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Abusive Credit Card Practices and Bankruptcy: Hearing Before the S. Comm. on the Judiciary, 111th Cong., March 24, 2009 (Statement of Associate Professor Adam J. Levitin, Geo. U. L. Center)

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Testimony of Adam J. Levitin

Associate Professor of Law, Georgetown University Law Center

Hearing: Abusive Credit Card Practices and Bankruptcy

March 24, 2009

United States Senate Committee on the Judiciary

Mr. Chairman, Members of the Subcommittee:
I am pleased to testify in support of the Consumer Credit Fairness Act, S.257, legislation proposed by Senator Whitehouse that would address abusive credit card practices.
There are five major points I wish to make in my written testimony:

I. S.257 enacts an essential principle of fairness: a creditor that causes a debtor's financial ruin should not be allowed to use the courts as a collection agency or share in bankruptcy distributions the same as innocent creditors.

2. S.257 will encourage safer and sounder consumer lending by discouraging lenders from making loans that they cannot reasonably expect consumers to repay, including "sweatbox" lending models.

3. S.257 is not a usury law, and arguments against usury laws are inapplicable to S.257.

4. By waiving the means test for consumers with high-interest-ratc debt, S.257 encourages efficient bankruptcy filings, discourages strategic gaming of the bankruptcy system, and promotes the core bankruptcy principle of "equity is equality".

5. S.257 will give financially distressed consumers additional leverage to renegotiate their debts outside of bankruptcy.

1. CREDITORS WHO CAUSE CONSUMERS' FINANCIAL RUIN SnOULD NOT BE ALLOWED TO USE THE COURTS AS COLLECTION AGENCIES
Bankruptcy courts are courts of equity. I Perhaps the most famous equity maxim is that "lIe who comes into equity must come with clean hands.,,2 The clean hands maxim expresses the principle that a party should not be able to invoke the power of the courts to benefit from its own

wrongdoing. This principle is age-old; in I Kings, prophet Elijah rebukes King Ahab for benefiting from the escheat of property after arranging a judicial murder: "Hast thou killed, and also taken possession?"

S.257 recognizes this basic point of fairness: creditors who cause debtors' financial ruin should not be allowed to use the courts as their collection agents. The United States courts should not be enforcers for loan sharks. The Bankruptcy Code currently gives courts that power to equitably subordinate creditors who acted improperly . .:! But because equitable subordination is a discretionary remedy,S it is applied inconsistently. What S.257 does is to label a particular type of creditor behavior inequitable per se and provide for disallowance rather than subordination.6 High-interest-rate debt should be per se disallowed in consumer bankruptcy cases.

While one might reasonably debate the proper threshold for what qualifies as "high¬interest-rate debt," the impact of high-interest-rate debt on consumers and on other, more moderate creditors is undeniable.

A. lligh-interest-rate debt Contributes Substantially to Consumer Financial Distress and Bankruptcy Filings

High-interest-rate debt is financial quicksand.7 The interest accrues faster than a consumer can payoff the loan. Not surprisingly, Professor Ronald Mann has shown that dollar for dollar, a consumer with credit card debt (often a high-interest-ratc form of debt) is more likely to file for bankruptcy than a consumer with any other form of debt.s Even small debts at high interest rates can increase the chance of a bankruptcy filing. A study by Professors Paige Marta Skiba and Jeremy Tobacman found that a single payday loan of only $300 increases the chance of a bankruptcy filing by 2.84%.9 High-interest-rate debt strongly correlates with bankruptcy, which suggests that it contributes to consumer financial distress and bankruptcy filings.

Consider, [or example, the median consumer bankruptcy filer in 2007 with credit card debt. This median consumer had $17,513.00 in credit card debt, 10 which was 20% of the median consumer's total debt and half of unsecured debt (including taxes, rent, alimony, utilities, medical bills, and student loans). This $17,513.00 in credit card debt was also 65% of the median consumer bankruptcy filer's gross annual income. J I Conswner bankruptcy filers earn less than the median American household, but the $17,513 is still over 37% of the median gross annual national income.12 Over a year at 36% annual rate of interest, compounded daily, interest on this debt would amount to $7,584.44 or 16% of the median gross annual national income and 28% of the median gross income of bankruptcy filers. Few consumers can service that level of interest from their disposable income, let alone pay down principal.

To payoff such a loan by making m.inimwn payments for five years, the Office of Comptroller of the Currency's recommended amortization period for credit card debt, the consumer would

have to make monthly payments of $632.80. These payments would be 28% of a median consumer debtor's gross (pre-tax) monthly income, and 16% of the national median gross (pre-tax) monthly income. For a consumer who also has to pay taxes and provide basic necessities of food and shelter for her family, this sort of dcbt burden is near impossible. A consumer with this sort of high-interest-rate debt is on a sure path to financial ruin.

Creditors and debtors have co-dependent relationships, not unlike pushers and addicts. A creditor who is willing to set a consumer debtor down a near certain path to acute financial distress should not be pennitted to invoke the power of the federal bankruptcy courts to recover from the debtors' assets or future income.

B. High-interest-rate debt Hurts Other Creditors in Bankruptcy

Creditors who lend at exorbitantly high interest rates not only harm consumer debtors by shouldering them with unrealistic debt burdens, but they also harm other creditors. High-interest-ratc debt makes it difficult for debtors to manage their total debt burden for all creditors. By pushing more consumers into bankruptcy, creditors who lend at high interest rates impose costs on other creditors, including involuntary creditors like tort victims, who cannot protect themselves contractually. One creditor's rapaciousness can mean that all of the consumers' other creditors have to suffer; they have to incur the delay and expense of bankruptcy and will often recover little if nothing in the bankruptcy. A creditor who causes such harms to other creditors by pushing a debtor into bankruptcy in the .first place should not be allowed to share in the recovery from the bankruptcy estate.

II. S.2S? WILL ENCOURAGE SAFER AND SOU DER CONSUMER LENDI G

S.2S7 will promote safer and sounder consumer lending by discouraging lenders from making loans that they cannot reasonably assume consumers will be able to repay. No creditor can reasonably expect the typical consumer to be able to service more than a de minimis amount of extremely high-intcrest-rate debt. The creditor who lends at such exorbitant rates is making a gamble that for every few consumers who arc crushed under the burden of the high-interest-rate debt another will somehow manage to pay it off, making the overall venture profitable. This sort of lending model is premised on pushing some consumers to the limit, and pushing others over the edge.

Alternatively, the creditor might have a more sophisticated lending strategy-the creditor might know that the debt is unsustainable in the long run for almost all consumers, but as long as enough consumers make payments on the debt for a while before defaulting, the operation can still be profitable if the interest rates are high enough.13 As explained by Julie L. Williams, then the Acting Comptroller of the Currency, "Today the focus for lenders is not so much on

consumer loans being repaid, but on the loan as a perpetual earning asset. .. it's not repayment of the amount of the debt that is the focus, but rather the income the credit relationship generates through periodic payments on the loan, associated fees, and cross-selling opportunities.,,14

This is what Professor Ronald Mann has termed the "sweatbox" model of consumer lending-squeezing the borrower as hard as possible for as long as possible without pushing the borrower over the edge into default. The longer the consumer can be kept in the sweatbox of making minimum payments that exceed the cost of funds before eventually defaulting, the more profitable the loan. Thus, anything the lender can do to delay the default, such as making it more difficult to file for bankruptcy, allows the lender to extract greater revenue from the consumer.

All lenders lend for profit, of course, but a lender who lends with an eye to getting its principal repaid and making a profit from the interest is a very different type of lender than one who lends with an eye to turning the consumer into a "perpetual earning asset." No matter how greedy a lender is, a lender that is looking to get back its principal cannot squeeze a consumer too hard lest it push the consumer into default. A lender that doesn't care about getting principal repaid, as much as about extracting maximum payments from the consumer, will squeeze much harder. This business model resulted in things like the "interest only" and "pay option ARM" mortgages that are currently wreaking havoc on the economy. It is an inherently reckless business model because even if lenders do not want consumers to default, they lack sufficient information to make sure that they do not cnd up pushing the consumer into default. The sweatbox lending model is predatory and unsuited for sustainable lending.

S.257 will encourage safer and sounder consumer lending by creating a disincentive for lenders to make loans that are likely to drive consumers into bankruptcy. While S.257 will create a disincentive for making high-interest-rate loans it is not a usury law, as section III, below discusses. Its primary effect will be to ensure the integrity and fairness of the bankruptcy system, rather than regulate consumer credit.

III. S.257 Is NOT A USURY LAW AND WILL NOT HAVE THE CREDIT RATIO ') G OR PRODUCT SUBSTITUTION EFFECTS OF USURY LAWS

S.257 is not a usury law. A usury law limits the interest rate at which a creditor can lend. S.257 does not do that. Instead, it limits use of the bankruptcy courts to creditors who engaged in lending on responsible terms-those under which borrowers could be reasonably expected to be able to repay in an appropr' ate amortization period.

Traditional usury laws raise three concerns: credit rationing, term substitution, and product substitution. Credit rationing means that lenders are unwilling to advance additional funds to borrowers at permitted interest rates.15 Thus, a concern with usury laws is that by restricting the rate at which lenders can lend, they restrict the available supply of credit. Traditionally this has

been assumed to be a negative impact, although some might argue that credit rationing would have placed a brake on the recent economic bubble.

Term substitution refers to lenders shifting the price terms of a credit product to avoid regulatory limitations. For example, if a usury law applies only to interest rates, lenders might try to circumvent its impact by charging various fees that do not qualify as interest rates. This has been the case in the credit card industry; interchange fees developed in part as a resul to avoid state usury laws.16

Product substitution means that consumers shift from one credit product to another as the result of regulatory limitations. Thus, a concern with usury laws is that it might result in credit rationing by legitimate lenders, which will cause consumers who are unable to obtain credit from legitimate sources to switch to less wholesome forms of credit like loan sharks. Empirical research on product substitution, however, indicates that it might be less pervasive of a problem than fcared; when consumers are unable to access legitimate sources of credit, they frequently curtail their spending rather than turn to loan sharks. 17

Credit rationing, term substitution, and product substitution are all legitimate concerns for usury laws, particularly ones with a flat rate cap. But S.257 is not a usury law. S.257 does not limit the rate at which lenders can lend. It merely provides that lenders who lend at such high interest rates that they cannot fairly expect many consumers to be able to successfully repay their loans cannot engage the powerful legal engine of the United States bankruptcy system to do their collection work. Put morc starkly, S.257 says that the United States courts will not be the enforcers for loan sharks, even when those loan sharks are hiding behind a national bank or federal thrift charter.

S.257 does not function as a de facto usury cap either. While critics of the bill can be expected to claim that it will have the precatory effect of limiting lenders from lending at rates above the lower of 15% over the thirty-year Treasury bill, or 36%, this ignores the fact that most people do not file for bankruptcy and even most people in financial distress do not fIle for bankruptcy. 18 Consumers behave much less strategically than simple theoretical economics would suggest. Many consumers try to payoff their debts, even when bankruptcy would be the wiser choice. A study by Professor Michelle 1. White, President of the American Law and Economics Association, found that many people who would benefit economically from filing for bankruptcy do not do SO.19

Most consumers will not jump into bankruptcy merely to rid themselves of a high-interest-rate debt; the trigger event for most bankruptcy filings are dunning calls and notices reaching an unbearable threshold, not a strategic decision to avoid paying a debt. Moral hazard is not a major concern for consumer bankruptcy because filing for bankruptcy imposes severe costs on consumers. Filing for bankruptcy carries with it a profound stigma, and most consumers file with deep shame and embarrassment. Bankruptcy also requires consumers to make all their personal

finances a matter of public record. Debtors must pay their attorneys' fees, and many must try to save money they don't have to do SO.20 Bankruptcy filings remain on consumers' credit re~orts for ten years,21 which will result in future higher costs of credit for the consumer. 2 Numerous types of debts Cal not be discharged in bankruptcy including those that were fraudulently incurred,23 and there is a presumption that certain consumer debts for "luxury goods or services" were fraudulently incurred?4 And even when debts can be discharged, the consumer is barred from future bankruptcy discharges for up to eight years.25

For Chapter 13 debtors, the process is even more onerous. In order to receive a discharge in Chapter 13, a debtor must live on a court-supervised means-tested budget for 3 or 5 years.26 Having to get the court and the United States Trustee to sign off on the reasonableness of daily expenses creates a powerful disincentive against filing for bankruptcy unless the filing is absolutely necessary. Moreover, Chapter 13 insists on full repayment of certain debts, including allowed secured claims, domestic support obligations, and tax liabilities.27 A below-median-income debtor who does not repay creditors in full can only receive a Chapter 13 discharge once every six years; an above¬median-income debtor who does not repay creditors in full can only receive a Chapter 13 discharge once every ten years.2S Because of thc severe costs of bankruptcy, consumers arc unlikely to file strategically.

This means that S.257 will not have the effect of a usury law, as it will not functionally prohibit lenders from lending at high interest rates. Most consumers with high-interest-rate loans will not file for bankruptcy, so 8.257 should have no affect on lenders' ability to originate loans at high interest rates. It will not result in credit rationing, term substitution, or product substitution. Nor does 8.257 create a federal right of action for ruinous lending or other lender liability. It will only deny them the use of the federal bankruptcy courts as a collection mechanism.

IV. THE MEA S TEST SHOULD BE WAIVED FOR DEBTORS WITH HIGH-INTEREST-RATE DEBTS IN ORDER TO ENCOURAGE EFFICIENT BANKRUPTCY FILINGS AND PROTECT REsPONSIBLE CREDITORS

The centerpiece of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was the "means test" that determines which consumers are eligible for filing for Chapter 7 bankruptcy. The means test is a rubric for a complex statutory provision regarding whether a rebuttable presumption of abuse exists for a consumer debtor to file for Chapter 7 and who can raise the presumption. If the debtor's filing is found to be an abuse of Chapter 7's provisions, then the case must be dismissed or converted to Chapter 13 or I 1.

The means test can only be applied if the debtor does not qualify for a safe harbor "median income" test.29 If the debtor's "currently monthly income,,3o (roughly the debtor's average gross income for the last six months) is below the median income for households of the same size in

the debtor's state, then no party can raise the presumption of abuse against the debtor. If the debtor's current monthly income is above the median income for households of the same size in the debtor's state, then an adjusted version of the debtor's current monthly income is weighed against a numeric formula to determine whether the debtor has the "means" to repay his or her debts. If the debtor has too much income under the means test, then a presumption of abuse exists. The presumption can be rebutted only by showing additional expenses or adjustments to current monthly income that would put the debtor's adjusted current monthly income beneath the means test's threshold3l and which are justified by "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces".32 These special circumstances must be documented in detail. 33

There is a great dea to strongly criticize about BAPCPA in general and the means test in particular. As a policy matter, the means test is misguided. The means test (and BAPCPA as a whole) arc unusually poorly drafted34 and can easily be gamed by strategic debtors (the ones most likely to abuse the bankruptcy process) with the result that the means test only screens out debtors who have an urgent need to file, such as to prevent a home foreclosure. And, the means test encourages bankruptcy filings to occur at suboptimal times that hurt creditors who do not charge high interest rates. These last features argue strongly for exempting debtors with high-interest-rate debt from the means test so that they file at the optimal time and do not have an incentive to game the bankruptcy system.

A. The Means Test is a Misguided Policy in the First Instance

BAPCP A's focus on preventing "bankruptcy abuse" is a misguided policy based on anecdote, not data. BAPCPA, and the means test in particular, is animated by a concern that debtors who could repay their debts over time in a" Chapter 13 bankruptcy were instead filing for Chapter 7 and walking away from their debts with little consequence. This was viewed as abusing the bankruptcy system. No one supports abuse of the bankruptcy system, but there is no empirical evidence that there ever has been a systemic abuse problem in the bankruptcy system. All that has ever been mustered as proof of systemic abuse are some shocking anecdotes and some tangential statistics, such as past increases in bankruptcy filings. Bankruptcy filing rate increases are hardly conclusive of abusive consumer behavior; they are consistent with other interpretations, including abusive lending practices. No doubt there have and will continue to be some individuals who act strategically. But good policy is not based on a handful of shocking cases, and the bankruptcy system already had the tools to deal with these cases without a presumption of abuse.

B. Tlte Means Test Can Be Easily Gamed by Strategic Debtors and Only Screens Out Truly Desperate Debtors

Both the safe harbor median income tests and the means test proper are easily gamed. The safe

harbors and the means test are based around a comparison of the debtor's "current monthly income," which is defined as the average of the consumer's income for the previous six months,35 and various metrics.

For the median ineome test safe harbors, the metric is the median income of households of the same size in the debtor's state. Debtors can thus game the system by either reducing their "current monthly income" or increasing their household size. To reduce "Current Monthly Income," the consumer debtor can simply stop working (or stop working overtime or a second job). Alternatively a consumer can increase his or her household size and thus the relevant median income threshold for comparison. The Bankruptcy Code does not define "household." Therefore, it would be fairly simple for a debtor to have a friend or relative move in temporarily and become part of the "household." bankruptcy system by encouraging debts to grow non-pro rata for an extended period before bankruptcy.

V. S.257 PROVIDES DEBTORS wlTn IMPROVED LEVERAGE FOR VOLUNTARY LOAN WORKOUTS

S.257 will help some consumers avoid bankruptcy by providing them with increased negotiating leverage \iVith creditors who are charging high interest rates. If a consumer is in such financial straights that bankruptcy is a realistic option, S.257 provides the consumer with the leverage to renegotiate the debt with the creditor to make it affordable. A creditor would reasonably prefer to receive payments based on a lower interest rate than to receive nothing in bankruptcy. This does not mean that creditors will necessarily recover less, it is possible to lower rates, but increase amortization term periods to achieve net present value equivalencies while making the debt more affordable to the consumer. S.257 thus encourages a win-win situation by helping encouraging creditors to be more reasonable in their demands and thus not pushing consumers into bankruptcy.

VI. POTENTIAL IMPROVEMENTS TO S. 257

Although S. 257 is not a usury bill, it could be improved to eliminate national banks' ability to engage in regulatory arbitrage and avoid state usury regulations. Doing so would further encourage responsible lending and discourage creditors from underwriting risky high-interest-Tate debt. Currently most financial institutions engaged in consumer lending are not subject to usury regulations. Usury laws were historically the major fonn of consumer protection in banking because they were a shield against borrowers assuming obligations that they could not reasonably be expected to be able to repay absent significant hardship and privation for themselves and their dependents. While usury laws limited credit availability to some higher-risk borrowers, those were precisely the borrowers who were so desperate for credit that they were unlikely to make wise borrowing judgments.

State usury laws were largely eviscerated following the Supreme Court's 1978 decision in lvfarquelle National Bank of Minneapolis v. First of Omaha Service Corp.41 Marquette held that because the National Bank Act preempted state law, the usury ceiling that applied to a national bank's lending operations was that of the state in which the bank is located, as provided by the National Bank Act. not the state of the borrower. Marquette did not turn on the \-visdom of usury regulations. Instead, it turned on the interpretation of the vague language of the 1863 National Bank Act, legislation enacted to help finance the Union effort in the Civil War.

Marquette meant that even if the state legislatures of 49 states enacted a uniform usury law, banks based in the 50th state could end-run this under the aegis of preemption because of Marquette. As a result, national banks could base themselves in states with high or non-existent usury ceilings, like Delaware, South Dakota, Nevada, and Arizona so they could export these states' lax rate ceilings to other states. These states have become in-land usury shelters, a consumer credit equivalent of off-shore tax shelters.

The means test itself can be gamed because it is based on an adjusted "current monthly income," which is the debtor's "current monthly income" reduced for secured debt payments, payments for health and disability insurance, and health savings accounts. Not only can debtors reduce their current monthly income, but they can also increase the deductions from it. While attorneys are forbidden from advising clients to incur more debt36 (a provlSlon of the Code that the 8th Circuit Court of Appeals has found unconstitutional),37 an attorney could certainly explain the law to a client and let the client draw his or her own conclusions about the need for better insurance coverage or a health savings account.
The result of this is that the means test rcwards strategic consumers and penalizes those conswncrs who file for bankruptcy because of an acute need, like to stop a foreclosurc. This is upside-down from the result the means test was supposed to accomplish, but its poor drafting is consistent with the overall character of BAPep A.
So what, then, does the means test accomplish? As the most recent empirical study of the impact of BAPCPA on bankruptcy filings notes, "instead of functioning like a sieve, carefully sorting the high-income abuscrs [rom those in true need, the amendments' means test functioned more like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual income circumstances. ,,38 BAPep A has delayed and kept down bankruptcy filings in general, rather than screen out abusers. This is not what the biB was marketed as doing. It "was not the Bankruptcy Numbers Reduction Act; it was the Bankruptcy Abuse Prevention Act. ,,39

C. The Means Test Benefits Higll-interest-rate creditors at the Expense of Responsible and

Involuntary Creditors

The means test does not function to keep out abusive bankruptcy filers. Instead, it merely delays and discourages filings overall. Delayed filings benefit creditors with high-interest-rate debt. Almost all high-interest-rate debt is unsecured debt, and unsecured creditors are prohibited from receiving post-petition interest in bankruptcy.4o By delaying bankruptcy filings, the means test allows all unsecured creditors entitled to interest to accumulate larger claims.

These claims do not grow pro rata, however; instead, they grow according to the contract (or judgment) rate of interest. Thus, the claims of lenders with the highest interest rates grow the fastest. Because lillsecured creditors are paid pro rata in bankruptcy, delay thus has the effect of increasing the bankruptcy dividend for high-interest-rate creditors (like credit card lenders, payday lenders, and refund anticipation lenders) at the expense of other unsecured creditors, like tort claimants, medical bill creditors, landlords, and local merchants and small businesses. This is unfair and contrary to the basic bankruptcy principal of "equity is equality."

By distorting normal bankruptcy filing patterns, the means benefits high-interest-rate creditors-lenders that cause the most acute financial distress-at the benefit of other creditors. The means test thus distorts the hallmark pro rata distribution of the

This in turn set off a two-part regulatory race toward the bottom, as banks began: to switch to federal charters and look for states with high or no usury ceilings in which to base at least their credit card operations. Some states responded by dropping or raising usury ceilings in order to keep national bank operations in their states. Other states adopted parity laws that would allow their state-chartered banks the same leeway as national banks.42 As Harvard Law School Dean Howell Jackson and Stacy A. Anderson have noted, "the Marquette decision, coupled with the cooperation of several state legislatures, effectively ended interest rate regulation for certain kinds of consumer credit in the United States.,,43 Moreover, subsequent court rulings have extended Marquette to preempt state regulation of late fees,44 various loan closing fees,45 and disclosures in credit agreements.46

Marquette thus created a regulatory arbitrage possibility that set off a regulatory race to the bottom. Congress should act to close this loophole. There is a reasonable debate to be had on usury regulations, but that is one that should be held in legislatures, not determined by the Supreme Court's interpretation of a hoary statute. A 1970s interpretation of an 1863 law should not be what determines 21st century consumer credit regulation. Congress should permit the states, the laboratories of democracy, to go further than S.257 if they wish in regulating high-interest-rate consumer credit. This essential consumer protection power should be restored to the states.

* * * * *

S.257 offers an important protection to consumers and responsible creditors, eliminates an incentive to game the bankruptcy system, and encourages responsible lending. These protections will help ensure fairer, safer, and sounder consumer credit. Now, more than ever, consumers and creditors need reforms that will create a fair and sustainable credit system. I urge the Congress to pass S.257.

I See, e.g., Young v. United States, 535 U.S. 43,50 (2002), United States v. Energy Res. Co., Inc. 495 U.S. 545, 549-50 (1990); Norwest Bank Worthington v. Ahlers, 485 U.S. 197,206 (1988).

2 See Precision Instrument Mfg. Co. v. Auto. Maint. Mach., 324 U.S. 806, 814-15 (1945) ("The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' Thus w'hile 'equity does not demand that its suitors shall have led blameless lives' as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue."). The maxim is also express as 'he who seeks equity must do equity." See Manual Enters. Inc., v. Day, 370 U.S. 478, '26 (1962).
See also Mfr.'s Co. v. McKee, 294 U.S. 442, 451-52 (1935) (refusing to apply "clean hands doctrine to void debtor corporation's high-interest-rate contract because state law did not permit corporations a usury defense).

3 I Kings 21:19.

4 II U.S.c. §510(c).

5 See, e.g., English-Speaking Union v. Johnson, 381 B.R. I (D.D.C. 2008).

6 Subordinated claims are still allowed and will be paid if there are sufficient funds to do so. See
.
Adam 1. Levitin, Finding Nemo: Rediscovering the Virtues of Negotiabili~v in the Wake of Enron, 2007 COLUM. Bus. L. REv. 83 (2007).

7 In the corporate debt context, high-interest-rate debt is politely known as "high-yield debt" and commonly referred to as "junk" because of the limited likelihood of repayment. "Junk debt" is

not "investment grade."

8 RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS (2006).

9 Paige Marta Skiba & Jeremy Tobacman, Do Payday Loans Cause Bankruptcy? 30, at http://papcrs.ssrn.com/soI3/papers.cfm')abstract id== 1266215.

10 2007 Consumcr Bankruptcy Project Database. For a description of the 2007 CBP Database, see Robcrt M. Lawless, et al., Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors, 82 AM. BANKR. L.J. 349 (2008).

II 2007 Consumer Bankruptcy Project Database (median annualized gross monthly income of $26,814.00).

12 Brian K. Bucks, et aI., Changes in u.s. F amity Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances, 95 FED. REs. BULL. AI, A5 (2009), at http://www.fcderaLreserve.gov/pubslbulietini2009/pdf/scfU9.pdf (reporting national median income of $47,300.00).

13 See Ronald J. Mann, Bankruptcy Reform and the "Sweat Box" of Credit Card Debt, 2007 U. ILL.
L. REV. 375,392-97 (2007).

14 Remarks by Julie L. Williams, Acting Comptroller of the Currency, Before the BAI National Loan Review Conference, New Orleans, LA, March 21, 2005, at

15 http://www.occ.treas.(!.ov/ftp/r.elease/2005-34a. df.
at least three offive years, depending on wh thcr the debtor is below or above the applicable state's median income. II U.S.e. §§ 1325(b)(1), (4). Thus, it is the length of plan, not the time between discharges, that controls for debtors who have repay less than 100% of their debts.
IS Charles W. Calomiris & Stanley D. Longhofer, "Credit Rationing," THE NEW PALGRA VE DICTIONARY OF ECONOMICS. (2d Ed.); Joseph E. Stiglitz and Andrew Weiss, Credit Rationing in Markels with Imperfect Information, 71 AM. ECON. REv. 393 (1981).

16 Adam J. Levitin, Priceless? The Economic Costs of Credit Card Merchant Restrail7ls, 55 UCLA L. REV. 1321 (2008).

17 Angela K. Littwin, Beyond Usury: A Study of Credit Card Use and Preference Among I-ow¬Income Consumers, 86 TEXAS L. REV. 451 (2008).

18 Ronald 1. Mann & Katherine M. Porter, Saving up for Bankruptcy, 98 GEO. L.J. _. (2009).

19 Michelle J. White, Why Don't More Households Filefor Bankruptcy, 14 J. L. ECON. & ORG. 205
(1998).

20 Mann & Porter, supra note 18.

21 15 U.s.e. § 1681c.

22 See Katherine M. Porter, Bankrupt Profits: The Credit Industry's Business Model for Pastbankruptcy Lending, 93 U. IOWA L. REV. 1369, 1401 (2008).

23 II U.s.e. § 523(a)(2).

24 II U.s.e. § 523(a)(2)(C). 25 II V.S.C. § 727(a)(8).

26 II U.s.e. § 1325(b).

27 II V.S.e. §§ 1322(a); I 325(a)(5).

28 II V.S.C. § 1328(0(2) prohibits a Chapter 13 discharge if a Chapter 13 discharge was granted within two preceding years, but for debtors who do not repay creditors in fuJI, a Chapter 13 plan must last

29 II U.S.C. § 707(b)(6)-(7).

30 The tenn is defined in II U.s.e. § 101(lOA).

31 11 USe. § 707(b)(2)(B)(iv).

32 II U.S.e. § 707(b)(2)(B)(i), (iv).

33 II u.s.e. § 707(b)(2)(B)(ii).

34 BAPCPA's uniquely sloppy drafting, including many undefined terms and even missing words, has created tremendous uncertainty for creditors and debtors alike and greatly increased the workload of the federal courts.
5 11 U.S. C. § IOlOGA).

3611 U.S.C. §§ 526(a)(4); 101(4A); IOl(12A).

37 Milavetz, Gallop & Milavetz, P.A. v. United States, 54 J F.3d 785, 794 (81h Cir. 2008). But see Hersh v. United States, 553 F.3d 743, 761 (5th Cir. 2008) (upholding the Constitutionality of II U.s.e. § 526(a)(4) under a narrow reading of its application per the doctrine of Constitutional avoidance).

38 Lawless, et aI, supra note 10, at 353.

39 Jd. at 352.

40 II U.S.e. § 502(b)(2).

41 439 U.S. 299 (1978).

42 See Elizabeth R. Schiltz, The Amazing, Elastic, Ever-Expanding Exportation Doc/rine and its Effect on Predatory Lending Regulation, 88 MINN. L. REV. 518 (2004); Donald C. Langevoort, Statu/OJY Obsolescence and the Judicial Process: The Revisionist Role o/the Courts in Federal Banking Regula/ion, 85 MICII. L. REV. 672 (1987). Moreover, Congress subsequently enacted section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified at 12 U.S.C. § 1831 d (2006», which grants state banks the power to export local interest rates.

43 Howell E. Jackson & Stacy A. Anderson, Can Slates Tax National Banks /0 Educate Consumers About Predatory Lending Practices?, 30 HARV. 1.L. & PUB. POt.'y 831, 838 (2007). See also Beneticial Nat'l Bank v. Anderson, 539 U.S. I, 10 (2003) (holding that the National Bank Act is exclusive cause of action for usury against national banks). Usury, of course, can be a defense as well as a counterclaim. Even after Beneficial Nat'l Bank, it remains unclear whether state law usury defenses or counterclaims are preempted. See Yaden v. Discover Bank, 556 U. S. __ , Slip Op. No. 07-773, at 19 (2009).

014 Smiley v. Citibank, 517 U.S. 735 (1996) (deferring to Office of Comptroller of the Currency's interpretation of its regulation as providing that late fees are treated like interest).

45 Phipps v. Guar. Nat'l Bank of Tallahassee, 2003 WL 22149646 Sept. 17,2003 (defining interest to include origination fees, loan discount fees, processing fees and other closing costs).

46 Am. Bankers Ass'n v. Lockyer, 239 F. Supp. 2d 1000 (E.D. Ca. 2002) (California statute requiring warning statements about implications of making only minimum payments was

preempted, despite Truth in Lending Act's provision permitting more stringent state disclosure laws, 15 U .s.C. § 1610(a».