141, at 809-10; David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 166-69 (2000).

<sup>144</sup> 11 U.S.C. § 726(b) (“Payment of claims . . . shall be made pro rata . . .”).

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example is the treatment under Judaic laws. The Book of Deuteronomy requires a forgiveness of debts every seven years and directs lenders not to withhold additional credit as the sabbatical year approaches and the debt remains unpaid.<sup>145</sup> Yet another example is during the Middle Ages in Italy, when merchants displayed their wares on tables. When a merchant was unable to meet his financial obligations, his creditors broke the debtor's bench, referred to as "banco-rotto."<sup>146</sup> Eventually the term was anglicized as "bankrupt." Under Henry VIII, England passed its first bankruptcy laws, characterizing debtors as criminals and offering no discharge for debts.<sup>147</sup>

That historic treatment has provided the backdrop for the development of bankruptcy law in the United States. As discussed above, prior to BAPCPA there were five major bankruptcy national acts in the United States. The Bankruptcy Act of 1800 was quite similar to British statutory law, including imprisonment for "fraudulent bankrupts,"<sup>148</sup> but it was repealed in 1803.<sup>149</sup> The Bankruptcy Act of 1841, repealed shortly after enactment in 1843, expanded eligibility requirements and provided direct protection to debtors.<sup>150</sup> Between the enactment of the 1800 and 1841 acts, imprisonment for debt was forbidden in most states through constitutional provisions or statutes during the 1830s.<sup>151</sup> The Bankruptcy Act of 1867 was a response to severe economic conditions following the Civil War. Consent of all creditors was required for a discharge if the estate was to pay less than 50% of claims. It also did not permit a second discharge. Considering the historical treatment of debtors as prisoners and the unavailability of multiple discharges, the lengthening of the current waiting period from six to eight years under BAPCPA may not seem quite so harsh when compared with the 1867 Act's prohibition on a subsequent discharge.<sup>152</sup>

The fourth major act was the Act of 1898 that was enacted during

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<sup>145</sup> Kennedy, *supra* note 143, at 166 (quoting *Deuteronomy* 15:1-4: "At the end of every seven years thou shalt make a release. And this is the manner of the release: Every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it of his neighbor or his brother; because it is called the Lord's release. Of a foreigner thou mayest exact it again; but that which is tithed with thy brother thine hand shall release; save when there shall be no poor among you").

<sup>146</sup> Kennedy, *supra* note 143, at 168.

<sup>147</sup> Kennedy, *supra* note 143, at 166-69.

<sup>148</sup> Bankrupts, as they were called under the Bankruptcy Act of 1800, who were adjudicated fraudulent were subject to imprisonment. See Countryman, *supra* note 141, at 813.

<sup>149</sup> Tabb, *supra* note 8, at 345; see also Countryman, *supra* note 141, at 813 (discussing the Bankruptcy Act of 1800 and similarities to English bankruptcy law).

<sup>150</sup> Tabb, *supra* note 8, at 349-50.

<sup>151</sup> Countryman, *supra* note 141, at 814.

<sup>152</sup> Kennedy, *supra* note 143, at 170-72.

the beginnings of large-scale industrialization in America. The 1898 legislation “gave birth to the fresh start principle,”<sup>153</sup> provided for discharge of unpaid deficiencies, and dealt with an alternative to liquidation, the composition of debts. Significant to this legislation were the subsequent amendments of 1938, known as the “Chandler Act.”<sup>154</sup> Congress, responding to the depression, implemented a policy favoring reorganization over liquidation whenever possible.<sup>155</sup> Ongoing throughout subsequent bankruptcy laws, this policy can clearly be seen in the most recent amendments that clearly disfavor Chapter 7 liquidation and strongly encourage repayment plans under Chapters 11 and 13.

The fifth act, the 1978 Code, made sweeping changes in the nation’s bankruptcy laws primarily focused on jurisdictional issues and court structure.<sup>156</sup> A shift in the statutory perception of financially stressed individuals and entities is evident. Even the term “bankrupt” was eliminated. It was replaced by the term “debtor.”<sup>157</sup> The 1978 Code has been amended several times, including the introduction of Chapter 12 creating a special debtor category for family farmers, as defined in § 101(18).<sup>158</sup> BAPCPA has been extended to include the additional debtor category in Chapter 12 - the family fisherman.<sup>159</sup>

#### IV. CONCLUSION

The BAPCPA represents over 500 pages of new legislation.<sup>160</sup> As with all new statutory law, the exact meaning and implications of the new act will not be known until courts begin to sort out its myriad provisions via statutory construction. There are many unsettled areas. The bankruptcy bar faces greater challenges due to new responsibilities and sanctions, and debtors face uncertainties regarding their ability to find financial solutions under the creditor-driven new law. Many bar associations around the country have had seminars to address the nuances of the new law. For example, in the Western District of Tennessee a series of “We Will Survive Seminars” were held to deal

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<sup>153</sup> Kennedy, *supra* note 143, at 174.

<sup>154</sup> *Id.*

<sup>155</sup> Kennedy, *supra* note 143, at 174-76.

<sup>156</sup> Kennedy, *supra* note 143, at 178-80.

<sup>157</sup> Kennedy, *supra* note 143, at 178-79.

<sup>158</sup> 11 U.S.C. § 101(18) (2005).

<sup>159</sup> *Id.* § 101(19A) (2005).

<sup>160</sup> S. REP. NO. 109-31, pt. 1 (2005). The full text of the Senate Report No. 256, which is 514 pages long, can be found at the Government Printing Office website at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:s256rh.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s256rh.txt.pdf) (last visited Dec. 12, 2005).

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with BAPCPA's complexities and ambiguities.<sup>161</sup> Both lawyers and judges have participated in workshops to hone their analytical skills. If the new law created by BAPCPA is confusing to the bench and bar, one can only imagine the plight of debtors. It should be an interesting intellectual and professional ride for lawyers, judges and academics.<sup>162</sup>

Whether the amended Bankruptcy Code is a return to debtors' prisons without walls or just desserts for deadbeats is a question that will be answered, if at all, years down the road when meaningful empirical analysis can be performed to determine the impact of the amendments. At first blush it does not appear the amended Bankruptcy Code will be either a return to debtors' prisons without walls or just desserts for deadbeats. Preliminary estimates indicate that roughly 15% of Chapter 7 debtors will have currently monthly incomes above the median family income in a state,<sup>163</sup> and therefore, the most significant public aspect of the reform, the means test, will not apply to approximately 85% of Chapter 7 debtors.<sup>164</sup> Furthermore, even though the means test may apply to 15% of Chapter 7 debtors, whether these debtors will be permitted to stay in Chapter 7 will depend on the particular facts of their cases. It will be years before we can make meaningful conclusions about the impact of the reform. Until then, the debate on whether the reform is good or bad, successful or unsuccessful, will be merely opinions subject to our own perspective and tinted by the lens we choose to examine the reform through.

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<sup>161</sup> Various CLE materials on file with the authors.

<sup>162</sup> The academic community has its work cut out for it. For over 25 years scholars have studied and tried to explain the causal factors of consumer bankruptcy and looked for ways to improve the bankruptcy system. With the passage of BAPCPA there are dozens and dozens of unanswered questions and each court decision interpreting the legislation will open up new areas of research.

<sup>163</sup> KVOA, *Bankruptcy Reform May Have Little Effect on Bankruptcy Rates* (July 14, 2005), <http://kvoa.com/Global/story.asp?S=3594211>.

<sup>164</sup> *Id.*