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2005: A Consumer Bankruptcy Odyssey

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2005: A CONSUMER BANKRUPTCY ODYSSEY

GARY NEUSTADTER†

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INTRODUCTION

"I'm sorry, Dave, but . . . 'When the crew are dead or incapacitated, the onboard computer must assume control' . . . I must, therefore, override your authority now since you are not in any condition to exercise it intelligently." HAL¹

Congress has concluded that the voyage of consumer bankruptcy in the United States is off course and that some of its crew - consumer bankruptcy attorneys and bankruptcy judges - no longer can be completely trusted at the helm. Following years of drama reminiscent of the 1914 silent film serial "Perils of Pauline," we now have a mid-course correction: the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("the Act").² Save perhaps the 1938 introduc-

1. 2001: A SPACE ODYSSEY (MGM 1968).

2. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter BAPCP Act]. Prior to the passage of the BAPCP Act in the 109th Congress, bankruptcy reform legislation containing virtually all of its essential features failed in each of the four preceding Congresses, notwithstanding significant and consistent bipartisan support. The journey began in the 105th Congress. The House of Representatives passed the Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998), by a vote of 306-118. 144 CONG. REC. H4442 (1998). After substituting the language of S. 1301, 105th Cong. (1998), the Senate passed the bill by a vote of 97-1. 144 CONG. REC. S10767, 10789 (1998). The House of Representatives agreed to the resulting Conference Report (H.R. CONF. REP. NO. 105-794 (1998)), by a vote of 300-125. 144 CONG. REC. H10239-40 (1998). Opposition to the Conference Report by Senate Democrats and a threatened veto by President Clinton killed the bill in the Senate. Caroline E. Mayer, *Negotiators Complete Bankruptcy Reform Bill*, WASH. POST, Oct. 8, 1998, at E01; Monica Borkowski, *The 105th Congress; A Look Back at a Legislative Term*, N.Y. TIMES, Oct. 18, 1998, §1, at 22.

In the 106th Congress, the House of Representatives passed the Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. (1999), by a vote of 313-108. 145 CONG. REC. H2770-71 (1999). After substituting the language of S. 625, 106th Cong. (1999), the Senate passed H.R. 833 by a vote of 83-14 and requested a conference. 146 CONG. REC. S255 (2000). The Senate version, which renamed the measure the Bankruptcy Reform Act of 2000, included an amendment offered by Senator Charles Schumer (D.N.Y.)

("Schumer amendment") restricting the dischargeability of fines and judgments incurred by virtue of impermissible obstruction of access to providers of abortion services. H.R. 833 (Engrossed Amendment as Agreed to by Senate), 106th Cong. § 328 (2000). It also included an amendment capping the homestead exemption at \$100,000. H.R. 833 § 324. The Schumer amendment, tangential to the bankruptcy reform then desired by bipartisan majorities of Congress, was a poison pill carefully chosen by opponents of the proposed consumer bankruptcy reform. Anathema to right-to-life legislators, it worked for a time, killing bankruptcy reform legislation in the 106th, 107th, and 108th Congresses. Near the end of the 106th Congress, House and Senate Republicans executed a controversial legislative maneuver. A conference committee stripped the American Embassy Security Act of 1999, H.R. 2415, 106th Cong. (2000), of all but its bill number and then agreed to the bill after substituting the text of S. 3186, a bankruptcy bill first introduced the same day in the Senate. H.R. CONF. REP. NO. 106-970 (2000). Because a conference report is both privileged (motions to proceed to them cannot be debated) and not amendable, this forced an up or down vote in both houses on a bill that did not even purport to reconcile earlier conflicting versions of H.R. 833. Senator Wellstone later described and criticized this maneuver in comments on the Senate floor. 146 CONG. REC. S11683, S11687-88 (2000) (statement of Senator Wellstone). The bill reported out of conference included neither the \$100,000 cap on the homestead exemption nor the Schumer amendment that had emanated from the Senate in its engrossed version of H.R. 833. H.R. CONF. REP. NO. 106-970 (2000). A day later, the House of Representatives passed the bill by voice vote. 146 CONG. REC. H9840 (2000). The Senate, precluded from either filibuster or amendment, passed the bill in December 2000 by a vote of 70-28. 146 CONG. REC. S11730 (2000). President Clinton pocket vetoed the bill, emphasizing two features of H.R. 2415 in his message explaining the pocket veto: failure to include language making non-dischargeable debts incurred for abortion clinic violence, and failure to cap the homestead exemption. President's Memorandum of Disapproval regarding the "Bankruptcy Reform Act of 2000," 36 WEEKLY COMP. PRES. DOC. 3130 (Dec. 25, 2000).

The election of Republican President George Bush in November 2000 buoyed the prospect for reform in the 107th Congress. On March 1, 2001, the House of Representatives passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001), a bill virtually identical to the bill pocket vetoed by President Clinton, by a vote of 306-108. 147 CONG. REC. H600-01 (2001). On March 15, 2001, the Senate passed its version, S. 420, 107th Cong. (2001), by a vote of 83-15. 147 CONG. REC. S2379 (2001). The Senate bill included a cap on the homestead exemption and the Schumer amendment. 147 CONG. REC. S2480, 2496, 2501 (2001).

Differences between the competing versions necessitated a conference. The battle for power in the Senate, split equally between Democrats and Republicans following the November 2000 national elections, delayed appointments to a conference committee in the first months of 2001. The impasse, unrelated to bankruptcy reform, was ultimately broken by the May 2001 defection of Senator James Jeffords from the Republican Party and the consequent reallocation of power in the Senate. Katharine Q. Seelye & Adam Clymer, *Balance of Power: The Power Shift; Senate Republicans Step Out and Democrats Jump In*, N.Y. TIMES, May 25, 2001, at A1. In July 2001, the Senate considered H.R. 333, first offering the language of S. 420 as a substitute and then passing H.R. 333 with the substitute language by a vote of 82-16. 147 CONG. REC. S7553-54 (2001); 147 CONG. REC. S7742 (2001). The substitute language included both a cap on the homestead exemption and the Schumer amendment. 147 CONG. REC. S7742, 7758, 7762 (2001). The Senate and House then named members of the conference just prior to the summer recess. 147 CONG. REC. S7796 (2001); 147 CONG. REC. H4954-55 (2001). The first meeting of the conference, which was scheduled for September 12, 2001, was postponed as a result of the September 11, 2001 terrorist attacks on the United States. The terrorist attacks put war, security, and related matters at the top of the legislative agenda, and the conference did not first meet until November 2001. The attacks, together with a reported recession in progress, also created a climate of economic instability and uncertainty and highlighted the economic suffering of some citizens. In

addition, the bankruptcy filing and off-balance-sheet transactions of energy trading giant Enron commanded attention to the manner in which bankruptcy law treated securitized assets sold to special purpose vehicles and to the unseemly prospect of Enron executives residing in Texas or Florida preserving expensive homesteads in bankruptcy even though the retirement accounts of many Enron employees, invested heavily in Enron stock, had been devastated. In that climate, legislation to restrict consumer bankruptcy filing was not politically palatable. Riva D. Atlas, *How Will Washington Read the Signs? Review of Bankruptcy Changes*, N.Y. TIMES, Feb. 10, 2002, §3, at 13.

On April 23, 2002, the conference reached agreement on a provision capping the homestead exemption at \$125,000 for convicted felons and those owing debts under federal or state securities laws and barring use of an unlimited exemption to anyone who had not lived in the relevant state for at least 40 months. Philip Shenon, *Congress Panel Agrees to Limit Home Shield in Bankruptcy*, N.Y. TIMES, Apr. 24, 2002, §C, at 1. On July 25, 2002, the conference agreed to compromise language on the issue raised by the Schumer amendment and issued its report. H.R. CONF. REP. NO. 107-617 (2002); Philip Shenon, *Negotiators Agree on Bill to Rewrite Bankruptcy Laws*, N.Y. TIMES, July 26, 2002, at A1. In a stunning vote on November 14, 2002, fueled by the objections of right-to-life legislators to the compromise version of the Schumer amendment, the House of Representatives, by a vote of 172-243, rejected a motion to consider the Conference Report. 148 CONG. REC. H8742-8757 (2002). It then passed a version of the bill, stripped of both the cap on the homestead exemption and the Schumer amendment, by a vote of 244-116, 148 CONG. REC. H8825-8877 (2002), and sent it to the Senate, but then Senate Majority Leader Tom Daschle (D.S.D) announced that the Senate, which was scheduled to adjourn shortly, would not pass the bill and therefore would not consider the bill. Philip Shenon, *Bankruptcy Bill, Caught in Abortion Dispute, Dies in Congress*, N.Y. TIMES, Nov. 16, 2002, at A15. Bankruptcy reform thus died in the 107th Congress, poisoned by the Schumer amendment.

Sponsors tried again in the 108th Congress. Early in 2003, the House, by a vote of 315-113, passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. (2003), a bill virtually identical to the bill passing the House in November 2002 (i.e. without an outright cap on the homestead exemption or the Schumer amendment), but the bill languished in the Senate without a vote for the balance of the congressional term in part because the Senate's support of the Schumer amendment had not changed.

The November 2004 elections, in which Republicans gained four Senate seats, changed the political landscape sufficiently to bring the epic struggle to an end. Jonathan Yarowsky, advisor to and lobbyist for the National Association of Consumer Bankruptcy Attorneys ("NACBA") since 1998, explained the end game in his comments to attendees of the 13th Annual Convention of the NACBA in San Diego, California on April 29, 2005. Following the elections, bankruptcy reform was viewed in both houses and in the White House as "low hanging fruit," especially given the absence of any significant congressional business in the first months of 2005. Republican leadership in the Senate, in cooperation with Republican leadership in the House and with the support of the White House, insisted that Senate Republicans vote as a bloc against all amendments to a bankruptcy bill save for those pre-cleared by House leadership. As a result, the Senate passed S.256, carrying the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 by a vote of 74-25. 151 CONG. REC. S2474 (daily ed. Mar. 10, 2005). Before doing so, the Senate rejected virtually all amendments offered on the floor of the Senate, including the Schumer amendment and an outright \$300,000 cap on the homestead exemption, and invoked cloture. 151 CONG. REC. S. 2215, 2326, 2216 (daily ed. Mar. 8, 2005). Passage by the House of Representatives on April 14, 2005 followed swiftly, by a vote of 302-126. 151 CONG. REC. H2076-77 (daily ed. Apr. 14, 2005). President Bush signed the measure on April 20, 2005. Although the Act does not include an outright cap on the homestead exemption, it restricts homestead exemptions in some cases involving fraudulent transfers, some cases involving acquisition of a homestead within 1215 days of filing the petition, and some cases involving certain debtor misconduct. For discussion of these restrictions, see Margaret Howard, *Exemp-*

tion of Chapter XIII, the correction presents the most far reaching changes in consumer bankruptcy law since the adoption of the Bankruptcy Act of 1898. These changes come little more than a decade after Congress established a National Bankruptcy Review Commission (the second such commission in twenty-five years) to review, improve, and update the Bankruptcy Code “in ways which do not disturb the fundamental tenets and balance of current law.”³ A House Report accompanying the legislation that established the second Commission pronounced Congress “generally satisfied with the basic framework established in the current Bankruptcy Code.”⁴

The Act ignores most of the Commission’s consumer bankruptcy recommendations.⁵ Fueled by concern about dramatic increases in

tions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost, 79 AM. BANKR. L.J. 397, 398-408 (2005).

For an entire article devoted to the legislative history of the Act, see Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

3. H.R. REP. NO. 103-835, at 59 (1994). Title VI of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4107, 4147 (1994) established the National Bankruptcy Review Commission. The commission issued its report on October 20, 1997, NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT (Oct. 20, 1997) [hereinafter COMM’N REPORT], available at <http://govinfo.library.unt.edu/nbrcreporttitlepg.html>. Ironically, Senator Grassley (R. Iowa), a prime mover of the Act and predecessor bills in previous Congresses, said the following of the Commission’s contemplated work:

[T]o review the code, and . . . not . . . to overhaul it. The term ‘fine-tuning’ might better fit the purpose we see behind the Commission’s establishment, because we on the Judiciary Committee are generally satisfied with the code, and we are not interested in the proposals that start from scratch.

140 CONG. REC. S4508 (1994).

Congress established the earlier commission in 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970), and that commission provided its report on July 30, 1973. REPORT OF THE COMM’N ON THE BANKR. LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, Pts. I & II (1973).

4. H.R. REP. NO. 103-835, at 59 (1994).

5. See George J. Wallace, *The National Bankruptcy Review Commission and Consumer Bankruptcy: Proposals in Search of a Rationale*, 5 AM. BANKR. INST. L. REV. 341, 341-42 (1997). Critical of the Commission’s consumer bankruptcy reform recommendations, Mr. Wallace concludes “Its early obscurity deserves to be its final epitaph.” *Id.* at 362. Evaluation of the Commission’s consumer bankruptcy reform recommendations reminds us of *Goldilocks and the Three Bears*. Mr. Wallace found the recommendations too favorable to debtors. *Id.* Gary Klein, Staff Attorney at the National Consumer Law Center, found the recommendations too favorable to creditors. Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission’s Recommendations Tilt Toward Creditors*, 5 AMER. BANKR. INST. L. REV. 293 (1997). Not surprisingly, Commission Reporter Elizabeth Warren found the recommendations just right. Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AMER. BANKR. L.J. 483 (1997). Professor Warren’s article also described the high stakes, intense scrutiny, and professional lobbying associated with the Commission’s consideration of consumer bankruptcy reform. The text of the Commission’s consumer bankruptcy recommendations may be found in Appendix A to Professor Warren’s article. *Id.* at 509. The text can also be found in the COMM’N REPORT, *supra* note 3, Vol. I, at 1-9.

Chapter 7 filing rates,⁶ the Act accepts instead the premise, advanced persistently and forcefully by and on behalf of extenders of consumer

Many of the recommendations were highly controversial within the Commission. The consumer bankruptcy reform recommendations, referred to collectively by the Commission as a “framework,” were adopted by a 5-4 vote. Views of the dissenting commissioners, some strident, are expressed in Chapter 5 of the Commission Report. *E.g.*, Hon. Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, COMM’N REPORT, *supra* note 3, Vol. I, at 1043. The animosity and deep divisions reflected in parts of the dissent have been mirrored in the ensuing four years of national debate:

Seen in its best light, the Framework reflects the well-intentioned aspirations of individuals who live in ivy-covered towers who have no real day-to-day experience with the law they are seeking to reform. The sum of their knowledge of consumer bankruptcy is the incomplete raw data from selected judicial districts from which they draw “undisputable” conclusions and make recommendations, and the culled and selected portions of the Commission’s hearings and materials . . . which reflect and support their preconceived ideas of problems and need for reform.

Id. at 1115.

The harsh language ran both ways. Professor Warren, one of the “individuals who live[s] in ivy-covered towers,” is quoted as saying “Those who want to say [that] the way to solve rising consumer bankruptcy is by changing the law are the same people who would have said during a malaria epidemic that the way to cut down on hospital admissions is to lock the door.” Peter Pae & Stephanie Stoughton, *Personal Bankruptcy Filings Hit Record; Easy Credit Blamed, Congress May Act*, WASH. POST, June 7, 1998, at A1.

Some members of Congress were predisposed to ignore recommendations of the Commission Report prior to its receipt by Congress, as evidenced by considerably different consumer bankruptcy reform provisions in both the Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. (1997), which was introduced a month before the Commission issued its report, and the Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. (1997), introduced one day after the Commission issued its report.

Professor David Skeel attributed the chilly reception of the Commission’s Report to two factors: a shift to a Republican controlled Congress in 1994 after the appointment of the Commission and the Commission’s apparent slighting of the law-and-economics perspective on consumer bankruptcy. DAVID A. SKEEL, JR., *DEBT’S DOMINION, A HISTORY OF BANKRUPTCY LAW IN AMERICA 199-202* (2001).

6. The number of non-business Chapter 7 bankruptcy filings for the calendar years 1990 and 1995 through 2004, were as follows:

Year	Non-business Chapter 7 filings
1990	452,801
1995	597,048
1996	779,741
1997	957,117
1998	1,007,922
1999	904,564
2000	838,885
2001	1,031,493
2002	1,087,602
2003	1,156,274
2004	1,117,766

Administrative Office of the United States Courts, Bankruptcy Statistics, *available at* <http://www.uscourts.gov/bnkrpctystats/statistics.htm#calendar> (last visited July 23, 2005).

credit, that too many consumer debtors with the ability to repay meaningful amounts of non-priority unsecured debt have been seeking Chapter 7 relief.⁷ Advocates of reform have attributed much of this

7. Several studies attempted to predict the number of consumer debtors that a means test would screen from Chapter 7 as well as the amount of non-priority unsecured debt that consumer debtors screened from Chapter 7 by a means test could repay. GAO reports in 1998 and 1999 reviewed, analyzed, and summarized the key studies. U.S. GEN. ACCOUNTING OFFICE, *Personal Bankruptcy: The Credit Research Center Report on Debtors' Ability to Pay* (1998) [hereinafter 1998 GAO REPORT], available at <http://www.gao.gov/archive/1998/gg98047.pdf>; UNITED STATES GENERAL ACCOUNTING OFFICE, *Report to Congressional Requestors, Personal Bankruptcy, Analysis of Four Reports on Chapter 7 Debtors' Ability to Pay* (1999) [hereinafter 1999 GAO REPORT], available at <http://www.gao.gov/archive/1999/gg99103.pdf>.

The 1998 GAO REPORT reviewed a study prepared for the Credit Research Center: JOHN M. BARRON & MICHAEL E. STATEN, *PERSONAL BANKRUPTCY: A REPORT ON PETITIONERS' ABILITY-TO-REPAY* (1997), available at <http://govinfo.library.unt.edu/nbr/report/g2b.pdf>. That study concluded the following:

[A]pproximately 25% of Chapter 7 debtors declared income sufficient to repay at least 30 percent of their non-housing debt over 5 years while still maintaining their mortgage or rental payments on their homes. Ten percent of Chapter 7 debtors declared income sufficient to repay at least 78% of their non-housing debt over 5 years. Five percent of Chapter 7 debtors could have repaid 100% of their debts over 5 years.

Id. at 31.

The United States General Accounting Office suggested that additional research and clarification would be needed to confirm the accuracy of the report's conclusions. 1998 GAO REPORT, at 2.

The 1999 GAO REPORT reviewed four studies. Ernst and Young LLP, sponsored by Visa U.S.A. and MasterCard International, produced two of the studies: TOM NEUBIG, FRITZ SCHEUREN, GAUTAM JAGGI, & ROBIN LEE, ERNST & YOUNG LLP, *CHAPTER 7 BANKRUPTCY PETITIONERS' ABILITY TO REPAY: THE NATIONAL PERSPECTIVE 1997* (1998) [hereinafter 1998 EY STUDY], available at <http://judiciary.house.gov/legacy/5343.htm>; TOM NEUBIG, FRITZ SCHEUREN, GAUTAM JAGGI, & ROBIN LEE, ERNST & YOUNG LLP, *CHAPTER 7 BANKRUPTCY PETITIONERS' REPAYMENT ABILITY UNDER H.R. 833: THE NATIONAL PERSPECTIVE* (Mar. 1999) [hereinafter 1999 EY STUDY], reprinted at 7 AM. BANKR. INST. L. REV. 79 (1999), available at http://lobby.la.psu.edu/046_Bankruptcy_Reform/Congressional_Statements/House/H_Gekas_030099.pdf. Law professors at Creighton University School of Law, funded by the National Conference of Bankruptcy Judges, produced a third study based on data gathered for a study of reaffirmation practices. Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27 (1999) [hereinafter *Creighton Study*]. Researchers at the Executive Office for United States Trustees produced the fourth study. GORDON BERMANT & ED FLYNN, *EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, INCOMES, DEBTS, AND REPAYMENT CAPACITIES OF RECENTLY DISCHARGED CHAPTER 7 DEBTORS* (1999) [hereinafter EOUST STUDY], http://www.usdoj.gov/ust/eo/public_affairs/articles/docs/ch7trends-01.htm.

The four studies differed in a variety of respects, including the sampling method, the proposed legislation by which repayment ability was measured, and the assumptions used to estimate debtors' living expenses and debt repayments. 1999 GAO REPORT, at 8-22. Accordingly, their results are not entirely comparable.

The 1998 EY STUDY concluded that 15% of consumer Chapter 7 debtors annually would be subject to dismissal and could pay \$4 billion in non-priority unsecured debt over 5 years. *Id.* at 15. Applying the same legislation, the *Creighton Study* concluded that 3.6% of consumer Chapter 7 debtors annually would be subject to dismissal and could pay \$870 million in non-priority unsecured debt over 5 years. *Id.* Applying different legislation, the 1999 EY STUDY concluded that 10% of consumer Chapter 7 debtors

alleged abuse to consumer bankruptcy law that they characterize as lenient, to an alleged decline in the moral shame and social stigma associated with bankruptcy, and to increased attorney advertising.⁸ This claim of abuse, together with concomitant suggestions for restricted access to the Chapter 7 discharge, is a familiar refrain, having been advanced several times during the twentieth century, most notably in the 1930s, in the 1960s, and soon after the 1979 effective date of the Bankruptcy Code.⁹ The claim also has deeper historical roots. As Professor Bruce Mann has argued, from at least the beginning of the eighteenth century “inability to pay was [perceived as] a moral failure, not a business risk.”¹⁰

annually would be subject to dismissal and could repay \$3 billion in non-priority unsecured debt over 5 years. *Id.* Based on varying assumptions, the EOUST STUDY concluded that between 12.2% and 15% of Chapter 7 debtors annually would be subject to dismissal and could repay between less than \$1 billion and a maximum \$3.76 billion in non-priority unsecured debt over 5 years. *Id.*

Each of the studies assumed the accuracy of data reported by debtors in their bankruptcy schedules, assumed that the income and allowable living expenses of debtors would remain constant for five years following the filing of a petition, and assumed that all debtors required to file a five-year Chapter 13 plan would complete the plan. 1999 GAO REPORT, at 3. None of the three assumptions had been validated and review of data on completion rates under Chapter 13 (36% average completion rate from 1980-1988) led the GAO to conclude that repayment could be less than that predicted by these studies. *Id.* The *Creighton Study* characterized the assumption that there would be no change in income or expenses during the five years following the petition and the assumption that 100% of debtors would complete payments in a five-year Chapter 13 plan as “impossible dreams.” *Creighton Study*, at 59-60.

8. The argument is developed at length in Honorable Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177 (1999). See also A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243 (2001) (arguing advocacy for means testing in bankruptcy is consistent with evolving public attitudes toward public entitlement programs, such as welfare, which have been altered to require greater personal responsibility and sacrifice as a condition to the receipt of benefits).

Jones and Zywicki offer a useful distinction between shame and stigma: “Shame is the internal, psychological compass that forces one to keep his word; stigma is the external, social constraint that reinforces this.” Jones & Zywicki, 1999 BYU L. REV. at 215. Gordon Bermant reviews recent studies attempting to correlate increased individual bankruptcy filings with decline in shame and stigma, reflects upon the difficulty of measuring shame and stigma, and questions the validity of certain research proxies for shame and stigma. Gordon Bermant, *What's Stigma Got to Do with It?*, 22 AM. BANKR. INST. J. 22 (2003). See also Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 450-55 (2001) (reviewing TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS, AMERICANS IN DEBT* (2000)) (arguing that theories and anecdotes rather than statistically valid study support claims of decline in stigma).

9. David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 314-20 (1999).

10. Bruce H. Mann, *Failure in the Land of the Free*, 77 AM. BANKR. L.J. 1 (2003) (adapted from Professor Mann's book, BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2002)).

“Means testing” is a cornerstone of the perceived solution. Means testing, a formula applied to the imputed income, imputed expenses, and actual debt of some individuals who file, or might otherwise file, a Chapter 7 petition, can deny Chapter 7 relief to some consumer debtors presumed able to pay a defined portion of their non-priority unsecured debt over a five-year period.¹¹ Although means testing will affect only a small percentage of individual debtors contemplating Chapter 7, it has nonetheless commanded the lion’s share of debate, overshadowing other significant components of the reform. I discuss several of these other components of consumer bankruptcy reform in this Article. Part I considers the purposes, contours, and possible benefits, costs, and consequences of two new conditions to Chapter 7 and Chapter 13 relief for individual debtors: receipt by the debtor of a briefing and related budget analysis by a nonprofit budget and credit counseling agency as a condition to the filing of a petition, and completion of an instructional course in personal financial management as a condition to discharge. Part II explains means testing and dismissal of consumer Chapter 7 cases for abuse, in part to suggest both the transitory and enduring flaws of means testing and in part to provide important context for the remaining portions of the Article. Part III considers provisions requiring that consumer Chapter 7 debtors furnish what may often be superfluous additional information and computations in support of a petition. Part IV considers extensive new rules governing the behavior of consumer bankruptcy attorneys. It includes discussion of rules restricting the kind of advice that an attorney may give to a client and mandating specific content in advertising, rules that raise significant First Amendment issues. It also includes discussion of rules imposing new due diligence obligations upon consumer bankruptcy attorneys and authorizing sanctions for violation of those obligations, rules that have raised significant concerns about the viability of consumer bankruptcy practice and access of debtors to legal representation.

Together with significant reform of Chapter 13, which I do not discuss, this package of reforms - - counseling, instruction, means testing, documentation, and attorney regulation - - constitutes the core of the Act’s consumer bankruptcy design. Its architects have clearly intended through them to constrict the availability, feasibility, and de-

11. The Act also provides for means testing of some Chapter 13 debtors to determine the amount of disposable income they must devote to payments under a Chapter 13 plan, BAPCP Act, *supra* note 2, § 102(h) (amending § 1325(b) of the Bankruptcy Code), and probably also provides for means testing of some Chapter 11 debtors who are individuals to determine the amount of disposable income they must devote to payments under a Chapter 11 plan, BAPCP Act, *supra* note 2, § 321(c) (adding § 1129(a)(15) to the Bankruptcy Code). I do not discuss means testing in those contexts.

sirability of Chapter 7 relief for individuals. The mid-course correction occurred on October 17, 2005.¹²

I. PRE-PETITION BRIEFING FROM A CREDIT COUNSELING AGENCY AND POST-PETITION INSTRUCTION IN PERSONAL FINANCIAL MANAGEMENT

The Act introduces two new conditions to bankruptcy relief for an individual debtor. First, an individual may not file a petition without the benefit of a “briefing” and related budget analysis from an approved nonprofit budget and credit counseling agency (“counseling agency” or “agency”) during the 180-day period preceding the date of filing a petition.¹³ To assure compliance, the Act requires the debtor to file both a certificate from an approved counseling agency stating that the debtor received the briefing and a copy of any debt repayment plan developed through the agency.¹⁴ Second, the Act denies an individual debtor a Chapter 7 or Chapter 13 discharge absent post-petition completion of an approved instructional course in personal financial management.¹⁵ The Act does not exempt sole proprietors (or other individuals whose debts are not primarily consumer debts) from either of the two new requirements even though experience in operating a business likely makes either credit counseling or instruction in personal financial management superfluous for many such debtors. Likewise, the Act does not exempt others whose education, training, or experience will make a briefing and budget analysis or instruction in financial management superfluous, but the bright line rule avoids

12. President Bush signed the Act on April 20, 2005. With exceptions not relevant to this Article, the Act became effective 180 days following enactment. BAPCP Act, *supra* note 2, § 1501.

13. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 § 106(a) (2005) [hereinafter BAPCP Act] (adding § 109(h) to the Bankruptcy Code).

14. BAPCP Act, *supra* note 13, § 106(d) (adding § 521(b) to the Bankruptcy Code). A proposed interim amendment to the Federal Rules of Bankruptcy Procedure requires the debtor to file the certificate and debt repayment plan, if any, with the petition. FED. R. BANKR. P. 1007(b)(7), (c) (proposed interim amended rule), *available at* http://www.uscourts.gov/rules/CPA2005/Text_Consumer_Rules.pdf (last visited Aug. 25, 2005).

15. BAPCP Act, *supra* note 13, § 106(b) (adding § 727(a)(11) to the Bankruptcy Code); *id.* § 106(c) (adding § 1328(g) to the Bankruptcy Code). Note that these sections would preclude discharge if, after filing a petition, the debtor has failed to *complete* the required course of instruction. The sections do not state that the debtor must both *start* and complete the course of instruction after filing the petition. If a debtor may start a course of instruction pre-petition, counseling agencies might attract debtors by offering and advertising a package that includes both pre-petition credit counseling and pre-petition instruction in personal financial management and schedule completion of the instruction (e.g. taking a multiple choice test) for a time after, even on the same day as, the debtor files a petition.

both the burden of administering an exemption and its uneven application.

The Act charges the United States trustee¹⁶ with the task of evaluating, approving, and annually re-evaluating counseling agencies and instructional courses, and requires that bankruptcy court clerks maintain a publicly available list of approved agencies and instruction providers.¹⁷ The United States Trustee Program announced the beginning of the approval process and posted the application forms and related materials on June 30, 2005.¹⁸ It began accepting applications on July 5, 2005.¹⁹ The Act exempts from the briefing or education requirements those debtors filing in districts in which the United States trustee determines that the approved counseling agencies or instructional courses, as the case may be, cannot adequately serve all who would otherwise be required to obtain a briefing or financial management instruction.²⁰ The Act also exempts debtors from a pre-petition briefing and budget analysis upon submission to the court of a satisfactory certification of both exigent circumstances and inability to

16. I follow the convention used in the Act of using the lower case for “trustee” and of referring to the United States trustee in the singular notwithstanding that the Attorney General of the United States appoints a different United States trustee for each of 21 regions. 28 U.S.C. § 581 (2000). Note, in addition, the Executive Office for United States Trustees has assumed responsibilities, assigned by language in the Act to “the United States trustee,” for the approval of nonprofit credit counseling agencies and providers of personal financial management instruction. *See infra* notes 18 and 42.

17. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code). Hopefully bankruptcy court clerks will post the list on the Web for the convenience of individual debtors and consumer bankruptcy attorneys, although, as suggested later, many individual debtors would not benefit from any information on the Web. *See infra* pp. 268-70.

18. UNITED STATES TRUSTEE PROGRAM, PRESS RELEASE: U.S. TRUSTEE PROGRAM BEGINS APPROVAL PROCESS FOR BUDGET AND CREDIT COUNSELING AGENCIES, FINANCIAL MANAGEMENT INSTRUCTIONAL COURSES (June 30, 2005) [hereinafter TRUSTEE PRESS RELEASE], available at http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20050630.htm (copy also on file with author). The Executive Office for United States Trustees concurrently published the following documents on its web site, <http://www.usdoj.gov/ust/eo/bapcpa/ccde/index.htm>: EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, APPLICATION FOR APPROVAL AS A NONPROFIT BUDGET AND CREDIT COUNSELING AGENCY (June 2005) [hereinafter CC AGENCY APP.]; EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, INSTRUCTIONS FOR APPLICATION FOR APPROVAL AS A NONPROFIT BUDGET AND CREDIT COUNSELING AGENCY (June 2005) [hereinafter COUNSELING AGENCY INSTRUCTIONS]; EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, APPLICATION FOR APPROVAL AS A PROVIDER OF A PERSONAL FINANCIAL MANAGEMENT INSTRUCTIONAL COURSE (June 2005); EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, INSTRUCTIONS FOR APPLICATION FOR APPROVAL AS A PROVIDER OF A PERSONAL FINANCIAL MANAGEMENT INSTRUCTIONAL COURSE (June 2005) [hereinafter PROVIDER INSTRUCTIONS].

19. TRUSTEE PRESS RELEASE, *supra* note 18.

20. BAPCP Act, *supra* note 13, § 106 (a) (adding § 109(h) to the Bankruptcy Code); *id.* § 106 (b) (adding § 727(a)(11) to the Bankruptcy Code); *id.* § 106(c) (adding § 1328(g) to the Bankruptcy Code).

obtain the briefing and budget analysis within five days of requesting the counseling.²¹

The justifications for and implications of these two new conditions to bankruptcy relief warrant extended discussion.

A. PRE-PETITION BRIEFING AND BUDGET ANALYSIS

For individuals seeking bankruptcy relief, the Act requires an individual or group “briefing” with an approved counseling agency within the 180-day period preceding the date of the filing of the petition.²² The briefing, which may be conducted in person, by telephone, or over the Internet, must outline opportunities for credit counseling and assist an individual in performing a related budget analysis.²³ In a complementary provision, the Act amplifies the written notice that the clerk of the bankruptcy court must provide to an individual whose debts are primarily consumer debts before that individual commences a case. The notice must briefly describe the types of services available from counseling agencies in addition to briefly describing Chapters 7, 11, 12, and 13 and the purposes, benefits, and costs of each.²⁴ The Act

21. *Id.* § 106(a) (adding § 109(h) to the Bankruptcy Code).

22. *Id.*

23. *Id.*

24. BAPCP Act, *supra* note 13, § 104 (amending § 342(b) of the Bankruptcy Code). Section 342(b) of the Bankruptcy Code has previously required that the clerk’s notice to individual debtors “indicate[] each chapter . . . under which . . . [an] individual may proceed.” 11 U.S.C. § 342(b) (2000). Some clerks have posted the written notice on the Internet. *E.g.*, the web site of the United States District and Bankruptcy Court for the District of Idaho, at <http://www.id.uscourts.gov/trustinfo.htm> (last visited July 23, 2005) (which, incidentally, incorrectly lists the information as being provided pursuant to “U.S.C. § 341”). To see whether or how web sites of bankruptcy courts throughout the country display the required information, select some of the links at the web site maintained by the Administrative Office of United States Courts on behalf of United States courts, at <http://www.uscourts.gov/courtlinks/index.cfm> (last visited July 23, 2005). Heretofore, the notice, whether or not posted on the Web, has been virtually worthless. Most individuals would not know to look or know how to find or look on a web site containing the information, and a significant number of debtors would not have convenient or cost free Internet access. Individuals represented by attorneys generally would not receive the notice from the clerk’s office because usually only the attorney, the attorney’s employee, or a runner files the petition and schedules. Even if an individual, either represented by an attorney or pro se, visits the clerk’s office to file the petition and schedules, his or her decision to file has already effectively been made and will rarely if ever be altered by a notice of alternatives then provided by the clerk. Persisting in the Pollyannaish notion that the notice of alternatives might accomplish something, the BAPCP Act insures that debtors get the notice in one of two ways. An individual debtor whose debts are primarily consumer debts and who files a petition identifying an attorney or petition preparer must file a certificate that the attorney or petition preparer delivered the clerk’s notice to the debtor. BAPCP Act, *supra* note 13, § 315(b) (amending § 521 of the Bankruptcy Code). Such a debtor whose petition names neither an attorney nor petition preparer must file a certificate that the debtor received and read the certificate. *Id.* If such a requirement is to have any meaning, Bankruptcy Rule 1007(c), which presently permits filing of schedules and statements within fifteen days

also requires that consumer bankruptcy attorneys and bankruptcy petition preparers furnish that notice to their clients.²⁵

The pre-petition briefing and budget analysis requirement is one product of congressional concern about the increase in individual bankruptcy filings. Some may view the requirement as a wasteful detour deliberately designed to discourage bankruptcy even by those with no other realistic alternative. If not that, the requirement must reflect either hope or assumption that fewer individual debtors will pursue bankruptcy relief if each must first consult with a representative of an approved counseling agency or interact with the agency over the telephone or Internet to learn about, assess the viability of, and possibly pursue a workout with creditors, known in the credit counseling industry as a Debt Management Plan (“DMP”). In a DMP, formulated by a credit counseling agency and administered either by the agency or an affiliate, the debtor makes lump sum monthly payments to the agency or affiliate in lieu of payments to individual creditors. The agency or affiliate in turn disburses payments to creditors pursuant to the workout that the agency has arranged. Creditor concessions in the workout rarely reduce the principal amount owing but may include “re-aging” an account (i.e. changing the status of the account from delinquent to current), waiving or reducing fees such as late payment fees or fees for exceeding an allowable credit limit, or reducing interest rates.²⁶

In evaluating the credit counseling detour, I pursue three lines of inquiry. First, I consider whether the detour likely will divert a meaningful number of individual debtors from a Chapter 7 or Chapter 13 filing to a DMP and whether the benefits of such diversion, for both unsecured creditors and debtors, justify the costs of the detour. Second, I consider some troubling questions about the nature and scope of the required briefing. Third, I consider the application of the require-

of the filing of a petition, should be amended to require the filing of such a certificate with the petition. FED. R. BANKR. P. 1007(c), *available at* http://www.uscourts.gov/rules/CPA2005/Text_Consumer_Rules.pdf (last visited January 27, 2006). Picture, then, the uninformed pro se debtor approaching the bankruptcy clerk, petition and schedules in hand. Under such a rule, the clerk would refuse to accept the filing and hand the debtor the required notice. Most likely the notice would not alter the debtor’s decision to file, but the debtor nonetheless must retreat, obtain and sign a certificate stating that he or she has received and read the notice, and then make a second trip to the clerk’s office. To avoid that waste of time, sympathetic bankruptcy judges might require their court clerks to have a certificate at the ready.

25. BAPCP Act, *supra* note 13, § 228(a) (adding § 527 to the Bankruptcy Code).

26. NATIONAL CONSUMER LAW CENTER INC. & CONSUMER FEDERATION OF AMERICA, CREDIT COUNSELING IN CRISIS: THE IMPACT ON CONSUMERS OF FUNDING CUTS, HIGHER FEES AND AGGRESSIVE NEW MARKET ENTRANTS 21-22 (Apr. 2003) [hereinafter NCLC REPORT], *available at* http://www.consumerlaw.org/initiatives/credit_counseling/content/creditcounselingreport.pdf.

ment to debtors facing exigent circumstances that require an immediate bankruptcy filing.

1. *Extent, benefits, and costs of diversion*

Some individuals in financial distress consult a credit counseling agency before considering bankruptcy even absent a requirement to do so.²⁷ Others seek help only from a consumer bankruptcy attorney. The economics of consumer bankruptcy law practice dictate that consumer bankruptcy attorneys offer clients relief under Chapter 7, under Chapter 13, or under both, but little else.²⁸ Consumer bankruptcy attorneys are unlikely to suggest a visit to a credit counseling agency if the attorney believes that a DMP would not be feasible. Even if feasible, the attorney may persuade a client that Chapter 7 or Chapter 13 is preferable to a DMP. Congress may believe this to be particularly likely in high volume bankruptcy law offices (sometimes derisively referred to as “bankruptcy mills”²⁹) that advertise debt relief without mention of bankruptcy yet produce a large number of bankruptcy filings. The pre-petition briefing requirement thus will channel all individual debtors first to an institution that is both more hospitable to a non-bankruptcy workout than a consumer bankruptcy attorney and also structurally better suited to provide a workout at a lower cost than the consumer bankruptcy attorney.

Surely there are some financially distressed debtors for whom a DMP might be feasible who would not, but for the requirement, contact a counseling agency before filing bankruptcy. A subset of those debtors will be diverted from bankruptcy by the pre-petition briefing requirement. We just don’t know how many, nor do we know how many of those diverted debtors would have chosen Chapter 13 rather than Chapter 7.³⁰ Were we able to approximate the number of debt-

27. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 524 (1993).

28. Gary Neustadter, *When Attorney and Client Meet: Observations of Interviewing and Counseling in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 235-40 (1986); Braucher, *supra* note 27, at 522-26.

29. *E.g.*, Federal Trade Commission, Consumer Alert, Advertisements Promising Debt Relief May Be Offering Bankruptcy, at <http://www3.ftc.gov/bcp/online/pubs/alerts/bankrupt.htm> (last visited July 23, 2005). In its press release announcing this consumer alert, the F.T.C. referred to “bankruptcy mills.” Press Release, Federal Trade Commission (Mar. 26, 1997), reprinted in *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the House Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 105th Cong., Pt. III, at 90-91 (1998) [hereinafter *Hearings Part III*].

30. A study conducted by the National Foundation for Credit Counseling (“NFCC”) (at the time known as the National Foundation for Consumer Credit) of 129,556 counseling sessions by NFCC member agencies in 1996, 1997, and 1998, found the following: 5% of those counseled were advised that they could handle repayment on their own with

ors diverted from Chapter 7, we could claim as a benefit of the pre-petition briefing requirement the amounts paid to unsecured creditors through DMPs that would not have been paid had the debtor filed Chapter 7. We couldn't calculate that amount, however, because we would have no reliable way to measure how much pre-petition unsecured debt that debtors diverted from Chapter 7 would have paid following a Chapter 7 discharge (voluntarily without reaffirmation, pursuant to a reaffirmation, or because non-dischargeable). Likewise, were we able to approximate the number of debtors diverted from Chapter 13, we could claim as a benefit the amounts paid to unsecured creditors through DMPs that debtors would not have paid in a Chapter 13. But we would have no reliable way to measure that amount either. In short, we are unlikely to know how many debtors who otherwise would not have visited a counseling agency will be diverted to a DMP through the briefing requirement and unlikely to know how much more money, if any, such debtors will pay through a DMP than they would not have paid in or following bankruptcy.

In addition to the speculative amount of benefit to be reaped by unsecured creditors, some diverted debtors will reap some benefit from the pre-petition briefing requirement, even if they pay more in principal, interest, and fees through a DMP than they otherwise would have paid, to their own attorney and to creditors, in connection with or after bankruptcy. Some will reap psychological and emotional satisfaction in avoiding bankruptcy, although the psychological and emotional satisfaction could be outweighed by the stress and other personal or family problems associated with a continued financial struggle to abide the terms of a DMP, a struggle that would be abated or mitigated by the filing of a Chapter 7. In addition, each debtor will avoid mention of bankruptcy on his or her credit record, but that may

the help of intensive budget counseling; 7.4% of those counseled chose a DMP; 8.8% of those counseled were advised to increase income or reduce expenses before a DMP would work; 12.6% of those counseled were referred for other action (e.g. to a social service agency for unstable family issues); 32.2% of those counseled were referred for legal advice. NATIONAL FOUNDATION FOR CONSUMER CREDIT, THE IMPACT OF CREDIT COUNSELING ON BANKRUPTCIES EXECUTIVE SUMMARY (1999), available at <http://68.72.75.1/research/nfccimpact.html>. Without more, the study does not directly predict the number of debtors that pre-petition counseling might divert from bankruptcy. Many of the subjects may have self-selected counseling because they were pre-disposed to avoid bankruptcy. The study also did not attempt to determine whether those who filed bankruptcy without first consulting a counseling agency might have avoided bankruptcy had they first visited a counseling agency. For anecdotal evidence comparing consumer credit counseling with Chapter 7 relief, see *Bankruptcy Reform Act of 1998 Part I Before the House Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 105th Cong., Pt. I, at 94-95 (1998) (prepared statement of Nicholl Russell, Sioux Falls, S.D., comparing benefits of consumer credit counseling for financial problems encountered after bankruptcy with earlier visit to attorney who filed the bankruptcy).

not improve, indeed in some cases it may hinder, a debtor's access to future credit.³¹ Finally, diversion from bankruptcy will preserve a debtor's right to a discharge in a subsequent bankruptcy, if needed, no matter when it is filed.³²

The benefits of diversion, difficult if not impossible to quantify, should be weighed against the costs in time and money that the pre-petition briefing requirement will impose both upon debtors and upon the United States trustee.

The requirement will waste the time (less if by telephone or Internet than if in person) of the substantial number of debtors hopelessly mired in overwhelming debt who otherwise would not have contacted a counseling agency. The required pre-petition contact by these debtors will serve only to confirm that a DMP is not feasible. Credit counseling might have helped such debtors earlier in the history of their financial difficulties but no longer can.

The requirement also will waste the time of some debtors who have previously contacted a credit counseling agency and who nonetheless have decided to file bankruptcy. Some will have visited an agency not on the clerk's list of approved agencies, not knowing that they will have to visit an approved agency before filing bankruptcy. The Act does not require that agencies disclose to debtors, in advertising, at the debtor's initiation of contact with the agency, or thereafter, that the agency has not been approved by a United States trustee or that a debtor must visit an approved agency if he or she thereafter

31. A financially distressed debtor is likely to have a bad credit record even without filing bankruptcy. In contrast, some extenders of credit may be more willing to extend credit to debtors who have obtained a Chapter 7 discharge, or seek out debtors who have obtained a Chapter 7 discharge, because such debtors thereafter cannot receive another Chapter 7 discharge for a significant period of time. See *infra* note 32.

32. By avoiding Chapter 7, a debtor avoids a bar on discharge in either a subsequent Chapter 7 or Chapter 13. Under the Act, a debtor will be ineligible for a Chapter 7 discharge if the debtor received a discharge in a Chapter 7 case commenced within eight years (changed from six years) preceding the date of the filing of the petition in the second case. BAPCP Act, *supra* note 13, § 312 (amending § 727(a)(8) of the Bankruptcy Code). A debtor will be ineligible for a Chapter 13 discharge if the debtor received a discharge in a Chapter 7 case filed during the four-year period preceding the date of the order for relief under Chapter 13. *Id.* § 312 (adding § 1328(f) to the Bankruptcy Code). By avoiding Chapter 13, a debtor also avoids a bar on discharge in either a subsequent Chapter 7 or Chapter 13. Under existing law, a debtor is ineligible for a Chapter 7 discharge if the debtor received a discharge in a prior Chapter 13 case commenced within six years preceding the filing of the subsequent Chapter 7 case, unless the debtor paid at least 70 percent of unsecured claims in the Chapter 13 case under a plan proposed in good faith that reflects the debtor's best effort. 11 U.S.C. § 727(a)(9) (2000). Under the Act, a debtor will be ineligible for a Chapter 13 discharge if the debtor received a discharge in a prior Chapter 13 case commenced during the two-year period preceding the date of the order for relief in the subsequent Chapter 13 case. BAPCP Act, *supra* note 13, § 312 (adding § 1328(f) to the Bankruptcy Code).

wishes to file bankruptcy.³³ Out of self-interest, an agency presumably would not disclose this information unless asked, or it might dissemble. Debtors in this situation must contact an agency, and perhaps pay a consultation fee, a second time. Other debtors must contact an agency anew if the first contact, even with an approved agency, occurred more than 180 days preceding the contemplated bankruptcy filing, or if the debtor does not have and cannot obtain a copy of any debt repayment plan prepared by the agency. The debtor might well have discarded the repayment plan upon realizing that it was not feasible; the Act does not require that agencies, as a condition to approval, disclose to debtors that they must retain the plan if they wish to file bankruptcy.

The implementation, operation, and supervision of a system of required pre-petition briefing will cost money. Debtors not diverted from bankruptcy, debtors diverted from bankruptcy, and taxpayers will share the cost. Counseling agencies to which debtors must turn for a briefing have typically generated revenue from some combination of fees charged a debtor for an initial consultation, fees charged a debtor for setting up a DMP, fees taken from a debtor's monthly DMP payment, and a "fair share" contribution from some creditors that receive DMP payments.³⁴ Agencies may need to generate additional revenue either to fund compliance with standards for United States trustee approval or to serve a greater number of debtors or both. A raft of new debtors, appearing at agency doorsteps to have their bankruptcy ticket punched, may require additional agency resources or divert resources from service to debtors for whom a DMP might be feasible.³⁵ In addition, to preserve tax-exempt status, some agencies

33. An approved agency may state that it is approved, but the United States trustee requires any advertising to that effect to state the following, verbatim: "Approved to issue certificates in compliance with the Bankruptcy Code. Approval does not endorse or assure the quality of an Agency's services." CC AGENCY APP., *supra* note 18, Appendix A at 2.

34. NCLC REPORT, *supra* note 26, at 10-17. "Fair share" contributions, which vary among creditors, are payments to the agency of a percentage of the debtor's DMP payment. *Id.* Using 1999 figures, the then president and CEO of the National Foundation for Credit Counseling indicated that while fair share payments were made in only 35% of DMPs, they nonetheless served as a primary revenue source to cover expenses associated with an agency's education and counseling activities. ANNE STANLEY, *A Panel Discussion on Dynamics in the Consumer Credit Counseling Service Industry* in FEDERAL RESERVE BANK OF PHILADELPHIA: PAYMENT CARDS CENTER 1, 3 (2001), available at <http://www.phil.frb.org/pcc/workshops/workshop1.pdf>.

35. Oklahoma's experience with the consequences of a law governing payday lenders may be instructive. Its law required that borrowers seeking five payday loans within ninety days would first have to contact a qualified financial counselor before being granted another loan. Soon after the law became effective, the qualified counseling agencies were overwhelmed with calls from borrowers desperate for the next payday loan and feared losing legitimate counseling clients to others. Ginnie Graham, *Credit*

may have to generate additional revenue to fund educational activities not currently provided.³⁶

Deriving sufficient additional revenue may be problematic. Agencies might generate sufficient revenue through fair share contributions from creditors for an increased *volume* of DMPs, but likely not from increased *rates* of fair share contributions, which have recently declined.³⁷ A recent proposal of the Congressional Joint Committee on Taxation, if implemented, would significantly impair if not preclude the ability to raise additional revenue from fair share contributions by conditioning an agency's tax-exempt status under section 501(c)(3) of the Internal Revenue Code upon limitation of its DMP activities.³⁸ If fair share contributions cannot provide necessary additional revenue, agencies must generate additional revenue by charging debtors for services rendered, through some combination of fees for initial counseling, fees to set up a DMP, fees drawn from a debtor's monthly DMP payment, or from some other source.³⁹ The Act permits counseling agencies to charge debtors a "reasonable fee" for the briefing and budget analysis but also requires agencies to "provide services without

Counselors Feel Holiday Pinch, TULSAWORLD, Dec. 18, 2003, at A1; *Discredit*, TULSAWORLD, Dec. 19, 2003, at A24.

36. See *infra* note 56 and accompanying text.

37. Within the past several years, major creditors have stiffened conditions to an agency's receipt of fair share contributions or have reduced the percentage of fair share contributions on eligible DMPs, or both. NCLC REPORT, *supra* note 26, at 10-13; MAJORITY AND MINORITY STAFFS OF PERMANENT SUBCOMM. ON INVESTIGATIONS OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, PROFITEERING IN A NONPROFIT INDUSTRY: ABUSIVE PRACTICES IN CREDIT COUNSELING 25-28 (Comm. Print Mar. 24, 2004) [hereinafter PROFITEERING REPORT], available at http://hsgac.senate.gov/_files/032404psistaffreport_creditcounsel.pdf. Conceivably, creditors might in the future condition fair share contributions on an agency's approval by the United States trustee. Some creditors may decide to abandon fair share contributions altogether because the United States trustee's approval process requires that an agency agree not to exclude any creditor from a DMP because the creditor declines to make such a contribution. CC AGENCY APP., *supra* note 18, Appendix A at 2. Citicorp and Bank of America have reduced fair share contributions in favor of grants allocated on the basis of a demonstrated commitment to education and counseling. Leslie E. Linfield, *Credit Counseling Update: The 'Perfect Storm' Brewing*, XXIV AM. BANKR. INST. J. 30, 46 (Apr. 2005).

38. Among other things, the proposal would deny section 501(c)(3) status (charitable or educational organization) to credit counseling agencies whose aggregate debt management plan services during a defined period exceed 10 percent of the agency's total activities during the same period. STAFF OF THE JOINT COMM. ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 332 (2005), available at <http://www.house.gov/jct/s-2-05.pdf>. The proposal would not deny section 501(c)(4) status (social welfare organization) to such an agency, but section 501(c)(4) status would reduce or eliminate grant funding to the agency, such as grants referred to *supra* note 37, because a charitable deduction for grants would not be available to donors. 26 U.S.C. § 170(a)(1), (c) (2000).

39. NCLC REPORT, *supra* note 26, at 13-16.

regard to ability to pay the fee.”⁴⁰ Fee ceilings imposed in some states also will constrain this source of revenue for some agencies.⁴¹ Ironically, to the extent that agencies generate additional revenue by charging, or charging more, for initial counseling, debtors who can afford to pay that fee (presumably including some who thereafter participate in a DMP) will be subsidizing those who can’t afford to pay the fee (presumably including many who thereafter file bankruptcy). Likewise, to the extent that agencies generate additional revenue by charging debtors more for a DMP, the very debtors whom supporters of the Act would presumably applaud for avoiding bankruptcy will be subsidizing counseling services provided to debtors who thereafter file bankruptcy.

The United States trustee must evaluate agency applicants and approve (in effect “license”) a sufficient number of counseling agencies for each district lest debtors be exempt from the briefing requirement, and it must re-evaluate an approved agency after an initial probationary period not to exceed six months and then re-evaluate each agency annually.⁴² The Congressional Budget Office has estimated the cost

40. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code). The United States trustee elaborated by stating that the applicant “will not withhold a certificate of counseling because of an inability to pay.” COUNSELING AGENCY INSTRUCTIONS, *supra* note 18, at 3. The Act gives no guidance, and the United States trustee has not yet publicly provided any guidance about what fee would be unreasonable and what degree of financial need would excuse a debtor from paying any fee. In contrast, the Act authorizes a bankruptcy court to waive an individual debtor’s Chapter 7 filing fees for an individual with income less than 150 percent of the income official poverty line applicable to a family of the size involved, if the individual is unable to pay the fees in installments. BAPCP Act, *supra* note 13, § 418 (adding subsection (f) to 28 U.S.C. § 1930). Section 23(d)(3) of a proposed uniform state law regulating credit counseling agencies would establish a generally applicable maximum fee of \$100 for education and counseling services, subject to inflation adjustments. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM CONSUMER DEBT COUNSELING ACT §§ 23(d), 32(f) (2005) (to be renamed Uniform Debt-Management Services Act if approved by the National Conference of Commissioners on Uniform State Laws) [hereinafter UNIFORM ACT], available at http://www.law.upenn.edu/bl/ulc/UCDC/2005AMDraft.htm#TOC1_2.

41. NCLC REPORT, *supra* note 26, at 40-41. Some agencies might not comply with state law, particularly if providing services by telephone or Internet. In response to a telephone survey conducted by the National Consumer Law Center, some agencies unlicensed in a state requiring a license of credit counseling agencies nevertheless expressed willingness to help debtors living in such a state. NATIONAL CONSUMER LAW CENTER INC., CREDIT COUNSELING IN CRISIS UPDATE: POOR COMPLIANCE AND WEAK ENFORCEMENT UNDERMINE LAWS GOVERNING CREDIT COUNSELING AGENCIES 8, 9 (2004), available at http://www.consumerlaw.org/initiatives/credit_counseling/content/cc_enforcement.pdf [hereinafter COUNSELING AGENCY COMPLIANCE REPORT].

42. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code). The Act refers to approval by the “United States trustee (or the bankruptcy administrator, if any).” *Id.* While this language might be interpreted to vest responsibility in each of the twenty-one United States trustees, the United States Trustee Program published the application for approval and the instructions for completing it and directed that an application package be mailed to the Executive Office. TRUSTEE PRESS RELEASE, *supra* note 18; COUNSELING AGENCY INSTRUCTIONS, *supra* note 18. The application calls for the

of these tasks, ultimately borne by taxpayers, to be \$4 million in fiscal year 2006 and from \$6-8 million in each of the four ensuing fiscal years.⁴³

At least initially, the United States trustee may be flooded with applicants for approval. The National Foundation for Credit Counseling ("NFCC"), founded in 1951, claims nearly 150 member agencies with more than 1,300 community based offices,⁴⁴ and the Association of Independent Consumer Credit Counseling Agencies ("AICCCA"), founded in 1993, claims 23 member agencies that provide nationwide service and many more that provide service in a specific state.⁴⁵ A Google search under "credit counseling agencies" discloses scores of other counseling agencies, including Christian-based organizations, some of which claim assorted memberships, affiliations, licenses, or

applicant to notify the Executive Office of any change in circumstances that would cause an answer in the application to change and also calls for the applicant to list each judicial district for which the Agency requests approval. CC AGENCY APP., *supra* note 18, at 1, 2. At the same time, the United States trustee for each judicial district appears to retain some unspecified role in the process because the instructions require that an applicant provide all information and documents required either by the Executive Office or by the United States trustee responsible for each judicial district in which the applicant seeks approval. COUNSELING AGENCY INSTRUCTIONS, *supra* note 18, at 1. On September 20, 2005, approximately two and one half months after first inviting applications, the United States Trustee Program posted on its web site its initial list of approved credit counseling agencies. United States Trustee Program, List of Credit Counseling Agencies Approved Pursuant to 11 U.S.C. § 111, at http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm (last visited Sept. 22, 2005) (copy on file with author). Among the agencies initially approved were three agencies approved for counseling in all judicial districts (other than in Alabama and North Carolina, which are not governed by the United States Trustee Program); each such agency offers in-person counseling in some districts and telephonic and Internet counseling in all districts. *Id.*

43. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, S. 256 BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, 3, 6 (2005) [hereinafter CBO COST ESTIMATE], available at <http://www.cbo.gov/ftpdocs/62xx/doc6266/s256hjud.pdf>. It is unclear whether these estimates, identified under the heading "Credit Counseling Certification (Section 106)," also include estimated expenditures for approval and re-approval of instructional courses that will be required to fulfill the separate mandate of the Act that the debtor obtain instruction in personal financial management as a condition to discharge. The reference at page 3 of the estimate to "Credit Counseling Certification" suggests that the estimate is limited to the task of approval and re-approval of credit counseling agencies, as does the explanation at page 6 of the estimate. *Id.* On the other hand, the reference at page 3 of the estimate to "Section 106," which also governs instructional courses, suggests that the estimate might include the task of approval and re-approval of instructional courses. *Id.*

44. NFCC web site, at http://www.debtadvice.org/AboutUs/aboutus_01.html (last visited July 23, 2005).

45. AICCCA web site, at <http://www.aiccca.org/findn.cfm> (last visited July 23, 2005).

accreditations.⁴⁶ As of 2003, 872 counseling agencies with section 501(c)(3) status were operating in the United States.⁴⁷

The Act requires that the United States trustee conduct a *thorough* review of a counseling agency's qualifications and services prior to approval and re-approval.⁴⁸ At least de jure, the standards for approval, which must be "fully" satisfied,⁴⁹ are rigorous. They require qualified, experienced, and trained counselors who provide adequate counseling, without commissions or bonuses based on outcome, adequate provision "for safekeeping and payment of client funds," including an annual audit and appropriate employee bonding, a board of directors a majority of which is disinterested, no more than a reasonable fee for client services and the provision of services without regard to ability to pay the fee, full disclosures to clients of specified information, and adequate financial resources to provide continuing support services for clients over the life of any repayment plan.⁵⁰ The literature suggests that some counseling agencies operate in ways that would fall short of compliance with one or more of these standards,⁵¹ and recent congressional hearings as well as recent I.R.S. and F.T.C.

46. For example, Family Credit Counseling Service describes itself as a "non-denominational Christian organization" that is a member of the Better Business Bureau, the International Christian Business Association, and the American Association of Christian Credit Counselors, that is licensed by the New York Banking Department, and whose counselors are certified by the Institute for Personal Finance. Family Credit Counseling Service web site, at <http://www.familycredit.org/About/affiliations.cfm> (last visited July 23, 2005). In contrast, AMMEND Credit Counseling and Debt Consolidation claims no memberships, accreditations, or affiliations. AMMEND Credit Counseling and Debt Consolidation web site, at <http://home.fuse.net/04HELPCCCSCreditCounseling> (last visited July 23, 2005).

47. PROFITEERING REPORT, *supra* note 37, at 3.

48. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code).

49. *Id.*

50. *Id.* The standards are elaborated in the United States trustee's instructions for an application for approval, which require, among other things, that an applicant must have provided credit counseling services for the two years preceding the application or must currently employ in each office location that serves clients at least one office supervisor with experience and background in credit counseling for two of the preceding three years, and that a counselor will be deemed adequately trained and experienced if the counselor is accredited or certified by a recognized independent organization or has successfully completed a course of study acceptable to the United States trustee and worked a minimum of six months in a related area. COUNSELING AGENCY INSTRUCTIONS, *supra* note 18, at 3-4.

51. Howard B. Hoffman, *Consumer Bankruptcy Filers and Pre-Petition Consumer Credit Counseling: Is Congress Trying to Place the Fox in Charge of the Henhouse*, 54 BUS. LAW. 1629 (1999) (including discussion of existing federal and state regulation); David Lander, *Recent Developments in Consumer Debt Counseling Agencies: The Need for Reform*, 21 AM. BANKR. INST. J. 14 (Feb. 2002); Abby Milstein & Bruce Ratner, *Consumer Credit Counseling Service: A Consumer-Oriented View*, 56 N.Y.U. L. REV. 978 (1981).

actions confirm that significant problems in the industry persist.⁵² It is ironic that the Act imposes the new briefing requirement precisely at the time when the credit counseling industry faces renewed criticism and scrutiny, but not surprising that the Act presumes that evaluation by a federal bureaucracy with finite resources and multiple competing tasks will adequately respond to these problems.

The United States trustee may not approve an agency unless it is a nonprofit organization.⁵³ In most cases, tax-exempt status under the Internal Revenue Code will serve as a convenient surrogate for nonprofit status.⁵⁴ The United States trustee requires that an applicant for approval identify the applicant's basis for claiming nonprofit status and suggests as an example the applicant's status as tax-exempt under the Internal Revenue Code.⁵⁵ An analysis by the Na-

52. *Profiteering in a Non-Profit Industry: Abusive Practices in Credit Counseling Before the Senate Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 108th Cong. (2004) (including testimony concerning inadequate counseling, payment of commissions, excessive fees, inadequate disclosures) [hereinafter *Profiteering Hearings*]; stipulated judgment in *F.T.C. v. Debt Management Services*, Civ. No. 8:04-cv-01674-EAK-MSS (M.D. Fla. 2004), available at <http://www.ftc.gov/os/caselist/0423029/050330sstip0423029.pdf> (enjoining, inter alia, deceptive marketing practices in connection with debt management services). See also Linfield, *supra* note 37 (describing process of IRS review and possible revocation of tax-exempt status).

53. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code). Some states restrict debt management services to nonprofit organizations, and creditors have required nonprofit status as a condition to fair share contributions. NCLC REPORT, *supra* note 26, at 27. This does not explain why the Act limits approval to nonprofit organizations. Perhaps the Act imposes the limit to prevent consumer bankruptcy attorneys from offering those services, for the reasons discussed *supra* pp. 238. Whatever the reason for the limit, a consumer bankruptcy attorney could test the acceptability, both with the IRS and with the United States trustee, of setting up a separate nonprofit organization to provide the counseling, with the lawyer or his or her staff first wearing a credit counseling hat and then representing the debtor in a bankruptcy proceeding unless the client chooses to pursue a DMP or other solution. See Leslie E. Linfield, *Strange Bedfellows: Bankruptcy Reform and Mandatory Credit Counseling*, 24 AM. BANKR. INST. J. 12, 65 (May 2005) (describing this strategy and identifying potential obstacles to its success).

54. While nonprofit status and tax-exempt status are not synonymous, the tax-exempt status of a credit counseling agency may serve as a convenient surrogate for nonprofit status. Corporations organized for charitable or educational purposes are exempt from taxation under section 501(c)(3) of the Internal Revenue Code if no part of the corporation's net earnings inure to the benefit of any private shareholder or individual and if no substantial part of its activities consist of propaganda or otherwise attempting to influence legislation or intervention in any political campaign on behalf of (or in opposition to) any candidate for public office. I.R.C. § 501(c)(3) (2004). Two Revenue Rulings by the Internal Revenue Service in the 1960s confirmed the tax-exempt status of two credit counseling agencies. Rev. Rul. 65-299, 1965-2 C.B. 165; Rev. Rul. 69-441, 1969-2 C.B. 115. Revocation of tax-exempt status of two credit counseling agencies by the Service was reversed in two cases. See *Credit Counseling Ctrs. of Okla., Inc. v. United States*, No. 78-1958, 1979 U.S. Dist. LEXIS 11741 (D.D.C. 1979) and *Consumer Credit Counseling Serv. of Ala. v. United States*, No. 78-0081, 1978 U.S. Dist. LEXIS 15942 (D.D.C. 1978).

55. CC AGENCY APP., *supra* note 18, at 2.

tional Consumer Law Center of claims by credit counseling agencies of tax-exempt status, and recently enhanced Internal Revenue Service scrutiny of existing claims and new applications, suggest that some agencies could not substantiate a claim of tax-exempt status because of failure to provide educational or charitable services, excessive compensation to executives, or inappropriately close relationships with profit making organizations.⁵⁶ Nevertheless, in view of the balance of its investigative responsibilities in evaluating an applicant, and perhaps also to avoid duplicating Internal Revenue Service activity, the United States trustee may not attempt to verify independently the factual basis for either tax-exempt or nonprofit status. The United States trustee also might not investigate, or thoroughly investigate, whether an agency otherwise complies with state law, notwithstanding evidence that some agencies do not comply with state law,⁵⁷ even though an applicant must represent to the trustee its compliance with all applicable state law.⁵⁸

The Act also imposes a variety of other costly new responsibilities on the United States trustee.⁵⁹ It is therefore appropriate to wonder whether the trustee can consistently perform them all well with funds actually allocated. If funding is inadequate, we may fairly surmise that some other United States trustee tasks or this new task won't be performed as promptly or as well notwithstanding the best of intentions and the efforts of capable people.⁶⁰ As a result, the United States trustee may not approve or re-approve a sufficient number of agencies or debtors in some districts may be required to procure counseling from agencies whose compliance with the standards may be marginal or dubious.

56. See NCLC REPORT, *supra* note 26, at 26-34; PROFITEERING REPORT, *supra* note 37, at 3-5, 31-32; *Profiteering Hearings*, *supra* note 52, at 181-88 (written statement of Mark W. Everson, Commissioner of Internal Revenue); *id.* at 78-79 (testimony of Mark W. Everson, Commissioner of Internal Revenue).

57. See *supra* notes 51-52 and accompanying text. The most recent draft of the Uniform Consumer Debt Counseling Act, UNIFORM ACT, *supra* note 40, suggests the scope and content of possible state regulation.

58. CC AGENCY APP., *supra* note 18, Appendix A at 1.

59. The Congressional Budget Office estimated that implementation of the Act would result in \$392 million in gross discretionary costs during the period 2006-2010, primarily to pay for all of the increased responsibilities of the United States trustee. It also estimated that those costs would be partially funded by an estimated \$75 million in additional bankruptcy filing fees and an estimated \$60 million from a temporary reallocation of bankruptcy filing fees during the same period. CBO COST ESTIMATE, *supra* note 43, at 1.

60. Resource allocation constraints in state offices charged with the licensing of credit counseling agencies presage this possibility. See COUNSELING AGENCY COMPLIANCE REPORT, *supra* note 41, at 6-8.

2. *Nature and scope of the required briefing*

In assigning to the United States trustee the task of evaluating counseling agencies, the Act leaves several questions unanswered, among them the following: To secure approval, must a counseling agency offer a DMP? Must the service it offers be free from the immediate or direct influence of a consumer bankruptcy attorney? If offered over the Internet, may the service be entirely automated? Does the statute's requirement that an agency provide "adequate counseling" require that the agency include in its briefing a discussion of bankruptcy alternatives? Must there be a sufficient number of counseling agencies for a district that offer services in languages other than English before the United States trustee concludes that there are a sufficient number of agencies to serve debtors in that district? The trustee's resolution of each of these issues would appear to be subject to judicial review and thus subject to ultimate resolution in the courts.⁶¹

A system marketed by one entrepreneur, a consumer bankruptcy attorney who directs the operations of Hummingbird Credit Counseling and Education ("Hummingbird"),⁶² squarely poses some of these questions. Hummingbird proposes to provide a briefing and budget analysis through an automated program accessible over the Internet from the office of any bankruptcy attorney in the country who has registered with Hummingbird. Upon the debtor's completion of the interactive program, typically in 10-15 minutes, the program prints for the debtor the required certificate and budget analysis. The attorney, billed monthly by Hummingbird, would presumably pass the \$34-\$39 fee to the client.⁶³ Hummingbird will not offer a DMP and, accordingly, describes its complete independence from creditors and its free-

61. Administrative Procedure Act, 5 U.S.C. §§ 551(1), 701, 702 (2000). The Act explicitly authorizes an interested person to seek judicial review of a final decision made by the United States trustee to approve or disapprove a counseling agency following the end of an initial six-month probationary period or following evaluation for successive one-year approval periods. *Id.* Because the Administrative Procedure Act otherwise permits judicial review of any such decision by the United States trustee, including a decision upon an initial application, the explicit authorization for judicial review of decisions made on other than an initial application is puzzling.

62. Hummingbird Credit Counseling and Education was a vendor at the 13th Annual Convention of the National Association of Consumer Bankruptcy Attorneys, in San Diego, California (Apr. 29-May 1, 2005). My description of its system is based upon my conversations with Hummingbird representatives at the convention and upon its promotional flyer (copy on file with author).

63. The Act requires that approved counseling agencies provide service without regard to a debtor's ability to pay the fee. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code). Hummingbird would waive the fee if called by the debtor or attorney and persuaded that the client cannot afford the fee.

dom from “anti-bankruptcy bias.” If a client decides to pursue a DMP, Hummingbird will refer the client to an agency that can provide one.

It is unsurprising that someone would develop an idea like this, designed to minimize the inconvenience of the briefing requirement. The Act explicitly permits counseling over the Internet, and the United States trustee has concluded that the provider of credit counseling need not offer a DMP.⁶⁴ Nonetheless, the United States trustee, or a court thereafter, might conclude that such a system minimizes the potential effectiveness of the pre-petition credit counseling in a manner inconsistent with the purpose if not the explicit language of the requirement. It could conclude, for example, that a debtor using the system would be unduly dissuaded from making another contact in order to pursue a DMP because the debtor is in the attorney’s office, subject to the attorney’s influence, perhaps already prepared to file for bankruptcy. It could also conclude that a briefing over the Internet, to be effective, should be longer than ten to fifteen minutes and involve a trained counselor at the other end of the connection (such as by email or instant message).⁶⁵

The United States trustee must also determine what “adequate counseling” requires. The Act requires “*adequate counseling* with respect to a client’s credit problems that includes an analysis of such client’s current financial condition, factors that caused such financial condition, and how such client can develop a *plan to respond to the problems without incurring negative amortization of debt*.”⁶⁶ The trustee’s instructions for an application for approval as a credit counseling agency go further, requiring that an applicant provide “credit counseling services to clients which include consideration of *all alternatives* to resolve a client’s credit problems”⁶⁷ Perhaps the most sensitive and important question here is the extent to which credit counseling can or must include advice about filing Chapter 7 or Chapter 13 (and in a rare case Chapter 11 or 12), advice about the timing of any such filing, and discussion of advantages and disadvantages of

64. Section 6 of the United States trustee’s instructions for applying to be an approved counseling agency applies only if the applicant offers DMPs. COUNSELING AGENCY INSTRUCTIONS, *supra* note 18, at 4.

65. Section 4 of the United States trustee’s instructions for applying to be an approved counseling agency states that an adequate briefing should average 90 minutes in length. COUNSELING AGENCY INSTRUCTIONS, *supra* note 18, at 3. The instructions state that an applicant must demonstrate sufficient experience and proficiency in designing and providing services over the Internet and state that the applicant must provide trained and experienced counselors. *Id.* at 3-4. This could be read to require either that trained counselors participate in a counseling session or only that trained counselors participate in designing and implementing an automated Internet counseling session.

66. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code) (emphasis added).

67. COUNSELING AGENCY INSTRUCTIONS, *supra* note 18, at 3 (emphasis added).

doing so.⁶⁸ Both Chapter 7 and Chapter 13 are methods of responding to financial distress that do not incur negative amortization of debt and they clearly are among the alternatives available to resolve a client's credit problems. Thus, one may interpret the Act and the trustee's instructions to applicants as requiring that an agency include in its briefing of debtors an honest and meaningful discussion of those bankruptcy alternatives.

This mandate poses two problems. First, an agency and individual counselors providing information about and discussing bankruptcy alternatives would invariably run the risk of unauthorized practice of law, a criminal act under state law.⁶⁹ Agencies might therefore justifiably wish to resist talking about bankruptcy alternatives at all, but in that case would fail to fulfill the apparent statutory and United States trustee's mandate to do so. If an agency nevertheless must discuss bankruptcy alternatives, either the United States trustee or approved agencies face the difficult task of defining the permissible scope of the counseling, and agencies must sufficiently monitor the activity of counselors to assure that advice given is sufficient but not impermissible.⁷⁰ Differences among states in the definition of unauthorized practice exacerbate the difficulty; an agency's discussion

68. In addition to the most obvious or common kinds of advice about Chapter 7 and Chapter 13, there may be a need for more subtle advice. For example, on the assumption that counseling agencies should have to discuss bankruptcy options, two analysts at the Executive Office for United States Trustees argued that counseling agencies should disclose that the IRS expense allowances relevant to means testing are generally more generous than the expense allowances used by the collection agency to assess the feasibility of DMPs. Gordon Bermant & Ed Flynn, *Planning for Change: Credit Counseling at the Threshold of Bankruptcy*, 20 AM. BANKR. INST. J. 20 (2001). If this is true for a particular counseling agency, shouldn't the agency inform the debtor that the debtor might confirm a Chapter 13 plan (whose disposable income requirement in some cases must reflect the IRS expense allowances) with smaller monthly payments to unsecured creditors than would be required under a DMP? *Fuller v. U.S. Dep't of Educ.* (*In re Fuller*), 296 B.R. 813 (Bankr. N.D. Cal. 2003), suggests another example of the difficulty of assessing whether a counseling agency is providing "adequate counseling." The bankruptcy court denied Mr. Fuller an undue hardship discharge of student loans in part because of the court's finding of the debtor's earlier lack of good faith in paying credit card debt instead of student loan debt, even though he did so on the seemingly sensible advice of a credit counselor to first retire debt accruing higher rates of interest.

69. *E.g.*, CAL. BUS. & PROF. CODE § 6126 (West 2003).

70. The difficulty is emphasized by language in *Oregon State Bar v. Smith*, 924 P.2d 793 (Or. Ct. App. 1997):

We cannot, and will not, purport to derive an omnibus definition of "practice of law" from [prior cases]. Indeed, [one prior case] cautions that a determination of unauthorized practice may depend on case-specific circumstances. Nevertheless, regardless of any uncertainty at the margins, certain core criteria are well settled. Most significantly, for present purposes, the "practice of law" means the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance.

Oregon State Bar, 942 P.2d at 800 (citation omitted).

of bankruptcy alternatives with a debtor residing in one state might be permissible whereas the same discussion with a debtor residing elsewhere (even in the same United States trustee region) might be impermissible.⁷¹

Second, any requirement to objectively discuss bankruptcy alternatives would pose an obvious conflict of interest for an agency.⁷² Unlike an agency adopting a model comparable to that proposed by Hummingbird Credit Counseling and Education, many counseling agencies derive significant revenue from the fair share contributions of creditors and some revenue from fees charged debtors for DMPs.⁷³ Not surprisingly, web sites for counseling agencies typically describe bankruptcy summarily, promote the avoidance of bankruptcy, demean bankruptcy, or avoid the mention of bankruptcy altogether.⁷⁴ The counseling presently provided by many counseling agencies no doubt mirrors the perspective evident from the web sites.⁷⁵ If so, interpretation of “adequate counseling” that requires objective and meaningful

71. The potential impact of differing definitions of unauthorized practice is illustrated by the application of unauthorized practice rules to the activities of bankruptcy petition preparers. *Compare, e.g., In re Boyce*, 317 B.R. 165 (Bankr. D. Utah 2004) (holding petition preparer’s use of bankruptcy software to prepare the debtor’s schedules and automatically select the debtor’s exemptions did not constitute unauthorized practice under Utah law), *with In re Kaitangian*, 218 B.R. 102 (Bankr. S.D. Cal. 1998) (holding petition preparer’s use of bankruptcy software to prepare the debtor’s schedules and automatically select the debtor’s exemptions constituted unauthorized practice under California law). *Compare, e.g., In re Leon*, 317 B.R. 131 (Bankr. C.D. Ca. 2004) (holding bankruptcy petition preparer did not engage in unauthorized practice under California law by furnishing client with copy of a document entitled “Bankruptcy Overview Chapter 7 and Chapter 13 California”), *with In re Doser*, 281 B.R. 292 (Bankr. D. Idaho 2002) (holding, without reference to Idaho law defining unauthorized practice, bankruptcy petition preparer engaged in unauthorized practice by furnishing client with a copy of a document entitled “Bankruptcy Overview—Chapter 7 Idaho”).

72. In 1997, for example, the Federal Trade Commission and the National Foundation for Consumer Credit (NFCC), addressing the conflict of interest, developed a policy requiring all NFCC offices to disclose to debtors that the bulk of funding comes from creditors and that counselors have an allegiance not only to the debtor but also to the creditors who fund the offices. Release, Federal Trade Commission, FTC Staff Works with Credit Counseling Agencies to Ensure Disclosure of Counselors’ Dual Role of Assisting Both Consumers and Creditors (Mar. 17, 1997), <http://www.ftc.gov/opa/1997/03/nfcc.htm>.

73. *See supra* p. 241.

74. For example, Consumer Credit Counseling Service of Greater Atlanta uses the word “bankrupt” once on its home page in a link (one of twenty-six on the right side of the page) to an article about how bankruptcy becomes harder under the Act. The word “bankruptcy” also appears in another link on the home page only if one selects the drop down menu entitled “Money Smarts Center.” That link leads to a short article emphasizing disadvantages of bankruptcy. Consumer Credit Counseling Service of Greater Atlanta web site, at <http://www.cccsatl.org> (last visited July 23, 2005).

75. *See* Affidavit of Ruth Ellen Doscher, posted at the web site of Coalition For Responsible Credit Practices in 2004, *archived at* <http://web.archive.org/web/20040705210730/responsiblecreditpractices.com/resources/affidavits/doscher.pdf> (last visited Feb. 28, 2006).

discussion of bankruptcy options (yet short of unauthorized practice of law) would require that counselors adopt a new script.⁷⁶ One wonders how faithfully they would read it.

One mitigation of both the unauthorized practice and conflict of interest problems consistent with the statutory mandate would be to forbid counselors from discussing bankruptcy at all with debtors but require counselors to furnish to every debtor a United States trustee written or approved general description of bankruptcy alternatives, advantages and disadvantages, and resources, and a list of local consumer bankruptcy attorneys or the phone number of a local attorney referral service.⁷⁷ Proponents of the Act's measures to reduce the incidence of consumer bankruptcy well might view that suggestion with alarm.

The last question pursued here concerns counseling for debtors who don't speak English or don't speak it very well. Such debtors cannot be given meaningful credit counseling only in English unless they can find and persuade an English speaking relative, friend, or someone else to translate. The United States Trustee Program implicitly recognizes this problem because its web-posted "Bankruptcy Information Sheet" offers translations in eight foreign languages.⁷⁸ Many debtors cannot speak English, or speak it very well, although the number of such debtors varies widely among United States trustee regions because of significant variations in race, ethnicity, or national origin. For example, the 2000 Census revealed that 25.6% of the population of Santa Clara County, California (total population 1,682,585, part of United States Trustee Region 17) was Asian and 24% of the population was Hispanic or Latino.⁷⁹ In contrast, in Decatur County, Iowa (total population 8,689, part of United States Trustee Region 12) 0.6% was Asian and 1.7% was Hispanic or Latino.⁸⁰ Not surprisingly, differences in race, ethnicity, and national origin account for wide disparities in ability to speak English, prompting recognition in other le-

76. Because a debtor is ineligible to file bankruptcy unless he or she has obtained the required counseling within 180 days prior to the filing of the petition, should the script include advice to the debtor to file bankruptcy, if at all, within 180 days of the credit counseling in order to avoid the necessity of repeating the credit counseling process?

77. The United States Trustee Program already posts a "Bankruptcy Information Sheet" on its web site. http://www.usdoj.gov/ust/r18/r_bkinfo.pdf (last visited Jan. 28, 2006). Referring a debtor to the Web-posted "Consumer Education Center" of the American Bankruptcy Institute, http://www.abiworld.org/Template.cfm?Section=consumer_Education_Center (last visited Aug. 25, 2005), or to a hard copy equivalent, would be more useful.

78. *Id.*

79. United States Census, 2000, American Fact Finder, Data Sets, Census 2000 Summary File 1, Table GCT-P6, at <http://factfinder.census.gov>.

80. *Id.*

gal contexts of the need to provide appropriate translation.⁸¹ These differences, for Santa Clara County, California and Decatur County, Iowa, are reflected in the following chart.⁸²

Age 5 or older*	Santa Clara County, Ca.	Decatur County, Iowa
Total population	1,564,068	8,208
Speak no English	40,750 (2.6%)	0 (0.0%)
Speak English "not well"	116,507 (7.4%)	80 (1.0%)
Speak English less than "very well"	343,320 (21.9%)	158 (1.9%)

*In both counties, well over a majority of those who spoke no English, who spoke it "not well," or who spoke it less than "very well" were 18 - 64 years old.⁸³

Disparity in the ability of potential bankruptcy filers to speak English raises a host of difficult questions. Among the counseling agencies approved by the United States trustee, must there be at least some that offer briefings available in every language spoken in the relevant geographical region, or in every language spoken by some minimum percentage or number of people in the relevant geographical area, analogous to requirements under the Voting Rights Act of 1965 mandating the provision of non-English voting materials in certain states or political subdivisions?⁸⁴ What should the location and the

81. California law, for example, requires persons engaged in a trade or business who have negotiated specified contracts in Spanish, Chinese, Tagalog, Vietnamese, or Korean to deliver to the other party prior to execution of the contract a translation of the contract in the language used during the negotiations. CAL. CIV. CODE § 1632 (West Supp. 2005). The legislature's statutory finding and declaration in support of the amendment reads:

According to data from the United States Census of 2000, of the more than 12 million Californians who speak a language other than English in the home, approximately 4.3 million speak an Asian dialect or another language other than Spanish. The top five languages other than English most widely spoken by Californians in their homes are Spanish, Chinese, Tagalog, Vietnamese, and Korean. Together, these languages are spoken by approximately 83 percent of all Californians who speak a language other than English in their homes.

§ 1632.

82. United States Census, 2000, American Fact Finder, Data Sets, Census 2000 Summary File 3, Table QT-P17, at <http://factfinder.census.gov>.

83. *Id.*

84. The Voting Rights Act of 1965, as amended, requires (through August 5, 2007) a State or political subdivision to provide various voting materials in the language of a single language minority group if more than 5% of the citizens of voting age of a state or political subdivision are members of a single language minority and are limited-English proficient, or if more than 10,000 citizens of voting age of a state or political subdivision are members of a single language minority and are limited-English proficient, and if the illiteracy rate of such citizens is higher than the national illiteracy rate. 42 U.S.C. § 1973aa-1a (2000). Pursuant to Administrative regulations that implement this requirement, found in Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. 55 (2004), the Director of the United States Census has published a notice of the political subdivisions within each state that are

minimum number of such agencies be? Will there be sufficient economic incentive for counseling agencies to provide briefings in languages other than English that are spoken only by a relatively small number of people? Would the United States trustee have the resources to hire people to determine initially and annually thereafter whether counseling in languages other than English is adequate? Would agencies that provide briefings in languages other than English be less accessible or more costly? May the United States trustee determine that there is a sufficient number of agencies for English speaking debtors, such that English speaking debtors are not eligible for relief absent pre-petition counseling, and at the same time determine that there is an insufficient number of agencies for debtors who don't speak English or don't speak it well enough, such that those debtors are exempt from the pre-petition counseling requirement? If so, who would determine (and when) whether or not a debtor speaks enough English? The United States trustee has not publicly indicated that it is considering any of these questions.⁸⁵

3. *The debtor facing exigent circumstances*

In addition to the foregoing concerns, consider issues posed by the exemption from the pre-petition briefing requirement that the Act extends to debtors who demonstrate exigent circumstances. A debtor who certifies exigent circumstances that merit waiver of the counsel-

subject to the requirement with a corresponding listing of the single language minority group for which the political subdivision must furnish minority language voting materials. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871 (July 26, 2002). While the conditional statutory right to a bankruptcy discharge does not rival in importance the ability to meaningfully exercise a constitutional right to vote, the United States trustee nonetheless could rationally respond to the problem of limited-English proficient debtors by crafting standards analogous to the voting rights standards and single language minority group designations already in place. Consider, for example, the comparison in the text between Santa Clara, California and Decatur, Iowa. The notice in the Federal Register identifying single language minority groups designates Hispanic, Chinese, Filipino, and Vietnamese for Santa Clara, California, but designates no minority groups for the State of Iowa. *Id.* Using that approach, the United States trustee could determine that there are not enough approved instructional providers in the Northern District of California unless there are a sufficient number of providers offering instruction in English, Spanish, Chinese, Tagalog, and Vietnamese. In that case, those limited-English proficient citizens speaking other languages would be left to their own devices. For example, residents of Santa Clara County speak over 30 languages. Web site of Santa Clara County Public Health Department, at <http://www.sccgov.org/portal/site/phd> (last visited July 24, 2005) (language information located under the "Public Health Department – Facts & History" link on that page).

85. The application for approval as a credit counseling agency does not require the applicant to state whether it will provide credit counseling in languages other than English, CC AGENCY APP., *supra* note 18, and the instructions for the application do not refer to the language in which counseling is to be provided. COUNSELING AGENCY INSTRUCTIONS, *supra* note 18.

ing requirement and certifies inability to obtain the required counseling within five days (not five business days) of making a request for counseling may file a petition before receiving the counseling, with the consequent benefit of the automatic stay.⁸⁶ Thereafter the debtor must obtain the briefing within 30-45 days.⁸⁷ The most obvious and not uncommon kinds of exigent circumstances would be imminent foreclosure on a residence, repossession of a vehicle, garnishment of wages, or utility cut-off. The Act's standards for approval of counseling agencies do not require that an agency devote resources sufficient to assure that most debtors be afforded an opportunity for a briefing within five days of the debtor's request for a briefing. Thus, there may be cases in which a debtor may appear to qualify for an exemption and therefore be tempted to file prior to obtaining a briefing.

Should a court conclude after notice and hearing that circumstances were not exigent, or that the briefing was available within five days of a request, the court presumably may dismiss the petition because the debtor would have been ineligible for relief, much as a court may dismiss a Chapter 13 petition upon a finding that the debtor's unsecured or secured claims exceed the maximum amounts specified in section 109(e) of the Bankruptcy Code.⁸⁸

In the meantime, however, the debtor will likely have obtained the required briefing and, if the first petition is dismissed, could re-file without need of the exemption. But this would risk premature termination of the automatic stay in the second case under provisions of the Act intended to deal with bad faith repeat filings. Under those provisions, if the debtor's first case was pending within the one-year period preceding the filing of the second case, and if the first case was dismissed, the automatic stay will terminate with respect to a debt or

86. BAPCP Act, *supra* note 13, § 106(a) (adding § 109(h) to the Bankruptcy Code). The certification must be "satisfactory to the court." *Id.* That could mean that the *form* of the certification is satisfactory to the court, or that the description of the exigent circumstances and of the debtor's inability to obtain timely counseling is factual rather than conclusory, or that the circumstances recited merit a waiver of the requirement. This last construction is less reasonable than the others because it would make the "satisfaction" requirement redundant to the requirement that the circumstances "merit" a waiver of the requirement. The pre-petition counseling requirement also does not apply to debtors unable to complete the requirement because of mental incapacity, physical disability, or active military duty in a military combat zone. *Id.*

87. *Id.* Experience in the Netherlands, which imposes a comparable condition to seeking debt relief under Dutch law, suggests the possibility that debtors in the United States might encounter significant delay in obtaining the required counseling. Jason Kilborn, *The Hidden Life of Consumer Bankruptcy Reform: Danger Signs for the New U.S. Law From Unexpected Parallels in the Netherlands* 18 (Aug. 16, 2005), available at <http://www.ssrn.com/update/lisn/index.html> (unpublished manuscript, posted on Legal Scholarship Network, copy on file with author) (reporting two to sixth month delay to get appointment in two-thirds of Dutch municipalities).

88. *E.g., In re Hounsam*, 294 B.R. 399 (Bankr. M.D. Fla. 2003).

property securing such debt, or with respect to any lease, on the thirtieth day after the filing of the second case.⁸⁹ By motion, the debtor may seek to extend the period of the stay by arguing that the second case was filed in good faith because the debtor, or the debtor's attorney, erroneously believed the exemption from pre-petition counseling to be applicable to the first case.

A substantial number of individual debtors may have difficulty affording the cost of opposing dismissal of the first case (arguing that an exemption from the pre-petition briefing requirement was appropriate) or the cost of seeking to extend the automatic stay in the second case (arguing that it was filed in good faith), or both. Thus, the debtor claiming the exemption in the first case will have to worry about prematurely losing the benefit of the automatic stay in the second case if the first case is dismissed. All of this suggests that well advised and risk-averse individual debtors may be loath to claim the exemption from the pre-petition briefing requirement, and consumer bankruptcy attorneys fearful of a malpractice claim may be loath to recommend claiming the exemption, an outcome that effectively narrows the exemption. Risk-taking debtors and ill-advised pro se debtors who claim the exemption may be courting trouble. On the other hand, some judges, sympathetic to this predicament, may signal a willingness to read the exemption expansively.

The exemption is not available to the debtor facing exigent circumstances if the debtor can obtain the required briefing within five days of a request. This suggests another difficulty. Consider the debtor facing a foreclosure sale on a residence scheduled for the day after the debtor first visits an attorney. If the debtor, immediately advised by the attorney to seek the briefing, cannot first obtain a briefing until the day after the scheduled foreclosure sale, then the debtor may not file a petition to stay the foreclosure sale. (To avoid this predicament, should the United States trustee approve a counseling agency model such as that proposed by Hummingbird Credit Counseling and Education?⁹⁰) Depending upon the type of foreclosure (judicial or pursuant to a private power of sale) and applicable state law, the foreclosure might be final and without right of redemption. The requirement for pre-petition briefing in such a case would thus emasculate the protections otherwise afforded to homeowners by the Bankruptcy Code, such as the critical cure provision in Chapter 13.⁹¹ Other creditor remedies such as garnishment, repossession, or utility cut-off that could not be stayed because of a delay in filing may be

89. BAPCP Act, *supra* note 13, § 302 (amending § 362(c) of the Bankruptcy Code).

90. I discuss that model *supra* pp. 248-49.

91. 11 U.S.C. § 1322(b)(5) (2000).

reversible,⁹² but only after incurring additional legal fees and suffering deprivation. Because of these possibilities, the coupling of the five-day period with exigent circumstances seriously undermines the usefulness of the exemption by denying it to those whose exigency may be the most extreme.⁹³

Finally, the variety of individual facts in and variety of state law applicable to cases in which a debtor claims exigent circumstances likely will generate considerable variation among districts in application of the exemption. Varying interpretations of the condition that the debtor be unable to obtain the briefing within five days of a request will magnify the disparity. How many counseling agencies must a debtor try to contact before claiming an inability to obtain the briefing within five days? What if the briefing is only immediately available for a higher fee or at a more inconvenient time (e.g. a babysitter is unavailable) or location (e.g. not accessible by public transportation)? Must the debtor seek a briefing by telephone or over the Internet counseling even if the debtor would prefer a personal appointment?

Apart from the particular difficulties associated with exigent circumstances, we have seen significant reasons to question the usefulness, effect, and operation of the pre-petition counseling requirement. It may divert some individual debtors from bankruptcy and this may

92. *E.g.*, *Maus v. Joint Township Dist. Mem'l Hosp. (In re Maus)*, 282 B.R. 836 (Bankr. N.D. Ohio 2002) (post-petition recovery of preferential pre-petition wage garnishment); *Whittaker v. Philadelphia Elec. Co. (In re Whittaker)*, 882 F.2d 791 (3d Cir. 1989) (post-petition restoration of utility service discontinued pre-petition); *Gen. Motors Acceptance Corp. v. Radden (In re Radden)*, 35 B.R. 821 (Bankr. E.D. Va. 1983) (post-petition recovery of vehicle repossessed pre-petition).

93. A debtor might attempt the following end run to preclude exercise of the creditor's remedy without having first obtained the required counseling: file a petition prior to exercise of the remedy (e.g. prior to a foreclosure sale), gain the benefit of the automatic stay, and then re-file if the case is dismissed, in the meantime having obtained the required counseling. This effort would be rebuffed if a bankruptcy court clerk refuses to accept a filing from an individual debtor unaccompanied by either the required proof of pre-petition counseling or a certification claiming the exemption. Moreover, this strategy, more so than the re-filing discussed earlier in the text in which the debtor claims the exemption in the first filed case (*supra* pp. 254-56), risks premature termination of the automatic stay in the second filed case because the second filed case may not be filed in good faith if part of a strategy in which the first case was filed with knowledge that the debtor was not yet eligible for relief. An attorney probably could not ethically advise or participate in this course of action. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003) (stating "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is . . . fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client . . ."). In doing so, the attorney would also risk sanctions. FED. R. BANKR. P. 9011. Ironically, if not rebuffed by the clerk, the same sequence of actions might work for the pro se individual debtor who files the first case either ignorant of the pre-petition counseling requirement or believing that it couldn't possibly apply under the circumstances. If the end run is successful, the five-day restriction on availability of the exemption will simply have increased costs with no commensurate benefit to anyone.

benefit unsecured creditors and the debtors diverted. Whether or not it does so, the requirement adds significant costs to the bankruptcy system and imposes significant new burdens upon the United States trustee. It also suggests for the trustee difficult questions concerning the nature and scope of the required briefing. We may never be able to accurately quantify the benefits of the requirement and may therefore be limited in our ability to fairly assess whether the benefits justify the burdens and other difficulties that it generates.

B. POST-PETITION INSTRUCTION IN PERSONAL FINANCIAL MANAGEMENT

Heretofore, some Chapter 13 trustees have required instruction in personal financial management of Chapter 13 debtors or offered it to them.⁹⁴ One panel trustee has offered some instruction for Chapter 7 debtors in Nashville, Tennessee.⁹⁵ The Coalition for Consumer Bankruptcy Debtor Education recently concluded a pilot project offering a free, voluntary, three-hour course in personal financial management to 600 individual debtors filing in the United States Bankruptcy Court for the Eastern District of New York.⁹⁶ The Act goes well beyond these scattered efforts, requiring that all individual debtors receive post-petition instruction in personal financial management as a condition to the Chapter 7 or Chapter 13 discharge.⁹⁷ The United

94. Professor Braucher describes mandatory Chapter 13 financial management education programs in Greensboro, North Carolina, and Fort Worth and San Antonio, Texas, and a voluntary program in Columbus, Ohio. Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 580-87 (2001).

95. See *id.* at 588.

96. Susan Block-Lieb et al., *The Coalition for Consumer Bankruptcy Debtor Education: A Report on Its Pilot Program*, 21 BANKR. DEV. J. 233 (2005) [hereinafter *Pilot Program*]. A complete report of the findings of the project will appear in Susan Block-Lieb, Corinne Baron-Donovan, Karen Gross, & Richard L. Wiener, *Debtor Education, Financial Literacy, and Pending Bankruptcy Legislation*, BEHAV. SCI. & L. (forthcoming 2005).

97. BAPCP Act, *supra* note 13, § 106(b) (adding § 727(a)(11) to the Bankruptcy Code); BAPCP Act, *supra* note 13, § 106(c) (adding § 1328(g) to the Bankruptcy Code). Although the Act does not require that the debtor file with the court a certificate of completion of pre-petition counseling, a proposed interim amendment to the Federal Rules of Bankruptcy Procedure requires that the debtor file such a statement, prepared as prescribed by the appropriate Official Form. FED. R. BANKR. P. 1007(b)(7) (proposed interim amended rule), available at <http://www.uscourts.gov/rules/CPA2005.html> (Draft Interim Consumer Rules) (last visited Aug. 25, 2005). In Chapter 7 cases, the debtor must file the form within forty-five days after the meeting of creditors under section 341 of the Bankruptcy Code. FED. R. BANKR. P. 1007(c) (proposed interim amended rule), available at <http://www.uscourts.gov/rules/CPA2005.html> (Draft Interim Consumer Rules) (last visited Aug. 25, 2005). Should illness or other unforeseen circumstances prevent the debtor from timely completing the instructional course and timely filing the statement of completion, the debtor must seek an extension of time by noticed motion. FED. R. BANKR. P. 1007(c).

States joins Canada in imposing this education requirement.⁹⁸

The justification for this mandatory education is at best obscure. The National Bankruptcy Review Commission recommended additional *voluntary* financial education programs and suggested that

98. Bankruptcy relief for individuals in Canada involves either personal bankruptcy (roughly analogous to our Chapter 7) or the filing of a proposal (roughly analogous to our Chapter 13). For a general description of both, see PERSONAL INSOLVENCY TASK FORCE FINAL REPORT 1-5 (Aug. 2002) [hereinafter PERSONAL INSOLVENCY REPORT], <http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/br01285e.html>. The Canadian Bankruptcy and Insolvency Act requires counseling as a condition to an automatic discharge following either a personal bankruptcy or consumer proposal. Act of June 23, 1992, ch. 27, § 32, 1992 S.C. 598-600 (adding § 66.13(2)(b) to the Canadian Bankruptcy Act, contemporaneously renamed Canadian Bankruptcy and Insolvency Act, requiring the administrator to provide or provide for counseling, in accordance with directives issued by the Superintendent of Bankruptcy, to debtors who wish to make a consumer proposal); *id.* § 58, at 639 (adding § 157.1(1) to the Canadian Bankruptcy and Insolvency Act, requiring trustee, in accordance with directives issued by the Superintendent of Bankruptcy, to provide counseling for an individual bankrupt), § 61, at 640-41 (adding § 168.1(1)(f) to the Canadian Bankruptcy and Insolvency Act, providing for discharge of individual who has never previously been a bankrupt under the laws of Canada or of any prescribed jurisdiction), § 58, at 639 (adding § 157.1(3) to the Canadian Bankruptcy and Insolvency Act, denying discharge under § 168.1(1)(f) to individual who has refused or neglected to receive the required counseling). Directives issued by the Superintendent of Bankruptcy are binding. Act of June 23, 1992, ch. 27, § 5(4), (5), 1992 S.C. 561-62. The Superintendent of Bankruptcy implemented the counseling requirements in Directive No. 1R2, Counseling in Insolvency Matters (Dec. 21, 1994), <http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/br01091e.html>. The directive requires that a qualified counselor provide the debtor or bankrupt with two stages of counseling to be completed no later than 210 days following the filing of a consumer proposal or the effective date of a bankruptcy. *Id.* In the first stage, the directive requires the counselor to provide advice, either individually or in a group not to exceed twenty participants, in the areas of money management, spending and shopping habits, warning signs of financial difficulty, and obtaining and using credit. *Id.* In the second stage, to be conducted no earlier than thirty days after completion of the first stage, the directive requires, among other things, that the counselor follow up on the debtor's application of principles presented in the first stage to identify the debtor's strengths and weaknesses in money management and budgeting skills, assist the debtor in identifying non-budgetary causes (e.g. alcohol abuse) that may have contributed to the debtor's financial difficulties, and make appropriate referrals to specialized counseling to deal with non-budgetary causes of financial difficulty. *Id.* Fees for the counseling are paid from funds committed by an individual debtor to a consumer proposal, Act of June 23, 1992, ch. 27, § 66.12(6)(b), 1992 S.C. 599, or, in the case of an individual bankrupt, from the estate. *Id.* § 157.1(1), at 639.

Both the first stage and part of the second stage of this counseling are comparable to the Act's required instruction in personal financial management. The Act provides no counterpart to that part of the second stage of the Canadian counseling that assists the debtor in identifying non-budgetary causes of bankruptcy and provides appropriate referrals. The educational component of the Canadian counseling should also be distinguished from counseling a Canadian debtor receives when he or she first visits a trustee to discuss the filing of a consumer proposal or a bankruptcy. Iain Ramsay, *Mandatory Bankruptcy Counseling: The Canadian Experience*, 7 FORDHAM J. CORP. & FIN. L. 525, 528 (2002). That pre-filing counseling is akin to the Act's requirement of pre-petition credit counseling.

judges might require the education in some circumstances,⁹⁹ explaining in part that “[t]he people who file for bankruptcy often have demonstrated the pressing need for heightened understanding of family finances.”¹⁰⁰ Several witnesses testifying in 1998 House subcommittee hearings on bankruptcy reform spoke in support of financial literacy education in the bankruptcy process. Some favored voluntary programs.¹⁰¹ Some of those favoring mandatory education more or less suggested the need to reduce bankruptcy recidivism.¹⁰²

Fears or complaints of bankruptcy recidivism have been a recurrent theme in the United States,¹⁰³ and reduction of recidivism appears to have been at least one goal of the Canadian mandatory education requirement first adopted in 1992.¹⁰⁴ But if recidivism is a concern, mandatory financial management education for *all* individual debtors makes sense only if the rate of bankruptcy recidivism is

99. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT, Vol. I, at 114-16 (Oct. 20, 1997) [hereinafter COMM'N REPORT], available at <http://govinfo.library.unt.edu/nbr/reporttitlepg.html>. The Commission's recommendation was supported by a wealth of testimony and earlier comparable recommendations and by a report submitted to the Commission by Professor Karen Gross, well-known for her interest and expertise in financial literacy education. Karen Gross, *Introducing a Debtor Education Program into the U.S. Bankruptcy System: A Roadmap for Change*, COMM'N REPORT, *supra* Vol. II, App. G-3.a. Her report expressed sympathy for mandatory education but endorsed voluntary education. *Id.* at 18.

100. *Id.* at 114.

101. *E.g.*, *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998 Part II: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the House Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong., Pt. II, at 120-26 (1998)* (prepared statement of Karen Gross, Professor, New York Law School).

102. *See, e.g.*, *Bankruptcy Reform Act of 1998 Part I: Hearing on H.R. 3150 Before the House Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary, 105th Cong., Pt. I at 12, 13 (1998)* (prepared statement of Hon. James P. Moran, member of House of Representatives); *id.* at 94-95 (prepared statement of Nicholl Russell); *Hearings Part III, supra* note 29, at 36, 41 (Appendix C to proposal of National Federal Credit Union to improve the bankruptcy process, attached to prepared statement of Brian L. McDonnell, President and CEO, Navy Federal Credit Union).

103. TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 191-92 (1989) [hereinafter AS WE FORGIVE OUR DEBTORS].

104. Ruth E. Berry & Sue L.T. McGregor, *Counseling Consumer Debtors Under Canada's Bankruptcy and Insolvency Act*, 37 OSGOODE HALL L.J. 369, 370-73, 376 (1999). Canada's mandatory counseling also was motivated in part by a conclusion that individuals often end in bankruptcy as a result of "psychosocial" problems such as alcohol or drug abuse, inadequate family role models, or problems in schooling, because the second stage of the Canadian required counseling provides for assessment of potential non-monetary causes of financial difficulty and referral to additional non-monetary counseling. *See supra* note 98. *See also* Carol Ann Curnock, *Insolvency Counseling-Innovation Based on the Fourteenth Century*, 37 OSGOODE HALL L. J. 387 (1999) (describing and criticizing the research on which that basis for mandatory counseling seems to have rested).

significant and if ineffective financial management contributes to the first or subsequent bankruptcy filing. Each is a dubious premise.

Bankruptcy recidivism among individual debtors who have previously filed Chapter 7 or Chapter 13 probably does not exceed 10% of those who have filed once. In a sampling of Chapter 7 and Chapter 13 cases filed in the United States by individuals in 1981, about 8% of the debtors were repeat players,¹⁰⁵ but only about half of those, 3.7% of the sample, were potentially seeking a second discharge.¹⁰⁶ Some, for example, were seeking a Chapter 7 discharge after dismissal of a failed Chapter 13, such that a second filing did not indicate financial difficulty independent of the difficulty that precipitated the first filing.¹⁰⁷ After further excluding self-employed individuals whose business ventures had failed, only about 2.6% of the sample was wage earners potentially seeking a second discharge. Data from another study, based on a sample of Chapter 7 cases filed in 1995, indicated that 4.6% of the debtors disclosed a prior bankruptcy by themselves or their spouses, relatives, or affiliates.¹⁰⁸ One study in Canada found a percentage of repeat individual bankrupts (10%), but did not isolate the number of individuals seeking a second discharge.¹⁰⁹ Another study of files in Canada found that 8% of the sample had previously filed the rough Canadian equivalent of our Chapter 7 case.¹¹⁰

However, presupposing either a higher rate of recidivism¹¹¹ or conceding that even the rates mentioned above are cause for concern, inability of individuals to effectively manage their personal finances is not the likely culprit. Data reported in *The Fragile Middle Class*¹¹²

105. AS WE FORGIVE OUR DEBTORS, *supra* note 103, at 192.

106. *Id.* at 192-94.

107. *Id.* at 193.

108. The study from which the data derives is described in Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709 (1999) [hereinafter *Reaffirmation Study*]. That article did not include data about repeat filers. Professor Culhane provided me with the data after a query to the database. Email from Marianne Culhane, Professor of Law, Creighton University School of Law, to author (Aug. 27, 2002) (on file with author).

109. Wally Clare, *Repeat Bankruptcies of Consumer Debtors*, 10 INSOLV. BULL. 201 (1990).

110. IAIN D.C. RAMSAY, *Individual Bankruptcy: Preliminary Findings of A Socio-Legal Analysis*, 37 OSGOODE HALL L. J. 15, 65 (1999).

111. In a proposal to Congress to improve the bankruptcy system, the National Association of Federal Credit Unions referred without citation to “[s]everal recent studies [showing] that as many as 20 percent of bankruptcy filers find it necessary to refile for bankruptcy a second time.” *Hearings Part III, supra* note 29, at 41.

112. TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS, AMERICANS IN DEBT* (2000) [hereinafter *FRAGILE MIDDLE CLASS*]. In her review of *FRAGILE MIDDLE CLASS*, Professor Margaret Howard summarizes its findings more fully. Margaret Howard, *Bankruptcy Empiricism: Lighthouse Still No Good*, 17 BANKR. DEV. J. 425, 427-39 (2001). Professor Howard then argues that the empirical data it reports are unlikely to persuade policymakers, academics, or others

indicate alternative reasons for most individual bankruptcy filings. “[T]he data reveal a middle-class population of bankrupts”¹¹³ who had been but a traumatic event away from financial crisis. The leading cause of financial crisis and then collapse is disruption of the debtor’s debt to income equilibrium caused by “the loss of income and long-term reduction in income that result from job loss or job changes,”¹¹⁴ loss of income or large uninsured medical debt resulting from illness or injury,¹¹⁵ and divorce.¹¹⁶ For many individual debtors the crisis leads to bankruptcy because, absent broader social safety nets, individuals and families are unable to tolerate the effect of those traumatic events upon precarious budgets that are laden with otherwise payable mortgage obligations or other debt, including substantial amounts of credit card debt.¹¹⁷

One might attribute precarious budgets of some debtors to ineffective financial management. Some debtors with large amounts of credit card debt are “sliders,” slipping into greater debt incrementally through small individual charges coupled with minimum monthly payments.¹¹⁸ And from among a small group of individual bankruptcy debtors surveyed who identified their bankruptcy as in part related to problems with credit cards (5.4%), many identified themselves as foolish, stupid, or lacking in money management knowledge or skills.¹¹⁹ These and some other debtors might lack effective financial management skills, and acquisition of those skills might teach them to avoid credit that again puts them on the brink. Yet it seems equally likely that many individual bankruptcy debtors managed their finances quite effectively until catastrophe struck, successfully maintaining in the meantime a budget made precarious by limits to their income and by their reasonable expenses rather than by ineffective financial management.¹²⁰ In sum, more effective financial management would not have prevented many first time individual bankruptcy filings. If the same is true of repeat individual filers,

predisposed to views that the data challenges. *Id.* at 439-59. In response to that and other criticisms of the usefulness of empirical research in law generally and its impact on consumer bankruptcy law, see Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123 (2002).

113. FRAGILE MIDDLE CLASS, *supra* note 112, at 5.

114. *Id.* at 239.

115. *Id.* at 240-41.

116. *Id.* at 241-42.

117. *Id.* at 242-43, 256-61; See Melissa B. Jacoby, Teresa A. Sullivan, & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001).

118. FRAGILE MIDDLE CLASS, *supra* note 112, at 111-12 (“sliders” is a term introduced by the authors of FRAGILE MIDDLE CLASS).

119. *Id.* at 133.

120. *Id.* at 113-14 (discussing “crashers”).

mandated financial management education will do little to reduce recidivism.

If not to reduce recidivism, the justification for conditioning a discharge for an individual debtor upon completion of personal financial management instruction cannot be to increase notoriously low Chapter 13 completion rates,¹²¹ both because the education mandate is also applicable to individuals in Chapter 7 and because, for Chapter 13 debtors, the education need only be completed prior to discharge, not at a time proximate to the beginning of plan payments.¹²² Even if Chapter 13 debtors were required to complete the instruction earlier, Professor Braucher's study of plan completion rates in five Chapter 13 trusteeships, three with and two without mandatory debtor education programs, casts doubt upon a claim that timely mandatory education would increase Chapter 13 completion rates. She concluded that, taking other local practices and individual debtor characteristics into account, "debtor education is not associated with increased completion."¹²³

Professors Block-Lieb, Gross, and Wiener suggested another justification in support of financial management instruction in a bankruptcy proceeding. In their preliminary description of a pilot program providing financial instruction to volunteering Chapter 7 and Chapter 13 debtors in the Eastern District of New York, the authors suggested that "the filing of a bankruptcy creates, in the parlance of educators and psychologists, a 'teachable moment,'"¹²⁴ at which time instruction can empower debtors to achieve a more meaningful fresh start by providing them with information critical to navigating a complex credit-

121. The data available suggest that only 20-40% of Chapter 13 filers nationwide complete their Chapter 13 plan and receive a discharge. Some of the studies reaching this conclusion are identified in Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 439 n.83 (1999). Professor Norberg's study found a completion rate of 33% in a limited number of cases filed in 1992 and 1998 in the Southern District of Mississippi. *Id.* at 439.

122. Ordinarily, plan payments must commence within thirty days of the time that the debtor files the plan. 11 U.S.C. § 1326(a)(1) (2000). The plan must be filed within fifteen days of the filing of the petition, unless the court extends the time period for cause. FED. R. BANKR. P. 3015(b). Under a proposed interim amendment to Fed. R. Bankr. P. 1007, a Chapter 13 debtor need not file a statement of completion of a course in personal financial management until the time of the debtor's last plan payment or the time of the filing of a motion for discharge under section 1328(b) of the Bankruptcy Code. FED. R. BANKR. P. 1007(c) (proposed interim amended rule), available at <http://www.uscourts.gov/rules/CPA2005.html> (Draft Interim Consumer Rules) (last visited Aug. 25, 2005).

123. Braucher, *supra* note 94, at 558.

124. Susan Block-Lieb et al., *Lessons from the Trenches: Debtor Education in Theory and Practice*, 7 FORDHAM J. CORP. & FIN. L. 503, 508 (2002) [hereinafter *Lessons from the Trenches*].

based economy.¹²⁵ However, in articulating their reason for an empirical study of the pilot program, they acknowledged that their beliefs “rest on humanistic optimism and not empirical proof,”¹²⁶ and they did not claim justification for a mandatory program.¹²⁷

Instruction in personal financial management may therefore serve nothing more than “the rhetorical function of assigning debtors responsibility for their own problems.”¹²⁸ Absent a clearly articulated justification for mandatory instruction, it will be difficult to assess its efficacy. The Act nonetheless calls for the Director of the Executive Office of United States Trustees to develop a curriculum and materials for a financial management training program, test them in six judicial districts for eighteen months, and report to Congress on the effectiveness and costs of the curriculum and materials as well as the effectiveness and costs of a sample of other consumer education programs.¹²⁹ Quite obviously the required evaluation is neither long enough nor focused enough to measure whether the instruction will reduce bankruptcy recidivism, and, as previously mentioned, it cannot measure whether the instruction affects Chapter 13 plan completion rates. At most it could measure and compare the extent to which the test program and other consumer education programs improve an individual’s ability to manage personal finances, compare the costs of such programs, and recommend guidelines for effective instructional courses.¹³⁰ It may therefore help instructional providers of the future maximize the potential benefit from a “teachable moment,” but it is unlikely to yield any justification for mandating the moment as a condition to discharge.

125. *Id.* at 505-10. At one point the authors hypothesized that “most” debtors can benefit from the education but at another point they stated that debtors can “all” benefit. *Id.* at 508.

126. *Id.* at 513.

127. *Id.* at 522-23.

128. Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1083 (2004).

129. BAPCP Act, *supra* note 13, § 105.

130. A fairly recent review of some of the research on the efficacy of varying kinds of financial literacy training reported more success in training aimed at achievement of specific goals (e.g. maintaining mortgage payments) but less clear cut success as a result of more abstract training. Sandra Braunstein & Carolyn Welch, Federal Reserve Board Division of Consumer and Community Affairs, *Financial Literacy: An Overview of Practice, Research, and Policy*, 88 FED. RES. BULL. 445, 452 (Nov. 2002). This review of research also reported the conclusion of one study that consumers benefit more from ready access to information on an ongoing basis than from the teaching of financial literacy in the abstract. *Id.* at 452. It also reported the results of a Federal Reserve Board study of perceived effectiveness of different means of information delivery in which consumer respondents to survey questions reported greater effectiveness from information on demand than from information at the time of another’s choosing and greater effectiveness from mass media, brochures, and home video than from the Internet, seminars, or classroom instruction. *Id.* at 453-55.

Pending the results of that study, we may gain some initial insight about the value of mandatory personal financial management instruction in bankruptcy by considering the experience of Canada, which introduced its mandatory education requirement (there named “counseling”) in 1992.¹³¹ The Canadians adopted the requirement both to reduce perceived recidivism and to identify and refer for professional counseling debtors with certain psychological or social problems (e.g. alcohol abuse) perceived to be at the root of many bankruptcies.¹³² Professor Iain Ramsey describes two studies of the effectiveness of the required education in Canada, both of which appear to have been based primarily, if not exclusively, on interviews with the professionals who performed the counseling and with the debtors who received it.¹³³ Well over half of the Canadian trustees interviewed in both studies had concluded that the counseling was of little or no use to most debtors. “A common theme [among trustees] was the mismatch between the assumptions of the counseling directive and the reasons for bankruptcy. In many cases, the trustees stated that the reason for bankruptcy was not financial mismanagement but loss of income or other change of circumstances.”¹³⁴ In the second study, 55% of the professional, non-trustee counselors interviewed had concluded that the counseling was very useful, a view that Professor Ramsey suggests might be self-serving.¹³⁵ In contrast, a significant majority of debtors interviewed in both studies expressed enthusiasm about the success of the counseling.¹³⁶ A more recent study gathered current credit profiles on Canadian debtors who had filed both prior to and after implementation of the mandatory counseling, but did not provide “any significant and unambiguous indication as to the beneficial impact of counseling.”¹³⁷ Giving all praises their due, these findings neither signify a successful Canadian experience nor predict a successful experience in the United States.¹³⁸

Without knowing how well the mandatory instruction under the Act may achieve some unstated objective, it is troubling that debtors will be burdened with the expense of this instruction in addition to

131. See *supra* note 98.

132. See *supra* notes 98, 104.

133. Ramsay, *supra* note 98, at 536-38.

134. *Id.* at 533.

135. *Id.* at 538.

136. *Id.* at 536-38.

137. *Id.* at 538-39.

138. The Personal Insolvency Task Force, an advisory group established in 2000 by the Office of the Canadian Superintendent of Bankruptcy to suggest possible revisions of the personal insolvency provisions of the Canadian Bankruptcy and Insolvency Act, declined to recommend any changes to the mandatory counseling requirement after having received a preliminary government report on the subject. PERSONAL INSOLVENCY REPORT, *supra* note 98, at 9.

fees, if applicable, for pre-petition credit counseling,¹³⁹ increased bankruptcy filing fees for some debtors,¹⁴⁰ and likely increased attorneys' fees for some debtors.¹⁴¹ Some debtors will be spared the expense of the instruction because, as in the case of credit counseling, the Act requires that the fee for instruction be reasonable and that providers offer the instruction to a debtor without regard to the debtor's ability to pay the fee.¹⁴² Those able to pay must do so.¹⁴³ Beyond the out-of-pocket expense, of course, debtors without access to Internet or telephone instruction may have to take additional time off work or incur transportation, childcare, or other incidental expenses.

The contours of the required education are less obscure than its justification. The Act identifies in general terms the standards for instructional courses¹⁴⁴ and, as is the case with approval of counseling

139. See *supra* note 40 and accompanying text.

140. The Act increases Chapter 7 filing fees from \$155 to \$200. BAPCP Act, *supra* note 13, § 325 (amending 28 U.S.C. § 1930). Congress subsequently amended § 325 of the Act to increase the filing fee to \$220. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 6058, 119 Stat. 231, 297 (2005). Pursuant to its authority under 28 U.S.C. § 1930(b), the Judicial Conference of the United States requires that all debtors pay an additional \$39 administrative fee and that Chapter 7 debtors pay an additional \$15 fee for the trustee serving in the case, both payable at filing or in installments. Judicial Conference of the United States, Bankruptcy Court Miscellaneous Fee Schedule 2 (effective Jan. 1, 2005), <http://www.uscourts.gov/fedcourtfees/010305bankruptcyFee.pdf>. Therefore, unless the bankruptcy court waives the fees, Chapter 7 debtors must pay to the clerk of the bankruptcy court fees totaling \$274 either at the time of filing or, pursuant to FED. R. BANKR. P. 1006(b), in installments. Some individuals filing Chapter 7 will not have to pay the fees, however, because, for the first time, the Act authorizes the bankruptcy court to waive the fees for an individual with income less than 150 percent of the income official poverty line applicable to a family of the size involved, if the individual is unable to pay the fee in installments. BAPCP Act, *supra* note 13, § 418 (adding subsection (f) to 28 U.S.C. § 1930). Close to 30% of individual Chapter 7 debtors might meet the income qualification. See Gordon Bermant & Ed Flynn, *Bankruptcy by the Numbers: The Impact of the Coming Fee-waiver Provision*, http://www.usdoj.gov/ust/eo/public_affairs/articles/docs/abi01julnumbers.html (last visited Feb. 2, 2005) (applying 1999 Census Bureau poverty thresholds to 5,165 no-asset Chapter 7 cases filed between 1998 and 2000). Very few of those individuals might be able to pay the filing fees in installments. *Id.*

141. See *infra* note 270 and accompanying text, *infra* note 319 and accompanying text, *infra* pp. 342-44, 350-54.

142. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code). The United States trustee elaborates by stating the applicant "may not withhold services because of an inability to pay." PROVIDER INSTRUCTIONS, *supra* note 18, at 6. The Act gives no guidance, and the United States trustee has not yet publicly provided any guidance about what fee would be unreasonable and what degree of financial need would excuse a debtor from paying any fee. Contrast the specificity of the Act in identifying those debtors for whom filing fees may be waived. See *supra* note 140.

143. By way of very rough comparison, as of 2002, debtors in Canada paid \$85 Canadian (roughly \$70 dollars U.S. as of July 15, 2005) for each of two one-hour counseling sessions. Ramsay, *supra* note 98, at 530.

144. The standards for initial six-month probationary approval are the following: trained personnel with adequate relevant experience and training, adequate learning

agencies, leaves interpretation and application of those standards to the United States trustee.¹⁴⁵ In its instructions for an application to be approved as a provider of an instructional course, the United States trustee identifies the minimum qualifications for persons employed by an applicant to supervise instructors, requires that a course provide written information and instruction on budget development, money management, wise use of credit, and other identified consumer information, and requires that courses be at least two hours long.¹⁴⁶ Prior to initial approval and annually required re-approval of an instructional course, the United States trustee must “thoroughly review the qualifications . . . of the provider of . . . [an] instructional course” and must be satisfied that the course “fully satisfies” the prescribed standards.¹⁴⁷ As in the context of approval and re-approval of counseling agencies, we may question here as well the adequacy of United States trustee resources for this task,¹⁴⁸ and also may suggest the importance of considering the issue of instruction for non-English speaking or limited English-speaking debtors.¹⁴⁹

materials and teaching methodologies, adequate facilities (including provision of instruction by telephone or Internet), preparation and retention of designated records. For subsequent one-year approvals, the provider of the course must also demonstrate that the course has been effective in assisting a substantial number of debtors to understand personal financial management and is otherwise likely to increase substantially debtor understanding of personal financial management. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code). Others have already questioned both the rigor and the meaning of these standards. *Lessons from the Trenches*, *supra* note 124, at 521. Moreover, it is difficult to see how a provider can demonstrate that the course has been effective in assisting a *substantial* number of debtors to understand personal financial management if neither the provider nor the United States trustee have any data to suggest how many debtors who file Chapter 7 or Chapter 13 do not otherwise understand personal financial management or if any such data demonstrates that most such debtors otherwise understand personal financial management. Finally, “[a] standardized approach that does not recognize the differences among debtors may be ineffective.” Richard L. Wiener, et al., *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 474 (2005). Higher-income debtors may need in addition, or instead, education about their attitudes toward unnecessary spending whereas lower-income debtors may need education focused on their perceptions of control of their behavior. *Id.*

145. BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code).

146. PROVIDER INSTRUCTIONS, *supra* note 18, at 3-4. The instructions require that a course offered via telephone or Internet be designed for average completion within a minimum of two hours. *Id.* at 4.

147. *Id.*

148. It is unclear whether the Congressional Budget Office Cost Estimate for the Act includes the cost of these tasks. *See supra* note 43.

149. *See supra* pp. 252-54. The application for approval as a course provider does not require the applicant to state whether it will provide instruction in languages other than English, PROVIDER APP., *supra* note 18, and the instructions for the application do not refer to the language in which instruction is to be provided. PROVIDER INSTRUCTIONS, *supra* note 18.

It will be a few years before we can evaluate the content and quality of approved instructional courses, the means of delivery, and their cost and convenience to debtors. Notwithstanding this present foggy view, we may reasonably expect the emergence of a cottage industry of providers affording choices to debtors varying in efficiency, convenience, and expense. Instruction over the Internet will play a prominent role, advantageous to some but unavailable to others.¹⁵⁰ We may expect exclusive providers of Internet instruction to charge debtors less for instruction than providers of on-site instruction because Internet providers need not defray the cost of classroom facilities.¹⁵¹ Internet instruction will be considerably more convenient to many debtors who will be able to avoid travel to possibly distant locations at inconvenient times. For some debtors, Internet instruction may even be more effective than on-site instruction because it can be self-paced and repetitive as well as interactive.¹⁵² It will offer privacy to debtors who don't wish to further expose their financial misfortune to other debtors. Thus, there should be considerable merit to applications for approval from providers of Internet instruction.

Yet Internet instruction will not be equally available to all. In October 2003, the latest in a series of Bureau of Commerce reports on computers and use of the Internet revealed that 61.8% of households in the United States had a computer and 87.6% of those households used the computer to access the Internet.¹⁵³ Not surprisingly, it also

150. Trustees may also approve courses offered by telephone. For such a course, the instructions for an application to be approved as a course provider require, among other things, the use of a toll-free number, distribution to the debtor of written materials prior to the telephonic instruction session, and the telephonic presence of a teacher (i.e. no pre-recorded instruction). PROVIDER INSTRUCTIONS, *supra* note 18, at 5.

151. The instructions for an application for approval of an instructional course require that classroom facilities comply with all applicable laws and regulations, including, but not limited to, the Americans with Disabilities Act Accessibility Guidelines and all federal, state, and local fire, health, safety, and occupancy requirements. *Id.* at 6.

152. I refer here to interaction with an automated program. I infer that the United States trustee will approve automated instruction over the Internet because its instructions for an application for approval of an instructional course provide that a teacher shall be present telephonically if the instruction is conducted by telephone, but with respect to Internet instruction state only that a teacher shall respond within twenty-four hours to a debtor student's questions or comments. *Id.* at 5.

153. ECONOMICS AND STATISTICS ADMINISTRATION, UNITED STATES DEPARTMENT OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE 4, 5 (2004) [hereinafter A NATION ONLINE], <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf>. The Pew Internet and American Life Project, a nonprofit organization funded by the Pew Charitable Trusts, reports Internet usage over time. Web site of Pew Internet and American Life Project, at <http://www.pewinternet.org/index.asp> (last visited July 28, 2005). Its reports include Internet usage among American adults from 1995 through February, 2004. *Id.* at <http://www.pewinternet.org/trends/InternetAdoption.jpg> (last visited July 28, 2005). The web site also includes demographics of adult Internet users. *Id.* at http://www.pewinternet.org/trends/User_Demo_05.18.05.htm (last visited July 28, 2005).

reported that Internet access from any location, including but not limited to the home, is partially a function of income, climbing from a low access rate of 31.2% of individuals aged three and older with family income of less than \$15,000 to a high access rate of 86.1% of individuals aged three and older with a family income of \$150,000 and greater.¹⁵⁴ Internet access is also at least partially a function of the location of a person's household, with use by individuals with households in rural areas somewhat lower than use by individuals living in urban areas other than the central city.¹⁵⁵ For those without access from home, either for lack of a computer or for lack of a connection to the Internet, access at public libraries may be limited,¹⁵⁶ access at educational institutions typically will not be open to the public, access at a cybercafé or other private facility with dedicated terminals usually will cost money, and wireless access at a wi-fi hotspot requires a laptop computer with wireless access capability. Accordingly, of the many individuals in bankruptcy with lower income,¹⁵⁷ a significant number may not have Internet access.¹⁵⁸ Moreover, only 19.9% of households in the United States (slightly more than one third of

154. A NATION ONLINE, *supra* note 153, at A-1. We are, of course, interested in Internet access by likely debtors, i.e. generally those over eighteen years old. Although the United States Department of Commerce Report provides data on Internet use by age, *Id.* at A-1 – A-2, it does not provide data for Internet use by age for each income group. The Pew Internet and American Life Project reports Internet usage by adults ranging from 48% of adults with household income of less than \$30,000/year to 92% of adults with household income above \$75,000/year. The Pew Internet and American Life Project, *supra* note 153, at http://www.pewinternet.org/trends/User_Demo_05.18.05.htm (last visited July 28, 2005).

155. A NATION ONLINE, *supra* note 153, at A-2.

156. In 1997, 79% of public libraries listed in an annual directory had Internet access. In a sample of those libraries with Internet access, 23.4% had one computer with access to the Internet, 17.2% had two such computers, 11.9% had three such computers, 10.5% had four such computers, 6.6% had five such computers, and 30.4% had more than five such computers, and the number of computer terminals with access to the Internet increases with the size of the population served by the library. THE LIBRARY RESEARCH CENTER, GRADUATE SCHOOL OF LIBRARY AND INFORMATION SCIENCE, UNIVERSITY OF ILLINOIS, SURVEY OF INTERNET ACCESS MANAGEMENT IN PUBLIC LIBRARIES, SUMMARY OF FINDINGS 2-3 (June 2000), <http://lrc.lis.uiuc.edu/web/internet.pdf>.

157. See *Reaffirmation Study*, *supra* note 108, at 770 (Table 22) (reporting median gross income of \$21,264 for 1,043 Chapter 7 debtors filing in 1995 and gross income of \$31,998 or less for 75% of filers); GORDON BERMANT & ED FLYNN, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES, INCOMES, DEBTS, AND REPAYMENT CAPACITIES OF RECENTLY DISCHARGED CHAPTER 7 DEBTORS (1999) [hereinafter EOUST STUDY], http://www.usdoj.gov/ust/eo/public_affairs/articles/docs/ch7trends-01.htm (reporting median income of \$22,800 for 1,955 debtors throughout country filing in late 1997 or early 1998). Comparable data is reported in FRAGILE MIDDLE CLASS, *supra* note 112, at 61-62, for Chapter 7 and Chapter 13 debtors filing in 1991, and in unpublished data that I compiled at the request of Bankruptcy Judge Randall Newsome, based on over 3,000 Chapter 7 bankruptcy filings around the country in 1996, 1997, and 1998 (spreadsheets on file with author).

158. Limitations on access to the Internet may be less of a drawback in the context of required pre-petition credit counseling because at least some debtors represented by

households with Internet access) have broadband Internet access that would avoid teeth-grinding delay and frustration.¹⁵⁹ Instruction via CD-ROM or DVD may be an acceptable alternative, but those media, unlike a web site, are static and obviously are not available to those without access to a computer.

Many credit-counseling agencies approved for pre-petition credit counseling undoubtedly also will seek approval of instructional courses, perhaps capturing market share for the instructional courses by virtue of the credit counseling function they will have performed for debtors pre-petition. Consumer bankruptcy attorneys will alert their clients to the education requirement and refer clients to approved providers, and perhaps some consumer bankruptcy attorneys, desiring to offer or market convenient one-stop service to clients, will seek approval to offer the instruction themselves or through office staff.¹⁶⁰ Pro se debtors must learn of the requirement on their own and choose a provider based on advertising, suggestions from a bankruptcy petition preparer, word of mouth, or the list maintained by the clerk of the bankruptcy court. We can only hope that not too many pro se debtors will be lured to instructional courses not approved by the United States trustee before checking the list.

We have seen, to summarize, that the justification for instruction in personal financial management is obscure or nonexistent, and that implementation of the requirement for such instruction will demand the ongoing expenditure of resources by the United States trustee. It will impose additional costs, in both time and money, upon financially strapped individual debtors, many of whom are in bankruptcy for reasons entirely unrelated to inept financial management and for whom the education will be make-work. The requirement is almost certain to be unevenly administered and not equally convenient to all individual debtors. At best we might rationalize the requirement in the following terms. Financial literacy among adults in the United States is an important goal.¹⁶¹ The bankruptcy process provides a captive au-

an attorney may be able to obtain Internet counseling through a terminal in the attorney's office, as in the proposed system described *supra* pp. 248-49.

159. A NATION ONLINE, *supra* note 153, at 4-5.

160. Unlike approved providers of credit counseling, approved providers of personal financial management instruction need not be nonprofit. The Act refers to approval by the United States trustee of "a *nonprofit* budget and credit counseling agency or an *instructional course* concerning personal financial management . . ." BAPCP Act, *supra* note 13, § 106(e) (adding § 111 to the Bankruptcy Code) (emphasis added). The attorney's service can only be one-stop service if the client can also obtain credit counseling at the attorney's office, a possibility suggested *supra* pp. 248-49.

161. Concerning financial illiteracy in the United States, see *Hearing on the State of Financial Literacy and Education in America: Before the Senate Comm. on Banking, Hous. and Urban Affairs, 107th Cong.* (Feb. 5, 2002) (first hearing in a series), available at http://www.senate.gov/%7Ebanking/02_02hrg/020502/index.htm; *id.* (Feb. 6, 2002)

dience, one that may include a percentage of adults likely to benefit from personal financial management education that is higher than any other subset of adults. The instruction might reduce the likelihood of recidivism, however low the rate of recidivism may be, thus providing some comfort to those who absorb or pass on the cost of unpaid debt. Moreover, even if events beyond an individual's control rather than ineffective financial management precipitate most bankruptcy filings by individuals, filtering out those who would not benefit from the education would consume too many resources and invoke too much discretion.¹⁶² Finally, if the education program were voluntary, too many debtors in need of the education might fail to participate.¹⁶³

II. MEANS TESTING AND DISMISSAL OF CONSUMER CHAPTER 7 CASES FOR ABUSE

A. AN INTRODUCTION TO MEANS TESTING AND DISMISSAL OF CONSUMER CHAPTER 7 CASES FOR ABUSE

Creditors have advocated means testing of individual Chapter 7 debtors for decades.¹⁶⁴ In 1984 Congress rejected statutory language that would have imposed an eligibility requirement for Chapter 7 based upon future income.¹⁶⁵ Instead, it enacted section 707(b) of the

(second hearing in a series), *available at* http://www.senate.gov/%7Ebanking/02_02hr/020602/index.htm. For additional resources on financial illiteracy and financial literacy programs, see web site of Jump\$tart Coalition for Personal Financial Literacy, at <http://www.jumpstart.org/index.cfm> (last visited July 24, 2005); web site of Project Money \$mart, a project of the Federal Reserve Bank of Chicago, at http://www.chicagofed.org/consumer_information/money_smart_index.cfm (last visited July 24, 2005).

162. One bankruptcy judge has described the prospect of screening out debtors who do not require personal financial management education as a "nightmare administratively." A. Mechele Dickerson, *Can Shame, Guilt, or Stigma be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 *LOY. L.A. L. REV.* 945, 962 n.48 (1999).

163. Results from the pilot voluntary education program for Chapter 7 and Chapter 13 debtors in the Eastern District of New York suggest the difficulty in attracting voluntary participants, even though the free counseling, with a free set of materials, was limited to one three-hour session, supplemented by a certificate, a small gift, and refreshments. *Lessons from the Trenches*, *supra* note 124, at 517-18; *Pilot Program*, *supra* note 96, at 238-42.

164. *Personal Bankruptcy Oversight Hearings: Before the House Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong. 545, 545-46 (1982) (prepared statement of Frank R. Kennedy); DAVID A. SKEEL, JR., *DEBT'S DOMINION, A HISTORY OF BANKRUPTCY LAW IN AMERICA* 154 (2001) (identifying efforts of consumer credit industry in the 1960s); Richard E. Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification For Bankruptcy Discharge*, 62 *ALB. L. REV.* 467, 500 (1998) (identifying bills in 1964 and 1967).

165. Early versions of what would become section 707(b) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 contained a future income test. The future income test was dropped in favor of the substantial abuse language of section 707(b). For descriptions of the legislative history, see Coulson, *supra* note 164, at 501-05; Wayne R. Wells et al., *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 *CLEV. ST. L. REV.* 15, 28-30 (1991).

Bankruptcy Code, which authorized the bankruptcy court to dismiss the Chapter 7 case of an individual debtor whose debts were primarily consumer debts if the court concluded that granting relief would constitute a “substantial abuse” of Chapter 7.¹⁶⁶ Congress had never before so restricted relief under Chapter 7.¹⁶⁷

Section 707(b) authorized a court to dismiss for substantial abuse only on its own motion or upon motion of the United States trustee.¹⁶⁸ To forestall creditor leverage, the section even precluded any party in interest from requesting or suggesting such a motion. Circuit court interpretations of “substantial abuse” diverged¹⁶⁹ and varying

166. 11 U.S.C. § 707(b) (2000).

167. The relevant characteristics of the first three bankruptcy statutes, adopted and repealed in the 19th century, are reviewed in Coulson, *supra* note 164, at 471-76. In brief, the Bankruptcy Act of 1800, repealed in 1803, was limited to involuntary cases against merchants or bankers, and discharge of the debtor was conditioned upon a finding of the debtor's cooperation, including the surrender of non-exempt property, and the signed consent of creditors holding at least 2/3 in number and value of proven debts. *Id.* at 471-72. The Bankruptcy Act of 1841, repealed in 1843, introduced relief in voluntary cases. Discharge was conditioned upon the debtor's cooperation, including surrender of non-exempt property. If a majority of creditors in both number and value of debts objected to discharge, the debtor was nonetheless entitled to a discharge upon a finding of full disclosure, cooperation, compliance with the Act, and surrender of property. *Id.* at 473-74. The Bankruptcy Act of 1867, repealed in 1878, specified “numerous conditions [to discharge] of candor and cooperation” and, for cases filed after January 1, 1869, also required consent to the discharge by specified majorities of creditors in cases in which specified amounts of dividends were not paid. *Id.* at 475-76. The Bankruptcy Act of 1898 introduced what we now know as the grounds for denial of discharge and specified debts that are not dischargeable. It did not reintroduce the notion of creditor consent to discharge. Act of July 1, 1898, ch. 541, 30 Stat. 544, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2682.

168. 11 U.S.C. § 707(b) (2000).

169. *Kornfield v. Schwartz* (*In re Kornfield*), 164 F.3d 778 (2d Cir. 1999) (affirming dismissal for substantial abuse based on totality of circumstances including incurring of substantial debts from extravagant lifestyle and a substantial income that could repay debt, but declining to spell out precise content of “totality of circumstances” test); *Green v. Staples* (*In re Green*), 934 F.2d 568, 572-73 (4th Cir. 1991) (reversing dismissal for substantial abuse based solely on excess of income over necessary expenses and requiring consideration of totality of circumstances, including five listed factors); *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989) (affirming dismissal for substantial abuse based on totality of circumstances demonstrating insufficient degree of honesty and need, although either will suffice, and when insufficient need may be demonstrated by ability to repay debts out of future earnings); *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (affirming dismissal for substantial abuse because disposable income was sufficient to fund Chapter 13 plan); *Zolg v. Kelly* (*In re Kelly*), 841 F.2d 908, 914-15 (9th Cir. 1988) (remanding to bankruptcy court, but holding that a debtor's ability to pay his debts, standing alone, sufficient to support a conclusion of substantial abuse); *Price v. U.S. Trustee* (*In re Price*), 353 F.3d 1135, 1140 (9th Cir. 2004) (affirming dismissal for substantial abuse based on debtor's ability to pay but noting that ability to pay debts does not compel dismissal and that, in some cases, other circumstances alone could justify dismissal). For a comparison of some of these decisions and a survey of other approaches among bankruptcy judges, see Coulson, *supra* note 164, at 505-16; Honorable Tamara O. Mitchell, *Dismissal of Cases via U.S.C. § 707: Bad Faith and Substantial Abuse*, 102 COM. L. J. 355, 359-74 (1997).

caseloads and philosophical dispositions of bankruptcy judges, coupled with varying screening mechanisms used by different United States trustees, compounded the effect of the disagreement.¹⁷⁰ Accordingly, the frequency of section 707(b) motions and dismissals varied widely.

Section 707(b) was the proverbial camel's nose under the tent. The means-testing amendments to section 707(b) carried by the Act shove in the rest of the camel. Under the means-testing amendments, a Chapter 7 debtor whose debts are primarily consumer debts will be subject to a means test if the debtor's putative annual income exceeds a specified state annual median income.¹⁷¹ If the putative annual income does not exceed the specified median, the debtor is spared application of the means test. Comparison of a debtor's putative annual income to a specified state median income is thus a trigger for application of the means test. The income level at which the means-test trigger is set reflects a prediction that very few individual Chapter 7 debtors whose putative annual income falls short of the relevant median would be able to pay very much to non-priority unsecured creditors if the case were to be dismissed or converted to Chapter 13.

If the comparison of a debtor's putative annual income to the relevant median triggers application of the means test, application of the means test determines the amount that the debtor is presumed able to pay on non-priority unsecured claims over a period of five years, based upon calculations using the debtor's imputed income, imputed expenses, some actual expenses, and payments due on secured and priority claims.¹⁷² If, as a result of those calculations, the debtor is presumed able to pay a stated minimum amount on non-priority unsecured claims over a five-year period, the bankruptcy court *must* presume abuse of Chapter 7 (a finding of "substantial" abuse is no longer required) and *may* dismiss the case or, with the debtor's consent, convert to Chapter 11 or 13.¹⁷³

170. See Wells et al., *supra* note 165, at 15 (reporting the results of a survey questionnaire distributed to all bankruptcy courts, United States trustees, and assistant United States trustees). They reported that 85% of courts responding to the survey did not screen Chapter 7 cases for substantial abuse because of lack of time, concern as to the role of a judge, reliance on the United States trustee, or objection to setting up a screening process. *Id.* at 19-23. Survey responses also indicated different screening mechanisms among United States trustee offices. Some relied on panel trustees and some, but not all, United States trustee offices furnished screening guidelines to panel trustees. Other United States trustee offices conducted their own screening, some by reviewing all Chapter 7 petitions and some by reviewing a sample of Chapter 7 petitions. In some offices the United States trustee or assistant trustee conducted the review and in other offices other personnel conducted the review. *Id.* at 24.

171. See *infra* pp. 276-83.

172. See *infra* pp. 284-88.

173. See *infra* pp. 284-85. The first sentence of § 707(b) of the Bankruptcy Code states, in relevant part, "a court . . . *may* dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the grant-

If the means test is not triggered or if application of the means test does not create a presumption of abuse, the bankruptcy court may nonetheless conclude that the debtor has abused Chapter 7 if it finds either that the debtor has filed a Chapter 7 petition in bad faith or that the totality of the circumstances of the debtor's financial situation demonstrates abuse.¹⁷⁴ In such a case the court may then dismiss or, with the debtor's consent, convert to Chapter 13. On the other hand, a debtor for whom abuse is presumed may rebut the presumption of abuse by itemizing, documenting, and explaining under oath "special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."¹⁷⁵ Even if the debtor rebuts the presumption of abuse, however, a court may nonetheless conclude that the debtor has abused Chapter 7 and dismiss based upon a finding of bad faith filing or the totality of the circumstances of the debtor's financial situation.¹⁷⁶

The Act imposes significant new burdens upon the United States trustee associated with the means test,¹⁷⁷ estimated to cost \$150 mil-

ing of relief would be a substantial abuse of the provisions of this chapter." 11 U.S.C. § 707(b) (2000) (emphasis added). The Act amends that sentence by deleting the word "substantial" and adding the words "or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title" after the words "consumer debts," but does not alter the word "may." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 102(a)(2)(B) (2005) [hereinafter BAPCP Act] (amending § 707(b) of the Bankruptcy Code). It is curious, indeed almost bizarre (or perhaps inadvertent), that exercise of the dismissal power remains permissive given that one justification for means testing by formula has been to reduce or eliminate disparity in the application of section 707(b). Perhaps the word "may" takes on a different meaning after the amendment, namely, that the court must either dismiss or convert but it may, with the debtor's consent, do either. But that would have been the meaning had the language been amended to say that the court "must dismiss . . . or may, with the debtor's consent, convert to . . . chapter 11 or 13" Alternatively, perhaps the word "may" reflects the possibility that a debtor may rebut a presumption of abuse and thereby convince the court not to dismiss.

174. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(3) to the Bankruptcy Code).

175. § 102(a)(2)(C) (adding § 707(b)(2)(B) to the Bankruptcy Code). The additional expenses or adjustments to current monthly income must be sufficient to deprive the debtor of means to pay a minimum amount to non-priority unsecured creditors over a period of five years. *Id.* The minimum amount is identified in Table 1 and related text, *infra* pp. 284-85. I discuss the meaning of "additional expenses or adjustments of current monthly income" *infra* pp. 296-98.

176. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(3) to the Bankruptcy Code).

177. The Act imposes the same burdens upon bankruptcy administrators. The Report of the National Bankruptcy Review Commission succinctly explains the difference between the United States Trustee and Bankruptcy Administrator programs: "The United States Trustee Program is an executive branch agency within the department of Justice that is responsible for overall bankruptcy administration in forty-eight states, Puerto Rico & Guam." NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT, Vol. I, at 844 [hereinafter COMM'N REPORT], available at <http://govinfo.library.unt.edu/nbrcreport/tittlepg.html> (last visited Jan. 28, 2006).

lion for the period 2006-2010.¹⁷⁸ The United States trustee must review every Chapter 7 case filed by an individual debtor for the possibility of presumed abuse, file a statement with the court reflecting a conclusion on that issue, and thereafter, in specified cases, either file a motion to dismiss or convert to another Chapter based on presumed abuse or file a statement explaining reasons for not doing so.¹⁷⁹ The Act also amends section 707(b) to permit any creditor of the debtor, or the panel trustee, to file a motion to dismiss for abuse if the debtor's putative annual income exceeds the relevant state median.¹⁸⁰ This enhances creditor leverage outside bankruptcy ("we'll file a 707(b) motion if you file a Chapter 7 petition") and may also enhance creditor leverage in bankruptcy ("we'll dismiss this 707(b) motion if you reaffirm").

By adding section 707(b) to the Bankruptcy Code in 1984, Congress took its first stab at denying a Chapter 7 discharge to an individual who, without inappropriate sacrifice, could afford to pay a meaningful amount of his or her unsecured debt in a reasonable period of time.¹⁸¹ Two decades later, dissatisfied with judicial discretion as the mechanism to achieve that objective, Congress has substituted a detailed rule confining judicial discretion.¹⁸² The means test fixes a

The remaining six judicial districts in North Carolina and Alabama do not have United States Trustees. The Bankruptcy Administrator system is responsible for bankruptcy administration in those districts. Section 302(d)(3)(I) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 authorized the Judicial Conference of the United States to establish a bankruptcy administrator program. The Bankruptcy Administrator system is part of the judicial branch under the Administrative Office of the U.S. Courts. Pub. L. No. 99-554, 100 Stat. 3088 (1986).

COMM'N REPORT, Vol. I, at 844 n.2112.

For simplicity, this Article refers throughout only to rights and duties of United States trustees even though the Act affords the same rights and delegates the same duties to bankruptcy administrators.

178. CONGRESSIONAL BUDGET OFFICE ESTIMATE, S. 256 BANKRUPTCY ABUSE PREVENTION & CONSUMER PROTECTION ACT OF 2005, 5, available at <http://www.cbo.gov/ftpdocs/62xx/doc6266/s256hjud.pdf>.

179. BAPCP Act, *supra* note 173, §102(c) (adding § 704(b) to the Bankruptcy Code).

180. §102(a)(2)(B) (amending § 707(b) of the Bankruptcy Code); *id.* §102(a)(2)(C) (adding § 707(b)(6) to the Bankruptcy Code).

181. As suggested by a reading of judicial opinions seeking congressional intent at the time, this may be slightly revisionist history. The federal circuit court cases are identified *supra* note 169.

182. Professor Jack Williams has thoughtfully explored the debate about which limit on judicial discretion, general standard or detailed rule, better serves the goal of screening abuse by consumer debtors. Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105 (1999). Professor Ted Janger explores competing visions of the design of bankruptcy legislation and the role of judicial discretion in bankruptcy cases. Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001). Professor Janger also cautions against an "unreflective shift to crystalline rules in bankruptcy." Janger, 43 ARIZ. L. REV. at 623.

meaningful amount of repayment, fixes five years as the reasonable period of time, and requires bankruptcy judges to evaluate by formula an individual debtor's ability to pay without inappropriate sacrifice. The formula is complex.¹⁸³ Nonetheless, in several critical respects it remains incomplete or unclear, guaranteeing the prospect of years of judicial, regulatory, and legislative refinement.¹⁸⁴ Awaiting refinement might be a price worth paying were the formula free of other serious and enduring flaws, but it isn't. I elaborate on three in the more detailed explanation that follows of the means-test trigger and means test. First, the formula preserves significant judicial discretion. Alone that would evoke praise. But the Act elsewhere exposes consumer bankruptcy attorneys to the possibility of sanctions attendant to the exercise of judicial discretion adverse to the debtor, thereby jeopardizing the prospect of legal representation for some debtors or increasing its cost. Second, for debtors potentially subject to the means test, the formula multiplies the opportunities for pre-petition planning, thereby assuring continuing waves of litigation as well as renewed occasion to decry both disparate outcomes and gaming of the system. Third, the means-test formula assumes that payment of secured debt is not abusive, irrespective of the amount of debt and irrespective of the nature and value of the collateral. It thus can reward prior extravagance or good fortune and punish prior parsimony.¹⁸⁵ I do not address the complex empirical and normative question of the extent to which the means-test calculation of the debtor's ability to pay understates or overstates expenses of living that society should tolerate before denying a debtor Chapter 7 relief.

B. THE MEANS-TEST TRIGGER

A Chapter 7 filing by an individual whose debts are primarily consumer debts will trigger means testing and the possibility of dismissal for presumed abuse if the debtor's putative annual income exceeds the relevant state median of annual income.¹⁸⁶ The Act derives the

183. See *infra* pp. 284-88.

184. See *infra* pp. 289-300. Congress acknowledges in the Act the likely need for regulatory or legislative refinement by expressing the sense of Congress that the Secretary of the Treasury has the authority to alter existing Internal Revenue Service standards to accommodate their use in the means test and by requiring the Director of the Executive Office of United States Trustees to submit a report containing findings on use of those standards in the means test and recommending amendments to the Bankruptcy Code consistent with those findings. BAPCP Act, *supra* note 173, § 103.

185. As to this third observation, I elaborate on an argument advanced earlier by Professor Tabb. Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States*, 18 BANKR. DEV. J. 1, 18-29 (2001).

186. The Act establishes the trigger first by articulating a means test, BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code), and then by denying standing to invoke the means test unless the debtor's putative annual income

debtor's putative annual income (although it does not use that phrase) by multiplying the debtor's current monthly income ("CMI") by twelve. The Act derives the debtor's CMI by averaging the debtor's income for a six-month period preceding the filing of the petition.

1. *Current monthly income*

The Act defines "current monthly income" as the following:

(A) . . . the average monthly income from all sources that the debtor receives (or in a joint case, the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current monthly income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism . . . or domestic terrorism . . . on account of their status as victims of such terrorism.¹⁸⁷

While CMI includes the monthly income of the debtor's spouse only in a joint case, the means-test trigger nonetheless appears to consider the monthly income of both the debtor and the debtor's spouse even in an individual case filed by a married debtor, except for certain cases in which the debtor and the debtor's spouse are either separated or living separate and apart.¹⁸⁸ Thus, while CMI technically includes the monthly income of a debtor's spouse only in a joint case, it is con-

exceeds the relevant median. *Id.* § 102(a)(2)(C) (adding § 707(b)(7) to the Bankruptcy Code).

187. BAPCP Act, *supra* note 173, §102(b) (adding § 101(10A) to the Bankruptcy Code).

188. The relevant language denies standing to move for dismissal for presumed abuse "if the current monthly income of the debtor . . . and the debtor's spouse combined . . . [does not exceed the relevant median]." *Id.* § 102(a)(2)(C) (adding § 707(b)(7) to the Bankruptcy Code). Because the Act defines "current monthly income" to include income of the debtor's spouse in a joint case, that portion of the preceding phrase that reads "and the debtor's spouse combined" appears to mean that for purposes of the trigger the spouse's income should be considered even if the case is not a joint case. That

venient to assume for discussion of the means-test trigger that CMI also includes income of a debtor's spouse even if only one spouse files.

CMI is putative income because it derives from a six-month average. As an average, it will be skewed by shifts (especially spikes) in income, up or down, such as those for seasonal employees, for persons temporarily unemployed, for employees working overtime or receiving a bonus, for persons irregularly receiving support payments, or in myriad other circumstances. Here we see the first example of opportunities for pre-petition planning, by savvy or well counseled debtors whose putative annual income is close to the relevant state median and whose financial circumstances leave some flexibility in the timing of the filing of a petition. The seasonal worker, for example, whose season (and higher income) ended three months earlier and whose next season does not begin for a few months might avoid the means-test trigger by waiting a few months before filing and thereby decreasing CMI. A companion worker, either unable to afford legal counsel or facing imminent foreclosure or wage garnishment that he or she cannot otherwise forestall, may be denied the opportunity to postpone filing. Reminiscent of pre-petition exemption planning, which can lower a debtor's price for Chapter 7 relief, pre-petition means-test planning can affect the availability of Chapter 7 relief. Inconsistent and unpredictable judicial treatment of pre-petition exemption planning is well documented.¹⁸⁹ We may fairly expect the same result for pre-petition planning aimed at avoiding the means-test trigger.

Pre-petition planning to avoid the means-test trigger will not be risk-free however. Suppose that a debtor with lower than average recent income delays filing, or a debtor expecting imminent increases in income files quickly, in order to generate a figure for putative annual income that falls short of the relevant state median. In either case, the court may nonetheless find abuse based either upon a finding of bad faith filing or based upon the totality of the circumstances of the

conclusion is reinforced because the trigger excludes the income of the debtor's spouse when the spouses are separated or living separate and apart. *Id.*

189. *E.g.*, Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 AM. BANKR. L.J. 221 (1997); ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 254-57 (4th ed. 2001) (comparing three outcomes in the 8th Circuit particularly difficult to reconcile). *See generally*, Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh Start?*, 70 N.Y.U. L. REV. 235 (1995). The Act explicitly addresses another form of pre-petition planning by prohibiting an attorney from advising a debtor to incur new debt in contemplation of bankruptcy (e.g. "buy a new car on credit"), advice that might help the debtor pass the means test. *See infra* pp. 314-21. In marked contrast, it does not prohibit advice to delay or to rush the filing of a petition or advice to change domicile to a state with a higher median income prior to filing a petition.

debtor's financial situation.¹⁹⁰ The debtor's strategy in the first case may be inferred because the debtor still must file a Statement of Financial Affairs that reveals the gross amount of the debtor's income from the beginning of the calendar year to the date of the filing of the petition and the gross amount of the debtor's income for the preceding two calendar years.¹⁹¹ The debtor's strategy in the second case may be inferred because the Act requires that the debtor file a statement of any reasonably anticipated increase in income over the twelve-month period following the filing of the petition.¹⁹² The United States trustee may be tempted to seize upon either piece of information should the debtor's putative annual income fall not too far below the relevant state median. Variations in the screening policies among United States trustees, comparable to current variations in screening for substantial abuse,¹⁹³ and variations in judicial treatment of these kinds of cases will render the pre-petition planning more successful in some jurisdictions than in others. At the very least, however, the debtor's planning will avoid any prospect of a motion to dismiss from a panel trustee or creditor because only the court or United States trustee may bring a motion to dismiss for abuse (not presumed abuse) if the debtor's putative annual income does not exceed the relevant median.¹⁹⁴

The debtor whose filing is urgent and who is unable to avoid the means-test trigger by delaying a filing might nonetheless have insufficient means under the means test to generate the presumption of

190. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(3) to the Bankruptcy Code).

191. FED. R. BANKR. P. Official Form 7: Statement of Financial Affairs (2001). The Act adds to the debtor's duties specified in section 521 of the Bankruptcy Code, and restructures that section, but does not alter the existing requirement to file a statement of financial affairs. BAPCP Act, *supra* note 173, § 315(b) (amending § 521 of the Bankruptcy Code).

192. BAPCP Act, *supra* note 173, § 315(b) (amending § 521 of the Bankruptcy Code).

193. *See supra* note 170.

194. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(6) to the Bankruptcy Code). Note, however, that the Act deletes language from existing section 707(b) that prohibits the court from dismissing a case "at the request or suggestion of any party in interest." *Id.* § 102(a)(2)(B) (amending § 707(b) of the Bankruptcy Code). The deletion of that language might be construed as permitting the court or United States trustee to bring the motion on the suggestion of a creditor, overruling cases such as *In Re Restea*, 76 B.R. 728, 732 (Bankr. S. D. 1987) (dismissing United States trustee motion to dismiss for abuse because investigation for substantial abuse had been suggested by creditor at section 341 meeting), in favor of cases such as *In re Stewart*, 201 B.R. 996, 1003 (Bankr. N.D. Okla. 1996) (declining to dismiss United States trustee motion to dismiss for abuse on ground that it had been suggested by a creditor).

abuse.¹⁹⁵ Alternatively, if that debtor's means generate the presumption of abuse under the means test, he or she may seek to rebut the presumption of abuse by claiming that anticipated drops in income will leave the debtor with insufficient means.¹⁹⁶ But rebutting the presumption will require the debtor, at additional expense to the debtor and additional risk to a debtor's attorney, to oppose a motion for dismissal that could not have been filed in the first place had the debtor been able through delay to avoid the means-test trigger.

2. *Relevant state median annual income*

Under the Act, no one, including a bankruptcy judge, has standing to invoke the means test if the putative annual income of the debtor, as of the date of the order for relief, does not exceed the following median income:

- (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
- (B) in the case of a debtor in a household of 2, 3 or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
- (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4.¹⁹⁷

195. The debtor's presumed expenses, including average monthly payments on account of secured debt and priority unsecured debt, may consume enough of the debtor's presumed income to avoid the presumption of abuse. See *infra* pp. 284-85.

196. See *infra* pp. 296-98.

197. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(7) to the Bankruptcy Code). The provision adds \$525 per month for each individual in excess of four rather than referring to medians for family sizes of five or more because national medians of family income, but obviously not expenses, peak at families of four and decline for families of five, decline again for families of six, and decline again for families of seven or more. United States Census Bureau, Historical Income Tables - Families, Table F-8, <http://www.census.gov/hhes/income/histinc/f08.html> (reporting national median family income by family size) (last visited July 24, 2005).

The Act does not define "applicable state." Absent definition, it should probably be interpreted to mean the state in which the district court with proper venue is located. That state is the state of the debtor's domicile or residence for the 180 days preceding commencement of a case or for a longer portion of such 180-day period than in any other state. 28 U.S.C. § 1408 (2000). Contrast the Act's new and more elaborate provision concerning the applicable state for the purpose of claiming exemptions if the debtor does not elect the federal bankruptcy exemptions. BAPCP Act, *supra* note 173, § 307 (amending § 522(b) of the Bankruptcy Code). The Act's reference to median family income for a state may prompt some forum shopping. Consider the following example, which uses 1999 median income figures reported by the 2000 Census. The median annual family income for a family of two living in Oregon is \$44,278 and the median annual family income for a family of two living in California is \$50,574 (derived in the manner specified *infra* note 201, but without the required inflation adjustment described *infra* note 206 and accompanying text). If the putative annual income of an Oregon resident (including the income of his spouse) is \$49,000, he and his spouse

In addition, only the bankruptcy judge and United States trustee have standing to bring a motion to dismiss for abuse based on allegations of bad faith or based on the totality of the circumstances of the debtor's financial situation, if the debtor's putative annual income, as of the date of the order for relief, does not exceed the relevant state median.¹⁹⁸

Note that while the statutory language predicates choice of median upon *household* size, the relevant median is a median of *family* income, not *household* income, in the applicable state. The United States Bureau of the Census ("Census Bureau") distinguishes between a household and a family and calculates and publishes different median income figures for each. The Census Bureau defines household as "all the people who occupy a housing unit" and defines householder as "the person (or one of the people) who owns or rents (maintains) the housing unit."¹⁹⁹ It defines family as "a group of two or more people . . . related by birth, marriage, or adoption and residing together . . ."²⁰⁰ Thus, for example, a married couple (with or without children) occupying a housing unit, a single person occupying a housing unit, or two or more persons unrelated by birth, marriage, or adoption occupying a housing unit all would be members of a household,

might relocate to California and wait ninety-one days before filing a petition to avoid triggering the means test. Relocation to some states might not be advisable if exemptions in the destination state are less generous than exemptions in the state of origin. If exemptions are not an issue, the possibility of relocating for the purpose of avoiding the means-test trigger raises a host of questions for a debtor: Will the benefit of a bankruptcy discharge outweigh the cost and inconvenience of relocation or, in more distant relocations, the higher cost of living, the need to find a new job and new schools, the loss of contact with friends and family, and other psychological costs? Would the debtor's attorney in the origination state commit malpractice by failing to mention the possibility? Might the debtor's petition be dismissed nonetheless for a filing in bad faith or because of the totality of the circumstances of the debtor's financial situation? See *supra* note 176 and accompanying text. An alternative and possibly less disruptive pre-petition strategy for avoiding the means-test trigger would be for the debtor to increase the size of the household (and thus the level of the relevant median) by inviting relatives, friends, or others to share living accommodations. If discovered, this strategy might also provoke a motion to dismiss for abuse based on a filing in bad faith or because of the totality of the circumstances of the debtor's financial situation.

198. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(6) to the Bankruptcy Code). The Act also invokes the medians for other purposes that I do not discuss: (1) triggering determination of a Chapter 13 debtor's disposable income by using the means-test calculations if the debtor's putative annual income exceeds the relevant median, *Id.* § 102(h) (amending § 1325(b)(2) of the Bankruptcy Code and adding § 1325(b)(3) to the Bankruptcy Code); (2) extending the permissible or required length of a debtor's Chapter 13 plan if the debtor's putative annual income exceeds the relevant median, *Id.* § 318 (amending §§ 1322(d) and 1325(b)(1) of the Bankruptcy Code and adding § 1325(b)(4) to the Bankruptcy Code).

199. United States Census Bureau, Current Population Survey (CPS) - Definitions and Explanations (Jan. 20, 2004), <http://www.census.gov/population/www/cps/cpsdef.html>.

200. *Id.*

but only the married couple (and its children) would be members of a family. Families are therefore a subset of all households.

Through spring 2005, the Census Bureau reported median annual family income for each state by family size based only upon its decennial census (for the year preceding the decennial census). The relevant data, based upon the 1999 decennial census, is available through the Census Bureau's American Fact Finder.²⁰¹ The Census Bureau has not heretofore updated the data annually, on the basis of its annual March Current Population Survey, because the sampling size of the March Survey was too small.²⁰² Someone on the Hill appears to have realized or feared late in the 107th Congress that the required data might not be available for each year. Rather than retreating to proposals in earlier bills to use *national* median family income by family size or *national* median household income by household size,²⁰³

201. For family sizes of two or more, consult the Census Bureau web site, at <http://www.census.gov> (last visited July 24, 2005) and proceed as follows: (1) select the link to American FactFinder; (2) select the link to Data Sets; (3) select Census 2000 Summary File 4 and select Detailed Tables from the menu thereby generated; (4) select "State" as the relevant geographic type, select and add the desired state, and then select the link entitled "Next"; (5) using the "show all tables" tab, find and add Table PCT118, and then select the link entitled "Next"; (6) select and add "Total Population" and then select the link entitled "Show Result." For median family income for one earner, select Table PCT115 instead of Table PCT118.

202. A representative of the Income Surveys Branch of the Housing & Household Economic Statistics Division of the United States Census Bureau explained the following:

The March [Current Population Survey] is designed to collect reliable data primarily at the national level and only secondarily at the regional level. State estimates of income are considerably less reliable. Specifically, the sampling variability associated with the state estimates is higher than for estimates based on the country as a whole or on regions, and year-to-year state estimates fluctuate more widely than national estimates

It is the Bureau's policy not to publish any derived measure from the [Current Population Survey] where the base is less than 75,000. Whenever a base of an income distribution is relatively small, the medians, means, and percent distributions are extremely unreliable because of the limited size of the sample and they must be used with caution.

Email from Shirley L. Smith, United States Census Bureau, to author (Mar. 22, 2001) (on file with author).

203. Section 101(4) of The Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998), referred to the national median family income for a family of equal size or, in the case of a household of one person, the national median household income for one earner. Section 102(a)(5) of the Consumer Bankruptcy Reform Act of 1998 (engrossed amendment agreed to by the Senate), H.R. 3150, 105th Cong. (1998), referred to the national median household income of a household of equal size. Those medians would have disadvantaged debtors living in states with median incomes higher than the national median and favored debtors living in states with median incomes lower than the national median. The use of state medians in the Act shifts the disadvantage to debtors living in counties with median incomes higher than the state median and shifts the advantage to debtors living in counties with median incomes lower than the state median.

which are reported annually,²⁰⁴ the Conference Report on H.R. 333 added a definition of median family income that has been carried over to the Act.²⁰⁵ Under the definition, the relevant figure for median family income by family size for each state is that which the Census Bureau has most recently calculated and reported, but if not calculated and reported in the current year (i.e. the year in which the petition is filed), the relevant figure is the figure calculated and reported in the then most recent year adjusted through the intervening years to reflect changes in the Consumer Price Index for All Urban Consumers.²⁰⁶ Serendipity, in the form of the Census Bureau's new American Community Survey, launched by the Census Bureau in January 2005,²⁰⁷ spares us the necessity of estimating current medians by adjusting very old medians. It will provide the relevant data annually, to be posted on the web site of the Executive Office of United States Trustees.²⁰⁸

204. United States Census Bureau, Historical Income Tables - Families, Table F-8, <http://www.census.gov/hhes/income/histinc/f08.html> (last visited July 24, 2005) (reporting national median family income by family size); United States Census Bureau, Historical Income Tables - Households, Table H-11, <http://www.census.gov/hhes/income/histinc/h11.html> (last visited July 24, 2005) (reporting national median household income by household size).

205. BAPCP Act, *supra* note 173, § 102(k) (adding § 101(39A) to the Bankruptcy Code). H.R. 333 did not originally include the definition. H.R. 333, 107th Cong. (2001) (as engrossed and agreed to by the Senate). The Conference Report to accompany H.R. 333 added the definition. H.R. CONF. REP. NO. 107-617, § 102(k) (2002).

206. BAPCP Act, *supra* note 173, § 102(k) (adding § 101(39A) to the Bankruptcy Code). Consider the following example, which appears to be moot by virtue of developments described *infra* notes 207-08 and accompanying text. The United States Census Bureau did not report the 1999 median income by family size for each state until 2003. Thus, for purposes of a petition filed in 2005, the relevant median family income would be the 1999 median, reported in 2003, adjusted by the percentage change in the Consumer Price Index for All Urban Consumer ["CPI"] between December 31, 1999 and December 31, 2004. One may derive that percentage change by visiting the web site of the United States Department of Labor Bureau of Labor Statistics, at <http://www.bls.gov/cpi/home.htm> (last visited July 24, 2005). At that site, under the heading labeled "Get Detailed CPI Statistics," select the link to "Most Requested Statistics" next to CPI - All Urban Consumers (Current Series). Then check the box labeled "U.S. All items, 1982-84=100 - CUUR0000SA0" and then the box labeled "Retrieve Data." The CPI for December 1999 is 168.3 and the CPI for December 2004 is 190.3, a difference of 22 points. The percentage change between the two is 13.1% (22/168.3). Thus, if the Census Bureau reported the relevant 1999 median family income as \$50,000, the relevant median for a petition filed in 2005 would be \$56,550 (\$50,000 + 13.1% of \$50,000).

207. The Census Bureau reports that the American Community Survey will produce annually the same quality of statistical information that the Decennial Census produces. United States Census Bureau, American Community Survey Fact Sheet (Feb. 2005), <http://www.census.gov/Press-Release/www/2004/05ACSmediafactsheet.pdf>.

208. A representative of the Statistical Information Staff of the Housing and Household Economic Statistics Division of the Census Bureau advised me by email that the Income Survey Branch of that division is working on tables designed for use with the Act based on the American Community Survey. Email from Cheryl [last name not given], United States Census Bureau, to author (May 18, 2005) (on file with author). The United States Trustee Program has posted the median family income data for the

C. THE MEANS TEST

1. *An overview of the means test*

Once triggered, the means test determines the extent of a debtor's presumed ability to repay non-priority unsecured debt in a hypothetical five-year Chapter 13 plan. One calculates and evaluates the debtor's presumed ability to pay in several steps. First, one calculates the debtor's presumed monthly expenses (including a postulated average monthly payment on account of secured debt). Then, one subtracts the presumed monthly expenses from the debtor's CMI, an amount already determined in the process of assessing whether the means test is even triggered,²⁰⁹ to arrive at a debtor's presumed monthly disposable income, if any. Next, one multiplies the debtor's presumed monthly disposable income by sixty, the number of months in a five-year Chapter 13 plan,²¹⁰ to arrive at the debtor's presumed means. Finally, one compares the debtor's presumed means to a statutory amount to determine whether the debtor's presumed means are sufficient to raise a presumption that the debtor is abusing Chapter 7. The statute states the amount to which one compares the debtor's presumed means in language that scales new heights of obscurity:

[T]he court shall presume abuse exists if the debtor's [presumed 5-year cumulative disposable income] . . . 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) \$10,000.²¹¹

The following table translates:

year 2004, to "be used . . . until the data is adjusted in early 2006," on its web site. United States Trustee Program, Census Bureau Median Family Income By Family Size (in 2004 inflation-adjusted dollars), at http://www.usdoj.gov/ust/eo/bapcpa/bci_data/median_income_table.htm (last visited Sept. 22, 2005).

209. In an individual case filed by a married debtor, the putative income of the debtor nonetheless includes the income of the debtor's non-filing spouse for purposes of the means-test trigger. *See supra* note 188 and accompanying text. Yet the means test itself does not consider the income of the debtor's non-filing spouse in such a case, because it compares only the "debtor's current monthly income" with the debtor's presumed monthly expenses, BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2)(A) to the Bankruptcy Code), and the Act defines the "debtor's current monthly income" to include the income of the debtor's spouse only in a joint case. *Id.* § 102(b) (adding § 101(10A) to the Bankruptcy Code). I cannot fathom a reason for this seeming inconsistency.

210. The Act amends Chapter 13 of the Bankruptcy Code to require plan payments for five years if the debtor's putative annual income exceeds the relevant state median income, unless the plan provides for full payment of allowed unsecured claims in a shorter period. BAPCP Act, *supra* note 173, § 318 (amending §§ 1322(d) and 1325(b)(1) of the Bankruptcy Code and adding § 1325(b)(4) to the Bankruptcy Code).

211. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code).

Presumed 5-year cumulative disposable income	Consequence
If \$5,999.99 or less (i.e. less than \$100.00 presumed <i>monthly</i> disposable income)	Debtor passes means test (i.e. the debtor's means are insufficient) and abuse cannot be presumed
If \$10,000 or more (i.e. more than \$166.66 presumed <i>monthly</i> disposable income)	Debtor fails means test (i.e. the debtor's means are sufficient), abuse is presumed, and court may dismiss if debtor fails to rebut presumption
If \$6,000.00 - \$9,999.99, inclusive (i.e. \$100.00 - \$166.66 presumed <i>monthly</i> disposable income, inclusive)	<p>Debtor passes means test (i.e. the debtor's means are insufficient) if the amount is less than 25% of the debtor's non-priority unsecured claims</p> <p>Debtor fails means test (i.e. the debtor's means are sufficient) if the amount is 25% of the debtor's non-priority unsecured claims or greater; abuse is presumed and the court may dismiss unless the debtor rebuts the presumption²¹²</p>

The first step, calculating the debtor's presumed monthly expenses, is intricate, fraught with difficult problems, and time-consuming for debtors and consumer bankruptcy attorneys. The remaining steps in the process are ministerial.²¹³

2. *The debtor's presumed monthly expenses*

Calculation of a debtor's presumed monthly expenses starts with monthly expense amounts specified by the Internal Revenue Service in its Collection Financial Standards ("IRS Standards").²¹⁴ The IRS Standards identify categories and amounts of necessary monthly expenses to be used by IRS field agents negotiating collection of tax obli-

212. For example, if a debtor's presumed five-year cumulative disposable income were \$7,000 and the debtor's non-priority unsecured debt were \$32,000, abuse would not be presumed because \$7,000 is less than 25% of the debtor's non-priority unsecured debt. However, if non-priority unsecured debt were \$27,000, abuse would be presumed because \$7,000 is greater than 25% of the debtor's non-priority unsecured debt. This portion of the means test rewards either irresponsible or deliberate pre-petition money management to the extent that such behavior increases a debtor's non-priority unsecured debt to a point four or more times greater than the debtor's presumed five-year cumulative disposable income. Note, however, the Act prohibits debt relief agencies (which include consumer bankruptcy attorneys) from advising a debtor to incur debt in contemplation of a bankruptcy filing, a prohibition that might violate the First Amendment. *See infra* pp. 314-19.

213. For two detailed hypothetical examples, one in which the means test is not triggered and the other in which the means test is triggered, see David W. Allard, *Means Testing, Dismissal and Conversion Under the New Law*, AM. BANKR. INST. J. 8, 70, 72 (July/Aug. 2005).

214. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code).

gations from delinquent individual taxpayers.²¹⁵ Part 5 of the Internal Revenue Manual elaborates on the interpretation and application of the IRS Standards.²¹⁶

The IRS Standards establish four groups of necessary expenses: (1) food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous,²¹⁷ (2) housing and utilities,²¹⁸ (3) transportation,²¹⁹ and, (4) other necessary expenses, reasonable in amount, that a taxpayer can substantiate.²²⁰ For the first group of expenses the IRS allows a taxpayer an amount based on national standards that apply irrespective of the location of a debtor's

215. INTERNAL REVENUE SERVICE, COLLECTION FINANCIAL STANDARDS [hereinafter IRS STANDARDS], at <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (last visited July 24, 2005). The Executive Office of United States Trustees also has posted the Standards on its web site, at <http://www.usdoj.gov/ust/> (last visited March 3, 2006).

216. INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL, COLLECTING PROCESS, § 5.15.1 [hereinafter IR MANUAL], <http://www.irs.gov/irm/part5/index.html> (last visited Sept. 27, 2005). The Executive Office of United States Trustees may also publish relevant portions of the Manual on its web site, at <http://www.usdoj.gov/ust/> (last visited July 24, 2005).

217. IRS STANDARDS, *supra* note 215. Expenses for food encompass those for meals both home and away. Expenses for apparel encompass those for both purchase and care of shoes and clothing, including laundry and dry cleaning and shoe repair. Expenses for housekeeping supplies encompass those for postage and stationary, laundry and cleaning supplies, cleansing and toilet tissue, paper towels and napkins, lawn and garden supplies, and miscellaneous household supplies. Expenses for personal care products and services encompass those for hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances. IR MANUAL, *supra* note 216, Exhibit 5.15.1-2. The amounts allowed are updated annually based upon results derived from the Bureau of Labor Statistics Annual Consumer Expenditure Survey. *Id.* § 5.15.1.7.3. The IRS sets the figure for miscellaneous expenses at \$100/person and \$25 for each additional person in a taxpayer's household. *Id.*

218. IRS STANDARDS, *supra* note 215. Expenses for housing encompass mortgage or rent payments, property taxes, interest, parking, necessary maintenance and repair, homeowner's or renter's insurance, and homeowner dues and condominium fees. Expenses for utilities encompass those for gas, electricity, water, fuel oil, coal, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, and telephone. IR MANUAL, *supra* note 216, Exhibit 5.15.1-2.

219. Expenses for transportation encompass those for vehicle purchase or lease, vehicle insurance, maintenance, fuel, state and local registration, required vehicle inspection, parking fees, tolls, a driver's license, and public transportation. IR MANUAL, *supra* note 216, Exhibit 5.15.1-2.

220. IRS STANDARDS, *supra* note 215. Other necessary expenses include the following: child care, dependent care for the elderly, invalid, or disabled, taxes, health care, court-ordered payments, involuntary deductions, life insurance, disability insurance for a self-employed individual, union dues, professional association dues, accounting and legal fees for representing a taxpayer before the Service, optional telephone service (call waiting, call identification, etc.) and long distance if they meet the necessary expense test, charitable contributions if they are a condition of employment or otherwise meet the necessary expense test, and education expenses that are a condition of employment or are for a physically or mentally handicapped dependent and the education is not provided by public schools. IR MANUAL, *supra* note 216, § 5.15.1.10.

residence (except for Alaska and Hawaii). The standard amount varies with the size of the taxpayer's family and the taxpayer's gross monthly income, and the IRS will concede the standard amount even if it exceeds a debtor's actual expenses for items in the group.²²¹ For housing and utilities the IRS allows a taxpayer a standard amount or actual expenses, whichever is less. The standard amount depends upon the location of the debtor's residence and varies with the size of the taxpayer's family.²²² For transportation the IRS allows a taxpayer a standard amount or actual expenses, whichever is less, for purchase or lease of up to two cars ("ownership expenses").²²³ It also allows a taxpayer a standard amount or actual expenses, whichever is less, for operating expenses and the costs of public transportation.²²⁴ The standard amount for both depends upon the number of cars that the debtor operates and the Metropolitan Statistical Area in which the debtor lives.²²⁵

The Act provides for the following adjustments to the amounts allowed by the IRS Standards: (1) it allows a debtor to add no more than 5% to the food and clothing allowance if reasonable and necessary and increase the expense allowance for housing and utilities based on actual expenses for home energy costs if reasonable, necessary, and documented;²²⁶ (2) it requires that the debtor substitute *average* monthly debt service on account of secured debt (e.g. mortgage or automobile installment payments), calculated in a specified manner, for *actual* monthly debt service on account of secured debt;²²⁷ (3) it allows the debtor to add 1/60th of the total amount of claims, if any, entitled to priority under section 507 of the Bankruptcy Code;²²⁸ (4) for debtors eligible for relief under Chapter 13, it allows the debtor to add the actual administrative expenses of administering a Chapter 13 plan, up to a maximum of 10% of projected plan payments, as determined under schedules to be issued by the Executive Office for United States Trustees;²²⁹ (5) it allows the debtor to add any reasonable and

221. IRS STANDARDS, *supra* note 215.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code).

227. *Id.*

228. *Id.*

229. *Id.* In reporting their empirical test of an earlier proposed means-testing formula, Professors Culhane and White emphasized the necessity of presuming Chapter 13 administrative expenses as part of a debtor's monthly expenses in a means-test calculation. Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankr. Model for a Test Drive: Means Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 52-53 (Mar. 1999) [hereinafter *Creighton Study*]. The 10% maximum

necessary expenses to protect against identified types of family violence,²³⁰ any reasonable and necessary expenses to care for and support “elderly, chronically ill, or disabled household member[s] or member[s] of the debtor’s immediate family” who are unable to pay such expenses,²³¹ and any reasonable and necessary expenses, not exceeding \$1,500 per year, for each child under the age of eighteen “to attend a private or public elementary or secondary school,” if not already accounted for in the IRS Standards.²³²

As I hope to demonstrate, the portions of this required calculation that focus on the debtor’s payment of debt introduce new and unwarranted discrimination among debtors into the calculus of abuse, discrimination that may only be mitigated by exercise of the very judicial discretion that the means test was designed to constrain. We can see the most significant instances of the discrimination in the Act’s treatment of a debtor’s housing and utilities expenses and transportation ownership expenses. We can see the continuing role for judicial discretion both in the Act’s treatment of those expenses as well as in its treatment of a debtor’s “other necessary expenses.”

means-test allowance for Chapter 13 administrative expenses is probably too low. In 1998, plan disbursements for debtors’ attorney fees and standing chapter 13 trustee fees amounted to 13% of total disbursements, and in 1999 disbursements for these fees amounted to 12.4% of total disbursements. Gordon Bermant & Ed Flynn, *Sources of Variability in Chapter 13 Performance*, AM. BANKR. INST. J. 20 (Apr. 2001). Thus, some debtors will be dismissed from Chapter 7 for presumed abuse even though, on account of actual Chapter 13 administrative expenses, they will be unable to pay non-priority unsecured creditors in Chapter 13 the amount presumed by the means test.

Note that calculation of the adjustment to reflect anticipated Chapter 13 administrative expenses is circular. To determine a debtor’s presumed expenses under the means test, one includes an adjustment for anticipated Chapter 13 administrative expenses. To determine anticipated Chapter 13 administrative expenses, one must calculate a debtor’s anticipated Chapter 13 plan payments. To determine a debtor’s anticipated Chapter 13 plan payments, one must calculate a debtor’s disposable income. To calculate a debtor’s disposable income (for debtors whose putative annual income exceeds the relevant state median), one must apply the means test. BAPCP Act, *supra* note 173, § 102(h) (amending § 1325(b)(2) of the Bankruptcy Code and adding § 1325(b)(3) to the Bankruptcy Code). To apply the means test, one must include an adjustment to reflect Chapter 13 administrative expenses. One could interrupt the circularity as follows. First, apply the means test without any adjustment for Chapter 13 administrative expenses. Next, multiply by 60 the figure for disposable income so generated to derive the total projected Chapter 13 plan payments. Multiply that total by the allowed percentage (e.g. 10%) to generate projected Chapter 13 administrative expenses. Reapply the means test with an adjustment for projected Chapter 13 administrative expenses so calculated.

230. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code).

231. *Id.*

232. *Id.*

a. Housing and utilities expenses

The Act introduces sub silentio a distinction between mortgage payments and rent into judicial decisions about abuse and in so doing effectively prefers debtors who own homes to debtors who lease housing. Nothing in the legislative history explains or justifies this preference; it appears to be either inadvertent or the result of benign neglect.²³³

To see the distinction, recall that in assessing a taxpayer's ability to retire a delinquent tax debt, the IRS Standards cap a taxpayer's allowance for housing and utilities expenses equally for lessees and homeowners.²³⁴ As a result, if a delinquent taxpayer's rent or mortgage payment, together with other housing and utilities expenses, exceeds the cap, the IRS Standards reflect a judgment that the taxpayer, whether lessee or homeowner, should move to less expensive housing and apply the money saved to payment of the tax debt. The means test, in contrast, reflects that judgment only for lessees. Consider, for example, the amount allowed by the means test for the housing and utilities expenses of a childless married couple leasing housing in Santa Clara County, California. As of January 1, 2005, the IRS Standards, and hence the means test, would permit that couple to claim the lesser of \$2,048/month or their actual expenses for rent, other housing expenses (e.g. renter's insurance), and utilities expenses (e.g. gas, electricity, water, telephone, trash collection).²³⁵ If their rent is \$1,200/month and their other housing and utilities expenses total \$750/month, the IRS Standards, and hence the means test, would permit them to claim \$1,950/month for the housing and utilities category of expenses, but if their actual expenses for housing and utilities exceed \$2,048/month, the means test caps their presumed expenses for this category of expenses at \$2,048/month.

For debtors seeking bankruptcy relief whose putative annual income triggers application of the means test, this cap indirectly limits the location, spaciousness, and quality of leased housing. In limiting location, the cap also limits accessibility to desirable public schools. If, for example, our couple's actual housing and utilities expenses for leased housing exceed the cap by virtue of "excessive" rent, the means test presumes lower rent and hence presumes a fictional disposable

233. One can imagine several possible justifications for a preference for home owners, including the possible difficulty of obtaining the new credit, or the higher cost of credit necessary to purchase a less expensive home or refinance an existing mortgage, but none of the possible justifications would explain the kind of distinction about to be described in the text.

234. "Housing expenses include: mortgage or rent . . ." IR MANUAL, *supra* note 216, § 5.15.1.9.

235. IRS STANDARDS, *supra* note 215.

income for them. Fearing a presumption of abuse, they may decide not to file a Chapter 7 petition or may see their Chapter 7 dismissed for presumed abuse. As an alternative, to qualify for confirmation of a Chapter 13 plan, they first would have to move to less expensive leased housing, making the fictional disposable income real, because the Act's amendment of Chapter 13 confirmation standards requires that their presumed disposable income in Chapter 13 also be determined by application of the means test and hence by the same IRS housing and utilities expenses allowance.²³⁶

As in the case of collection of delinquent taxes, this result might not be troubling, or as troubling, were the means test to generate a comparable result for homeowners. It does not. Were our Santa Clara County couple to own a home encumbered by a mortgage, the means test will sanction the location, spaciousness, and quality of their home and the existing terms of their mortgage, no matter how high the monthly mortgage payment.²³⁷ The means test calculation of presumed expenses states that, notwithstanding allowances under the IRS Standards, such as for housing and utilities expenses, "the monthly expenses of the debtor shall not include any payments for debts."²³⁸ Shortly thereafter, however, the means test calculation permits the debtor to claim as part of presumed monthly expenses the debtor's average monthly payments on account of secured debt, including debt secured by a mortgage, "scheduled as contractually due" for the 60 months following the filing of the petition.²³⁹ Accordingly,

236. BAPCP Act, *supra* note 173, § 102(h) (amending § 1325(b)(2) of the Bankruptcy Code and adding § 1325(b)(3) to the Bankruptcy Code). The Act requires courts to measure disposable income by reference to the means test only if the debtor's putative annual income exceeds the relevant state median income. *Id.*

237. I assume in the discussion that follows a debtor whose homestead exemption protects any equity in the home.

238. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code). This will include payments on second and subsequent mortgages, if any, including non-purchase-money mortgages securing either a lump sum advance or a revolving line of credit. For a revolving line of credit, the amount "scheduled as contractually due" probably means the minimum monthly payment under the line of credit. I do not pursue a discussion of the additional discrimination between lessees and homeowners implicit in permitting a home-owning debtor to include within presumed monthly expenses the average monthly payments on account of *non-purchase money* mortgage payments.

239. *Id.* Suppose that at the time of filing a Chapter 13 petition, our couple makes mortgage payments of \$2,000/mo. payable over the ensuing twenty-five years. They also make automobile loan payments of \$300/mo., payable over the ensuing forty months. For purposes of the means test, the debtor's presumed monthly payments on account of secured debt would be $((\$2,000 \times 60) + (\$300 \times 40))/60 = \$2,200$. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code). The means test uses this amount rather than the debtor's actual monthly payments on account of secured debt (\$2,300 for the next forty months and \$2,000/month thereafter), to reflect an assumption that the debtor could stretch out the car payments to sixty months in a Chapter 13 plan. This means-test substitution of average payments on secured debt

homeowners such as our couple with a monthly mortgage payment equal to or exceeding the rent paid by their neighbors who lease need not move on account of the mortgage payment to avoid the presumption of abuse in Chapter 7 or to confirm a Chapter 13.

The issue is more complex, however, because the preference for homeowners under the means test wanes outside the means test. Under the pre-Act version of section 707(b), exercising their discretion to dismiss for substantial abuse, some courts dismissed Chapter 7 cases at least partially on the basis of the size of the debtor's mortgage payment.²⁴⁰ The Act preserves this judicial discretion because a court may still dismiss a Chapter 7 case for abuse based on the totality of the circumstances of the debtor's financial situation, even if the debtor passes the means test and avoids a presumption of abuse. Thus, while the means test constricts judicial discretion with respect to all housing expenses of a lessee, the Act leaves unchanged judicial discretion with respect to the reasonableness of a homeowner's mortgage payment.²⁴¹ Exercise of that discretion may continue to produce the kind of inconsistent results at which the means test was partially directed. Some courts may infer from the means test a congressional intent to concede a debtor's monthly mortgage payment as a matter of law and thus decline to dismiss any case for abuse on the basis of a seemingly excessive mortgage payment. Others may read the law differently and dismiss at least some cases for abuse after measuring the reasonableness of a mortgage payment in whole or in part by reference to the IRS Standards even if the debtor has passed the means test, a kind of

over a sixty-month period for actual payments on secured debt reconciles the means test with the structure of the hypothetical Chapter 13 plan that the debtor could propose if the court dismisses the Chapter 7 for abuse. Under such a plan, the debtor must pay the mortgage without modification, may modify payments on other secured debt, and must pay unsecured debt with remaining disposable income. 11 U.S.C. §§ 1322, 1325 (2000). This reconciliation incorrectly assumes that a court will determine the amount of disposable income that should be devoted to unsecured creditors in a Chapter 13 plan without any consideration of the reasonableness of the debtor's payments on account of secured debt. A court might find a debtor's mortgage or car payments unreasonable, conclude that disposable income devoted to a plan is therefore insufficient, and deny confirmation of a Chapter 13 plan. *E.g., In re Baird*, 2005 Bankr. Lexis 364 (Bankr. N.D. Iowa 2005) (finding pre-petition purchase of home and car demonstrated lack of good faith and also finding that disposable income devoted to plan was insufficient partially on account of mortgage and car payments). The flawed assumption is mitigated by the fact that the Act continues to permit a court to dismiss a Chapter 7 case for abuse even if a debtor passes the means test. *See supra* note 176 and accompanying text.

240. *E.g., In re Mooney*, 313 B.R. 709, 714-15 (Bankr. N.D. Ohio 2004); *Shaw v. U.S. Bankr. Adm'r*, 310 B.R. 538, 541 (Bankr. M.D.N.C. 2004). *But see, e.g., Turner v. Johnson (In re Johnson)*, 318 B.R. 907 (Bankr. N.D. Ga. 2005).

241. The means test does not entirely eliminate judicial discretion even with respect to lessees because the court may still decline to dismiss, even if abuse is presumed, if the debtor demonstrates special circumstances. *See supra* note 175 and accompanying text.

means test outside the means test. Still others might or might not dismiss for abuse after assessing the reasonableness of a mortgage payment on the basis of a variety of factors other than the IRS Standards, including the original purchase price or present value of the home, the cost of relocation, including possible increased transportation costs, the potential sacrifice of value likely to result from a rushed sale of the home, the interest rate on and amortization period of the mortgage, and the amount of the debtor's down payment.²⁴²

The contrast between the means-test treatment of mortgage payments and the IRS treatment of mortgage payments poses a related problem. In both the bankruptcy and tax collection contexts, as we have seen, lessees may claim the lesser of the entire IRS allowance or their actual expenses for rent, other housing expenses, and utilities expenses. In the tax collection context, the same is true for homeowners (substituting mortgage payment for rent). In bankruptcy, however, the homeowner to whom the means test applies must back out mortgage payments from the total IRS housing and utilities expense allowance (before later re-introducing an average monthly payment on debt). Not having been drafted to anticipate use in bankruptcy, the IRS Standards do not separately identify the portion of the housing and utilities allowance allocable to housing expenses other than mortgage or rent (e.g. homeowner's insurance, property taxes, and repair) and to utilities expenses. The homeowner in Chapter 7 thus cannot determine from the IRS Standards how much he or she may claim under the means test for non-mortgage housing and utilities expenses.

Just prior to the effective date of the Act, we have been given a regulatory response to this problem²⁴³ because judicial resolution of the problem would be problematic. A court could permit a homeowner to claim as non-mortgage housing and utilities expenses the full IRS housing and utilities allocation (e.g. \$2,048), or the debtor's actual non-mortgage housing and utilities expenses, whichever is less. This approach, informally but seriously advanced by one consumer bankruptcy professional,²⁴⁴ unreasonably presumes congressional intent to permit homeowners the entire allowance, if actually incurred, for non-mortgage housing and utilities expenses in addition to payment of a mortgage. A variation subject to the same criticism would be to allow

242. This potential disparity in judicial approach and case outcomes lurks elsewhere as well because in preserving the court's power to dismiss for abuse outside the means test the Act does not indicate the weight, if any, to be given to the IRS Standards.

243. See *infra* notes 246-47 and accompanying text.

244. Standing Chapter 13 Trustee Henry Hildebrand III advanced this possible reading of the Act in his remarks to attendees of the 13th Annual Convention of the National Association of Consumer Bankruptcy Attorneys in San Diego, California (Apr. 29, 2005).

the debtor's actual non-mortgage housing and utilities expenses only to the extent the court deems reasonable, but in no event more than \$2,048. Alternatively, a court could permit the homeowner a maximum non-mortgage housing and utilities allowance equal to the difference between the maximum housing and utilities allowance (e.g. \$2,048/month) and the amount of the debtor's monthly mortgage payment. That reading is unreasonable, however, because the maximum amount of the non-mortgage housing and utilities expense would shrink or grow, dollar for dollar, with each dollar change in the amount of the mortgage payment. At the extremes, a debtor with a monthly mortgage payment equal to or greater than the total allowance (e.g. \$2,048/month or more) would not be permitted *any* amount for non-mortgage housing or utilities expenses and a debtor with a very low monthly mortgage payment would be permitted an excessive maximum amount for non-mortgage housing and utilities expenses. A third alternative would be for the court to evaluate the reasonableness of a homeowner's non-mortgage housing and utilities expenses without any reference to the IRS expense allowance, thereby exercising the very discretion that the means test was designed to eliminate.²⁴⁵

To avert this difficulty, just prior to the effective date of the Act, the IRS and the United States Trustee Program entered into a Memorandum of Understanding resulting in the publication of tables separately identifying non-mortgage expenses and mortgage/rent expenses,²⁴⁶ and the Judicial Council approved a form (Official Form

245. In doing so, it would still be appropriate for the court to refer to the Internal Revenue Service Manual, which identifies permissible non-mortgage housing and utilities expense items: property taxes, interest, parking, necessary maintenance and repair, homeowner's or renter's insurance, homeowner dues and condominium fees. IR MANUAL, *supra* note 216, Exhibit 5.15.1-2. A court would have to amortize any home maintenance, repair expense, and other irregular periodic expenses to derive a monthly expense for purposes of the means-test calculation.

246. Revisions to Interim Bankruptcy Rules and Official Forms 2 (Oct. 3, 2005) (memorandum from Hon. Thomas Zilly, Chair, Advisory Committee on Bankruptcy Rules, to Committee on Rules of Practice and Procedure), http://www.uscourts.gov/rules/Revised_BK_Rules_and_Forms.pdf (copy on file with author). The United States Trustee Program published the resulting tables on its web site, <http://www.usdoj.gov/ust/bapcpa/meanstesting.htm> (last visited Oct. 27, 2005) and the Internal Revenue Service amended its Housing and Utilities Allowable Living Expenses to include a disclaimer stating that its allowable expenses apply to delinquent taxpayers and referring to the web site of the United States Trustee Program for expense information to be used in bankruptcy calculations, <http://www.irs.gov/businesses/small/article/0,,id=104696,00.html> (last visited Oct. 27, 2005). Therefore, although the Act expresses the sense of Congress that the Secretary of the Treasury may alter IRS Standards to accommodate the means test, BAPCP Act, *supra* note 173, § 103, the IRS has not altered its Standards but rather seems to have given the United States Trustee Program expense information to use for means-test calculations. One wonders whether use of this expense information is consistent with the mandate of the Act because the means test requires use of IRS Standards.

B22A) for means-test calculations conforming to that understanding.²⁴⁷ If recognized as a legitimate solution to the problem, this understanding and the resulting tables will eliminate judicial discretion under the means test to determine non-mortgage housing and utilities expenses for homeowners. At the same time, however, a court exercising its discretion outside the means test might infer from this separate identification of non-mortgage housing and utilities expenses an upper limit on the reasonableness of a mortgage payment (by subtraction of the non-mortgage housing and utilities expenses from the total housing and utilities expense allowance). Other courts might not draw that inference, leaving the parameters of judicial discretion outside the means test with respect to mortgage payments uncertain or inconsistent.

b. Transportation ownership expenses

The Act's treatment of transportation ownership expenses for debtors subject to the means test introduces discrimination among means-tested debtors analogous to the discrimination that the Act introduces between means-tested lessees and means-tested homeowners. The IRS Standards allow delinquent taxpayers an amount for transportation ownership costs not to exceed monthly loan or lease payments of \$475 for a first car and \$338 for a second car.²⁴⁸ As indicated above, however, the means test first requires that the debtor back out payments on debt from the relevant IRS expense allowance and then permits the debtor to reintroduce average monthly payments on secured debt into the means-test calculation of the debtor's presumed monthly expenses.²⁴⁹ Thus, a debtor who, at the time of the

247. Revisions to Interim Bankruptcy Rules and Official Forms, at 2-3; Memorandum from Judicial Conference of the United States to Chief Judges, United States District Court Judges, United States Bankruptcy Courts (Oct. 14, 2005), http://www.uscourts.gov/rules/DIR5_145.PDF (copy on file with author). Line 20A, Part V of Form B22A requires the debtor to enter non-mortgage expenses and Line 20B requires the debtor to enter mortgage/rent expenses and back out average monthly mortgage payments. Official Form B22A (Chapter 7) (10/05) (statement of Monthly Income and Means Test Calculation), http://www.uscourts.gov/rules/new_and_revised_official_forms_101405.htm (last visited Oct. 27, 2005).

248. IRS STANDARDS, *supra* note 215. The IRS Standards also allow taxpayers a separately identified amount for transportation operating costs or public transportation. *Id.* I do not discuss this allowance except to note that this separate identification of transportation operating costs avoids a problem comparable to the problem, discussed *supra* pp. 292-94, concerning identification of allowable non-mortgage housing utilities expenses by homeowners subject to the means test.

249. The debtor who leases a vehicle also must back out lease payments from the IRS transportation ownership allowance because the Bankruptcy Code defines "debt" as liability on a claim and "claim" as a right to payment. 11 U.S.C. § 101(5), (12) (2000). The Act elsewhere adds a provision to the Bankruptcy Code addressing the issue of post-petition assumption by a debtor of a lease of personal property, thereby implicitly acknowledging post-petition lease expenses for an automobile. BAPCP Act, *supra* note

petition, is making payments over some portion of the ensuing 60 months on one or more debts secured by a vehicle, including late model or luxury vehicles, may claim all of those payments as part of presumed monthly expenses no matter the number of vehicles involved. In contrast, a debtor who, at the time of the petition, owns free and clear an older vehicle possibly soon in need of replacement, or a debtor who, at the time of the petition, doesn't own a vehicle but needs to purchase one soon, may not claim *any* transportation ownership expense as part of the presumed monthly expenses.²⁵⁰

173, § 309(b) (adding § 365(p) to the Bankruptcy Code). Nonetheless, unless one contorts the meaning of "secured debt," the debtor who leases a vehicle may not reintroduce average monthly payments on vehicle leases into the expense calculation because the debtor may only reintroduce into presumed monthly expenses an average derived from "the total of all amounts scheduled as contractually due to secured creditors" BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code) (emphasis added). A lease payment is not an amount due to a secured creditor. The Uniform Commercial Code distinguishes a true lease from a security interest. U.C.C. § 1-203 (2001). The Bankruptcy Code defines a security interest as a lien created by agreement and defines a lien as a charge against or interest in property to secure payment of a debt. 11 U.S.C. § 101(51), (37) (2000). The result of this reading of the means test will be an artificially low figure for the presumed monthly expenses of a debtor who leases a vehicle. As a consequence, abuse might be presumed for Debtor A, who leases a vehicle, but not for the otherwise identically situated Debtor B, who is purchasing the identical vehicle. Pending legislation to correct this problem, to overcome this obvious anomaly a court would have to permit the debtor to reintroduce lease payments as part of the debtor's average monthly payments on account of secured debt even though a lease payment is not a payment to a secured creditor. Alternatively, a court could conclude that the debtor need not back out lease payments from the IRS transportation allowance even though a lease payment is a payment on a debt. This is an inferior solution because it would give an advantage to some debtors who lease vehicles over some debtors who owe secured debt on vehicles. The leasing debtor would include actual expenses for lease payments (to the maximum amount permitted by the IRS transportation ownership allowance) in presumed monthly expenses. The purchasing debtor would have to back out actual debt repayment from presumed monthly expenses and could only reintroduce into presumed monthly expenses an amount calculated on the basis of a sixty-month average. In other words, the leasing debtor, unlike the purchasing debtor, would not have to average lease payments over sixty months. The shorter the remaining duration of the lease, the greater this advantage becomes. The advantage would be big enough in some cases to avoid the presumption of abuse for the debtor who leases whereas the virtually identically situated purchasing debtor might not avoid the presumption of abuse.

250. This conclusion seems to follow from this statement in the IRS Standards: "If a taxpayer has no car payment, or no car, only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense." IRS STANDARDS, *supra* note 215. Some might claim that a debtor with no vehicle payment nonetheless should be entitled to claim some portion or all of the IRS transportation ownership expense to reflect the possibility or likelihood of having to purchase a first vehicle, or a replacement vehicle, within five years of filing the petition. This interpretation was suggested in the *Creighton Study*, *supra* note 229, at 43-46, based in part upon the authors' findings concerning the age of vehicles owned by Chapter 7 debtors. *Id.* In a sample of Chapter 7 cases filed by individual debtors in 1995, approximately half of the approximately 1,300 vehicles owned by debtors in the sample were owned free and clear, all of the debt-free vehicles were at least five model years old, 550 were at least ten model years old at the time of the filing of the petitions. Marianne B. Culhane

As in the case of a homeowner with a large mortgage payment, a court might exercise its discretion outside the means test, based upon the totality of the debtor's financial circumstances, to dismiss for abuse the Chapter 7 case of a debtor paying more for a vehicle or paying for more vehicles than the court deems appropriate. For the same reasons discussed with respect to possible dismissal for abuse because of an "excessive" mortgage payment, however, exercise of that discretion may produce results that are inconsistent or difficult to predict.²⁵¹

It is unclear whether the Act grants a court discretion that would work in the opposite direction, saving a case that would otherwise be subject to dismissal for presumed abuse. Consider the debtor with no car payments at the time of the petition who hopes to rebut a presumption of abuse by claiming that post-petition purchase of a first or replacement vehicle is reasonably necessary in the near future and that payments for such a vehicle would reduce putative disposable income sufficiently to avoid the presumption of abuse.²⁵² A debtor may rebut the presumption of abuse "by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances . . . justify *additional expenses* or adjustments of current monthly income for which there is no reasonable alternative."²⁵³ We may assume, without deciding, that a court might conclude that a special circumstance comparable to the two illustrations in the statutory language

& Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 738 (1999). This suggested interpretation explained a substantial part of the difference between the findings of the *Creighton Study* (which assumed an ownership allowance for debtors without a vehicle payment) and the findings of the 1999 EY STUDY (which did not) on the amount of repayment that might be generated by application of a means test. *Creighton Study*, *supra* note 229, at 46. This important reason for the difference in findings between the two studies, a difference identified *supra* note 7, never penetrated the public debate and was either overlooked or conveniently ignored or dismissed by those supporting means testing. Assuming that many debtors without a vehicle payment might reasonably need to replace a vehicle within five years of filing a petition, some allowance for transportation ownership expense in the means-test calculation would seem appropriate. But given the language of the IRS Standards quoted above, the difficulty of predicting when the debtor may need to purchase a vehicle, and the difficulty of predicting the amount of the monthly payments, I do not think the means test can be so read. In his article devoted to means testing, Judge Wedoff advances an opposing viewpoint. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 257-58 (2005).

251. See *supra* pp. 291-92.

252. The debtor might purchase a vehicle prior to filing the petition and thereby incur additional debt that would reduce putative disposable income sufficiently to avoid the presumption of abuse, but the Act prohibits an attorney from advising a client to do so. See *infra* pp. 314-21.

253. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code) (emphasis added).

warrants a debtor's post-petition purchase of a vehicle in the near future. Even so, however, the Act may not permit the debtor to rebut the presumption of abuse by virtue of anticipated monthly payments for the vehicle because the phrase "additional expenses" may refer only to expenses as of the date of the petition that exceed expenses allowed under the means test (e.g. expenses for housing and utilities that exceed amounts permitted by the IRS Standards); the phrase may not refer to anticipated new post-petition expenses. The quoted language follows immediately the list of a debtor's presumed expenses under the means test.²⁵⁴ Most of those expenses derive from the IRS Standards. Thus, it would be natural to read "additional expenses" as expense amounts as of the date of the petition that exceed those otherwise allowed by the IRS Standards. Moreover, a debtor may rebut the presumption based on additional expenses only if those expenses "cause" (not "would in the future cause") the debtor's presumed disposable income to fall below the amount at which abuse is to be presumed.²⁵⁵ In other words, the means test operates as a snapshot of the debtor's financial circumstances as of the time of the petition. The court, so the argument would run, should not project future expenses, especially because it is impossible for the court to know when or whether the debtor actually would incur the additional expenses or how much those expenses would be. This narrower but reasonable interpretation of "additional expenses" would preclude a court from allowing the debtor to rebut the presumption of abuse by claiming anticipated additional expenses for post-petition purchase of a vehicle. Perhaps the Act should grant the court such discretion because consideration of the anticipated additional expenses would help portray a debtor unable to pay non-priority unsecured creditors the amounts presumed under the means test. Yet the Supreme Court has declared policy considerations of this sort (as well as legislative history and prior bankruptcy law and practice) irrelevant to statutory interpretation if the statutory language has a plain meaning that does not lead to an absurd result.²⁵⁶

254. *Id.*

255. *Id.* ("The presumption of abuse may only be rebutted if the additional expenses . . . cause . . .").

256. *E.g.*, *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters, Inc. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Celebrating the 25th anniversary of the Bankruptcy Reform Act of 1978, a review of Supreme Court bankruptcy jurisprudence since 1979 discusses cases in which members of the Court have disagreed on whether Bankruptcy Code language has a plain meaning and cases in which either the Court, or its majority or minority, has resorted to legislative history, prior bankruptcy law and practice, or policy in interpreting language of the Bankruptcy Code. Lee Dembart & Bruce Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979-2004*, 78 AM. BANKR. L.J. 373, 386-93 (2004).

The suggested statutory construction leaves a troubling question, however, which might lead some to conclude that the meaning of “additional expenses” is not plain. If we interpret “additional expenses” only as expenses incurred as of the time of the petition that exceed those otherwise permitted by the means test, what then do we make of the accompanying phrase “adjustments of current monthly income”? If the means test is a snapshot as of the date of the petition, and if we construe the two phrases in *pari materia*, “adjustments of current monthly income” must refer to some way of adjusting how we count, total, or average a debtor’s *pre-petition* income. But nothing in the Act, including its definition of current monthly income, suggests what could qualify as an appropriate adjustment and I haven’t been able to imagine what such an adjustment would be. Alternatively, “adjustments to current monthly income” (which, you will recall, appears in language permitting a debtor to rebut the presumption of abuse) could refer to anticipated decreases in *post-petition* income. Such an interpretation, however, would be inconsistent with a view of the means test as a snapshot. Moreover, that construction would permit a debtor to introduce evidence of anticipated decreases in post-petition income for the purpose of rebutting the presumption of abuse without any parallel permission to introduce such evidence for the purpose of avoiding the means-test trigger.

There are, therefore, three choices for construing the statutory language permitting a debtor to rebut the presumption of abuse, each of them imperfect. By construing the two phrases in *pari materia*, a court either could deem relevant both anticipated post-petition decreases in monthly income and anticipated new post-petition monthly expenses or could deem both irrelevant. Alternatively, construing the phrases independent of each other, a court could deem relevant anticipated post-petition decreases in monthly income but not anticipated new post-petition monthly expenses. Only under the first construction (both deemed relevant) could a court exercise discretion in favor of a debtor who seeks to rebut the presumption of abuse by claiming the need to purchase a vehicle in the near future.

c. Other necessary expenses

As we have seen, exercise of judicial discretion with respect to housing and utilities expenses and transportation ownership expenses may lie primarily outside the means test, either leading to dismissal for abuse when abuse is not presumed or saving a case from dismissal when abuse is presumed. In addition, the Act preserves significant judicial discretion within the means test by including in a debtor’s presumed monthly expenses the debtor’s actual monthly expenses for

what the Act refers to as “Other Necessary Expenses”²⁵⁷ and what the Internal Revenue Manual refers to as “other expenses.”²⁵⁸ The Internal Revenue Manual (“Manual”) lists several expense items that may qualify as other expenses, including child care, health care, life insurance, and charitable contributions.²⁵⁹ The Manual allows these other expenses to delinquent taxpayers if, considering the facts and circumstances of each case, the expenses are incurred to provide for the health and welfare of a taxpayer or his or her family, or are incurred for the production of income (“the necessary expense test”), and if the amount of the expenses are reasonable.²⁶⁰

By incorporating into the means test other expenses to the extent necessary and reasonable, the Act requires that bankruptcy judges exercise the discretion that the Manual otherwise delegates to IRS collection agents. For example, the Manual identifies term life insurance on the life of the debtor as necessary, but does not describe the amount of insurance or the amount of premiums that would be reasonable.²⁶¹ It identifies child care expenses as necessary, but admonishes IRS agents not to allow unusually large child care expense if more reason-

257. BAPCP Act, *supra* note 173, § 102(a)(2)(C) (adding § 707(b)(2) to the Bankruptcy Code).

258. IR MANUAL, *supra* note 216, § 5.15.1.10.

259. *Id.* The imperfect fit between language of the Bankruptcy Code, as amended by the Act, and language in the Internal Revenue Service Manual generates uncertainty about the extent to which a debtor may claim charitable contributions as part of presumed monthly expenses. The Internal Revenue Service Manual (and hence the means test) permits a taxpayer to include in “other necessary expenses” a reasonable amount of charitable contributions to the extent necessary for the health and welfare of the debtor or the debtor’s family or to the extent necessary for the production of income. *Id.* The Manual gives the following example of a charitable contribution that qualifies as a necessary expense: “A minister is required to tithe according to his employment contract.” *Id.* In at least some cases, a debtor in Chapter 7 will not be able to demonstrate such necessity, and in some cases, even if the contributions are necessary, the debtor may not be able to demonstrate that the amount of the contributions is reasonable. The language of the means test thus would suggest that the debtor may not include the charitable contributions (or at least the unreasonable amount of such contributions) in calculation of presumed monthly expenses. Yet the Act leaves unaffected the last sentence of current section 707(b) of the Bankruptcy Code, which instructs the court that in making a decision about whether to dismiss a case for abuse it may not consider whether the debtor has made or continues to make defined qualifying charitable contributions. 11 U.S.C. § 707(b) (2000) (adopted as part of the Religious Liberty and Charitable Donation Protection Act of 1998, Pub. Law No. 105-183, 112 Stat. 518 (1998)). It is unclear how that admonition should be read in light of the new means-test reference to an Internal Revenue Service Manual that requires exclusion from presumed monthly expenses of charitable contributions that are not necessary or reasonable. The two seemingly inconsistent directives might be reconciled by concluding that a debtor may always include in presumed monthly expenses the defined qualifying charitable contributions and may include additional charitable contributions to the extent that they are necessary and reasonable.

260. IR MANUAL, *supra* note 216, §§ 5.15.1.7 (item 5), 5.15.1.10.

261. *Id.* § 5.15.1.10.

able alternatives are available.²⁶² It identifies health care expenses as necessary, but not if for elective surgery.²⁶³ Of course, bankruptcy judges have for years exercised that same kind of discretion in deciding whether to dismiss a Chapter 7 case for substantial abuse or in deciding whether a Chapter 13 debtor has devoted all disposable income to a plan. That history should help counsel who are familiar with local legal culture predict the kinds and amounts of “other expenses” that local judges are likely to allow as well as how those judges may exercise their discretion outside the means test to dismiss when abuse is not presumed or to save from dismissal cases in which abuse is presumed. For the first time, however, a debtor’s counsel may risk sanctions for an inaccurate prediction.²⁶⁴

III. REQUIRED CALCULATIONS AND DOCUMENTS

Ascertaining and reporting expenses and calculating imputed disposable income in large part by reference to the IRS Standards will be an intricate and time-consuming process. Disclosures in schedules already are incomplete or erroneous and the remedies for those deficiencies are inadequate.²⁶⁵ The new complexity will compound the problem.²⁶⁶ The Act can be read to require the necessary work from every consumer debtor filing a Chapter 7 petition, whether or not the debtor is subject to the means test. The relevant, ungrammatical language provides the following:

As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor’s current monthly income, and the calculations that determine whether a presumption arises under

262. *Id.*

263. *Id.*

264. *See infra* pp. 342-44, 347-54.

265. Honorable Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 AM. BANKR. L.J. 653 (1999). This study found a significant amount of incomplete and erroneous disclosures in a randomly chosen sample of Chapter 7 and Chapter 13 cases filed in one district. My experiences in reviewing Chapter 7 cases in the Northern District of California lead me to believe that the results of the study would be replicated in other districts. The authors of *THE FRAGILE MIDDLE CLASS, AMERICANS IN DEBT*, argued that there were “substantial reasons to support the general accuracy of the data reported in the files,” TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS, AMERICANS IN DEBT* 8-9 (2000) [hereinafter *FRAGILE MIDDLE CLASS*], but did not report any study of the files intended to determine the completeness and accuracy of the disclosures.

266. The Rhodes study did not distinguish between debtors who were represented by counsel and those who were not. It did find that the amount of incomplete or erroneous disclosure did not correlate with the size of the fee that an attorney charged. Rhodes, *supra* note 265, at 680-81.

subparagraph (A)(i) [the means test], that show how each such amount is calculated.²⁶⁷

Failure to include the required statement and calculations requires automatic dismissal of the case, effective on the forty-sixth day following the filing of the petition (or earlier upon motion of any party in interest) unless the court extends the time period, not to exceed forty-five days, upon the debtor's request.²⁶⁸

If required from every individual debtor whose debts are primarily consumer debts, the information so reported would be superfluous in an overwhelming number of consumer Chapter 7 cases because the means test will not be triggered for most consumer Chapter 7 debtors.²⁶⁹ In such cases the reporting requirement would impose sense-

267. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 102(a)(2)(C) (2005) [hereinafter BAPCP Act] (adding § 707(b)(2) to the Bankruptcy Code). Although the quoted language refers to "debtor" rather than to an individual debtor whose debts are primarily consumer debts, the language surely was not intended to require the statement and calculations from debtors whose debts are not primarily consumer debts because such debtors are not subject to the means test. Even if interpreted to apply to all Chapter 7 debtors, the court's power under section 521 of the Bankruptcy Code to order "otherwise" remains unaltered. 11 U.S.C. § 521(1) (2000).

268. BAPCP Act, *supra* note 267, § 316 (adding § 521(i) to the Bankruptcy Code). Upon request of a party in interest, "the court *shall* enter an order of dismissal not later than 5 days after such request." *Id.* (emphasis added). The debtor may file a schedule of current income and expenditures within fifteen days of the filing of a petition. FED. R. BANKR. P. 1007(c). Presumably a court will not dismiss on request of a party in interest made prior to the expiration of the fifteen-day period even though the amendment to § 521 would seem to permit such a request at any time.

269. A proposed amendment to S. 256, the bill carrying the Act, would have excused debtors whose calculations showed income below the relevant median from having to furnish further calculations. 151 Cong. Rec. S2139 (daily ed. Mar. 7, 2005) (Amendment No. 110); 151 Cong. Rec. S2307 (daily ed. Mar. 9, 2005) (statement of Sen. Durbin). Defeat of the amendment, 151 Cong. Rec. S2311 (daily ed. Mar. 9, 2005), suggests that the Act requires means-test calculations from every consumer debtor. There are no studies estimating the percentage of consumer Chapter 7 debtors who would be subject to the means test under the Act. Yet we can safely predict that the percentage would be well below 33%, perhaps fewer than 20%, by extrapolating from earlier studies of somewhat different means-test triggers under prior versions of consumer bankruptcy reform. The 1999 GAO REPORT compared results of four studies that applied differing versions of means-test triggers in earlier legislation that used *national* medians. Under those studies, the percentage of debtors who would have been subject to means testing was estimated to be the following: 1998 EY STUDY (47%); *Creighton Study* (24.2%); 1999 EY STUDY (19%); EOUST STUDY (17.7%). UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS, PERSONAL BANKRUPTCY, ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTORS' ABILITY TO PAY, GAO/GGD-99-103 (June 21, 1999), *available at* <http://www.gao.gov/archive/1999/gg99103.pdf>, at 15, Table 3. The 1998 EY STUDY is probably the least predictive of what might happen under the Act because the means-test trigger used in that study would have subjected debtors to a means test if their income was 75% of the relevant median, whereas the other three studies were based on means tests, like the means test in the Act, that would have subjected a debtor to the means test if their income exceeded 100% of the relevant median. The authors of the *Creighton Study* imply that their percentage (24.2%) of non-business Chapter 7 debtors that would have been subject to a version of the means test using a national

less cost, in the form of higher fees charged by consumer bankruptcy attorneys,²⁷⁰ as well as inconvenience and delay. Pro se debtors²⁷¹ will find preparation of the necessary documents considerably more difficult than at present, even with the aid of inevitably more lengthy self-help publications.²⁷² This may discourage some from filing at all and may fuel greater use of petition preparers by others.

The Act requires promulgation of a bankruptcy form for the statement and calculations and authorizes general rules concerning its content.²⁷³ In responding to this mandate, Interim Bankruptcy Rule 1007(b)(4) and a new bankruptcy form entitled "Statement of Current Monthly Income and Means Test Calculation" read the reporting requirement narrowly. The interim rule provides that the debtor must file the "calculations in accordance with § 707(b)" only if the debtor's current monthly income exceeds the relevant state median,²⁷⁴ and Part III of the new form excuses the debtor from the means-test calculations if the debtor's income does not exceed the relevant state me-

median might overstate the number who would be subject to a means test using state medians. Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 38-39 (Mar. 1999). Data from two earlier empirical studies also supports a prediction that considerably fewer than 33% of consumer Chapter 7 debtors would be subject to a means test under the Act. See comparisons of the median annual household income of a 1991 sample of bankruptcy debtors with the median annual household income of the populations of five states. FRAGILE MIDDLE CLASS, *supra* note 265, at 60, Table 2.1. Also see comparisons of mean family income of 1981 sample of bankruptcy debtors with national mean family incomes. TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 92-93, Table 5.3 and 151, Table 8.1 (1989).

270. Fees charged by consumer bankruptcy attorneys are, of course, subject to court supervision. 11 U.S.C. § 329 (2000). Presumably, bankruptcy judges will permit additional fees on account of the additional obligations imposed by the Act.

271. In a sample of 1,043 Chapter 7 cases filed in 1995, 9% of debtors filed pro se, and in a 1992 sample of 761 cases filed in San Jose, 35% of debtors filed pro se, some with the aid of petition preparers. Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 732. If one assumes a 9% national pro se filing rate among individuals filing non-business Chapter 7 cases each year, 100,599 pro se debtors filed such petitions in 2004. See *supra* note 6. The rate may rise with an increase in fees charged by consumer bankruptcy attorneys.

272. Self-help legal publisher Nolo Press currently publishes two relevant books, one on Chapter 7 and one on Chapter 13. STEPHEN ELIAS ET AL., HOW TO FILE FOR CHAPTER 7 BANKRUPTCY (9th ed. 2001); ROBIN LEONARD, CHAPTER 13, BANKRUPTCY: REPAY YOUR DEBTS (4th ed. 1999). Revisions to these books to reflect the means test and other relevant changes to the Bankruptcy Code perforce will increase their complexity and size. They are already 384 and 350 pages long, respectively.

273. BAPCP Act, *supra* note 267, § 1232 (amending 28 U.S.C. § 2075).

274. FED. R. BANKR. P. 1007(b)(4) (interim amended rule), available at <http://www.uscourts.gov/rules/interim.html> (last visited Oct. 20, 2005).

dian.²⁷⁵ This rule and form reflect a conclusion that calculations demonstrating that the debtor's income does not trigger the means test are alone sufficient to demonstrate that a presumption of abuse does not arise under the means test. This is a sympathetic and sensible reading of the language of the Act's reporting requirement because no one has standing to raise the presumption of abuse if the debtor's income does not exceed the relevant median.²⁷⁶ A presumption can hardly arise in connection with a motion that cannot be brought. On the other hand, a judge or United States trustee may still seek dismissal for abuse based on the totality of circumstances of the debtor's financial situation. The data reported in means-test calculations might be relevant to a court's assessment of the possibility of abuse under that standard for decision even if it does not generate a presumption of abuse.²⁷⁷ The interim rule, if adopted by the Supreme Court, therefore might impermissibly abridge or modify the right of a court or United States trustee to consider dismissal for abuse by initially depriving them of potentially relevant information.²⁷⁸

The Act also requires the debtor to file with the court other documents not heretofore required. The debtor must file copies of all payment advices or other evidence of payment received from the debtor's employers in the sixty days preceding the filing of the petition, a statement of monthly net income, itemized to show how it was calculated, and a statement disclosing any reasonably anticipated increase in income or expenditures during the twelve-month period following the filing of the petition.²⁷⁹ Here, too, failure to file the required documents requires automatic dismissal of the case.²⁸⁰ The court may decline to dismiss for failure to file all required payment advices (but not for failure to file the other required documents) if, on timely motion of a trustee, the court finds both that the debtor attempted in good faith

275. Official Form B22A (Chapter 7) (10/05) (Statement of Monthly Income and Means Test Calculation), http://www.uscourts.gov/rules/new_and_revised_official_forms_101405.htm (last visited Oct. 27, 2005).

Use of an Official Form is obligatory without the need for approval by the Supreme Court or Congress. FED. R. BANKR. P. 9009 advisory committee's notes.

276. See *supra* note 197 and accompanying text. This reading of the requirement rejects the inference that could be drawn from the defeat of proposed Amendment No. 110 to S. 256. See *supra* note 269.

277. I do not address the important and difficult question of whether dismissal for abuse based upon the totality of circumstances of the debtor's financial situation in effect permits the court to apply some or all of the statutory formula for means testing "outside the means test." The means-test calculations are relevant only if the court may do so. If the court may do so, my earlier statement (*supra* text accompanying note 269) exaggerates the superfluity of the reporting requirement.

278. Bankruptcy rules may "not abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2075 (2000).

279. BAPCP Act, *supra* note 267, § 315(b) (amending § 521 of the Bankruptcy Code).

280. BAPCP Act, *supra* note 267, § 316 (adding § 521(i) to the Bankruptcy Code).

to file all required payment advices and that the best interests of creditors would be served by administration of the case.²⁸¹ The language requiring automatic dismissal does not appear to countenance an exception on the basis of a *debtor's* motion that he or she could not file all required payment advices!²⁸²

The Act presumably requires a debtor to file payment advices so that the court, the United States trustee, a panel trustee, or a creditor can verify the debtor's claimed current monthly income.²⁸³ There is no obvious reason, however, why the debtor also is required to file a statement of the amount of net monthly income, a concept that is neither defined in the Act nor relevant to means testing. Net monthly income might mean the sum of taxable and non-taxable income less deductions from taxable income required by law, or it might mean the sum of taxable and non-taxable income less all deductions from taxable income, whether or not the deductions are required by law, including such deductions as those for union dues, medical insurance premiums, or contributions to retirement plans. It might even mean only taxable income less deductions required by law or taxable income less all deductions. The Act leaves the debtor guessing which is intended, although the guess is irrelevant in any event because net monthly income bears no relationship to the critical concept of current monthly income. Current monthly income is an average computed on the basis of all of the debtor's income over a six-month period, taxable or otherwise, without any deductions.²⁸⁴ Because the Act assigns the

281. *Id.* Although a current procedural rule permits the debtor to file a schedule of current income and expenditures within fifteen days of the filing of a petition, that rule does not extend to the additional documents that the debtor now must file. FED. R. BANKR. P. 1007(c). Because that rule acknowledges the need to facilitate emergency filings, it should be interpreted or amended to permit a fifteen-day delayed filing of these additional documents.

282. BAPCP Act, *supra* note 267, § 316 (adding § 521(i) to the Bankruptcy Code).

283. The provision requiring the filing of payment advices is curious in at least two respects. First, recall that current monthly income is derived from a six-month average. *See supra* pp. 277-78. Yet the debtor need only file copies of payment advices for income received within the sixty days preceding the filing of the petition. Second, in an individual case filed by a married debtor, the combined income of both the filing and the non-filing spouse is relevant to determine standing to bring a motion to dismiss for reasons other than presumed abuse. BAPCP Act, *supra* note 267, § 102(a) (adding § 707(b)(6) to the Bankruptcy Code). Yet a married debtor filing an individual petition need not file copies of payment advices received by the non-filing spouse.

284. The definition of "current monthly income" in the Act does not refer to deductions from taxable income. It simply refers to "income from all sources that the debtor receives . . . without regard to whether such income is taxable income . . ." BAPCP Act, *supra* note 267, § 102(b) (adding § 101(10A) to the Bankruptcy Code). However, "current monthly income" must refer to all such income without deductions because the means test otherwise accounts for deductions through its allowance of certain presumed expenses. For example, the Internal Revenue Service Manual identifies taxes, involuntary deductions, and union dues as among other necessary expenses that the debtor may subtract from current monthly income in determining whether or not the debtor

concept of net monthly income no other function, the requirement to report it imposes a meaningless albeit small additional burden on debtors.

The debtor also must file a statement of a reasonably anticipated *increase* in income or expenditures. Post-petition increases in income would not be relevant either to the triggering of the means test or to its application if triggered. Both the means-test trigger and the means test use average monthly *pre-petition* income.²⁸⁵ But an anticipated increase in income could justify the alternative motion to dismiss for abuse based on the debtor's alleged lack of good faith or the totality of the circumstances of the debtor's financial situation, a motion for which a judge and the United States trustee have standing even if the debtor's putative annual income falls below the relevant median.²⁸⁶ An anticipated post-petition increase in expenditures accompanying an anticipated increase in income would be relevant in opposition to such a motion, but, as previously discussed, may not be relevant to a debtor's effort to rebut a presumption of abuse generated by the means test.

The Act also requires consumer Chapter 7 debtors to provide certain tax returns. First, all consumer Chapter 7 debtors must provide to the trustee a copy of the debtor's federal income tax return (or, at the debtor's election, a transcript of the return) for the most recent tax year ending immediately before commencement of the case and for which a return was filed.²⁸⁷ The debtor must also furnish this return (or transcript) to any creditor that timely requests it.²⁸⁸ For ease of subsequent reference, I will call this the "first required return." The court must dismiss the debtor's case for failure to provide the first required return unless the debtor demonstrates that the failure to provide the return is due to circumstances beyond his or her control.²⁸⁹

passes the means test. INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL, COLLECTING PROCESS, § 5.15.1.3.2.3. Reaching this conclusion, and therefore reaching the conclusion that "net monthly income" is irrelevant under the means test, is an unfortunate labyrinth.

285. See *supra* pp. 277, 284.

286. BAPCP Act, *supra* note 267, § 102(a) (adding § 707(b)(6) to the Bankruptcy Code).

287. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(e) to the Bankruptcy Code). A "tax year" is an annual accounting period for keeping records and reporting income and expenses. A taxpayer may choose either a calendar year or a fiscal year as the relevant accounting period. For purposes of this Article, I will treat tax year and calendar year as synonymous, because most individuals treat the calendar year as their tax year. A transcript will show most line items from a Form 1040EZ, Form 1040A, or Form 1040, including accompanying forms and schedules. Internal Revenue Service, Tax Tip 2005-13, Need a Copy of Your Tax Return Information? (Jan. 19, 2005), <http://www.irs.gov/newsroom/article/0,,id=105370,00.html>.

288. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(e) to the Bankruptcy Code).

289. *Id.*

There seems to be little good reason to require that a consumer Chapter 7 debtor provide the first required return. It would provide information with at best an attenuated relationship to the information required to apply either the means-test trigger or the means test, and in most cases it would not be reviewed by those with standing to seek dismissal for abuse based on a debtor's bad faith or the totality of the circumstances of the debtor's financial situation.

To be useful in relation to the means-test trigger or the means test, the first required return would need to provide relevant current information about income, expenses, or debt repayment. It doesn't do so. By showing the debtor's income for the relevant tax year, the first required return might generally imply the accuracy or inaccuracy of the debtor's computation of current monthly income (a six-month average). It cannot verify that computation, however, even taken together with copies of the debtor's payment advices, because the return doesn't show monthly income and the required copies of payment advices reach back at most sixty days. Moreover, if the debtor files a Chapter 7 petition between January 1 and April 15,²⁹⁰ the first required return will be an even less useful indicator of current monthly income. In such a case the first required return will not be for the preceding calendar year, but for the year before that.²⁹¹ Moreover, the debtor need not provide the first required return to the United States trustee.²⁹² Thus, even were the income information useful, the United States trustee may not consider the first required return in its mandated review of all materials filed by the debtor, a review under-

290. This and subsequent references to April 15 should be taken to refer to the date of the Monday first following April 15 for years in which April 15 falls on a Saturday or Sunday.

291. Consider the following example. Debtor files a Chapter 7 petition on January 15, 2005. The first meeting of creditors is first scheduled for February 15, 2005. The debtor must provide the tax return not later than seven days preceding the date first scheduled for the first meeting of creditors, i.e. not later than February 8, 2005. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(e) to the Bankruptcy Code). The most recent tax year ending immediately before commencement of the case is 2004, but the debtor has not yet filed a return for that year. Therefore, the debtor must provide the tax return for 2003, filed on April 15, 2004. Consider another example. Assume the debtor files the Chapter 7 petition on April 1, 2005 and the first meeting of creditors is first scheduled for May 1, 2005. The debtor must provide the return not later than April 23, 2005. However, the debtor could satisfy the requirement by providing a return more than 7 days before the first scheduled meeting of the first meeting of creditors. Hence, in this circumstance the debtor may choose whether to file the return for 2004 or the return for 2005.

292. The debtor must provide the tax return "to the trustee [not United States trustee]" and, upon timely request, to a creditor. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(e) to the Bankruptcy Code).

taken for the purpose of deciding whether to file a motion to dismiss for presumed abuse.²⁹³

The Act requires the debtor to file additional tax returns (or a transcript of the relevant return) with the court, but only if so requested by the court, the United States trustee, or any party in interest.²⁹⁴ One such request may be for the federal income tax return with respect to each tax year of the debtor ending while the case is pending.²⁹⁵ I will call this the “second required return.” While the Act mandates dismissal of the case for the debtor’s failure to provide the first required return absent sufficient excuse,²⁹⁶ it (perhaps inadvertently) fails to specify either a consequence or an excuse for failure to file the second required return. Presumably, the court may nonetheless dismiss for failure to file under its power to dismiss for cause²⁹⁷ or excuse the filing under its equitable powers.²⁹⁸

Generally, the second required return will not be useful either. Chapter 7 cases of consumer debtors who file between January 1 and April 15 will almost always close the same year. Thus, for most such debtors, no tax year will end while the case is pending and the requirement would not apply. Debtors whose cases are pending on December 31, most of whom will have filed a Chapter 7 petition after April 15 of the same year, will have already provided a tax return for the tax year ending the preceding December 31. They need not file with the court the second required return until the ensuing April 15,²⁹⁹ by which time many of their cases will have been closed or the time for a motion to dismiss based on abuse will have expired.³⁰⁰

Alternatively or in addition, the debtor also must file with the court upon request a tax return (or transcript) first filed with the tax-

293. See *supra* note 179 and accompanying text. Although the first required return “shall be available to the United States trustee . . . for inspection and copying . . .,” BAPCP Act, *supra* note 267, § 315(b) (adding § 521(g) to the Bankruptcy Code), someone would first have to alert the United States trustee to the desirability of inspecting and copying the return, an event unlikely to occur in many if not most cases.

294. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(f) to the Bankruptcy Code).

295. *Id.*

296. See *supra* note 289 and accompanying text.

297. 11 U.S.C. § 707(a) (2000).

298. 11 U.S.C. § 105(a) (2000).

299. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(f) to the Bankruptcy Code).

300. The United States trustee must file with the court, not later than ten days after the date of the first meeting of creditors, a statement of whether the debtor’s case would be presumed to be an abuse and file any motion to dismiss or convert for presumed abuse within thirty days after filing the statement. BAPCP Act, *supra* note 267, § 102(c) (adding § 704(b) to the Bankruptcy Code). An existing rule of procedure grants the United States trustee a slightly longer time (sixty days after the first meeting of creditors unless extended by the court for cause) and grants the court sixty days after the first meeting of creditors for a motion *sua sponte*. FED. R. BANKR. P. 1017(e). The rule will have to be amended to accommodate the time limit for the United States trustee stated in the Act and also to state a time limit for a motion by a creditor or trustee.

ing authority after commencement of the case with respect to any tax year of the debtor ending in the three-year period ending on the date of commencement of the case.³⁰¹ I will call this the “third required return.” The Act fails to specify either a consequence or an excuse for failure to file the third required return, but, as with the second required return, the court presumably may sanction failure to file with dismissal or excuse the failure for good reason shown.³⁰²

This requirement appears to be aimed at debtors who should have filed required tax returns with the IRS for certain years ending prior to the commencement of the case but failed to do so. But, perhaps without having been so intended, the third required return would also provide information about the income of debtors for the calendar year immediately preceding a filing between January 1 and April 15. The debtor must file the third required return with the court “at the same time filed with the taxing authority.”³⁰³ This might imply that a debtor who files a Chapter 7 petition between January 1 and April 15 need not file the third required return (for the immediately preceding calendar year) with the court if the court, United States trustee, or other party in interest fails to make the request before April 15, a failure that grows more likely the closer the date of the filing of the bankruptcy petition is to April 15.³⁰⁴

In sum, the tax returns required of consumer Chapter 7 debtors who file a petition may be of little benefit in assessing the accuracy of a debtor’s computation of current monthly income. If the debtor files a Chapter 7 petition between January 1 and April 15, the first required return will reflect an annual, not monthly, income earned during a period ending at least twelve months preceding the filing of the petition. In such cases, the debtor must furnish a report of income for the immediately preceding calendar year (the third required return) only upon request, and maybe only upon a request made prior to April 15. If the debtor files a petition after April 15, the first required return will reflect an annual, not monthly income, for a year ending, at a minimum, three and one half months prior to the filing of the petition, and thus more than half of the income reflected in the return will be irrelevant to computation of current monthly income. The same will be true with respect to a third required return requested of a debtor

301. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(f)(2) to the Bankruptcy Code).

302. *See supra* notes 297-98 and accompanying text.

303. BAPCP Act, *supra* note 267, § 315(b) (adding § 521(f)(2) to the Bankruptcy Code).

304. This timing requirement strengthens the inference that the provision was intended to catch income tax returns that the debtor previously should have but failed to file.

who files between January 1 and April 15. Finally, many debtors whose cases are pending on December 31 and who, upon request, must file with the court a tax return for the tax year ending that December 31 (the second required return), need not file it until a date on which it no longer will be useful.

Quite simply, information provided in a tax return ill fits an inquiry about the current income of a consumer Chapter 7 debtor because a tax return provides information about a year-long period ending several months before the return is filed with the taxing authority and consumer Chapter 7 cases typically close within six months of the filing of a petition.

A tax return also will provide little if any useful information to assist an assessment of the debtor's expense and secured debt profile. Many consumer Chapter 7 debtors will have been earning less than \$50,000 annually in taxable income.³⁰⁵ If they do not claim dependents and are single or married filing (a tax return) jointly, they may have qualified to file, and may have filed, a Form 1040EZ federal tax return.³⁰⁶ That form, which does not accommodate itemized deductions, provides not a single item of expense or debt information.³⁰⁷ Debtors with taxable income not exceeding \$50,000 who do not qualify to file a Form 1040EZ (because, for example, they claim dependents) may file a Form 1040A if, among other things, they do not itemize deductions.³⁰⁸ Form 1040A will reveal only a few selected expenses as adjustments to total income and a few more expenses as income tax credits, if the debtor incurred such expenses.³⁰⁹ Form 1040, necessary if the debtor itemizes deductions,³¹⁰ will reveal additional expenses, if incurred.³¹¹ Yet even Form 1040 accompanied by a schedule of itemized deductions will not contain information about some expenses that a debtor might claim in means-test calculations, such as an additional allowance for food and clothing, and will not contain information

305. See *supra* note 157.

306. A taxpayer qualifies to use Form 1040EZ if the taxpayer is single or married filing jointly, is under 65 and not blind, does not claim any dependents, has a taxable income of less than \$100,000, does not have taxable interest of over \$1,500, does not claim identified deductions or credits, has income only from wages or other listed sources, and did not receive an advance earned income credit payment. Internal Revenue Service, Publication 17, *Your Federal Income Tax For Individuals 10* (2004) [hereinafter *Publication 17*], <http://www.irs.gov/pub/irs-pdf/p17.pdf>.

307. Internal Revenue Service, Form 1040EZ (2004), <http://www.irs.gov/pub/irs-pdf/f1040ez.pdf>.

308. Publication 17, *supra* note 306, at 10.

309. Internal Revenue Service, Form 1040A (2004), <http://www.irs.gov/pub/irs-pdf/f1040a.pdf>.

310. Publication 17, *supra* note 306, at 11.

311. Internal Revenue Service, Form 1040 (2004), <http://www.irs.gov/pub/irs-pdf/f1040.pdf>.

about the amount of a debtor's payment on secured debt.³¹² Moreover, the relationship between any expense data revealed by the use of Form 1040A or Form 1040 and the debtor's expenses as of the filing of a petition will be as attenuated as the relationship between the income revealed by the form and the debtor's computation of current monthly income.³¹³

While of dubious relevance to the means-test trigger or to the means test, perhaps the information in any of the required tax returns, either alone or taken together with other information included in the debtor's schedules or statements or other information known to a creditor or trustee, might nonetheless prompt a motion to dismiss for abuse based on the debtor's bad faith or the totality of the circumstances of the debtor's financial situation. In the great number of consumer Chapter 7 cases, however, only the judge and United States trustee would have standing to make such a motion.³¹⁴ Yet the Act does not require the debtor to provide the first required return to the judge or United States trustee.³¹⁵ It requires the debtor to provide that return to the trustee, or creditor upon request, and either could bring the return to the attention of the judge or United States trustee,³¹⁶ but one wonders how often the minimal additional information in the return would tip the balance in favor of such a referral or convince a judge or United States trustee to file the motion. The court or United States trustee may request that the debtor file a copy of the second or third required return (or transcript). Presumably, however, either would make such a request only if there is already other information suggesting the possibility of abuse that the return might confirm or disprove.

In conclusion, for most consumer Chapter 7 cases the value of the required tax returns appears marginal, either for purposes of the means-test trigger, means testing, or motion to dismiss for abuse outside the means test. Were it not for concern about confidentiality of information in a tax return (such as detail about a debtor's medical expenses in a schedule of itemized deductions), the value of information in the returns of a relatively small number of debtors might nonetheless justify the requirement that all consumer debtors provide the

312. Internal Revenue Service, Instructions for Schedule A, Itemized Deductions, <http://www.irs.gov/instructions/i1040sa/ar01.html> (last visited July 24, 2005).

313. See *supra* pp. 305-07.

314. BAPCP Act, *supra* note 267, § 102(a) (adding § 707(b)(6) to the Bankruptcy Code) and the data reported *supra* note 157.

315. See *supra* notes 287-88 and accompanying text.

316. The Act makes clear that both a trustee and a creditor could make such a referral. Amendment of language in § 707(b) of the Bankruptcy Code deleted language prohibiting any party from suggesting a motion to dismiss. BAPCP Act, *supra* note 267, § 102(a)(1) (amending § 707(b) of the Bankruptcy Code).

returns, either automatically (as with the first required return) or upon request (as with the second and third required returns). The additional burden that the requirement imposes upon debtors is limited to finding and duplicating, or requesting a transcript of, the relevant return.³¹⁷ The Act expresses considerable concern for protecting the confidentiality of the tax information revealed, instructing the Director of the Administrative Office of the United States Courts to develop procedural safeguards and to report to Congress assessing the effectiveness of such procedures and, if appropriate, recommending further protective legislation.³¹⁸ Therefore, in evaluating the requirement that the debtor provide tax returns, we should also weigh whatever burdens on trustees, the United States trustee, creditors, and bankruptcy clerks may come to be associated with complying with the resulting procedural safeguards. We may reach the conclusion that the requirement to provide tax returns, or at least to provide a specified return automatically, reaps too little benefit to justify the burden that it imposes.

IV. REGULATION OF CONSUMER BANKRUPTCY ATTORNEYS

The Act regulates part of the practice of law for consumer bankruptcy attorneys, imposes upon them new diligence obligations, and exposes them to some additional risk of sanctions for failure to fulfill those obligations. Critics of the Act have predicted that the new regulation, the new obligations, and the increased risk of sanctions will produce an epidemic of adverse consequences: exodus of experienced attorneys from the consumer bankruptcy bar and a consequent decline in the standard or efficiency of practice in bankruptcy court, a significant increase in attorneys' fees charged by those remaining in practice and a consequent increase in the number of pro se debtors and debtors using bankruptcy petition preparers, a decrease in the number of at-

317. Many consumer Chapter 7 debtors may file federal income tax returns electronically over the telephone by using TeleFile. Internal Revenue Service, e-file Using a Telephone (Telefile), <http://www.irs.gov/efile/article/0,,id=98296,00.html> (last visited July 24, 2005). TeleFile is available to taxpayers who may file a simple tax return (Form 1040EZ). *Id.* A taxpayer using TeleFile receives only a confirmation number over the telephone if the filing has been accepted. Taxpayers who file federal income tax returns electronically through use of a personal computer may print out a transcript of the return at the end of the process. Taxpayers who file federal income tax returns electronically through use of tax professional will typically receive a copy of the paper return from the tax professional. Taxpayers who make a paper filing will have had the opportunity to make a copy of the return. A taxpayer without either a copy or a transcript may request either from the IRS. Internal Revenue Service, Tax Tip 2005-13, Need a Copy of Your Tax Return Information? (Jan. 19, 2005), <http://www.irs.gov/newsroom/article/0,,id=105370,00.html>. The IRS charges for a copy of the return but not for a transcript. *Id.*

318. BAPCP Act, *supra* note 267, § 315(c).

torneys willing to represent a debtor pro bono, and the retirement of bankruptcy judges unwilling to abide the resulting debris.³¹⁹ These consequences would be the Act's worst legacy, but I suggest that the fears may be overstated. After some years of experience under the Act, empirical research should be able to test the accuracy of these predictions. In the meantime, through analysis of the relevant provisions, we may begin to evaluate the possible impact of the Act upon consumer bankruptcy practice and access to counsel.

The provisions come in two parts, first in the regulation of "debt relief agencies," defined by the Act to include consumer bankruptcy attorneys and others, and second as part of the amendments to section 707(b) of the Bankruptcy Code dealing with dismissal for abuse. The Act regulates debt relief agencies by prohibiting certain behavior, including the giving of certain kinds of advice, by mandating specified language in advertising, by requiring a written contract between the agency and a client, and by requiring disclosure of information to a client or potential client. The amendments to section 707(b) impose due diligence obligations on consumer bankruptcy attorneys and slightly modify sanctions that might otherwise be imposed for violation of Rule 9011 of the Federal Rules of Bankruptcy Procedure.

A. REGULATION OF DEBT RELIEF AGENCIES

The Act mints the new label "debt relief agencies" and regulates debt relief agencies through prohibitions of certain behavior, advertising and disclosure requirements, and sanctions for misbehavior. With certain exceptions (including authors, publishers, distributors, and sellers of works subject to copyright protection and nonprofit tax exempt organizations), a debt relief agency "means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110."³²⁰ "Assisted person" and "bankruptcy assistance" are also newly defined terms. An assisted person "means any person whose debts consist primarily of con-

319. Thomas J. Yerbich, *The Coming Exodus of Consumer Counsel*, XXII AM. BANKR. INST. J. 10 (July/Aug. 2003); American Bar Association Fact Sheet, Bankruptcy Attorney Liability Legislation (Apr. 20, 2005), [http://www.abanet.org/poladv/brat-tyliabilityfactsheet\(march112005\).pdf](http://www.abanet.org/poladv/brat-tyliabilityfactsheet(march112005).pdf). Predictions in the American Bar Association Fact Sheet were dire: new sanctions would force "an attorney to hire private investigators and appraisers to verify" information in schedules, "adding thousands of dollars to the cost of representing a debtor in bankruptcy and making bankruptcy" representation unaffordable for most debtors. *Id.*

320. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, § 226(a)(3) (2005) [hereinafter BAPCP Act] (adding § 101(12A) to the Bankruptcy Code). I do not discuss the effect of the new provisions on bankruptcy petition preparers.

sumer debts and the value of whose nonexempt property is less than \$150,000.”³²¹ Bankruptcy assistance

means . . . services . . . provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors’ meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.³²²

Voila! Consumer bankruptcy attorneys are now debt relief agencies.³²³ The label is more than a statutory convention because consumer bankruptcy attorneys and others who provide bankruptcy assistance to an assisted person must use “debt relief agency” in their advertising.³²⁴

This new label lumps consumer bankruptcy attorneys together with bankruptcy petition preparers (“a person, other than an attorney” or an employee of an attorney “who prepares for compensation a document for filing”³²⁵), unlicensed individuals targeted with strict regulation in 1994.³²⁶ In so doing, the label diminishes the attorney’s professional cachet, earned through extensive specialized education, screening, and licensing, and masks the proud historical tradition of persons with specialized knowledge and training who provide confidential, zealous, and conflict-free representation to persons in need of help. The label also dehumanizes attorneys by conveying an impression of assistance from an organization rather than assistance from an individual, much as we would dehumanize doctors by calling them

321. *Id.* § 226(a)(1) (adding § 101(3) to the Bankruptcy Code).

322. *Id.* § 226(a)(2) (adding § 101(4A) to the Bankruptcy Code).

323. The reference to “attorney” in the title of a notice that debt relief agencies will be required to provide to assisted persons makes this point abundantly clear. The title of the notice must read: “IMPORTANT INFORMATION ABOUT BANKRUPTCY ASSISTANCE SERVICES FROM AN ATTORNEY OR BANKRUPTCY PETITION PREPARER.” *Id.* § 228(a) (adding § 527(b) to the Bankruptcy Code). The Act also provides that nothing in the regulation of debt relief agencies shall be deemed to limit or curtail the authority or ability of a state or instrumentality thereof or federal court “to determine and enforce qualifications for the practice of law.” *Id.* § 227(a) (adding § 526(d)(2) to the Bankruptcy Code). On the effective date of the Act, Chief Judge Lamar W. Davis of the Bankruptcy Court for the Southern District of Georgia issued a General Order, absent a case or controversy, concluding that the phrase “debt relief agencies” does not include attorneys and ruling that attorneys regularly admitted to the Bar of his Court or admitted pro hac vice are not covered by the provisions of the Bankruptcy Code regulating debt relief agencies “so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise.” *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005). This extraordinary order – the judicial equivalent of “take that!” – came too late for an evaluation or response in this Article.

324. *See infra* pp. 323-24.

325. 11 U.S.C. § 110(a)(1) (2000).

326. *Id.* (added by The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 308(a), 108 Stat. 4106 (1994)).

“pain and illness relief agencies” or dehumanize priests, rabbis, or other spiritual leaders by calling them “faith agencies.”

The label also may misdirect debtors. While consumer bankruptcy attorneys who advertise must use the label in their advertising, and while such advertising must state that the debt relief agency provides bankruptcy relief,³²⁷ the advertising need not state that the service provider is an attorney. Some debtors, therefore, quite naturally may believe that the advertiser provides credit counseling. Such a debtor may reach a consumer bankruptcy attorney or bankruptcy petition preparer instead and, contrary to the purpose of some of the Act’s consumer bankruptcy reforms, be enticed or persuaded to pursue bankruptcy relief that he or she otherwise might not have considered.

1. *Restrictions on advice*

Heightened regulation of consumer bankruptcy attorneys reflects a congressional conclusion that consumer bankruptcy attorneys contribute to a surfeit of consumer bankruptcy filings and that state regulation of the practice of law through rules of ethics and malpractice liability is insufficient to curb the perceived excess.³²⁸ Nonetheless, some of the Act’s restrictions on attorney behavior largely mimic extant rules of ethics or standards of reasonable care. The Act’s regulations, in new section 526(a) of the Bankruptcy Code, provide that a debt relief agency shall not misrepresent the nature of the services that it will provide,³²⁹ fail to perform promised services,³³⁰ counsel any assisted or prospective assisted person to make an untrue or misleading statement “in a document filed in a case or proceeding under” the Bankruptcy Code,³³¹ or misrepresent, either affirmatively or by

327. See *infra* note 362 and accompanying text.

328. Note, however, that the new regulation of debt relief agencies is not to “annul, alter, affect, or exempt any person” from state law regulation, except to the extent that state law is inconsistent with the new federal regulation. BAPCP Act, *supra* note 320, § 227(a) (adding § 526(d)(1) to the Bankruptcy Code).

329. *Id.* § 227(a) (adding § 526(a)(3)(A) to the Bankruptcy Code).

330. *Id.* (adding § 526(a)(1) to the Bankruptcy Code). For a rule of ethics that reaches the same conduct, see, for example, MODEL RULES OF PROF’L CONDUCT R. 1.3 (2003), which states that “[a] lawyer shall act with reasonable diligence and promptness in representing a client,” elaborated in Comment 4 to the Rule as “carry through to conclusion all matters undertaken for a client.” *Id.* R. 1.3 cmt. 4.

331. BAPCP Act, *supra* note 320, § 227(a) (adding § 526(a)(2) to the Bankruptcy Code). For a rule of ethics that reaches the same conduct, see, for example, MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2003), which states that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent” Section 526(a)(2) would reach slightly further because it also applies to statements in documents that the attorney *should have* known through the exercise of reasonable care to be untrue or misleading. BAPCP Act, *supra* note 320, § 227(n) (adding § 526(a)(2) to the Bankruptcy Code).

material omission, the benefits and risks of becoming a debtor under the Bankruptcy Code.³³²

Another of the Act's regulations goes well beyond rules of ethics and standards of reasonable care. An attorney may not "advise an assisted or prospective assisted person to incur more debt" either in contemplation of filing a case under the Bankruptcy Code or for the purpose of paying the attorney for bankruptcy services.³³³ In part, this prohibition, if constitutional and enforceable, will inhibit one type of pre-petition planning - - incurring additional secured debt to be reaffirmed post-petition - - that could save a debtor from the presumption of abuse under the means test by increasing the debtor's presumed monthly expenses.³³⁴ Thus, for example, the prohibition prevents an attorney from advising a client to incur secured debt through a pre-petition installment purchase of a vehicle in contemplation of bankruptcy.³³⁵ This prohibition raises significant First Amendment issues.³³⁶

Most legal advice from an attorney to a client likely enjoys First Amendment protection. While not the explicit holding of any decision of the Supreme Court of the United States, this conclusion is implicit in many of its decisions concerning attorneys speaking in a professional capacity. The Court has protected some commercial speech of attorneys designed to attract clients,³³⁷ extrajudicial public state-

332. BAPCP Act, *supra* note 320, § 227(a)(B) (adding § 526(a)(3) to the Bankruptcy Code). For a rule of ethics that reaches the same conduct, see, for example, MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2003), which states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

333. BAPCP Act, *supra* note 320, § 227(a) (adding § 526(a)(4) to the Bankruptcy Code).

334. *See supra* pp. 284-85.

335. Although the prohibition applies to an attorney's advice to incur any debt, whether secured or unsecured, there is less reason to be concerned about the likelihood of an attorney giving a debtor advice to incur unsecured debt unless the client would otherwise have difficulty paying for the attorney's bankruptcy services. If a client incurs unsecured debt, in contemplation of bankruptcy, with no intent to repay the debt incurred, the creditor may request a determination that the debt is not dischargeable. 11 U.S.C. § 523(a)(2), (c) (2000). An attorney giving advice to incur debt in those circumstances would be committing malpractice and is therefore unlikely to give such advice in any event. I discuss an attorney's advice to incur debt for the purpose of paying for the attorney's bankruptcy services *infra* pp. 321-23.

336. In addition to the First Amendment analysis explored in the text, if a law is unclear about what speech it restricts, the law will be invalidated if it is vague. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1347-50 (15th ed. 2004).

337. On several occasions the Court has applied the First Amendment to state bar disciplinary rules restricting advertising and solicitation by attorneys. *E.g.*, Florida Bar v. Went For It, Inc., 515 U.S. 618, 623 (1995). In sweeping dictum in this commercial speech case, the Court stated "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Id.* at 637. In this and others of its attorney

ments on behalf of clients that are not substantially likely to prejudice an adjudicative proceeding,³³⁸ and attorney solicitations encouraging potential clients to express personal political beliefs or advance civil liberties objectives through litigation.³³⁹ Yet some legal advice to a client, like other forms of speech such as fighting words, obscenity, or inaccurate commercial speech, may lie outside the ambit of First Amendment protection or may command less rigorous First Amendment scrutiny.³⁴⁰ Neither Supreme Court precedent nor First Amendment theory tells us, however, whether or to what extent the First Amendment protects attorney advice that would facilitate a debtor's evasion of the means-test presumption of abuse.³⁴¹

As a starting point, we might assume that the First Amendment does not protect an attorney's advice to a client that the client engage

commercial speech cases, the Court has applied intermediate scrutiny as originally articulated in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

338. *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

339. *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

340. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (inaccurate commercial speech).

341. Recent First Amendment scholarship identifies the broad theoretical difficulties attending the question. "Current First Amendment analysis lacks a coherent view of speech in the professions." Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 772 (1999). "Despite the century-old recognition of the regulation of professions, we still have . . . no paradigm for the First Amendment rights of attorneys, physicians, or financial advisers when they communicate with their clients." *Id.* at 772. Frederick Schauer identifies the variety of types of speech considered to be beyond the boundaries of First Amendment protection, including those where "boundary disputes have largely been invisible." Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004). These include "content-based restrictions in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the law of fraud, conspiracy law, the law of evidence," and "almost all of the regulation of professionals." *Id.* at 1768, 1784. He argues that "the boundaries of the First Amendment . . . turn out to be a function of a complex and seemingly serendipitous array of factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals of the First Amendment." *Id.* at 1768. In discussing and rejecting the "speech/conduct" distinction in First Amendment jurisprudence, Eugene Volokh suggests that professional licensing requirements and bans on seemingly unsound advice by an attorney may be constitutionally permissible but that broader bans on professional advice may not be constitutionally permissible. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1343-46 (2005). We should distinguish First Amendment analysis of restrictions on the content of an attorney's advice from First Amendment analysis of licensing restrictions that prevent all but attorneys from giving legal advice. For discussion of the latter, see Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000).

in conduct that is either criminal or fraudulent,³⁴² although some lower court authority might suggest the contrary.³⁴³ On that assumption, if advice to incur secured debt in contemplation of bankruptcy amounts to advice to engage in conduct that is criminal or fraudulent,

342. Justice O'Connor has stated as much: "Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1081-82 (1991) (O'Connor, J., concurring). State ethical rules governing attorneys prohibit them from advising clients to engage in conduct that is criminal or fraudulent. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003).

343. The Ninth Circuit Court of Appeals found a First Amendment violation in a federal policy calling for revocation of a physician's registration to prescribe controlled substances if the physician recommended to a patient the medical, although unlawful, use of marijuana. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), *cert denied*, 540 U.S. 946 (2003). The court held that the physician's recommendation alone, without the requisite elements of conspiracy or aiding and abetting, cannot be the subject of government action because it would "strike at core First Amendment interests of doctors and patients." *Id.* at 635-36. "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." *Id.* at 636. Even were the Supreme Court of the United States to agree, it might distinguish (and decline to extend First Amendment protection to) an attorney's recommendation to engage in criminal conduct from a physician's recommendation to engage in criminal conduct because an attorney's professionally prescribed responsibility to zealously represent a client must be exercised within the bounds of the law whereas the physician's exclusive professionally prescribed responsibility is to the health of a patient.

In two relatively recent federal district court cases, the United States Justice Department conceded the unconstitutionality of a prohibition in another federal statute analogous to the Act's prohibition of an attorney's advice to incur debt in contemplation of bankruptcy. Each case involved a challenge to a provision of the Balanced Budget Act of 1997 that made it a misdemeanor to knowingly and willfully counsel another to dispose of assets in order to thereafter become eligible for Medicaid. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4734, 111 Stat. 251, 522-23. In one case the court presumed but did not discuss the reasons for finding a First Amendment violation. *New York State Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998). In the other the court did not discuss the First Amendment issue at all. *Magee v. United States*, 93 F. Supp. 2d 161 (D.R.I. 2000). The Justice Department's concession in each case was based at least in part upon a memorandum prepared by the Congressional Research Service that stated the following: "To the extent that the provision would prohibit counseling about legal activities, a court would seem likely to declare it unconstitutional." Congressional Research Service Memorandum, Proposed Amendment of Section 217 of P.L. 104-193; Criminalizing Certain Transfers of Assets to Become Eligible for Medicaid, at 2, July 11, 1997 (copy on file with author). The memorandum did not cite any cases analyzing the precise First Amendment issue. The memorandum concluded "a prohibition of counseling about legal activities would be a content-based restriction on speech, and, as such, would be subject to strict scrutiny under the First Amendment, which means that it would be upheld only if it is necessary 'to promote a compelling state interest,' and is 'the least restrictive means to further the articulated interest.'" *Id.* The memorandum also concluded that the prohibition would not be subject to the lower degree of First Amendment protection afforded to commercial speech because the attorney's advice, while given for a fee, does not propose a commercial transaction and is therefore not commercial speech. *Id.* The memorandum also distinguished "speech . . . used as an integral part of conduct in violation of a valid criminal statute." *Id.* Neither the memorandum nor the cases considered whether disposition of assets in order to qualify for Medicaid would be fraudulent and whether the First Amendment might tolerate prohibition of an attorney's advice to engage in fraudulent conduct.

the Act's prohibition on such advice would be constitutionally permissible. Yet to incur secured debt in contemplation of bankruptcy is not a crime.³⁴⁴ Nor is it common law fraud, which requires some misrepresentation, concealment, or non-disclosure.³⁴⁵ The debtor cannot misrepresent, conceal, or fail to disclose secured debt incurred prior to bankruptcy (unless entirely paid before bankruptcy and thus irrelevant) because the debtor must truthfully describe it in Schedule D filed with the petition.³⁴⁶ It might be a fraudulent conveyance, however, on the theory that the debtor would be incurring a secured obligation with actual intent to hinder unsecured creditors of the debtor by seeking to avoid the presumption of abuse under the means test.³⁴⁷ Yet in many decisions rendered in the seemingly analogous context of pre-petition exemption planning, bankruptcy courts have declined to find intent to defraud unsecured creditors simply from the fact that the debtor deliberately converted non-exempt property to exempt property pre-petition for the purpose of reducing or eliminating creditor recovery in bankruptcy.³⁴⁸ Were courts to reach the same conclusion with respect to a debtor's assumption of secured debt in contemplation of bankruptcy, an attorney's advice to incur such debt would not be advice to engage in conduct that is fraudulent and our postulated exception to First Amendment protection of an attorney's advice would not apply.

The Act's prohibition of an attorney's advice to incur debt in contemplation of bankruptcy could survive First Amendment scrutiny then only were we to hypothesize some as yet unarticulated exception to the First Amendment, such as one permitting the prohibition of legal advice given to assist a client's evasion of consequences implicit in, or perhaps clearly stated in, legislation (e.g. advice given to avoid the means-test presumption of abuse). Yet such an exception to First Amendment protection of an attorney's legal advice would sanction

344. Bankruptcy fraud is a federal crime. 18 U.S.C. § 157 (2000). Bankruptcy fraud requires that the "debtor devise or intend to devise a scheme or artifice to defraud" and, inter alia, files a petition under title 11 "for the purpose of executing or concealing such a scheme or artifice or attempting to do so." *Id.* Whether the attorney's advice to incur debt in contemplation of bankruptcy is advice to commit bankruptcy fraud depends, therefore, upon whether incurring debt in contemplation of bankruptcy is part of a scheme or artifice to defraud, a question to which the text now turns. If the behavior is not part of a scheme or artifice to defraud, it can't be criminal. If it is part of a scheme or artifice to defraud, under the analysis suggested in the text, the fact that it is also criminal would be moot because the attorney's advice could constitutionally be banned if the behavior of the client is either criminal or fraudulent.

345. RESTATEMENT (SECOND) OF CONTRACTS §§ 159-62 (1981).

346. RULES AND FORMS OF PRACTICE AND P. IN BANKR., Rule 1007(b)(1), Official Form 6; 11 U.S.C. § 548(a)(1)(A) (2000).

347. UNIF. FRAUDULENT TRANSFER ACT §4(a)(1) (1984).

348. See *supra* note 189 and accompanying text.

prohibitions striking at core functions of attorneys, tax planning advice for example, long accorded legitimacy by the Court.³⁴⁹

Moreover, unless narrowly construed to apply only to advice given with that motive, the prohibition would be subject to attack under the First Amendment's overbreadth doctrine.³⁵⁰ Surely there will be instances involving neither fraud nor intent to evade a presumption of abuse in which advice to incur debt in contemplation of bankruptcy will be appropriate. Consider two examples. A client struggling with hefty mortgage payments on a fifteen-year mortgage might wish to employ Chapter 13 to address her overall financial difficulties. To facilitate a feasible plan and to respond to the client's desire to pay a significant sum to unsecured creditors, the attorney might suggest that the client generate additional disposable income by refinancing the mortgage (which will incur new debt) with a longer-term mortgage (at the same time discussing disadvantages of that option with the client). Another client, safe from the means-test presumption of abuse in part by virtue of large monthly payments on an expensive late-model automobile, might be exposed on account of those payments to possible dismissal of a Chapter 7 petition under the court's reserved power to dismiss for abuse based on the totality of the debtor's financial circumstances.³⁵¹ Searching for an appropriate strategy to lessen that risk, the attorney might wish to advise the sale of the expensive late-model automobile and the credit purchase of a less expensive automobile (assuming either that the client would still be safe from the means-test presumption of abuse with lower monthly automobile payments or that the client might be able to overcome the means-test presumption of abuse resulting from lower automobile payments and greater putative disposable income). The Act's prohibition, literally read, applies to the advice in both instances, but without any justification that would save it under the First Amendment.

Even if constitutional, the prohibition on advising a client to incur debt in contemplation of bankruptcy nevertheless may be ineffectual. The statutory language does not prohibit the attorney from truthfully responding to a question from the debtor about the impact of new debt (e.g. "What if I buy a new car on credit?"), and a court probably would

349. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935); *Superior Oil Co. v. Mississippi ex rel. Knox*, 280 U.S. 390, 395-96 (1930); *United States v. Isham*, 84 U.S. (17 Wall.) 496, 506 (1873).

350. The First Amendment overbreadth doctrine permits a litigant to challenge the constitutionality of a statute on its face, not just as applied, for an unnecessarily broad reach into the area of protected expression. The litigant challenging the statute need not be harmed by the speech infringement, and if the litigant prevails, the court invalidates the entire statute even if the law as applied in some contexts would be constitutional. See generally SULLIVAN & GUNTHER, *supra* note 336, at 1334-47.

351. See *supra* note 174 and accompanying text.

not infer such a prohibition given the prevailing ethical rule that an attorney may discuss the legal consequences of any proposed course of conduct with a client even though the attorney may not suggest that the client engage in criminal or fraudulent conduct.³⁵² Nor would the statutory language seem to prevent the attorney from volunteering an explanation of how the means test works. In fact, another part of the legislation *requires* that the attorney furnish the client with “reasonably sufficient information (which shall be provided in a clear and conspicuous manner) . . . on how to provide all the information . . . required . . . pursuant to section 521, including—the amounts specified in section 707(b)(2).”³⁵³ (Recall that the amounts specified in section 707(b)(2) include the amount of secured debt and the amount of imputed disposable income.) As a consequence, debtors whose income triggers the means test but who are sufficiently astute or tactical, that is, some of the very debtors at whom much of the consumer bankruptcy reform was targeted, may be among the most successful in evading the presumption of abuse. Debtors who read and rely on self-help publications, either in preparation for seeing an attorney or in connection with self-representation, also may be more successful than others in evading the presumption of abuse by incurring additional secured debt because, in what would seem to be deference to First Amendment concerns, the Act excludes authors, publishers, distributors, or sellers of works subject to copyright protection, when acting in that capacity, from the definition of debt relief agency.³⁵⁴ The Act therefore does not prohibit such entities from giving advice to incur debt in contemplation of bankruptcy, elevating the sanctity of speech that gives general advice above the value of professional speech directed to the specific circumstances of a particular client.

An attorney’s violation of the prohibition on advice to incur debt in contemplation of bankruptcy also will be difficult to detect. If the debtor disregards the advice, nothing in the debtor’s schedules will suggest to other actors in the system that they should inquire about the attorney’s advice. If the debtor follows the advice, the reflection of recently incurred debt on the debtor’s schedules would alert other actors in the system, but inquiry about the attorney’s advice likely would be stymied by the attorney-client privilege, unless the debtor waives the privilege.³⁵⁵ Waiver of the privilege would be against the

352. *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2003).

353. BAPCP Act, *supra* note 320, § 228 (adding § 527(c) to the Bankruptcy Code).

354. *Id.* § 226(a) (adding § 101(12A)(E) to the Bankruptcy Code).

355. The Federal Rules of Evidence apply to bankruptcy cases. FED. R. BANKR. P. 9017; FED. R. EVID. 1101(b). Under the Federal Rules of Evidence, the attorney-client privilege is a creature of federal common law. FED. R. EVID. 501. The privilege protects both “confidential disclosures made by a client to an attorney in order to obtain legal

debtor's interest, and thus unlikely, because testimony about the reason for incurring debt might support a motion to dismiss either under the means test (the court deciding to ignore the newly incurred debt in determining imputed disposable income) or on the ground that the petition was filed in bad faith.³⁵⁶

As previously noted, the Act also prohibits the attorney from advising an assisted or prospective assisted person "to incur more debt . . . to pay an attorney . . . for services performed as part of preparing for or representing a debtor in a case under . . . [the Bankruptcy Code]."³⁵⁷ Thus, in addition to making Chapter 7 more complex and thus more difficult for consumer debtors to use without legal representation, this provision of the Act also makes it more difficult for cash-strapped consumer debtors to timely obtain legal representation. This prohibition also raises First Amendment concerns. An unknown number of consumer debtors considering bankruptcy relief lack funds sufficient to pay the full amount of an attorney's fee prior to the filing of a petition. Consumer bankruptcy attorneys have pursued different approaches to this problem in consumer Chapter 7

advice as well as an attorney's advice in response to the disclosures." *E.g.*, *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997). The privilege is unavailable if the client seeks or obtains the services of the attorney for the purpose of enabling fraud. *E.g.*, CAL. EVID. Code § 956 (West 1995). *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985), held "the trustee of a corporation in bankruptcy has the power to waive the attorney-client privilege with respect to pre-bankruptcy communications" between corporate management (on behalf of the corporation) and the corporation's attorney. *Weintraub*, 471 U.S. at 358. The Court reserved the question of whether an individual's trustee in bankruptcy has the same power in the following language:

[R]espondents maintain that the result we reach today would also apply to *individuals* in bankruptcy, a result that respondents find "unpalatable." . . . But our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case. As we have stated, a corporation, as an inanimate entity, must act through agents When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contrast, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be under some theory different from the one that we embrace in this case.

Id. at 356-57.

356. Whether incurring additional debt solely for the purpose of passing the means test would justify dismissal of the case under either of these theories is a nice question. The Bankruptcy Code does not prohibit the debtor from incurring debt pre-petition, although debt incurred in contemplation of bankruptcy with no intent to repay would be non-dischargeable.

357. BAPCP Act, *supra* note 320, § 227(a) (adding § 526(a)(4) to the Bankruptcy Code).

cases.³⁵⁸ Some attorneys have extended partial fee credit to the client with the expectation that the client pay the attorney post-petition.³⁵⁹ Other attorneys, insisting on payment of legal fees in full prior to filing a petition for the client, have suggested that the client borrow the necessary funds from a friend or relative or suggested that the client save and earmark funds that the client might otherwise have paid to existing unsecured creditors. Perhaps some have suggested that the client incur a cash advance on a credit card to fund payment of the attorney's fees.

The prohibition on an attorney's advice to incur debt to fund bankruptcy legal services can be read to extend to all of these approaches. It clearly applies to advice that a client seek a cash advance on a credit card. If limited to that advice, the prohibition might survive First Amendment scrutiny under our postulated exception for ad-

358. Two student notes survey attorney-fee arrangements in consumer Chapter 7 cases and the judicial responses to those arrangements. Kerry Haydel Ducey, Note, *Bankruptcy, Just For the Rich? An Analysis of Popular Fee Arrangements for Pre-petition Legal Fees and a Call to Amend*, 54 VAND. L. REV. 1665 (2001); Joshua D. Morse, Comment, *Public Policy is Never a Substitute for Statutory Clarity: Rejecting the Notion That Pre-Petition Attorney-Fee Debts Are Dischargeable in Chapter 7 Bankruptcies*, 40 SANTA CLARA L. REV. 575 (2000).

359. The attorney's extension of fee credit in a Chapter 7 case poses a clear conflict of interest, permissible only if the attorney advises the client that the debt to the attorney will be discharged in the Chapter 7 and need not be repaid. The Sixth Circuit Court of Appeals is the most recent of four circuit courts to have held unpaid pre-petition attorneys' fees dischargeable in bankruptcy. *Rittenhouse v. Eisen*, 404 F.3d 395 (6th Cir. 2005). In addition, if the attorney takes any act to collect the unpaid fees post-petition as a personal liability of the debtor, the attorney violates either the automatic stay or the discharge injunction. To avoid that problem, the attorney may secure the debt pre-petition such as with a security interest in a debtor's expected income tax refund.

Consumer bankruptcy attorneys customarily extend fee credit in Chapter 13 cases and collect those fees from plan payments. While the prohibition against advice to incur additional debt to pay for bankruptcy assistance can be read to prohibit attorneys from advising Chapter 13 clients about this customary practice, Congress could not have intended that result. First, the Act leaves intact provisions in the Bankruptcy Code that treat compensation to a debtor's Chapter 13 attorney as a priority administrative expense that a Chapter 13 plan must pay in full. The Bankruptcy Code requires that a Chapter 13 plan provide for full payment of all claims entitled to priority under § 507. 11 U.S.C. § 1322(a)(2) (2000). Section 507 provides for priority of administrative expenses that are allowed under section 503(b). *Id.* § 507(a)(1). Under § 503(b)(2), compensation awarded under § 330(a) is an allowed administrative expense. *Id.* § 503(b)(2). Such compensation includes compensation to a debtor's Chapter 13 attorney. *Id.* § 330(a)(4)(B). Second, the Act also leaves intact a rule of bankruptcy procedure that permits a cash-strapped debtor to pay bankruptcy petition filing fees in installments following the filing of the petition but requires that such fees be fully paid before the debtor or a Chapter 13 trustee may pay an attorney who renders services to the debtor in connection with the case. FED. R. BANKR. P. 1006(b). Both the Bankruptcy Code provision concerning Chapter 13 compensation for attorneys and this rule of bankruptcy procedure presume that attorneys in Chapter 13 cases may extend fee credit. Surely, therefore, the attorney would not be prohibited from advising the client about such fee credit.

vice to engage in conduct that is fraudulent if, as a result of the advice, the client incurs such a debt with no intention of repayment post-petition.³⁶⁰ Much more dubious, however, is the constitutionality of prohibiting legal advice to pursue one of the other approaches because any such advice does not suggest fraudulent conduct by the client. If the attorney extends fee credit, or if the client borrows from a friend or relative, both attorney and client expect that the client will voluntarily repay the discharged debt. If the client delays filing of the petition and in the meantime earmarks for the attorney funds that the client otherwise might have paid to an unsecured creditor (which incurs new debt by virtue of interest and late fees), the creditor is no worse off than had the client filed the petition earlier. Other than the possibility of fraud in the one case, there doesn't seem to be any other legitimate reason for denying First Amendment protection to speech by an attorney that suggests how a client can obtain and pay for bankruptcy legal representation. Accordingly, unless narrowly construed to apply only to such a case, the entire prohibition might be struck under the First Amendment overbreadth doctrine.³⁶¹

2. Advertising

Under new section 528 of the Bankruptcy Code, consumer bankruptcy attorneys (as debt relief agencies) must include specified language in some advertising that is directed to the general public. If an attorney advertises bankruptcy assistance services, the benefits of bankruptcy (including Chapter 13, whether or not Chapter 13 is mentioned), or assistance with respect to "credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt," then the advertisement must clearly and conspicuously disclose "that the assistance may involve bankruptcy relief" under the Bankruptcy Code.³⁶² The advertising also must include the following (or substantially similar) statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code."³⁶³ As a result, some attorneys who re-

360. The credit card issuer can contest the dischargeability of the claim arising from the cash advance by alleging that the advance was incurred with no intention of repayment. 11 U.S.C. § 523(a)(2) (2000). In doing so, the creditor may draw upon a presumption of non-dischargeability if the cash advance is incurred within seventy days before the order for relief and exceeds \$750. BAPCP Act, *supra* note 320, § 310 (amending § 523(a)(2)(C) of the Bankruptcy Code). But the cost and problems of proof associated with that remedy make it imperfect. Congress might have addressed this specific problem with a much narrower and likely more effective solution: make claims for cash advances to pay for bankruptcy legal services per se non-dischargeable.

361. See *supra* note 350 and accompanying text.

362. BAPCP Act, *supra* note 320, § 229(a) (adding § 528(b)(2) to the Bankruptcy Code).

363. *Id.*

present individuals filing bankruptcy as well as creditors may feel compelled to abandon advertising of bankruptcy assistance services or eliminate their consumer bankruptcy practice for fear of alienating creditor clients.

Congress may intend this required language in advertising to curb instances of perceived abusive, or at least opportunistic, marketing practices by some consumer bankruptcy attorneys.³⁶⁴ Advertising that does not mention bankruptcy, for example, may lure some clients interested in a non-bankruptcy workout to an attorney who then persuades or pressures the client to file bankruptcy - - a kind of bait and switch.³⁶⁵ Ironically, this rationale for the required language in advertising undercuts the argument that consumer bankruptcy has lost its shame or stigma.³⁶⁶ Bankruptcy must still retain shame or stigma for some individuals if consumer bankruptcy attorneys lure them by avoiding mention of bankruptcy.

The Act's requirement to include specified language in advertising probably does not abridge free speech rights, but resolution of this First Amendment issue is not entirely free from doubt. Advertising of bankruptcy services is commercial speech. If misleading, commercial speech is not subject to any First Amendment protection.³⁶⁷ Even if not misleading, commercial speech may be regulated if the regulation directly advances a substantial governmental interest through means not more extensive than necessary to serve the interest.³⁶⁸ The Supreme Court of the United States has described this formulation as "intermediate scrutiny," emphasized its application to attorney advertising, and refined it to require that the regulation directly and materially advance the governmental interest and be narrowly drawn.³⁶⁹

364. Testimony in 1998 congressional hearings claimed such abuse. *Bankruptcy Reform Act of 1998 Part I: Hearing on H.R. 3150 Before the House Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 105th Cong., Pt. I at 61, 63 (1998) [hereinafter *Hearings Part I*] (prepared statement of John J. Gleason, Vice President of Credit, Bon-Ton Department Stores); *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998 Part II: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the House Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 105th Cong., Pt. II, at 58, 59 (1998) (prepared statement of George J. Wallace, Esq., Eckert Seamons Cherin & Elliott, LLC).

365. As suggested in Gary Neustadter, *When Attorney and Client Meet: Observations of Interviewing and Counseling in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 187-88, 239-40 (1986), a non-bankruptcy workout in a consumer context using the services of an attorney is inefficient and rare. Thus, what some might characterize as pressure to file bankruptcy might also or instead be a dose of realism.

366. This argument is identified *supra* note 8 and accompanying text.

367. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

368. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

369. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

Judicial scrutiny of a mandate to disclose commercial information (as distinguished from a prohibition or restriction upon commercial speech) is yet further relaxed. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,³⁷⁰ the Supreme Court upheld against a First Amendment challenge an Ohio State Bar Disciplinary Rule requiring that an attorney advertising his or her availability on a contingent fee basis disclose that clients would have to pay costs even if their lawsuits were unsuccessful (assuming clients would be so liable).³⁷¹ “Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.”³⁷² Accordingly, “an advertiser’s [First Amendment] rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”³⁷³ The Disciplinary Rule in question passed muster under that standard, the court concluded, because the State could reasonably conclude that potential contingent fee clients could be misled by advertising that failed to include the required language,³⁷⁴ and because the record did not provide any factual basis for concluding that the disclosure requirement was unduly burdensome.³⁷⁵

Nine years later, in *Ibanez v. Florida Dep’t of Business & Professional Regulation, Board of Accountancy*,³⁷⁶ the Supreme Court again spoke to the First Amendment implications of required language in advertising. The Florida Board of Accountancy had disciplined a Florida certified public accountant who was also a Florida attorney for identifying herself under the attorneys’ listings in the telephone directory as “IBANEZ SILVIA S CPA CFP.” Among other things, the Board contended that use of “CFP” (meaning Certified Financial Planner) was misleading or potentially misleading because it incorrectly suggested state approval and recognition. The Court concluded that the Board had failed to demonstrate that the use of “CFP” was misleading³⁷⁷ and therefore failed to meet the constitutional burden for a total ban on use of “CFP.” The Court also concluded that the Board

370. 471 U.S. 626 (1985).

371. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

372. *Zauderer*, 471 U.S. at 651.

373. *Id.* at 651.

374. *Id.* at 652-53.

375. *Id.* at 653 n.15.

376. 512 U.S. 136 (1994).

377. *Ibanez v. Florida Dep’t of Bus. & Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 144-45 (1994).

had failed to demonstrate that the use of “CFP” was potentially misleading.³⁷⁸ Accordingly, the Board could not justify *any* measure to prevent deception or confusion. The Court intimated in dictum, however, that on a different record demonstrating a potential to mislead (and thus justifying some regulation of commercial speech) it still might not countenance another Board regulation that required a disclaimer in any advertising by a CPA that uses language suggesting specialization. The regulation required that such a disclaimer “state that the recognizing agency is not affiliated with or sanctioned by the state or federal government,’ and . . . must set out the recognizing agency’s ‘requirements for recognition, including, but not limited to, education, experience[,] and testing.’”³⁷⁹ After reiterating the admonition expressed in *Zauderer* that unduly burdensome disclosure requirements would offend the First Amendment, the Court noted that such a detailed disclaimer would effectively preclude use of the word “specialist” on letterhead, “on a business card, or in a yellow pages listing.”³⁸⁰

Thereafter, in *Borgner v. Brooks*,³⁸¹ the Eleventh Circuit upheld against a First Amendment challenge a Florida statute requiring that Florida-licensed dentists advertising a specialty practice or credential accredited by a bona fide credentialing organization other than the American Dental Association or the Florida Board of Dentistry disclose in the advertisement that the indicated specialty or credentialing organization was not state-approved. The Court credited a survey demonstrating that consumers might be misled to their detriment absent the disclosure³⁸² and found the disclosure requirement “not . . . especially long or burdensome, but simply an effective manner to convey necessary information to the public.”³⁸³ The court distinguished the lengthier and more complex disclaimer discussed in *Ibanez*; this disclaimer did not require dentists to identify the requirements, such as a dentist’s education, experience, and testing, imposed by a credentialing organization as a condition to issuing a credential.³⁸⁴

Required language in advertising by consumer bankruptcy attorneys will be constitutional, then, if the government could reasonably conclude that advertising without the disclosure is potentially misleading, that the required language is reasonably directed toward les-

378. *Ibanez*, 512 U.S. at 146.

379. *Id.* at 146.

380. *Id.* at 146-47.

381. 284 F.3d 1204 (11th Cir. 2002), *cert. denied*, 537 U.S. 1080 (2002).

382. *Borgner v. Brooks*, 284 F.3d 1204, 1211-13 (11th Cir. 2002).

383. *Borgner*, 284 F.3d at 1215.

384. *Id.* at 1215.

sening the potential for deception, and that the required language does not unduly burden consumer bankruptcy attorneys.

Courts have alternatively relied on logic or surveys in concluding that a governmental authority could reasonably have found advertising to be potentially misleading. In *Zauderer*, the Supreme Court found one of the State's claims of potential deception "self-evident" and therefore reasonable even without supporting survey data.³⁸⁵ In that case, the attorney's advertisement of contingent fee representation for women injured by use of the Dalkon Shield Intrauterine Device stated that "if there is no recovery, no legal fees are owed by our clients."³⁸⁶ It did not mention the distinction between the attorney's fees and litigation costs and did not mention that a client might have to pay litigation costs if the client were unsuccessful in pursuing his or her claim. The Court found to be obvious that some members of the public could be misled into thinking that retaining the attorney would be a no-lose proposition.³⁸⁷ In contrast, in *Ibanez*, the Court did not find self-evident the assertion by the Florida Board of Accountancy that an attorney's use of the designation "CFP" was potentially misleading. It therefore was unwilling in that case to accept the Board's bare assertion as sufficient to meet the government's burden of demonstrating that the advertising was potentially misleading.³⁸⁸ A claim that advertising by consumer bankruptcy attorneys is potentially misleading if it omits mention of bankruptcy appears analogous to the claim that *Zauderer's* advertising of contingent fee representation was potentially misleading in its omission of the client's potential exposure for litigation costs. Both involve a suggestion of a legal solution to a client's problem without mention of information about the solution that would be important to a reasonable person. The Supreme Court might therefore find self-evident the claim that advertising by consumer bankruptcy attorneys is potentially misleading if it fails to mention bankruptcy.

385. *Zauderer*, 471 U.S. at 652-53.

386. *Id.* at 652.

387. *Id.*

388. *Ibanez*, 512 U.S. at 146. The Court's earlier opinion in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), did not quite reach the issue. An attorney had challenged a decision of the Supreme Court of Illinois that had censured him for letterhead that identified his certification by the National Board of Trial Advocacy as a civil trial specialist. The Supreme Court reversed the decision on First Amendment grounds. It first found a complete absence of any evidence of actual deception. *Peel*, 456 U.S. 91, 98 (1990). It then turned to the question of potential deception. Without addressing whether or how the state's attorney registration and disciplinary commission might have demonstrated potential deception, it concluded that the rule restricting the attorney's advertising was "broader than reasonably necessary to prevent the perceived evil (internal quotation marks omitted)." *Id.* at 107.

The government must adduce evidence to shoulder its burden if the claim is not self-evident. In *Borgner*, the Eleventh Circuit credited two surveys conducted by the Florida Board of Dentistry demonstrating that consumers seeing advertising of a dental specialty practice might incorrectly believe that the practice was state-certified.³⁸⁹ I am unaware of any survey data on which the United States could rely in claiming that advertising by consumer bankruptcy attorneys that fails to mention bankruptcy relief is potentially misleading. But the government could adduce assertions to that effect made in testimony before Congress³⁹⁰ and likely also could adduce anecdotal evidence to the same effect.³⁹¹ In a slightly different context, the Supreme Court has suggested that anecdotes might suffice.³⁹²

If the government can sustain its burden of demonstrating that consumer bankruptcy advertising that omits reference to bankruptcy is potentially misleading, it must also demonstrate that the required language is reasonably directed toward lessening the potential deception. Surely it can do so. The required language³⁹³ clearly and simply identifies the potential for relief under the Bankruptcy Code. Reading the required language, no one could reasonably think otherwise. *Ipsa facto* the required language is reasonably directed toward lessening the potential for deception.

Finally, the government must demonstrate that the required language in advertising, which must be clear and conspicuous,³⁹⁴ does not unduly burden consumer bankruptcy attorneys. The required lan-

389. *Borgner*, 284 F.3d at 1211-13.

390. See *supra* note 364 and accompanying text.

391. Cf. *Hearings Part I*, *supra* note 364, at 95 (statement of Nicholl J. Russell) (stating that attorney did not advise him of Chapter 13 or consumer credit counseling alternatives).

392. In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the court considered a First Amendment challenge to a Florida Bar rule prohibiting personal injury attorneys from sending targeted direct-mail solicitations to victims and their relatives for thirty days following an accident or disaster. The Court concluded that the Bar had adequately demonstrated that the rule served a substantial governmental interest. In rejecting concerns voiced by the dissent about survey data on which the Bar had relied, the Court referred to prior cases in which it “permitted litigants to justify speech restrictions by reference to studies and *anecdotes*” (emphasis added). *Id.* at 628.

393. See *supra* note 362 and accompanying text.

394. Neither the Bankruptcy Code nor the Act provides a definition of “conspicuous,” although the Act requires that the Federal Reserve Board promulgate regulations offering guidance on the meaning of “clear and conspicuous” when used in certain provisions of the federal Truth in Lending Act. BAPCP Act, *supra* note 320, § 1309(a). Absent a definition, courts are likely to refer to the definition of “conspicuous” in the Uniform Commercial Code. *Am. Gen. Fin., Inc. v. Bassett*, 285 F.3d 882, 884-85 (9th Cir. 2002) (applying Uniform Commercial Code definition for purposes of provisions in the Bankruptcy Code governing the enforceability of reaffirmation agreements). That definition provides that a term or clause is conspicuous when so written “that a reasonable person against whom it is to operate ought to have noticed it” and gives as examples printed headings in capitals and language in a body of a form that is in larger or other

guage in advertising could impose a burden in two ways. Holding other advertising content and appearance constant, the additional language could increase the cost of the advertising. Alternatively, holding the cost of advertising constant, the additional language could reduce the prominence of or displace other content, thus reducing the competitive benefit of the advertisement to the advertiser. The Supreme Court's cryptic dictum in *Ibanez* implies that both cost and content are relevant.³⁹⁵ Reducing the prominence of or displacing content would also reduce the amount of information available to consumers. In *Ibanez*, the Court did not consider the impact on consumers of less prominent or reduced information, but surely that also should be relevant to a First Amendment analysis.

Attorneys advertise through a variety of media: on television, on radio, in print, and on the Internet. The nature and degree of burden on the attorney for each kind of media will differ. On television, the required language could be supplied by a graphic displayed at the bottom of the screen contemporaneously with the projection of images and voice. It could thus be accomplished without lengthening the advertising spot or accelerating the presentation of images or voice. The only additional cost, therefore, would be the cost of supplying the graphic, relatively trivial in comparison to the cost of the advertising spot. On radio, in contrast, the required language necessarily must be spoken. The advertising spot must therefore be lengthened unless at least some of the remaining message is either deleted or spoken more quickly.

Adding the required language to print or Internet advertising may consume more space and may be more costly unless the advertisement either deletes other information or displays some other information less conspicuously (such as by using smaller font or reducing letters from upper to lower case). Consider advertising by a bankruptcy attorney in the yellow pages of a telephone directory, perhaps the most common form of bankruptcy attorney advertising. SBC's Smart Yellow Pages, for example, offers four relevant types of advertising, grouped by kind of business (e.g. "Attorneys – Bankruptcy

contrasting type or color. U.C.C. § 1-201(10). Whether a term or clause is conspicuous is for decision by the court.

395. See *supra* notes 379-80 and accompanying text. The Court's concern in that case about the impact of a required disclosure on the use of a letterhead or business card is probably not relevant to the disclosure required by the Act because the Act imposes the disclosure requirement only on advertising directed to the general public. BAPCP Act, *supra* note 320, § 229(a) (adding § 528 to the Bankruptcy Code). On the other hand, a business card might be considered advertising directed to the general public if an attorney routinely encloses a business card with a mailing directed to potential clients with the knowledge that many recipients will discard the mailing but keep the business card.

Law”). In order of increasing size or prominence and cost they are listings, in-column space ads, leader ads (in-column space ads that appear immediately below the heading for the relevant category of business), and display ads.³⁹⁶ Listings typically provide only a name, address, and telephone number. As such, they are probably not subject to the Act’s disclosure requirement, although this is not entirely free from doubt.³⁹⁷ The Act’s mandate to disclose will apply, however, to in-column space ads, leader ads, and display ads.³⁹⁸

SBC prices in-column space ads, leader ads, and display ads based on size, color, artwork, background, photographs, and other variables, but not per word.³⁹⁹ Display ads are at least two columns wide and one-quarter of the page in height.⁴⁰⁰ Some consume an entire page.⁴⁰¹ There may be enough blank space in a full-page or half-page display ad to permit the additional language with no change or only minor changes in the remaining copy. Moreover, because SBC does not price the ads based on the number of words, the additional language also would not increase the cost of such an ad. They are expensive,⁴⁰² however, and display ads by consumer bankruptcy at-

396. These types of ads are described on the web site of SBC Smart Yellow Pages, at http://www.sbcsmaryellowpages.com/pages/products/products_yellow.htm#InCOL (last visited Mar. 18, 2005).

397. The Act triggers the mandated disclosure if the advertisement indicates that the attorney provides assistance with respect to credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay a consumer debt. BAPCP Act, *supra* note 320, § 229(a) (adding § 528(b)(2) to the Bankruptcy Code). Unless the attorney adds language to the listing beyond name, address, and telephone number, this trigger will not apply. The Act also requires the mandated disclosure in any advertisement of “bankruptcy assistance services.” *Id.* (adding § 528(b)(1)(A) to the Bankruptcy Code). “Bankruptcy assistance services” include “descriptions of services that provide Chapter 13 relief whether or not the advertisement mentions Chapter 13 statements that could lead a reasonable consumer to believe that the attorney was offering debt counseling when in fact the attorney is only offering to provide services under the Bankruptcy Code.” *Id.* Because the definition of “bankruptcy assistance services” uses the word “include,” the simple listing of an attorney’s name, address, and telephone number in the yellow pages under a heading entitled “Attorneys – Bankruptcy Law” could amount to advertising of bankruptcy assistance services. In the Bankruptcy Code, the use of the word “includes” is not limiting. 11 U.S.C. § 102(3) (2000). If the disclosure requirement applies to listings, attorneys will either have to choose the more expensive in-column space ad or eliminate the listing entirely.

398. *See supra* note 397 and accompanying text.

399. Telephone Interview with SBC advertising sales representative (Mar. 17, 2005).

400. SBC Smart Yellow Pages for Santa Clara and San Jose, California, 132-134 (June 2004).

401. *Id.* at 128, 129.

402. Depending upon style, artwork, and other variables, SBC may charge in the neighborhood of \$4,000/month for a full page ad (discounted if bundled with Internet advertising). Telephone Interview with SBC advertising sales representative (Mar. 17, 2005).

torneys are therefore rare.⁴⁰³ A few consumer bankruptcy attorneys may run large display ads as loss leaders, primarily to generate more lucrative (e.g. Chapter 11) bankruptcy work,⁴⁰⁴ and a few large volume consumer bankruptcy law offices may use them to generate volume sufficient to justify the expense.

To accommodate the required language, conspicuously, in display ads smaller than half a page, or in leader ads or in-column space ads, the attorney almost invariably must either increase the size of the ad, at increased cost,⁴⁰⁵ or omit other potentially valuable information, such as the attorney's educational background, certification, experience, other practice areas, initial consultation fees, email address, web site URL, languages spoken, availability of weekend or evening appointments, or the kinds of problems for which bankruptcy may offer relief (e.g. foreclosure, repossession, garnishment, tax levies).⁴⁰⁶ Some attorneys using these smaller ads may not wish to pay the same amount to convey less information and may not wish to pay more to convey the same information together with the required language. If so, they may stop advertising entirely. Ironically, therefore, the required disclosure may provide large volume law offices (already using large display ads) an unintended, and for many lawmakers likely an undesirable, competitive advantage.

With the barest of guidance from the Supreme Court, it is impossible to predict whether the increased costs associated with advertising in particular media or the less measurable costs attributable to a competitive disadvantage from shrunken or less informative advertising amounts to an "undue burden."⁴⁰⁷ In the meantime, a bankruptcy

403. Of seven display ads in the June 2004 edition of the SBC Smart Yellow Pages for Santa Clara and San Jose, California, none are half or full page, two measure two columns in width by half a page in height, one measures three columns in width by a quarter page in height, and the remaining five measure two columns in width by a quarter page in height. SBC Smart Yellow Pages for Santa Clara and San Jose, California, 132-34 (June 2004).

404. Interview with Santa Clara County bankruptcy attorney who runs a display ad as a loss leader (Mar. 12, 2005).

405. Depending upon style, format, and other variables, SBC may charge \$79-\$148/month for a one inch in-column space ad, \$154-\$361/month for a two inch in-column space ad, and \$339-\$800/month for a four inch in-column space ad. Telephone interview with SBC advertising sales representative (Mar. 17, 2005).

406. One finds all of these kinds of information among the 25 display ads, leader ads, and in-column space ads in the June 2004 SBC Smart Yellow Pages for Santa Clara and San Jose, California. SBC Smart Yellow Pages for Santa Clara and San Jose, California, 132-34 (June 2004).

407. The First Amendment overbreadth doctrine (see *supra* note 350 and accompanying text) does not apply in commercial speech cases. *E.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-80 (1977). Thus, only an attorney who advertises or contemplates advertising may bring the constitutional challenge, and if an attorney advertises or contemplates advertising only in specific media, a court might limit its holding only to the types of media and other particular circumstances involved.

attorney defying the mandate risks civil liability (including for costs and attorneys' fees) to assisted persons, avoidance of contracts with assisted persons, and civil liability (including for costs and attorneys' fees) in an action brought by the State on behalf of its residents.⁴⁰⁸

3. *Disclosures and written contract*

New section 527 of the Bankruptcy Code imposes new disclosure requirements upon consumer bankruptcy attorneys and requires a written contract between the attorney and an assisted person. The disclosures are required of any debt relief agency "providing bankruptcy assistance to an assisted person."⁴⁰⁹ "Bankruptcy assistance" includes information, advice, or counsel, whether sold or otherwise provided.⁴¹⁰ Thus, an attorney must provide the disclosures to an assisted person even if the assisted person, after getting the information, advice, or counsel, decides not to retain the attorney to file a petition or otherwise represent the client in a case under the Bankruptcy Code.

The attorney must provide to an assisted person the written notice required from the clerk of the bankruptcy court under section 342(b)(1) of the Bankruptcy Code.⁴¹¹ That section requires the clerk to give to individuals whose debts are primarily consumer debts a written notice that contains a brief description of Chapters 7, 11, 12, and 13, and the general purpose, benefits, and costs of proceeding under each of those chapters, a brief description of the types of services available from credit counseling agencies, and statements alerting the individual of the consequences of knowing and fraudulent concealment of assets or false oaths or statements under penalty of perjury in connection with a bankruptcy case and that information supplied by an individual in connection with a case is subject to examination by the Attorney General.⁴¹² The Bankruptcy Code previously required the clerk to give a simpler notice that simply indicated each chapter under which the individual debtor could proceed. That simpler notice from the clerk was futile, and, except perhaps for the new warnings, the elaborated notice from the clerk will be equally futile. The only effective way for the clerk to comply is to give the notice to the debtor (or more often to the debtor's agent who is about to file a petition and schedules with the clerk) at the time of filing, a time obviously too late to educate the debtor or influence a decision about

408. BAPCP Act, *supra* note 320, § 227(a) (adding § 526(c) to the Bankruptcy Code).

409. *Id.* § 228(a) (adding § 527 to the Bankruptcy Code).

410. *Id.* § 226(a) (adding § 101(4A) to the Bankruptcy Code).

411. *Id.* § 228(a) (adding § 527(a)(1) to the Bankruptcy Code).

412. *Id.* § 104 (amending § 342(b)(2)(B) of the Bankruptcy Code).

whether or not to file a case or the chapter under which to file.⁴¹³ The additional requirement that an attorney also give such notice might mitigate the problem. The statute does not specify a time at which the attorney must give the notice, which means that the attorney could give the notice to the client at a time too late to influence a client's decision. On the other hand, the attorney may (but need not) combine this notice with other disclosures that are required within three business days after the first date on which the attorney first offers to provide any bankruptcy assistance services to an assisted person.⁴¹⁴ Giving this notice at the same time as those other required disclosures will be more efficient and hence more likely. Even if given that early in the counseling process, however, the notice may carry little or no impact. Many consumer debtors decide before visiting a consumer bankruptcy attorney that they want bankruptcy relief and, of those, many know what form of bankruptcy relief they want. Moreover, some consumer bankruptcy attorneys will steer the undecided debtor either to Chapter 7 or to Chapter 13 based upon the attorney's own attitudes and the attorney's knowledge of prevailing practices of local judges and trustees.⁴¹⁵ The efficacy of written notice in the face of personal interaction with an attorney is dubious.

In the same notice, or in a separate clear and conspicuous written notice, the attorney must advise assisted persons that information to be provided with a petition or thereafter in a case must be complete, accurate, and truthful, that all assets and liabilities must be completely and accurately disclosed in documents filed to commence the case, that certain asset values and information relevant to application of the means test must be stated after reasonable inquiry, that cases may be audited, and that failure to provide the required information may result in dismissal or other sanction, including a criminal sanc-

413. The futility may long ago have been recognized, or the requirement forgotten, by some bankruptcy clerks. On August 23, 2001, I called the clerk's office of bankruptcy courts in San Francisco and San Jose. From my conversation with employees of both offices, it appeared that neither office provided the required written notice at that time. One employee told me that there were pamphlets available if someone asked. Another referred me to the web site of the bankruptcy court for the Northern District of California, but the web site did not contain the required notice and would in any event not likely be visited by a consumer debtor. United States Bankruptcy Court for the Northern District of California, at <http://www.canb.uscourts.gov/> (last visited June 30, 2005).

414. See *infra* text accompanying notes 416-17.

415. In part, these conclusions rest upon my observation of the interviewing and counseling behavior of six consumer bankruptcy attorneys, and of the predisposition of their clients, described in Neustadter, 35 *BUFF. L. REV.* at 199-228. Professor Braucher reached the same conclusion about the behavior of consumer bankruptcy attorneys after her study of the influence of local legal culture (attorney attitudes and local practices) on consumer bankruptcy filing choices in Cincinnati and Dayton, Ohio, and in Austin and San Antonio, Texas. Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 *AM. BANKR. L.J.* 501, 580-81 (1993).

tion.⁴¹⁶ The attorney must provide this notice not later than three business days after the first date on which a debt relief agency *first offers* to provide any bankruptcy assistance services to an assisted person.⁴¹⁷ The first offer of bankruptcy assistance services surely cannot be when a prospective assisted person first reads an advertisement because the person advertising cannot know at that time to whom the notice should be sent. The first offer is certainly no later than when the attorney or the attorney's paralegal meets with a prospective assisted person and then offers to provide services. The first offer might well occur earlier, however, such as during a telephone conversation in which the attorney or attorney's agent describes the attorney's services and either sets up or offers to set up an appointment to meet with a prospective assisted person, thereby making an offer to provide bankruptcy assistance at least in the form of information. Thus, the attorney or attorney's agent must get an address for immediate mailing of the disclosures because the attorney cannot rest assured, even with an imminent appointment, that he or she will see the prospective client within three business days of the telephone conversation.

At the same time that the attorney furnishes the client the notice required under section 342(b)(1) of the Bankruptcy Code, the attorney also must provide an assisted person with another set of clear and conspicuous disclosures in a single document separate from other documents or notices provided to an assisted person. These disclosures, either taken verbatim from quoted language in the Act or adapted from that language, advise assisted persons of the basic events and procedures in a routine bankruptcy, advise them that they may represent themselves, hire an attorney, or obtain help from a bankruptcy petition preparer, and advise them that they should ask to see a contract before hiring anyone.⁴¹⁸ The disclosures forewarn assisted persons about the possibility of reaffirmation, suggest that they may want help in preparing a Chapter 13 plan and in getting it confirmed, suggest that they may want help from a specialist if they are going to select bankruptcy relief other than under Chapter 7 or 13, and forewarn them about the possibility of litigation in bankruptcy court.⁴¹⁹

Finally, and once again at the same time that the attorney furnishes the client the notice required under section 342(b)(1) of the Bankruptcy Code, the attorney must provide an assisted person with disclosures that explain *how* to provide information required by sec-

416. BAPCP Act, *supra* note 320, § 228(a) (adding § 527(a)(2)(D) to the Bankruptcy Code).

417. *Id.* (adding § 527(a)(2) to the Bankruptcy Code).

418. *Id.* (adding § 527(b) to the Bankruptcy Code).

419. *Id.*

tion 521 of the Bankruptcy Code, unless the attorney provides the information after reasonably diligent inquiry.⁴²⁰ The disclosures must explain how to value assets at replacement value, how to determine amounts required by the means test, how to complete the list of creditors, and how to determine what property is exempt and how to value exempt property at replacement value as defined in section 506 of the Bankruptcy Code.⁴²¹

The efficient attorney will provide all of the foregoing disclosures at once, in two separate documents. One document will contain the disclosures required to be in a single document separate from other documents and notices, for which the attorney may simply duplicate language of disclosure quoted in the statute. The second document will contain the remaining disclosures, including the notice required under section 342(b)(1) of the Bankruptcy Code. The cautious attorney should mail these disclosures to a prospective client immediately after the prospective client's first contact with the attorney's office (usually a telephone contact), whether or not the prospective client schedules an appointment, or provide them during the initial consultation of an unannounced walk-in client.

The attorney also must execute a written contract with an assisted person that clearly and conspicuously explains the services to be provided and the cost and terms of payment.⁴²² The attorney and assisted person must execute this written contract not later than five business days after the first date on which the attorney provides bankruptcy assistance services to the assisted person but prior to the filing of a petition by the assisted person, and the attorney must furnish the assisted person with a copy of the fully executed and completed contract.⁴²³ To assure compliance, the attorney must avoid providing any information, advice, or counseling about bankruptcy in telephone conversations with prospective clients prior to an initial consultation because the prospective client may not meet with the attorney, if at all, until more than five days after such a conversation. This will severely restrict the early and convenient flow of information from attorney to prospective client, frustrate prospective clients, and waste the time of both the attorney and prospective client for whom the telephone conversation might otherwise have been sufficient.

420. *Id.* (adding § 527(c) to the Bankruptcy Code). Unlike section 527(b), this section does not specifically require the information be provided in a document separate from other documents, but the requirement that the information be clear and conspicuous suggests that it would be good practice to use a separate document.

421. *Id.*

422. *Id.* § 229(a) (adding § 528(a) to the Bankruptcy Code).

423. *Id.*

The attorney must then require execution of the contract at the time of the initial consultation because the client thereafter may not return, if at all, within the five-day period. If, as is most likely, the attorney uses a standard form of contract for all clients, the client's promise in the contract must be conditional upon the client's subsequent choice to use the attorney's services because some clients will not have made that choice by the conclusion of the initial appointment. The statutory language may even be read to require a contract with a person who only takes advantage of a free initial consultation, in which case the attorney again must require execution of the contract at the time of the consultation, even if the client may never return, because the client might return for additional services after expiration of the five-day period. It would of course not be surprising if some prospective clients who are undecided at the end of an initial appointment, whether free or otherwise, decline to sign a contract even if the attorney explains the conditional nature of the prospective client's promise.

The disclosure requirements and the written contract, each a form of compelled speech, probably do not violate an attorney's First Amendment rights.⁴²⁴ Moreover, they are not likely to add significant cost to the process of representation. Consumer bankruptcy attorneys can quickly and easily create the relevant forms, or obtain them from customary sources, and they will integrate use of the documents into a standard, repetitive routine for counseling a client.⁴²⁵

In theory, most of the disclosures will provide useful information to a prospective client, and the written contract will help avoid unnecessary misunderstanding, especially because state law may not require execution of a written contract.⁴²⁶ Yet the timing, content, and dynamic of the personal interaction between attorney and client often will overshadow the disclosures.⁴²⁷ Moreover, like truth-in-lending disclosures, real estate closing disclosures, and a host of other disclosures mandated by consumer protection legislation, this additional disclosure may overwhelm or confuse many consumer debtors with in-

424. Commenting on other regulatory schemes that require disclosure, Professors Gunther and Sullivan comment, "Most of these regulatory requirements have never been the subject of any serious First Amendment challenge." SULLIVAN & GUNTHER, *supra* note 336, at 1386.

425. For a discussion of routines adopted by consumer bankruptcy attorneys in their service to clients, see Neustadter, *supra* note 365, at 199-228.

426. See, e.g., CAL. BUS. & PROF. CODE § 6148 (West 2003) (requiring written contracts between attorney and client only if expenses, including attorney fees, will exceed \$1,000).

427. See *supra* note 415 and accompanying text.

formation that they have an insufficient capacity to understand or absorb.⁴²⁸

4. *Sanctions of debt relief agencies*

The Act affords a menu of sanctions for violation of the rules governing the behavior of debt relief agencies. Some of the sanctions raise additional concerns.

Any contract between an attorney and an assisted person that does not comply with the “material requirements” of sections 526, 527, or 528 is void and unenforceable except by the assisted person.⁴²⁹ It must have been a late night for the drafter of that sanction. An attorney’s contract with the client cannot fail to comply with section 527 because that section doesn’t state any requirements for such a contract. More important, the Act gives no clue to determining which of the requirements in sections 526 and 528 applicable to such contracts are or are not material. Of less importance, but amusing, is the misuse of conventional vocabulary: a contract enforceable by one party but not the other is voidable, not void.

The attorney’s intentional or negligent violation of any provision of sections 526, 527, or 528 also exposes the attorney to liability to the assisted person in the form of disgorgement of fees and charges, actual damages, and costs and reasonable attorneys’ fees incurred in seeking those remedies.⁴³⁰ Although partly redundant to common law claims for breach of contract or misrepresentation, the liability extends also to failure of the attorney to make the new required disclosures or advertise properly and changes the American common law rule on recovery of attorneys’ fees. It also arises if a case is dismissed or converted to another chapter as a result of the attorney’s intentional or negligent failure to file any required document,⁴³¹ or if the attorney intentionally or negligently disregards the “material requirements of [the Bankruptcy Code] or the Federal Rules of Bankruptcy Procedure applicable to such [debt relief] agency.”⁴³² Once again, the Act offers no guidance about which of those requirements are or are not material

428. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 242, 260-61 (2002).

429. BAPCP Act, *supra* note 320, § 227(a) (adding § 526(c)(1) to the Bankruptcy Code).

430. *Id.* § 526(c)(2).

431. *Id.* § 526(c)(2)(B).

432. *Id.* § 526(c)(2)(C). The language imposing this liability refers to “debt relief agencies,” a phrase that includes bankruptcy petition preparers. In its application to bankruptcy petition preparers the language is superfluous because the Bankruptcy Code already had imposed a stiffer sanction upon bankruptcy petition preparers for intentional or negligent disregard of even non-material requirements of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. 11 U.S.C. § 110(i) (2000).

and hence no guidance on when the attorney will or will not be liable for disregarding a material requirement.

For violations of section 526(a), the Act also authorizes a State to sue on behalf of its residents to recover actual damages incurred by assisted persons, together with the costs of suit and its own attorney's fees.⁴³³ A State's allocation of limited law enforcement resources to this purpose likely will be rare, but the rare case likely would involve a law firm that represents a large number of consumer debtors annually and is thereby seriously exposed.

Federal district courts may enjoin violations of section 526(a) in an action by the State,⁴³⁴ but a bankruptcy court may enjoin such violations, or impose "an appropriate civil penalty," on its own motion, or on the motion of the United States trustee or the debtor, only if it finds that the attorney intentionally violated section 526(a) or engaged in a clear and consistent pattern or practice of such violations.⁴³⁵ Drafters of the Act probably intended to require the greater showing in bankruptcy court only because of the authority conferred on the bankruptcy court to impose a civil penalty and in so doing, probably inadvertently, also required the greater showing for an injunction.

Injunctive relief poses a constitutional problem in one case. Recall that an attorney violates section 526(a) if he or she gives specified kinds of advice.⁴³⁶ Injunctive relief against such advice may be an unconstitutional prior restraint on speech even if the speech prohibition itself does not violate the First Amendment. While not *per se* unconstitutional, a content-based injunction against speech bears a heavy presumption of unconstitutionality.⁴³⁷ It will be constitutional only if the attorney's advice would invariably be unprotected speech and if the injunction is narrowly tailored.⁴³⁸

B. ATTORNEY DUE DILIGENCE OBLIGATIONS AND SANCTIONS FOR ATTORNEY VIOLATIONS OF RULE 9011

The Act amends section 707(b) of the Bankruptcy Code to impose due diligence obligations on attorneys representing individual debtors in Chapter 7 beyond those stated in Rule 9011 of the Federal Rules of

433. BAPCP Act, *supra* note 320, § 227(a) (adding § 526(c) to the Bankruptcy Code). In the action, the State may also recover "any liability under paragraph (2)," which seems to be a reference to the liability imposed under section 526(c)(2) for disgorgement of attorneys' fees and charges. *Id.*

434. *Id.*

435. *Id.*

436. *See supra* pp. 314-23.

437. *E.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 715-16 (1931).

438. *See* *Tory v. Cochran*, 125 S. Ct. 2108 (2005).

Bankruptcy Procedure (“Rule 9011”). For delinquency in meeting those obligations or in complying with Rule 9011, the amendments authorize the bankruptcy court to impose specified sanctions.⁴³⁹ The Act also expresses the sense of Congress that Rule 9011 be modified to impose additional obligations upon bankruptcy attorneys (and upon *pro se* debtors).⁴⁴⁰ These amendments articulate and attempt to insure a heightened gate-keeping function for consumer bankruptcy attorneys. Combined with required pre-petition credit counseling, means testing, and regulation of debt collection agencies, they appear designed to further discourage or prevent “unwarranted” Chapter 7 filings by individual debtors.

To understand the meaning and evaluate the impact of these amendments, it is useful to begin with a review of some history of both Rule 9011 and Rule 11 of the Federal Rules of Civil Procedure (“Rule 11”). Rule 9011 derives from and in substantial measure replicates Rule 11,⁴⁴¹ and Rule 11 jurisprudence therefore informs interpretation of Rule 9011.⁴⁴² Both rules require the attorney’s signature on certain documents filed with a federal court on behalf of a client, and both rules attribute to the attorney’s signature specified certifications by the attorney to the court.⁴⁴³ Both rules authorize the court to sanction an attorney for inaccurate certifications.⁴⁴⁴ The original version of Rule 11, adopted as part of the Federal Rules of Civil Procedure in 1938, attributed to an attorney’s signature on a pleading a certification that the pleading was not interposed for delay and that, to the best of the attorney’s knowledge, information, and belief, there was

439. Because the new obligations and sanctions are part of a bundle of amendments to section 707, they presumably apply only in Chapter 7 cases, and because they are part of a bundle of amendments to section 707(b), a section dealing with dismissal for abuse of cases filed by individual debtors whose debts are primarily consumer debts, they would appear to apply only to attorneys representing such debtors in connection with a motion to dismiss for abuse. This is clearly true for sanctions identified in new section 707(b)(4)(A), which refers explicitly and exclusively to sanctions against an attorney for a debtor in connection with a successful motion to dismiss for abuse under section 707(b). BAPCP Act, *supra* note 320, § 102(a)(2)(C) (adding § 707(b)(4) to the Bankruptcy Code). It is also reasonably clear for the Rule 9011 sanction identified in new section 707(b)(4)(B), which uses the same language (“attorney for the debtor”) as section 707(b)(4)(A) and appears to refer to the violation of Rule 9011 identified in section 707(b)(4)(A). *Id.* The same conclusion is not as clear from the language of new sections 707(b)(4)(C) and 707(b)(4)(D), which refer instead to “attorney” (not “attorney for the debtor”) and refer to certifications about pleadings, written motions, and schedules without limitation to the context of a motion to dismiss for abuse. *Id.*

440. BAPCP Act, *supra* note 320, § 319. I discuss this invitation further *infra* pp. 344-45.

441. FED. R. BANKR. P. 9011 advisory committee’s note (1997 Amendment).

442. *See, e.g., Klein v. Wilson*, 279 F.3d 148, 151 (2d Cir. 2002).

443. FED. R. CIV. P. 11; FED. R. BANKR. P. 9011.

444. FED. R. CIV. P. 11; FED. R. BANKR. P. 9011.

good ground to support the pleading.⁴⁴⁵ It authorized but did not require "appropriate disciplinary action" for willful violation of the rule.⁴⁴⁶ Courts rarely imposed discipline, however, in part because of uncertainty about the nature of appropriate discipline and in part because they read Rule 11 to require only an attorney's subjective determination that good grounds supported a pleading.⁴⁴⁷

In response to perception that Rule 11 was not effective in deterring abuses, amendments to Rule 11 in 1983 sharpened its bite.⁴⁴⁸ Among the changes, an attorney's signature thereafter represented "that to the best of the [signer's] knowledge, information, and belief *formed after reasonable inquiry* it [a pleading, motion, or other paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"⁴⁴⁹ The italicized language made clear that an attorney's honesty in presenting a document was not sufficient.⁴⁵⁰ Nonetheless, the Advisory Committee notes to the 1983 amendments, and subsequent case law, suggested that the reasonableness of an inquiry might depend upon the amount of time available for investigation, the need to rely on the client for information, the complexity of the factual issues, or the need for additional discovery.⁴⁵¹ The 1983 amendments to Rule 11 also replaced a court's discretion to impose "disciplinary action" with a mandate to impose an "appropriate sanction" for violation of the rule, including an order to reimburse the opposing party for reasonable expenses, including attorneys' fees, incurred by virtue of the violation.⁴⁵² Rule 9011, which first became effective at the same time as the 1983 amendments to Rule 11, carried identical language.⁴⁵³

Further amendment to Rule 11 in 1993, which has since remained unchanged, retracted the mandate to impose sanctions for violation of the rule and limited the nature of sanctions to those sufficient to deter improper conduct: directives of a non-monetary nature, payment of a penalty into court, or, only if warranted for effective deterrence, reim-

445. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331, at 9, 11 (Civil 2d ed. 1990).

446. *Id.* § 1331, at 9; *id.* § 1336, at 99.

447. *Id.* § 1331, at 10-12; *id.* § 1335, at 58-59.

448. *Id.* § 1331, at 21-22.

449. 97 F.R.D. 165, 167 (Apr. 25, 1983) (emphasis added).

450. Fed. R. Civ. P. 11 advisory committee's note (1983 Amendment); WRIGHT & MILLER, *supra* note 445, § 1335, at 58-64.

451. Fed. R. Civ. P. 11 advisory committee's note (1983 Amendment); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875 (5th Cir. 1988).

452. 97 F.R.D. 165, 167 (Apr. 25, 1983); WRIGHT & MILLER, *supra* note 445, § 1336, at 99-100.

453. 97 F.R.D. 57, 149 (Apr. 25, 1983) (Rule 9011 effective Aug. 1, 1983); 97 F.R.D. 165, 167 (Apr. 25, 1983) (Rule 11, effective Aug. 1, 1983).

bursement to the movant of reasonable expenses, including attorneys' fees, incurred as a direct result of the violation.⁴⁵⁴ The 1993 amendments left unchanged the attorney's duty to conduct a reasonable inquiry,⁴⁵⁵ but modified the substance of an attorney's certifications to the court. The attorney no longer certifies that a pleading, motion, or other paper is "well grounded in fact." Instead, among other things, the attorney certifies that allegations or other factual contentions in a pleading, motion, or other paper "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"⁴⁵⁶ Rule 9011 was amended in 1997 to conform to the 1993 changes to Rule 11.⁴⁵⁷

Two developments in 1995 enhance our understanding of the evolution of Rules 11 and 9011. In 1995, House Bill 988 would have restored mandatory sanctions for Rule 11 violations and would have provided that sanctions suffice to compensate the parties injured by the violation as well as deter future violations.⁴⁵⁸ The bill passed the House⁴⁵⁹ but died in the Senate. However, in response to a perceived "proliferation of frivolous private securities fraud suits,"⁴⁶⁰ Congress in the same session altered application of Rule 11 in private securities litigation as part of the Private Securities Litigation Reform Act of 1995.⁴⁶¹ That Act requires court findings on compliance with Rule 11(b) (the subsection in which an attorney's certifications are listed) upon final adjudication in any private action arising under either the Securities Act of 1933 or the Securities Exchange Act of 1934.⁴⁶² It then mandates Rule 11 sanctions upon any attorney found to have violated Rule 11 and establishes a rebuttable presumption that the appropriate sanction for failure of any responsive pleading or dispositive motion to comply with Rule 11(b) is an award of attorneys' fees and expenses incurred by the opposing party as a direct result of the violation and, for substantial failure of any complaint to comply with Rule 11(b), an award of all attorneys' fees and expenses incurred in the action by the opposing party.⁴⁶³

454. 146 F.R.D. 401, 421-23; Fed. R. Civ. P. 11 advisory committee's note (1993 Amendment).

455. 146 F.R.D. 401, 420; Fed. R. Civ. P. 11 advisory committee's note (1993 Amendment).

456. 146 F.R.D. 401, 421.

457. FED. R. BANKR. P. 9011 advisory committee's note (1997 Amendment).

458. H.R. 988, 104th Cong. § 4 (1995).

459. 141 CONG. REC. H2749 (1995).

460. WRIGHT & MILLER, *supra* note 445, § 1338.5, at 157 (Supp. 2004).

461. Pub. L. No. 104-67, 109 Stat. 737 (codified at 15 U.S.C. § 77z-1 (2000)).

462. 15 U.S.C. § 77z-1(c) (2000).

463. *Id.*

Action by a conference committee in the 107th Congress completes the picture drawn by this abbreviated historical foray. In that Congress, both H.R. 333 and S. 420 (versions of bankruptcy reform preceding the Act) had *required* a bankruptcy court to sanction a debtor's attorney with a civil penalty, payable to the trustee or United States trustee, in the event of a Rule 9011 violation.⁴⁶⁴ Those bills also had *required* the court to order a debtor's attorney to reimburse a *panel* trustee for all reasonable costs incurred by such trustee in prosecuting a motion filed under section 707(b) (dismissal for abuse, including abuse presumed by virtue of means testing) if the court both granted the motion and found that the attorney's action in filing a Chapter 7 petition violated Rule 9011.⁴⁶⁵ The Private Securities Litigation Reform Act of 1995 provided ample precedent for these mandates. But in the face of significant opposition, including from the American Bar Association,⁴⁶⁶ the Conference Report on H.R. 333 receded from mandated sanctions in favor of discretionary sanctions,⁴⁶⁷ a change preserved in the Act.⁴⁶⁸

With that historical background as context, we now may explore new section 707(b)(4) of the Bankruptcy Code, which encompasses four subsections articulating the new attorney obligations and attendant sanctions, and section 319 of the Act, which invites modification of Rule 9011 but does not amend the Bankruptcy Code. I first discuss the new sanctions for violation of Rule 9011, then discuss the invitation to amend Rule 9011, and close by discussing the new attorney obligations.

1. *Civil penalty and reimbursement of attorneys' fees*

New section 707(b)(4)(B) authorizes the court to assess a civil penalty against the debtor's attorney for a violation of Rule 9011, payable to a panel trustee or to the United States trustee.⁴⁶⁹ New section

464. H.R. 333, 107th Cong. § 102(a) (2001); S. 420, 107th Cong. § 102(a) (2001).

465. H.R. 333, 107th Cong. § 102(a) (2001); S. 420, 107th Cong. § 102(a) (2001).

466. Letter from Harold S. Barron, Chair-Elect, ABA Section of Business Law, to House and Senate Conferees on H.R. 333 (Apr. 22, 2002), *available at* <http://www.abanet.org/poladv/letters/107th/bankruptcy042202.html>, and letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to Honorable Patrick Leahy (Aug. 30, 2001), *available at* <http://www.abanet.org/poladv/letters/107th/bankruptcy083001.html>.

467. H.R. CONF. REP. NO. 107-617, at 8, 186 (2002) (replacing "the court . . . shall" with "the court . . . may" in those portions of § 102(a) of the bill adding § 707(b)(4)(A) and § 707(b)(4)(B) to the Bankruptcy Code).

468. BAPCP Act, *supra* note 320, § 102(a)(2)(C) (adding § 707(b)(4) to the Bankruptcy Code). In contrast, note a renewed congressional effort to mandate sanctions for violation of Rule 11 (but not Rule 9011). Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. §§ 2, 3 (2005).

469. BAPCP Act, *supra* note 320, § 102(a)(2)(C) (adding § 707(b)(4) to the Bankruptcy Code).

707(b)(4)(A) authorizes the court to order the debtor's attorney to reimburse a panel trustee for all reasonable costs, including reasonable attorneys' fees, in prosecuting a motion for dismissal or conversion under section 707(b) (for abuse) if, in addition to finding a Rule 9011 violation, the court grants the motion.⁴⁷⁰

Rule 9011 already authorizes the court to order an attorney to pay a penalty *into court* for violation of Rule 9011.⁴⁷¹ In authorizing a penalty payable to the United States trustee or panel trustee, the Act does not amend Rule 9011 *per se*. Rather than leaving amendment of Rule 9011 to the typical process,⁴⁷² it legislates what appears to be an additional sanction. Accordingly, a court could conceivably order payment of a penalty into court for violation of Rule 9011 and payment of a separate penalty to a United States trustee or panel trustee. It seems more reasonable, however, to construe this new civil penalty provision as, in effect, an amendment to Rule 9011, such that the court may order a penalty payable only to a United States trustee or panel trustee when an attorney has violated Rule 9011. So construed, this amendment to section 707 would only slightly alter existing law by changing the identity of the payee of the penalty. That change alone, therefore, should not deter attorneys from practicing consumer bankruptcy law or increase the cost of consumer bankruptcy representation.

Rule 9011 also already authorizes a court to order an attorney violating the rule to reimburse some or all of a moving party's reasonable attorneys' fees and other expenses incurred as a direct result of a Rule 9011 violation, but only if warranted for effective deterrence.⁴⁷³ Authorization in the Act for an order to reimburse a panel trustee is

470. *Id.*

471. FED. R. BANKR. P. 9011 (emphasis added).

472. Under the Rules Enabling Act, 28 U.S.C. §§ 2071-77 (2000), and an act establishing the Judicial Conference of the United States, 28 U.S.C. § 331 (2000), changes to rules of procedure in federal courts normally emanate from an Advisory Committee of the Judicial Conference of the United States, are reviewed, after public comment, by the Judicial Conference Committee on Rules of Practice and Procedure and by the Judicial Conference, and are then transmitted to the Supreme Court of the United States. If the Court decides to prescribe the rules, it must transmit them to Congress not later than May 1 of the year in which they are to take effect. Absent congressional action, the rules become effective on December 1 of the same year. The process is more fully described on the web site of the Administrative Office of United States Courts, at <http://www.uscourts.gov/rules/proceduresum.htm> (last visited July 5, 2005). However, as we have seen, Congress has acted more directly by altering application of Rule 11 in private securities litigation, *see supra* p. 341, and it also continues to consider legislation that would restore mandatory sanctions for Rule 11 violations in all actions. *See supra* note 468. The Supreme Court of the United States affirmed the congressional power to prescribe federal court rules of practice and procedure in *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).

473. FED. R. BANKR. P. 9011.

not so constrained if the court also grants the trustee's motion to dismiss under section 707(b). But this change also may little affect the practice of consumer bankruptcy law. At most it would affect a consumer bankruptcy attorney's calculus of risk only in the small number of consumer bankruptcy cases for which the trustee has standing to bring and is likely to bring a motion to dismiss under section 707(b).⁴⁷⁴ Even in those cases, the calculus of risk cannot be complete until consumer bankruptcy attorneys learn the predilection of particular judges for granting section 707(b) motions under the new standards of the Act, their predilection to find an accompanying Rule 9011 violation, and their predilection to exercise their discretion to issue reimbursement orders unconstrained by the existing Rule 9011 requirement that such orders be warranted for effective deterrence. In practice, therefore, even this change may do little either to deter attorneys from consumer bankruptcy practice or to increase the cost of consumer bankruptcy representation.

2. *Invitation to amend Rule 9011*

The Act also invites the Judicial Conference of the United States to propose modifications to Rule 9011.⁴⁷⁵ Under Rule 9011, an attorney of record need not sign bankruptcy schedules or a "statement."⁴⁷⁶ As a consequence, under Rule 9011(b), the attorney makes no certifications concerning the schedules or Statement of Affairs filed on behalf of a debtor and cannot be sanctioned if they are inaccurate. The Act invites modification of Rule 9011 to require that an attorney of record conduct "a reasonable inquiry to verify" that the information in the schedules and the Statement of Affairs (even though still signed only by a debtor) is "well grounded in fact" before the debtor submits those documents to the court or to a trustee.⁴⁷⁷ With respect to the schedules, that inquiry might involve, for example, the review of pay stubs and other evidence of income, discussion of monthly expenses and review of related documents, and some effort to establish or verify values ascribed by debtors to assets, including having someone view and appraise the debtor's real and personal property. With respect to the Statement of Affairs, that inquiry might involve, for example, review of evidence of payments to creditors, gifts, and other transfers, review of legal proceedings against the debtor, and review of the value of property subject to foreclosure or repossession. An attorney's legal assistant could perform much of this inquiry, and an appraiser could

474. See *supra* notes 197, 269 and accompanying text.

475. BAPCP Act, *supra* note 320, § 319.

476. FED. R. BANKR. P. 9011 advisory committee's note.

477. BAPCP Act, *supra* note 320, § 319.

value assets, but the additional time and expense required would increase an attorney's costs of doing business. Because profit margins are small in the highly competitive practice of consumer bankruptcy, the cost of hiring an expert and some or all of the other additional costs would likely be reflected in an increased price of bankruptcy legal services.

3. *Attorney certification of inquiry about schedules*

Unless the Judicial Conference of the United States proposes and the Supreme Court of the United States prescribes the congressionally requested modification to Rule 9011, however, the Act leaves us with the following stripped-down version, in new section 707(b)(4)(D) of the Bankruptcy Code:

The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.⁴⁷⁸

Like the civil penalty provision of the Act previously discussed, this provision does not purport to amend Rule 9011 per se. Clearly, however, it should be read together with Rule 9011 because Rule 9011 requires an attorney of record to sign the petition, attributes other certifications to such a signature, and sanctions an incorrect certification.⁴⁷⁹

Section 707(b)(4)(D) is unlikely to increase the attorney's cost of doing business or risk of sanction. It does not require an attorney to investigate the accuracy of information contained in the schedules, does not require a "reasonable" inquiry about the accuracy of the information, and does not state that the attorney's signature on the petition certifies the accuracy of that information. Instead, the section requires only that the attorney inquire about the accuracy of the information, something the attorney can do simply by asking the client if the information is accurate. Unless the client states or implies that some of the information is inaccurate, the attorney does not know after inquiry that the information is inaccurate. The attorney's signature on the petition cannot therefore lead to a sanction if any of the information in the schedules proves inaccurate. Attorneys routinely make this inquiry already, and the additional cost of documenting the inquiry and the client's response will be de minimus. If the section is so read, its effect on consumer bankruptcy practice is likely to be negligible.

478. BAPCP Act, *supra* note 320, § 102(a)(2)(C) (adding § 707(b)(4) to the Bankruptcy Code).

479. FED. R. BANKR. P. 9011.

There is good reason to read the section this narrowly. This new duty to “inquire” about the correctness of information in schedules stands in marked contrast to more far-reaching language in Rule 9011(b) that requires “inquiry reasonable under the circumstances” as to other matters, but not as to schedules.⁴⁸⁰ It also stands in contrast to the invited modification of Rule 9011 that would, if adopted, require “reasonable inquiry to verify” that information contained in the debtor’s schedules and Statement of Affairs is well grounded in fact.⁴⁸¹

The legislative history of the evolution of amendments to section 707(b) also supports this narrow reading. Bills in the 105th Congress introduced new attorney duties and sanctions. H.R. 3150 provided, among other things, that the signature of an attorney on any petition, pleading, motion, or other paper filed with the court in the case of a debtor would constitute a certification that the attorney had performed a *reasonable investigation* into the circumstances giving rise to the petition, *schedules, and statement of financial affairs* or the pleading, as applicable, and had *determined that the petition, schedules, and statement of financial affairs, including the choice of Chapter 7, were well grounded in fact* and did not constitute an inappropriate use of Chapter 7.⁴⁸² S. 1301 would have applied the certification of reasonable investigation and certification of determination only to the petition, not to the schedules or statement of financial affairs.⁴⁸³ The Conference Report reconciling the two bills adopted the language of S. 1301.⁴⁸⁴ Bankruptcy reform legislation in the 106th Congress followed a similar path on these issues. H.R. 833 provided, among other things, that the signature of an attorney on the petition would constitute a certification that the attorney has performed a *reasonable investigation* into the circumstances giving rise to the petition and has *determined that the petition and supporting lists, schedules, and documents are well grounded in fact* and do not constitute an abuse.⁴⁸⁵ S. 625 mimicked the more limited language of S. 1301 from the 105th Congress, but introduced the language that we now see in section 319 of the Act inviting an amendment of Rule 9011 that would require a reasonable inquiry to verify that the schedules and Statement of Affairs are well grounded in fact.⁴⁸⁶ The Conference Report on the com-

480. *Id.*

481. *See supra* note 477 and accompanying text.

482. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 103 (1998) (emphasis added).

483. Bankruptcy Reform Act of 1998, S. 1301, 105th Cong. § 102(a) (1998).

484. H.R. CONF. REP. NO. 105-794 § 102(a) (1998).

485. H.R. 833, 106th Cong. § 102(a) (1999) (emphasis added).

486. S. 625, 106th Cong. §§ 102(a), 319 (1999).

peting bills provided that the attorney's signature on a petition, pleading, or written motion constituted a certification of a reasonable investigation into the circumstances giving rise to the petition, pleading, or written motion and a determination that the pleading, petition, or written motion (but not the schedules) is well grounded in fact and do not constitute an abuse.⁴⁸⁷ It also added a new and separate provision (which we now see in section 707(b)(4)(D) of the Act) stating that the attorney's signature on a petition constitutes a certification that the attorney has no knowledge after inquiry that the information in the schedules is incorrect.⁴⁸⁸ It also included language from the Senate bill inviting modification of Rule 9011.⁴⁸⁹

Thus, the Conference Reports in both the 105th and the 106th Congresses receded from house bills carrying broader attorney certifications about the accuracy of information in the schedules. In their place, the Conference Report in the 106th Congress substituted a certification of lack of knowledge after inquiry that the schedules are incorrect and invited, but did not adopt, an amendment of Rule 9011 to impose the more rigorous duty of reasonable inquiry to verify that the schedules and Statement of Affairs are well grounded in fact. The Act replicates the language of that Conference Report on these issues, thus strongly suggesting the more narrow duty that I have described. The invited modification to Rule 9011, not section 707(b)(4)(D), is the bogeyman.

4. *Attorney certification of reasonable investigation and determination*

I have suggested that provisions in new section 707(b)(4)(A), (B), and (D) do not significantly enhance the extent or risk of attorney sanctions and therefore may not significantly impact consumer bankruptcy law practice. It is more difficult to predict the impact of new section 707(b)(4)(C), which reads in full as follows:

The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

- (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
- (ii) determined that the petition, pleading, or written motion—

487. H.R. CONF. REP. NO. 106-970 § 102(a) (2000).

488. *Id.* I leave for another day discussion of the problem that this section and section 707(b)(4)(C) pose for emergency petitions filed without accompanying schedules pursuant to the authority of FED. R. BANKR. P. 1007(c).

489. *Id.* § 319.

- (I) is well grounded in fact; and
- (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under [amended section 707(b)] paragraph (1).⁴⁹⁰

Like amendments earlier discussed, this amendment does not modify Rule 9011 per se and does not articulate sanctions for inaccurate certifications. However, it clearly rides the back of Rule 9011, which requires an attorney of record to sign a petition, attributes other certifications to the filing of a signed petition, and sanctions inaccurate certifications. Accordingly, Rule 9011 almost certainly will be read as authorizing a court to impose sanctions in cases in which the additional certifications specified in this amendment prove to be inaccurate.

The amendment speaks to an attorney's obligations concerning a petition, pleading, or written motion. In this Article, however, I focus only on that portion of the amendment addressing certifications concerning the petition.⁴⁹¹ Consider first the attorney's certification that he or she has determined that the petition "is well grounded in fact," a certification that seems to go beyond the existing Rule 9011(b) certification that allegations and factual contentions in a petition have evidentiary support or are likely to have such support after a reasonable opportunity for further investigation or discovery.⁴⁹² A voluntary petition filed by an individual whose debts are primarily consumer debts states only a few facts: the debtor's name(s) and street and mailing address, digits from the debtor's social security number or EIN or other tax identification number, information relevant to determination of venue, the debtor's status as an individual, and the consumer nature of the debtor's debts.⁴⁹³ It also must identify any prior bankruptcy filed by the debtor within the preceding eight years, any pend-

490. BAPCP Act, *supra* note 320, § 102(a)(2)(C) (adding § 707(b)(4) to the Bankruptcy Code).

491. When an attorney signs a pleading or written motion, new section 707(b)(4)(C) heightens the attorney's obligations beyond the obligations imposed by Rule 9011: reasonable investigation rather than inquiry reasonable under the circumstances, allegations and contentions well-grounded in fact rather than having evidentiary support, and claims and legal contentions warranted by a good faith argument rather than a nonfrivolous argument for extension, modification, or reversal of existing law. Compare BAPCP Act, *supra* note 320, § 102(a)(2)(C), with FED. R. BANKR. P. 9011. Some consumer bankruptcy attorneys might therefore be more reluctant to handle matters requiring a pleading or written motion (e.g. dischargeability of a debt or avoidance of a lien), or charge more for representation in such matters. Those matters do not arise in the run-of-the-mill consumer bankruptcy case, however, and thus the heightened obligations with respect to pleadings and written motions should not similarly affect representation in most consumer bankruptcy cases.

492. FED. R. BANKR. P. 9011.

493. FED. R. BANKR. P. Official Form 1: Voluntary Petition (2001).

ing bankruptcy case filed by the debtor's spouse, partner, or affiliate, and any property that the debtor owns or possesses that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety.⁴⁹⁴ Under Rule 9011(b)(3), the attorney may truthfully certify that these facts asserted in the petition have "evidentiary support" if the debtor tells the attorney that the facts are true and it is reasonable under the circumstances for the attorney to rely on the debtor's assertion.⁴⁹⁵ Section 707(b)(4)(C), requiring that the petition be "well grounded in fact," appears to require in addition that the attorney seek reasonable additional verification of at least some of the facts, such as by looking at bills to verify name and address of the debtor and the consumer nature of debts, looking at a social security card or other document bearing the debtor's social security number, and undertaking a PACER search to determine whether the debtor has filed a bankruptcy case within the preceding eight years.

A petition also estimates the number of creditors, the value of assets, the amount of debts, and whether funds will be available for distribution to unsecured creditors. These estimates are based on facts stated in the schedules. As I have argued, the attorney's certification of the accuracy of facts stated in the schedules can be read narrowly to require only an inquiry of the client, not something more, such as the verification of the value of assets identified in the schedules. It would be inconsistent with that argument to expect a certification about estimates in the petition, based on facts stated in the schedules, to rest on anything more. Thus, to certify that a petition is well grounded in fact adds little burden of consequence beyond existing attorney obligations.

Consider next the attorney's certification that he or she has determined that the petition "does not constitute an abuse [under section 707(b)(1)]." This required certification is perplexing because ultimately only a judge can make that determination. At best, an attorney only can be expected to reach an honest and reasonable legal

494. *Id.*

495. See *O'Brien v. Alexander*, 101 F.3d 1479, 1488-89 (2d Cir. 1996) (sanctions may not be imposed unless a particular allegation is utterly lacking in support). As to some facts stated in the petition, reliance exclusively on the debtor's statements might be *per se* unreasonable. See *In re Oliver*, 323 B.R. 769 (Bankr. M.D. Ala. 2005) (sanctioning debtor's attorney for violation of Rule 9011(b)(1) by relying exclusively on debtor's failure to disclose prior Chapter 13 filings when simple and inexpensive check of bankruptcy court records, such as through PACER, would have revealed debtor's serial Chapter 13 filings, an injunction against yet another bankruptcy filing, and hence an improper purpose for the filing). The same also may be true as to some facts asserted in other contexts. See *In re Melendez*, 235 B.R. 173 (Bankr. D. Mass. 1999) (striking attorneys' declarations in support of reaffirmation agreements for lack of sufficient inquiry concerning facts supporting attorneys' conclusions that reaffirmation would not impose undue hardship upon debtor).

judgment that a court likely would not presume abuse if the debtor's putative annual income triggers the means test, or that, based on special circumstances, a court would decline to find abuse notwithstanding a presumption of abuse, and that, irrespective of the means test, a court would not find abuse based on either on a finding of a debtor's bad faith or the totality of circumstances of the debtor's financial situation.⁴⁹⁶ So interpreted, this certification requirement essentially would be identical to the subjective good faith standard applied to the pre-1983 Rule 11 certification that to the best of the attorney's knowledge, information, and belief there was good ground to support a pleading. The risk of sanctions for an inaccurate certification that a petition does not constitute an abuse, like the prospect of sanctions under the pre-1983 version of Rule 11, would be remote.⁴⁹⁷

It is unclear, however, whether the attorney's determination that a petition is well grounded in fact and does not constitute an abuse is independent of or linked to the additional requirement in section 707(b)(4)(C) that an attorney perform a reasonable investigation into the circumstances giving rise to the petition. Resolution of the ambiguity in the section on that question is critical to assessment of its impact upon consumer bankruptcy practice.

The first clause of the section requires reasonable investigation into the circumstances giving rise to the petition. The second clause requires the attorney's determination that the petition is well grounded in fact and does not constitute an abuse. The two duties might be separate and unrelated, for a couple of reasons. First, one may read "circumstances that gave rise to the petition" as meaning job loss or interruption, uninsured medical expense, death or divorce in the family, excessive use of credit cards, or other events or behaviors generating the debtor's financial distress. Those circumstances would indicate *why* the debtor is filing a petition; they do not relate in any way to the attorney's determination under the second clause. The attorney's burden to reasonably investigate such circumstances might be satisfied by a review of a few documents that confirm a client's story. Second, the syntax of section 707(b)(4)(C) contrasts with that of Rule 9011(b). Rule 9011(b) explicitly links *all* of an attorney's certifications under that rule to knowledge, information, and belief formed after "an inquiry reasonable in the circumstances."⁴⁹⁸ It does this by identifying all of the certifications in a numbered list that follows the language concerning reasonable inquiry.⁴⁹⁹ In contrast, the language

496. See *supra* Part II.

497. See *supra* note 447 and accompanying text.

498. FED. R. BANKR. P. 9011.

499. *Id.*

of section 707(b)(4)(C) lists two certifications, separated by a semi-colon, only the first of which expressly requires that the certification be based upon "reasonable investigation." Finally, the Act's invitation to modify Rule 9011 such that an attorney be required to conduct a reasonable inquiry to verify that the information in the schedules and the Statement of Affairs is well grounded in fact suggests that section 707(b)(4)(C) requires a lesser inquiry. If Rule 9011 were modified in the manner that Congress invites, then and perhaps only then would an attorney's determination that a petition is well grounded in fact and does not constitute an abuse have to rest in part upon the attorney's reasonable inquiry concerning the accuracy of critical facts in the schedules - - the debtor's income, expenses, and debt - - from which claims of abuse could be defeated.

On the other hand, this suggested reading of section 707(b)(4)(C) is in one sense strained. Were we to read "circumstances that gave rise to the petition" as referring to reasons that explain the debtor's financial distress and decision to file a Chapter 7 petition, the language of the section would require an inquiry serving no relevant function because the Bankruptcy Code requires neither a reason for filing a Chapter 7 petition nor an explanation of a reason for the filing. If not so construed, and if not linked to the second clause, the first clause would require that an attorney reasonably investigate circumstances giving rise to the petition for some other unidentified reason. Accordingly, the language of the section could be construed to require that the attorney's determination that a petition is well grounded in fact and does not constitute an abuse be based upon a reasonable investigation of the circumstances giving rise to the petition, in which case "circumstances" would refer to the debtor's income, expenses, and debt rather than to the underlying cause or causes of the debtor's financial distress. Such an interpretation would be consistent with the linkage expressed differently and more precisely in Rule 9011 between reasonable inquiry and the attorney's resulting certifications. If we read the section as linking the two clauses, the new duty imposed by the section may significantly increase an attorney's costs of preparing a case,⁵⁰⁰ especially because a reasonable "*investigation*" suggests a responsibility beyond the reasonable "*inquiry*" that is a predicate for

500. Based on information provided by the American Bar Association, the Congressional Budget Office estimated an increase in attorney costs of between \$150 and \$500 per consumer Chapter 7 case on account of a reasonable investigation of a debtor's financial affairs and computing debtor eligibility for Chapter 7. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE, S. 256 BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, 14 (2005), available at <http://www.cbo.gov/ftpdocs/62xx/doc6266/s256hjud.pdf>. The American Bar Association appears to have furnished much more conservative figures to the Congressional Budget Office than it claimed in its fact sheet for public dissemination. See *supra* note 319.

existing Rule 9011 certifications, as well as increase the burden on the debtor to obtain and produce for the attorney copies of relevant documents.

Reasonable investigation leading to a determination that a petition does not constitute an abuse might require, for example, that the client provide and the attorney review copies of all paychecks and other evidence of income for the six-month period preceding the filing of a petition to determine whether the debtor's putative annual income will trigger the means test.⁵⁰¹ If the debtor's putative annual income triggers the means test, reasonable investigation might further require that the client provide and the attorney review documentary evidence of all of the debtor's monthly expenses, secured debt, and priority unsecured debt to determine the debtor's putative disposable income,⁵⁰² and that the attorney review documentary evidence of all of the debtor's unsecured debt to determine the percentage of unsecured debt that could be retired over a five-year period from the debtor's putative disposable income.⁵⁰³ If application of the means test triggers the presumption of abuse, reasonable investigation would then require review of documents and possibly other investigation that would demonstrate special circumstances rebutting the presumption of abuse.⁵⁰⁴

In most cases, the debtor's putative annual income will not trigger the means test.⁵⁰⁵ Accordingly, if we assume for such cases the interpretation of a debtor's reporting requirements advanced in proposed interim bankruptcy rules,⁵⁰⁶ reasonable investigation need not extend beyond an investigation of income unless the attorney is concerned about other circumstances that might trigger a motion to dismiss for abuse based on the debtor's bad faith or the totality of circumstances of the debtor's financial situation. As a result, we may see tiered attorney fees, with a significantly higher fee charged only to clients whose putative annual income triggers, or comes close to triggering, the means test and to clients whose financial situation or other circumstances suggest the possibility of abuse apart from the means test.

501. See *supra* pp. 276-83.

502. See *supra* pp. 284-300.

503. See *supra* pp. 284-85. The attorney might satisfy the duty of reasonable investigation of the debtor's debt by ordering and downloading into bankruptcy petition software a report from services that merge data from the three major credit reporting agencies (Equifax, TransUnion, and Experian), even though data reported by those agencies may be incomplete, inaccurate, or out of date. One such service, Online Credit Reporting, charges \$34.95 for a report combining data from all three credit reporting agencies. <http://www.onlinecreditreporting.com> (last visited Feb. 28, 2006).

504. See *supra* note 175 and accompanying text.

505. See *supra* note 269.

506. See *supra* pp. 302-03.

An attorney might charge an even higher fee in cases when application of the means test generates a presumption of abuse and the attorney must demonstrate special circumstances to rebut the presumption. Alternatively, some attorneys may decline to represent clients facing a presumption of abuse, unwilling even for a higher fee to face the risk of sanctions. The possibility of significantly increased fees, or more limited access to legal representation, is thus greatest for debtors whose financial circumstances will generate a presumption of abuse, and this consequence is most unsavory for those among them whose circumstances might overcome the presumption of abuse.

To briefly review, new section 707(b)(4) of the Bankruptcy Code exposes the debtor's attorney to the possibility of a civil penalty for a Rule 9011 violation and to the possibility of an order to reimburse costs and attorneys' fees if the attorney's Rule 9011 violation accompanies a trustee's successful motion to dismiss for abuse, but the increased exposure beyond current Rule 9011 exposure is minimal. The section attributes to an attorney's signature on a petition a certification that the attorney has no knowledge after inquiry that information in the schedules filed with the petition is incorrect, but the required inquiry falls short of a requirement to make a reasonable inquiry that the information in the schedules is well grounded in fact, a requirement that hovers menacingly in a congressional invitation to amend Rule 9011. Finally, the section attributes to an attorney's signature on a petition a certification that the attorney has conducted a reasonable investigation into the circumstances giving rise to the petition and has determined that the petition is well grounded in fact and does not constitute an abuse. One reading of that section imposes little additional burden on an attorney, requiring an investigation only of the reasons why a debtor is filing a petition, a verification only of the limited number of factual assertions contained in the petition itself, and a good faith legal judgment predicting a court's ruling on a motion to dismiss for abuse. An alternative reading of that section imposes greater burdens, but they may be significant only in the relatively small number of cases in which a debtor's putative annual income triggers the means test or the debtor's financial situation or other circumstances suggests the possibility of abuse outside the means test. Additional attorney obligations under new section 707(b)(4) may contribute to some increase in attorney fees for Chapter 7 consumer debtor representation and somewhat reduce pro bono representation, and it may unfairly increase fees or limit access to representation for some debtors whose circumstances would rebut a presumption of abuse, but dire predictions that it will lead to a mass exodus of attorneys from the consumer bankruptcy bar, or cause massive increases in

fees that leave most debtors unable to afford legal representation,⁵⁰⁷ seem hyperbolic.

CONCLUSION

“Look Dave, I can see you’re really upset about this. I honestly think you ought to sit down calmly, take a stress pill, and think things over.” HAL⁵⁰⁸

The closing scenes of 2001: A Space Odyssey offer a mystifying view of the future.⁵⁰⁹ We can begin to map much of the new landscape of Chapter 7 consumer bankruptcy more clearly. We are likely to see efficient, if generally unnecessary or unproductive, delivery of pre-petition credit counseling and pre-discharge instruction in personal financial management. The United States trustee will spend several million dollars annually approving and continuously reviewing providers of both. Self-help publications, postings on the Web, and petition preparers will describe the requirements, consumer bankruptcy attorneys will fold the counseling and instruction into the service routine, debtors with broadband access to the Internet and facile with computers will find the requirements relatively easy to satisfy, and debtors able to pay for the counseling and instruction will subsidize those unable to do so. Some pro se debtors, debtors with exigent circumstances, debtors with limited English-speaking ability, and debtors without computer savvy or access to the Internet may experience greater difficulty with the requirements.

Means testing for abuse will apply to only a relatively small number of Chapter 7 debtors or potential Chapter 7 debtors. Politicians, credit card issuers, and others will declare victory over abusers of Chapter 7, and the means test at least certainly symbolizes victory. At the same time, amended section 707(b) of the Bankruptcy Code preserves much of the judicial discretion that the means test was designed to eliminate and will generate creative forms of evasive planning. The possibly shallow victory will leave in its wake a bonanza of litigation parsing the statute, the IRS Standards, and the Internal Revenue Manual. To screen for abuse, actors in the system must generate and process more paperwork, much of it superfluous. The direct and indirect costs of doing so are not inconsequential.

Consumer bankruptcy attorneys, who must identify themselves as debt relief agencies, will integrate additional disclosures and a written contract into their service routine, but the disclosures are un-

507. See *supra* note 319 and accompanying text.

508. 2001: A SPACE ODYSSEY (MGM 1968).

509. *Id.*

likely to trump the client's or the attorney's predispositions. Pending resolution of a likely First Amendment challenge to mandated disclosures in advertising, large volume consumer bankruptcy firms may continue to advertise at little if any additional cost whereas a firm with a smaller advertising budget may have to eliminate useful information from its advertising or eliminate some forms of advertising altogether.

In other respects the future terrain of consumer bankruptcy practice is less clear. Attorneys will increase their fees, at least to cover the cost of more paperwork and, perhaps, to defray costs of additional due diligence, at least until judges clarify the nature and scope of the Act's attorney due diligence obligations and signal the likelihood of sanctions for non-compliance. Cautious attorneys will avoid advising clients to incur debt in contemplation of bankruptcy pending resolution of a First Amendment challenge to restrictions on that advice. Less likely, I suspect, is a mass exodus of attorneys from consumer bankruptcy practice or attorney fee increases so substantial as to deprive most debtors of legal representation. No modern-day Commander Dave will soon disable the consumer bankruptcy reform of 2005, but most consumer bankruptcy attorneys, including those who vigorously opposed the reform, will turn their skills, passion, and advocacy to restricting its reach and adapting to its demands.