BYU Law Review

Volume 2011 | Issue 5 Article 1

12-1-2011

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State-Mandated Disability Insurance as Salve to the Consumer Bankruptcy Imbroglio

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From Main Street to Wall Street, Americans are hurting. In 2009, over 1.4 million families filed for bankruptcy. Researchers examining the causes of bankruptcy discovered that as many as sixty-two percent of all bankruptcies were precipitated by a medical crisis. Because many Americans are living paycheck to paycheck and lack disability insurance, when a medical crisis strikes, bank accounts are quickly depleted by the amalgam of high medical bills and lost wages. Disability insurance provides needed wage replacement when a worker is unable to work due to an illness or injury. This Article presents the case for state-mandated disability insurance as a solution for combating the rising number of consumer bankruptcies. It describes the prevalence of medical bankruptcies and the impact of disabilities on American families as well as the most commonly available substitutes for comprehensive disability insurance and explains why these substitutes do not provide workers with adequate wage protection. Then, this Article presents state-mandated disability insurance as a solution to the medical bankruptcy imbroglio and provides statistical evidence demonstrating that states mandating disability insurance for most workers have on average a lower per capita bankruptcy rate than the national average. Finally, this Article argues that the best alternative for increasing access to disability insurance is for more states to mandate disability insurance, and provides a blueprint for designing state disability insurance programs.

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I. INTRODUCTION

A record 2.8 million American families received a foreclosure notice in 2009,[1] and over 1.4 million families filed for bankruptcy.[2] Over 7.2 million jobs have been lost since the beginning of the Great Recession in 2007,[3] and roughly 15.4 million Americans are unemployed.[4] As startling as those statistics are, it is even more surprising that many American families report that it is not getting laid off from a job or having to downsize in the wake of a divorce that pushes them to brink of financial ruin; rather, it is a medical crisis.[5]

Clearly, this phenomenon has not happened overnight. The American family has been struggling for years. Over the past two decades, an increasing portion of Americans have filed for bankruptcy.[6] Bankruptcy filings in federal courts have risen dramatically.[7] The total number of individual bankruptcy petitions

1. Foreclosure filings include default notices, scheduled foreclosure actions, and bank repossessions. *See* Lynn Adler, *U.S. 2009 Foreclosures Shatter Record Despite Aid*, REUTERS (Jan. 14, 2010, 10:30 AM), http://www.reuters.com/article/2010/01/14/us-usa-housing-foreclosures-idUSTRE60D0LZ20100114 (noting that 2.8 million properties were foreclosed upon in 2009).

2. *See* Admin. Office of the U.S. Courts, *Bankruptcy Statistics 2009*, U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2009/1209_f2.pdf (last visited Aug. 25, 2011).

3. *See* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009) (discussing how large amounts of consumer debt coupled with the collapse of housing market triggered a devastating chain reaction).

4. Louis Uchitelle, *In Surprise, Jobless Rate Fell to 10% in November*, N.Y. TIMES, Dec. 5, 2009, at A1.

5. *See, e.g.*, David U. Himmelstein et al., *Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF., Feb. 2, 2005, at w5-63, w5-66 to -68 (presenting a study detailing the medical causes of bankruptcy); Melissa B. Jacoby, *The Debtor-Patient: In Search of Non-Debt-Based Alternatives*, 69 BROOK. L. REV. 453, 456–61 (2004); Melissa B. Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377, 386–91 (2001); Christopher Tarver Robertson et al., *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, 18 HEALTH MATRIX 65, 66 (2008).

6. Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 27 (2004) ("More adults will file for bankruptcy than will be diagnosed with cancer. More people will file for bankruptcy than will graduate from college. And, in an era when traditionalists decry the demise of the institution of marriage, Americans will file more petitions for bankruptcy than for divorce."); *see also* Teresa A. Sullivan et al., *Young, Old, and In Between: Who Files for Bankruptcy?*, NORTON BANKR. L. ADVISER, Sept. 2001, at 1–2.

7. There was a 31% increase in bankruptcy filings between 2007 and 2008. Admin. Office of the U.S. Courts, *Bankruptcy Filings Up in Calendar Year 2008*, U.S. COURTS (Mar. 05, 2009), http://www.uscourts.gov/News/NewsView/09-03-05/Bankruptcy_Filings_ Up_In_Calendar_Year_2008.aspx.

filed during the twelve-month period ending September 2009 equaled 1,344,095,[8] up from 1,004,342 individual bankruptcy petitions filed in fiscal year 2008[9] and 775,344 filed in 2007.[10]

The current rate of bankruptcy filings, roughly 5900 per day, rivals the number of filings prior to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[11] BAPCPA[12] was enacted in 2005 and was intended to address and prevent what was believed to be widespread bankruptcy abuse by consumers.[13] The legislative history of BAPCPA illustrates that lawmakers believed that consumers were using bankruptcy "as a first resort, rather than a last resort" and taking advantage of loopholes in the 1978 Code.[14] However, many bankruptcy scholars criticized BAPCPA for making it harder for working-class Americans to file for bankruptcy.[15] Thus, the recent dramatic increase in filings despite the

8. Admin. Office of the U.S. Courts, *Bankruptcy Statistics for Twelve-Month Period Ending Sept. 2009*, U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2009/0909_f2.pdf (last visited Aug. 25, 2011).

9. Admin. Office of the U.S. Courts, *Bankruptcy Statistics for Twelve-Month Period Ending Sept. 2008*, U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2008/0908_f2.pdf (last visited Aug. 25, 2011).

10. Admin. Office of the U.S. Courts, *Bankruptcy Statistics for Twelve-Month Period Ending Sept. 2007*, U.S. COURTS, http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2007/0907_f2.xls (last visited Aug. 25, 2011).

11. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

12. BAPCPA was implemented at tremendous cost to taxpayers. It cost approximately $72.4 million for fiscal years 2005 through 2007 to implement the reform. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-697, BANKRUPTCY REFORM: DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 11 (2008), *available at* http://www.gao.gov/new.items/d08697.pdf.

13. Some bankruptcy experts have argued that widespread bankruptcy abuse was a myth and that BAPCPA was poorly drafted. *See, e.g.*, David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007) ("BAPCPA adds a great amount of detail and is rife with bad draftsmanship, dumbfounding contradictions, and curious, even comical, special interest exceptions. It is hard to choke out any words of admiration for the quality of BAPCPA's draftsmanship. Judges and scholars have not hesitated to pour scorn on Congress for the details of BAPCPA."); Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1296 (2006) (noting that soon after BAPCPA's enactment, bankruptcy experts began to refer to it by the fanciful acronym "BARF," for "Bankruptcy Abuse Reduction Fiasco").

14. H.R. REP. NO. 109-31, pt. 1, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90.

15. *See, e.g.*, Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375 (2007) (arguing that the decrease in consumer debt discharge under the BAPCPA is unlikely to result in savings to credit card consumers); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy*

new hurdles imposed by BAPCPA is dramatic evidence of the financial crisis that is plaguing main streets all across America.[16]

At the same time, the rate of home foreclosures has skyrocketed with a record spike in foreclosures in 2008.[17] A total of 861,664 families lost their homes to foreclosure in 2008.[18] This means that one out of every fifty-four households received a foreclosure notice last year. The most common explanation for the rise in foreclosures has been that borrowers used interest-only loans and adjustable-rate mortgages to purchase homes that they could ill afford to buy.[19] Media pundits and analysts have also pointed their fingers at banks (for relaxing lending standards) and at aggressive practices by brokers as having contributed to the increase in nontraditional, fee-laden loans.[20] Even traditionally straight-laced lenders like Citibank and

Abuse Prevention and Consumer Protection Act of 2005," 79 AM. BANKR. L.J. 191 (2005) (opining that the BAPCPA will make consumer bankruptcy more expensive, less effective, and in many cases inaccessible).

16. *See* Tara Siegel Bernard, *Downturn Pushes More into Bankruptcy, Despite Tighter Rules*, N.Y. TIMES, Apr. 4, 2009 at B1 (quoting president of a bankruptcy data and management company: "It shows you that a lot more people are hurting. . . . Even with the more restrictive law in place, the filings are back up to the prelaw level.").

17. *See, e.g.*, Gretchen Morgenson, *So Many Foreclosures, So Little Logic*, N.Y. TIMES, July 5, 2009, at BU1 ("The Office of the Comptroller of the Currency said that among the 34 million loans it tracks, foreclosures in progress . . . . [were] 73% higher than in the same period last year."); E. Scott Reckard, *State's Mortgage Woes Forecast to Rise*, L.A. TIMES, Aug. 25, 2009, at B2 ("[T]he percentage of California home loans that are delinquent at least 60 days or are in foreclosure is projected to skyrocket to more than 14% by year's end from 9.7% as of June 30."); Chris Reidy, *Foreclosures Petitions Skyrocket*, BOS. GLOBE, Aug. 20, 2009, at B9 ("[L]enders initiated 2,822 foreclosure proceedings against homeowners in Massachusetts [in July 2009], more than five times the 502 that were filed in July 2008."); Les Christie, *Foreclosures Up a Record 81% in 2008*, CNNMONEY.COM (Jan. 15, 2009, 3:48 AM), http://money.cnn.com/2009/01/15/real_estate/ millions_in_foreclosure/index.htm.

18. Christie, *supra* note 17.

19. *See, e.g.*, David Streitfeld, *The House Trap*, N.Y. TIMES, Sept. 9, 2009, at B1 ("Homeowners with interest-only loans have a much greater likelihood of default . . . . Nationally about 18 percent of prime interest-only loans are at least 60 days delinquent. In California, the level is even higher: 21 percent, a rate exceeded only in the other bubble states of Florida and Nevada."); David Streitfeld, *The Mortgage Meltdown: Foreclosure Pace Nears Decade High*, L.A. TIMES, Apr. 17, 2007, at C1 ("Most of the loans going into default now were made at the peak of the housing boom in 2005, when some thought the good times would continue forever and lending standards were lax. Nearly 80% of loans made in the state in May 2005 for the purpose of purchasing houses had adjustable rates, a record high.").

20. *See, e.g.*, Gretchen Morgenson, *Inside the Countrywide Lending Spree*, N.Y. TIMES, Aug. 26, 2007, at B1 ("[P]otential borrowers were often led to high-cost and sometimes unfavorable loans that resulted in richer commissions for Countrywide's smooth-talking sales force, outsize fees to company affiliates providing services on the loans, and a roaring stock price that made Countrywide executives among the highest paid in America.").

Household reached settlement agreements after being sued for predatory lending.[21] Thus, it is pretty clear that subprime loans and deceptive marketing practices contributed to the rise in the number of bankruptcy petitions and foreclosure filings.

However, some have argued that the banks merely preyed on a culture of overconsumption. In particular, there is a popular view that Americans, particularly those living in the middle class, are suffering from "affluenza" or the insatiable need to overconsume and live beyond their means.[22] Yet the view of the insatiable and irresponsible debtor has been debunked in recent studies. These studies have established a medical crisis, as mundane as it might seem, as being the key factor in the escalating foreclosure and bankruptcy rates. Just as important, other commentators have linked the rise in bankruptcies and foreclosures to increasing costs of medical treatments, care, and prescription drugs.[23] Research has also shown that debtors who have filed for bankruptcy and people who have lost their homes in foreclosure often report that a medical crisis contributed to their predicament.[24]

Although a handful of scholars have noted that greater utilization of disability insurance might reduce the number of bankruptcies,[25] none have adequately addressed the connections

21. U.S. GEN. ACCT. OFFICE, GAO-04-280, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 4 (2004), *available at* http://www.gao.gov/new.items/d04280.pdf; Paule Beckett, *Citigroup's 'Subprime' Reforms Questioned*, WALL ST. J., July 18, 2002, at C1 (quoting a former loan officer who testified about how she marketed the mortgages: "If someone appeared uneducated, inarticulate, was a minority, or was particularly old or young, I would try to include all the [additional costs] CitiFinancial offered."); Fed. Trade Comm'n, *Citigroup Settles FTC Charges Against the Associates Record-Setting $215 Million for Subprime Lending Victims*, FTC.GOV (Sept. 19, 2002), http://www.ftc.gov/opa/2002/09/associates.shtm.

22. *See* JOHN DE GRAAF ET AL., AFFLUENZA: THE ALL-CONSUMING EPIDEMIC (2d. ed. 2005).

23. *See* Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 538 (2006) (discussing the consequences of incurring large medical bills, including wage garnishment, home liens, frozen bank accounts, and long-term payment plans with regularly-compounded interest); *see also* Marsha Austin, *Uninsured Pay Higher Price: Hospital Collection Agents Demand Full Cost of Care*, DENVER POST, Jan. 28, 2003, at A-01 (reporting that hospitals in area had sued at least 210 individuals for unpaid medical bills of $2000 or more in the previous two years, with 24% of the cases involving bills of $10,000 or more).

24. *See supra* note 5 and accompanying text.

25. *See* Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129 (2005) (discussing how forms of social insurance overlap and inviting scholars to explore the optimal relationship between consumer

between disability insurance and consumer bankruptcy,[26] and proposals for how to expand access to disability insurance have thus far been inchoate. Disability insurance is an available mechanism for resolving the associated problems of injury, medical bills, and missed work, giving families just enough of a lifeline to allow them to avoid bankruptcy and foreclosure. This Article presents an argument for expanding disability insurance and demonstrates how access to disability insurance can be increased, allowing Americans to better prepare for and guard against the risk of a medical crisis.

Part II of this Article defines the scope of the problem. Part III details the prevalence of disability in the United States and how incurring a disability or illness may lead to bankruptcy. Part IV discusses the common substitutes for disability insurance for most workers, namely, health insurance, Social Security, worker's compensation programs, and retirement plans. As will be discussed, these sources of disability coverage for workers fail to replace income at adequate levels, exclude too many participants from coverage, and impose lengthy waiting periods, along with several other problems. Part V presents data supporting the theory that state-mandated disability insurance offers an effective solution to the medical bankruptcy imbroglio. Part VI presents a blueprint for designing effective state-mandated insurance schemes. Finally, Part VII provides a brief conclusion.

II. THE MEDICAL BANKRUPTCY IMBROGLIO

The majority of the research regarding the link between a medical crisis and bankruptcy has been pioneered by Elizabeth Warren and other scholars working on the Consumer Bankruptcy Project.[27] The scholars of the Consumer Bankruptcy Project III

bankruptcy and forms of social insurance including unemployment insurance, Medicare, disability insurance, and workers' compensation); Jacoby, *supra* note 5, at 481 ("Because medical problems also can reduce one's ability to work, high-income households also should consider purchasing disability insurance coverage, which is expensive but within reach for this segment of the population."); Warren, *supra* note 6, at 38 ("Our federal disability system is geared toward those who will be out of work for a year or more. Families facing cancer, heart disease, diabetes, and many other diseases that may leave them with periods of debilitation but who may recover are left out of the system entirely. Whether change is to be accomplished by public or private means, the expansion of disability insurance to aid all workers who are struck with a serious disease should be on national agenda.").

26. *See* Feibelman, *supra* note 25, at 134.

27. Consumer Bankruptcy Project I, in 1981, and Consumer Bankruptcy Project II, in

conducted a national study in order to better understand why debtors file for bankruptcy. The researchers surveyed a random sample of 2314 debtors during early 2007 and examined their bankruptcy court records. In addition, they conducted extensive telephone interviews with 1032 of these bankruptcy filers.[28] Their study was one of the first to illuminate the connection between a medical crisis and bankruptcy.

According to the findings of the Consumer Bankruptcy Project, medical problems contributed to nearly two-thirds (sixty-two percent) of all bankruptcies in 2007.[29] Between 2001 and 2007, the proportion of all bankruptcies attributable to medical problems rose by forty-nine percent.[30] Particularly alarming was the finding that most of the debtors bankrupted by medical problems had health insurance. More than two-thirds were insured at the start of the bankrupting illness, including sixty percent who had private insurance coverage.[31] The debtors with private insurance reported medical bills that averaged $17,749, versus $26,971 for the uninsured.[32] Those debtors who initially had health insurance but lost coverage during the course of their illness had costs averaging $22,568.[33] Most of the medically bankrupt were solidly middle-class before their medical crisis—half were homeowners and three-fifths had attended or graduated from college.[34] Over the past two decades the number of families declaring bankruptcy after a serious illness has multiplied more than 2000%.[35] Still, the most startling finding of the

1991, were the work of Professors Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westrbook, all of whom have continued their work in Consumer Bankruptcy Project III, in 2001. In addition, Professors David Himmelstein, Robert Lawless, Bruce Markell, Michael Schill, Susan Wachter, and Steffie Wollhander have shared in the design and development of the 2001 study.

28. *See* David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 741–46 (2009), *available at* http://www.pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf.

29. Himmelstein, *supra* note 28, at 743.

30. *Id.* at 744.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 743.

35. Warren, *supra* note 6, at 37.

Consumer Bankruptcy Project is that having health insurance does not insulate a family from the risk of having to file bankruptcy as a result of medical bills.[36]

While some debtors lost their health insurance because they were unable to afford the premiums, some maintained their health insurance coverage throughout the medical crisis yet still could not afford to pay their medical bills.[37] In either scenario, the result is the same: the family ends up in bankruptcy court.[38] An illness or accident leads to missing work, followed by missed wages, job loss, and financial collapse.

The findings of the Consumer Bankruptcy Project were similar to the results obtained by Robertson, Egelhof, and Hoke (the "Robertson Study"). The principal investigators in the Robertson Study sought to understand the causes of home foreclosure by conducting a survey of homeowners on the brink of foreclosure who had (allegedly) defaulted on their loans and had their lenders initiate foreclosure proceedings against them.[39]

In the Robertson Study, nearly half of the respondents (49%) indicated that medical problems in part caused their foreclosure.[40] The investigators also examined objective indicia of medical disruptions in the two years prior to foreclosure, "including those respondents paying more than $2000 of medical bills out of pocket (37%), those losing two or more weeks of work because of injury or

36. *See generally*, Kevin Sack, *From the Hospital Room to Bankruptcy Court*, N.Y. TIMES, Nov. 25, 2009, at A1 (discussing the rise in medical bankruptcies and high out-of-pocket costs).

37. *See* Jessica H. May & Peter J. Cunningham, *Tough Trade-Offs: Medical Bills, Family Finances, and Access to Care*, CENTER FOR STUDYING HEALTH SYS. CHANGE, June 2004, at 1, *available at* http://www.hschange.org/CONTENT/689/689.pdf (finding about 43 million people have medical debt problems even though about two-thirds have insurance).

38. The work of the Consumer Bankruptcy Project is not without critics. *See, e.g.*, Scott Fay et al., *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706, 714 (2002) (finding that health problems were not a statistically significant factor in bankruptcy filings.); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1518 (2005) ("[A] recent study concludes that approximately half of consumer bankruptcies are caused by medical problems, a twenty-three-fold increase over a twenty-year period. Both conclusions are fundamentally unsupportable, however, and rest primarily on the way in which the researchers define and count what constitutes a medical bankruptcy rather than an actual increase in the number of bankruptcies caused by medical problems.").

39. *See* Robertson et al., *supra* note 5, at 68.

40. *Id.* (stating that medical problems included "illness or injuries (32%), unmanageable medical bills (23%), lost work due to a medical problem (27%), or caring for sick family members (14%)").

illness (30%), those currently disabled and unable to work (8%), and those who used their home equity to pay medical bills (13%)."[41] Ultimately, about seven in ten of the "respondents either self-reported a medical cause of foreclosure" or experienced one of the above indicia of medical disruptions in the two years before foreclosure.[42] "In many cases, homeowners were hit with a perfect storm of factors—a few thousand dollars of medical bills, a few weeks of missed work . . . [and a] rising interest rate—all combined to push them over the edge into foreclosure."[43]

In order to weather the perfect storm, or even a mild one, individuals and families need personal savings and social safety nets. Thirty years ago, the average family saved about 11 % of their take home pay. In contrast, during the housing boom, some experts claimed that the average savings rate had dropped to negative one percent due in large part to Americans tapping their home equity and other easy lines of credit.[44] In May 2009, the Commerce Department reported that the rate of personal savings as a percentage of disposable income for that month had increased to 6.9%, the highest levels since 1993,[45] but by August 2009, the rate had dropped to 3.0%.[46] The sharp momentary spike in the personal savings rate in early 2009 suggests that Americans were trying to use stimulus money to build a buffer against the threat of job losses during the recession. However, most were unable to maintain such a high rate of savings because so many Americans were living paycheck to paycheck.[47]

41. *Id*.

42. *Id*.

43. *Id*. at 68–69.

44. *See* Warren, *supra* note 6, at 10 (2004) (citing SMR RESEARCH CORP., THE NEW BANKRUPTCY EPIDEMIC: FORECASTS, CAUSES, AND RISK CONTROL 94 (2001)).

45. *See* James E. Rankin & Brendan Leary, *Personal Income and Outlays: May 2009*, BUREAU OF ECON. ANALYSIS, June 26, 2009, *available at* http://www.bea.gov/newsreleases/national/pi/2009/pdf/pi0509.pdf; Jack Healy, *As Incomes Rebound, Saving Hits Highest Rate in 15 Years*, N.Y. TIMES, June 27, 2009, at B7 ("Although saving money helps individuals repair their finances and pay debts, a sharp rise in overall personal saving can actually deepen a recession and hurt the people who are saving more. As people save money, fewer dollars circulate through shopping malls, Main Street businesses, and large employers and subsequently back to workers through their paychecks. This thrift pulls the economy lower.").

46. *See* James E. Rankin & Brendan Leary, *Personal Income and Outlays: August 2009*, BUREAU OF ECON. ANALYSIS, Oct. 1, 2009, http://www.bea.gov/newsreleases/national/pi/2009/pdf/pi0809.pdf [hereinafter *Personal Income and Outlays 2009*].

47. *See* Am. Payroll Ass'n, *Most Americans Living Paycheck to Paycheck, Still*

Thus, most Americans simply are not able to maintain a personal rate of savings that would allow them to survive a loss of income caused by a medical crisis. With little or no savings, families simply do not have a "rainy day" fund to weather multiple setbacks. For example, a family that is pushed to the brink by an adjustable-rate mortgage often has no extra money to cover expenses when wages are lost due to an unexpected illness. Without adequate savings, most families faced with a medical crisis dangle on the precipice of bankruptcy.

Further, having health insurance is not enough to insulate families from facing financial ruin. In many cases, high out-of-pocket maximum expenditures and high deductibles result in families having to shoulder a large portion of the costs of medical treatments.[48] Even worse, in many cases individuals covered under such high deductible or catastrophic plans will delay going to the doctor for routine medical care and not seek care for seemingly minor ailments, which when left untreated all too often become harder and more costly to cure, ultimately requiring more missed days to remedy.[49] For this reason, many families that have health insurance are still not prepared to shoulder the costs that their health insurance fails to cover.[50] Moreover, health insurance is designed simply to replace lost wages and income when workers suffer from an extended illness.

Contributing to 401(k), MARKETWIRE (Sept. 30, 2009, 11:22 AM), http://www.marketwire.com/press-release/most-americans-living-paycheck-paycheck-still-contributing-401k-according-survey-american-1202899.htm ("Seventy one percent of American employees are living paycheck to paycheck, according to results released today from the 2009 'Getting Paid in America' survey."); Joseph Pisani, *More Upper-Income Workers Living Paycheck to Paycheck*, CNBC NEWS ASS'N (Sept. 16, 2009, 11:48 AM), http://www.cnbc.com/id/32862851 ("Thirty percent of workers with salaries of $100,000 or more said they are living paycheck to paycheck, up from 21 percent last year, according to the survey of 4400 workers nationwide. Overall, 61 percent said they always or usually live paycheck to paycheck, up from 49 percent in 2008 and 43 percent in 2007.").

48. *See* Melissa Jacoby, *The Debtor-Patient Revisited*, 51 ST. LOUIS U. L.J. 307, 309–10 (2007) (discussing an analysis from the 2003 MEPS survey that found that 2.8% of non-elderly individuals lived in families with out-of-pocket expenditures (including insurance premiums) exceeding $10,000 that year, 14% were in families spending more than $5000, and 43% lived in families with out-of-pocket expenditures exceeding $2000).

49. It is estimated that the economy loses $207 billion a year because of the poor health and shorter lifespan of the uninsured and underinsured. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1501, 124 Stat. 119, 908 (2010).

50. *See* Walecia Konrad, *Health Insurance with High Deductibles Isn't Always a Bargain*, N.Y. TIMES, May 30, 2009, at B6 (noting that low caps on lifetime coverage and high out-of-pocket costs for doctor visits are hidden costs that might make these plans undesirable for many workers).

In contrast, disability insurance is specifically designed to provide wage replacement when income is lost due to an accident or illness. Thus, individuals and families who are covered by disability insurance receive a certain level[51] of wage replacement to compensate for the wages lost due to an unexpected illness. Having wage replacement will likely enable most families to avoid or at least significantly delay becoming a foreclosure and bankruptcy statistic. Unfortunately, most Americans do not purchase disability insurance. Americans buy life insurance to provide for their families after death, but they rarely buy insurance to protect their families in the event that they lose their ability to work.[52] Given the likelihood of disability, it is essential that more families have access to disability insurance in order to ensure financial stability during a medical crisis.

III. THE DISABILITY IMBROGLIO

Mention the word "disability" and people will likely conjure up images of persons who have congenital or developmental disabilities such as cerebral palsy, mental retardation, or Down syndrome. Disability can mean different things in different contexts, but this Article focuses on a concept of disability that includes a physical or mental impairment caused by an illness or accident that impedes an individual from working in her normal capacity. As shall be discussed, such disabilities occur rather frequently and are often linked to consumer bankruptcy filings and foreclosures.

In the United States, a disabling injury occurs every second. This amounts to sixty disabling injuries per minute and over 85,000 each day. Surprisingly, more than 90% of the disabilities in the U.S. are *not* work-related and hence not covered under worker's compensation benefits.[53] Almost forty-two million Americans are disabled.[54] Sixteen percent of the female population is disabled and

51. *See infra* Part VI.A.2 for a detailed explanation of levels of income replacement.

52. *See, e.g.*, David Futrelle, *Fear Factor: We All Worry About Money. Problem Is, We're Scared of the Wrong Things*, MONEY, Oct. 2005, at 86, *available at* http://money.cnn.com/magazines/moneymag/moneymag_archive/2005/10/01/8277950/index.htm (noting that 50% of Americans buy life insurance while only 28% buy disability insurance even though there is a greater chance of becoming disabled before sixty-five than dying before sixty-five). *See also* AM. COUNCIL OF LIFE INSURERS, LIFE INSURERS FACT BOOK 2009 63 ("Americans purchased $3.0 trillion of new life insurance coverage in 2008.").

53. NAT'L SAFETY COUNCIL, INJURY FACTS 2008 EDITION 52 (2008).

54. Press Release, U.S. Census Bureau, U.S. Census Bureau News, Facts for Features: Americans with Disabilities Act: July 26th (May 27, 2008), *available at*

14% of the male population is disabled.[55] About one-fourth of Americans entering the work force today will become disabled before they retire.[56] Most disabilities are attributed to pregnancy[57] or illness. The leading causes of illness include cancer, heart disease, and diabetes.[58] Back injuries and accidents also are common causes of disability.[59]

Thus, a period of disability can be caused by a myriad of reasons. For instance, the woman next door, who is battling breast cancer,[60] will be disabled when she is unable to work while undergoing chemotherapy and radiation treatments. Mounting medical bills and missed wages from mounting absences from work for medical treatments could easily wipe out her savings (if she was lucky enough to even have savings), and she could be teetering on financial ruin regardless of whether or not she is covered by health insurance.[61] Similarly, the young associate at a law firm who is injured in a serious car accident will be disabled during her recovery period. Finally, the middle-aged man who decides to reduce the stress in his life by enrolling in a yoga class and strains his back will be disabled for the several weeks that he is out of the office recovering from his back injury. All three would easily face severe financial strain without disability insurance to replace the income lost while recuperating.

In spite of the relatively high chances of becoming disabled during one's lifetime,[62] over 100 million workers, roughly 70% of the

http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb08-ff11.html.

55. *Id.*

56. U.S. Soc. Sec. Admin., *Social Security Basic Facts,* SSA.GOV (May 17, 2011), http://www.ssa.gov/pressoffice/basicfact.htm [hereinafter *Social Security Basic Facts*].

57. *See The Basics of Short Term Disability Insurance*, INSURE.COM, http://www.insure.com/articles/disabilityinsurance/short-term-disability.html (last updated Jan. 29, 2010).

58. *See id.*

59. *See Personal Income and Outlays 2009*, *supra* note 46.

60. The five-year relative survival rate for female breast cancer patients has increased from 63% in the early 1960s to 89% today. *See* Press Release, Am. Cancer Soc'y, Cancer Facts & Figures 2009, at 11, *available at* http://www.cancer.org/acs/groups/content/@nho/documents/document/500809webpdf.pdf (last visited Sept. 19, 2011).

61. *See* Jacoby, *supra* note 5; *see also* Joanna Stavins, *Credit Card Borrowing, Delinquency, and Personal Bankruptcy*, NEW ENG. ECON. REV., July/Aug. 2000, at 21, 24 (finding 70.73% insurance rate among bankruptcy filers in 1998 Survey of Consumer Finances and noting that those with health insurance were more likely to have filed for bankruptcy).

62. Although most Americans lack disability insurance, over two-thirds of all families in the U.S. own some kind of life insurance. In 2008, total life insurance coverage in the U.S.

private sector, lack disability insurance.[63] Without disability insurance and without personal savings, Americans have few options for avoiding bankruptcy and foreclosure in the wake of income disruptions and medical illness. As mentioned previously, the majority of Americans are living from paycheck to paycheck[64] with little or no savings.[65] This means that even with health insurance many are unable to handle their share of the medical costs due to a lack of savings and the high out-of-pocket medical costs that are associated with many insurance plans.[66] Consequently, very little stands between the average worker and financial ruin when a medical crisis happens.

The data collected from the Consumer Bankruptcy Project, discussed previously in Part II, shows an alarming increase in the number of consumer bankruptcy petitions and home foreclosures. In 2008, bankruptcies were up 31%[67] and foreclosures were up 81% from the previous year. [68] Interviews with debtors, reviews of bankruptcy petitions, and interviews with individuals whose homes are in the foreclosure process all paint a similar picture. The studies taken as a whole illustrate that average working Americans quickly deplete what little savings they have when a medical crisis occurs. Soon the combination of medical bills and lost wages pushes families into bankruptcy court and out of their homes.

Having disability insurance as a safety net would go a long way toward helping workers weather a medical crisis. For instance, the leading cause of long-term disability is cancer.[69] Medical advances

totaled 19.1 trillion dollars. *See* Ginger Applegarth, *Disability Insurance Can Save Your Life*, MSN MONEY, http://articles.moneycentral.msn.com/Insurance/InsureYourHealth/DisabilityInsuranceCanSaveYourLife.aspx.

63. *See* Social Security Basic Facts, *supra* note 56.

64. *See* Pisani, *supra* note 47.

65. *See* Rankin & Leary, *supra* note 46.

66. *See* Jacoby, *supra* note 48, at 309–10.

67. Press Release, Am. Bankr. Inst., May Consumer Bankruptcy Filings Increase Nearly 31 Percent over Previous Year (June 5, 2008), *available at* http://www.abiworld.org/AM/PrinterTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=53116; *see also* Christie, *supra* note **Error! Bookmark not defined.**.

68. Press Release, RealtyTrac, Foreclosure Activity Increases 81 Percent in 2008 (Jan. 15, 2009), *available at* http://www.realtytrac.com/content/press-releases/foreclosure-activity-increases-81-percent-in-2008-4551; *see also* Christie, *supra* note 17.

69. *See* Press Release, Unum, Survivors of Cancer More Likely to Return to Work Than in Past Years (April 28, 2011), *available at* http://unum.newshq.businesswire.com/press-release/research-news/cancer-leads-causes-unum%E2%80%99s-disability-claims-10th-year.

and increased access to health care have led to a decline in the incidence and mortality rates associated with the lung, prostate, breast, and colorectal cancers, the four most common types of cancer.[70] The National Cancer Institute estimates that approximately 11.1 million Americans with a cancer diagnosis were alive in 2005, and the five-year survival rate for all cancers diagnosed between 1996 and 2004 was 66%, up from 50% during the 1975 to 1977 period.[71] Despite the fact that survival rates are increasing, the numbers of people diagnosed with cancer each year still remains high.

Roughly 1.5 million workers will be diagnosed with cancer this year.[72] Many of these 1.5 million workers will undergo chemotherapy or radiation treatments. Some will face temporary disability and others will have a long-term disability. Most of these 1.5 million workers will not meet the Social Security Disability Income definition of "disabled" because they will not meet the requirement that either the period of disability last 12 months or be likely to result in death.[73] In addition, most of these 1.5 million workers will not qualify for worker's compensation because their cancer will not be caused by workplace exposure to a cancer-causing agent, such as asbestos. Retirement benefits will also likely be unavailable to these 1.5 million workers diagnosed with cancer because they will not meet the definition of "totally disabled" as defined by many retirement plans.[74] These 1.5 million workers diagnosed with cancer are representative of the many workers[75] who

70. U.S. Nat'l Inst. of Health, *Cancer Trends Progress Report – 2009/2010 Update*, NAT'L CANCER INST., http://progressreport.cancer.gov/highlights.asp (last visited Sep. 19, 2011).

71. *See* Am. Cancer Soc'y, *supra* note 60, at 1–2.

72. An estimated 766,130 men and 713,220 women will be diagnosed with cancer in 2009. Of the estimated number of men diagnosed with cancer, 25% will have prostate cancer, 15% will have lung cancer, and 10% will have colon cancer. Of the estimated number of women diagnosed with cancer, 27% will have breast cancer, 14% will have lung cancer, and 10% will have colon cancer. *See id.* at 4.

73. *See* GEORGE E. REJDA, SOCIAL INSURANCE AND ECONOMIC SECURITY 264–65 (1999).

74. *See infra* Part IV.D (discussing retirement plans).

75. Similar to advances in cancer treatment, the advances in the treatment of human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) have resulted in much longer life expectancies and an increasing number of survivors returning to work. *See* Anne Cristiansen Bullers, *Living with AIDS–20 Years Later*, FDA CONSUMER, Nov.–Dec. 2001, at 33–34 (noting that the late 1990s has been called the "golden era" of HIV/AIDS treatment because of the discovery of the effectiveness of a variety of powerful and effective drug cocktails). The longer life expectancies created a surge in HIV/AIDS-positive

will take time off from work to recover from an illness without adequate disability coverage.[76]

Whether faced with cancer, bed-rest during pregnancy, weeks of recovery from heart surgery, or one of the multitude of other disabilities, most workers will find that they have few resources available to replace the income lost during their recovery period when they are unable to work. Thus, disability insurance is needed to bridge the income gap created by lost wages during a medical crisis. Disability insurance pays a percentage of lost wages when a worker cannot work due to an illness or injury. Often the benefits provided by a disability plan can be the difference between making ends meet during a medical crisis and falling behind on mortgage notes and car payments.

In general, there are two categories of disability insurance available to workers: short-term disability insurance and long-term disability insurance. Short-term disability insurance is designed to provide workers with income replacement if they become disabled for a short duration, usually a year or less.[77] Typically, short-term disability policies provide a worker with a portion of her pre-disability wages, most commonly one-half to two-thirds of her pre-disability income for a period of thirteen, twenty-six, or fifty-two weeks.[78] Short-term disability claims are most often filed due to pregnancy and non-back-related injuries.[79]

In contrast, long-term disability insurance is designed to provide benefits to workers when the period of disability is expected to last for a long period of time—usually a year or more.[80] Benefits under a long-term disability insurance plan typically begin at the expiration of short-term benefits. Like short-term disability policies, long-term

individuals returning to work, and many of those trying to return to work face a myriad of difficulties. Because of the increased demand from clients seeking to return to the workforce, some advocates began publishing guides to help with the transition. *See, e.g.*, AIDS LAW PROJECT OF PA., RETURNING TO WORK: A HELPFUL GUIDE (Dec. 2002), *available at* www.aidslawpa.org/wp-content/uploads/2011/04/backtowork.pdf.

76. Like individuals with AIDS, cancer survivors who return to work often complain of difficulties with health and life insurance and "a lack of understanding from co-workers." *See* Evelien R. Spelten et al., *Factors Reported to Influence the Return to Work of Cancer Survivors: A Literature Review, Psycho-Oncology*, 11 PSYCHO-ONCOLOGY 124, 124 (2002).

77. *See The Basics of Short Term Disability Insurance*, *supra* note 57.

78. *See id.*

79. *See id.*

80. *See id.*

policies typically replace anywhere from one-half to two-thirds of the worker's lost wages.[81] The most common long-term disability claims stem from cancer, pregnancy complications, back injuries, heart disease, and diabetes.[82]

Thus, short-term and long-term disability insurance are designed to provide a portion of the income lost when workers are forced to miss work due to an injury or sickness. The disability benefits received under a short-term or long-term disability policy can be used to pay the mortgage, health insurance premiums, food costs, and other basic necessities. Without disability insurance, most Americans have few alternative means of covering the cost of basic needs when faced with an unexpected injury or illness. Missed work equals missed wages; missed wages equal missed payments on homes, cars, and medical bills, and soon, bankruptcy. Most workers are not insured against these categories of worries.

Unfortunately, most Americans lack adequate disability insurance.[83] This is in large part because they do not have access to moderately priced disability insurance. Individual disability policies are often hard to find and even harder to qualify for.[84] In addition, individual policies are notoriously expensive.[85] Group disability insurance,[86] which is sometimes provided as a fringe benefit of

81. *See id.*

82. *See id.*

83. *See* Social Security Basic Facts, *supra* note 56.

84. In order to qualify for an individual insurance policy, the worker must complete a full application, take a physical examination, and otherwise qualify for the insurance. *See* AM. COUNCIL OF LIFE INSURERS, DISABILITY INCOME INSURANCE: FINANCIAL PROTECTION FOR YOU AND YOUR FAMILY, http://www.acli.com/Consumers/Disability%20Income%20Insurance/Documents/e09ac83683ae42189dc919484b0de605DI_Consumer_Broch1.pdf (last visited Nov. 4, 2011) (noting that individual carriers look more closely at the policy applicant and consider a variety of factors to determine whether they will cover her the premium amount, including age, benefit amount, benefit period, current health status, gender, tobacco use, and type of job).

85. *See* Kelly L. Knudson, *California State Disability Insurance: Privatization Is the Answer to Employee Woes*, 40 U.S.F. L. REV. 539, 548 (2006) (lamenting the expense of individual long-term disability plans and noting that "[i]n 2003, the average annual premium for a non-cancelable policy was $1336").

86. Group disability insurance is the term used for disability insurance purchased by a group as opposed to a single individual purchasing a policy from an insurer. Large employers contract with insurers to provide disability benefits for employees at a discounted group rate. *See, e.g.*, *Benefits and Other Programs*, BANK OF AMERICA, http://careers.bankofamerica.com/learnmore/benefits.asp (last visited Feb. 18, 2011); *Benefits*, HOME DEPOT, INC., https://careers.homedepot.com/cg/content.do?p=benefits (last visited Feb. 18, 2011); *Benefits*, KROGER CO., http://www.kroger.com/company_information/careers/

employment, is easier to qualify for and is significantly cheaper.[87]

A recent survey by the Department of Labor found that in 2009 roughly 37% of workers had access to group short-term disability insurance through their employer.[88] Of the workers with access, 97% of them enrolled in the short-term disability plan.[89] Nationwide about 36% of workers have coverage under a group short-term disability insurance plan.[90] Not surprisingly, white-collar workers are the most likely to have access to short-term disability insurance through their employer. Around 43% of white-collar workers have employer-provided access to short-term disability benefits.[91] In contrast, service workers have the least access. Only about 23% of service workers have employers who offer a short-term disability insurance plan.[92]

Similarly, about 33% of workers have access to a group long-term disability insurance plan through their employer, and about 32% of all private sector workers are covered by a group long-term disability insurance plan.[93] About 96% of workers elected long-term disability insurance when a group rate was offered through their employer. Fifty percent of white-collar workers have long-term disability insurance coverage, while only 15% of service workers have coverage.[94] Overall, the data clearly shows that employees participate in very high numbers when offered group disability insurance by their employer. As a result, increasing the percentage of employers who offer group disability insurance should greatly increase the

Pages/benefits.aspx (last visited Feb. 18, 2011). Workers employed by companies that do not offer group disability insurance might still be able to participate in a group disability insurance plan sponsored by an industry, trade, or professional association such as the American Bar Association or the American Medical Association. *See*, *e.g.*, *Disability Insurance*, AMERICAN BAR ENDOWMENT, http://www.abendowment.org/insurance/dis_lt.asp (last visited Mar. 1, 2011) (offering group disability insurance to members of the American Bar Association).

87. *See* JHA, 2008 U.S. GROUP DISABILITY MARKET SURVEY SUMMARY REPORT 7 (Apr. 2009), *available at* https://www.genre.com/sharedfile/pdf/GDMS200904-en.pdf (noting that in 2008, the average annual premium for a group long-term disability insurance was $225 a year).

88. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS SURVEY tbl. 16 (Mar. 2009), *available at* http://www.bls.gov/ncs/ebs/benefits/2009/ownership/civilian/table12a.htm.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

number of workers covered by group disability benefits.

When group disability insurance is offered, the employee typically has the option of electing short-term disability insurance, long-term disability insurance, or both. As with most group programs, the cost of group disability insurance is usually less than that of similar individual disability insurance programs. The average premium for a group short-term disability policy was $202 per year in 2008.[95] When a short-term disability policy is purchased through an employer, the policy is "guaranteed issue"—meaning a subscriber does not have to take a medical exam to prove insurability. If a worker's employer does not offer short-term disability coverage, individual policies are only available on an extremely limited basis.

Similarly, the average cost for long-term disability coverage under a group plan is roughly $225 a year.[96] Unlike the short-term disability market, an individual long-term disability policy is widely available, albeit at a significant cost. An individual long-term disability policy purchased directly from an insurer costs well over $1000 each year on average.[97] This price difference is substantial to the average worker. For example, a forty-year-old male professional who makes $50,000 a year would pay about $1,700 a year for a policy that would pay him $2,900 a month for up to five years for a covered disability.[98] In contrast, if the forty-year-old professional were covered under a group plan offered through his employer, then he could enjoy similar coverage for about $225 a year.[99] Thus, the lack of access to moderately priced disability insurance means that most Americans do not purchase disability insurance and are left without a needed safety net when they are unable to work due to an illness or injury.[100]

The failure of employers to readily offer disability insurance is in part based on the lack of aggressive marketing by insurers. Kenneth Abraham and Lance Liebman have articulated two theories for why insurers have allowed the private disability market to remain

95. *See* JHA, *supra* note 87, at 8.

96. *See id.*

97. *See* Stacey L. Bradford, *Do You Need Disability Insurance?*, SMART MONEY (Sept. 10, 2008), http://www.smartmoney.com/plan/insurance/do-you-need-disability-insurance-17318/.

98. *See What is Income Disability Protection?*, UNUM, http://www.unum.com/disability101/WhatIsIt.aspx#howmuch (last visited Feb. 13, 2011).

99. *See* JHA, *supra* note 87, at 7.

100. *See infra* Part IV.

anemic.[101] First, the threat of adverse selection limits interest from insurers in increasing their disability insurance offerings. Adverse selection generally refers to the disproportionate tendency of those who are more likely to suffer losses to seek insurance against those losses. Thus, most applicants seeking disability coverage seek out the coverage because of a belief that they have some risk factors that increases their need for coverage. This phenomenon raises costs for the insurers and policyholders alike. Thus, those who do not fully appreciate the probability of a disabling injury will likely be deterred from buying coverage because of the higher prices and lack of appreciation for the true scope of the risk.[102]

Second, "moral hazard" ratchets up the cost of individual disability insurance policies and limits their supply. Moral hazard is the tendency of an insured party to exercise less care to minimize losses than she would exercise if she were uninsured.[103] Moral hazard is present both ex ante and ex post in the disability context. One who has disability insurance is more likely to become disabled than an uninsured person and is more likely to have a slower recovery or to never recover.[104] Insurers try to induce policyholders to recovery quickly by limiting coverage to typically no more than 60% of after-tax income and by reducing benefits by the amounts recovered from Social Security and workers' compensation programs.[105]

In sum, employees often do not appreciate the risk of being disabled and those employees who do appreciate the risk do not

101. *See* Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 101 (1993) (noting that historical reasons have limited the appeal of disability insurance to lower wage workers and arguing that "the extension of [Social Security Disability] to virtually all Social Security participants after 1956, the growth of some state disability protection programs, and the indexing of SSD benefits in 1972 essentially have made the lower-income market an unlikely source of private disability insurance policyholders").

102. *See id.* at 102 n.82. Although all voluntary insurance is affected to some extent by adverse selection, the disability insurance market is especially vulnerable to adverse selection because the application screening process that is typically used to neutralize this problem in other insurance contexts tends to be least effective in the disability insurance context. There is a lack of reliable data to base predictions on. For instance, morbidity data is not as widely available as mortality data, nor is it as reliable. Additionally, whether an injury or sickness will disable an individual is dependent, in large part, on personality traits which are hard to reduce to objective indices. *Id.*

103. *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 64–83 (1986).

104. *See* Abraham & Liebman, *supra* note 101, at 102.

105. *See id.* at 103.

readily have access to moderately priced disability insurance. As a result, the majority of American workers rely on inadequate substitutes for disability insurance. A minority of workers, however, are covered by state-mandated disability insurance. As will be discussed in Part V, states that have mandated short-term insurance generally have a lower per-capita consumer bankruptcy rate than the national average.

IV. SUBSTITUTES FOR DISABILITY INSURANCE

Because most workers are not covered by state-mandated disability insurance, most workers are not covered by any disability insurance policy and rely on ineffective substitutes for disability insurance. This Part discusses alternatives to disability insurance that are commonly thought to provide some protection against a disability. Although these substitutes can ameliorate the effects of a medical crisis, they are not adequate substitutes for disability insurance.

A. Comprehensive Health Care: An Inadequate Solution

From the bankruptcy courts to Congress and everywhere in between, there is no shortage of evidence showing that health care costs are crippling families in America. Thus, many interested parties and pundits alike have advocated for some level of health care reform as the cure to the medical bankruptcy imbroglio.

Growth in national health expenditures (NHE) in the United States was projected to be 6.1% in 2008. The average annual NHE growth is expected to be 6.2% per year for 2008 through 2018. By 2018, national health spending is expected to reach $4.4 trillion and comprise just over one-fifth (20.3%) of the gross domestic product (GDP).[106] In 2009, national health spending was $2.5 trillion.[107]

Health care costs also comprise a larger part of family budgets. As a result, workers are increasingly unable to afford comprehensive health insurance. The average cost of an employer-subsidized health insurance policy for a family of four increased by 131% between

106. CTRS. FOR MEDICARE AND MEDICAID SERVS., NATIONAL HEALTH EXPENDITURE PROJECTIONS 2008–2018, *available at* http://www.cms.hhs.gov/NationalHealthExpendData/downloads/proj2008.pdf.

107. 42 U.S.C.A. § 18091(a)(2)(B) (West 2010).

1999 and 2009.[108] In 2009, the average cost of an employer-subsidized health insurance policy for a family of four was $13,375, which is almost equal to the yearly salary for someone making minimum wage.[109] Nationally, private health insurance spending totaled $854 billion.[110]

Health insurance costs are out of reach for too many families, leading many to call for substantial health care reform. While there is almost universal agreement that America's health care system needs reform, there is scant agreement about how to fix it or even what ails the system. The road to health care reform has traditionally been a political quagmire; therefore, efforts to reform health care in America have gained momentum at various junctures over the past century with typically little success.[111]

One of the earliest, most organized campaigns for compulsory health insurance in the United States was started by the American Association for Labor Legislation (AALL). The AALL was an organization of economists, lawyers, and other reformers who studied labor legislation and pushed reforms in the early part of the twentieth century.[112] The organization was triumphant in passing workers' compensation legislation. Germany had inaugurated the first national system of compulsory health insurance in 1883, followed closely by Norway in 1909 and Britain in 1911. In turn, momentum seemed to be swelling for compulsory health care in America.[113] Buoyed by its workers' compensation victory, the AALL decided to expand its agenda to include health care coverage for low-income workers. It produced a model health insurance bill in 1915 and initially garnered the support of the American Medical

108. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2009 SUMMARY OF FINDINGS 1 (2009) *available at* http://ehbs.kff.org/pdf/2009/ 7937.pdf.

109. *Id.*

110. 42 U.S.C.A. § 18091(a)(2)(B) (West 2011).

111. For accounts of health care reform in the U.S., see, e.g., RONALD L. NUMBERS, ALMOST PERSUADED: AMERICAN PHYSICIANS AND COMPULSORY HEALTH INSURANCE, 1912–1920 (1978); Theodore R. Marmor & Jonathan Oberlander, *Paths to Universal Health Insurance: Progressive Lessons from the Past for the Future*, 2004 U. ILL. L. REV. 205, 208 (2004).

112. *See* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY 243 (1982).

113. *See* Samuel Levey & James Hill, *Universal Health Insurance: Incrementalism or Comprehensive Reform?*, 3 STAN. L. & POL'Y REV. 189, 191 (1991).

Association.[114]

In a nutshell, the bill limited coverage to workers earning less than $1,200 a year. The services of physicians, nurses, and hospitals were included, as was sick pay, maternity benefits, and a death benefit of fifty dollars to pay for funeral expenses. Costs were to be shared between workers, employers, and the state.

The AALL's push ultimately ended in failure. In the end, special interest groups and a changing political climate led to the defeat of the bill. The American Medical Association, unions, and commercial insurance companies all lobbied against the bill because a disagreement had arisen over physician payments within the American Medical Association; the unions feared that if the government provided health insurance, the unions' power might wane, and the commercial insurance industry feared lost profits.[115]

Moreover, the political climate changed dramatically when America entered World War I in 1917. Nationalism and anti-communist rhetoric, along with the typical priority shifts during wartime, led to the first defeat of compulsory health care. If the AALL's vision of comprehensive health care had passed, consumer bankruptcies arising from medical illness or injury would likely not be a problem today.

With the defeat of the AALL's bill, later attempts at health care focused more narrowly on benefits for the cost of receiving health care services. Thus, no health reform proposals since the AALL's proposal have included a wage replacement component for disabled workers. The election of President Clinton in 1992 marked the first time since Truman[116] that a president had made national health care

114. *See* Jill Quadagno, *Physician Sovereignty and the Purchaser's Revolt*, 29 J. HEALTH POL. POL'Y & L. 815, 816–17 (2004).

115. Karen S. Palmer, *A Brief History: Universal Health Care Efforts in the U.S.*, PHYSICIANS FOR A NATIONAL HEALTH PROGRAM, http://www.pnhp.org/facts/a_brief_history_universal_health_care_efforts_in_the_us.php?page=all (last visited Sept. 19, 2011).

116. Truman was unexpectedly reelected President in 1948 after making universal health care the centerpiece of his campaign. *See* Sven Steinmo & Jon Watts, *It's the Institutions, Stupid! Why Comprehensive National Health Insurance Always Fails in America*, 20 J. HEALTH POL. POL'Y & L. 329, 342 (1995). In spite of polls taken in 1947 and 1948 showing strong public support for national health care, Truman failed to get the legislation passed. *Id.* at 343. The American Medical Association vigorously opposed the legislation and preyed on fears of "socialized medicine" to erode public support. *Id.* at 345. Although Democrats had a majority in Congress, southern Democrats voted with Republicans to block passage of the health bill, in part based on fears of having to end segregation in hospitals. *See id.* at 344–45.

a central part of his election platform.[117] First Lady Hillary Clinton led the taskforce charged with drafting the bill. The fruit of her efforts was a very complex, nearly 1400-page bill known as the Health Security Act.[118] Clinton's attempt, like others in the past, failed. The complexity of the bill coupled with the secrecy surrounding its drafting played a role in its defeat. Although quite lengthy, the bill did not provide benefits comprehensively. It did not mandate paid sick, maternity, or paternity leave for workers, nor did it provide an additional death benefit.

Special Interest Groups again played a large role in swaying public opinion against the bill.[119] The Health Insurance Association of America sponsored the infamous "Harry and Louise" ad campaign, which portrayed an ordinary couple complaining about the government limiting their individual choices.[120] Though many believe the ad did not affect public opinion, the ad is often credited with helping to deflate public support for the Clinton plan by portraying the plan as a threat to the public.[121] An additional impediment to passage of the Clinton bill was that the Democrats were not able to agree on its contents, and Republicans were able to successfully mount opposition and galvanize the public.[122]

In spite of past failures, in 2009, newly elected President Obama decided to press forward with making health care reform a top legislative priority. Having large Democratic majorities in the both the House and Senate seemed to present reformers with the perfect opportunity to actually pass sweeping legislation. Finally, after a century of false starts, it seemed all but certain that a health care reform bill, which would provide health insurance for most

117. *See* Theodore Marmor & Jonathan Oberlander, *A Citizen's Guide to Healthcare Reform*, 11 YALE J. ON REG. 495, 495–96, 500 (1994).

118. Health Security Act, H.R. 3600, 103d Cong. (1993).

119. *See* Raymond L. Goldsteen et al., *Harry and Louise and Health Care Reform: Romancing Public Opinion*, 26 J. HEALTH POL. POL'Y & L. 1325, 1345–47 (2001) (suggesting that advertising of this sort can demobilize public support for health policy initiatives that are unfavorable to special interests).

120. *Id*. at 1326.

121. *See id*. at 1346.

122. Nonetheless, after Clinton's attempt at comprehensive health reform failed, he was able to pass the State Children's Health Insurance Program (SCHIP) as part of the Balanced Budget Act of 1997. Pub. L. No. 105-33, 111 Stat. 251 (1997). SCHIP expanded Medicaid to provide federal matching funds to states that provide insurance to families with children. *See id*.

Americans, would finally become law.[123]

Ultimately, on March 23, 2010, President Barrack Obama signed health care reform legislation into law.[124] The Patient Protection and Affordable Care Act (the "PPACA") requires that all U.S. citizens and legal residents have qualifying health coverage. Those without coverage pay a tax penalty not to exceed 2.5% of household income.[125] In the legislative history of the PPACA, Congress specifically noted how the cost of health care impacts commerce and the national economy. In particular, Congress noted the fact that "62% of all personal bankruptcies are caused in part by medical expenses" and argued that "[b]y significantly increasing health insurance coverage, the requirement, together with the other provisions of th[e] Act, will improve financial security for families."[126]

Thus, one of the thrusts of the PPACA is to make health insurance more affordable for families so that the costs of medical care will not cause families undue hardship and financial ruin. To that end, various subsidies make health insurance affordable for low- to moderate-income families.[127] In addition, the PPACA reduces the out-of-pocket limits for those with incomes up to 400% of the federal poverty line.[128] Finally, insurers are required to provide

123. Nonetheless, fortunes changed swiftly, and health care reform stalled again. The Democrats lost their filibuster-proof majority in the Senate, and again public support has waned. *See generally* Robert Pear & David M. Herzenshorn, *Democrats Ask, Can This Health Care Bill Be Saved?*, N.Y. TIMES, Feb. 5, 2010, at A9.

124. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *as amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

125. The penalty will be phased in according to the following schedule: $95 in 2014, $325 in 2015, and $695 in 2016 for the flat fee or 1.0% of taxable income in 2014, 2.0% of taxable income in 2015, and 2.5% of taxable income in 2016. 26. U.S.C.A. § 5000A (West 2010).

126. *Id.* § 18091(a)(2)(G).

127. The PPACA provides premium credits such that the premium contributions are limited to the following percentages of income for specified income levels: For families earning up to 133% of the Federal Poverty Line (FPL), contributions are limited to no more than 2% of income; for families earning between 133% and 150% of the FPL, contributions are limited to no more than 4% of income; for families earning between 150% and 200% of the FPL, contributions are limited to no more than 6.3% of income; for families earning between 200% and 250% of the FPL, contributions are limited to no more than 8.05% of income; and for families earning between 250 and 400% of the FPL, contributions are limited to no more than 9.5% of income.

128. Individuals and families between 100% and 200% of the FPL ($1983 per individual and $3967 per family); 200% and 300% of the FPL ($2975 per individual and $5950 per

dependent coverage for children up to the age of 26.[129]

In spite of its noble efforts, the PPACA is unlikely to stem the tide of medical bankruptcies for three main reasons. First, the out-of-pocket maximums are still too high for working Americans. The current recession is, in part, a product of high debt loads and the dismal rate of savings among American families.[130] Therefore, with little to no money left after paying regular monthly household bills, many families are sure to encounter hardship even with an out-of-pocket maximum as low as $2500. To assume that the average family earning roughly $40,000 can afford up to $6000 in out-of-pocket costs, as contemplated by the PPACA, is totally unrealistic.

Second, the loss of income that accompanies a health crisis leaves families with medical bills and no income to pay those bills. The study by the Consumer Bankruptcy Project illustrated that most of the medically bankrupt had health insurance but still faced crippling out-of-pocket costs. Many of those families were ruined by out-of-pocket costs below the caps in the PPACA.[131] Five to ten thousand dollars in medical costs coupled with lost wages in a given year is still more than enough to drive many families into bankruptcy. The data shows that it is the combination of additional medical bills and the loss of wages that pushes families into bankruptcy. Seven out of ten debtors interviewed by the Consumer Bankruptcy Project reported that income loss due to health problems contributed "very much" to their bankruptcies. [132] Therefore, attempts to reduce the costs of medical care are an incomplete solution to reducing consumer bankruptcies.

Finally, the fate of PPACA is still uncertain. A litany of states have pursued filings challenging the constitutionality of the PPACA. Currently, five judges have weighed in on the constitutionality of the PPACA, with two judges finding the legislation to be unconstitutional.[133] Just as troubling, the Obama administration has

family); and 300% and 400% of the FPL ($3987 per individual and $7973 per family).

129. 42 U.S.C.A. § 300gg-14(a) (West 2011).

130. *See* POSNER, *supra* note 3.

131. For the findings of Consumer Bankruptcy Project, see *supra* note 5 and accompanying text.

132. *See* Jacoby & Warren, *supra* note 23, at 561.

133. *See, e.g.*, Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011) (holding that the PPACA did not violate the Commerce Clause, Necessary and Proper Clause, General Welfare Clause, or the Religious Freedom Restoration Act); Florida *ex. rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (holding that health

granted broad waivers to four states that allow health insurance companies operating in those states to continue offering benefits that are below the minimum threshold provided for in the PPACA.[134]

For the reasons discussed in this Part, it is unlikely that the PPACA or any remedy based entirely on expanding access to affordable health insurance will stem the tide of medical bankruptcies. The data illustrates that families file for bankruptcy because of missed wages and medical costs.[135] Therefore, any solution must provide wage replacement during a health crisis when the worker is unable to work. Thus, the expansion of disability insurance is a necessary element of any effective solution. When trying to recover from an injury or sickness without disability insurance, families simply cannot pay medical bills, mortgage payments, and car notes when they lack savings and can no longer rely on their weekly paycheck.

In addition, presenting the case to the American public regarding the necessity of disability insurance should be much easier than creating the buy-in that is necessary for a sweeping overhaul of health care financing. Many ardent supporters of the PPACA emphasized that roughly forty-seven million Americans, equaling 18% of the population under the age of sixty-five, lack health insurance.[136] Thus, supporters assumed that it would be axiomatic that, with 18% of Americans lacking health insurance, there would be a large groundswell of popular support. However, supporters overlooked the fact that over 200 million Americans had health insurance, and that many Americans were relatively content with

insurance mandate exceeded Congress's power under the Commerce Clause and that because the mandate was so inextricable linked to the entire act that the whole act was unconstitutional); Liberty Univ. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010) (holding that the PPACA was a valid exercise of congressional Commerce Clause power); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (holding that the PPACA is a constitutional exercise of power under the Commerce Clause and that the penalty was not a tax-triggering Anti-Injunction Act); Virginia *ex rel.* Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010) (holding that the PPACA exceeded the scope of Congress's power under the Commerce Clause).

134. The four states are Florida, New Jersey, Ohio, and Tennessee. "To qualify for a waiver [the] state . . . must show that compliance with the federal requirement would cause 'a significant increase in premiums or decrease in access to benefits.'" Robert Pear, *Four States Get Waivers to Carry Out Health Law*, N.Y. TIMES, Feb. 17, 2011, at A22 (citation omitted).

135. *See* Jacoby & Warren, *supra* note 233, at 536.

136. *See* Diane Rowland & Adele Shartzer, *America's Uninsured: The Statistics and Back Story*, 36 J.L. MED. & ETHICS 618, 619 (2008).

their private plans and fearful of any changes to their plans and increased governmental regulation. Most Americans lack disability insurance,[137] in contrast to health insurance. Therefore, any effort to increase access to disability insurance would be giving most Americans something they lack rather than taking away or altering something they have and are comfortable with.

B. Social Security Benefits: An Inadequate Solution

Social Security was expanded in 1956 to provide disability insurance for American workers with long-term disabilities. Today, most American workers who have long-term disability coverage have it through the federal Social Security Disability program.[138] In July 2011, 8,435,000 disabled workers received disability under the Social Security program. Those receiving benefits had an average monthly benefit of $1,069.90 (average spousal and children's benefits amounts were $288.10 and $317.50, respectively).[139] After twenty-four months, individuals who receive disability benefits under Social Security are also eligible for Medicare Part A, which covers hospital costs and a few other medical expenses, and Medicare Part B, which covers doctor bills and other medically necessary and preventive subjects.[140] They are also eligible to participate in the prescription drug benefit under Medicare Part D.[141]

Unfortunately, for a number of reasons, Social Security's disability income does not provide an adequate safety net for many workers. As Warren has noted, "the holes in the SSDI safety net are large enough to drive a truck through—or for millions of families to fall through."[142] This is because the definition of disability is

137. *The Hartford Sees Drop in Number of U.S. Workers with Disability Insurance*, THE HARTFORD (Sept. 20, 2011, 8:52:00 p.m.), http://www.thehartford.com/cs/Satellite?pagename=GBD_Internet/HLI03Article/NewsArticle&cid=1287776844394&c=HLI03Article&p=1248974913168.

138. *See* U.S. Soc. Sec. Admin., DISABILITY PROGRAMS, http://www.ssa.gov/disability (last visited Feb. 13, 2010).

139. *See* U.S. Soc. Sec. Admin., *Monthly Statistical Snapshot*, SOCIALSECURITY.GOV, (Oct. 2011), http://www.socialsecurity.gov/policy/docs/quickfacts/stat_snapshot.

140. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE & YOU 18, 33–35, 36 (2011), *available at* http://www.medicare.gov/Publications/Pubs/pdf/10050.pdf (last visited Feb. 25, 2011). *See also* 42 U.S.C.A. § 1395(c) (West 2011).

141. CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 140, at 56.

142. *See* Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 418 (2004).

extremely stringent. Although any individual who is covered under Social Security and suffers a disabling sickness or injury can apply for a monthly benefit, the covered individual must not be able to work in *any* occupation (not just her own occupation) because of a medically determined physical or mental impairment that is expected to last at least twelve months or result in death.[143] Under this standard, for instance, the neighbor undergoing chemotherapy and radiation therapy in her quest to beat breast cancer, the young associate at the large law firm who was injured in a car accident, and the middle-aged man who injures his back while attempting a yoga pose would all fail to meet the requisite definition of disability. Because the standard of disability is so exacting, it is not surprising that about one-eighth of participants die before completing the two-year waiting period.[144] Therefore, the disability program under Social Security fails to provide easy access to income replacement for middle class families and individuals who are confronted with financial hardships as a result of a sudden illness or disability. [145]

C. Workers' Compensation: An Inadequate Solution

Every state has a workers' compensation program that covers most workers.[146] To be eligible for benefits under a workers' compensation program, the disability must arise from accidents in the workplace or in performance of normal services. Workers' compensation programs are funded by an employer's purchase of qualified insurance or by specifically and tightly defined self-insurance programs.[147]

In addition to disability income, workers receiving workers' compensation benefits usually receive medical care and rehabilitation benefits.[148] Benefits are usually determined as a percentage—typically about 70% of the worker's wage. However, like disability income provided under the Social Security program, there is usually a

143. 42 U.S.C. § 423(d) (2006); 20 C.F.R. § 404.1505 (2009).

144. GINA LIVERMORE ET AL., COSTS AND BENEFITS OF ELIMINATING THE MEDICARE WAITING PERIOD FOR SSDI BENEFICIARIES 2 (2009).

145. *See* MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 84 (1999).

146. *See* Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 320 (1998).

147. *See* REJDA, *supra* note 73, at 264–65.

148. *See id.* at 265–67.

maximum weekly benefit amount that caps the benefits at a relatively low rate. In addition, benefits are sometimes determined by the degree of the worker's disability, meaning that a worker might only qualify for payment for a partial disability.[149]

Although workers' compensation programs provide needed wage replacement for workers who are injured on the job, it is important to note that workers suffering from a non-work related injury or sickness are not eligible to receive benefits under workers' compensation programs. As the economy has shifted from a manufacturing-based economy to one driven by the provision of information, innovation, finance, and services, the working environments for many workers have shifted from factories fraught with danger to relatively safe air-conditioned office buildings.[150] Currently, workplace injuries and illnesses represent a small fraction of the new cases of disability each year in the United States. In fact, almost 90% of the disabilities occurring each year in the U.S. are *not* work-related.[151] Since most of the families and individuals teetering on the brink of financial disaster are grappling with medical crises that are not job-related, workers' compensation benefits are not available as an additional source of income. Therefore, workers' compensation programs are not a viable source of wage replacement for most American workers.

D. Retirement Plans: An Inadequate Solution

Another potential source of disability benefits is an employer-sponsored retirement plan, such as a pension, or a profit-sharing or stock bonus plan qualified under section 401 of the Internal Revenue Code. The primary purpose of a qualified retirement plan is to provide retirement benefits when a participant leaves the workforce, which may occur earlier than the normal retirement date

149. *See id.*

150. The passage of the Occupational Safety and Health Act of 1970 also helped reduce the number workplace injuries. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 2, 84 Stat. 1590–91 (1970). The Occupational Safety and Health Act was a federal effort to reduce the number of workplace hazards. The stated purpose of the Act was to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." *See* 29 U.S.C. § 651 (2006). In order to achieve that goal, the Act authorized the Secretary of Labor to establish mandatory national standards to assure worker health and safety. 29 U.S.C. § 655. This job is carried out by the Occupational Safety and Health Administration, an agency within the Department of Labor. *See id.*

151. *See* NAT'L SAFETY COUNCIL, *supra* note 53, at 2.

if the participant is determined to be disabled.

Disability benefits are provided as a secondary benefit of some retirement plans. The standard for disability under retirement plans varies widely. While most plans require a standard of an absolute and permanent disability, others may permit disability payments for a temporary disability. Disability payments received from a retirement plan by the disabled participant are generally fully taxable.[152] However, there may be some tax-free benefits paid if the payments are deemed to be funded by the employee's own nondeductible contributions to the retirement plan.[153]

From an employer's perspective, retirement plans are attractive vehicles for meeting disability needs because the employer can take a current business expense deduction for its contributions to the plan and the employees are not currently taxed on these contributions. Instead, just like in the typical retirement context, employees are taxed only as benefits are disbursed from the plan.[154] In all cases, the amount of any disability payment is dictated by the size of the retirement account or fund accrued for the benefit of the participant. Thus, the amount of the disability benefit usually correlates with the length of time that the disabled worker has participated in the plan. The amount of benefit increases with the length of participation.[155]

Relying on a retirement plan to replace income lost in the wake of a disability can have severe consequences later in life. When faced with mounting medical bills, missed mortgage payments, and other crucial bills, withdrawing money from a retirement plan to replace lost income due to a disability might seem like a good idea; however, using retirement savings early comes at a tremendous cost. Namely, the individual has depleted some or all of her retirement nest egg. Depending on her age and length of the disability, she might not have enough healthy working years left to replenish her retirement

152. *See* IRS, PUBLICATION 525: TAXABLE AND NONTAXABLE INCOME, at 17 (2010), *available at* http://www.irs.gov/pub/ irs-pdf/p525.pdf ("If you retired on disability, you must include in income any disability pension you receive under a plan that is paid for by your employer. You must report your taxable disability payments as wages on line 7 of Form 1040 or Form 1040A until you reach minimum retirement age.").

153. *See* 26 U.S.C. § 402 (2006).

154. *See id*. Typically, there is a 10% early withdrawal penalty on distributions taken from a retirement plan (i.e., 401(k), 403(b), or IRA). William Perez, *Tax Penalty for Early Distribution of Retirement Funds*, ABOUT.COM (Nov. 3, 2008), http://taxes.about.com/od/retirementtaxes/a/early_penalty.htm.

155. *See* 26 U.S.C. § 402.

account. Thus, siphoning off retirement income to pay her bills during a period of disability leaves her without a necessary retirement nest egg.

In sum, retirement plans were designed to provide income for workers during retirement and not during a period of disability. At every phase of a worker's career, withdrawing money from her retirement account to cope with a disability is fraught with peril, and in most cases will only delay a bankruptcy filing until the retirement years.

V. A SOLUTION TO THE MEDICAL BANKRUPTCY AND DISABILITY IMBROGLIOS

As discussed previously in Part IV, health insurance, Social Security, workers' compensation, and retirement plans are inadequate substitutes for disability insurance. Providing workers with disability insurance is a necessary component of curing the medical bankruptcy imbroglio. In accounting for the wide variety in the number of bankruptcy filings across the states, researchers and scholars have overlooked the impact of mandated disability insurance.

Recently, Lefgren and McIntrye attempted to account for the puzzling disparity in the rate of bankruptcy filings across the states.[156] The findings from their study suggest that the differing number of bankruptcy filings across states reflects, in large part, the relative costs of formal and informal default and legal institutions that exist in the states.[157] The study also finds that the size of the public safety net and legality of payday lending were statistically and economically insignificant.[158] The presence of mandated short-term disability coverage was not included in the public safety nets analyzed by Lefgren and McIntyre.

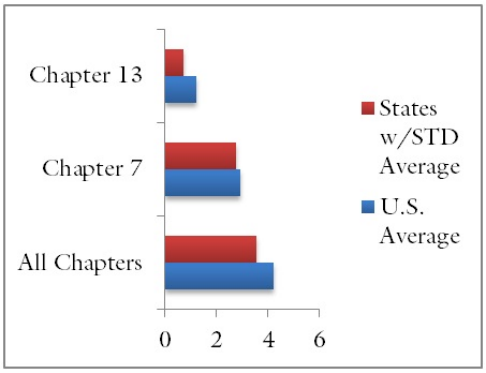
As discussed previously, the purpose of disability insurance is to provide a basic level of wage replacement when a worker is unable to work due to illness or injury. Thus, it is understandable why having disability insurance would lessen the impact of an injury or illness and make it less likely that the individual would file for bankruptcy as

156. Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367 (2009).

157. *See id.*

158. *See id.* at 380.

a result of a medical crisis. The data on bankruptcy filings from the Administrative Office of U.S. Courts seems to support this hypothesis. California,[159] Hawaii,[160] New Jersey,[161] New York,[162] and Rhode Island[163] are the only states that require employers to provide short-term disability benefits for their employees. These states require private employers to provide a minimum amount of short-term disability benefits to all employees while disabled. States that have compulsory short-term disability plans for private sector employees are generally below the national average for bankruptcy filings. When comparing the average number of per capita bankruptcy filings in states with compulsory short-term disability insurance to the national per capita average, the average rate for the group of five states with compulsory short-term disability insurance was lower than the national average, as evidenced in the chart below.



159. In 1946, the California State Legislature enacted a disability insurance program during its 56th session. At the time of the enactment, California had a surplus from employee unemployment insurance contributions and decided to establish the SDI program. *See* Pat Merrick, *California's Disability Insurance System*, 304 INS. L.J. 371, 372 (1948). The program is called the State Disability Insurance ("SDI") program and is administered by the Employment Development Department. *See About the Program*, ECON. DEV. DIVISION, ST. OF CAL., http://www.edd.ca.gov/Disability/About_the_Program.htm (last visited Feb. 17, 2011).

160. The Hawaii Temporary Disability Insurance ("TDI") law was enacted in 1969. HAW. REV. STAT. §§ 392-1 to -101 (2009).

161. New Jersey's program is also called Temporary Disability Insurance. N.J. STAT. ANN. §§ 43:21-25 to -65 (West 2009).

162. New York's program is called New York Statutory Disability Insurance. N.Y. WORKERS' COMP. LAW §§ 200–242 (McKinney 2006).

163. In 1942, Rhode Island was the first state to enact a temporary disability program for its workers. The program is called Temporary Disability Insurance ("RITDI"). R.I. GEN. LAWS §§ 28-39-1 to -41-33 (2010).

Figure 1: Comparison of Average U.S. Per Capita Bankruptcy Filings to Average of States with Compulsory STD Benefits[164]

	Chapter 13 Filings
California	1.03
Hawaii	0.41
New Jersey	0.94
New York	0.56
Rhode Island	0.69
U.S. Average	1.24
States w/ Compulsory Short-term Disability Average	0.72

Figure 2: Comparison of Per Capita Bankruptcy Filings between States with Compulsory STD Benefits and the U.S. Average of Chapter 13 Petitions Filed During Year Ending June 30, 2009.[165]

Although more advanced statistical analysis comparing bankruptcy filings in states with compulsory short-term disability insurance to those without compulsory disability insurance is warranted, these findings provide support for the idea that providing workers with compulsory short-term disability insurance coverage helps reduce the likelihood that a wage interruption due to a non-work-related illness or accident will lead to bankruptcy.

Thus, increasing worker access through state-mandated disability insurance seems to be an effective solution to combating the medical bankruptcy imbroglio. As a first step toward implementation of this solution, state legislators must be educated about the basics of how these insurance programs are administered and their positive impact on workers.

164. These figures represent bankruptcy filings per thousand individuals for year ending June 30, 2009. Population as of December 31, 2008, as estimated by the Administrative Office of the United States Courts. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: JUNE 30, 2009 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2009/0609_f.pdf.

165. Bankruptcy filings per thousand individuals for year ending June 30, 2009. Population as of December 31, 2008, as estimated by the Administrative Office of the United States Courts. *Id.*

VI. POLICY RECOMMENDATIONS TO REDUCE THE MEDICAL BANKRUPTCY IMBROGLIO

This Part describes the state-mandated insurance programs in detail and proposes increasing the number of states mandating short-term disability coverage for all workers. As noted in the previous Part, only five states mandate short-term disability insurance in addition to workers' compensation insurance for their workers.[166] The average per capita bankruptcy rate for states that have compulsory short-term disability coverage is below the national average. Although further statistical analysis is necessary, this suggests that expanding mandatory short-term disability insurance coverage to more states would help decrease the number of bankruptcies.

A. Existing State-Mandated Disability Insurance Programs: A Better Solution

1. Funding

There are two funding models for state-mandated disability insurance programs. States have elected to fund their insurance programs by (1) requiring employees to fund the plan through a payroll deduction; or (2) giving employers the option of paying a certain percentage of wages into the program or cost sharing with employees. California and Rhode Island fund their programs exclusively through employee payroll deductions. Workers in California were taxed on income up to $90,669.00 in 2009 and up to $93,316.00 in 2010.[167] The maximum employee contribution rate for California workers in 2010 was $1,026.48 (which is 1.1% of $93,316.00). Similarly, in Rhode Island, employees pay 1.3% of the first $58,400 of income to cover the cost of disability insurance in Rhode Island.[168]

166. The Commonwealth of Puerto Rico also requires that employers provide short-term disability insurance for employees. *See* DEP'T OF LABOR, TEMPORARY DISABILITY INSURANCE (2009), *available at* http://www.ows.doleta.gov/unemploy/uilawcompar/2009/disability.pdf.

167. *See Disability Benefits 101*, WORLD INST. ON DISABILITY, http://www.disabilitybenefits101.org/ca/programs/income_support/sdi/program2.htm#Paying_into_SDI (last visited Feb. 17, 2010).

168. *See* R.I. DEPT. OF LABOR AND TRAINING, 2011 UI AND TDI QUICK REFERENCE, *available at* http://www.dlt.ri.gov/lmi/news/quickref.htm.

In contrast, in Hawaii, the employer has the option of paying the entire cost of the disability insurance or sharing the cost with its employees.[169] If the employer opts to share the costs with employees, then the employer may deduct one-half of the premium cost but not more than 0.5% of the employees' weekly wages up to the maximum of $4.39 per week for 2009.[170] Similarly, in New York, employers may pay for coverage for their employees or share the cost with their employees.[171] New York provides that an employer is allowed, but not required, to collect contributions from its employees to offset the cost of providing benefits. An employee's contribution is computed at the rate of one-half of one percent of her wages, but may not be more than sixty cents per week.[172]

Finally, in New Jersey both employers and employees are required to contribute to the disability insurance fund. In 2011, the employee contribution rate is one-half of one percent on the first $29,600 of wages paid by an employer in a calendar year. Although the rates vary, employers must also pay contributions on the first $29,600 in wages paid to each worker.[173]

2. Benefits

Although disability is defined slightly differently by each state, generally, benefits are payable for any disability which results from any non-job related mental or physical illness or injury that prevents the employee from performing her regular or customary work.[174] Illness or injury also includes pregnancy complications, childbirth, or

169. In addition, an employer may provide TDI benefits by adopting one of the following methods: (a) by purchasing insurance from an authorized insurance carrier, (b) by adopting a sick leave policy, which is in essence a self-insured plan, that must be approved by the state, or (c) by a collective bargaining agreement that contains sick leave benefits at least as favorable as required by the TDI. HAW. REV. STAT. §§ 392-1 to -101 (2009).

170. *Id.* § 392–43.

171. In New York, employers with more than one employee must provide coverage. In addition, larger companies have the option of becoming authorized by the Workers' Compensation Board to self-insure. N.Y. WORKERS' COMP. LAW § 211 (McKinney 2006).

172. *Id.* § 209.

173. *See* SEDGWICK CMS, 2011 STATE DISABILITY INSURANCE (SDI) SCHEDULES, *available at* http://www.vpainc.com/about/pdf/SDI.pdf.

174. The standard of disability under the state plans is much more generous than the Social Security definition. Under state plans, a worker is disabled when she can no longer perform her job. Under Social Security, a worker is disabled when a worker can no longer perform *any* job. See *supra* Part IV.B for a discussion of disability benefits under the Social Security program.

related medical conditions. In addition, California[175] and New Jersey[176] provide benefits for paid family leave. California's disability insurance pays 55% of wages for up to fifty-two weeks of disability.[177] In 2010, the maximum weekly benefit amount was $987.[178] To

175. California amended its disability program in 2002 to provide for paid family leave. Paid family leave is available when an employee takes time off from work to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with a foster care or adoption. Workers are limited to six weeks of paid family leave per year. *See* California Work and Family Coalition, *Paid Family Leave California*, PAIDFAMILYLEAVE.ORG, http://www.paidfamilyleave.org/ (last visited Feb. 18, 2010). California defines disability as an "illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition." CAL. UNEMP. INS. CODE § 2626(b)(1) (West 2009).

176. New Jersey provides for paid family leave but requires certification.

> b. Any period of family temporary disability leave for the serious health condition of a family member of the covered individual shall be supported by certification provided by a health care provider. The certification shall be sufficient if it states:
>
> (1) The date, if known, on which the serious health condition commenced;
>
> (2) The probable duration of the condition;
>
> (3) The medical facts within the knowledge of the provider of the certification regarding the condition;
>
> (4) A statement that the serious health condition warrants the participation of the covered individual in providing health care, as provided in the "Family Leave Act," P.L.1989, C. 261 (C.34:11B-1 et seq.), and regulations adopted pursuant to that act;
>
> (5) An estimate of the amount of time that the covered individual is needed for participation in the care of the family member;
>
> (6) If the leave is intermittent, a statement of the medical necessity for the intermittent leave and the expected duration of the intermittent leave; and
>
> (7) If the leave is intermittent and for planned medical treatment, the dates of the treatment.

N.J. STAT. ANN. § 43:21–39.2 (West 2011).

177. CAL. INS. CODE §§ 2653, 2655 (West 2009).

178. *Benefits Amounts for Disability Insurance*, ECONOMIC DEVELOPMENT DEPARTMENT, STATE OF CALIFORNIA, http://www.edd.ca.gov/Disability/Benefits.htm (last visited Feb. 18 2011). The benefit amount under this program is calculated by looking at a worker's wages during a specific twelve-month period of time. The twelve-month base period begins roughly seventeen months before the worker becomes disabled and ends about five months before the disability begins. The twelve-month base period is divided into four quarters, and the quarter when the worker had the highest earnings is the quarter used to determine the benefit amount.

receive the maximum benefit amount an individual must have earned at least $23,305.46 in a calendar quarter during the base period.[179] There is also a waiting period of seven days before benefits are payable.[180]

Hawaii's disability insurance provides cash benefits of 58% of the disabled employee's average weekly wages.[181] The maximum weekly benefit for 2009 is $510.[182] Workers are eligible for benefits from the eighth day of disability, and there is a seven-consecutive-day waiting period.[183] Benefits are limited to a maximum of twenty-six weeks of benefit payments during a benefit year.[184] Similarly, under New York's insurance program,[185] the benefit rate is 50% of the employee's last eight weeks of average gross wages with a maximum benefit of $170 per week.[186] A worker must be off work eight consecutive days to be eligible for benefits. The first week (seven days) is a waiting week that is not paid.[187] The maximum benefit period is twenty-six weeks in a fifty-two-week period.[188] Thus, the benefits available under New York's system are by far the least generous.

In New Jersey, an eligible employee is paid two-thirds of her average weekly wage up to the maximum amount payable, which is $546 as of January 1, 2009.[189] The average weekly disability benefit is generally based on the employee's earnings in the eight calendar

179. *Id.*

180. CAL. UNEMP. INS. CODE § 2627.

181. In order to qualify for disability benefits in Hawaii, the following conditions must be met: (a) the injury or illness must not be work-related; (b) the injury or illness must prevent the applicant from performing her regular job duties; and (c) the applicant must be under the care of a licensed physician who certifies her disability. HAW. REV. STAT. § 392-26 (2009).

182. *Id.* § 392–33(3).

183. *Id.* § 392–24.

184. *Id.* § 392–23.

185. Under New York's insurance program, disability is defined as the inability of an employee, as a result of injury or sickness not arising out of and in the course of an employment, to perform the regular duties of her employment or the duties of any other employment that her employer may offer her at her regular wages and that her injury or sickness does not prevent her from performing. N.Y. WORKERS' COMP. LAW § 201(A) (McKinney 2010).

186. *Id.* § 204.

187. *Id.*

188. *Id.* § 205.

189. N.J. STAT. ANN. § 43:21–3 (2009); *see also* DEP'T. OF LABOR, SUMMARY OF STATE DISABILITY BENEFITS, *available at* http://www.ows.doleta.gov/unemploy/uilawcompar/2009/disability.pdf.

weeks immediately preceding the week in which the disability begins. The maximum benefit amount that may be paid for each period of disability is one-third (1/3) of the total wages the claimant earned in New Jersey covered employment during the base year, or twenty-six times the weekly benefit amount, whichever is less. The first seven days of disability are called the waiting week, meaning benefits are payable on the eighth consecutive day of disability.[190]

Finally, Rhode Island's disability insurance[191] provides a weekly benefit rate that is equal to not more than 85% of the wages paid to the employee in the highest earning quarter of her base period.[192] As of July 1, 2009, the minimum weekly benefit rate is $69.00 and $694.00 is the maximum benefit rate.[193] The maximum benefit period is thirty weeks.[194] Generally, a worker must have been paid at least $8,880.00 in either their base period or an alternate base period in order to qualify for benefits.[195] In addition, an applicant must serve a one-week waiting period.

190. If the worker's disability continues for three consecutive weeks, then she will receive benefits for the waiting week. N.J. STAT. ANN. § 43:21–38 (West 2011). In addition to meeting the requirements for a covered disability, a claimant must have worked at least twenty calendar weeks in what is considered covered New Jersey employment in which she earned $143 or more (called "base weeks"), or have earned $7200 or more in such employment during the "base year" period. The "base year" is the fifty-two weeks immediately before the week in which the disability began. Only covered wages earned during the base year period can be used in determining a claim. *Id.* § 43:21–41.

191. To be medically eligible for RITDI benefits, a Qualified Healthcare Provider ("QHP") must certify that the worker is disabled, meaning unable to perform her customary job by reason of a physical or mental condition or pregnancy. Under the statute, midwives, nurse practitioners, physicians, physician assistants, psychiatric clinical nurse specialists, licensed clinical social workers ("LCSWs"), and licensed independent clinical social workers ("LICSWs") are QHPs. R.I. GEN. LAWS § 28–39–2(20) (2010), *available at* http://www.rilin.state.ri.us/Statutes/TITLE28/28-39/28-39-2.HTM.

192. The base period is the first four of the last five completed calendar quarters before the starting date of a new claim. R.I. GEN. LAWS § 28–39–2. The alternate base period is the last four completed calendar quarters before the starting date of the disability claim. *Id.* § 28–41–12 (rule 3.3).

193. *New Maximum Benefit Rates,* R.I. DEP'T OF LABOR AND TRAINING (June 15, 2009), http://www.dlt.state.ri.us/News_Releases/NR_061509.htm. This amount does not include the dependency allowance. Rhode Island's program is the only state disability program that provides an additional allowance if the disabled worker has children less than eighteen years of age. The dependency allowance is limited to five dependents and is equal to the greater of $15 or 5% of the worker's benefit rate per child. R.I. GEN. LAWS § 28–41–5(b).

194. R.I. GEN. LAWS § 28–41–7.

195. *Id.* § 28–41–11.

B. Blueprint for New State Mandated Disability Plans: An Ideal Solution

As illuminated in the previous Part, there is a wide variety among the existing state-mandated disability insurance schemes ranging from funding to benefits. Thus, this Part offers a blueprint of the best design elements from the existing plans as a guide for states implementing state-mandated disability insurance in the future. As a starting point, state-mandated disability insurance should accomplish three goals: (1) provide coverage with reasonable eligibility requirements so that all workers will be protected against disability losses; (2) provide adequate benefits so that that the disabled worker will be able to pay for basic necessities; and (3) distribute the cost of insurance in a fair and efficient manner.[196] State-mandated disability insurance is preferable to a concerted effort to incentivize more private employers to offer disability insurance because it ensures that all workers will be covered, and because it eliminates the adverse selection problem.[197]

1. Coverage

In contrast to many of the existing disability models, any state considering adopting a disability insurance scheme should extend eligibility to cover all workers.[198] All workers are at risk of a disability-induced bankruptcy and should receive protection from wage interruption as a result of a disability. Therefore, it follows that the definition of disability should be sufficiently broad to cover almost all instances of disabilities resulting from a non-work-related injury or illness. Disability should be defined as the inability to perform the regular duties of employment at her most recent job due

196. *See* Comment, *Insurance Against Temporary Disability: A Blueprint for State Action*, 60 YALE L.J. 647 (1951).

197. *See supra* note 102 (discussing adverse selection as a reason why insurers have not made a marketing push for disability insurance). State-mandated disability insurance also significantly increases moral hazard if the benefit levels are set to provide only for basic necessities and are limited in duration.

198. California's program does not cover railroad workers, non-profit agency employees, and some government employees. CAL. UNEMP. INS. CODE § 2653 (2009). New York's program does not cover government, railroad, maritime, and farm laborers. In addition, professional employees of nonprofit organizations are not covered. N.Y. WORKERS' COMP. LAW § 201 (McKinney 2006).

to a physical or mental disability or illness.[199] In addition, the waiting period for benefits should be no more than a week.

2. Funding

Although some states use only employee-funded payroll taxes,[200] it is preferable for employers to shoulder the burden, in addition to the employees, for a number of reasons. First, employer contributions provide an additional revenue stream. With the high unemployment rate, states that rely solely on employee contributions are particularly vulnerable to revenue shortfalls. For example, with California's unemployment rate hovering around 12%,[201] some have estimated that unless California raises the rates that employees pay into the disability fund, the system could soon go bankrupt.[202] Second, employers derive a benefit from state-mandated disability insurance. Having wage replacement reduces the stress that is often associated with a disability. Less stress speeds up recovery time, which will reduce absenteeism and benefit the employer's bottom line. Third, the employer receives some reciprocal benefits associated with the employee's ability to maintain some level of consumption while avoiding bankruptcy. Employees, who are provided with wage replacement through disability insurance, retain their ability to buy essential goods and continue to consume. Because consumption drives the economy, enabling families to have adequate resources to consume basic necessities is a positive benefit for everyone.

Although it is equitable to ask employers and employees to contribute, the tax rate should not be unduly burdensome.

199. Advocates for paid family leave have targeted state mandated disability insurance as a way of achieving their goals. *See, e.g.*, Katherine Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 45 (2002) (noting that temporary disability insurance programs may be expanded to include family risks); *see also* NAT'L P'SHIP FOR WOMEN & FAMILIES, THE CASE FOR PAID FAMILY LEAVE (2011), *available at* http://www.nationalpartnership.org/site/DocServer/PFML_The_Case_FINAL.pdf? docID=7848 (highlighting the fact that New Jersey and California successfully integrated paid family leave into their existing temporary disability insurance programs).

200. Both California and Rhode Island fund their plans exclusively through employee payroll deductions. *See supra* notes 167–68 and accompanying text.

201. *See* Timothy Homan, *U.S. Jobless Rate Falls to 8.9%, California Dips*, SAN FRANCISCO CHRON., Mar. 5, 2011, at D1 (noting that California's unemployment rate dipped slightly to 12.4%).

202. Greg Lucas, *Davis Says No Boost in Disability Deduction: Governor Defies Warnings on Health of State Fund*, SAN FRANCISCO CHRON., Jan. 27, 2000, at A3 (noting that employee contribution rates have steadily risen).

Therefore, the ideal rate of tax is probably 0.5% of wages for both the employee and the employer. Currently, all the states cap the amount of income that is subject to the disability insurance payroll deduction. Low income caps jeopardize continued viability of the plans and prevent some state's plans, like New York,[203] from providing sufficient wage replacement. Thus, the 0.5% payroll deduction, like the Medicare tax, should not be subject to a contribution limit or cap.[204]

3. Plan administration

The states mandating disability insurance organize the administration of the plans in one of two ways. First, some states have created a state fund with the payroll contributions and pay all benefits out of the state fund.[205] Other states have implemented a "play-or-pay" strategy. Under this approach, the states create a fund and allow employers to opt out of the state fund in order to self-insure or purchase a private plan.[206] Eliminating private insurers and relying exclusively on the state to administer the plan ultimately is the best option for two important reasons.

First, state administration allows the state greater control in ensuring that claims are processed properly.[207] Although some will argue that state administration leads to waste and is inefficient, reports of abuse are still more easily correctable if the state maintains control. For instance, California's temporary disability insurance plan has received negative press for improperly processing claims, which

203. *See supra* note 186 and accompanying text.

204. See INTERNAL REVENUE SERV., PUBLICATION 15: EMPLOYER'S TAX GUIDE (2011). The 2011 employee tax rate for Medicare is 1.45% (amount withheld). The 2011 employer tax rate for Medicare tax is also 1.45% (2.9% total). There is no wage base limit for Medicare tax; all covered wages are subject to Medicare tax. *Id.*

205. The Rhode Island Department of Labor and Training manages the fund into which the employee contributions are paid and disability payments are paid out of. R.I. GEN. LAWS § 28–39–10 (2010).

206. In addition to approval from the state, New Jersey requires employee approval of a private plan if employee contributions will be required for funding. N.J. STAT. ANN. § 43:21–32 (2010). California law requires that private plans provide benefits greater than those under the State plan in all respects. CAL. INS. CODE § 3254 (2006).

207. California fined Unum, the nation's largest disability insurer, $8,000,000 and required that the company reopen as many as 26,000 cases because, inter alia, the company knowingly applied the wrong legal definition of "disability" in denying claims. *See* Victoria Colliver, *Insurer Deal Is Industry Changer: Settlement Sets New Standards for Disability Claims*, SAN FRANCISCO CHRON., October 4, 2005, at C–1.

contributed to millions in losses for the plan.[208] The same report found that the percentage of paperwork mistakes made by state employees was 39% in 2001 and 27.5% in 2002.[209] Further, utilization of a private insurer does not ensure that claims will be properly administered. Unum, the largest disability insurer in the country, was fined $8 million and ordered to reassess over 26,000 cases of disability that were denied in bad faith.[210] The state has a vested interest in ensuring that its citizens are treated fairly and receive disability benefits. Therefore, the state should undertake administration of claims and periodic reviews of its efficiency.

Second, the mandate to buy private health insurance has been a point of contention with the PPACA even with the existence of precedent for Congress and state legislatures to channel the spending of private resources toward certain public objectives such as COBRA,[211] HIPAA,[212] the Women's Health and Cancer Rights Act,[213] and the Pregnancy Discrimination Act.[214] There is no reason

208. *See, e.g.*, Robert Salladay, *Disability Plan Loses Millions: State Insurance Program's Costs Skyrocket Through Errors, Abuse*, SAN FRANCISCO CHRON., Jan 26, 2003, at A1. (reporting that in 1999 and 2000 SDI overpaid between $124 million and $200 million in benefits to workers who may not have been disabled) [hereinafter Salladay, *Disabiltiy Plan Loses Millions*]; Robert Salladay, *Chief of State Disability Program Quits Under Fire, Takes New Post with Probe Ahead, She Goes to Health Agency.* SAN FRANCISCO CHRON., Feb. 5, 2003, at A1.

209. *See* Salladay, *Disability Plan Loses Millions*, *supra* note 208.

210. *See* Colliver, *supra* note 207.

211. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) amended the Employee Retirement Income Security Act of 1974 (ERISA) and provides certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage at group rates. 29 U.S.C. § 1162(2)(A)(i) (2006). This coverage, however, is only available when coverage is lost due to certain specific qualifying events. *Id.* Group health coverage for COBRA participants is usually more expensive than health coverage for active employees, since usually the employer pays a part of the premium for active employees while COBRA participants generally pay the entire premium themselves. *Id.*

212. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) more directly prohibits employers from imposing rules of employee plan eligibility that restrict access based on, inter alia, health status, medical condition, prior claims experience, or even a preexisting condition. Pub. L. No. 104–191, 110 Stat. 1936 (codified in part at 42 U.S.C. § 300gg–1(a)(1)).

213. The Women's Health and Cancer Rights Act of 1998 ("WHCRA") applies to persons covered under group and individual health plans, and it requires these insurers to cover breast reconstruction in connection with mastectomies. 29 U.S.C.A. § 1185b(a) (West 2011). Thus, to the extent that a health plan covers mastectomies, the reconstruction of the affected breast, surgery and reconstruction of the other breast (for symmetry purposes), prostheses, and treatment for possible mastectomy complications must also be covered. *Id.*

214. The Pregnancy Discrimination Act that protects women was passed in 1978 and

to believe that a similar mandate in the disability context would not meet similar resistance.[215] Further, both California and Rhode Island have managed to administer their plans for over fifty years. [216] Thus, other states are likely capable of doing so as well.

VII. CONCLUSION

Medical bankruptcies are an unfortunate byproduct of the rising cost of health care and lost wages. Congress has focused on health care reform as a panacea for medical bankruptcies. Because a large percentage of debtors and homeowners on the brink of foreclosure and bankruptcy report that an illness and lost wages led to their financial troubles, it is prudent to expand the safety nets available to individuals in this predicament. Recent proposals to expand health insurance coverage will not prevent families from suffering a financial collapse in the wake of a medical crisis.

Disability insurance provides wage replacement to workers who have a non-job related illness or injury. However, many workers do not have affordable access to this type of insurance. Expanding state-mandated short-term disability programs is a necessary component of any attempt to solve the medical bankruptcy imbroglio. States that have mandated disability insurance for workers on average have lower per capita bankruptcy rates. Thus, the data suggests that mandating disability insurance for employees is an effective remedy to the medical bankruptcy imbroglio.

mandates that any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. 42 U.S.C. § 2000e(k).

215. *See supra* note 133 (discussing the litigation that has grown out of the enactment of the PPACA).

216. The costs associated with administering disability insurance programs are not tremendous. For the 2004–2005 fiscal years, California allocated $6.9 million of its budget for the operation costs of the SDI program. In that year, $3,314,511,122 in claims was paid out. OFFICE OF THE GOVERNOR OF CALIFORNIA, GOVERNOR'S BUDGET 2004–2005, LWD 4 (2004), *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget05/pdf/lwd.pdf.