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SMALL SCHOOL.
BIG VALUE.

CONSUMER SCAMS AND THE ELDERLY: PRESERVING INDEPENDENCE THROUGH SHIFTING DEFAULT RULES

Nathalie Martin

Modern technology has made it easier than ever for scammers, legitimate businesses with dubious intentions, and even charities to take advantage of telemarketing. For reasons including reduced mental faculties and loneliness, the elderly are increasingly at risk for losing money, credit, and ultimately independence to those who would exploit them. In this Article, Professor Martin explores the benefits of existing regulations, bankruptcy, and reverse mortgages as solutions to these problems. Professor Martin also recommends a new default rule for elderly consumers: no solicitations unless the consumer opts in.

As people age, dignity and independence are harder to maintain. In addition to obvious foils of independence, such as failing memories, lost drivers' licenses, and failing health, less obvious threats to independence lurk. Our deregulated consumer protection environment, coupled with advances in technology, make the consumer world a dangerous place, particularly for the elderly.

Professor of Law, University of New Mexico School of Law. I thank the University of New Mexico School of Law for its financial support and Aaron Martin for his fine research and editorial assistance. This Article is dedicated to my father, Dr. W. Don Martin, who keeps me on my toes, and who kept this topic from being merely an academic one.

Computers, high-tech databases, and other information systems make personal data much more easily accessible to legitimate as well as illegitimate businesses.¹ Moreover, the world of marketing, advertising, and financial product design is changing so rapidly that it is hard for anyone to keep up.² For the elderly, the fastest growing demographic in America,³ it is particularly difficult to cope. Many of the products being offered to consumers today simply were not available a decade ago, when many older clients were full participants in the economy.⁴ Crooks, as well as insidious solicitors, are a significant threat.

The largely unregulated state of the consumer credit industry⁵ provides ample opportunity for predatory solicitors to take advantage of the elderly, one of society's most vulnerable groups. While some of the scams the elderly need protection from are illegal, the majority are actually legal.⁶ They are just poor financial deals.⁷ Thus, there is often little one can do to stop the harm except educate the elderly person and, if necessary, remove some of his or her freedoms. Too often, then, families must take paternalistic steps that limit the independence and dignity of the elderly persons involved in order to prevent their exploitation.

1. See David Lish, *Would the Real David Lish Please Stand Up?: A Proposed Solution to Identity Theft*, 38 ARIZ. ST. L.J., 319, 330–32 (2006).

2. See generally Stephanie Clifford, *Web Marketing That Hopes to Learn What Attracts a Click*, N.Y. TIMES, Dec. 3, 2008, at B3 (describing the emergence of online advertising companies and their effect on the advertising world).

3. Seymour H. Moskowitz, *Reflecting Reality: Adding Elder Abuse and Neglect to Legal Education*, 47 LOY. L. REV. 191, 195 (2001).

4. See generally RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 81–96 (2006) (discussing the development of payment cards).

5. Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1092 (2004); Ralph Brubaker & Kenneth N. Klee, *Resolved: The 1978 Bankruptcy Code Has Been a Success*, 12 AM. BANKR. INST. L. REV. 273, 286 (2004).

6. Jeffrey Hines, *Telemarketing Fraud upon the Elderly: Minimizing Its Effect Through Legislation, Law Enforcement and Education*, 12 ALB. L.J. SCI. & TECH. 839, 843 (2002).

7. For instance, an offer for a “special deal” on magazine subscriptions may obligate the elderly person to years of monthly payments to magazines they do not want. See SmartLegalForms.com, *Telemarketing Fraud*, <http://www.smartlegalforms.com/guide.asp?level=2&id=128> (last visited Mar. 18, 2009). Fundraisers for Social Security and Medicare lobbyists are other examples of legal telemarketing offers that drain the elderly population of millions every year. See Erik Eckholm, *Alarmed by Fund-Raiser, the Elderly Give Millions*, N.Y. TIMES, Nov. 12, 1992, at A1.

Moreover, the legal solutions to the problems caused by unregulated consumer credit are ineffective protections for elderly consumers. Existing laws are incapable of effectively addressing the sheer volume and staggeringly sophisticated methodologies employed by telemarketers, who pose a particular problem for the elderly. Because current regulations are too seldom enforced and inadequately matched to the volume and complexity of the problem, they provide little or no deterrence for a malevolently pervasive and flourishing industry. Current default rules also fail to protect the elderly, who lose their assets, along with their independence, before legal remedies become available. While debts arising through solicitation can sometimes be addressed through bankruptcy or reverse mortgages,⁸ further legal reforms are needed to adequately address these problems.⁹

This Article was written to provide useful background information on each of these remedies, as well as to suggest other legal reforms that could reduce the risk of asset loss to the elderly through phone and mail solicitation.

Part I of this Article identifies a few common solicitation threats to the elderly and their independence, such as telemarketing and identity theft, solicitations of phony and real charitable contributions, and credit card solicitation and use. Part II discusses telemarketing laws, bankruptcy, and reverse mortgages as solutions. It concludes that these remedies are somewhat helpful but ultimately insufficient as they put the burden to unwind the fraud or unfair practices on the elderly person, who has less capacity and fewer resources than the perpetrators and much more to lose, namely independence.

As a proposed solution, Part II.D suggests shifting the default rules for soliciting the elderly, as well as for collecting debts solicited in violation of the new solicitation rules. This Part concludes that such a shift would make a tremendous difference in the number of

8. See *infra* Part II.B–C. The recent bankruptcy reform legislation can be found at Pub. L. No. 109-8, 119 Stat. 23 (2005) (enacted April 20, 2005, and generally effective for cases commenced 180 days after the enactment, though some provisions were immediately effective). Congress further clarified these amendments in December 2006. See Pub. L. No. 109-390, 120 Stat. 2692 (2006); see also *infra* Part II.B.1. Bankruptcy is still very much available today, despite what the media may report. See *infra* Part II.B.1.

9. As used here, “consumer scams” include calls and involuntary mail requests designed to convince older people to buy products or services, or to take on new debt or consolidate old debt, when they previously had no intention of doing so.

calls and mail solicitations received, and would thus protect the assets and independence of the elderly by decreasing the volume of phone and mail solicitations. This addition to the law would work far better than existing legal mechanisms.

Ultimately, this Article seeks legal redress that will discourage firms from soliciting the elderly by making unenforceable all debts arising from unsolicited contacts with a person over the age of sixty-five. This would be accomplished by reversing existing "do-not-call" and "do-not-send" rules and making debts arising out of unsolicited contacts unenforceable. While this remedy may seem drastic, it would enable the legal system to more effectively confront wrongdoers and thus would reduce economic and social costs. Because the consequence for elderly victims is loss of autonomy, additional legal reforms are needed in order to deter those who target them.

I. Dangerous Consumer Credit Traps: Problems and Solutions

There are many ways in which telephone and mail solicitations can threaten the economic status and independence of the elderly. Identity theft is one problem. Ubiquitous credit card solicitations, with their many hidden and unfamiliar terms, are another. While the law provides some relief for the debt resulting from these products and practices, none offer sufficient protection for the elderly.

A. Death by Telemarketer

An internet joke showed Osama bin Laden acquiescing after being telemarketed ad nauseam.¹⁰ Most of us know the feeling. One can receive a real education in telemarketing by spending an afternoon answering the phone in the home of an elderly person. Telemarketers have learned that the elderly are easy prey not just for sellers of goods and services¹¹ and solicitors of charitable contributions, but also for

10. About.com, *Taliban Telemarketing Assault—FBI Plan to Get bin Laden*, <http://politicalhumor.about.com/library/bltalibanphonecalls.htm> (last visited Mar. 18, 2009).

11. Jeffrey L. Bratkiewisz, *"Here's a Quarter, Call Someone Who Cares": Who Is Answering the Elderly's Call for Protection from Telemarketing Fraud*, 45 S.D. L. REV. 586, 589 (2000); Hines, *supra* note 6, at 841. According to the National Consumers League (NCL) Web site, telemarketing fraud costs Americans an estimated \$40 billion each year. NAT'L CONSUMERS LEAGUE, REPORT FROM THE NATIONAL CONSUMERS LEAGUE TO THE U.S. DEPARTMENT OF JUSTICE CONCERNING

those seeking to commit fraud and identity theft.¹² Loneliness can be a problem for many elderly people, which makes them more willing to talk to strangers on the phone.¹³ Some also may be very trusting, harkening back to a kinder and gentler world.¹⁴ Others may simply feel that hanging up or cutting off a caller is rude. Putting the phone number on a “do-not-call” or “do-not-send” list is far better than nothing, but will not stop anyone seeking a charitable donation.¹⁵ There also are many companies that will not honor the request not to be

TELEMARKETING AND INTERNET FRAUD (2000), http://www.nclnet.org/research/fraud/telemarketing_internet_fraud_report.htm. In 1992, the NCL commissioned a survey of consumers’ experiences with telephone-based fraud. *Id.*

The first of its kind, the survey found that 3 percent of the respondents, representing 5.5 million people, had bought something over the phone within the past two years that they now believed was fraudulent. Nearly two-thirds (62 percent) of the respondents said they would not know where to call to find out if a telephone offer or promotion was legitimate. And one in six (17 percent) admitted that they found it difficult to resist a telephone sales pitch. A 1999 AARP survey designed to assess consumer behavior, experiences, and attitudes found similar results. Of the 17 percent of respondents who believed they had been victims of a major consumer swindle, 2 percent said they had been telemarketing fraud victims. AARP has also found that older consumers are especially vulnerable to telemarketing fraud. In a 1996 AARP survey of victims of telemarketing fraud who had been identified by federal and state law enforcement officials, 56 percent were age 50 or older. NCL also collects data about telemarketing fraud directly from consumers through its National Fraud Information Center [(NFIC)], a toll-free hotline, (800) 876-7060, that was created in 1992 to offer consumers advice about telemarketing offers and relay victims’ information to the appropriate agencies. In 1998, 38 percent of the consumers who reported telemarketing fraud to the NFIC were age 50 or older, while that age group represented only 26 percent of the U.S. population according to 1996 Census data. The average loss per consumer was \$2,384, though some individual victims lost hundreds of thousands of dollars. The top ten telemarketing frauds reported to NFIC in 1998 were: 1. Telephone cramming [(that is, unauthorized charges on consumers’ phone bills for optional services they never ordered)], 2. Advance fee loans, 3. Telephone slamming, 4. Prizes and sweepstakes, 5. Work-at-home [schemes], 6. Magazine sales, 7. Credit card offers, 8. Pay-per-call services, 9. Business opportunities like franchises, [and] 10. Travel and vacation offers.

Id.

12. One law school’s elder law clinic lists identity theft as one of the most common legal problems of the elderly. Legal Counsel for the Elderly, Univ. of Ala. Clinical Law Program, *Identity Theft*, <http://www.uaelderlaw.org/identitytheft.html> (last visited Mar. 18, 2009).

13. Charles Duhigg, *Bilking the Elderly, with a Corporate Assist*, N.Y. TIMES, May 20, 2007, <http://www.nytimes.com/2007/05/20/business/20tele.html>.

14. Bratkiewisz, *supra* note 11, at 590.

15. Brian W. Stano, Note, *How Can They Keep Calling Me? Exemptions and Loopholes in the Telephone Consumer Protection Act and the Need for Further Regulation*, 50 CLEV. ST. L. REV. 487, 506 (2002).

called, especially scam artists.¹⁶ According to the FBI, the elderly are specifically targeted by many scam artists.¹⁷

1. TELEMARKETERS AND IDENTITY THEFT

The greatest risks to elderly people in dealing with strangers over the phone are identity theft and fraud. While it may seem an obvious mistake, many older people do not see the danger in giving out personal information, such as social security numbers, credit card numbers, and even bank account numbers, over the phone.¹⁸ Some scam artists pose as a bank calling to confirm information.¹⁹ Others claim that the elderly person has won a monetary prize and want an account number so they can deposit the money into the account.²⁰

Older clients and family members should be counseled never to give any personal information over the phone.²¹ No one should ever give bank account numbers or social security numbers to anyone over the phone.²² Even questions about the address of the person, who else is home, where one shops, where one banks, and so on, should not be answered.²³ Recipients of these calls should request and record information about the name of the caller, the name of the company, and the phone number and address of the company calling.²⁴ Most scammers will hang up when asked about such things.²⁵ Phone companies can track the numbers of frequent callers.²⁶ If the person receiving these calls has trouble remembering, a family member should post a

16. Andrea Coombes, *Telemarketer Flouting 'Do Not Call' Regulations*, CHARLESTON GAZETTE, Feb. 10, 2006, at 1D.

17. See *Telemarketing Fraud, 1996: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 104th Cong. (1996)* (statement of Charles L. Owens, Chief Financial Crimes Section), available at 1996 WL 193802.

18. NAT'L CONSUMER LAW CTR., PROTECT YOURSELF FROM IDENTITY THEFT (2006), http://www.consumerlaw.org/action-agenda/seniors_initiative/identity_theft.shtml.

19. OFFICE OF THE ATTORNEY GEN., STATE OF MICH., TELEMARKETING FRAUD—NEVER GIVE PERSONAL INFORMATION TO UNKNOWN CALLERS (2008), http://www.michigan.gov/ag/0,1607,7-164-34739_20942-131622--,00.html.

20. NAT'L CONSUMER LAW CTR., PROTECTING OLDER AMERICANS FROM TELEMARKETING SCAMS (2006), http://www.consumerlaw.org/action_agenda/seniors_initiative/concerns_telemarket.shtml.

21. See Legal Counsel for the Elderly, *supra* note 12.

22. NAT'L CONSUMER LAW CTR., *supra* note 18.

23. See NAT'L CONSUMER LAW CTR., *supra* note 20.

24. AARP.org, *Stop Dishonest Telemarketers*, Jan. 14, 2009, <http://www.aarp.org/money/consumer/articles/stopdishonesttelemarketers.html>.

25. See *id.*

26. See NAT'L CONSUMER LAW CTR., *supra* note 20.

sign to remind the person of the risk and the actions the person can take.²⁷ If all else fails, checkbooks and credit cards should be placed in a location where the elderly person cannot find them. While this advice may seem counterproductive to the ultimate goal of maintaining financial independence, the dire consequences outweigh the loss of freedom. Further legal sanctions are clearly needed in order to address these crimes, though they are beyond the scope of this Article.

2. TELEMARKETERS AND CHARITABLE SOLICITATIONS

It is legal to seek legitimate charitable donations over the phone from anyone who is willing to make an oral pledge.²⁸ My own parent pledges money to the police and the fire departments even though we have talked about his desire to give all his charitable contributions to the three colleges he has attended. Again, loneliness and boredom likely play a part in these pledges.²⁹ Legally, promises to legitimate telemarketers are enforceable under the doctrine of promissory estoppel.³⁰ This does not mean that all will try to collect, but the promises are enforceable.

One can advise a family member to send each charity a letter with the check, asking that the charity stop calling and stating that future promises will not be honored by the elderly person.³¹ AARP recommends that individuals tell their favored charities not to rent, sell, or share their contact information, and advises that consumers threat-

27. See AARP.org, *supra* note 24.

28. Fraudulent telefunding is commonly perpetrated against seniors as well. *Prepared Statement of the Federal Trade Commission on "Fraud Against Seniors": Hearings Before the S. Spec. Comm. on Aging, 106th Cong. (2000)* [hereinafter *Fraud Against Seniors*] (statement of Rolando Berrelez, Assistant Regional Director of the Midwest Region, Federal Trade Commission), available at <http://www.ftc.gov/os/2000/08/agingtestimony.htm>. Some estimate that up to 56% of the calls made by dishonest telemarketers may be made to seniors. AARP.org, *supra* note 24.

29. See Duhigg, *supra* note 13.

30. *Friends of Lubavitch/Landow Yeshivah v. N. Trust Bank of Fla.*, 685 So. 2d 951, 952-53 (Fla. Dist. Ct. App. 1996); *In re Estate of Timko v. Oral Roberts Evangelic Ass'n.*, 215 N.W.2d 750, 752 (Mich. Ct. App. 1974); Randy Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentation*, 15 HOFSTRA L. REV. 443, 451-52 (1987). In fact, these promises may be enforceable under traditional contract consideration principles as well. *Id.*; see also Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 172 (2005).

31. See Sally Hurme, *Ask the Experts: How Do I Get Charities to Stop Calling Me*, AARP BULL., July 7, 2008, http://bulletin.aarp.org/yourmoney/personalfinance/articles/ask_the_experts__i.html.

en to discontinue donations if the request is not honored.³² Such a request imposes no legal obligation upon the charity, so it may not stop future solicitation.³³ It could, however, make for some undesirable publicity if the charity receives this information and still pursues the elderly person.

If applicable, the letter can also say any of the following: that the solicited person has no funds with which to pay any future pledges; that the solicited person lacks the capacity to contract and thus to pledge money; or that the solicited person does not recall making the pledge. Of course, there are costs to taking these positions, including impairing the self-esteem of the elderly person and providing future justifications to limit an elderly person's autonomy.

Elderly family members should be informed of the possibility of fraudulent telemarketing. Family members should empower elders with the knowledge that fraudulent telemarketing is a violation of federal law.³⁴ Although fraudulent telefundraisers may be dissuaded by simple requests for written material or contact information, seniors can take more proactive steps by reporting suspicious calls to their local attorneys general or filing a Federal Trade Commission complaint form.³⁵

B. Credit Cards and the Elderly

Credit card offers are so ubiquitous now that the average American receives numerous offers in the mail each month,³⁶ not to mention many telephone offers for credit cards. Some older Americans shun credit cards and thus do not use them at all.³⁷ Many others fall prey to the same traps as the rest of us: seemingly easy money attached to as-

32. *Id.*

33. Stano, *supra* note 15, at 506.

34. 15 U.S.C. § 45(a)(i) (2004) (prohibiting "unfair or deceptive acts or practices in or affecting commerce"); *see also* FTC v. Gold, No. SACV 98-968 DOC (RZx) (C.D. Cal. filed May 16, 2003) (entering default judgment against U.S. Marketing Inc. and North American Charitable Services for fraudulent charitable fund raising).

35. AARP.org, *supra* note 24.

36. Even people who have recently filed for bankruptcy receive an average of fourteen credit card offers in the mail each month. Katherine Porter, *Bankrupt Profits: The Credit Card Industry's Business Model for Post-Bankruptcy Lending*, 93 IOWA L. REV. 1369, 1392-93 (2008).

37. *See* GEORGE P. MOSCHIS ET AL., *THE MATURING MARKETPLACE* 40 (2000).

tronomical interest rates and fees.³⁸ The elderly are frequently less educated about the sophistication of these products and in less of a position to dig themselves out of debt with future income.³⁹ Credit cards ultimately provide very expensive credit to people who do not understand their terms. After experiencing the tricks and traps of these forms of credit, younger individuals have time to get back on their feet, but the elderly have no such luxury.

In his article *Seduction by Plastic*, Professor Oren Bar-Gill uses behavioral theory to explain some of the surprising ways in which credit card issuers induce us to spend money and then make it difficult for us to pay off the resulting debt.⁴⁰ These traps and tricks have created staggering levels of credit card debt in modern society.⁴¹ Focusing on the unique design of the underlying credit card contract, he notes how several human cognitive errors or behavioral biases cause consumers to underestimate future borrowing and overestimate their future ability to pay back the debt.⁴²

First, he describes imperfect self-control, or an underappreciated weakness of the will.⁴³ He analogizes spending to dieters in restaurants who promise themselves they will forego dessert and begin to work out.⁴⁴ Unfortunately, the allure of the dessert tray overwhelms the desire to lose weight.⁴⁵ He notes that “imperfect self-control also plagues consumption and savings decisions,” which explains low savings rates and deficient retirement planning.⁴⁶ Weakness of the will

38. Donna S. Harkness, *When Over-the-Limit Is Over the Top: Addressing the Adverse Impact of Unconscionable Consumer-Credit Practices on the Elderly*, 16 ELDER L.J. 1, 19 (2008).

39. See Deanne Loonin & Elizabeth Renuart, *The Life and Debt Cycle: The Growing Debt Burdens of Older Consumers and Related Policy Recommendations*, 44 HARV. J. ON LEGIS. 167, 170 (2007).

40. Oren Bar-Gill, *Seduction by Plastic*, 98 Nw. U. L. REV. 1373, 1375–76 (2004).

41. *Id.* at 1375.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*; see, e.g., Kathleen H. Czarney, Note, *The Future of Americans' Pensions: Revamping Pension Plan Asset Allocation to Combat the Pension Benefit Guaranty Corporation's Deficit*, 51 CLEV. ST. L. REV. 153, 155 (2004). Though Americans have traditionally relied upon the three-legged stool of personal savings, pension funds, and social security for their retirement needs, all three have been weakened over time. *Id.* Personal savings are at a seventy-four-year low. Martin Cruisinger, *2006 Personal Savings Drop to 74-Yr. Low*, JONES REP., Feb. 1, 2007, http://www.jonesreport.com/articles/010207_personal_savings_low.html. Pension plan assets are significantly reduced today compared to the recent past. See Czarney, *supra*, at 170 n.140, stating that “[i]n 2001, some of the largest plans in PBGC’s twenty-

also explains why consumers underestimate their future borrowing, which is common.⁴⁷ “Often the consumer will end up borrowing on [his or her] credit card, despite the ex ante intentions” never to carry a balance.⁴⁸

“A second bias underlying the underestimation of future borrowing is the optimism bias.”⁴⁹ As Bar-Gill explains:

Consumers tend to underestimate the likelihood of adverse events that might necessitate borrowing. Optimistic individuals tend to underestimate the probability of being involved in an accident that might generate high medical bills or other liquidity needs. Similarly, individuals tend to underestimate the probability that either they or a loved one will become ill and require costly treatment (that is not covered or not entirely covered by their insurance plan). Finally, individuals tend to underestimate the likelihood that they will lose their job, or the time it will take them to find a new job. These and other manifestations of the optimism bias lead consumers to underestimate the likelihood that they will incur a liquidity shock that necessitates a resort to credit card borrowing.⁵⁰

seven-year history were terminated including “Trans World Airlines (36,500 workers and retirees), The Grand Union Company (17,000 workers and retirees), Outboard Marine Corporation (10,000 workers and retirees), Bradlees Stores (8,000 workers and retirees), Northwestern Steel and Wire Company (4,000 workers and retirees) and Laclede Steel Company (4,000 workers and retirees).” As Czarney notes, “both pension plans and Social Security have proven to be inadequate to provide financial stability during retirement.” See *id.* at 153 n.1 (citing Robert Perez & Susan Malley, *Asset Allocation and the Social Security System*, 12 FIN. MGMT. 29 (1983); Mary Williams Walsh, *\$8 Billion Surplus Withers at Agency Insuring Pensions*, N.Y. TIMES, Jan. 25, 2003, at A1; Mary Williams Walsh, *Many Companies Fight Shortfalls in Pension Funds*, N.Y. TIMES, Jan. 13, 2003, at A1). “Millions of people have relied on pension funds as an ensured income for retirement, yet many have failed to receive any amount of promised pension funds.” *Id.* Moreover, the future of social security is also uncertain. Neil H. Buchanan, *Social Security and Government Deficits: When Should We Worry?*, 92 CORNELL L. REV. 257, 275–77 (2007).

47. Bar-Gill, *supra* note 40, at 1375.

48. *Id.*

49. *Id.*

50. *Id.* at 1375–76.

The underestimation bias can explain the unique pricing patterns in the credit card market. If consumers underestimate their future borrowing, issuers can be expected to raise the long-term, borrowing-contingent elements of the credit card price. Thus, interest rates as well as late and over-limit fees are set above marginal cost, since consumers are insufficiently sensitive to variation in these long-term elements of the credit card price. On the other hand, competition in the credit card market forces issuers to compensate for these high long-term prices by underpricing the short-term, noncontingent elements of the credit card contract, which are not subject to the underestimation bias. To attract consumers, issuers must resort to below-marginal-cost (and even negative) prices in setting annual and per-

Other studies show that optimism can cause students to take on more student debt than they might otherwise have done.⁵¹ In sum, many studies show that optimism, teamed with outright denial, explains some of our credit issues.⁵² Just as Americans frequently underestimate what they eat and overestimate how much they exercise, they also underestimate how much they use a credit card.⁵³ They overestimate their ability to resist temptation to finance consumption at a high interest rate.⁵⁴ They overestimate their ability to make rational choices about the need for and cost of financed consumer goods.⁵⁵ This is a problem not just for the elderly, but for people of all ages.

Credit card companies capitalize on this human weakness in many surprising ways. As explained by scholar Elizabeth Warren:

In March 2008, an executive of Bank of America mentioned in an almost off-hand manner during the course of his testimony before Congress that last year the bank had conducted more than 500 experiments and sent out 111 million pieces of mail to test consumer behavior with credit cards. . . .

There is no reason to believe that Bank of America is alone in the resources it dedicates to testing American consumer behavior. Bank of America has only about 18% of the business shared by the top ten credit card issuers. Surely American Express, Chase, CitiGroup, Capital One, Discover, Wells Fargo and others are engaging in their own experiments. Indeed, it [sic] Bank of

transaction fees as well as introductory, short-term interest rates (teaser rates).

Id. at 1376. In an early study of the optimism bias, psychology professor Neal Weinstein found that people overwhelmingly assumed that positive things would happen to them in the future and that negative events would not happen to them but to others. Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980). Virtually all participants predicted that their lives would be better than is statistically possible based upon existing data. *Id.*

51. Stephen E.G. Lea et al., *Student Debt: A Psychological Analysis of the UK Experience*, in *FRONTIERS IN ECONOMIC PSYCHOLOGY* 1, 430 (Ellen Nyhus & Sigurd V. Troye eds., 1995); Saul Schwartz, *Personal Bankruptcy Law: A Behavioural Perspective*, in *CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE* 61 (Johanna Niemi-Kiesiläinen et al. eds., 2003); Hamish G. Seaward & Simon Kemp, *Optimism Bias and Student Debt*, 29 N.Z. J. PSYCHOL. 17 (2000).

52. See Richard A. Brown & Susan E. Burhouse, *Implications of the Supply-Side Revolution in Consumer Lending*, 24 ST. LOUIS U. PUB. L. REV. 363, 377 (2005) (noting that consumers are in denial about credit card purchases).

53. See Ronald J. Mann, "Contracting" for Credit, 104 MICH. L. REV. 899, 912 (2006).

54. See Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 69-71 (1991).

55. *Id.* at 71.

America's proportional share of research is about the same as its proportional share of dollar volume of the top ten issuers, then the major credit card companies sent out more than half a billion pieces of mail to conduct more than 2500 experiments on their customers. Mortgage lenders, payday lenders, car lenders and other companies that make their profits from debt are quite likely in the same business of testing their customers in order to discover how to make their sales pitches more appealing and how to exploit their customers' cognitive biases and errors.⁵⁶

There is a darker side to these data than mere profit maximization. Creditors are well aware of the numerous errors of cognition committed by consumers and capitalize on the errors in order to increase bottom lines.⁵⁷ While credit companies know that a consumer will not be able to pay back her debts, they design products specifically to induce her to take on more credit than she can pay back.⁵⁸ Other products are designed specifically to take advantage of consumers' lack of understanding of teaser rates, late fees, over-the-balance fees, and so on.⁵⁹ Over-optimism about income and ability to repay debts leads consumers to discount information about the high cost of credit.⁶⁰ Most consumers assume others will pay interest but they themselves will pay off their balances.⁶¹ Other proprietary databases measure mistakes that trigger things like late fees, over-limit fees, and cash advance fees.⁶² Once a person is identified as someone who

56. Elizabeth Warren, *The Middle Class on the Brink of Disaster 2* (Apr. 17, 2008), <http://www.abiworld.org/debt08/additions/Warren.Middle%20Class%20on%20Brink%20of%20Disaster.pdf>.

57. *Id.* at 9.

58. *Id.*

59. *Id.* at 9–12.

60. *Id.* at 18.

61. *See id.* at 16. Other more specific cognitive errors are prevalent in the credit research. *Id.* at 14. For example, consumers often get a card for a very short-term teaser interest rate, but do not switch to another card after the low rate expires. *Id.* at 16. As Professor Warren notes, we have but do not need hard evidence that consumers do not make this switch. *See id.* at 16 n.21. The mere existence of teaser rates all over the marketplace suggests that people do not. *See id.* Otherwise, they would not be offered because they would not be profitable. *See id.* In fact, consumers seem to prefer a credit card with a 4.9% introductory teaser rate for six months, over a 7.9% teaser rate that lasts for a full twelve months, even when the permanent rate increased drastically thereafter and when the average consumer in the study carried a \$2,500 balance over a one-year period. *Id.* at 10. This is useful information to a creditor, who can test particular consumers for particular cognitive errors and exploit the specific error by changing the terms of outstanding credit cards to maximize revenues. *Id.*

62. *Id.* at 12.

makes a particular mistake, his or her credit card contracts can be unilaterally changed to maximize the profits from these transactions.⁶³

Thus, credit card issuers have a far better understanding of consumer error than ever before. Their analysis of consumer error is far more sophisticated than the consumers' self-awareness.⁶⁴ The data and informational asymmetry are used to devise more effective means of exploiting consumer error.⁶⁵ They can record every transaction, the place, time, amount, merchant, the name of the consumer, his or her credit score, address, zip code, payment history, payment place, transaction amount, and so on.⁶⁶ As stated by Professor Warren:

These data can be combined by demographic or geographic groups, creating powerful prediction models. Or the data can be mined to create individual debtor profiles that expose particular consumer weaknesses. Based on past history and a few demographic characteristics, an issuer can generate an accurate estimate of the probability that a particular consumer will trigger a penalty—an estimate that is often more accurate than the consumer's own estimate of the same probability.⁶⁷

Because the deck is stacked against the consumer, it would likely be better if most of us avoided credit cards completely. Given the limited possibility of future income and the realities of aging, the risks and consequences are greater for the elderly. Because current laws are no match for relentless and sophisticated credit card companies, regulations must be changed to deter predatory solicitation of seniors.

63. *Id.* at 10. This results in a huge array of consumer products customized to exploit different types of consumer error. *Id.* at 8–13. For example, though Black and Decker makes just eight types of toasters, Bank of America offers more than 400 different credit cards, a phenomenon Professor Warren describes as “slicing consumers into ever finer categories based on more detailed understandings of their behavior.” *Id.* at 13. Products are designed to exploit consumers through imperfect information and imperfect rationality. *Id.* at 14. For example, in the past, credit card interest rates were always exceptionally high, because, in the words of Visa's own consultants, demand for this product “was not sensitive to this price dimension.” *Id.* People did not care what the interest rate was because they were not going to carry a balance. *See id.* Again, the optimism bias is at work. *See id.* Rather, consumers picked cards based upon the annual fee, even though the actual cost of this fee was usually far lower than the interest. *Id.*

64. *See id.* at 14.

65. *Id.*

66. *Id.* at 19.

67. *Id.*

II. Possible Solutions for Debt Arising from Solicitation of the Elderly

A. Basic Consumer Protection Laws Regarding Telemarketing: A Brief Overview

True fraud is against the law, but many other harmful practices are not. Unless and until the law becomes more protective of consumers, such harmful practices must be fought through mechanisms outside the legal system.

State attorneys general fight consumer scams and have consumer protection divisions in their offices.⁶⁸ Some are more responsive to consumers than others, but all take consumer complaints.⁶⁹ Many will help with identity theft and also have very useful Web sites about how to proceed on one's own if they cannot help.⁷⁰ Many states also regulate telemarketing.⁷¹

The Department of Justice, working through the Federal Bureau of Investigation, is charged with enforcing telemarketing fraud.⁷² The Federal Trade Commission (FTC) enforces the federal civil and regulatory laws governing telemarketing activities under the Telemarketing Consumer Fraud Abuse Prevention Act.⁷³ With the 1994 Telemarketing Act, Congress greatly expanded the FTC's authority to regulate telemarketing fraud.⁷⁴ The power to enforce the provisions of the Te-

68. A sampling of state attorney general Web sites show that they fight consumer scams and have consumer protection divisions. *See, e.g.*, Office of the Attorney Gen., State of Cal., Consumers, <http://ag.ca.gov/consumer.php> (last visited Mar. 18, 2009); Office of the Attorney Gen., State of Mo., Consumer Protection, <http://ag.mo.gov/Consumer-Protection.htm> (last visited Mar. 18, 2009); Office of the Attorney Gen., State of N.Y., About the Consumer Frauds Bureau, http://www.oag.state.ny.us/bureaus/consumer_frauds/about.html (last visited Mar. 18, 2009).

69. *See* sources cited *supra* note 68.

70. *See* sources cited *supra* note 68.

71. *E.g.*, CAL. BUS. & PROF. CODE § 17511 (West 1985); FLA. STAT. § 501.615 (2008); IDAHO CODE ANN. § 48-1004 (2008); NEV. REV. STAT. § 599B.190 (2008); UTAH CODE ANN. § 13-26-5 (2008); WASH. REV. CODE ANN. § 19.158.120 (West 2008). State laws have numerous drawbacks, particularly in the information age. First, they do little to protect against calls made from outside the state. *See* Hebe M. Smythe, Note, *Fighting Telemarketing Scams*, 17 HASTINGS COMM. & ENT. L.J. 347, 376 (1994). Also, "the state law criminal penalties are often impossible to enforce against out-of-state offenders because it is difficult to obtain jurisdiction." *Id.* Despite all the attempts at legislation, telemarketing and telemarketing scams still proliferate. *Id.*

72. U.S. Dep't of Justice, *Telemarketing Fraud*, <http://www.usdoj.gov/criminal/fraud/telemarket/ask/doj.html#enforcement> (last visited Mar. 18, 2009).

73. 15 U.S.C. §§ 6101-6108 (2006).

74. *See* Bratkiewisz, *supra* note 11, at 594-95.

lemarketing Act and the Telemarketing Sales Rules is very broad, and the Telemarketing Act allows state attorneys general to bring suit for violations of its provisions.⁷⁵ Fraudulent telemarketers face criminal sanctions for their illegal activities, and the FTC can sue fraudulent telemarketers for damages on behalf of victims.⁷⁶ The FTC is also statutorily empowered to use a broad array of enforcement mechanisms to combat unfair and deceptive trade practices that affect commerce.⁷⁷ In addition, the adoption of the Telemarketing Act entrusted the FTC with the primary role in establishing guidelines for the telemarketing industry.⁷⁸ To combat telemarketing fraud, the FTC relies most often on the substantive provisions of the wire fraud statute,⁷⁹ money laundering statutes,⁸⁰ lottery statutes,⁸¹ and financial institutions fraud.⁸²

The FTC promulgated the Telemarketing Sales Rules to govern the conduct of telemarketers, particularly telephone behaviors,⁸³ abusive sales tactics,⁸⁴ permissible calling times,⁸⁵ and accurate communication of the value of any prize or investment.⁸⁶ The rules also require disclosure of the telemarketer's cancellation policy.⁸⁷ Violators are subject to civil penalties of up to \$10,000 per violation,⁸⁸ and must make full restitution to the victim.⁸⁹

The Senior Citizens Against Marketing Scams Act (SCAMS), a promising but never enacted piece of legislation, would have increased the penalties for telemarketers that target or victimize persons over age fifty-five.⁹⁰ Under SCAMS, a telemarketer that victimized or targeted those over age fifty-five would have been sentenced to an additional ten years in prison over and above the underlying penalty.⁹¹ SCAMS would have mandated restitution from violators.⁹²

75. 15 U.S.C. § 6103.

76. *See id.* § 6103(a).

77. *Id.*

78. *See* Bratkiewisz, *supra* note 11, at 594–95.

79. 18 U.S.C. § 1343 (2006).

80. *Id.* §§ 1956–1957.

81. *Id.* §§ 1301–1302.

82. *Id.* § 1344.

83. *See* 16 C.F.R. § 310 (2006).

84. *Id.* § 310.4

85. *Id.* § 310.4(c).

86. *Id.*

87. *Id.* § 310.3(a)(1)(iii).

88. 15 U.S.C. § 45(l) (2006).

89. *Id.*

90. H.R. 4399, 103d Cong. (1994).

91. 10 U.S.C. § 2326 (2006); *see also* Bratkiewisz, *supra* note 11, at 595; Moskowitz, *supra* note 3, at 208.

B. Bankruptcy as a Solution to Debts Arising from Telemarketing and Credit Card Solicitation and Use

Debt problems in our society are ubiquitous, but some elderly people are even more susceptible to excess debt than other segments of society.⁹³ First, as discussed above, they are preyed upon by thieves and perpetrators of fraud, as well as by those peddling expensive consumer credit.⁹⁴ Second, many are trusting and easy to reach. Third, many have expensive health problems that are not covered adequately by insurance.⁹⁵ Fourth, many have no capacity to rebound from financial setbacks because they cannot work.⁹⁶ Although the elderly formerly filed for bankruptcy at a much lower rate than other demographic groups,⁹⁷ they are now the fastest growing demographic in bankruptcy.⁹⁸

This section is designed to help elder law attorneys determine if bankruptcy is a good solution for a particular client. Attorneys should not be surprised, however, if elderly people resist bankruptcy

92. 10 U.S.C. § 2327; *see also* CAL. BUS. & PROF. CODE § 17511 (West 1985).

93. Robyn L. Meadows, *Bankruptcy Reform and the Elderly: The Effects of Means Testing on Older Debtors*, 36 IDAHO L. REV. 227, 229–31 (2000). I say “some” here because in my own experience, elderly people are from a generation in which they do not embrace credit or consumerism as much as many other generations. Thus, the very old in our society are much less inclined to use credit unless they become victims of fraud. This may not be true of aging baby boomers, however.

94. *See infra* Part II.B.1.

95. Meadows, *supra* note 93, at 230–31.

96. *Id.* at 237.

97. *Id.* at 230.

98. THERESA SULLIVAN ET AL., AARP PUB. POLICY INST., GENERATIONS OF STRUGGLE 10 (2008), http://assets.aarp.org/rgcenter/consume/2008_11_debt.pdf. As these authors note:

The economic news for seniors is consistently grim. Even following the changes in the law in 2005, bankruptcy filings among those age 55 or older have increased from their base rate in 1991 and already approach the filing levels in 2001. Age is increasingly associated with financial distress and seeking protection from creditors through the bankruptcy courts.

These data warn of increasing financial pressure on families as they age. The data take on particular urgency in light of recent research suggesting a relationship between financial strain and health problems for older people, particularly indications that financial problems are linked with declining self-assessments of their health, diminishing ability to care for themselves, and generalized demoralization. The rise in bankruptcy filings may presage increased physical and psychological problems among older Americans.

Id.

more than younger people. Many are personally opposed to bankruptcy and find it morally reprehensible.⁹⁹

In October of 2005, a new bankruptcy law went into effect that significantly changed the personal bankruptcy system in the United States.¹⁰⁰ Although some collection agencies have claimed that bankruptcy is now banned, that Chapter 7 is no longer available, and that credit card debt is no longer dischargeable, none of this is true.¹⁰¹ Bankruptcy has become more complex and expensive, and some debts are harder to discharge, but people can still file.¹⁰²

For most elderly people, Chapter 7, a straight liquidation-style bankruptcy, will be more beneficial than the other common option for individual debtors, the Chapter 13 repayment plan.¹⁰³ Thus, when

99. See Jennifer B. Herzog, Note, "The Diamond-Studded Wheelchair": The Health Aid Exemption in Bankruptcy and Its Application to the Elderly Debtor, 12 ELDER L.J. 385, 397 (2004).

100. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (enacted April 20, 2005 and generally effective for cases commenced 180 days after this enactment, though some provisions were immediately effective). Congress further clarified these amendments in December 2006. See Pub. L. No. 109-390, 120 Stat. 2692 (2006).

101. Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 382 n.112 (2008).

Of the 845 debtors who had been contacted by a debt collector, these were the recorded responses:

1. It was illegal to file bankruptcy: 4.9% (n = 41)
2. You might go to jail if you filed: 3.9% (n = 33)
3. I.R.S. would audit you if you filed: 7.3% (n = 62)
4. You might lose your job if you filed: 8.5% (n = 72)
5. Something else might happen if you filed: 19.4% (n = 164) (text fields recorded).

Overall, 12.9% (n = 133) reported one or more responses in categories one through four. The total with a response in any of one through five was 23.6% (n = 244).

Id.

102. See *id.*

103. Meadows, *supra* note 93, at 231-33. Meadows states:

The two primary avenues for debt forgiveness available to individual debtors in bankruptcy are liquidation under Chapter 7 and repayment of debts under Chapter 13. Each is generally designed to provide financially distressed debtors with protection from creditors. Both seek to supply the debtor with a means to achieve a financial fresh start while providing a means for repayment of creditors.

Under Chapter 7 liquidations, current non-exempt assets are used to repay all or a portion of the debtor's indebtedness. The debtor generally retains all future income, free and clear from most debts. Chapter 13 repayment plans, on the other hand, require the debtor to use some portion of future income over a three to five year period to repay all or a portion of the outstanding debt. In exchange, the debtor is generally allowed to retain currently owned assets.

analyzing a case to determine if bankruptcy will be useful, the first question is often whether the bankruptcy debtor is eligible for a Chapter 7 bankruptcy and the resulting quick discharge of debts. The answer is "yes" for most people, including the elderly. The more complex determinations are whether the person will get to keep his or her assets in bankruptcy, and whether the debts will be discharged.

1. THE MEANS TEST AND CHAPTER 7 ELIGIBILITY

Many attorneys have heard about the new bankruptcy means test, one of the hallmarks of bankruptcy reform. This test is designed to force more consumers who wish to file for bankruptcy to choose a payment plan by mandating partial repayment of debts.¹⁰⁴ Congress and the consumer credit industry, aided by cleverly manipulated but flimsy empirical data, justified introduction of the means test by assuming that bankrupt consumers can afford to pay back their debts and thus should be forced to do so.¹⁰⁵ The test itself has numerous conceptual flaws, including its use of past, rather than current or

Thus, the choice between the two chapters appears to come down to whether the debtor prefers to use current assets or future income to repay creditors. However, this is not actually the case. First, there are a number of exemptions available to debtors, even those choosing to liquidate their assets, which protect the debtor's property from the reach of creditors. Additionally, secured debt and priority claims are paid before any distribution is made to general unsecured creditors. As a result, most Chapter 7 liquidations involve no repayment to general unsecured creditors at all. Moreover, in those cases where some repayment is made, it generally amounts to pennies on the dollar.

Despite incentives in the Bankruptcy Code to induce debtors to choose Chapter 13 repayment plans, most debtors choose the liquidation alternative under Chapter 7, thus opting to retain their future income free and clear of most debt in exchange for the loss of non-exempt assets.

Id.

104. Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 12 (2001).

105. Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1563 n.369 (2006) (citing Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 13–20 (explaining the fallacy of the claim that bankruptcy costs every American family \$400 each year); Elizabeth Warren, *The Phantom \$400*, 13 J. BANKR. L. & PRAC. 77, 77–80 (2004) (describing the unsubstantiated \$400 "tax" as a creation of credit industry lobbyists, who derived the figure from dubious calculations and employed the \$400 "fact" as a sound-bite to garner support for bankruptcy reform legislation in Congress); Bruce A. Markell, *Sorting and Sifting Fact from Fiction: Empirical Research and the Face of Bankruptcy*, 75 AM. BANKR. L.J. 145, 152–53 (2001) (book review)).

prospective, income to determine the ability to pay.¹⁰⁶ Deceptive analysis and misinformation regarding bankruptcy reform and the means test are pervasive. While the media often reports that *most* people cannot pass the means test and therefore must file Chapter 13, less than 5% of bankruptcy filers actually fail the test.¹⁰⁷

In simple terms, the means test measures income over the past six months, annualizes this amount, and deducts a list of expenses taken from the IRS Offer in Compromise process¹⁰⁸ to determine if anything remains from which to pay creditors.¹⁰⁹ Because social security benefits are not included in the income that must be counted, it is easy for an elderly person who receives most of his or her income from social security to pass.¹¹⁰ Therefore, virtually anyone whose primary source of income is social security is automatically eligible to file whatever type of bankruptcy he or she chooses.

There is a split of authority among courts about whether income from exempt retirement accounts is included in the calculation of current monthly income.¹¹¹ Again, current monthly income is measured by the amount of money an individual or couple has received during the six months prior to the bankruptcy filing.¹¹² Thus, if financial statements reflect an unusually heavy reliance on withdrawal from retirement funds prior to the scheduled bankruptcy filing, an attorney may choose to delay filing until six months have elapsed.¹¹³ During

106. Actually, the phrase "current monthly income" is even more of a misnomer than that. As explained by Professor David Gray Carlson, the "current monthly income" used to measure the ability to pay under the means test is none of the above; rather, it constitutes past revenues over a six-month period, annualized. See David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 259 (2007).

107. The most well-known study suggests that 5% or less of debtors will ultimately fail the means test, though the study is based upon pre-reform data. See Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31 (1999).

108. 11 U.S.C. § 707(b) (2006).

109. 13 NORTON BANKRUPTCY LAW AND PRACTICE 3D DICTIONARY 155 (2008).

110. The definition of "current monthly income" provided in the Bankruptcy Code excludes social security benefits for the purposes of the means test. 11 U.S.C. § 101(10A)(B); *In re Ward*, 359 B.R. 741, 744 (Bankr. W.D. Mo. 2007).

111. James W. McNeilly Jr. & David P. Leibowitz, *Withdrawals from Tax-Deferred Retirement Accounts: Included in Monthly Income?*, AM. BANKR. INST. J., June 2008, at 12, 59.

112. 11 U.S.C. § 707(b).

113. Because "current monthly income" includes only the past six months of income, a delay in filing would take the retirement income outside the scope of the calculation. § 101(19A)(A).

this time, the client could protect his or her assets by making a conscious effort to reduce reliance on retirement accounts. Because they are derived from a finite source and must be relied upon by the retiree for an indeterminate time, there is a strong argument that the withdrawn funds should not be included in the monthly income at all.¹¹⁴ Thus, it is worth having a bankruptcy attorney analyze the case under both scenarios to determine the possible outcomes of either filing now or in the future.¹¹⁵ Most clients living primarily off of social security income with little or no retirement funds available will pass the means test and qualify for Chapter 7 bankruptcy.¹¹⁶

2. EXEMPTIONS AND ASSET PRESERVATION

It is important to consider whether filing for bankruptcy will preserve a debtor's assets. An attorney should determine early on if a bankruptcy debtor will be able to file for bankruptcy and discharge most debts, without losing any assets. This is particularly important for the elderly, who cannot always work to make up for lost assets. Retirement funds are now exempt from creditor claims, up to \$1,095,000 per person.¹¹⁷ Many older Americans, however, have a great deal of equity in their homes but not much else.¹¹⁸ This makes the ability to save a home, in which there could be significant equity,

114. "[D]istributions from IRAs should be excluded because the money deposited into an IRA is received for use *prior* to the distribution from the IRA . . . [and] should not be treated as income for purposes of the means test." *In re Zahn*, 391 B.R. 840, 845 (B.A.P. 8th Cir. 2008).

115. Because past income does not measure future ability to pay creditors, it is possible to pass the means test and still be disqualified for Chapter 7. This is because the means test merely creates a presumption of eligibility or ineligibility. *See, e.g., In re Zaporski*, 366 B.R. 758, 771 (Bankr. E.D. Mich. 2007) (finding that § 707(b)(2)(A) "offers no safe harbor to those debtors with respect to whom this statutory presumption does not arise" so that § 707(b)(3) permits a court to dismiss a case even absent the statutory presumption); *In re dePellegrini*, 365 B.R. 830, 833 (Bankr. S.D. Ohio 2007) ("The Debtor's contention that he 'passed' the means test of 707(b)(2) is not a defense to a § 707(b)(3) motion to dismiss."). Courts also generally agree that the debtor's "ability to pay" must be considered under the totality of the circumstances prong of § 707(b)(3). *See, e.g., Zaporski*, 366 B.R. at 771; Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035, 1036 (2006). According to Judge Wedoff, contributions made by debtors to certain retirement plans will not constitute current monthly income for purposes of Chapter 13, but this limitation does not apply in Chapter 7, and would not affect distributions from the retirement account in any event. *Id.* at 1050 n.73.

116. *Id.* at 1047-48.

117. 11 U.S.C. § 522(n); *see also* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 647-48 (2006).

118. Celeste M. Hammond, *Reverse Mortgages: A Financial Planning Tool for the Elderly*, 1 ELDER L.J. 75, 78 (1993).

critical. Which assets can be saved, free of creditor claims, depends upon the equity one has in each particular category of asset.¹¹⁹

While particular exemption schemes are unique to the states, their purpose is the same: to allow individuals in bankruptcy to preserve certain assets.¹²⁰ Some states allow bankruptcy debtors to choose between state and federal exemption schemes.¹²¹ States that deny the federal exemption scheme even in a federal bankruptcy, often have extremely low exemptions.¹²² For example, Georgia's homestead exemption in bankruptcy is just \$10,000.¹²³

In contrast, California's generous homestead exemption recognizes that the home is the primary asset of many retirees and thus increases for people over age sixty-five.¹²⁴ In California, a single person over the age of sixty-five can keep a house worth \$650,000 with a \$500,000 mortgage if the payments are current.¹²⁵ While the same person can save a \$150,000 home with no mortgage, a single person under the age of sixty-five cannot keep the same house because they are limited to \$50,000 in equity.¹²⁶ Because of significant variance in exemption schemes, one must do the exemption analysis in one's own state. If the person in financial trouble has more equity than would allow them to keep their home, he or she should consider a reverse mortgage, described in Part II.C. below.

119. 11 U.S.C. § 522(d). Tax-exempt retirement funds are generally exempted from a debtor's bankruptcy estate, meaning they are not part of the estate at all and need not fall within one of the bankruptcy exemptions. *Id.* § 522(b)(3)(C). A debtor's right to receive life insurance proceeds from a former spouse or partner, or other relative, may also be exempt. *Id.* § 522(d)(11)(C).

120. Daniel A. Austin, *The Bankruptcy Clause and the Eleventh Amendment: An Uncertain Boundary Between Federalism and State Sovereignty*, 42 U.S.F. L. REV. 383, 390 (2007).

121. *Id.* at 395. Most states *do not* allow use of the exemption scheme found in the federal Bankruptcy Code, which is entirely counterintuitive because federal law generally preempts state law. *Id.* at 396. Arkansas, Connecticut, District of Columbia, Hawaii, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Washington, and Wisconsin all allow bankruptcy debtors to choose between the federal exemption scheme or the state's own exemptions scheme. *Id.* at n.115. The rest of the states require all federal bankruptcy debtors to use their own state exemption schemes in bankruptcy. *See id.*

122. *See, e.g.*, GA. CODE ANN., § 44-13-100 (2008).

123. *Id.*

124. CAL. CIV. PROC. CODE § 704.730(a)(3)(A) (Deering 2008).

125. *See id.* This assumes the debtor wants to file a Chapter 7. In a Chapter 13, a person could make up past-due defaults as well. *See* 11 U.S.C. § 1322(c)(1) (2006).

126. CAL. CIV. PROC. CODE § 704.730(a).

3. WHICH DEBTS GET DISCHARGED?

A Chapter 7 bankruptcy will discharge most debts, but there are critical exceptions.¹²⁷ A person wishing to file bankruptcy in order to discharge debt should not do so if the filing will not result in discharge of most debts. Medical and health care bills, caretaker bills, most credit card debt, and other unsecured obligations are typical of elderly consumers and usually discharged.¹²⁸ Nondischargeable debts include certain tax obligations,¹²⁹ child support and other domestic support obligations,¹³⁰ and student loans.¹³¹ Such debts are not typical for elderly clients.¹³² Thus, elderly people often benefit greatly from a bankruptcy because most of their debts are general unsecured debts that qualify for discharge. Certainly most debts arising from phone and mail solicitations will be unsecured debts. Secured debt, on the other hand, does not get discharged unless the client is willing to return the collateral.¹³³

C. Reverse Mortgages

Many elderly people need to discharge a great deal of debt, but may have more equity in their home than they can keep if they file for bankruptcy. One option is a reverse mortgage. Reverse mortgages enable homeowners to tap into and use the equity or value stored in their residences, or at least avoid all future payments on the home.¹³⁴ The most frequently used type of reverse mortgage is guaranteed by the federal government, although private sector companies also offer them.¹³⁵ To be eligible, one must be at least sixty-two years old and have significant equity in their primary residence.¹³⁶ The loan is advanced in reverse and the interest accrues and is tacked on to the back

127. 11 U.S.C. § 523.

128. *Id.*; Jennifer Bayot, *As Bills Mount, Debts on Homes Rise for Elderly*, N.Y. TIMES, July 4, 2004, at A1.

129. 11 U.S.C. § 523(a)(1).

130. *Id.* § 523(a)(5).

131. *Id.* § 523(a)(8).

132. See Christine Dugas, *American Seniors Rack Up Debt Like Never Before*, USA TODAY, Apr. 24, 2002, at 1.

133. 11 U.S.C. §§ 506, 524, 722, 1129, 1322. Secured debt is that supported by collateral, such as a home or a car. *Id.* § 506.

134. Hammond, *supra* note 118, at 86.

135. *Id.* at 87.

136. *Id.* at 91.

of the loan.¹³⁷ There are no payments due while the elderly person lives in the home.¹³⁸

In its simplest form, the reverse mortgage involves an agreement between lender and borrower to create a rising-debt loan, in which the balance increases over time through the addition of interest.¹³⁹ The older person can receive cash for some portion of the equity in the home, either in a lump sum or in periodic payments.¹⁴⁰ Both the accumulated principal indebtedness and all the accrued interest become a lien against the house.¹⁴¹ The borrower is typically not obligated to repay the loan until either the home is sold or the debtor no longer occupies the residence.¹⁴² Thus, the reverse mortgage is structurally similar to an open-ended mortgage, a negative amortization mortgage, and a balloon mortgage.¹⁴³

As Professor Celeste Hammond explains:

The reverse mortgage is very different from the common, "forward" mortgage that the purchaser of a home gives to the lender in exchange for a loan of a portion of the sale price. Although the principal amount of the conventional mortgage is the highest at the beginning and decreases (or is self-amortized) as the borrower makes payments, the reverse mortgage principal amount is highest at the end, and the interest charges will be "back loaded" because the elderly borrower is not making any payment Also, the parties to the conventional mortgage limit the amount of the loan depending on the appraised value of the real estate at the start The reverse mortgage, in contrast, sets the total loan amount based on current appraised value, anticipated appreciation, and the life expectancy of the borrower.¹⁴⁴

The younger the person, the smaller the amount the person will receive in cash from the reverse mortgage.¹⁴⁵ Lenders must use actuarial tables and attempt to structure the loan so that interest can accrue on the loan through the borrower's likely life expectancy, but they can still recover all of their interests and costs on the loan.¹⁴⁶ Actual numbers vary daily, but for example, a home with \$200,000 in eq-

137. *Id.* at 86.

138. *Id.* at 87; see also ALISON BARNES ET AL., COUNSELING OLDER AMERICANS 225 (2006).

139. Hammond, *supra* note 118, at 86.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 86-87.

145. *Id.* at 91.

146. *Id.* at 86-91.

uity might provide \$70,000 in cash to a sixty-two-year-old, but \$130,000 to a seventy-eight-year-old. The cash the borrower gets can be used to pay off other bills. The borrower should also ensure that he or she has enough money to pay for taxes and insurance as well as repairs, because a failure to pay for these items can result in foreclosure of the loan.¹⁴⁷ The important thing to remember about using a reverse mortgage in this circumstance is not the amount of cash back, however, but the fact that the person can live in the home payment-free so long as he or she occupies the home.¹⁴⁸ This can be a huge financial benefit for many elderly people.

Still, reverse mortgages are not for everyone. They are a one-time solution. If the reverse mortgage is being taken out to cover debts that might recur, such as medical bills or other ongoing future expenses, the reverse mortgage could be a very poor choice. Usually, once one obtains a reverse mortgage, one cannot go back and get more equity out of the house.¹⁴⁹ Because transaction costs and fees are very high, reverse mortgages are best used in situations where the older person expects not to need more money from home equity in the future.¹⁵⁰ One older client had refinanced her home several times to absorb debt that family members had pressured her to take on. The payments on the debt became prohibitively burdensome, given her paltry social security income, yet there was still equity in the home. The reverse mortgage was perfect in that situation, so long as both the borrower and her family understood that there would be no more trips back to the home for home equity.

Moreover, because one takes on a loan like this hoping to get more cash than the actuarial tables say they deserve, the best-case scenario financially is that the person owning the home is very healthy and will occupy the home long into the future, until all of the equity in the home is eaten up by the interest.¹⁵¹ This means, by definition, that the person beat the actuarial tables. It also means that the family will not inherit the house or benefit from its exhausted equity. Thus, this

147. Richard Allen, *Retirement Income "On the House"*, 11 C. BAR. 48, 48 (1997) (book review).

148. *Id.*

149. Hammond, *supra* note 118, at 81.

150. *See id.* at 88.

151. *See id.* at 87–88 (explaining the advantages of reverse mortgages paying annuities for the life of the borrower).

product works best when the older person is cash-strapped and the children are better off financially than the parent or parents.

D. Assessing Existing Remedies and Focusing on New Ones

While current legal solutions to problems caused by soliciting the elderly are not insignificant, they do not fully address the problem. They create few incentives for solicitors to stop soliciting the elderly. Given this population's vulnerability and inability to recuperate from financial setbacks through long-term employment, more protections are needed. Creating strong disincentives to these hard-sell practices is highly desirable. Current practices lead to impairment of autonomy and reduction of assets, and thus externalize elder care onto society.

Changing certain default rules is one simple way to reduce the financial vulnerability of the elderly. Such changes would counterbalance the extreme asymmetry of sophistication between the elderly and consumer credit firms. Current regulation schemes cannot achieve these ends because they do not deter predatory solicitors. Changing the default rules would fill that regulatory void and deter those who prey upon the elderly.

Telemarketing calls have irritated Americans for decades. Fortunately, the Telemarketing Sales Rules discussed in Part II.A establish a nationwide do-not-call registry.¹⁵² The rules prohibit telemarketers from calling phone numbers consumers list on the registry.¹⁵³ The telemarketing industry affected by the Telemarketing Sales Rules generates \$275 billion annually, employs about 5.4 million workers in the United States at a time, and initiates an estimated 104 million telephone calls per day.¹⁵⁴

The national registry permits consumers who do not want to receive telemarketing calls to add their phone numbers to the registry via a toll-free telephone call or the internet.¹⁵⁵ Telemarketers governed by the Telemarketing Sales Rules are prohibited from calling and must

152. 16 C.F.R. pt. 310 (2004).

153. *Id.* § 310.4(b)(1)(iii)(B).

154. Edward J. Schoen & Joseph S. Falcheck, *The Do-Not-Call Registry Trumps Commercial Speech*, 2005 MICH. ST. L. REV. 483, 484 (citing *Mainstream Mktg. Servs. Inc. v. FTC*, 283 F. Supp. 2d 1151, 1154 (N.D. Cal. 2003); Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 47 C.F.R. pts. 64, 68 (2004)).

155. *Id.*

“scrub” their phone lists of numbers placed on the registry.¹⁵⁶ Though the national do-not-call registry was created for the express purpose of reducing unwanted telephone solicitations,¹⁵⁷ it is an incomplete prohibition because charities and pollsters are not bound by the rules—the registry applies only to “commercial callers.”¹⁵⁸ Also, under current law, solicitors and salespersons are permitted to call a person’s home unless one takes affirmative steps to put themselves and their household on a do-not-call list.¹⁵⁹ Similarly, solicitors or salespeople can mail credit and other solicitations to anyone who has not signed up for one of numerous, hard-to-understand “do-not-send” procedures.¹⁶⁰

156. *Id.* (citing 16 C.F.R. § 310.4(b)(1)(III)(B)(i), (ii) (2004)). This is supposedly accomplished “by periodically accessing the registry through a secure website to ascertain what numbers . . . have been listed, and then removing those numbers from their calling list.” *Id.*; see Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4640 (Jan. 29, 2003). I remain dubious that the lists are scrubbed, but this is the required procedure. Initial data from an empirical study I have just begun suggests that people receive calls even after being asked to be placed on do-not-call lists. Thus, do-not-call list procedures in place today may not be sufficient to stop commercial calling.

157. See Shoen & Falcheck, *supra* note 154, at 485.

158. See Telemarketing Sales Rule, 16 C.F.R. pt. 310 (2004); see also Jack Gravelle, Note, *Hold the Phone: Making the Call for “Personal Exceptions” to the Do-Not-Call Registry*, 65 OHIO ST. L.J. 991, 993 (2004).

159. To get on the do-not-call list, send your name and address to: Telephone Preference Service, Post Office Box 9014, Farmingdale, New York 11735-9014, or Preference Service Manager, Direct Marketing Association, 1120 Avenue of the Americas, New York, New York 10036-6700.

160. To remove your name from many national direct mail lists, write: Direct Marketing Association, Mail Preference Service, Post Office Box 9008, Farmingdale, New York 11735-9008, or Preference Service Manager, Direct Marketing Association, 1120 Avenue of the Americas, New York, New York 10036-6700. Unfortunately, opting out of all mail solicitations is far more complex than contacting these associations. Section 214 of Fair and Accurate Credit Transactions Act of 2003 (FACT Act), Pub. L. 108-159, 117 Stat. 1952 (2003), was enacted to amend the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681-1681x (2006), and gives consumers the right to restrict certain entities from using information received from affiliates to make credit solicitations to that consumer unless the consumer has been provided “clear and conspicuous” notice that the consumer’s information will be shared for such purposes and an opportunity to opt out of having such information shared for such purposes. 15 U.S.C. §§ 1681m, 1681s-3. Under the FCRA, consumer credit reporting companies are permitted to include a consumer’s name on lists used by creditors or insurers to make firm offers of credit or insurance that are not initiated by the consumer. *Id.* § 1681t. The FCRA also provides consumers the right to “opt-out,” which prevents consumer credit reporting companies from providing their credit file information for firm offers. *Id.* §§ 1681m, 1681s-3. This is a different opt-out procedure than the one for general direct mail solicitations referred to above. The best source for the information needed to opt out of everything is the Federal Trade Commission’s Web site, found at <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt063>.

A feasible alternative system is to require people to sign up or opt in before they can be called or solicited by mail. Given the current telemarketing abuses directed at the elderly, I propose banning telemarketing and unsolicited mail solicitations directed toward anyone over the age of sixty-five who has not explicitly given permission to be called or solicited by mail. This new rule would provide limited but significant protection to senior citizens. If the law were complied with, people over sixty-five would receive mail and telephone solicitations *only* if they so choose.

Because direct mail and telephone solicitation are not the only ways to sell goods and services, reversing these do-not-call and do-not-solicit rules, particularly for just one segment of the population, would likely have a minimal impact on our economy. This rule would prevent the collection of any debts created through unauthorized contact. I also propose the imposition of punitive damages, perhaps double the amount sought to be collected, for solicitors who contact elderly individuals in violation of the rule.¹⁶¹

Shifting the default rule from a “call list” to a do-not-call list for people over the age of sixty-five would make a tremendous difference in the number of calls received, as well as the number of dollars seniors part with for things they neither want nor need. Numerous studies show that the status quo is a powerful force and that many people do not change the default rules set for them in society, even if they intend to.¹⁶² In their book *Nudge*, Professors Thaler and Sunstein provide many other examples of instances in which people do not change the default rules once they are set, even when doing so would benefit them greatly.¹⁶³ These default rules can be set in a way that benefits citizens in areas such as increasing savings and improving

shtm. This complexity in opt-out procedures supports the notion that elderly people should not have to opt out of mail solicitations.

161. Moreover, as to charitable contributions not covered by these rules, one could never enforce any promise made over the phone made by a person over sixty-five, unless the promise was also confirmed in writing.

162. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 178–79 (2008). These authors report on a study showing that 79% of people favored organ donation and a sizable majority indicated a desire to give an organ to a child if the need arose, but only 42% actually checked the necessary box on the driver’s license form to accomplish this goal. *Id.* at 17. Conversely, in Austria, where one must opt out if one wishes not to donate one’s organs, 99% of people donate their organs, compared to 12% of people who must opt *in* under a German system. *Id.* at 178–79.

163. *Id.* at 178–82.

health care decisions, and even improving day-to-day decisions about what we choose to buy in a store, for example, by placing fruit at eye level and candy way above or below it.¹⁶⁴

What does this mean in the context of do-not-call or do-not-solicit-by-mail rules? People can seek out the products they genuinely want or need, but will not be asked to buy goods or services that they never thought about nor knew existed. Could people miss out on a few deals that might benefit them? Perhaps, but the benefits of shifting these default rules would far outweigh the burdens. Families would no longer be induced to limit the autonomy of older family members by hiding checks and credit cards. The cost of autonomous action in response to predatory solicitation would be shifted to the solicitor.

While firms will likely argue that they would be unable to comply with such a rule because it would be impossible to learn the age of the person being called, the information available about almost all of us belies that conclusion.¹⁶⁵ Many firms already know the age of those they call or solicit by mail, along with endless other data.¹⁶⁶ Other firms may argue that such a rule is unnecessarily paternalistic and will keep older people from obtaining the goods and services they want and need, and even limits the very independence it seeks to provide. These fears are unfounded because senior citizens would maintain the ability to choose to receive such solicitation. This measure would merely shift the burden of exploitation from families and elders to the firms that currently profit from their misfortune.

Unsolicited credit card offers cause problems of indebtedness similar to other telemarketed or unsolicited offers. Frequently, the terms of such offers are much more costly than they appear. The solution to addressing debt incurred through unsolicited credit card offers should be based on the same concept as a reversed do-not-mail rule, with the added justification of traditional risk allocation principles. Specifically, the party best able to avoid the risk of nonpayment of the debt, or to insure against it, should bear the risk.¹⁶⁷ While it may appear that individual borrowers are in a better position to avoid the

164. *Id.* at 8.

165. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 23 (2008).

166. *See id.*

167. Margaret Howard, *Shifting Risk and Fixing Blame: The Vexing Problem of Credit Card Obligations in Bankruptcy*, 75 AM. BANKR. L.J. 63 (2001).

risk of nonpayment because they “know more about themselves and have greater control of their affairs than lenders do,”¹⁶⁸ this is far from true. Creditors know far more and thus should bear the risk, at least as to unsolicited credit cards and the debts resulting from their use.¹⁶⁹

In her article *Shifting Risk and Fixing Blame: The Vexing Problem of Credit Card Obligations in Bankruptcy*, Professor Margaret Howard espouses her own risk allocation theory in the context of credit cards, which are heavily solicited by issuers with plenty of information about the consumers they solicit.¹⁷⁰ She argues that the party best able to minimize the risk of nonpayment in the credit card context is the issuer because it has more knowledge of the consumer’s situation.¹⁷¹ Consumers are simply no match for issuers in terms of knowledge, sophistication, and analysis capability.¹⁷² The superior risk bearer should bear the loss.¹⁷³ This she said in 2001, yet today creditors are more shrewd and knowledgeable about our credit histories and proclivities than ever. The creditors, not the debtors, are in the best position to avoid the loss of a failed credit transaction.

Because of this information imbalance, any debt arising through a credit card offered to an elderly individual who did not first inquire about the card should be per se uncollectible. Under this rule, there would be no need for bankruptcy and no need for reverse mortgages to pay off ballooning balances. This approach is justified by the naïveté of elderly borrowers with regard to the terms of credit card borrowing as well as the fact that such terms can change at any time.¹⁷⁴

Because some elderly people can understand credit cards and can use them without harm, this remedy is admittedly overbroad and protects some who do not need it. The rule would unquestionably discourage unsolicited offers, however, which would be beneficial in reducing the risks of over-indebtedness. Moreover, senior citizens could still apply for credit cards if they like, and if they did, the resulting debt would be fully enforceable. Thus, credit card companies would not be entirely deprived of revenues from this demographic.

168. *Id.* at 82.

169. *See id.* at 82–83 (describing that typical consumer debtors lack sophisticated financial understanding).

170. *Id.* at 64–65.

171. *Id.* at 82–83.

172. *Id.*

173. *See id.* at 82–84.

174. *See* Loonin & Renuart, *supra* note 39, at 170.

Solicitations of those who do not want, need, or understand this type of credit, however, would cease to be enforceable. This lack of enforcement mechanism would deter credit card companies from offering their products to the elderly without solicitation, which would reduce the instances in which the cards were obtained without knowledge of their terms.

III. Conclusion

While consumer protection laws, filing for bankruptcy, and obtaining a reverse mortgage address debts, and while FTC rules and other state enforcement laws are better than nothing when seeking to protect a victim of consumer fraud, all of these remedies fall short of actually remedying these problems and all leave many isolated elderly people, who have little access to the law, without an effective remedy.

Bankruptcy provides some relief to overindebtedness. For most middle-class and working-class debtors, a simple liquidation-style Chapter 7 bankruptcy is available and will discharge most debts. Nevertheless, not everyone wants to file for bankruptcy. Those who have been tricked or defrauded should not be required to file bankruptcy to discharge debts incurred as a result of such wrongdoing.

Reverse mortgages can sometimes be used by those who would lose their homes in bankruptcy because they have too much equity over and above the exemptions. For those who have been tricked or defrauded, however, it would be unfair and inappropriate to force them to forfeit their home equity in order to discharge debts arising from little fault of their own.

While some telemarketing activity is illegal, much is legal but insidious enough that it would be improper to make an individual file for bankruptcy or get a reverse mortgage to address the resulting debt. It would be more just to place a limit on the capacity of certain creditors to collect their debts by shifting the default rules in a manner that would require elderly individuals to elect to receive solicitations and only then to become vulnerable to collection of debts arising therefrom. At the very least, these legal reforms would create disincentives for firms to solicit the elderly, something current rules have not accomplished. Such a shift could greatly enhance the quality of life for many elderly people, and put the risk of nonpayment on the party most able to avoid that risk, namely the solicitors themselves.