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The Multiple Purposes of Bankruptcy: Restoring Bankruptcy’s Social Insurance Function After BAPCPA

Sean C. Currie*

I. INTRODUCTION

Throughout history, bankruptcy law has served many different purposes ranging from debt collection to providing a fresh start to debtors in financial distress. As societal attitudes regarding the proper manner for responding to distressed debtors evolved, bankruptcy law changed to reflect those attitudes. The enactment of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA")\(^1\) swung the pendulum toward debt collection and away from the idea of providing a financially distressed consumer with a fresh start.

Fueling this swing was the perception that consumer debtors were using bankruptcy as a first response to financial distress rather than a last resort.\(^2\) Creditors and some legislators perceived that debtors used bankruptcy to have their financial obligations discharged despite their ability to pay creditors. Unfortunately, BAPCPA’s amendments to the Bankruptcy Code missed the mark and resulted in many amendments that not only fail to address this concern, but also unduly hamper consumer debtors’ access to bankruptcy. The purpose of this article is to demonstrate that bankruptcy law can properly address many of the concerns that motivated BAPCPA without unduly prejudicing consumer debtors who justifiably need bankruptcy relief.

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2. See discussion infra Part III.
II. THE EVOLVING PURPOSE OF BANKRUPTCY

The historical evolution of bankruptcy allows reflection upon its proper purpose. Bankruptcy law represents a window into contemporaneous attitudes toward debt. The variety of legislative responses to financial distress demonstrates that bankruptcy laws can serve a similarly wide spectrum of purposes. These historical functions should be closely examined, so a society can determine the contemporary objective of bankruptcy.

Before discussing the purposes of bankruptcy law, it is important to recognize that debt is a fact of commercial life. Since the earliest periods of human civilization, people have bartered and traded for goods and services from each other. In modern times, despite the advent of a more predictable and universal currency as the medium of exchange, the trades taking place look much the same, albeit more civilized. While these economic exchanges would ideally result in balanced trades and ledgers, the uncertainties of life have caused otherwise. Thus throughout history, buyers have become debtors and sellers have become creditors.

These relationships that arose out of convenience persisted out of necessity as economic uncertainty often prevented debt settlement. Circumstances that precluded the parties from maintaining a comfortable balance of debt and credit strained these lending relationships while historical events further increased the uncertainty. At these breaking points, custom or the law stepped in and attempted to prescribe a solution for this seemingly insurmountable quandary. Debtors defaulted upon the credit extended to them, and the need for a collection remedy, such as bankruptcy, arose. Creditors would turn to law and custom to deal with these debtors that were unable or simply unwilling to pay their creditors.

4. Id.
Perhaps the most long-standing purpose for bankruptcy has been debt collection. The historical means by which this collection was accomplished often manifested a punitive character. During Roman times, bankruptcy laws focusing on debt collection employed rather brutal methods, such as forced slavery or the dismemberment of debtors.

Bankruptcy is, at its most basic level, a debt-collection law. Additions over time, such as the discharge of debts, have allowed bankruptcy to serve additional purposes, but the primary purpose has always been to institute an efficient debt-collection process. Bankruptcy laws have long served as the means to liquidate a debtor’s financial affairs in an orderly manner. The assembly of the debtor’s assets before the bankruptcy court largely serves this most basic function.

However, bankruptcy law does not only assemble assets to repay creditors. The current bankruptcy process permits discharge and allows debtors to retain some of their pre-bankruptcy assets through exemptions which demonstrate the bankruptcy process, as it has evolved, recognizes that those forced to declare bankruptcy remain members of society and need to return to a productive economic life.

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5. The term "bankruptcy" itself reflects the punitive aspects of bankruptcy. Ann Morales Olazábal & Andrew J. Foti, Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis, 12 B.U. PUB. INT. L.J. 317, 321 (2003) (noting, “the English word ‘bankruptcy’ comes from banqueroute, the French word derived from the Italian banca rota, or ‘broken bench.’”). Other punitive methods used to deal with the insolvent ranged from banishment and shaming to imprisonment which was, by far, the most prominent method. Davis S. Kennedy & R. Spencer Clift, III, An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today’s United States Bankruptcy Courts and Its Judicial Officers, 9 J. BANKR. L. & PRAC. 165, 168 (2000).

6. G. Eric Brunstad, Jr., Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law, 55 BUS. LAW. 499, 523 (2000); Andrew J. Duncan, From Dismemberment to Discharge: The Origins of Modern American Bankruptcy, 100 COM. L.J. 191, 211 (1995) (“Under the Code of Hammurabi, the law of the ancient Babylonians, the insolvent debtor was regularly sold into slavery while his kinsmen would frequently be sold into bondage until such time as the rest of his family could pay off the obligation.”). Roman law responded quite a bit more harshly than the Babylonians. Id. at 191. “If... a debtor was still in default on his debts, his creditors could, literally, divide his body among them.” Id. The financial recovery of the creditors on the debt through the acquisition of debtor body parts remains unknown.

7. Brian Rothschild, The Illogic of No Limits on Bankruptcy, 23 EMORY BANKR. DEV. J. 473, 477 (2007). Id. at 479 (noting that despite this assertion, “ninety-five percent of consumer bankruptcy cases do not collect any debts whatsoever”).

8. Id. at 478.


11. See id. §§ 727, 1328 (defining the process for discharge under Chapter 7 and Chapter 13).

Some claim the discharge offered by bankruptcy is simply "a necessary 'carrot'" to encourage debtor participation in the bankruptcy process of liquidating and distributing assets to creditors. Theoretically, the enticement of a discharge and consequent enhanced cooperation will maximize the return to the creditors. This theory has been embodied in judicial statements of the policies underlying individual bankruptcy. However, justifying the discharge as purely a necessary incentive to ensure cooperation in the bankruptcy process frankly ignores the humanity of the debtor as well as his continued existence in society beyond the length of the bankruptcy proceedings.

Discharge in bankruptcy gives debtors a fresh start. The idea for discharge and the need for a fresh start has its origins in Biblical times, but in modern times it has evolved to serve multiple purposes. The discharge of debt enables the economic rehabilitation of debtors and is often viewed as synonymous with a fresh start. The discharge lifts an overwhelming burden off the debtor's shoulders and allows him to return to active participation in commercial society. The discharge provides a fresh start because it releases the debtor from the burdens of otherwise legitimate indebtedness. In this sense, the discharge is a "societal act of forgiveness or mercy, which is mandated by

13. Czarnetzky, supra note 9, at 395.
14. Id. Evidence of the discharge serving purely to benefit creditors can be found in the fact that despite the historical importance of the first discharge provision, established in England in 1705, the statute was paradoxically motivated largely by concern for creditors' welfare and may have had limited beneficial effect for most debtors. Charles Jordan Tabb, The Historical Evolution of the Bankruptcy Discharge, 65 AM. BANKR. L.J. 325, 337 (1991).
15. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (the principle underlying bankruptcy "has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt").
17. The fresh start is not that recent of an idea; relieving a debtor of his obligations first began in Biblical times when all debts and debt slaves were to be released every seven years during the larger occurrence known as the Sabbatical year. See Deuteronomy 15:1-3 (commanding that "[e]very seventh year you shall grant a remission of debts"). See also Paul B. Rasor, Biblical Roots of Modern Consumer Credit Law, 10 J.L. & RELIGION 157, 187 (1994) (comparing the Biblical Sabbatical Release and modern bankruptcy law and noting that periodic debt release was not unique to Israel and in fact had long Mesopotamian precedent); Kennedy, supra note 5, at 166.
18. Porter, supra note 16, at 74 (noting that the discharge as it exists "is no more than the chosen means to an end").
moral or ethical concerns.”20 These views of the bankruptcy discharge reflect the reality that bankruptcy involves humans, a species that frequently makes irrational decisions.21

This fresh start policy also conveys the message that it is okay to fail. The availability of a discharge in bankruptcy instills in society members the belief that it is acceptable to take risks. This belief, in turn, leads to greater levels of entrepreneurship.22 Thus, the safety net that bankruptcy is capable of providing encourages the growth of spending and business. In fact, research suggests “states with higher exemptions, which allow an individual debtor to keep more assets free from creditor claims, have the highest levels of entrepreneurship in the country, . . . establishing the connection between business activity and an incentive to take risks.”23 In this way, discharging debt may foster economic growth that balances out some of the detrimental effects that discharge of debt may cause.

The discharge of consumer debt functions, at least in part, as a form of social insurance.24 The fresh start offered by the bankruptcy discharge and the potential for rehabilitation25 in bankruptcy are subsets of this larger social insurance function that bankruptcy can serve. Bankruptcy discharge can often function “as the backstop of the frayed social safety net in which the poor receive relief in proportion to their poverty.”26 Those “equating bankruptcy with failure, tend to view the bankruptcy relief system as an insurer of last resort, function-

20. Czarnetzky, supra note 9, at 395 (“Forgiveness coupled with rehabilitation presumably has salutary psychological effects for the debtors and creditors, and is part of society’s ‘responsibility to treat members of society humanely.’”).

21. Czarnetzky, supra note 9, at 395 (“[T]he discharge is a necessary corrective to human beings’ impulsive nature and their tendency to systematically underestimate the risks involved in credit.”).

22. Id. at 412.


25. Margaret Howard, A Theory of Discharge in Consumer Bankruptcy, 48 OHIO ST. L.J. 1047, 1059-60 (1987) (“Subsumed under the concept of rehabilitation are at least three analytically separate policy threads: 1) that discharge should (whether or not it does) serve a consumer education function; 2) that discharge constitutes an emotional and psychological purgative for the debtor; and 3) that discharge allows the debtor to resume active participation in the open credit economy.”).

26. Rothschild, supra note 7, at 492.
ally sewing up the gaps in the social safety net.” The broad availability and inclusion of a discharge in the Code “represents a major departure from the view that defaulters are, simply because of default, deserving of punishment for their guilt, negligence, or indolence, and that the experience of bankruptcy should be a solemn, perhaps punitive, moral lesson.”

Bankruptcy overlaps with, and often acts as a substitute for, other insurance. United States bankruptcy laws are comparatively generous to the approaches taken by other Western democracies to bankruptcy. However, this has compensated for the historically less generous government assistance offered by the United States. The proper policy would address the underlying causes of the economic distress, such as excessive medical costs and unemployment, but the reality is that such drastic changes to the American dynamic are unlikely to happen any time soon. Without a solution to the underlying causes of financial distress, bankruptcy should not be limited in such a way as to ignore this essential function. The availability of bankruptcy to serve this social insurance function is especially important because evidence suggests that, over the years, the typical bankruptcy petitioner has become poorer over time—they are not members of the middle class.

Throughout history, bankruptcy has served all of these purposes. The markedly different approaches to dealing with bankruptcy are difficult to reconcile. Bankruptcy law, beginning with its English birth

27. Id. at 496.
29. Rothschild, supra note 7, at 498.
31. Rothschild, supra note 7, at 487. See also Martin, supra note 23, at 21 (“bankruptcy is a treatment of a financial problem but is not itself the disease ... [U]nderemployment, illness, and divorce are the primary causes of bankruptcy in the United States, but ... huge amounts of consumer debt in general, and credit card debt in particular, lower U.S. citizens' threshold for collapse when financial disasters strikes [sic].”).
33. Tabb, supra note 3, at 7. The first English bankruptcy law was enacted in 1542 followed by a more comprehensive law passed in 1570. Id. at 7-8. The 1542 Act was officially entitled “An Act against such Persons as do make Bankrupts.” Id. at 8; Duncan, supra note 6, at 194. According to Charles Jordan Tabb, English bankruptcy law which was periodically revisited and amended “(1) to enhance the power of the bankruptcy commissioners to reach more of the debtor's assets; and (2) to increase the penalties against noncompliant debtors," began as a quasi-criminal proceeding. Tabb, supra note 3, at 10. See also id. at 8 (noting also that “[r]elief was not for debtors, but from debtors”).
and development,\textsuperscript{34} its adoption in America,\textsuperscript{35} and its subsequent evolution,\textsuperscript{36} reflects this struggle to balance a punitive, purely debt collection purpose with a humanitarian and socially responsive one. In recent years, as a result of BAPCPA, bankruptcy law's ability to serve these purposes has in many ways been foreclosed. Finding a balance between the conflicting moral demands of policy—providing for both debt collection and social insurance—is indeed a difficult proposition.\textsuperscript{37} However, a consumer bankruptcy system that reflects the dual purposes of debt collection and social insurance strikes a balance between the size of the social safety net and the ready availability of consumer credit.\textsuperscript{38} In the consumer lending relationship, the commercial lender may be better suited to provide this insurance.\textsuperscript{39}

Prior to BAPCPA, the United States offered "more families sanctuary in bankruptcy, while at the same time offering a wide open consumer credit economy with no limit on lending or interest rates, and few protections from the economic consequences of other problems

\textsuperscript{34} English law would eventually introduce the idea of discharge, a significant step, albeit a far cry from discharge as we know it today. See Duncan, supra note 6, at 199 (noting that many of bankruptcy's punitive and retributive aspects remained as those convicted as fraudulently bankrupt would "suffer as a felon, without benefit of clergy," i.e. receive the death penalty); Tabb, supra note 3, at 10 (noting that the quasi-criminal nature of bankruptcy remained). Additionally, bankruptcy remained a purely involuntary remedy. Tabb, supra note 14, at 332.

\textsuperscript{35} DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 2 (2001) (noting, "[w]hen the first U.S. bankruptcy law was enacted in 1800 . . . Congress borrowed nearly the entire legislation from England"). See also U.S. CONST. art. I, § 8, cl. 4 (empowering Congress to establish "uniform laws on the subject of Bankruptcies throughout the United States"). James Madison offered the only contemporary evidence of the meaning of "uniform bankruptcy," describing federal bankruptcy legislation as "intimately connected with the regulation of commerce,' and necessary to prevent debtors from fleeing to another state to evade local enforcement of their obligations." SKEEL, supra, at 23.

\textsuperscript{36} There were several attempts, often following economic downturns, to establish a uniform bankruptcy law in 1800, 1841, and 1867 before succeeding with a lasting bill in 1898. Tabb, supra note 14, at 345, 349-51, 353, 362. Importantly, 

\textsuperscript{37} Rasor, supra note 17, at 189 (noting that, "Modern bankruptcy law takes the forgiveness and fresh start end of the spectrum as its starting point, but then hedges by identifying certain classes of debts, and even certain types of debtors, which may not be released.").

\textsuperscript{38} Martin, supra note 23, at 24. See also Philip Shuchman, An Attempt at a "Philosophy of Bankruptcy", 21 UCLA L. Rev. 403, 439 (1973) ("The Bankruptcy Act can and is supposed to function in a manner to bring about greater equity between debtor and creditor and between creditors of a common debtor.").

\textsuperscript{39} Howard, supra note 25, at 1064. In fact, credit card companies could cut their bankruptcy losses by more than 50% if they would institute minimal credit screening. CONSUMER FED'N OF AM., NAT'L ASS'N OF CONSUMER BANKR. ATTORNEYS, FACTS ABOUT CONSUMER CREDIT CARD DEBT AND BANKRUPTCY 3 (2003), http://www.nacba.org/files/new_in_debate/Credit_Card_Debt_Bankruptcy.pdf.
such as job loss, illness, accidents, and family breakdowns.”

While this was in no way an ideal balance, the availability of sanctuary in bankruptcy helped to limit the effect of the social safety net’s other shortcomings. BAPCPA has further restricted the social insurance function of bankruptcy and failed to address many of the aspects of American society which demanded that social insurance.

BAPCPA represents a substantial change in the treatment of consumer debtors and a divergence from the bankruptcy jurisprudence which preceded its enactment. In many ways, the enactment of BAPCPA signals a change in how Congress wants the American public to view the purpose of bankruptcy. It is unlikely that anyone would advocate a return to the ancient days—the complete discharge offered in Biblical times or the Roman exchange of bodily appendages in satisfaction of debt. However, Congress’s new approach to bankruptcy is an errant path which ignores many of the important purposes bankruptcy can serve.

III. Dramatically Changing the Way Bankruptcy Works: The 2005 Enactment of The Bankruptcy Abuse and Consumer Protection Act

Bankruptcy laws in the United States have always “represented an amalgam of politics, economic pragmatism, and the prevailing attitude toward debt and debtors at the time of passage.” BAPCPA was the result of the consumer credit industry exerting its influence on how bankruptcy is handled. The consumer credit community long maintained that the Bankruptcy Reform Act of 1978 was far too debtor-

40. *Id.*


43. Rasor, *supra* note 17, at 189.
friendly.\textsuperscript{44} The establishment of the National Bankruptcy Review Commission ("NRBC") in 1994 galvanized the consumer credit community and provided the opportunity to push for more stringent rules.\textsuperscript{45} The NRBC convened on October 20, 1995, and two years later filed its report on the status of the Bankruptcy Code.\textsuperscript{46}

Four of the Commissioners on the NRBC prepared a lengthy dissent opposing the report; they argued the recommendations for consumer bankruptcy:

1. did not "go far enough to penalize or deter abuse;"
2. allowed debtors to claim "excessively generous exemptions;"
3. discouraged Chapter 13 repayment plans, while encouraging Chapter 7 liquidations;
4. imposed "unnecessary restrictions on lenders in regard to reaffirmations, household goods, rent-to-own contracts and credit card debt;" and
5. failed to "meaningfully restrict abusive refilings or misuse of the automatic stay to prevent evictions."

These arguments were reiterated during the years following the NRBC Report and advanced in support of new bankruptcy legislation, which eventually resulted in BAPCPA.\textsuperscript{48}

\textsuperscript{44} Id. The opinion espoused by creditors that bankruptcy gives debtors too much seems to follow any bankruptcy reform. According to Paul B. Rasor:

Creditors often complain that the process goes too far, that many debtors who can afford to pay are nevertheless discharged. Yet, as one group of bankruptcy scholars has noted, the question of who can pay "is in part a normative question: the answer depends on moral and social value judgments. . . . A debtor's ability to pay is a function of the level of sacrifice demanded. . . . Where to draw the line—how much sacrifice to require . . . is a key question in bankruptcy."


\textsuperscript{45} Susan Jensen, \textit{A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005}, 79 AM. BANKR. L.J. 485, 486 (2005). The credit community's response to the formation of the NRBC would ultimately become the impetus for BAPCPA. \textit{Id.}

\textsuperscript{46} Id. at 487. The report consisted of 1028 pages, 272 pages of additional and dissenting views, and 172 recommendations. \textit{Id.} Among the 172 recommendations, the 34 concerning consumer bankruptcy were the most divisive considered. \textit{Id.}

\textsuperscript{47} Id. The Commissioners stated:

First, the system lacks effective oversight or control over its integrity. . . . Second, there is growing perception that bankruptcy has become a first resort rather than a last measure for people who cannot keep up with their bills. . . . Third, apart from the urgent issues raised by increased filings, the law itself has proven unclear, leading to uncertain results and inconsistencies among and within circuits and even individual debtors. Fourth, the Bankruptcy Code offers opportunities for unjustifiable debtor manipulation by various means, including abuses of the automatic stay to fend off eviction, repetitious filings, and over-generous exemptions. Fifth, some creditor abuses have been reported, particularly with respect to reaffirmations and dischargeability claims . . .

\textit{Id.} (citations omitted).

\textsuperscript{48} Jensen, \textit{supra} note 45, at 486.
By the start of the 108th Congress, the Senate had passed bankruptcy reform legislation four times, and the House had passed similar legislation six separate times.\(^4\) However, it was not until the Republican Party regained control of the Senate following the November 2004 elections that attempts at bankruptcy reform finally succeeded.\(^5\) The Senate passed Senate Bill 256 on March 10, 2005, and on March 16 of that same year, the House Judiciary Committee reported favorably upon the bill and passed it without any amendments.\(^6\) The bill was signed into law by President George W. Bush on April 20, 2005.\(^7\)

The House Report accompanying the bill echoed many of the concerns the NRBC dissenters expressed years before.\(^8\) The report stated that the escalation of consumer bankruptcy filings was part of a generally consistent upward trend.\(^9\) Apparently, bankruptcy had become too readily available, particularly as a first, rather than a last, resort.\(^10\) Further, some legislators and creditors contended that pre-BAPCPA law provided loopholes and incentives that allowed and encouraged opportunistic filings and abuse.\(^11\) The House Report emphasized that bankruptcy debtors were able to repay a significant portion of their debts, but they were failing to do so.\(^12\) Despite the laudable goals of BAPCPA, its enactment was not without controversy.

Critics pointed to the years of intense lobbying by credit card companies.\(^13\) The practices of the industry itself were offered as one of the true causes of the increase in bankruptcy filings.\(^14\) Some derided the fact that "[n]othing who favored this bill chose to see that the bankruptcy epidemic had been produced in large measure by the banks, or

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49. Id. at 558.
50. Id. at 562.
51. Id. at 565.
52. Id. at 566. President Bush stated that the bankruptcy bill would “restore[ ] integrity to the bankruptcy process . . . mak[ing] our financial system stronger and better.” President George W. Bush, Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Apr. 20, 2005). He reiterated the perception that “too many people have abused the bankruptcy laws [and] walked away from debts even when they had the ability to repay them.” Id.
54. Id. at 3.
55. Id. at 4.
56. Id. at 5.
57. Id.
59. Dow Jones Newswire, No Longer Deadbeats: Credit Offers Flood Once-Bankrupt Consumers, Study Shows, GRAND RAPIDS PRESS, Aug. 11, 2007 at B6 (“Credit-card companies target people fresh out of bankruptcy with credit offers, a finding that raises questions about the industry’s efforts to paint bankruptcy filers as ‘untrustworthy deadbeats,’ according to a recent study.”).
that the real hidden costs were the usurious interest rates these banks charged borrowers." Congress was lambasted for bowing to lobbyists and ignoring the true causes of bankruptcy through the enactment of a law that failed to live up to its name. Absent consideration of the motivations for BAPCPA's enactment, many bankruptcy judges simply lamented the uncertainty that was sure to exist in bankruptcy jurisprudence for the foreseeable future.

The debate on both sides of BAPCPA is indicative of a divergence of opinion as to what purpose bankruptcy should serve. By asserting debtors were avoiding debts despite their ability to pay, proponents of BAPCPA emphasized the debt collection function of bankruptcy. Critics recognized that bankruptcy served an important social insurance function and that debtors in bankruptcy truly needed the sanctuary of discharge that the process provided. Both sides underscored appropriate functions of bankruptcy. However, there are a number of specific provisions in BAPCPA that unnecessarily penalize debtors seeking bankruptcy protection. Because these provisions ignore the important social insurance function of bankruptcy by restricting access to the bankruptcy process, they should be reassessed.

Some are willing to accept that the stated goals of the Congressional proponents of BAPCPA—aimed at preventing the abuse of bankruptcy—were legitimate. However, the negative impact of BAPCPA illustrates a starkly different goal, which is not to prevent abuse, but instead to prevent or deter filing for bankruptcy altogether. Remarkably, BAPCPA has usurped the social insurance function of bank-

60. Joe Lee and Thomas Parrish, Banks Gone Wild, N.Y. TIMES, Jan. 13, 2007, at A15 (noting that, "From 1980 to 2004, personal bankruptcy filings increased 443.45 percent, which is certainly impressive. But over the same time, consumer credit debt rose a bit more, by 501.29 percent. In 1980, less than one personal bankruptcy case was filed for each $1 million in consumer credit outstanding; the figure was slightly smaller in 2004.").

61. Id.

62. See, e.g., In re Kaplan, 331 B.R. 483, 484 (Bankr. S.D. Fla. 2005) ("After reading the several hundred pages of text in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the 'Reform Act'), one conclusion is inescapable. The new law is not a model of clarity. Implementing the changes will present a daunting challenge to judges, clerk's offices, attorneys and the parties who seek relief in the bankruptcy court after October 17, 2005, the date most of the provisions become effective.").

63. See, e.g., Braucher, supra note 1, at 1299.

64. Wenli Li, What Do We Know About Chapter 13 Personal Bankruptcy Filings?, BUSINESS REVIEW, 2007, available at http://www.philadelphiafed.org/econ/br. More support for this argument can be found in the gradual restriction of the bankruptcy discharge and the so-called "super discharge" under Section 1328, while forcing people out of Chapter 7. See 11 U.S.C § 1328 (2005). Congress, then, has determined that the best way to get debtors to repay their debts is to force them out of Chapter 7 through means testing rather than entice them into Chapter 13 with a broader discharge that once existed under Section 1328. See Alan Eisler, The BAPCPA's Chilling Effect on Debtor's Counsel, 55 AM. U. L. REV. 1333, 1334 (2006) ("In fair-
ruptcy by allowing lenders to "proceed with the project of expanding the consumer finance market while shifting (more of) the risks of that expansion onto borrowers."\textsuperscript{65}

Debtor abuse should be prevented, but the BAPCPA amendments should be altered to achieve that purpose while still recognizing the essential social insurance function that bankruptcy serves.

IV. Specific Changes Needed to Restore Bankruptcy's Social Insurance Function

A. Credit Counseling and Debtor Education Under Section 109(h)

Under Bankruptcy Code Section 109(h),\textsuperscript{66} individuals are ineligible for relief under any chapter of the Code unless they received an individual or group briefing from a nonprofit budget and credit counseling agency approved by the U.S. Trustee or bankruptcy administrator within 180 days of their filing.\textsuperscript{67} The services are to be provided to the debtor regardless of the debtor's ability to pay.\textsuperscript{68} Exceptions to the credit counseling requirement are available: (1) for districts in which adequate counseling services are determined to not be available; (2) for debtors that attempted but were unable to obtain the required counseling in the five days prior to filing; and (3) for debtors who are incapacitated, disabled, or on active military duty in a combat zone.\textsuperscript{69}

The credit counseling requirement is perhaps Congress's clearest expression of its increased awareness of the growing perception that bankruptcy was too easy to access and had become a first, rather than a last, resort.\textsuperscript{70} Congress's placement of the credit counseling requirement in Section 109 as a pre-petition duty gives rise to consequences that are far more severe than had it simply placed this requirement among the debtor's post-petition duties in Section 521.\textsuperscript{71}

\textsuperscript{65} See Trujillo, \textit{supra} note 24, at 29.

\textsuperscript{66} Section 109 of the Bankruptcy Code prescribes who may be a debtor in any bankruptcy proceeding and what that debtor must do in order to file under Title 11. See \textit{11 U.S.C.} \textsection 109 (2005).

\textsuperscript{67} \textit{Id.} \textsection 109(h).

\textsuperscript{68} \textit{Id.} \textsection 111(c).

\textsuperscript{69} \textit{Id.} \textsection 109(h).

\textsuperscript{70} \textit{In re} Tomco, 339 B.R. 145, 151-52 (Bankr. W.D. Pa. 2006)

\textsuperscript{71} Michael Newman, \textit{BAPCPA's New Section 109(h) Credit Counseling Requirement: Is it Having the Effect Congress Intended?}, \textit{2007 UT A H L. REV.} 489, 491 (asserting that Section 521 spells out the "Debtor's duties;" the documents that a debtor must file and the actions a debtor must take). The pre-petition requirement for credit counseling is strictly enforced. \textit{In re} Valdez, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005) ("It is a long recognized doctrine that ignorance of the law is not an excuse, and will not serve to justify a delay which causes exigent circumstances. . . .")
One of the credit counseling requirement’s more damning repercussions is its impact on the automatic stay provision for *pro se* filers. Occasionally, a *pro se* filer may seek bankruptcy protection without realizing the additional requirements imposed by Section 109. Prior to the enactment of BAPCPA, a bankruptcy petitioner enjoyed the protection of the automatic stay upon filing regardless of the fulfillment of any credit counseling requirements. BAPCPA, however, instituted changes to the automatic stay and left open the possibility that the stay would be weakened in situations where a debtor failed to complete the prepetition credit counseling requirement.

The impact of Section 109’s interplay with the automatic stay cannot be fully understood without first recognizing the importance of the automatic stay, which exists for the benefit of both creditors and debtors. The automatic stay benefits debtors by offering a “breathing spell” from creditors, while allowing creditors to be somewhat certain the debtors’ other creditors or third parties are not actively diminishing the bankruptcy estate. The stay also allows all judicial

While the sympathy of the Court goes out to the object of this harsh interpretation, the Court may not modify statutory language based on sympathy and must enforce the plain unambiguous language of the statute.” Interestingly, bankruptcy proceedings initiated involuntarily have been found to not be subject to the credit counseling mandate. In re Sadler, No. 06-10091, slip op. at 2 (Bankr. W.D. Tex. Oct. 18, 2006), http://www.txwb.uscourts.gov/opinions/opdf/06-10091-frm_Willis%20A.%20Sadler_2006-10-19%2023;05;02.pdf.

The stay offered the debtor protections from “all actions by creditors against the debtor or his property.” H.R. REP. No. 95-595, at 121 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6028. The stay would provide, in part, breathing room. Id.

Section 362(c)(3) and (4) state:

(3) [I]f a single or joint case is filed by . . . an individual . . . and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, . . . (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case; . . . (4)(A)(i) if a single or joint case is filed by . . . an individual under this title, and if 2 or more . . . cases of the debtor were pending within the previous year but were dismissed . . . the stay . . . shall not go into effect upon the filing of the later case . . .


All collection efforts against the debtor and the debtor’s estate are automatically stayed upon the filing of a petition in bankruptcy. Id. § 362(a).


H.R. REP. NO. 95-595, at 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97. (“The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.”). See also Tobar, *supra* note 75.

77. H.R. REP. NO. 95-595 (“The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor’s property.
disputes to be brought into a single forum and sorted out without interference from anxious creditors.\textsuperscript{78} The effect of Section 109 on the stay, however, may deny parties these benefits.

BAPCPA added two provisions to the automatic stay provision\textsuperscript{79} which were intended to prevent serial filers,\textsuperscript{80} but these additions may result in the automatic stay being unavailable for a debtor whose case is dismissed for filing without complying with the credit counseling requirements, even if this failure was inadvertent.\textsuperscript{81} Under BAPCPA, the automatic stay terminates after thirty days if a debtor has been the subject of a dismissal during the year prior to the current bankruptcy filing unless a motion to extend the stay has been granted.\textsuperscript{82} Additionally, a debtor in bankruptcy receives no protection from termination of the automatic stay if he has been the subject of two or more case dismissals in the year preceding the current filing.\textsuperscript{83} The implication is that filings dismissed for these reasons are presumed to be an abuse of the bankruptcy process.\textsuperscript{84}

The effect of this failure to receive counseling on the effectiveness of the automatic stay may depend largely on how a judge decides to handle the omission. Prior to BAPCPA, the distinction between "striking" and "dismissal" of a petition was largely semantic, but this semantic difference has become a matter of extreme importance to debtors who failed to receive credit counseling after BAPCPA.\textsuperscript{85} A judge's decision to strike a debtor's petition for failure to receive credit counseling voids the petition \textit{ab initio} and does not necessarily implicate the presumption of abuse when the debtor refiles.\textsuperscript{86} However, should a judge dismiss a case, rather than strike the petition for

\textsuperscript{78} Tobar, \textit{supra} note 75, at 7.
\textsuperscript{80} \textit{Id.} § 362(c)(3), (4).
\textsuperscript{81} Joseph Satorius, \textit{Strike or Dismiss: Interpretation of the BAPCPA 109(h) Credit Counseling Requirement,} 75 \textit{Fordham L. Rev.} 2231, 2231-32 (2007). A subsequent filing following a dismissal of a case for lack of credit counseling, gives rise to a presumption of abuse and limits the availability of the automatic stay. 11 U.S.C. § 362(c) (2005).
\textsuperscript{82} \textit{Id.} § 362(c)(3).
\textsuperscript{83} \textit{Id.} § 362(c)(4).
\textsuperscript{84} \textit{Id.} § 362(c).
\textsuperscript{85} Satorius, \textit{supra} note 81, at 2240.
\textsuperscript{86} See, e.g., \textit{In re Salazar,} 339 B.R. 622, 632-33 (Bankr. S.D. Tex. 2006) (striking debtors' petition and holding that an ineligible debtor's petition does not give rise to a bankruptcy case or entitle the debtor, even temporarily until an eligibility determination is made, to the protections of automatic stay).
failing to obtain credit counseling, the debtor may lose the protections offered by the stay when he later refiles after satisfying the credit counseling requirement. 87

There is a rational basis for BAPCPA's credit counseling requirement. 88 Congress clearly did not intend bankruptcy to be the first step people take when faced with seemingly insurmountable debt. 89 The credit counseling requirement was designed to provide debtors with information and alternative ideas to make informed decisions. 90 This intention, while laudable, is hardly realistic. Evidence strongly suggests that debtors have no practical alternatives at the time counseling is received, so the requirement amounts to an "administrative obstacle rather than a useful exercise." 91 Thus, credit counseling only increases the financial cost of bankruptcy, 92 as well as the emotional toll of pre-

87. See, e.g., In re Tomco, 339 B.R. 145, 157-158 (Bankr. W.D. Pa. 2006) (rejecting the notion that ineligibility impacts the determination of whether a case is "commenced," and expressing concern that if such a filing is deemed void ab initio, there would be no stay whatsoever in effect). The impact of this previous filing is implicated by BAPCPA's additions to the automatic stay provision. 11 U.S.C. § 362(c)(3), (4) (2005). Bankruptcy judges, themselves, have been confused as to how to dispose of cases filed without satisfying the credit counseling requirement and, in doing so, have lambasted the requirement itself. See In re Sosa, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005) (referring to Section 109(h) as, "[o]ne of the more absurd provisions of the new Act [which] makes an individual ineligible for relief under the Bankruptcy Code unless such individual" has completed the required counseling, and expressing discontent over the consequence that "if a debtor does not request the required credit counseling services . . . that person is ineligible to be a debtor no matter how dire the circumstances the person finds themselves in at that moment"). Other courts have expressed even stronger opinions on the new requirement. See, e.g., In re Navarro, No. 06-51007, slip op. at 1-2 (Bankr. W.D. Tex. June 27, 2006), available at http://www.txwb.uscourts.gov/opinions/opdf/06-51007-lmc_Cynthia%20Navarro%20and%20Jesse%20Navarro.pdf (providing that, "[T]he briefing has little or no effect on the actual decision to file because, by that time, the person's financial condition has deteriorated too far for any alternative other than bankruptcy to be effective. . . . What is more, the debtor may well actually be discouraged from filing when filing might be the right thing to do - by a credit counselor who is not a lawyer effectively giving the debtor legal advice."). Credit counseling "ends up being a useless formality." Id. at 2.

88. In re Tomco, 339 B.R. 145, 152 (Bankr. W.D. Pa. 2006) (noting that, "Congress made its general policy choice known in that debtors are now expected to be proactive.").

89. Id.

90. H.R. Rep. No. 109-31, pt. 1, at 18 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 104 (Congress stated that the "legislation's credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy-such as the potentially devastating effect it can have on their credit rating-before they decide to file for bankruptcy relief."). See also U.S. Gov't Accountability Office, Bankruptcy Reform: Value of Credit Counseling Requirement Is Not Clear 39 (2007), http://www.gao.gov/new.items/d07203.pdf [hereinafter GAO].

91. GAO, supra note 90, at 39.

92. GAO, supra note 90, at introductory page (noting that "[p]roviders typically charge about $50 per session").
paring to file a bankruptcy petition. Changes to BAPCPA’s credit counseling requirement may better serve Congress’s stated intentions while simultaneously eliminating the uncertainties and roadblocks facing many pro se debtors who fail to complete the counseling prepetition.

Congress’s first change to BAPCPA should be removing the prepetition credit counseling requirement. Few debtors on the eve of bankruptcy are in a position to be helped by credit counseling. It is far too late for many to change the financial habits that have brought them to the point of filing, so it is unlikely debtors will reconsider their decision to file at that point. This is not to say that credit counseling or financial management training is worthless. However, requiring counseling prior to filing simply acts as a roadblock for many debtors who need the sanctuary bankruptcy offers. The placement of this clause in Section 109 of the Bankruptcy Code results in an unduly punitive requirement.

Section 109(h) should be repealed. Further, Section 521 should be amended to require debtors to undergo credit counseling or financial management training within a certain period of filing. This amendment would eliminate the current requirement’s subversion of bankruptcy’s social insurance function and its punitive impact and further the potential rehabilitative purpose bankruptcy is capable of serving. The completion of this course as a prerequisite to discharge will further Congress’s stated intent and the social insurance function of bankruptcy. Credit counseling or financial management courses, properly placed on the timeline in a bankruptcy proceeding, would likely be invaluable, particularly considering how many creditors patiently await those emerging from bankruptcy on the other side. These courses would further the social insurance function of bank-

93. The financial and emotional stressors that trigger bankruptcy are presumably only increased by the additional hoops through which one must jump.
94. See supra note 87 and accompanying text.
95. Defining an eligible debtor as one whom has obtained credit counseling has the effect of creating a prepetition requirement. 11 U.S.C. § 109(h) (2005).
96. GAO, supra note 90, at 39.
97. Id. In testimony before the Senate Judiciary Committee, Elizabeth Warren told Congress, “I think you will find that most debtors are filing for bankruptcy not because they had too many Rolex watches and Gameboys, but because they had no choice.” Nat’l Ass’n of Consumer Bankr. Attorneys, Bankruptcy Reform’s Impact: Where Are All the “Deadbeats”? 3 (2006), http://nacba.com/files/main_page/022206NACBAbankruptcyreformstudy.pdf.
99. Section 727(a)(11) and 1328(g) already require completion of financial management courses as a prerequisite to discharge which further raises doubt as to the need for prepetition counseling. Id. §§ 727(a)(11), 1328(g).
100. Dow Jones Newswire, supra note 59.
ruptcy and likely prevent debtors from repeating the same financial mistakes. These courses may ultimately prevent filing for bankruptcy in the future by combating debtors’ ignorance of responsible borrowing practices as well as possibly altering their perceptions of credit.\textsuperscript{101}

If Section 109(h) remains a pre-petition requirement, the definition of “exigent circumstances” should be broadened to allow a court more leeway in waiving the requirement, or at least additional time to receive the required counseling.\textsuperscript{102} The “exigent circumstances” exception allows a bankruptcy court to permit a debtor to immediately file a bankruptcy petition if he cannot complete the counseling session due to reasons beyond his or her control.\textsuperscript{103} The courts construe exigent circumstances warranting a waiver of the pre-petition requirements rather narrowly.\textsuperscript{104} The current exigent circumstances exception is not broad enough to encompass the usual situations in which a debtor finds himself.\textsuperscript{105} Such a narrow interpretation of exigent circumstances again prevents debtors from receiving needed assistance in bankruptcy.


\textsuperscript{102} Currently, in order to receive a waiver a court must find: (1) exigent circumstances must exist; (2) the debtor must have requested credit counseling services prior to filing bankruptcy and been unable to receive credit counseling within five days of making the initial request; and (3) the certification must be satisfactory to the court. \textit{See In re Gee}, 332 B.R. 602, 604 (Bankr. W.D. Mo. 2005).

\textsuperscript{103} 11 U.S.C. § 109(h)(3) (2005) (To qualify, the debtor must: (a) file a written certification to the court; (b) describe exigent circumstances that merit a waiver of the counseling requirement; (c) state that the debtor requested credit counseling from an approved agency before the case was filed; and (d) state that the counseling was unable to obtain the services during the 5-day period beginning on the date on which the debtor made that request).

\textsuperscript{104} \textit{See In re Sukmungsa}, 333 B.R. 875, 880 (Bankr. D. Utah 2005) (Court not persuaded that debtors actually received required briefing prepetition or that Debtors or counsel were excusably negligent in failing to properly certify completion of the briefing requirement, as “the real issues involve Debtors’ questionable prepetition actions and counsel’s inexcusable failure to reasonably inquire and verify before filing”); \textit{In re Talib}, 335 B.R. 417, 422 (Bankr. D. Utah 2005) (Court should base exigency finding not as much on imminence of the threat but on the reasons why debtor could not obtain the required credit counseling); \textit{In re Childs, et al.}, 335 B.R. 623, 630 (Bankr. D. Md. 2005) (Receipt of certificate postpetition, does not cure failure to receive certificate prepetition due to lack of time); \textit{In re Valdez}, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005) (“exigent circumstances” does not refer to the debtor’s problems or situation but to the circumstances preventing the person from obtaining the required credit counseling); \textit{In re Ashley}, No. 06-10072, slip op. at 3 (Bankr. E.D. Va. Feb. 8, 2006), available at http://www.vaeb.uscourts.gov/dtssearch.html (\textit{pro se} debtor's petition dismissed when she argued she was unaware of the counseling requirement); \textit{In re Dixon}, 338 B.R. 383, 384-385, 388 (B.A.P. 8th Cir. 2006) (threatened loss of home by foreclosure was not exigent circumstance); \textit{In re Loving}, No. 06-70183, slip op. at 3-4 (Bankr. W.D. Va. Mar. 24, 2006) (Prisoners are required to seek credit counseling despite incarceration).

\textsuperscript{105} \textit{See, e.g., In re Talib, supra note 104.}
Accordingly, the exigent circumstances exception should be broadened to reflect not only the situation surrounding the credit counseling requirement, but also the undoubtedly stressful and trying conditions surrounding the filing of the bankruptcy petition. A debtor on the eve of foreclosure or repossession is no doubt dealing with matters that, at the time, may seem more pressing than fulfilling a credit counseling requirement. However, the failure to comply may ultimately bar a bankruptcy filing. Exigent circumstances should include consideration of debtors with language barriers or disabilities and debtors facing imminent foreclosure. This broader definition reflects greater consideration for those forced to file for bankruptcy. Similarly, this broader definition recognizes that bankruptcy serves an important social insurance function and enables it to do so. At the same time, these changes accept and further the Congressional goal of preventing abuse while also nurturing the important social insurance function bankruptcy serves.

B. Means Testing Under Section 707(b)(2)

As previously stated, the consumer credit industry long felt that the Bankruptcy Reform Act of 1978 was far too deferential to debtors. Creditors resented that debtors could opt for Chapter 7 liquidation despite an ability to repay some or all debts out of future income. The credit industry responded with extensive lobbying that culminated in the addition of Section 707(b) in 1984, empowering bankruptcy courts to dismiss a Chapter 7 case for "substantial abuse." However, the Code did not define what constituted "substantial abuse." The term was generally interpreted to include a debtor who opted to receive immediate discharge in Chapter 7 despite the ability to pay his or her obligations after discharge. Dramatically increased consumer bankruptcy filings led many creditors to speculate that debtors were substantially abusing the system, but that the perceived am-

107. Id.
111. Id.
bigness of what actually constituted "substantial abuse" prevented those debtors from being caught.\textsuperscript{112}

Following the 1984 amendments, the consumer credit industry remained dissatisfied with this ambiguous code provision.\textsuperscript{113} The consumer credit industry believed "can-pay" debtors continued to file under Chapter 7 thus requiring a strict, mechanical "means test" to keep these perceived "can-pay" debtors out of Chapter 7.\textsuperscript{114} The consumer credit industry desired the ability to challenge abuses analogous to that possessed by a U.S. Trustee or judge.\textsuperscript{115}

Rather than leave the determination of whether a Chapter 7 filing constituted abuse to a bankruptcy court, means testing would subject a debtor and his or her assets to a strict statutory formula to determine whether the ability to pay debts with future income is present.\textsuperscript{116} Means testing was to ensure that "can-pay" debtors could not opt for immediate discharge in Chapter 7 when they had the ability to carry out a lengthy repayment plan prior to receiving discharge in Chapter 13.\textsuperscript{117} Thus, the statutory formula, rather than the debtor, would make the determination as to which bankruptcy chapter from which a debtor may obtain relief.\textsuperscript{118}

BAPCPA reflects the concern that too many debtors who could afford to repay their debts were taking advantage of the fresh start offered by Chapter 7.\textsuperscript{119} To resolve this concern, Congress enacted one of the most substantial amendments to the Bankruptcy Code under BAPCPA. Congress acquiesced to the demands of the consumer credit industry and replaced the former "substantial abuse" test with a

\textsuperscript{112} Id. at 141.
\textsuperscript{113} Tabb, supra note 106, at 466 (asserting that the test was seen as a "toothless and erratic tiger").
\textsuperscript{114} Id. Chapter 7 of the U.S. Bankruptcy Code provides for liquidation of a debtor's estate, distribution of the proceeds to the creditors, and discharge of most of the remaining debts. See 11 U.S.C. §§ 701, 726, 727 (2005). Alternatively, Chapter 13 only provides for discharge of some debts after a lengthy repayment period. See id. §§ 1301, 1321-1330 (2005).
\textsuperscript{115} 11 U.S.C. § 707(b) (2000). Importantly, the power to move for the dismissal of a case for "substantial abuse" was limited to the Court and the U.S. Trustee. Id. § 707(b) (2000). Under the 1984 Amendment, the Code formerly provided:

\textit{After notice and a hearing, the court, on its own motion, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.}

\textit{Id.} (emphasis added).
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Tabb, supra note 106, at 463.
new "abuse" test under Section 707(b)(2)(A) of the Bankruptcy Code.\textsuperscript{120} Congress adopted the "means test" to restore integrity to the bankruptcy process by creating a presumption of "abuse" which requires dismissal of a Chapter 7 case or conversion to Chapter 13.\textsuperscript{121} The presumption in favor of granting the relief requested by the debtor was replaced with a presumption of abuse where the debtor fails the "means test."\textsuperscript{122} Rather than allow debtors to opt to file under Chapter 7 or Chapter 13, debtors are subjected to a strict mechanical test, the result of which may preclude the availability of Chapter 7 relief.\textsuperscript{123}

The complex means testing formula requires computing the debtor's current monthly income.\textsuperscript{124} All allowable monthly deductions are then subtracted from the gross monthly income to determine the debtor's net monthly income.\textsuperscript{125} The deductions include: monthly living expenses, calculated by reference to Internal Revenue Service collection guidelines for delinquent taxpayers;\textsuperscript{126} the projected payments for sixty months on actual secured debts;\textsuperscript{127} projected payments for sixty months on actual priority debts;\textsuperscript{128} and various special interest expenses, charitable contributions, and administrative charges.\textsuperscript{129}

The resulting net monthly income is then multiplied by sixty, which results in the debtor's projected repayment capacity.\textsuperscript{130} The court then must find that the lesser of (1) twenty-five percent of the debtor's nonpriority unsecured claims or $6,000, if greater, or (2) $10,000, if greater than the debtor's projected repayment capacity.\textsuperscript{131} If the court does not so find, the debtor's Chapter 7 filing is presumed abusive under Section 707(b)(2).\textsuperscript{132} The debtor may attempt to rebut the presumption of abuse.

\textsuperscript{121} Tabb, supra note 106, at 464.
\textsuperscript{122} 11 U.S.C. § 707(b) (2000).
\textsuperscript{123} Id.
\textsuperscript{126} Id. § 707(b)(2)(A)(ii)(1).
\textsuperscript{127} Id. § 707(b)(2)(A)(iii). The 60-month period reflects the length of a five year repayment plan that a debtor would necessarily complete to obtain relief under Chapter 13. See id. § 1322(c).
\textsuperscript{128} Id. § 707(b)(2)(A)(iv).
\textsuperscript{129} Id. § 707(b)(2)(A)(ii)(II)-(V), (b)(1).
\textsuperscript{130} Id. § 707(b)(2)(A)(i); see also supra note 127.
\textsuperscript{132} Id. § 707(b)(2)(A)(i).
This formula is almost impenetrably complex. The salient feature of BAPCPA’s means test is that it essentially abolishes debtors’ right to choose between Chapter 7 and Chapter 13. The chapter through which a debtor may file for relief is determined by the result of the means test rather than the economic realities of a particular debtor.

The means test, while seeking to ferret out “can-pay” debtors through a strict, mechanical formula, is difficult to apply. The debtor must take the previous six months income, from whatever source derived, to determine his “current monthly income” for the means test. Thus, if the income from the previous six months is not a representative sample of the debtor’s means, the test will yield a skewed starting point. Applying the IRS Collection Standards to calculate expenses is also difficult. For example, the IRS Collection Standards, allow both an ownership and an operating allowance for vehicles, sometimes enabling debtors to “double-dip” by taking multiple deductions from disposable income for mortgage and car payments.

While courts struggle to apply the means test, debtors must deal with the increasingly onerous administrative barrier to bankruptcy relief the test causes. The additional requirements of the means test serve only to increase the burden on debtors attempting to file for relief. The debtor is required to perform the complicated means testing and disclose it as part of his prepetition filings. The debtor must

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133. The complexity of the test itself may increase the burdens to filing as a pro se debtor may find difficulty in navigating through the formula.
134. White, supra note 58.
135. See Pardo, supra note 116, at 472-73.
136. See, e.g., In re James, 345 B.R. 664 (Bankr. N.D. Iowa 2006) (debtor received one time bonus of $20,000 in six month period preceding bankruptcy was unable to escape presumption of abuse).
138. See, e.g., In re Oliver, 350 B.R. 294, 300-302 (Bankr. W.D. Tex. 2006) (“The ‘means test’ attempts to create a formula to apply to all situations. However, the average of the last six months of income may or may not be an accurate picture of any person’s real financial situation. It is merely a snapshot as of the petition date.”).
139. See, e.g., Tabb, supra note 106, at 479 n.96 (noting that the National Standard does not even have a category for “clothing,” which is the term used in the Bankruptcy Code and the closest category is the much broader “apparel and services”).
140. See, e.g., In re Hardacre, 338 B.R. 718, 720 (Bankr. N.D. Tex. 2006) (despite the debtor’s argument that BAPCPA compelled him to include both the ownership allowance and the amount of the car payment, the court held that the debtor was entitled to only deduct the greater of the secured debt or the IRS allowance, but not both).
also include a certificate from a lawyer or bankruptcy petition preparer stating that he or she provided the debtor with the required notice, which details the alternatives to bankruptcy and what the bankruptcy process entails. The debtor must also provide pay stubs, tax returns, proof of identity, and a certificate noting completion of the required pre-petition credit counseling. These increased filings, while serving to support the means test, complicate the bankruptcy requirements and increase the financial and emotional cost of bankruptcy.

Although means testing increases the barriers to filing bankruptcy, it fails to accomplish its stated purpose. Means testing ferrets out a minimal number of filers for abuse. The majority of those that file under Chapter 7 are not deemed to have filed abusively. Further, well-informed or well-counselled debtors with proper planning are still able to file under Chapter 7 despite not possessing the same need for relief that less sophisticated debtors possess. Hypothetically, a debtor could reduce his income in the six months preceding the date his petition is filed in order to satisfy the required threshold to avoid the presumption of abuse. Additionally, a debtor could take on more secured debt in the months leading up to the bankruptcy petition filing in order to tilt the balance of the means test in his favor.

The effect of forcing debtors out of Chapter 7 and into Chapter 13 effectively precludes bankruptcy relief for many while failing to substantially increase creditor recovery. In fact, the payoffs to creditors...
are strikingly low when the substantial costs associated with Chapter 13 cases are taken into account. The additional recovery creditors receive by confining debtors to Chapter 13 seems inconsequential when one considers how this restriction subverts the potentially positive, social insurance functions that bankruptcy can serve.

The problems that have arisen in the application of the means test, and the consequent onerous burden it places on debtors preparing to file, demand reform. Ideally, Congress would recognize its error and repeal means testing. Bankruptcy, ideally, has the potential to be a self-policing system. The subtext of means testing was the errant perception that bankruptcy judges needed to be reined in to prevent them from further facilitating consumer debtor abuse. However, removing judicial discretion in bankruptcy proceedings ignores contemporary methods of statutory interpretation. The action implies that bankruptcy judges prior to BAPCPA sought to subvert Congress.

The repeal of means testing would restore judicial discretion and allow the doors to bankruptcy to be policed by experienced judges and trustees rather than a complex mechanical formula that—for many—fails to address the true causes of bankruptcy properly. Following the 1984 Bankruptcy Act, judges considered the ability to pay

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150. Li, supra note 64, at 6 (detailing two studies of the recovery under Chapter 13 plans in which the rates were 22% and 30.6% for secured creditors in the respective studies and 16% and 19.5% for unsecured creditors).

151. Id. at 7-8. Additionally, "[u]nder the new law, the means test is more difficult to pass for bankruptcy petitioners, and more subprime mortgagor filers are required to enter Chapter 13 rather than Chapter 7 bankruptcy, even though they might not be able to complete the repayment plan. . . . analysis reveals that a higher percentage of borrowers are failing their bankruptcy repayment plans." Rod Dubitsky et al., Heat Hot Topic: More Repay Plans Fail in Subprimes Under the 2005 Bankruptcy Law, CREDIT SUISSE, Mar. 8, 2007, http://bluwiki.com/images/6/64/ Credit_Suisse_HEAT_bk_report.pdf.

152. See Mary Jo Heston, The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions, 6 AM. BANKR. INST. L. REV. 359, 365 (1998) (noting that the Code had tools for investigation of abuse and tools designed to punish the wrongdoer, both important weapons in reducing bankruptcy fraud).

153. Jean Braucher, The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not be Futile, 2007 U. ILL. L. REV. 93, 94 (2007). In fact, one study found that courts systematically adjudicated exemptions to regulate abuse, and the presence of debtor sophistication reduced the chances of the debtor succeeding in her exemption of many assets by as much as 78.9%. See Trujillo, supra note 24, at 16.

154. Trujillo, supra note 24, at 2 (noting that data shows that, in fact, the U.S. bankruptcy system had developed effective internal mechanisms to address abuse, especially at the property exemptions phase of the case).
as the primary factor to determine abuse. However, other factors also contributed to judges' determination of abuse, including:

(1) whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment; (2) whether the debtor incurred cash advances and made consumer purchases in excess of his ability to repay; (3) whether the debtor's proposed family budget was excessive or unreasonable; (4) whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflected the true financial condition; and (5) whether the petition was filed in good faith.

This broad spectrum of factors which a bankruptcy judge was permitted to consider has since been replaced by a rigid formula that "is both over- and underinclusive as to its primary goal of preventing abuse." Judges are no longer able to take into account the circumstances that have led to the debtor's current situation. The means test in effect catches debtors as abusers of the system despite a legitimate need for relief. Thus, the elimination of broad judicial discretion would best be resolved through the repeal of means testing. Although a widely divergent view as to what constituted abuse contributed to the call for means testing, the best resolution to this problem is hardly a complete removal of discretion under the means test.

It is unlikely means testing will be repealed. However, Congress should consider changes to eliminate some of the most onerous effects of means testing. A method for determining the reasonableness of expenses should also be established. Although "current monthly income" is based on a historic weighted average, allowed expenses are not afforded the same considerations of debtor history. Thus, the means test establishes a projection of expected reasonable expenses without considering the debtor's historical reasonable expenses. Judges are actually prohibited from exceeding the prescribed expenses contained in the IRS tables by more than five percent. Ideally, Congress should go one step further and permit judges to determine income, expenses, and post-petition events, such as changes in

156. Id. (citing In re Krohn, 886 F.2d 123, 127 (8th Cir. 1997)).
157. Id. at 804.
158. Id.
159. See Price, supra note 110, at 140-43.
160. See generally, Tribble, supra note 155.
161. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2005). Debtors must use the "monthly expense amounts specified" by the IRS. Id. This amount must be used even if the amounts specified by the National and Local Standards specified by the IRS are higher than the debtor's actual expenses in the relevant categories. Id.
162. Id.
employment. Providing judges with additional discretion would broaden the rigid means test and provide consideration of the reality of many debtors’ situations.

Finally, judges must be allowed to consider the impetus for a debtor’s filing. The means test averages the income of the debtor over the six months preceding the debtor’s petition. However, this figure does not adequately take into account why bankruptcy is currently being filed. Some debtors may be subject to a slow descent into bankruptcy, such that the means test calculations might accurately reflect their situations. However, many debtors reach bankruptcy as a result of unexpected occurrences that cause a precipitous fall in their already tenuous situations. Judges should have the discretion to adjust the means testing formula to take such circumstances into consideration.

C. Amending BAPCPA to Enable Debtors to Save Collateral in Chapter 13 and Chapter 7

Retaining property that serves as collateral for secured debts is often a major objective of debtors entering bankruptcy. Prior to BAPCPA, those who filed under Chapter 13 were in an equally poor financial situation as their counterparts filing under Chapter 7. Eligible debtors chose Chapter 13 because it served as the primary route for retaining property and resolving arrearages to the extent the debtor was able. Alternatively, some Chapter 7 debtors were able to hold on to automobiles and other personal property collateral by continuing to make payments on the secured debt.

163. Perhaps even amending Chapter 13 to include in the plan payments to the trustee that might cover future unexpected emergencies might resolve this problem. This addition might even ensure the completion of more Chapter 13 plans. Should this hypothetical emergency never occur, these past payments could be distributed to creditors in further satisfaction of a debtor’s obligations.


166. See Teresa A. Sullivan et al., As We Forgive Our Debtors 77, 239-40 (1989) (noting similar debt/income ratios of debtors in Chapter 7 or Chapter 13 and also the randomness of the sorting of debtors between the two chapters rather than according to ability to pay). See also Jean Braucher, Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes, and Other Collateral under the 2005 Act 3 (Nat’l Law Ctr. for Inter-American Free Trade, 2005), available at http://www.natlaw.com/newbnkr2005act.pdf.

167. Braucher, supra note 166, at 3.

168. Id. at 14 (noting “prior to the 2005 act, the majority of circuits that had decided a case provided protection for debtors to retain consumer collateral so long as they remained current on their obligations, despite the fact that their personal liability would be discharged in bankruptcy;” a process commonly called a “ride-through”).
The ability to retain personal property in bankruptcy has been severely restricted by the 2005 amendments to the Bankruptcy Code, effectively leaving debtors worse off than they were prior to bankruptcy and with no real means to improve their situations. The provisions dealing with the retention of collateral, both before and after BAPCPA, apply more broadly to personal property securing debt.\(^{169}\) However, the inequitable implications of these provisions upon bankruptcy’s social insurance function and their onerous effects upon debtors are more frequent and readily apparent in their application to automobiles.

Under pre-BAPCPA law, Chapter 13 debtors were able to retain personal property and reduce the debt secured by the property to its current value through a process known as “cram-down.”\(^{170}\) A Chapter 13 debtor with personal property worth less than the amount owing against it could obtain a release from a secured claim by paying only the value of the property secured by the claim.\(^{171}\) A Chapter 7 debtor would also often have the opportunity to retain personal property, though this ability and the method through which it was accomplished would depend on the circuit in which the debtor filed for bankruptcy.\(^{172}\)

Prior to BAPCPA, debtors who opted for Chapter 7 could often ride through and maintain possession of the collateral.\(^{173}\) Some circuits allowed a debtor to retain possession of an automobile through a court-protected ride through so long as the required contractual payments continued.\(^{174}\) The automobile loan would convert into a nonrecourse loan and would not result in personal liability should the need for repossession later arise.\(^{175}\) Alternatively, a debtor may have been able to ride through by creditor acquiescence, in which case a creditor would simply continue to accept payments as usual from the debtor and forego the expenditure of foreclosing upon the collateral.\(^{176}\) Creditors, however, were dissatisfied with these results and wanted debtors to reaffirm the full amount of the debt, so the creditor would recover

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\(^{171}\) William C. Whitford, A History of the Automobile Lender Provision of BAPCPA, 2007 U. ILL. L. REV. 143, 145-146 (2007). Automobile lenders were dissatisfied with the result of Chapter 13 cases. Id.

\(^{172}\) Braucher, supra note 166, at 14.

\(^{173}\) Whitford, supra note 171, at 145-146.

\(^{174}\) Id. See also Braucher, supra note 166, at 14.

\(^{175}\) Whitford, supra note 171, at 145-146.

\(^{176}\) Braucher, supra note 166, at 14 (noting also that this method would often be more appealing when the value of the collateral was not worth the expense of a foreclosure).
more from the debt and have recourse later for any unpaid arrearages.\textsuperscript{177}

BAPCPA amended the Bankruptcy Code to achieve these desired ends by precluding debtors from riding through the bankruptcy process while maintaining possession of collateral with a nonrecourse loan. Specifically, Congress amended Section 521(a) to disallow debtors in Chapter 7 to retain secured property without entering a reaffirmation agreement and continuing to make payments on the debt.\textsuperscript{178} Thus, the debtor reaffirms liability for the entire loan.\textsuperscript{179}

Alternatively, a debtor may redeem the property under Section 722 at an increased "replacement value."\textsuperscript{180} Congress added new language to Section 722 to explicitly require complete satisfaction of the debt; thus, in order to redeem the collateral, the debtor must pay the existing claim in full. If the debtor fails to carry out either of its options within forty-five days of the meeting with the creditors, the automatic stay is lifted without a hearing allowing the debtor to repossess the collateral.\textsuperscript{181}

Section 506(a)(2) changed the value of the collateral from a previously ambiguous standard to a higher, but more certain, "replacement value."\textsuperscript{182} Should debtors seek to retain their automobile through Chapter 7 and then redeem the collateral under Section 722, the cost of exercising this right will be much more expensive.\textsuperscript{183} As a result of BAPCPA, bankruptcy trustees essentially use the Blue Book value of the automobile to determine its cost of redemption (at one time, a purely wholesale value was used).\textsuperscript{184}

In order to restore and nurture bankruptcy's social insurance function, Section 722 should return to its pre-BAPCPA form and be amended to explicitly allow redemption of collateral by installment payments. The right to redeem collateral is merely illusory if exercising that right requires a debtor in financial distress to fully satisfy the debt securing the collateral. It is safe to assume that a debtor, sufficiently distressed by his financial obligations to liquidate all his assets in bankruptcy, would likely be unable to produce the money necessary to redeem the collateral he was forced to give up. Debtors will eventually emerge from bankruptcy, so providing debtors with options and

\textsuperscript{177} Id.
\textsuperscript{179} Id. §§ 521(a), 722.
\textsuperscript{180} Id.
\textsuperscript{181} Id. § 722.
\textsuperscript{182} Id. § 506(a)(2).
\textsuperscript{183} Whitford, supra note 171, at 152.
\textsuperscript{184} Id.
opportunities to retain or redeem collateral quickly and successfully allows bankruptcy to serve as social insurance.

Additions to Chapter 13 also make it more difficult for debtors to retain collateral if they opt, or are forced, to file under this chapter. An unnumbered provision at the end of Section 1325(a) drastically changed how automobile loans are dealt with in Chapter 13.185 The "hanging paragraph" of Section 1325(a) prohibits Section 506(a)186 from applying to a claim if the creditor has a purchase money security interest securing the debt, the collateral secured is a motor vehicle, and the car was purchased within 910 days of filing.187 Section 506(a) defines the allowed amount of the claim as the lesser of the amount owed or the value of the collateral.188 Prior to the addition of Section 1325, the value of an automobile lender’s claim would often be reduced to the value of the car itself.189

Section 1325(a) also effectively prevents any other secured debts from being reduced to the actual value if any collateral is acquired within one year of filing.190 Additionally, changes to Section 506(a)(2) further restrict the ability to reduce an undersecured car loan, even if the car was purchased more than 910 days prior to the date of petition.191 The overwhelming majority of bankruptcy courts have determined that the purpose of the new provision in Section 1325 is to prevent the bifurcation, or "cramdown," of the claims of certain undersecured creditors into a secured claim and an unsecured claim.192

Ultimately, the collective effect of these changes to Sections 1325 and 506(a)(2) is to restrict a debtor’s ability to protect important assets through Chapter 13. Because Section 506 is given no effect in the case of an automobile purchased less than 910 days prior to petition, the secured claim cannot be bifurcated and, even upon surrender of the collateral, a debtor remains liable for any deficiency.193 Debtors

187. Id.
189. Whitford, supra note 171, at 145-46.
193. See In re Osborn, 515 F.3d 817 (8th Cir. Feb. 2008); see also In re Rodriguez, 375 B.R. 535 (9th Cir. BAP 2007) (providing that the surrender of a 910 vehicle does not extinguish a claim for deficiency).
attempting to protect important assets, such as vehicles, find themselves unable to do so because of Section 1325. Debtors find no way to reduce the amount owed on a debt or owing a deficiency should they simply opt to surrender the collateral.

The cramdown effect of Section 1325 was an important provision that allowed a debtor to reduce the amount owed on collateral to the actual value of the collateral. Removing this option is punitive and may potentially deny debtors collateral which will be important in their future as they struggle to regain their place in society following the bankruptcy proceeding.\textsuperscript{194}

The combined effect of the provisions restricting cramdown, redemption, and ride through results in fewer debtors being able to use Chapter 13 to protect important assets, while the means test increases the number of debtors forced to comply with its provisions.\textsuperscript{195} The resultant effect is devastating to the social insurance function that bankruptcy was once able to serve.

The limitations these provisions place on bankruptcy also adversely affect debtors filing under Chapter 7 by forcing them into reaffirmation agreements. Thus, debtors will emerge from bankruptcy burdened with additional payments and new, nondischargeable debts. These additional burdens potentially cause debtors to fall behind on obligations and living expenses. Any possible remnants of the social insurance function that bankruptcy once served are further subverted by effectively leaving debtors worse off than they were prior to beginning the arduous bankruptcy process. Section 1325 should be restored to its pre-BAPCPA form and permit the amount owed to a secured lender to be reduced to the value of the collateral. The restoration of this provision and Section 722 to their pre-BAPCPA forms will permit those forced into bankruptcy to more quickly return from bankruptcy as productive members of society. Loosening the severe restriction on cramdowns of debt and allowing more room for retention and redemption of collateral will ensure the possibility of bankruptcy being a brief affliction, rather than a lifelong condition.

\textsuperscript{194} Simultaneously, creditors are guilty of over-lending to debtors beyond the value of the collateral escape repercussions for their lending practices. Essentially the "hanging paragraph" of Section 1325 allows creditors to take advantage of debtors and force debtors to bear the cost of the creditors' lending practices. Section 1325 should be restored to allow the reduction of the amount owed on a vehicle to the value of the collateral. The return to Section 1325 pre-BAPCPA will place the onus on lenders to better police lending practices and simultaneously prevent the deprivation of collateral from debtors that will help them on their return to productive members of society.

\textsuperscript{195} See discussion \textit{supra} Part II.B.
While the anti-cramdown provision in Section 1325 is being amended, Congress should consider an additional amendment. Although it has not previously been provided for in the Bankruptcy Code, Section 1322(b)(2) should allow bankruptcy courts to reduce the amount owing when the value of homes and mobile homes are less than secured loans. The same justifications supporting the allowance of the cramdown of other undersecured loans also support granting the power to the bankruptcy court to reduce undersecured real property loans. The need for such a provision is especially poignant presently due to drastically falling housing prices. Permitting bankruptcy courts to cramdown real property loans will allow many debtors to avoid ending up with nothing following bankruptcy.

D. Attorney Regulation under Sections 526, 527, and 528

As if the above effects on consumers were not enough, BAPCPA also contains increased attorney regulation, which indirectly affects consumers. The reaction by attorneys to Sections 526, 527, and 528 of BAPCPA was especially pronounced because this effect was anticipated by those practicing in bankruptcy. Sections 526, 527, and 528 proscribe and prescribe certain activities of “debt relief agencies.” However, the pronounced response to these provisions was largely because “debt relief agencies” appeared to include bankruptcy attorneys. BAPCPA attempted to impose a litany of new require-

196. Note that at present, Senate Bill 2636, “The Foreclosure Prevention Act of 2008,” is pending to amend the Code to achieve this result. Additionally, this solution has been advanced by National Association of Consumer Bankruptcy Attorneys, the National Consumer Law Center, and the Center for Responsible Lending among others. See also John Rao et al., Joint Memo for Proposed Bankruptcy Law Reform, NAT'L ASS'N OF CONSUMER BANKR. ATTORNEYS, Apr. 27, 2007, at 4, http://www.nacba.org/files/main_page/Join%20Memo%20for%20Proposed%20Bankruptcy%20Law%20Reform.pdf (noting that, “The home mortgage exception was enacted in 1978, a time when home mortgages were nearly all fixed-interest rate instruments with low loan-to-value ratios and were rarely themselves the source of a family's financial distress.”).

198. Id. § 527.
199. Id. § 528.
200. See Katherine Porter, Going Broke The Hard Way: The Economics of Rural Failure, 2005 Wis. L. REV. 969, 1022 (2005) (noting that increased paperwork and requirements on attorneys may price many out of bankruptcy).
202. 11 U.S.C. § 101(12A) provides that “[t]he term ‘debt relief agency’ means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under Section 110...” Id. § 101(12A). An “assisted person” is defined as “any person whose debts consist primarily of consumer debts and the value of whose non-exempt property is less than $150,000.” Id. § 101(3).
ments upon debtor counsel whenever they provide broadly defined "bankruptcy assistance." 203

Specifically, Sections 527 and 528 require certain disclosures and statements be made by a "debt relief agency." 204 The "debt relief agency" is then required to provide the client with written notice reflecting the enumerated requirements. 205 Section 528 additionally requires that any advertisements contain the following statement: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 206 Section 526 prohibits the agency from advising the debtor to incur additional debt in contemplation of filing for bankruptcy. 207 This prohibition on advice presents a quandary since it may be completely legal and/or in a client’s best interest to take such steps. 208

Although the attorney-regulating provisions of BAPCPA do not immediately implicate the social insurance function of bankruptcy, they are relevant. In many situations, attorneys act as a client’s gateway to the bankruptcy system. 209 An unsophisticated debtor may rely on his attorney to provide guidance on what steps should be taken to maximize the benefits of the bankruptcy proceedings. 210 When representing a sophisticated debtor, an attorney may walk a fine line between representing his client zealously and permitting his client to abuse the system. 211 However, in all situations lawyers must take their cues from ethical guidelines. 212 BAPCPA limits many clients’ access to counsel by the heightened requirements it places on attorneys. 213 Indirectly,

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203. 11 U.S.C. § 101(4A) provides that “‘bankruptcy assistance’ means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors’ meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.” Id. § 101(4A).

204. Id. §§ 527, 528 (2005).

205. Id. § 527. However, considering the broad definition of “assisted person,” many of these required notices may be irrelevant or inaccurate to certain clients. See Erwin Chemerinsky, Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 79 AM BANK. L.J. 571, 576-77 (2005).


207. Id. § 526(a)(4).

208. See Chemerinsky, supra note 205.

209. Indeed, attorneys serve as the gateway to the legal system in general. This role is especially pronounced in the nuances of representation in bankruptcy.

210. As bankruptcy acts as a last line of social insurance, an attorney should assist, and a debtor should seek to come out of bankruptcy in a better situation than he was in before being forced to declare bankruptcy.


212. Id. at 790.

213. See Porter, supra note 200, 1021.
the heightened requirements on attorneys have perhaps the largest chilling effect on the social insurance function of bankruptcy. This is because the requirements, in essence, restrict debtors’ access to bankruptcy.\textsuperscript{214}

Due to the uncertainty caused by the increased requirements, many attorneys have been reluctant to represent clients in bankruptcy.\textsuperscript{215} One judge took it upon himself to rule \textit{sua sponte} that attorneys who are members of the bar of that court, as well as those admitted pro hac vice, are not “debt relief agencies” within the meaning of BAPCPA, so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise.\textsuperscript{216} However, the U.S. Trustee quickly contested this ruling based on the lack of a case or controversy rendering the ruling moot.\textsuperscript{217}

Other courts have found bankruptcy attorneys are “debt relief agencies” under the plain and unambiguous language of Section 101(12A).\textsuperscript{218} However, these same courts have held that: “[S]ection 526(a)(4), therefore, is overinclusive in at least two respects: (1) it prevents lawyers from advising clients to take lawful actions; and (2) it extends beyond abuse to prevent advice to take prudent actions.”\textsuperscript{219} However, challenges to the disclosures required by Section 527 were dismissed despite the fact that the disclosures can sometimes be misleading.\textsuperscript{220} Numerous courts are following suit and declaring many of BAPCPA’s regulations of “debt relief agencies” unconstitutional, but not the classification of attorneys as “debt relief agencies.”\textsuperscript{221}

Given Congress’s plain and unambiguous language,\textsuperscript{222} it appears the classification of bankruptcy attorneys as “debt relief agencies” is not soon to change. However, classifying attorneys as “debt relief agencies” and the additional duties this status imposes is troubling. Importantly, BAPCPA provides no clear-cut distinction between attorneys and non-attorneys providing bankruptcy assistance.\textsuperscript{223} This ambiguity has increased the cost to clients to obtain bankruptcy assis-

\begin{itemize}
  \item \textsuperscript{214} See id. at 1004.
  \item \textsuperscript{215} See id. at 1022-23.
  \item \textsuperscript{216} In re Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005).
  \item \textsuperscript{217} In re Attorneys at Law and Debt Relief Agencies, 353 B.R. 318 (Bankr. S.D. Ga. 2006).
  \item \textsuperscript{218} Hersh v. United States, 347 B.R. 19, 23 (Bankr. N.D. Tex. 2006); Milavetz, Gallop & Milavetz v. United States, 355 B.R. 758 (Bankr. D. Minn. 2006) (also holding that § 528(a)(4) is unconstitutional).
  \item \textsuperscript{219} Hersh, 347 B.R. at 23.
  \item \textsuperscript{220} Id.
  \item \textsuperscript{221} See, e.g., Olsen v. Gonzales, 350 B.R. 906, 916 (Bankr. D. Or. 2006).
  \item \textsuperscript{222} 11 U.S.C. § 101(12A) (2005).
  \item \textsuperscript{223} Id.
\end{itemize}
tance from attorneys and has further subverted bankruptcy's potential social insurance function.\textsuperscript{224}

Absent a distinction between attorneys and non-attorneys, bankruptcy subjects attorneys to a long list of duties that unnecessarily interfere with attorneys' ability to zealously represent their clients and, in many cases, explicitly prevents attorneys from performing this duty.\textsuperscript{225} Collectively, the additional duties and requirements placed on attorneys representing clients in bankruptcy inhibit a lawyer's ability to provide adequate representation.\textsuperscript{226} Thus despite placing heightened veracity requirements upon bankruptcy attorneys, BAPCPA actually encourages inferior representation, if not malpractice.\textsuperscript{227}

First Amendment concerns are clearly implicated by BAPCPA's provisions regulating "debt relief agencies," and these concerns have led many courts to find such provisions unconstitutional.\textsuperscript{228} However, the larger concern is BAPCPA's level of interference with an attorney's duty to zealously represent his client. This duty existed long before BAPCPA, and the manner in which it is carried out has also long been subject to comprehensive ethical guidelines.\textsuperscript{229} The government clearly has a strong interest in regulating credit counseling services, as well as the many non-attorney advisors of potential bankruptcy filers, but this same urgency is not present in the lawyer-client relationship.

To effectively deal with this problem, Congress should narrow the definition of "debt relief agencies" to exclude licensed attorneys serving as counsel to bankruptcy petitioners. Many of Congress's motivations in enacting these provisions may still be given effect by maintaining the heightened veracity requirements for attorneys to verify and sign off on bankruptcy filings.\textsuperscript{230} The continued existence of these requirements maintains Congress's goal of heightening responsibility in bankruptcy proceedings. However, narrowing the definition of "debt relief agencies" will continue to encourage attorney responsi-

\textsuperscript{224} See Porter, supra note 200.


\textsuperscript{226} Id. at 283-284.

\textsuperscript{227} Id.

\textsuperscript{228} Hersh v. United States, 347 B.R. 19, 23 (N.D. Tex. 2006); Milavetz, Gallop & Milavetz v. United States, 355 B.R. 758 (D. Minn. 2006) (also holding that § 528(a)(4) is unconstitutional).

\textsuperscript{229} See, e.g., \textit{Model Rules of Prof'l Conduct} 1.3.

bility and ethics without unnecessarily infringing upon the attorney-client relationship as well as attorneys' duty to zealously and effectively represent clients. BAPCPA's increased attorney requirements should be removed to allow those who need relief to find the assistance to do so.

V. Conclusion

Bankruptcy should serve as more than a mere debt collection law. It provides an important social insurance function that should be available when other social safety nets fail. Bankruptcy rehabilitates and bestows mercy upon distressed debtors. The enactment of BAPCPA, however, has severely limited the ability of bankruptcy to serve this legitimate purpose. BAPCPA has foreclosed the availability of bankruptcy to many who desperately need its sanctuary.

BAPCPA creates a system that unfairly penalizes debtors who are already in difficult situations. The increased procedural requirements unnecessarily force debtors to jump through hoops to resolve their unfortunate circumstances. Additionally, they increase the cost of the process itself, denying many the benefits that were once possible to attain through the bankruptcy process.