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PANEL: POLICY DEBATE: IS BAPCPA EFFECTIVE AT ACHIEVING ITS INTENDED GOALS AND OBJECTIVES?

Yes!
No!
Maybe!
We don't have enough information.

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The intended goals and objectives expressed in Congress have always been clear: reduce the rising volume of consumer bankruptcy filings and have consumer debtors who do file bankruptcy pay more to their creditors.[1] If the discussion is limited to "intended" goals and objectives, the answer is brief and easy: NO![2] If the discussion moves to measuring intention by actions rather than words; by studying the legislative choices; by analyzing outcomes and consequences; then the issues become more subtle, complex, and murky.

1. Has the primary expressed objective to reduce the number of filings for bankruptcy by individual debtors been effectively achieved? No, but admittedly we don't have enough information.[3]

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[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Report to accompany S. 256, 109th Cong. 1st. Sess., H.R. 109-031 Pt. 1 (2005).

[2] E.g., the lawyers in Kansas City consulted in Chris Grenz, Lawyers Say Reform Fell Short, Kansas City Bus. J., November 17, 2006.

[3] Total bankruptcy filings are: 1940, 52,320; 1950, 33,392; 1960, 146, 643; 1970, 194, 399. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2682, became effective in October, 1979. In 1980, 331,098 filings included 249,136 chapter 7 petitions and 75,584 chapter 13 petitions. By 1990, the total filings doubled to 782,960; and, by 2000, nearly doubled again to 1,253,444. The choice of chapter to identify the consumer or business nature of the debtor is a bit misleading in light of Toibb v. Radloff, 501 U.S. 157 (1991)(former manager of

The filings for 2005 show a striking drop in filings upon the effective date of BAPCPA, inviting the fallacy of *post hoc ergo propter hoc* ("After this, therefore because of this"). The huge increase in filings in the fourth quarter of 2005 immediately preceding the October 17, 2005, effective date points to anticipatory filings to avoid the stringent provisions of BAPCPA about to take effect. Evening out of the October bulge over a longer term suggests little deviation in filings. [4]

2. Will those individual debtors who file bankruptcy pay more to creditors? Yes! No! Maybe! We don't have enough information (and probably never will have). Shouldn't the Micawbers of the world be more responsible; and the Little Dorrits of this world be given solace? This is the question that made Charles Dickens rich and famous. Academics writing about it get neither, but they do get tenure. Bankruptcy filings have corresponded with debt and/or depression for many years, and BAPCPA does nothing about either.

Here is a puzzling question by way of example: Why should Utah – a state of small, homogenous population, dominated by a faith that consistently emphasizes personal responsibility and financial integrity — top the state list of individual bankruptcy? [5] Gambling must be ruled out — a cause that Todd

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utility could use chapter 11) and In re Moog 774 F.2d 1073 (11th Cir. 1985) (housewife could file chapter 11). Chapter 13 "consumer" has arguable margins as illustrated by the unincorporated entrepreneur, an over-the-road truck operator who seeks to cramdown the modification of the security interest in his semi-tractor upon the secured party in Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997). Annual filings are summarized in Christopher McHugh and Thomas A Sawyer eds., The 2005 Bankruptcy Yearbook & Almanac (15th ed. New Generation Research, Inc.). Current filings by federal district are available from the Administrative Office of the United States Courts. Www.uscourts.gov. The most convenient access is the American Bankruptcy Institute website which includes bankruptcy filings by state. Www.abiworld.org.

[4] See Charles J. Tabb, Consumer Filings: Trends and Indicators, Part I, XXV ABI J 1 (No. 9 November, 2006).

[5] Dave Anderton, Utah Falls to No. 3 in U.S. — for bankruptcy filings, Deseret Morning News, April 18, 2006. (Utah dropped from its number one ranking in 2002 to 2004 to current third place). American Bankruptcy Institute, Statistics of Households per filing, Rank During the 12-Month Period Ending June 30, 2002, indicates the Utah filings of 33.6 petitions for each household is highest per household filings amongst the states.

Zywicki and Judge Edith Jones argue should be explored — because Utah is one of two states with no form of allowed gambling.[6] On the other hand, Elizabeth Warren points to children as the consistent factor in bankruptcy [7] and Utah is a leader in population increase.[8] The best available study concurs that the

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[6] There is no solid evidence of connection, but a link between gambling and bankruptcy is intuitive. Richard I. Aaron, How Much Does the Rise in Gambling Cause a Rise in Bankruptcy?" 7 J. of Bankruptcy L. and Prac. 307 (1998). The anecdotal base for intuiting the connection are the cases most recently collected in Richard I. Aaron, Access to Justice: Bankruptcy 2006 Utah L. Rev. at note 5 (forthcoming). Judge Edith H. Jones and Todd J. Zywicki, It's Time for Means-Testing B.Y.U. L. Rev. 177, 244 (1999) assail bankruptcy scholars for not including "legalized gambling" amongst the factors to consider in financial distress of consumers. That there is correlation between gambling and some bankruptcy is undoubted. The problem is that there is also correlation between bankruptcy and divorce, bankruptcy and driving without insurance, bankruptcy and alcoholism, bankruptcy and layoffs, and bankruptcy and recession.

[7] "So where did their money go? It went to basics. The real increases in family spending are for the items that make a family middle class and keep them safe (housing, health insurance), that educate their children (pre-school and college), and that let them earn a living (transportation, childcare, and taxes)..... In other words, today's family has no margin for error. There is no leeway to cut back if one earner's hours are cut or if the other gets sick. There is no room in the budget if someone needs to take off work to care for a sick child or an elderly parent. Their basic situation is far riskier than that of their parents a generation earlier. The modern American family is walking a high wire without a net." Elizabeth Warren, The Middle Class on the Precipice, " Harvard Magazine (January-February, 2006), available at www.harvardmagazine.com/on-line/010682.html. Also, Elizabeth Warren and Amelia Tyagi, The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke, at pp. 6, 13, 173 - 179(Basic Books 2003). "Time-starved households have become easy prey for marketers, whose research shows that parents who spend less time with their children will spend more money on them." Juliet B. Schor, Born to Buy The Commercialized Child and the New Consumer Culture 25 (Scribner, New York 2004) (Study of advertising agencies and family data demonstrates how marketing toward children increases family spending).

[8] Statistical Abstracts of the United States, Table 76, www.census.gov/compendia/statab (2003 data for birth rate of 21.2 and fertility rate of 92.6 showing Utah amongst the highest of the United States); Hovey, Harold A. and Kendra A. Hovey , CQ's State Fact Finder 2006: Rankings Across America, 424 (CQ Press 2006) (Utah birth rate is first amongst the United States); Statistical Abstract of the United States Table No. 74, 2002, www. (Utah birth rate of 21.2 and fecundity rate of 90.6 is amongst highest in the United States); Slater, Courtney M. and Martha W. Davis (eds) State Profiles: The Population and Economy of Each U.S. State 383 - 384 (1st ed. 1999. Bernan Press) (Utah's high population growth ranking is attributed to birth rate and not the in-migration of other high growth ranking states).

distinctive Utah family dynamic is a factor, but only in conjunction with low wages, particularly a gender gap for women, and a higher divorce rate. [9]

A more common explanation for bankruptcy is credit card abuse.[10] Americans are immersed in debt because of excessive consumption. They choose bankruptcy as a way out from the crushing debt which they have heaped upon themselves. [11] If so, they are unwitting victims because they do not understand the

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[9] Jean M. Lown and Barbara R. Rowe, A Profile of Utah Consumer Bankruptcy Petitioners, 5 J of Law and Family Studies 1 (2003). Also, Rosemary Winters, Getting Out of Debt, Salt Lake Tribune, Sunday, January 9th through Tuesday, January 11, 2005; and Steven Oberbeck, Bankruptcy: Flip Side of Utah's Economic Boom, Salt Lake Tribune, Sunday, July 18, 1999.

[10] E.g. Robert Manning, Credit Card Nation. The Consequences of America's Addiction to Credit (New York. Basic Books. 2000). (the dramatic rise in consumer debt is planned strategy of credit card issuers, particularly CitiBank, especially impacting working class, students, and the elderly); and Diane Ellis, The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-offs, and the Personal Bankruptcy Rate, FDIC Bank Trends, No. 98-05 (March, 1998) available at www.fdic.gov/bank/analytical/bank/bt_9805.html looked to Canadian bankruptcy rates for support to her conclusion that the decision in Marquette Nat'l Bank of Minneapolis v. First Omaha Service Corp., 439 U.S. 813 (1978) paved the way for expanded credit card access and increased borrowing which led to a rise in consumer bankruptcy filings. The Supreme Court deferred to the state law of the lender rather than the state law of the card customer in setting interest rates. The result was a race to states with no interest rate limits — the deregulation — particularly South Dakota and then Delaware. Cf., however, Todd J. Zywi cki, An Economic Analysis of the Consumer Bankruptcy Crisis, 99 NW U L Rev. 1463, 1492-1496 (2005) (Increase in credit card debt is simply a substitution for former retail credit debt); and Judge Edith H. Jones and Todd J. Zywicki, It's Time for Means-Testing, B.Y.U. L. Rev. 177, 227 - 242 (1999 (Credit card access is competitive and not aggressively marketed; it is the users who are undisciplined).

[11] "affluenza. n. a painful, contagious, socially transmitted condition of overload, debt, anxiety, and waste resulting from the dogged pursuit of more." John de Graaf, David Waan, and Thomas H. Naylor, Affluenza: The All-Consuming Epidemic at p. 2 (San Francisco: Barrett-Koehler, 2nd ed.2005)(A follow-up to a 1997 television documentary outlines the binge of spending with, pp. 18 et. seq., inevitable bankruptcy consequence for some); "Despite working all these hours, somewhere between a quarter and 30 percent of households live paycheck to paycheck. With the margin of error so thin, it is not surprising that personal bankruptcies are at historic levels." Juliet B. Schor, The Overspent American: Upscaling, Downshifting, and the New Consumer at p. 20. (New York: Basic Books, 1998) (Desire fueled by television provokes spending, p. 72 et. seq.,paid by credit card). The same argument from the perspective of political

exponential growth of credit card debt through uncontrolled interest rate charges.[12]

For some, the bankruptcy growth is moral decay although some argue that moral decay needs to be overcome through stern measures.[13] The influence of medical debt is undoubted but unaddressed by BAPCPA. [14]

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role of consumerism is Lizabeth Cohen, A Consumers' Republic The Politics of Mass Consumption in Postwar America (Alfred A. Knopf, New York, 2003).

[12] American consumers are unaware of the terms of the credit card transactions, especially the "universal default" rule and its effect upon the initial — "come on"— terms. E.g., The Secret History of the Credit Card, Frontline, PBS, November, 2004 (WGBH Educational Foundation) interview with investigator Lowell Bergman and consumers Matthew, Lisa, Desiree, and Elliott. Transcript available at: www.pbs.org/wgbh/pages/frontline/shows/credit/etc/script.htm. The argument is more engagingly told in the story line of a legal secretary in a large Boston law firm whose credit card debt lands her in jail. Boston Legal, ABC.go.com/primtime/boston legal Episode 10, "Legal Deficits" aired December 13, 2005: Jerry Espenson, as banking transactions expert of the law firm declares to the attorney for the credit card issuer: "I have a Harvard M.B.A. and I cannot understand what it says."

[13] "There is no shame anymore with bankruptcy. Some people use bankruptcy for financial planning, and that's wrong." Sen. Charles Grassley,(R) Iowa, Bankruptcy Law? The News Hour, June 8, 1998, available at: www.pbs.org/newshour/bb/law/jan-june98/bankrupt_6-8.html. "...[W]e contend in this part that increased bankruptcy filings have been fueled by an increase in the net economic benefits of filing and by a decline in the level of personal shame and societal stigma that previously deterred individuals from filling bankruptcy. Bankruptcy is now too frequently a choice fostered by irresponsible spending habits and an unwillingness to live up to commitments." Judge Edith H. Jones and Todd J. Zywicki, It's Time for Means-Testing, B.Y.U. L. Rev. 177, 208 (1999). "Rising personal bankruptcy reflects the diminished influence of the Calvanist ethos of thrift and savings in maintaining social control, that is, constraining individual consumption behavior." Robert D. Manning, Credit Card Nation. The Consequences of America's Addiction to Credit, 127, 343 note 9 (Basic Books, New York 2000).
Anecdotal explanation may be the most insightful way to understand what drives consumers to choose bankruptcy. E.g, Diana R., Cold Rooms and Red Flowers, AA Grapevine (August 2006) p. 40; available at www.aagrapevine.org/digital archives.(rumination upon the "bad decisions, bad thinking, and bad trust" culminating in a seat in the waiting room of a bankruptcy lawyer).

[14] The degree to which overwhelming medical debt provokes bankruptcy is another commonly assumed but very much disputed cause. E.g., Aparna Mathur, Medical Bills and Bankruptcy Filings, American Enterprise Institute for Public Policy Research (July 19, 2006)

What is the problem which bankruptcy seeks to address: is it weak impulse control or rapacious external forces? Until there is a clear understanding on what precipitates bankruptcy, the reliance on BAPCPA to decrease bankruptcy is the logic of banning Big Macs to stop obesity or stemming STD by stopping the sale of condoms.

3. A subset of the expressed goals clearly identified is the elimination of the abuse of bankruptcy by "bankruptcy planning". No.

There is nothing new in this policy. Bankruptcy is a privilege for the honest but unfortunate debtor; not for the knave or churl . All agree that bankruptcy should be available for those who are unable to pay their debts, but not for those who are just unwilling. [15]

(As a primary cause, medical expense can account for 27% of bankruptcies, but up to 36% when co-factored with credit card debt), available at www.aei.org/publications; David Himmelstein, Elizabeth Warren, Debora Thorne, and Steffie Woolhandler, Illness and Injury as Contribution to Bankruptcy, Health Affairs (Feb. 2, 2005) (Medical bills account for 50% of bankruptcies). But, D. Dranove and M.L. Millenson, Medical Bankruptcy: Myth versus Fact, Health Affairs (Feb. 28, 2006)(Medical bills account for only 17% of bankruptcies); Todd J. Zywicki, An Economic Analysis of the Consumer Bankruptcy Crisis, 99 NW U L. Rev. 1463, 1518 (2006) (The studies of high correlation between medical expense and bankruptcy are flawed by over-inclusion of what is medical expense); and Judge Edith H. Jones and Todd J. Zywicki, It's Time for Means-Testing, B.Y.U. L. Rev. 177, 244 fn. 274 (1999)(The level of uninsured Americans has not changed, therefore medical burden cannot explain the steep rise in bankruptcy). Much of the debates about statistics centers on the question of whether credit card debt should or should not be counted in measuring medical bills. E.g., Shirley Nichols, a debtor who quit her job because of illness with the medical bills charged to credit cards. The News Hour, June 8, 1998, available at: www.pbs.org/newshour/bb/law/jan-june98/bankrupt_6-8.html; Melissa B. Jacoby and Elizabeth Warren, Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress, 100 NW U L. Rev. 535, 557 - 560 (2006)(29% of interviewees used general credit cards for medical expenses and some medical care providers offered specific credit cards).

[15] Local Loan Assoc. v. Hunt, 292 U.S. 234, 244 (1934) (Bankruptcy court is not limited to state wage assignment as lien). This policy is iterated by the Court in applying the present law: Cohen v. de la Cruz, 523 U.S. 213 (1998) (a treble damage award against landlord is not dischargeable); Grogen v. Garner, 498 U.S. 279 (1991) (fair preponderance standard applies to determination that debt is excepted from discharge); and Brown v. Felsen, 292 U.S. 127 (1979) (a bankruptcy court discharge determination is different cause of action from state debt determination).

Congress added the power to dismiss for substantial abuse of chapter 7 as part of the 1984 revision, but refused to require the use of chapter 13. [16] It was promptly construed as stressing the debtor's ability to repay creditors.[17] The Acting Director of the Executive Office of the United States Trustee, for example, points to the 2005 dismissal of an abusive chapter 7 petition in Utah by a real estate agent with annual income up to $300,000 and an $800,000 home, to illustrate the vigilance by his trustees.[18] So if the objective is to eliminate abuse of bankruptcy as distinguished from withdrawing decision-making power from judges, how do we compare the 707(b) case applications from the 707(b) means test? The initial results do not suggest a new day for creditors. The available data through June reveals ninety-four percent of petitioners were below the median income, and only ten per cent of the remaining six percent were "presumed abusive." The United States trustee chose not to seek dismissal of a quarter of these.[19]

The most obvious opportunity for pre-bankruptcy planning is excluding

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[16] Congress rejected the proposal of S. Rep. No. 446, 97th Cong., 2d Sess 14 (May 27, 1982), accompanying S. 2000, that future earnings and payback through chapter 13 be considered as a factor of abuse in choose chapter 7. See Rep. Rodino, 130 Cong. Rec. H7489 (daily ed. June 29, 1984). However, Rep. Anderson stated his belief that the conference report supports dismissal of a chapter 7 petition if the debtor is capable of using Chapter 13. 130 Cong. Rec. H7499 (daily ed. June 29, 1984).

[17] Courts rested heavily upon the income of the debtor which could be used to pay creditors. E.g., In re Taylor, 212 F.3d 395 (8th cir. 2000), cert. denied, 121 S.Ct. 564 (2000) (pension which is excluded as property of the estate should still be used to determine income available to pay creditors); In re Stewart, 175 F.3d 796 (10th Cir. 1999) (the totality of the debtor-physician's circumstances should measure his ability to pay creditors including his choice to lower his income through a fellowship); In re Kornfield, 164 F.3d 778 (2nd Cir. 1999) (exempt pension should be factored into hypothetical plan to repay creditors); In re Lamanna, 153 F.3d 1 (1st Cir. 1998)(monthly income while living at home with parents means income is $770 above expenses); In re Koch, 109 F.3d 1285 (8th Cir. 1997)(exempt workmen's compensation should be factored into hypothetical plan to repay creditors

[18] Statement of Clifford J. White before the House Subcomm. On Commercial and Admin. Law., Comm. On the Judiciary (July 26, 2005) available at www.justice.gov/ust/eo/.

[19] Remarks of Clifford J. White III, Georgetown University Law Center, October 16, 2006. Www.justice.gov/ust/eo. Cf. Marianne B. Culhane and Michaela M. White, Catching Can-Pay Debtors: Is the Means Test the Only Way? 13 Am. Bky. Inst. L. Rev. 665, 675 (2005) estimating that 15% of their studied bankruptcies revealed income above the median.

those debts for payment of secured debt .[20] These are the "...average monthly payments....[for] ...all amounts...contractually due...." Automobile installment payments and home mortgage are the items that immediately come to mind, but there is no qualifying language as to "reasonable and necessary". The most highly leveraged debtor, even if leveraged for snowmobiles, personal watercraft, entertainment centers and the like, are the debtors who will fall below the median because of high expense deductions.

The fair conclusion is that Congress withdrew judicial discretion to determine "substantial abuse" by debtors with too much income which it then replaced with a complex ---and therefore costly to implement --- formula fraught with ambiguity and opportunities to game the system.[21]

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[20] Bankruptcy Code § 707(b)(2)(A)(iii)(I). Of course the cases disagree on how to construe this language, but the disagreement is not over the kind of collateral which the debtor may acquire with deductible security agreement payments. Instead it is the date on which to measure the obligation in relation to current monthly income and presumed abuse. In re Singletary, 2006 WL 2987945 (Bankr. S.D. TX 2006) holds that surrendered collateral (a truck) cannot be used, but property subject to a statement of intention (house) can be used because the trustee's motion to dismiss is the determinative date and not the date of the petition. The court follows In re Walker, 2006 WL 1314125 (Bankr. N.D. GA 2006) that collateral covered in debtor's statement of intention is not excluded in making the deduction to find presumed abuse; but Walker takes a dictionary definition of "scheduled" to conclude that the date of the petition controls. The court in In re Singletary rejects this view. In re Harris, 2006 WL 2933891 (Bankr. E.D. OK 2006) and In re Skaggs, 349 B.R. 594 (Bankr. E.D. MO 2006) hold that collateral subject to debtor's statement of intention to surrender excludes the contractual payments from deduction to measure presumed abuse.

Income above the median is relevant to measure the chapter 13 debtor's disposable income in Bankruptcy Code § 1325(b)(2), and the formula of § 707(b)(2)(A) is referenced as the proper gauge. Therefore In re Love, 350 B.R. 611 (Bankr. M.D. Ala 2006) excludes property covered by the statement of intention to surrender in measuring disposable income. The unpublished opinion of In re Oliver, 2006 WL 2086691 (Bankr. D. OR 2006) disagrees and allows property subject to surrender or avoidance to be included in the disposable income calculation.

[21] The chief lobbyist for the bankruptcy legislation, Jeff Tassey, is quoted in Peter Gosselin, Judges Say Overhaul would Weaken Bankruptcy System, Los Angeles Times, March 29, 2005, at A1, as dismissing bankruptcy judges as "...[P]art of the problem...they're not real judges."

4. The mandatory pre-bankruptcy counseling and pre-discharge financial management class hope to teach debtors to manage credit more successfully. Surely any education of the debtors to function in this complex credit world works some good.[22] We don't have enough information, and probably won't have that information until we know what we're trying to measure.

The approach is deja vu all over again. In the angst and analysis leading to the 1978 "Reform Act", how to deal with the alarming consumer bankruptcy filing – then hovering around 220,000 per year — was the major focus of Congress. The Commission appointed by Congress to make a ten year study proposed an administrative agency to counsel the debtor and consider the best relief avenue as well as evaluate how the debtor got into this mess.[23]

Congress mandates a pre-filing counseling [24] and a pre-discharge financial management course [25] for individual debtors to be administered by agencies approved by the United States trustee.[26] Providers of pre-bankruptcy counseling must be non-profit, but not providers of pre-discharge financial management instruction. Who are the providers and who is supervising the providers: Are the

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[22] Whether the education will be sophisticated enough to overcome the problems raised in note 12, supra, may be in doubt. More important, compulsory education at the point of bankruptcy may be a little late.

[23] Executive Director, Comm. On The Bankruptcy Laws of the United States, Report of the Comm. On the Bankruptcy Laws of the United States. H.R. Doc. 137, 93d Cong., 1st Sess. Part I, pp. 9-12, 39 - 55, 120 - 123 (1973). Stanley Rutberg, Ten Cents on the Dollar: The Bankruptcy Game (1973) at p. 10: "The Bankrupts themselves generally fall into two categories – the honest schnook who gets into debt over his head through bad judgment or unfortunate circumstances and the cool professional bankrupt who knows precisely what he's doing, runs up a mountain of debts and then hurries to the bankruptcy courts where he can thumb his nose at angry and frustrated creditors." Also, D. Stanley and M. Girth, Bankruptcy: Problem, Process, Reform (1971) pp. 47 - 53, poor credit management by ignorant debtors. G. Sullivan, The Boom in Going Bust – The Threat of a National Scandal in Consumer Bankruptcy (1968).

[24] Bankruptcy Code §§ 109(h) and 521(b),

[25] Bankruptcy Code §§ 727(a)(11) and 1328(g).

[26] Bankruptcy Code § 111

non-profit standards of the I.R.S. sufficient?[27] What is the overlap with the criteria of the United States trustee now in proposed regulations?[28] What supervision is provided by the trade association such as the National Foundation of Credit Counseling?[29] If Congress hopes to enlighten debtors on the alternatives to bankruptcy, the initial experience is not impressive. The National Foundation for Credit Counseling reports that its members delivered 485, 963 certificates of pre-bankruptcy counseling, dominantly by telephone and internet versus face-to-face counseling; and 144,459 financial management counseling certificates, more than one-third of which was conducted face-to-face.[30] While it claims significant improvement in financial knowledge, less than four percent of those counseled chose not to file bankruptcy.

5. Every enactment is exemplary of the legislative process. Independent of the policy debate over the ills of bankruptcy and their cure, this legislation is a perverse example. The greatest cost is shoddy draftsmanship because uncertainty costs, and contradiction costs more.[31] Some of the problems may be remedied by

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[27] I.R.C.§ 501(c)(3); Office of Chief Counsel Memorandum 200620001(5/19/2006); and N.Y. Times, May 16, 2006 Sec. C p. 6(cancelling of tax-exempt status for predator credit counseling agencies).

[28] Fed. Register 38076 - 38085 (July 5, 2006).

[29] Www.nfcc.org "New Member Application".

[30] Www.nfcc.org "Consumer Credit Counseling and Education Under BAPCPA. Year One Report" and "Meeting the Mandate. A Six Month Progress Report". The telephone/internet mode is 16% less time than the face-to-face for pre-filing counseling, but up to two-thirds more time consuming for financial management sessions. It claims an average cost of $50.96 with only $38.47 recouped in fees, with the greatest loss ($17.51) in face-to-face pre-filing counseling sessions.

[31] A simple example is the "automatic dismissal" which Bankruptcy Code § 521(i)(1) imposes upon the debtor who fails to provide mandated documents by the 46th day after the filing of the petition. "Automatic" is a new term of art which suggests a mechanical event belied by the language of Bankruptcy Code §§ 521(i)(2) inviting a request for dismissal and 521(i)(4) empowering the court to decline the request. Another simple example is the pre-bankruptcy credit counseling mandated by Bankruptcy Code § 109(h) but referring to "waiver" and "exemption" from the requirement in 109(h)(3)(A)(i) and 109(h)(3)(B) when only a deferral from the requirement is expected. Ambiguous new terms of art play into the divergent incentives amongst debtor and creditors. Ambiguity becomes an invitation to litigate or,

subsequent amendment.[32] Some may be interpreted to reach a practical solution.[33] Some will be found unconstitutional.[34] Some will simply have to be ignored.[35] The

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alternatively, becomes a bargaining chip in negotiation. Negotiation is frequent over issues such as family support, opposition to a repayment plan or a hassle over the discharge of particular debts.

[32] The filing fee progression is, again, an example. Congress made incongruent changes to 28 U.S.C. § 589(a)(b)(1), which was effective immediately by Pub. L. No. 109-13 (May 11, 2005) changing the filing fee to $220. A technical correction in percentages of 28 U.S.C. § 589(b)(2) was enacted in Pub. L. 109-72 § 6058(a).

[33] E.g., In re Wilbur, 2006 WL 1687586 (Bankr. Ct. D. UT. June 21, 2006, Judge Thurman) (Bankruptcy Code § 1325(b)(1)(B) "unsecured creditors" means non-priority creditors to avoid absurd result). Another example is the $125,000 cap imposed by Bankruptcy Code § 522(p) upon a homestead acquired within 1215 days preceding the petition. In re McNabb, 326 B.R. 785 (Bankr. D. AZ 2005) found the statute could only apply to two states literally. The predicate of 522(p)(1) "...as a result of electing under subsection (b)(3)(A)..." limits the application to those states which have not opted out of 522(d) and which have homesteads above $125,000. Other courts reject a plain meaning approach. In re Kane, 336 B.R. 477 (Bankr. D. NV 2006) found that the " undoubted intent of Congress to close the 'mansion loophole' renders the "election" ambiguity a scrivener's error which the court should correct. In re Blair, 334 B.R. 374 (Bankr. N.D. TX 2005) held that the cap did not apply to the increased equity during the 1215 days preceding bankruptcy upon a home which the debtor acquired outside of the 1215 days. Such was not an "interest that the debtor acquired." In re Virissimo, 332 B.R. 201 (Bankr. D. NV 2005) found that the "election" referred to in Bankruptcy Code § 522(p)(1) is the election to declare a homestead exempt. Alternately, the statute is ambiguous and the intent of congress was to apply to all homestead claims. The court, 332 B.R. 208, certifies the issue to the Ninth Circuit Court of Appeals. In re Kaplan, 331 B.R. 483 (Bankr. S.D. FL 2005) holds that the $125,000 cap applies to states which have opted out of 522(d) in light of congressional intent. In re Landahl, 338 B.R. 920 (Bankr. M.D. FL 2006) agrees and holds that the $125,000 cap applies to Florida homestead.

[34] E.g., Bankruptcy Code § 526(4), bars an attorney from counseling a debtor "...to incur more debt in contemplation of...filing a case...." Hersh v. United States, 2006 WL 2088270 (N. D. TX 2006) held that the over-inclusive provision on increase in debt, offends the First Amendment as an unconstitutional intrusion upon the attorney-client relationship.

[35] One example is the requirement that every "debtor" file copies of its tax returns. Bankruptcy Code § 521(e)(2)(A)(I). By definitions of "debtor" and "person" in Bankruptcy Code § 101(13) and (41), corporations such as Enron and United Airlines would be included. Part of this absurdity is that no trustee normally exists in a chapter 11 case. To whom is the required tax return submitted: to itself as debtor in possession or will "trustee" be expanded to include the United States trustee? Another example is the command to the clerk of Bankruptcy

obligation of counseling may be deferred upon the proper application by the debtor, but what form must the application take; is certification required or not?[36] The mandated filing of documents and certification carry a sanction of automatic

Code §§ 342(d) and 707(b)(2) to give written notice within 10 days of the filing of a petition that a presumption of abuse arises, a conclusion requiring judicial construction upon a number of computational elements. Another example is Bankruptcy Code § 521(a)(1)(v) and (vi)imposing the duty upon each "debtor" to report income changes and forecast 12 month's of projected income. Another example is the designation of "debt relief agency" to be disclosed by every lawyer who gives bankruptcy advice to a consumer client whose income is below $150,000. Bankruptcy Code §§ 101(3), (4A),(12A), and 527. The entire firm of an attorney giving advice to a client about the threat to his or her pension rights provoked by an airline bankruptcy filing becomes "a debt relief agency" that must disclose such on all of its communications such as letterhead and faxes. Or, the firm traditionally advising its client as landlord or creditor about bankruptcy is a "debt relief agency." Another example is Bankruptcy Code §§ 101(10A) and 707(b)(7) which computes current monthly income as a six month average that includes the income of a non-debtor spouse.

[36] The term is not defined. 28 U.S.C. § 1746 describes a "certificate" as part of a "sworn declaration, verification, certificate, statement, oath, or affidavit" as being a writing that is subscribed under penalty of perjury. E.g.,In re Mingueta, 338 B.R. 833 (Bankr. C.D. CA 2006)(unsubstantiated request for waiver by pro se debtor cannot be considered); In re Miller, 336 B.R. 232 (Bankr. W.D. PA 2006)(FAX from unpaid agency is not a certificate. Treats as a motion to extend time and notes that agency can receive reasonable fee as an administrative expense.); In re La Porta, 332 B.R. 879, 881 - 82 (Bankr. D. MN 2005) (statement must be made under penalty of perjury); In re Hubbard, 333 B.R. 373, 375 -76 (Bankr. S.D. TX 2005)(Sworn statement must comply with 28 U.S.C. § 1746). Cf. In re Graham, 336 B.R. 292 (Bankr. W.D. KY 2005)(Motion must be signed by debtor but need not comply with 28 U.S.C. § 1746); In re Talib, 335 B.R. 417, 420, reconsideration denied, 335 B.R. 424 (Bankr. W.D. MO 2005) (certification under penalty of perjury is not required); In re Childs, 335 B.R. 623 (Bankr. D. MD 2005)(Certification need not be under oath); In re Cleaver, 333 B.R. 430 (Bankr. S.D. OH 2005)(Motion signed by debtor and debtor's attorney is sufficient)

dismissal,[37] a new concept which is confusing to the courts.[38]

6. A clear objectives is to increase the cost of using bankruptcy. Has this been achieved? Yes.

The filing fees have increased three times in six months to the current fees of $299 for chapter 7 and $274 for chapter 13. [39]

7. Is there an objective to encourage lawyers to choose another area of practice? Yes, but we don't have enough information.

The cost of legal representation is increased in a number of ways. A direct cost is the increased burden upon the lawyer whose service measure is time. The lawyer is responsible for assembling and evaluating the documents now added. More significant, the lawyer must sign off on the debtor's information putting a due diligence burden that will be reflected in increased fees.[40] Some burdens seem

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[37] Bankruptcy Code § 521(i)(1) "....[I]f an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required subsection (a)(1) [statements and certificates other than tax returns and statements of intention] within 45 days of the date of the filing of the petition, the case shall be automatically dismissed on the 46th day after the date of the filing of the petition." As discussed in note 22 supra, the "automatic" description of the dismissal is questioned because a creditor can "request the court to enter an order" and the court must comply within 5 days. Bankruptcy Code § 521(i)(2). The court can give limited extension to avoid dismissal. Bankruptcy Code § 521(i) (3) and (4).

[38] Seem e.g., In re Fawson, 338 B.R. 505 (Bankr. D. UT 2006) where the court finds that it is without discretion or authority to enter extension if not requested within 45 days. The court urges confused debtors to file ameliorative affidavits, e.g. that no payment advices were received by an unemployed debtor. The court also suggests that "comfort orders" confirming that case was dismissed automatically will be entered..

[39] Filing fees are set in 28 U.S.C. § 1930. The Bankruptcy Reform Act and Consumer Protection Act of 2005 § 325 originally set the fee at $200 for chapter 7 and $150 for chapter 13. A fourth increase is pending before Congress in H.R. 5585, 109th Cong. 1st. Sess.

[40] Bankruptcy Code § 707(b)(4)(C)(i) - (ii). "The going rate for low-end Chapter 7 bankruptcies range form $700 to $1,100. The added burden of the new law could add another $1,000 or so to those fees, bankruptcy lawyers predict." Terry Carter, The Exodus Begins. Lawyers Wonder Whether Chapter 7 Will be a Viable Practice Area under New Law. ABA J 12 (June 2005).

pointless such as the notice which the attorney for the debtor must provide that duplicates the notice which the clerk must provide.[41] Then there is the "Scarlet Letter"[42] imposed on each lawyer as a "debt relief agency."[43] Some lawyers choose to find a different practice.[44]

The attorney cannot simply tell the debtor to assemble the data and do the math. Neither can the attorney slough it off as a problem for the paralegal.[45] The attorney for the debtor must certify accuracy for the schedules. [46]

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[41] Bankruptcy Code §§ 342(b) and 521(a)(1)(B)(iii). The debtor must be told of the "general purpose, benefits, and costs" of the different bankruptcy chapters and warned of the consequences of fraudulent concealment.

[42] Nathaniel Hawthorne, The Scarlet Letter, 1850 (Classic American novel in which Hester Prynne must wear a letter "A" upon her gown in colonial Massachusetts to signify her adultery as part of a Puritan code to deter conduct by creating shame).

[43] The designation of "debt relief agency" must be disclosed by every lawyer who gives bankruptcy advice to a consumer client whose income is below $150,000. Bankruptcy Code §§ 101(3), (4A), (12A), and 526 - 528. "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." Bankruptcy Code §§ 526(a)(4) and 528(a)(4). The United States Bankruptcy Court for the Southern District of Georgia denied that attorneys who engaged in regular law practice were subject to the label. In re Attorneys at Law & Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. GA 2005). As developed in note 35, supra, the designation is required of all lawyers who might touch bankruptcy.

[44] Terry Carter, The Exodus Begins. Lawyers Wonder Whether Chapter 7 Will be a Viable Practice Area Under the New Law" ABA J 12 (June 2005) (Non-lawyer petition preparers abound; bankruptcy will be limited to boutique firms; firms revising their prior practice of doing bankruptcy as a pro bono activity);

[45] Stuart A. Gold, Ethics: Swearing Contest – Certifications of Information and Other Ethical Quandaries of the New Law, 120105 ABI-CLE 235 (December 1 - 3, 2005). (Attorney's professional responsibility is to supervise the accuracy of the paralegal).

[46] Certify that the attorney has made a "reasonable investigation", Bankruptcy Code § 707(b)(4)(C)(i); and certify that the petition is "well grounded in fact", Bankruptcy Code § 707(b)(4) (C) (ii) (I); and certify that the "attorney has no knowledge after inquiry" that the schedules and petition contain no incorrect information, Bankruptcy Code § 707(b)(4)(D).

Judge Thomas F. Waldron, Ethics: Swearing Contest: Certifications of Information and Other Ethical Quandaries of the New Law, 120105 ABI CLE 201 (December 1- 3, 2005) is a formidable list of obligations for a attorney representing the consumer debtor. The ABA Section

of Business Law offers a new Bankruptcy Deadline Checklist by Norman Pernick and Jay Shulman which now runs 165 pages.