

ARTICLES

A FRESH START FOR PERSONAL BANKRUPTCY REFORM: THE NEED FOR SIMPLIFICATION AND A SINGLE PORTAL

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INTRODUCTION

If it were possible to file for the bankruptcy of a legislative “reform,” a leading candidate for the first case would be the 2005 bankruptcy legislation.¹ Soon after its enactment, bankruptcy experts began to refer to it by the fanciful acronym BARF (perhaps for “BAnkrupcy ReForm Act” or “Bankruptcy Abuse Reduction Fiasco”), a sure sign of the enterprise’s distress. This locution sprang from a felt need for an honest title (and a pronounceable acronym)² for the legislation. “The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”³ commits two counts of intentional fraud in its name alone. The law, which will be referred to hereafter simply and neutrally as “the 2005 Act,” does not do a good job of preventing abuse and also does not protect consumers but rather puts new burdens on all filers, even the worst-off who are clearly not abusers.⁴ While judges, trustees, and lawyers will cope, resist, and generally perform large and small acts of courage and subversion to keep the system running,⁵ it is already clear that the 2005 Act is causing a dreadful waste of time and money. Bankruptcy is often unwisely

1. Pub. L. No. 109-8, 19 Stat. 23 (amending scattered sections of 11 U.S.C.). The formal name, “the Bankruptcy Abuse Prevention and Consumer Protection Act,” is objectionable in ways that are described *infra* in the text.

2. “BAPCPA” is impossible to say without repetitive drills. The acronym has already produced numerous pronunciations (hard C, soft C, and saying the name of each of the last three letters). Some use a scrambled or dyslexic version, “BAPCAP,” which in turn has led to a crude variation, adding an “R” before the second “A.”

3. Pub. L. No. 109-8, 19 Stat. 23 (amending scattered sections of 11 U.S.C.).

4. See Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005) [hereinafter Wedoff, *Means Testing*] (stating that the means test “is not simple and is not likely to achieve what its sponsors intended”). See also Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”*, 79 AM. BANKR. L.J. 191, 191 (2005) (“[B]ankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law. At the same time other debtors, often the higher income individuals the bill was ostensibly aimed at, will find themselves better off than before because of generous new exemptions for retirement and education savings accounts and a means test which can be turned to the debtor’s advantage . . . by the careful planning that only higher income debtors can afford.”).

5. See Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 169-70 (2005) (noting that the legislation’s impact will be filtered by the day-to-day actors in the bankruptcy system, making it highly unpredictable).

delayed, dimming recovery prospects. Quick action could save the bankruptcy system from more wasteful floundering.

The demand for justice could be satisfied with an adversary proceeding for malpractice against the 2005 Act's principal drafters, after discovery to find out who they were (no one seems to be claiming credit).⁶ Making use of the equitable character of bankruptcy proceedings, creative, appropriate sanctions could be designed; suggestions would no doubt flow in from interested parties.

The bankruptcy of the 2005 Act should be a reorganization, not a liquidation. While the 2005 Act is a botched project, it nonetheless exposes a leaner, more efficient personal bankruptcy system waiting to emerge. Sometimes taking two steps backward can reveal a way forward. The 2005 Act takes a couple of significant steps.

First, this legislation broke the back of the notion that the Bankruptcy Code ("the Code") provides individuals free access to a pure fresh start from old debts. The Code did not do so before, but now it is even more apparent that Congress has a goal of not giving a discharge to debtors with excess income unless they make some repayment.⁷

Second, Chapter 13 has lost much of its luster. It was always problematic for most of its users, either because they had no ability or

6. Although the persons who did the initial drafting of the legislation have not been coming forward to claim credit, others have been attempting to identify them to place blame. One account is that five lawyers working for the credit industry drafted the first version. See Brian J. Rogal, *Bankruptcy Law In Shambles*, available at <http://www.inthesetimes.com/site/main/article/2662/> (reporting that Professor Kenneth N. Klee said that about five people, including Professor Todd J. Zywicki and several lobbyists, wrote the legislation and also that a group that small cannot coherently revise something as intricate as the Bankruptcy Code). See also Sommer, *supra* note 4, at 192 & n. 3 (2005) (stating that the 2005 legislation's consumer provisions were largely drafted by lobbyists and mentioning George J. Wallace, for the American Financial Services Association, as one of them); Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOOD HALL L. J. 189, 193 n. 6, 200-02 (1999) (noting that the bill was reputedly drafted at a law firm for the credit industry, which thereafter largely resisted experts' efforts to fix even technical errors).

7. See 11 U.S.C.A. § 707(b) (West 2006) (reducing the test for dismissal to "abuse" and detailing a presumed abuse test). Under the pre-2005 Act version of § 707(b), Chapter 7 cases could be and were dismissed for "substantial abuse" based on ability to pay, a provision that the United States trustee system increasingly used in the last years before the 2005 Act. See Jacoby, *supra* note 5, at 171 & 190 n.15 (citing the United States Department of Justice Trustee Program Annual Report of Significant Accomplishments). Another reason that there was never a pure fresh start system is that many debtors repaid some old debt in Chapter 7, with and without reaffirmation. See Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 740-41 (1999) [hereinafter Culhane & White, *Debt After Discharge*] (discussing use of both ride-through and reaffirmation in Chapter 7).

no intention to complete a three-to-five-year repayment plan.⁸ Although many well-meaning and optimistic debtors entered into Chapter 13 to try to do the right thing, two-thirds did not complete their plans.⁹ Now, Chapter 13 is less voluntary¹⁰ and, for several reasons, even less promising as a way for debtors to deal effectively with their problems.¹¹ As a result, perhaps Chapter 13 will wither away,¹² or better yet, future reform legislation could deliver the *coup de grace*.

In short, now is a good time to begin thinking about simplifying the personal bankruptcy system by having a single portal. This proposal may seem quixotic; most bankruptcy experts do not think even technical amendments are politically feasible in the near term. However, it is possible that a structural overhaul is more feasible because it would not require Congress and its staff to clean up the

8. Some debtors used Chapter 13 to cure an arrearage on a secured debt, something they could not do in Chapter 7; thus some of the worst-off (those behind on secured as well as unsecured debts) were in Chapter 13, where they also often attempted significant unsecured debt repayment. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 528-29 (1993) [hereinafter Braucher, *Lawyers and Consumer Bankruptcy*] (discussing the common practice of using Chapter 13 to cure arrearages on secured debts, with the result that some of the worst-off debtors ended up in Chapter 13).

9. See Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. (forthcoming 2006) (finding an overall discharge rate of 33% in a study of Chapter 13 cases filed in 1994 in seven districts); see also NAT'L BANKR. REV. COM'N, REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 90 (1997) [hereinafter NBRC REPORT] (stating completion rate in Chapter 13 was 32%); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 410-11 (1994) (reporting an average completion rate of 31%, with a majority of Chapter 13 plans not completed in all regions of the country).

10. The new means test of § 707(b), added by the 2005 Act, is designed to push more debtors into Chapter 13. Those who are above median income face mandatory five-year commitment periods and potentially face unrealistic budgets under § 1325(b), although standing Chapter 13 trustees and bankruptcy judges have discretion to accept rebuttal of findings of presumed abuse. 11 U.S.C.A. § 707(b)(2)(B)(i) and § 1325(b)(3)-(4). Thus, under the 2005 Act, some debtors will be in Chapter 13 because their lawyers advised them of possible difficulty in passing the means test in Chapter 7 and of the likelihood that Chapter 13 would provide easier access.

11. Chapter 13's broader discharge has been reduced, 11 U.S.C.A. § 1328, and so has the potential for cramdown on secured debts, 11 U.S.C.A. § 1325(a). See Sommer, *supra* note 4, at 221-30 (discussing Chapter 13 changes, and concluding that Chapter 13, as amended, will be "more difficult and expensive, as well as much less efficient for debtors . . .").

12. The problems with Chapter 13 have been apparent for many years. See generally William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85 (1989) [hereinafter Whitford, *Repeal Chapter 13?*] (discussing the low completion rate, the huge difference in practices from district to district, the lack of explanation for the frequency of use of Chapter 13 as opposed to Chapter 7, and the phenomenon of debtors' lawyers steering them into Chapter 13 because of pressure from judges and trustees).

horrid mess they have made; a fresh start at drafting a workable law would be much more pleasant and promising than trying to undo the defacement of the Code wrought by the 2005 Act. Furthermore, only a reconceived system would have any hope of achieving the purported goals of the 2005 Act. Chapter 13, which can be thought of as an unsuccessful division of an otherwise viable enterprise, could be terminated, and its signature feature, repayment over time, could be moved into Chapter 7. Recognizing the stated goals of Congress (abuse prevention and consumer protection) as legitimate, this proposal is for a better means of accomplishing them without the unintended (giving Congress the benefit of the doubt) negative consequences.

Several years ago, Professor Charles Mooney and I suggested collecting excess income from debtors after they file in Chapter 7, which we called means measurement, as a more effective reform than that ultimately enacted in 2005.¹³ In this Article, I go a step further and suggest combining means measurement with the elimination of Chapter 13. This idea is different from an earlier proposal by Professor William Whitford¹⁴ to repeal Chapter 13 in that my proposal is not just to repeal Chapter 13, but to incorporate repayment into Chapter 7 for those debtors who can afford it. In addition to low completion rates,¹⁵ Chapter 13 has produced little unsecured debt repayment at high administrative cost.¹⁶ By objective criteria, Chapter 13 is a failure. The problem is not a lack of energy or talent on the part of Chapter 13 trustees¹⁷ but rather that they have

13. See Jean Braucher & Charles W. Mooney Jr., *Means Measurement Rather Than Means Testing: Using the Tax System to Collect from Can-Pay Consumer Debtors After Bankruptcy*, AM. BANKR. INST. J., Feb. 2003, at 6 (proposing repayment for a period after filing in Chapter 7, but not necessarily an end to Chapter 13).

14. See generally Whitford, *Repeal Chapter 13?*, *supra* note 12. See also Hung-Jen Wang and Michelle J. White, *An Optimal Personal Bankruptcy Procedure and Proposed Reforms*, 29 J. of Legal. Stud. 255 (2000) (presenting a mathematical model concerning optimal wealth and earnings exemptions in a one-chapter system). See *infra* Part IIA.-C. for a discussion of major implementation issues for a relatively simple single portal system, including how long to require repayment, how to measure surplus income and thus ability to repay something, when to permit collateral retention and on what terms, and the need to set federal bankruptcy exemptions and not allow opt-out or use of state exemptions.

15. See NBRC REPORT, *supra* note 9, at 90 (referring to a 32% completion rate for voluntary Chapter 13 plans).

16. See Norberg & Velkey, *supra* note 9, (finding that from 1994 to 2003, in the districts studied, between 21 and 30% of Chapter 13 trustee disbursements were to general unsecured creditors and that Chapter 13 costs ranged from 59 to 75% of disbursements to general unsecured creditors, and also noting that because in some districts debtors make their regular mortgage payments directly to creditors, the percentage of debtor payments made to general unsecured creditors is lower than these figures suggest).

17. See Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact*

an impossible task, which has been made even worse by the 2005 Act. These trustees could be redeployed to oversee repayment in a single individual bankruptcy option, an amended Chapter 7. By putting all consumer filers into one chapter and then sorting them according to ability to repay old debt, a single portal system could prevent abuse without gatekeeping that reduces access to bankruptcy for those who desperately need it.

Setting up a single consumer portal would enable the personal bankruptcy system to focus more effectively on both of its core goals—repayment of old debt to the extent reasonably feasible and discharge thereafter. The keys to a successful reorganization of personal bankruptcy using a single chapter are to set realistic and easy-to-compute repayment requirements and to eliminate the complicated new hurdles to bankruptcy access that are burdening all filers, including the worst-off. An early study under the 2005 Act indicates that few debtors with means are attempting to access the bankruptcy system. Credit counselors who were surveyed in February 2006 indicated that less than five percent of the debtors who sought the newly required pre-bankruptcy briefing on available credit counseling services qualified for a debt management plan.¹⁸

To implement a single portal system, Congress would need to address forthrightly the questions how much repayment to demand and for how long before debtors can get a bankruptcy discharge. Congress could set a test itself or delegate the job to an administrative agency, an approach that would make it easier to experiment and set expectations in light of empirical evidence of the achievable. In sum, to simplify the system and realize the supposed goals of the 2005 Act, a reconfigured Chapter 7 could make discharge conditional on

on *Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 572-79 (2001) (concerning practices Chapter 13 trustees have explored in attempts to increase plan completion).

18. See National Association of Consumer Bankruptcy Attorneys, *Bankruptcy Reform's Impact: Where are All The "Deadbeats"?* (Feb. 22, 2006), available at http://nacba.org/files/main_page/022206NACBAbankruptcyreformstudy.pdf (surveying credit counseling agencies that have provided credit counseling briefings to debtors since October 17, 2005, the effective date of the 2005 Act, and finding respondents reported that from 1 to 5% of debtors, an average response of 3.3% of debtors, qualified for a debt management plan). These results, though measuring something somewhat different, are very similar to those in a study of how many Chapter 7 debtors would have had to pay under the version of the proposed means testing legislation under consideration in 1998, the Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 101 (1998). See Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANK. INST. L. REV. 27, 31 (1999) [hereinafter Culhane & White, *Means-Testing Real Chapter 7 Debtors*] (finding that 3.6% of sample Chapter 7 debtors would have to pay under that means test).

meeting a realistic repayment requirement that can be simply stated. In addition, an administrative system could be implemented to oversee this repayment under new standing Chapter 7 trustees. A system of assessing contributions from post-filing surplus income, similar to the approaches taken in Canada and Australia,¹⁹ could accomplish the goal of requiring repayment from debtors with means, without creating barriers to bankruptcy access for those without them.

I. WHY THE 2005 ACT IS A FAILURE

A. A Capsule History of the 2005 Act

The story of the 2005 Act begins with the Bankruptcy Reform Act of 1978²⁰ (“the 1978 Act”). The credit industry never accepted the 1978 Act’s perceived liberalization of personal bankruptcy.²¹ The industry continued to fight for constraints on use of personal bankruptcy. Deregulation of interest rates between 1978 and 1984

19. See *infra* Part II.A (discussing requirements in Australia and Canada for contribution of surplus income). It should be noted that both countries also have two alternatives to straight bankruptcy, and one of these in each country is the “consumer proposal” arrangement, which has some resemblance to Chapter 13, but in neither country is the proposal form as common as Chapter 13 is here, and in both countries there is controversy about whether the proposal approach is serving debtors well. See Jacob S. Ziegel, *COMPARATIVE CONSUMER INSOLVENCY REGIMES—A CANADIAN PERSPECTIVE* 48 (2003) (noting that 16.8% of consumer bankruptcies in Canada in 2001 were consumer proposals, compared to 30% of US consumer bankruptcies in Chapter 13, and also noting initial high failure rates in the consumer proposal option as well as trustee incentive to put consumers in that option due to fee structure, but describing the Canadian consumer proposal option as being successful in attracting debtors with relatively higher incomes and more homes and cars). See also *id.* at 104-106 (describing the Australian proposal system as involving controversy about the persons who typically administer the cases without being registered trustees and about the initial high rates of non-completion and also noting that the rate of use of proposals in Australia grew rapidly from introduction of the system in 1996 to 2001-02, when the Official Trustee accepted for processing as proposals 5,647 cases, a figure that amounted to 23 percent of business and nonbusiness bankruptcies, with creditors voting to approve 58 percent, a requirement for a proposal to go forward for administration as a debt agreement). In sum, my proposal for a single portal draws only on the straight bankruptcy law of Canada and Australia in order to outline a possible streamlined US consumer bankruptcy system. Under this approach, individuals who could afford Chapter 11 could still use it to propose a plan of reorganization. See *infra* Part II.D. for a discussion of the possibility of adding a surplus income requirement to Chapter 7, while preserving Chapter 13, and of why that approach is inferior to having a single portal for all but the high-end consumer cases that could feasibly be brought in Chapter 11.

20. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified in scattered sections of 11 U.S.C. (2000)).

21. See William T. Vukowich, *Reforming the Bankruptcy Reform Act of 1978: An Alternative Approach*, 71 GEO. L.J. 1129, 1146-48 (1983) (arguing that liberalization in the 1978 legislation was more perception than reality).

led to increased supply and use of consumer credit and, as a result, increased over-indebtedness and bankruptcy.²² Despite compelling evidence that deregulation and the resulting “democratization of credit” were the primary precipitating causes of a bankruptcy boom, the credit industry tried and to some extent succeeded in blaming the increase in use of bankruptcy on the 1978 Act.²³ In 1984, the industry succeeded in getting Congress to add the “substantial abuse” test for dismissal of Chapter 7 cases and a requirement that Chapter 13 debtors commit “disposable income” for at least three years.²⁴ However, the credit industry was not fully satisfied by these discretionary standards and in the 1990s renewed the campaign for restricting access to bankruptcy.²⁵

When Congress authorized creation of the National Bankruptcy Review Commission (“NBRC” or “the Commission”) in the 1994 Act,²⁶ the charge was to propose modest improvements to increase uniformity rather than to come up with a plan for structural change.²⁷ The “Gingrich Revolution” in the 1994 congressional elections emboldened the credit industry to seek “means testing.”²⁸ The

22. See generally Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate* (Mar. 1998), available at http://www.fdic.gov/bank/analytical/bank/bt_9805.html (concerning the impact of deregulation of interest rates on consumer lending, particularly greater lending to lower income persons leading to increased credit problems and personal bankruptcy).

23. *Id.*

24. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 11 & 28 U.S.C. (2000)) (adopting a substantial abuse test into § 707(b) and disposable income test into § 1325(b)); see also DAVID A. SKEEL JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 196 (2001) (concerning the continuing creditor campaign for restrictions on bankruptcy access after the 1978 Act and the adoption of restrictions in 1984).

25. See SKEEL, *supra* note 24, at 196 (stating that the provisions adopted by Congress in the 1984 legislation reflected a compromise between creditors and bankruptcy professionals).

26. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 601-610, 108 Stat. 4106, 4147-50 (1994).

27. The NBRC REPORT noted that the Commission was assigned the job of making a study of the national bankruptcy system and recommending improvements but was admonished “not [to] disturb the fundamental tenets of current law,” with which Congress said it was “generally satisfied.” NBRC REPORT, *supra* note 9, at iv (quoting the House Judiciary Committee Report accompanying the legislation establishing the Commission, H.R. REP. NO. 103-835, at 59 (1994)). Following this charge, the Commission majority rejected proposals for “radical or architectural” change. NBRC REPORT, *supra* note 9, at iv.

28. Between the time Congress voted to establish the Commission in 1994 and the time the Commission issued its report in 1997, the authorizing environment had changed. See SKEEL, *supra* note 24, at 197-201 (noting the ideological split in the Commission). The “Gingrich Revolution” put the House of Representatives under Republican leadership for the first time in more than thirty years, and the Commission minority, egged on by the credit industry, felt emboldened to suggest

“means testing” concept was floated within the Commission, but never developed in detail.²⁹ Instead, the industry prepared legislation in secret and released it before the NBRC published its report,³⁰ effectively pre-empting the modest suggestions of the Commission’s majority report.³¹

With twenty-twenty hindsight, it is clear that the Commission majority and staff would have been wise to propose a way to address abuse, no matter how small the problem was. Estimates of the number of “can pay” debtors who managed under the pre-2005 Act to get a Chapter 7 discharge ranged from 3.6% to 15%, with most experts putting the figure at the low end of that range.³² In other words, eighty-five to over ninety-five percent of debtors were having trouble meeting their current expenses, making repayment of old debt unrealistic. This is why these debtors were in bankruptcy. The problem of abuse, in the sense of ability to repay old debts out of income, was small. Still, it would have been prudent to put a set of “abuse prevention” proposals into the *NBRC Report*, at least as an alternative to the majority’s recommendations, in case Congress wanted to address abuse. With disinterested expertise, it would have been possible to suggest ways to force repayment by those with adequate incomes while avoiding burdening those without means.

The Commission did recognize that true abuse prevention would include capping the assets that can be kept in bankruptcy, something the 2005 Act does not do. Rather, it rewards those who plan ahead and set up asset protection trusts and acquire substantial homesteads in permissive states.³³ Congress proved unwilling to override state law

major changes in the law to prevent abuse. *Id.* Lost in this process was any effort to clearly articulate what constitutes abuse and how to achieve the goal of preventing it without burdening those with no means to repay. *Id.*

29. See NBRC REPORT, *supra* note 9, at 89-91 (discussing lack of detail on the cost and implementation of “means testing” proposed by the credit industry).

30. See *id.* at 89 (referring to legislation already proposed).

31. See Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission’s Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 1-2 & n.5 (1998) [hereinafter Braucher, *Increasing Uniformity*] (noting that the Commission’s recommendations got less attention than the proposal for means testing); see also SKEEL, *supra* note 24, at 202 (concerning the introduction of legislation before the Commission completed its report).

32. See Culhane & White, *Means-Testing Real Chapter 7 Debtors*, *supra* note 18, at 29-31 (discussing an industry-financed Ernst & Young study that initially indicated that 15% of debtors would have to pay something under means-testing and that later lowered the estimate to 11%). The article also describes the authors’ empirical study, which found that 3.6% of Chapter 7 debtors would have to pay something under the 1998 version of the legislation. *Id.*

33. See *infra* notes 101-108 and accompanying text (outlining loopholes in the 2005 Act concerning asset protections).

protections of the rich from their creditors.³⁴ The Commission proposed addressing this problem by setting a \$100,000 cap on the homestead exemption and a \$20,000 limit on additional exemptions.³⁵

The failure of the Commission majority to propose new provisions to catch debtors with surplus income gave the credit industry an opening for its legislation. It is hard to oppose legislation that supposedly would prevent bankruptcy abuse and protect consumers.³⁶ The complexity of the legislation made it very difficult to explain reasons for opposition. After lopsided votes for the legislation in 1998,³⁷ most senators and representatives were on record in favor, making it hard for them to admit error and change their positions.

34. See Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 399 & 418 n.11 (2005) (noting that Congress failed to set a federal ceiling on state exemptions).

35. See NBRC REPORT, *supra* note 9, at 125-38 (reporting on proposed lump sum limits on homestead and other exemptions).

36. The primary "consumer protection" objective of the legislation seems to be to protect debtors from bankruptcy by trying to divert them to credit counseling. 11 U.S.C.A. § 109(h) (West 2006). Thus, the legislation requires a pre-bankruptcy briefing on credit counseling. *Id.* It also requires those who provide bankruptcy assistance, apparently including lawyers, to advertise themselves as "debt relief agencies." 11 U.S.C.A. § 526; see *infra* notes 58-61 and accompanying text; the debt relief agency provisions indicate an intention to protect debtors from petition preparers and perhaps also from their own lawyers. Alternatively, "consumer protection" in the title of the 2005 Act may be a reference to the claim, later disproved, that bankruptcy was costing every American family \$400 a year. See Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 13-20 [hereinafter Warren, *The Market for Data*] (detailing why the \$400 figure is spurious, drawing upon government and other sources). The House Judiciary Committee Report on the 2005 Act refers to all these concerns and several others. See generally House Judiciary Committee Report, H.R. REP. NO. 109-31 (2005), reprinted in 2005 U.S.C.C.A.N. 88. It mentions under "consumer debtor bankruptcy protections" the following: strengthening professional standards for attorneys and others who assist consumer debtors, certain changes in the Truth in Lending Act, new disclosures associated with reaffirmation agreements, expanded asset protection, the required credit counseling briefing ("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," but not noting that debtors considering bankruptcy may already have very low credit ratings and may improve credit access by getting a bankruptcy discharge), new notices in bankruptcy, and a new provision for waiver of filing fees in case of need. *Id.* at 17-18. The report also mentions a concern that when creditors are unable to collect debts because of bankruptcy, some of that loss is passed on "to responsible Americans," and it even cites the phantom \$400 cost to every American household. *Id.* at 4. See *supra* Warren, *The Market for Data* (explaining why the true figure is a small fraction of that amount). Another problem with this "consumer protection" rationale is that it does not take into account the feedback loop involved in high priced credit, in which the high cost not only reflects higher risk but creates it.

37. See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 512, 515 (2005) (stating that the House vote on H.R. 3150 was 306 to 118, and the Senate vote on S. 1301 was 97 to 1).

The details of the problems were hard to fathom, even for experts, but they did eventually come to light in the long period that the legislation was pending. Opponents managed to stall the legislation for seven years, but proponents finally were successful in 2005.³⁸

Unfortunately, the 2005 Act's defects were much too convoluted to explain in a sound bite. At any rate, they were not fixed. Furthermore, credit industry lobbyists and their most dedicated supporters in Congress knew that opening up the drafting process would provide an opportunity for rethinking policy choices, so even the legislation's typos and technical flaws were not addressed. Professor Kenneth Klee, a congressional staffer when the 1978 Act was written and a lifelong Republican, tried to get technical corrections made as legislative chairman of the National Bankruptcy Conference from 1992 to 2000.³⁹ He said the Republican congressional staff "largely spurned the efforts of the conference to work out linguistic issues . . . even when we showed them pages and pages of grammatical and typographical errors."⁴⁰ Early in 2006, Klee predicted a great deal of litigation because "the new law is so poorly crafted and so internally inconsistent."⁴¹

B. Burdens on All, With Loopholes Galore

The argument for the 2005 Act was that it would stop abuse. A typical statement by a proponent was that of Representative George W. Gekas: "Unfortunately, bankruptcy has become a way for reckless spenders to escape their debts."⁴² The 2005 Act was not sold to

38. See generally *id.*

39. See Justin Scheck, *Bankruptcy Rewrite Predicted to Bring a Flood of Appeals*, THE RECORDER (Feb. 8, 2006), <http://www.law.com/jsp/article.jsp?id=1139306710471> ("[T]he country's top bankruptcy lawyers say the legislation is intellectually and linguistically insolvent.")

40. *Id.*

41. *Id.*

42. See Jensen, *supra* note 37, at 495 (quoting this statement from a hearing on the NBRC REPORT, *supra* note 9, held in the fall of 1997, when Gekas was chairman of the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee). Gekas also spoke of a new phenomenon of a "bankruptcy of convenience" that was "borne out of the loss of stigma the word bankruptcy once, but no longer carried." See Braucher, *Increasing Uniformity*, *supra* note 31, at 5. Gekas, who sponsored the 1998 House legislation, appears to be a rare politician who has paid a price for support of the bankruptcy legislation. He was defeated in 2002 by Representative Tim Holden, in a race that pitted two sitting members of Congress against each other because of redistricting. Gekas's support for the bankruptcy bill was an issue in the campaign. See *Holden Seen As Having Momentum in Race with Gekas*, BULLETIN BROADFAXING NETWORK, Oct. 15, 2002 (describing a campaign mailing by the Democratic State Committee making an issue of Gekas' support for the "mansion loophole" in bankruptcy legislation sponsored by Gekas). The credit industry's support for Gekas's campaign was an issue used against him. See Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through The News Media*, 41 HOUS. L. REV. 1091,

Congress as a way to make access to bankruptcy difficult for all while permitting relatively well-off persons who plan ahead to shelter both income and assets from their creditors.

As it becomes clearer that critics of the legislation were right and that it was not well designed to achieve abuse prevention or consumer protection,⁴³ the honest response would be for Congress to go back to the drawing board as soon as possible. More than technical corrections are needed. A structural overhaul is essential to prevent abuse without jeopardizing needed debt relief.

Rather than try to describe in excruciating detail all the new burdens, loopholes and uncertainties of the legislation, this article will discuss most of them briefly so as not to lose the big picture. The objective is to give the reader an appreciation of how ineffective the legislation is as a means to achieve its purported purposes, while at the same time causing presumably unintended consequences. This analysis is the background for the simplification proposal in Part II.

1. *The primary new burdens on debtors and their lawyers under the 2005 Act*

a. *Means testing*

Under the 2005 Act, every debtor, no matter how poor, must submit a means-testing calculation.⁴⁴ Because the presumed abuse test does not reflect actual income and expenses, some debtors will need to make a rebuttal to avoid dismissal of their cases.⁴⁵ The presumed abuse test uses a six-month look-back on income⁴⁶ and uses

1099, 1105 (2004) (commenting on Congressmen McCollum's and Gekas's support of credit industry proposals to bankruptcy legislation and their eventual campaign losses).

43. See *supra* note 36 (concerning supposed consumer protection objectives of the legislation).

44. See 11 U.S.C.A. § 707(b)(2)(C) (West 2006) (requiring every debtor to submit a statement of "current monthly income" and a calculation of whether a presumption of abuse arises under the requirements of § 707(b)(2)(A)(i)). The form used for this purpose is "B22A." Form B22A: Statement of Current Monthly Income and Means Test Calculation (Oct. 2005), available at http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Form_B22A101105.pdf. While the Rules Committee has done its best to minimize the burden on debtors by not requiring expense information from those at or below median income, all debtors still have to fill out the first part of the form concerning income from all sources over the last six months. See *id.* (directing those debtors at or below median income not to fill out the rest of the form).

45. See 11 U.S.C.A. § 707(b)(2)(B) (providing that the presumption of abuse can only be rebutted by a showing of special circumstances, including serious medical conditions or a call to active duty in the Armed Forces).

46. See 11 U.S.C.A. § 101(10A) (defining "current monthly income" as "the average monthly income from all sources that the debtor receives . . . derived during the [previous] six-month period").

IRS guidelines on expenses.⁴⁷ Some debtors will flunk the test and then need to pay for a rebuttal based on actual income and actual reasonable expenses to avoid dismissal, a cost that will be prohibitive for some.

In addition, there is the possibility of a third level of means-testing based on a “totality of the circumstances” review.⁴⁸ Even low-income debtors, if they happen to have low expenses, could be considered abusers under this test. There is already debate about whether the “totality of the circumstances” test gives judges discretion to find abuse even though the debtor passed the presumed abuse test without any fraud or manipulation.⁴⁹

47. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I); see Internal Revenue Service, *Collection Financial Standards*, <http://www.irs.gov> (follow “Individuals” hyperlink; then follow “Collection Financial Standards” hyperlink) [hereinafter *Collection Financial Standards*] (last visited Apr. 13, 2006) (providing that the IRS “national standards” cover food, clothing, personal care, and entertainment, depending on the family size, and debtors with more income are allowed higher expenses in these categories). Under the means test, debtors can deduct the national standards amount plus five percent of the food and clothing allowance, if the debtor can demonstrate that this is reasonable and necessary. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I). The IRS also has “local standards” covering transportation (on a regional basis) and housing standards (on a county by county basis), and both of these standards are incorporated into the presumed abuse test. *Collection Financial Standards, supra*. Because secured debts are separately deducted and unsecured debts will be discharged, parts of the national and local standards attributable to debt payment must be deducted from the IRS expenses. See 11 U.S.C.A. § 707(b)(2)(A)(ii)(I) (precluding IRS standard amounts reflecting payments for debts from inclusion in the monthly expenses calculation); 11 U.S.C.A. § 707(b)(2)(A)(i), (iii)(I) (providing for the deduction of “all amounts scheduled as contractually due to secured creditors . . .”). The IRS collection guidelines also include “Other Necessary Expenses,” without specific allowances, and have been incorporated into Bankruptcy Form B22A, lines 25-32. See http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Form_B22A101105.pdf. The means test also picks up “actual monthly expenses” of this sort and states that they “include reasonably necessary health insurance, disability insurance, and health savings account expenses” of the debtor, the debtor’s spouse, and dependents. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I).

48. See 11 U.S.C.A. § 707(b)(3)(B) (providing for a review based on “the totality of the circumstances, including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor,” an example that is unusual and perhaps suggests coverage of circumstances other than actual surplus income that does not cause the debtor to flunk the presumed abuse test).

49. See Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 666 (2005) (arguing against the use of the “totality of the circumstances” test in § 707(b)(3)(B) to permit another review of ability to repay, absent serious debtor misconduct, such as fraud or manipulation); see also Wedoff, *Means Testing, supra* note 4, at 236-38 (arguing that the “totality of the circumstances” test can be used to fix loopholes in the presumed abuse test).

b. Mounds of new paperwork

The 2005 Act buries debtors and their attorneys in paperwork. Debtors must provide payment advices for the last sixty days.⁵⁰ Because many workers do not save this paperwork, this requirement sends debtors on a scavenger hunt to get copies from employers. If after gathering these, the lawyer does not immediately file the case, it is necessary to gather more pay stubs. Also, each debtor must submit a statement of “monthly net income,”⁵¹ an undefined term of uncertain meaning.⁵² Moreover, each debtor is required to submit a tax return or a transcript of a tax return,⁵³ and possibly additional returns or transcripts during the debtor’s case.⁵⁴ Finally, each debtor must provide a certificate of receipt of notice, required by § 342(b), describing available credit counseling and bankruptcy options under Chapters 7, 11, 12, and 13.⁵⁵ Failure to submit the required paperwork results in “automatic dismissal,” a new concept of uncertain meaning.⁵⁶ A dismissal means the debtor would have to pay a new filing fee to start a new case, and the dismissal could also trigger new provisions providing for the automatic stay to expire or not to arise in repeat cases, absent court action (and thus necessitating a motion to extend the automatic stay or put in place a stay).⁵⁷

50. 11 U.S.C.A. § 521(a)(1)(B)(iv).

51. 11 U.S.C.A. § 521(a)(1)(B)(v).

52. See Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA* (draft as of July 11, 2005) [hereinafter Wedoff, *Major Effects*], available at <http://www.abiworld.org/pdfs/s256/mainpoints11.pdf>, at 3 (noting three possible meanings of “monthly net income:” gross income less payroll deductions, amount left after taking allowable deductions from “currently monthly income” under the means test of § 707(b), or the difference between debtor’s income reported on Schedule I and expenses reported on Schedule J).

53. 11 U.S.C.A. § 521(e)(2)(A)(i).

54. 11 U.S.C.A. § 521(f)(1)-(3). Because of a new Chapter 13 requirement that debtors file the last four years’ tax returns, if they did not do so at the time, before the first meeting of creditors, 11 U.S.C.A. § 1308, prudent attorneys now gather copies of returns for the last four years to make sure this requirement is met.

55. 11 U.S.C.A. § 521(a)(1)(B)(iii)(I). The form to comply with the notice requirement is “B 201.” Form B 201, United States Bankruptcy Court: Notice to Individual Consumer Debtor Under § 342(b) of the Bankruptcy Code (Oct. 2005), http://www.uscourts.gov/rules/Revised_Rules_and_Forms/b201_1005.pdf. This form attempts to do something useful, especially for pro se debtors, by expressly telling debtors that they are required to undergo credit counseling. *Id.*

56. 11 U.S.C.A. § 521(i)(1). “Automatic” dismissal sounds as though dismissal happens without a court order, until one reads § 521(i)(2) and (4), suggesting that the court has to act to dismiss the case. See 11 U.S.C.A. § 521(i)(2),(4) (noting that “any party in interest may request the court to enter an order dismissing the case,” and “the court may decline to dismiss the case”).

57. 11 U.S.C.A. § 362(c)(3)-(4) (describing how, if a debtor had a previous case dismissed during the previous year, the stay expires thirty days after filing the later case except if the dismissal was under § 707(b) and the later case was filed in another

c. New burdens on lawyers

A lawyer who provides bankruptcy advice is apparently now a “Debt Relief Agency” (“DRA”) and thus subject to elaborate disclosure requirements. DRAs must explicitly state in any advertisement: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”⁵⁸ In addition to the new disclosure requirements, DRAs are also subject to many substantive restrictions, including a prohibition on advising a client “to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee,” even though sometimes incurring more debt is a reasonable and legal thing to do.⁵⁹ There is some uncertainty about whether lawyers are DRAs,⁶⁰ but if so, the DRA provisions are particularly problematic. They may confuse the public about the difference between attorneys and petition preparers. Furthermore, in addition to making lawyers spend time explaining misleading or confusing required disclosures, some of the DRA provisions may be unconstitutional infringements upon free speech and state judicial power to regulate the bar.⁶¹

chapter, and how a stay shall not go into effect upon the filing of a later case if the debtor had two or more cases pending within the previous year that were later dismissed, except if refiled under another chapter after dismissal under § 707(b)).

58. 11 U.S.C.A. § 526(a)(4) and § 528(a)(4).

59. See 11 U.S.C.A. § 526(a)(4) and generally §§ 526-528 (listing the various requirements imposed on DRAs); see also Sommer, *supra* note 4, at 206-11 (discussing the complexities, uncertainties, and absurdities of the DRA provisions). An example of when it would be reasonable to incur more debt in contemplation of filing a case is to take out a home equity loan or to borrow against a retirement account to pay a nondischargeable debt for back support obligations. It is also reasonable for a lawyer to discuss borrowing from a relative, with disclosure, to buy a reliable car or to pay the lawyer’s fee. On the other hand, even without the 2005 Act, it would be malpractice to advise a client to borrow without intent to repay because this would be fraudulent and would make the debt nondischargeable. 11 U.S.C.A. § 523(a)(2).

60. See *In re Att’y’s at Law & Debt Relief Agencies*, 332 B.R. 66, 71 (Bankr. S.D. Ga. 2005) (holding, in an opinion issued the morning of October 17, 2005, the general effective date of the 2005 Act, that attorneys admitted to practice before that bankruptcy court are not debt relief agencies “so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise”).

61. See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 577-79 (2005) (arguing that forcing debtors’ lawyers to advertise that they are debt relief agencies may violate the First Amendment); see also Reed Smith, *Commercial & Restructuring Bankruptcy Alert*, Jan. 2006, at 3, available at <http://www.reedsmith.com/> (follow “Library” hyperlink; then follow “Newsletter” hyperlink) (discussing the yet to be decided case of *Milavetz, Gallop & Milavetz, P.A. v. United States*, No. 05-CV-2626 (D. Minn. filed Nov. 14, 2005), in which a law firm in Minneapolis, Minnesota, has commenced an action in the United States District Court for the District of Minnesota challenging the constitutionality of the “debt relief agency” limitations on attorneys). The plaintiffs are a law firm that practices consumer bankruptcy in the District of Minnesota and the firm’s attorneys. *Id.* The action seeks a declaratory judgment that these provisions of the 2005 Act inappropriately classify attorneys as

When signing a petition or motion, bankruptcy lawyers must certify that they engaged in a “reasonable investigation” of the circumstances giving rise to the case and made a determination that the petition or motion is “well grounded in fact,” standards that have given rise to a great deal of debate about the degree of “due diligence” now required of debtors’ lawyers, who may be put in the position of investigating their clients.⁶² A lawyer who fails to meet these standards may be subject to civil penalties in addition to the costs and attorneys’ fees of the trustee in bringing a § 707(b) motion to dismiss.⁶³

In addition to these burdens, lawyers face many new, highly uncertain legal issues.⁶⁴ The likely result of all these changes is a

“debt relief agencies” and that as a result the law limits attorneys’ ability “to ethically and competently advise and represent clients and illegally restricts the attorneys’ right to free speech.” *Id.* The plaintiffs further allege that the restrictions, if applied to attorneys, restrict the public’s right under the First Amendment to receive information from attorneys. *Id.* Another case, *Connecticut Bar Ass’n v. United States*, was filed in the United States District Court in Connecticut on May 11, 2006 by the Connecticut Bar Association and the National Association of Consumer Bankruptcy Attorneys, along with some named lawyers and one client. *See NACBA Files Suit to Have Provisions of New Law Held Unconstitutional*, NAT’L ASSOC. OF AM. BANKR. ATTY’S, http://nacba.com/files/main_page/complaint.pdf (last visited June 5, 2006) (providing copy of the complaint and other documents in the lawsuit). Declarations filed in the lawsuit detail the new burdens on lawyers, including telling clients that there are certain things that are lawful to do but which the lawyer cannot advise the client to do and also explaining to clients the ways in which required disclosures are false or misleading. *Id.* These declarations show a concern that the public will be misled into confusing attorneys with petition preparers. A required disclosure (“If you decide to seek bankruptcy relief, you can represent yourself,” 11 U.S.C.A. § 527(b)), may sometimes conflict with an attorney’s professional opinion, particularly in complicated cases where the debtor is not sophisticated or even literate.

62. 11 U.S.C.A. § 707(b)(4)(C)(i)-(ii). *See generally* CORINNE COOPER & CATHERINE E. VANCE, *ATTORNEY LIABILITY IN BANKRUPTCY* (2006) (discussing the new responsibilities of attorneys under the 2005 Act). *But see* Consumer Practices Subcommittee, Fellows of the American College of Bankruptcy, *Best Practices for Consumer Bankruptcy Cases (including Commentary)* (Feb. 8, 2006), available at www.amercol.org, (stating:

The debtor client is, of necessity the primary source of information in a consumer bankruptcy case, and the client’s statement of the facts, obtained in a thorough and probing interview, should be presumed to be true absent particular circumstances that give rise of a suspicion that it is not. The debtor’s attorney should also obtain all documents reasonably available that are necessary to complete the petition, statement and schedules as fully and accurately as is reasonably possible. The debtor should be advised that all information presented to the court must be truthful and complete).

In general attorneys are now much more likely to gather extensive files of debtors’ various financial records, including several years of bank account and credit card statements and tax records, credit reports, and to search real estate and court records.

63. *See* 11 U.S.C.A. § 707(b)(4)(A)-(B) (providing for sanctions, costs, and attorneys fees only if the lawyer violated the standard of Rule 9011 of the Federal Rules of Bankruptcy Procedure).

64. *See, e.g., supra* notes 49-61, 72-73, and 78-86, and accompanying text (listing many of the legal issues lawyers will face under the 2005 Act).

decline in the number of lawyers willing to provide debtors with bankruptcy assistance, especially lawyers who only did a little of this work before the 2005 Act, while those remaining in bankruptcy practice on behalf of debtors are typically increasing their fees substantially.⁶⁵

d. Higher filing fees in response to new paperwork and other burdens on the system

The filing fee for Chapter 7 went up by \$65 in 2005, from \$155 to \$220, while the fee for Chapter 13 went down by \$5, from \$155 to \$150.⁶⁶ In April 2006, the Chapter 7 filing fee went up again, to \$245, and the Chapter 13 filing fee jumped substantially, to \$235.⁶⁷ With trustee and miscellaneous fees, the amount paid at filing went up to \$299 in Chapter 7 and \$274 in Chapter 13.⁶⁸

e. Counseling and debtor education requirements

In addition to these initial fees paid to the court, debtors, prior to filing, are required to undergo a briefing on credit counseling, typically at a cost of about \$50.⁶⁹ Absent circumstances giving rise to limited exceptions,⁷⁰ an individual debtor is not eligible for any chapter unless the debtor receives a briefing outlining available

65. See Sommer, *supra* note 4, at 211 (stating that the main impact of the 2005 Act will likely be “to drive general practitioners out of bankruptcy practice,” which would especially burden debtors in small towns and rural areas). See also Tom Shean, *Bankruptcy Law is Making for More Deliberate Filing*, VIRGINIAN-PILOT, Mar. 17, 2006, at D2 (quoting Harry W. Jernigan III, a Virginia Beach attorney who specializes in bankruptcy, as stating that his firm installed \$150,000 in office and computer equipment to scan and store additional documents and that “you had to gear up for the changes in bankruptcy law or get out,” and also stating that his fees in Chapter 7 have about doubled under the new law); see also Greg Stiles, *Oregon lawyers abandon bankruptcy practice*, MAIL TRIB., Aug. 23, 2005 (quoting Ashland attorney Joe Charter as saying he was leaving the field primarily because of the expense associated with new due diligence obligations and because of the risk of liability).

66. 28 U.S.C.A. § 1930(a)(1)(A)-(B) (West 2006).

67. See *id.*

68. See U.S. BANKRUPTCY COURTS, BANKRUPTCY FILING FEES, <http://www.uscourts.gov/bankruptcycourts/fees.html> (last visited June 5, 2006) (listing these total fees paid at filing effective April 9, 2006).

69. 11 U.S.C.A. § 109(h) (West 2006); see Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549, 567 (2005) (describing generally the risks of predatory behavior by credit counseling providers and of low-quality services, and using the example of the \$50 fee).

70. 11 U.S.C.A. § 109(h)(2)-(4) (providing for exceptions when the US trustee determines counseling is not available in the district, when there are exigent circumstances but with some limits discussed *infra* in note 73, and when the debtor cannot complete counseling due to incapacity, disability, or active military duty in a military combat zone).

credit counseling, together with a related budget analysis, in the 180-day period before filing.⁷¹ Failure to get this briefing could result in a trap especially likely to catch pro se debtors, although judges could interpret the provision to avoid this effect.⁷² There are also tricky issues about getting a briefing at the last minute before filing in bankruptcy to stop a foreclosure.⁷³

Moreover, after filing a petition, debtors are required to participate in a course in personal financial management,⁷⁴ usually at a cost of

71. 11 U.S.C.A. § 109(h)(1).

72. See *In re Dixon*, No. 05-6059EM, 2006 WL 355332, at *5 (B.A.P. 8th Cir. 2006) (upholding an order to dismiss the case of a debtor who failed to get counseling prior to filing and also discussing the possibility of remedies other than dismissal of the case, such as dismissing or striking the petition, but noting that the debtor had not raised this issue). Section 109(h) does not say what the remedy is for ineligibility, in this case a curable ineligibility; to avoid unintended consequences, courts could permit a debtor who filed without counseling to get it and then permit the debtor to file another, amended petition post counseling. There is a new reference in the 2005 Act to amending the petition, in 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa). The advantage of the approach of not dismissing the case is that it would not require the debtor to file a new case, with a new filing fee, and it would not potentially trigger § 362(c)(3)-(4) concerning cases filed within a year after dismissal. Also, the automatic stay would continue in place while the debtor got counseling and filed an amended petition. Concerning the consumer protection purpose of the counseling requirement, see H.R. REP. NO. 109-31, at 18 (2005), reprinted in 2005 U.S.C.A.N. 88, 104, stating that 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.” For a case that takes the consumer protection purpose into account, see *In re Rios*, 336 B.R. 177, 180 (Bankr. S.D.N.Y. 2005), noting that Congress sought to enlarge debtors’ options not limit them.

73. A debtor who at the last minute learns about the credit counseling requirement may not qualify for an exception for exigent circumstances because the debtor must be able to show that services were not available within five days of requesting them from a provider. 11 U.S.C.A. § 109(h)(3)(A)(i)-(ii). If services were available within five days, but not before the debtor needed to file, apparently the debtor is out of luck. On the other hand, because Internet services meet the requirement, the debtor may be able to obtain Internet services very quickly and meet the requirement. See 11 U.S.C.A. § 109(h)(1) (specifying that the initial credit briefing can be completed by telephone or on the Internet). Another issue, however, is whether services must be obtained at least by the day before filing. An argument that the services may be obtained on the day of filing involves using the dictionary meaning of “date,” which can include the time of day. Section 109(h) does not require that the counseling occur during the 180 days prior to the day of filing, but rather requires counseling within the “180-day period” prior to the *date* of filing. 11 U.S.C.A. § 109(h). A comparison involving other timing language in the Bankruptcy Code is § 547(b)(4)(A), where bankruptcy law explicitly provides for a period to measure back a number of days before the date of filing. See 11 U.S.C.A. § 547(b)(4)(A) (describing the requisite time period as “on or within 90 days before the date of filing”). In contrast, § 109(h)(1) requires counseling “during the 180-day period preceding the date of filing . . .” 11 U.S.C.A. § 109(h). This could be a direction to measure the 180-day period from the time of day that the debtor files. See *In re Warren*, 339 B.R. 475 (Bankr. E.D. Ark. 2006) (upholding day-of-filing counseling on this basis).

74. 11 U.S.C.A. §§ 727(a)(11), 1328(g).

about another \$50.⁷⁵ An individual debtor apparently must take such a course prior to discharge in Chapter 7 or Chapter 13, no matter what caused the bankruptcy.⁷⁶

f. New uncertainty about the best way to keep collateral

The law has become considerably more complex on questions about ways for debtors to keep collateral. Prior to the 2005 Act, using a practice known as “ride-through,” many debtors current on secured loans were able to keep the collateral in Chapter 7 by just continuing to pay the regular contract payments, either because the court would protect them against creditor attempts to repossess or because the creditor acquiesced in accepting the payments.⁷⁷ The 2005 Act eliminates the possibility of court-protected ride-through for personal property collateral, but it provides that the creditor’s remedy when the debtor retains such collateral without reaffirming or redeeming is that the stay lifts.⁷⁸ Creditors are likely to continue in many cases to

75. See Gross & Block-Lieb, *supra* note 69, at 567 (identifying several recommendations for improving the credit counseling and debtor education services).

76. 11 U.S.C.A. §§ 727(a)(11), 1328(g)(1). There is a difference in wording between these two provisions. Section 727(a)(11) provides that a debtor is entitled to a discharge unless the debtor has not received financial management education, suggesting courts could have discretion to grant a discharge even if the course has not been taken, while § 1328(g)(1) provides that the court “shall not grant” a discharge to a debtor who has not taken a course. *Id.*; see 4 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 75.12 (Alan N. Resnick & Henry Sommer eds., 2005) (stating that after the court determines whether or not to grant a discharge under §§ 727 or 1328, the court must hold a hearing in which it informs the debtor either that a discharge has been granted or why a discharge has not been granted).

77. See Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 475-76 (2005) [hereinafter Braucher, *Cars, Homes*] (concerning law and practice of ride-through under pre-2005 Act). Another option for the debtor concerning cars may be redemption at a price just above wholesale value, using a redemption loan. Although the 2005 Act has generally changed the valuation of a secured claim under 11 U.S.C.A. § 506(a)(2) to retail value for consumer personal property collateral, thus giving the creditor a legal entitlement to retail value in a redemption under 11 U.S.C.A. § 722, debtors may be able to redeem for less by taking the position that otherwise they will simply return the collateral to the lender, who would typically only get auction value for it. See Redemption Funding, Inc., http://www.722redemption.com/debtor_attorney.aspx (noting that creditors are often interested in offers that exceed auction value) (last visited June 24, 2006).

78. The applicable authority is in myriad sections. See 11 U.S.C.A. § 521(a)(2) (requiring, as under prior law, debtors to make a statement of intention concerning the property and, “if applicable,” that the debtor plans to redeem or reaffirm); 11 U.S.C.A. § 722 and § 506(a)(2) (concerning redemption of personal property collateral, which in the case of consumer collateral now must be at retail value for a car of the age and in the condition of the debtor’s car); 11 U.S.C.A. §§ 521(a)(6) and 362(h)(1) (providing for the stay to lift as to personal property collateral, but not mentioning real property collateral, and for the creditor to have nonbankruptcy remedies if the debtor does not surrender or state an intention to redeem or reaffirm and perform that intention). Also, a debtor may continue to keep personal

acquiesce in taking full payment, even though the debtor's personal liability will be discharged, because they prefer full payment to surrender of the collateral or a negotiated reaffirmation at less than full debt amount.

In Chapter 13, there is also new uncertainty about how much debtors have to pay to keep cars. Under prior law, debtors typically were required to pay midpoint of wholesale and retail book value to keep their cars; they could cram down the debt to this amount and this was a carrot inducing use of Chapter 13.⁷⁹ There is now a new argument that the secured creditor is legally entitled to full debt amount as to some motor vehicles and other personal property collateral; however, a debtor threat to surrender the collateral could well induce a secured creditor to take less, perhaps continuing the midpoint value as the measure widely used in practice.⁸⁰ To the extent creditors are successful in extracting full debt payment from debtors in Chapter 13 (perhaps when a debtor is so enamored with a particular car that he does not want to risk losing it), it will be more expensive than under prior law to hold on to a car in that chapter. The higher cost and new uncertainty about how much the creditor is entitled to may drive more debtors to try to keep cars in Chapter 7, where they can discharge unsecured debts and then better afford to make their regular car payments.

g. New difficulties with multiple filings

Multiple filings by the same debtor are quite common; sometimes this is a strategy to avoid foreclosure on a home or car, while other times it reflects nothing more than unstable finances, misjudgment

property collateral such as a car and pay the debt if the creditor refuses the debtor's offer to reaffirm the debt on the original terms. 11 U.S.C.A. § 362(h)(1)(B). See Braucher, *Cars, Homes*, *supra* note 77, at 474-81 (arguing that debtors can continue to pay secured debts and thus "ride through" on these debts, with creditor acquiescence in the case of cars and with court protection in the case of homes).

79. See Braucher, *Cars, Homes*, *supra* note 77, at 464 (concerning practice of using midpoint of retail and wholesale value in Chapter 13 after the Supreme Court decided *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997), holding that "replacement value" was the correct measure in Chapter 13, but leaving what that meant to be determined by the bankruptcy courts).

80. See *In re Ezell*, 338 B.R. 330, 342 (Bankr. E.D. Tenn. 2006) (holding that upon surrender of collateral valued at full debt amount under the hanging paragraph of 11 U.S.C.A. § 1325(a), debtor is not liable for deficiency, but noting that parties could negotiate a valuation in cases of retention, perhaps at midpoint of wholesale and retail); see also Braucher, *Cars, Homes*, *supra* note 77, at 469-74 (arguing that in cases where debtor retains collateral in Chapter 13, conventional wisdom that the full debt amount must be paid under the hanging paragraph at the end of 11 U.S.C.A. § 1325(a) is not supported by a close reading of the language or by policy).

or both, resulting in a failed Chapter 13 case.⁸¹ Under the 2005 Act, multiple filings are likely to become more frequent, because as already noted, mistakes in paperwork now can lead to dismissal and in turn require a debtor to file again and pay a new filing fee.⁸² A new filing within a year of a dismissal of one or more previous cases may result in the debtor losing the automatic stay or not getting an automatic stay upon refileing, with a need to move for continuation of the stay or for a court-imposed stay; in either case, the debtor needs to provide clear and convincing evidence of good faith, adding to the complexity of the case.⁸³

h. New complexity concerning exemptions

Debtors who have moved within 730 days before filing cannot use the exemption laws of their domicile, even though there was no intention to seek more generous exemptions.⁸⁴ Lawyers in such cases will have to learn the exemption law of another state, adding to the complexity of otherwise simple cases.⁸⁵

2. New and remaining loopholes abound

a. Sheltering income

Because “current monthly income” is not based on actual current income, but instead is an average based on a six-month look-back,⁸⁶ it

81. See Norberg & Velkey, *supra* note 9 (finding that half of sample debtors in Chapter 13 had filed at least one other case and 10% had filed three or more other cases); see also Jean M. Lown, *Serial Bankruptcy: A 20-Year Study of Utah Filers*, AM. BANKR. INST. J., Feb. 25, 2006, at 24-25 (classifying 10.7% of Utah filers as “serial filers” on the basis that they either had three filings within two years or four or more filings in the last twenty years). Repeat filings can be used to stave off foreclosure even though the debtor has no intention of following through with the bankruptcy case, but in many instances repeat filing just reflects chaos in debtors’ lives or misjudgment about ability to repay in Chapter 13. *Id.* at 68.

82. 11 U.S.C.A. § 521(i)(1); see *supra* notes 56-57 and accompanying text (describing the difficulty involved in filling out all of this new paperwork).

83. 11 U.S.C.A. § 362(c)(3)-(4) (providing that the filing of a later case within a one-year period is presumptively not filed in good faith and that the debtor can only overcome this presumption through a showing of clear and convincing evidence).

84. 11 U.S.C.A. § 522(b)(3)(A).

85. See 11 U.S.C.A. § 522(b)(3)(A)-(B) (providing for the use of the exemption law of the state in which the debtor lived for the longest time in the 180 days before the 730-day period, and if there is a tie among jurisdictions, for the use of federal bankruptcy exemptions). Further new exemption complexity is introduced by § 522(o)-(q), aimed at certain situations involving abuse. See *infra* notes 102, 162 and accompanying text.

86. 11 U.S.C.A. § 101(10A). Debtors whose incomes went down in the last six months may need rebuttal to stay in Chapter 7. See *supra* notes 44-48 and accompanying text.

is possible for debtors to pass the presumed abuse test⁸⁷ of Chapter 7 by reducing their income for some or all of the six months prior to filing. For example, a small businessperson could simply take on less work for a period before filing, or an employee could take a lower paying job for all or part of the six months before filing. Debtors are required to report “reasonably anticipated” increases in income for the twelve months after filing, but what is “reasonably anticipated” is hardly certain.⁸⁸ Increases that are possible but not guaranteed may not be reasonably anticipated.

In addition, deductions from income under the presumed abuse test include payments on secured debts, even if they are not necessary or reasonable.⁸⁹ Thus, buying a new car or a bigger house is a way to pass the presumed abuse test. Lawyers apparently may not advise clients to do this, although perhaps they can tell clients about this aspect of the law without advising them to make use of it.⁹⁰ In some instances, however, buying a car or home would be a reasonable pre-bankruptcy step.⁹¹

Debtors also may include in deductions from income expenses for health insurance, disability insurance, and health savings accounts.⁹² If documented as reasonable and necessary, debtors may deduct up

87. 11 U.S.C.A. § 707(b)(2). It may also be possible to reduce income in order to benefit under Chapter 13, which now uses “current monthly income” in its disposable income test. 11 U.S.C.A. § 1325(b)(2). However, because § 1325(b)(1)(B) uses the phrase “projected disposable income to be received,” it is not clear that a look-back period should be used, as opposed to current income. See *In Re Hardacre*, 338 B.R. 718, 722-23 (Bankr. N.D. Tex. 2006) (holding that “projected disposable income” is forward-looking to the income the debtor reasonably expects to receive during the plan). See generally Henry E. Hildebrand, III, *Unintended Consequences: BAPCPA and the New Disposable Income Test*, AM. BANKR. INST. J., Mar. 25, 2006, at 14 (concerning the ways in which Chapter 13 debtors may have to pay less than they can afford because of the anomalies of the “current monthly income” definition as well as the use of the presumed abuse deductions under § 707(b)(2)(A) to determine disposable income available to fund a plan).

88. 11 U.S.C.A. § 521(a)(1)(vi). Even if debtors do report reasonably anticipated income, this does not affect the application of the presumed abuse test; someone would have to bring a “totality of the circumstances” challenge to raise this issue. 11 U.S.C.A. § 707(b)(3)(B).

89. 11 U.S.C.A. § 707(b)(2)(A)(i)-(iii).

90. See 11 U.S.C.A. § 526(a)(4) (providing that a “debt relief agency” shall not “advise” a debtor to “incur more debt in contemplation of such person filing a case under this title”). See *supra* notes 58-61 and accompanying text (concerning restrictions on DRAs and the issue of whether lawyers are DRAs).

91. A debtor might need a reliable car or affordable housing and anticipate inability to get credit after bankruptcy. Such a debtor might acquire a car or home intending to reaffirm or ride-through on the debt. See 11 U.S.C.A. § 362(h)(1)(B) (suggesting in a new provision that a debtor has a right to reaffirm on the original contract terms or otherwise continue making contract payments and keep the collateral).

92. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I) (identifying several “reasonably necessary” health and safety expenses, which reduce monthly net income).

to \$1,500 a year per child for expenses to attend a private or public elementary or secondary school.⁹³

In some instances, it is easier to pass the presumed abuse test if the debtor has more unsecured debt.⁹⁴ Thus, running up additional unsecured debt can be a way to pass the test. Again, lawyers apparently may not advise clients to do this,⁹⁵ although perhaps they can tell clients about this aspect of the law without advising them to make use of it. However, as under prior law, if debt is incurred without intent to repay, that will make it nondischargeable.⁹⁶

When making a determination whether to dismiss a case for abuse, courts may not take into account that the debtor has made or continues to make charitable contributions.⁹⁷ This may mean there is an unlimited expense deduction for charitable contributions.⁹⁸

A debtor who fails the presumed abuse test can then attempt rebuttal,⁹⁹ and debtors with means can more easily afford to do this. If a debtor is able to pass the presumed abuse test, there are arguments against another level of review under a “totality of the circumstances” test, absent manipulation or bad faith.¹⁰⁰ Overall, the complexity of the abuse tests in Chapter 7 leave plenty of room for those with means to slip through, and courts potentially have a great deal of discretion at the rebuttal and “totality of the circumstances”

93. 11 U.S.C.A. § 707(b)(2)(A)(ii)(IV).

94. 11 U.S.C.A. § 707(b)(2)(A)(i); see Wedoff, *Means Testing*, *supra* note 4, at 242 (giving examples of when increasing unsecured debt allows a debtor to pass the presumed abuse test, for example, when debtors have excess income under the presumed abused test between \$100 and \$166.66 per month).

95. 11 U.S.C.A. § 526(a)(4).

96. See 11 U.S.C.A. § 523(a)(2)(A) (providing that an individual debtor will not be discharged from a debt obtained by “false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition”). However, a lawyer might, for example, explain to a debtor that he should try to dig himself out of his debt, but that if the debtor is driven by circumstances to incur more debt and is unable, despite efforts, to repay it, the debtor will be in a better position to file later on if he has more unsecured debt. See also *supra* note 59 (concerning other permissible borrowing in contemplation of bankruptcy).

97. See 11 U.S.C.A. § 707(b)(1) (providing that these contributions must meet the formal definition of “charitable contribution” under § 548(d)(3), including gifts to qualified religious or charitable entities under § 548(d)(4)).

98. 11 U.S.C.A. § 707(b)(2)(A). Although this section does not list charitable contributions as deductions from current monthly income, if a court does not make allowances for these contributions, that could amount to the court taking them into account, which would be contrary to § 707(b)(1). See Wedoff, *Major Effects*, *supra* note 52, at 19.

99. 11 U.S.C.A. § 707(b)(2)(B).

100. 11 U.S.C.A. § 707(b)(3); see also Culhane & White, *supra* note 49 and accompanying text (arguing against the use of the “totality of the circumstances” test for another round of means testing).

phases of review, where those with resources to pay an attorney will have better prospects.

b. Sheltering assets

The new cap on the homestead exemption, \$125,000, does not apply to a debtor who acquired the interest more than 1,215 days before the filing.¹⁰¹ In addition, asset protection trusts can shelter an unlimited amount during bankruptcy to the extent that transfers were made into them more than ten years before the filing.¹⁰² If transfers were made within the last ten years, the test is whether they were made with “actual intent” to “hinder, delay, or defraud” present or future creditors.¹⁰³ Litigation will have to address whether simply making contributions to an asset protection trust constitutes actual intent to hinder future creditors.

A debtor may exempt up to a million dollars, or even more “if the interests of justice so require,” in an individual retirement account.¹⁰⁴ This is in addition to sheltering pension funds that are either not property of the estate because there are enforceable restrictions on their transfer under nonbankruptcy law,¹⁰⁵ or that are exempt.¹⁰⁶

Also, certain contributions to educational retirement accounts¹⁰⁷ and to state tuition programs¹⁰⁸ are newly excluded from property of the estate and thus are not subject to creditors’ claims. Overall, a debtor who plans ahead can shelter unlimited assets in bankruptcy by using some combination of a homestead, an asset protection trust, an individual retirement account, an educational retirement account, and a pension.¹⁰⁹

101. 11 U.S.C.A. § 522(p).

102. 11 U.S.C.A. § 548(e)(1)(D) (protecting transfers made more than ten years before filing even if made with intent to hinder future creditors).

103. *Id.*

104. 11 U.S.C.A. § 522(b)(3)(C), (n).

105. 11 U.S.C.A. § 541(c)(2).

106. *See* 11 U.S.C.A. § 522(b)(3)(C), (d)(12) (making exempt funds “to the extent that those funds are in a fund or account that is exempt from taxation”).

107. *See* 11 U.S.C.A. § 541(b)(5) (excluding these funds from property of the estate “only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account”).

108. *See* 11 U.S.C.A. § 541(b)(6) (prohibiting inclusion in property of the estate of tuition program funds if the beneficiary was a child, stepchild, grandchild, or stepgrandchild of the debtor).

109. Sheltering a homestead and a pension could be called the O.J. plan. O.J. Simpson is living on his pension in Florida, a state with an unlimited homestead exemption. Of course, he was able to do this under permissive Florida law. Bankruptcy would not have worked for him because of the nondischargeability provision for debts for “willful and malicious injury.” 11 U.S.C.A. § 523(a)(6). This provision also existed under the pre-2005 Act.

C. Continuing Problems with the Two-Option System

Even before the 2005 Act, the consumer bankruptcy system was too complex and needed structural reform.¹¹⁰ Complexity, particularly in having two options with overlapping features, contributed to a failure to sort “can’t-pay” debtors into Chapter 7 and “can-pay” debtors into Chapter 13. Instead of coherent results, the system has and will continue to cause two problems: a small number of debtors who have the ability to make some repayment to unsecured creditors out of excess income, assets, or both can nonetheless get a fresh start in Chapter 7,¹¹¹ while a larger number of debtors without means make the mistake of filing an infeasible repayment plan in Chapter 13. The 2005 Act does not deal effectively with either of these problems. A single portal, with a feasible, straightforward repayment feature, is the simplest, most effective way to address both problems.

Chapter 7 is thought of as the “fresh start” option but in fact debtors have always engaged in repayment after filing in Chapter 7¹¹² and will continue to do so under the 2005 Act for various reasons.¹¹³ Chapter 13 is the repayment plan option, but most debtors do not complete their plans and thus do not get a discharge; the Chapter 13 discharge rate is less than one third of cases filed.¹¹⁴ Furthermore, most of the repayment that does occur in Chapter 13 goes to secured creditors, with high administrative costs in relation to unsecured debt repayment.¹¹⁵ It has never been the case that debtors who are better off are cleanly sorted into Chapter 13; often, Chapter 13 is used by debtors who are worse off in the sense of being in default on both

110. See Braucher, *Increasing Uniformity*, *supra* note 31, at 21-23 (arguing that uniformity of results could only be achieved with structural change and for clarification of the purposes of the two chapters rather than consolidation into one chapter, as proposed in this Article).

111. See Hildebrand, *supra* note 87, at 54 (discussing the possibility that those with means will be able to create sweetheart deals in Chapter 13, which incorporates aspects of the Chapter 7 abuse tests in § 1325(b), with possible unintended consequences).

112. See Culhane & White, *Debt After Discharge*, *supra* note 7, at 720-21 and 740-41 (concerning repayment of debts for motor vehicles purchases, with and without reaffirmation; 28% of debtors in the author’s sample reaffirmed one or more debts and others held on to their cars by simply continuing to make contract payments). Debtors can also voluntarily pay creditors after discharge, 11 U.S.C.A. § 524(f), and some do for reasons such as maintaining a relationship with a health care provider or a relative who made a loan.

113. For example, debtors may decide to pay for collateral in Chapter 7 if they have to pay more for it in Chapter 13 than they would have prior to the 2005 Act. See 11 U.S.C.A. §§ 506(a)(2), 1325(a); see also *supra* notes 78-79 and accompanying text.

114. See *supra* note 9 and accompanying text (listing various studies that compiled plan completion rates for Chapter 13 debtors).

115. See Norberg & Velkey, *supra* note 9 (concerning low percentage of trustee disbursements that go to unsecured creditors, at high administrative cost).

unsecured and secured debts, so that they need the ability to cure defaults on secured debts provided in Chapter 13.¹¹⁶

Some judges, Chapter 13 trustees, and even debtors' lawyers have long had an ideological commitment to pushing more debtors into Chapter 13.¹¹⁷ In this view, Chapter 13 is about doing the right thing and rehabilitating oneself by repayment, so debtors should be pushed into proposing plans. Siding to some extent with this view, the Chapter 7 means test in the 2005 Act is intended to pressure more debtors into Chapter 13, but in the process Congress has made Chapter 13 less about voluntarily doing the right thing. In addition, changes in Chapter 13 in the 2005 Act make it less promising as a way for debtors to rehabilitate themselves successfully. To the extent that Chapter 13 increases the amount needed to retain possession of a car,¹¹⁸ the result is to make Chapter 13 less affordable or to reduce the amount available for unsecured creditors (or both effects at once). Furthermore, to the extent the 2005 Act increases the length¹¹⁹ and amount¹²⁰ of repayment requirements in Chapter 13 for debtors who are above median income, it makes plan completion more difficult, so that those who can pass the Chapter 7 means test by taking advantage of its many deductions may be more likely to use Chapter 7 than they would have been under prior law. The 2005 Act also

116. See *supra* note 8 and accompanying text (explaining the common practice of using Chapter 13 to cure arrearages on secured debts).

117. See, e.g., Whitford, *Repeal Chapter 13?*, *supra* note 12, at 89-90 (concerning the practice of debtors' lawyers steering clients into Chapter 13 due to pressures of local legal culture reflecting the view that repayment is the moral course).

118. See *supra* notes 79-79, 113 and accompanying text.

119. Above median income debtors must pay their disposable income for a five-year period. 11 U.S.C.A. § 1325(b)(4). Under prior law, the disposable income test only required payment for three years, but debtors often used five-year plans because of the pressure either of local legal culture or to spread out payment on collateral. See Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 8, at 579 (quoting a San Antonio lawyer as saying, "You have to do a five-year plan here if your plan is not for 100%").

120. For above median debtors, repayment is presumptively based on the formula of § 707(b)(2)(A) but subject to rebuttal using § 707(b)(2)(B). 11 U.S.C.A. §§ 707(b)(2), 1325(b)(3). Because the IRS standards are stringent as applied to some debtors, this could mean very difficult repayment requirements for above median income debtors in Chapter 13. Also, the use of "current monthly income" in the disposable income test could mean some debtors will not have the income shown in that calculation and will have to engage in rebuttal. See Hildebrand, *supra* note 87, at 54 (suggesting that there will also be a problem of too little repayment in Chapter 13 under the new disposable income test); *supra* notes 45-47 and accompanying text (explaining the disposable income test and discussing problems with using rebuttal in Chapter 7). Low repayment could occur in some cases due to using both a look-back on income, which can understate current income, and the long list of deductions that may not reflect actual expenses of some debtors. See *In Re Hardacre*, 338 B.R. 718, 722-23 (Bankr. N.D. Tex. 2006) (using a forward-looking measure of income).

shrank the broader discharge in Chapter 13.¹²¹ Overall, and contrary to intentions, the net result may be lower rates of use of Chapter 13 and even less plan completion and unsecured debt repayment than under prior law. Alternatively, there may be little change in how Chapter 13 is used, leaving in place high noncompletion rates and low unsecured debt repayment at high administrative cost.

II. SIMPLIFICATION USING A SINGLE PORTAL

The obvious way to do a better job of sorting individual debtors according to ability to repay some of their old debts is to give debtors only one bankruptcy option, moving the repayment feature of Chapter 13 into Chapter 7 and repealing Chapter 13. With one option, debtors would not be left—as they are now—to sort themselves. The complex set of carrots and sticks in current Chapters 7 and 13 have not worked to do this sorting in a rational way.

Having a single consumer chapter is the key step needed to simplify the bankruptcy system and make it coherent. In addition to dealing with repayment from income more effectively, this change would also make it possible to have one set of rules concerning collateral retention. Unfortunately, the 2005 Act leaves the rules concerning keeping collateral even more muddled than before.¹²² Another important step toward simplification would be to have one set of federal bankruptcy exemptions, rather than permitting states to set exemptions and opt out of federal bankruptcy exemptions, as the 2005 Act continues to allow.¹²³

In addition to rational sorting and fairness in the sense of uniform results for similarly situated debtors, simplification would have other benefits. It would make the system more understandable to its users and to the general public. Another benefit would be to reduce the costs of bankruptcy, both in the form of attorneys' fees and in maintaining the capacity of the bankruptcy courts and an elaborate

121. See 11 U.S.C.A. § 1328(a)(2), (4) (picking up seven new categories of debt as nondischargeable in Chapter 13); Wedoff, *Major Effects*, *supra* note 52, at 31 (listing new exclusions in Chapter 13 as unfiled, late-filed, and fraudulent tax returns, debts incurred fraudulently, debts of which debtor did not give creditor timely notice, debts for embezzlement or breach of fiduciary duty, and debts for personal injury or wrongful death).

122. See Braucher, *Cars, Homes*, *supra* note 77, at 461-62 (analyzing the possible interpretations of the 2005 Act and their effect on the terms available to debtors who wish to retain collateral under both Chapters 7 and 13).

123. See 11 U.S.C.A. § 522(b)(3)(A) (continuing to permit states to opt out of federal bankruptcy exemptions).

system of trustees to deal with the many legal and administrative challenges presented by our current complex system.

A. Setting Clear, Feasible Repayment Expectations

The means test added to Chapter 7 by the 2005 Act shows that Congress has an objective to keep debtors who can afford to repay some of their debts from getting a pure fresh start. However, Chapter 7 does not itself set a repayment requirement. Debtors who can get into Chapter 7 will not have to repay, and Chapter 7 leaves even those with means ways to pass the supposed means test.¹²⁴

A huge advantage of imposing a repayment requirement in Chapter 7, for those debtors with ability to repay, is that this approach would not involve gate-keeping that burdens all debtors. It would eliminate a wasteful system of means testing that sets up at least two levels of review. Instead, repayment would be required of those who actually have surplus income over an assessment period after they file. Rather than requiring mounds of paperwork that may already be out of date or that may otherwise not reflect accurately the debtor's ability to repay, the required paperwork would report the debtor's income after filing. The system would engage in means measurement rather than means testing.¹²⁵ Debtors above a threshold level of income would be required to make payments to be distributed to unsecured creditors.

To design such a system, several key issues need to be addressed. One is the appropriate period of repayment. Another is the basis for determining whether there is surplus income, which requires a determination of how much income a debtor should be permitted to keep for expenses. Other issues include how to take account of inevitable variations in expenses and how to create some incentive for debtors to earn surplus income.

One possibility for the duration of the repayment period would be to use the plan length in Chapter 13 (three to five years).¹²⁶ Experience in Chapter 13, however, demonstrates that this length makes for a high noncompletion rate.¹²⁷ In other words, this is

124. See *supra* Part I.B.2 (examining the various loopholes that exist to allow those with means to pass the Chapter 7 abuse test).

125. See Braucher & Mooney, *supra* note 13, at 6 (proposing measuring ability to repay based on actual income after filing).

126. See 11 U.S.C.A. § 1322(d) (continuing to set five years as the maximum plan length); 11 U.S.C.A. § 1325(b)(4)(A)(i), (ii) (setting the commitment period under the disposable income test at a minimum of three years).

127. See *supra* note 9 and accompanying text (concerning evidence that plan completion rate prior to the 2005 Act was at or below one-third of Chapter 13 filings).

probably not a feasible period. Other countries use shorter¹²⁸ and longer periods.¹²⁹ Australia has a twelve-month assessment period,¹³⁰ and Canada is poised to raise its automatic assessment period for surplus income to twenty-one months.¹³¹ Until the change is implemented, Canada's assessment period is nine months, with trustee discretion to increase that period.¹³² European systems, introduced in the late 1980s and early 1990s, started with long, onerous repayment expectations but have since been slightly liberalized in response to experiencing plan failure.¹³³ The determination of a reasonable repayment period ought to be informed by facts on the grounds about what is achievable. This question is ultimately the sort that elected representatives ought to decide or, better still, delegate to an administrative agency based on fact-finding and expertise, an approach that would permit

128. See *infra* notes 130-131 and accompanying text (providing examples of shorter time frames in other countries).

129. See *infra* note 133 (discussing examples of longer time periods in European nations).

130. Bankruptcy Act, 1966, § 139K (Austl.) (Sept. 18, 2005), available at <http://www.comlaw.gov.au> (using the "Find Current Law" search engine, enter the phrase "Bankruptcy Act 1966"; then follow "Bankruptcy Act 1966, Volume 1" pdf hyperlink).

131. See The Wage Earner Protection Act, 2005 S.C., ch. 42, § 100 (Can.) (assented to on Nov. 25, 2005) [hereinafter, WEPA § 100], available at <http://www.parl.gc.ca/common/bills.asp?Ses=1&parl=38> (follow "House of Commons Government Bills" hyperlink; then follow "C-55" hyperlink; then follow "First Reading" hyperlink) (last visited Apr. 5, 2006) (amending § 168.1 of the Bankruptcy and Insolvency Act and providing for a twenty-one-month assessment period). See Jacob S. Ziegel, *The Travails of Bill C-55*, 42 CAN. BUS. L.J. 440, 447-48 (2005) (noting that the Act cannot come into effect before June 30, 2006, and also not before it has been referred to the Canadian Senate for detailed study and a report).

132. See WEPA § 100, *supra* note 131. See *infra* note 19 and accompanying text (noting that this article draws only on the straight bankruptcy laws of Canada and Australia and not on their "consumer proposal" alternatives).

133. See Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*, 37 OSGOODE HALL L.J. 473, 481-82, 486 (1999) (describing communitarian and social welfare theory underlying European systems and noting long repayment periods such as ten years in France and seven years in Germany); Jason J. Kilborn, *The Innovative German Approach to Consumer Debt Relief: Revolutionary Changes in German Law, and Surprising Lessons for the United States*, 24 NW. J. INT'L L. & BUS. 257, 282, 284-86 (2004) (concerning the original seven-year repayment period in Germany and eventual reduction to six years, with significant reduction in the amount of repayment); Jason J. Kilborn, *La Responsabilisation de L'Economie: What the United States Can Learn From the New French Law on Consumer Overindebtedness*, 26 MICH. J. INT'L L. 619, 655-57 (2005) (noting that France finally introduced a fresh start form of bankruptcy for the worst-off in 2003, but only on a showing of insolvency and that the debtor's situation is "irremediably compromised"). Most French debtors must still attempt repayment; however, short deferral times, long repayment periods, and insufficient allotments for reasonable living expenses suggest that the majority of these repayment plans will fail. *Id.* at 640-43.

experimentation to come up with a repayment period that most debtors can handle, probably three years or less.

The more difficult question is how to measure surplus income. A threshold, based on family size, is a reasonable starting point. The 2005 Act took state median income as a threshold for presumed abuse, categorizing anyone at or below median income as not subject to a presumed abuse challenge.¹³⁴ That benchmark could be used as the threshold for repayment in a single portal system.¹³⁵ Prior to the 2005 Act, few debtors (less than sixteen percent) were above median income.¹³⁶ That pattern seems likely to continue. If so, applying a surplus income test only to above median income debtors would allow most debtors to get a fresh start without first making payments out of income (and also without the complex gatekeeping of means testing). Because the surplus income test would apply for the assessment period, assumed to be three years for purposes of discussion, some debtors might have to pay in the second or third year even if they did not in the first year after filing. Furthermore, this approach would likely catch more debtors than the presumed abuse test of the 2005 Act because the deductions under that test are likely to allow most above-median income debtors to pass the test.¹³⁷ The significant improvement in the system would be that the approximately eighty-five percent of debtors below median income would not be burdened by means testing.

Median income might be considered too lenient a threshold for a repayment requirement. Prior to the 2005 Act, most Chapter 13 debtors had below-median income and close to a third of Chapter 13 debtors managed to complete their plans.¹³⁸ Canada and Australia

134. 11 U.S.C.A. § 707(b)(6)(A) (West 2006).

135. Under the 2005 Act, it is unclear whether “totality of the circumstances” refers to ability to repay; even if so, such challenges are likely to be rare for below median income debtors. See *supra* note 49 and accompanying text (describing different arguments about the purpose and proper interpretation of the “totality of circumstances” test under the 2005 Act).

136. See Ed Flynn & Gordon Bermant, *Pre-Bankruptcy Planning Limits Means-Testing Impact*, AM. BANKR. INST. J., Feb. 19, 2000, at 22, 22 [hereinafter Flynn & Bermant, *Pre-Bankruptcy*] (finding based on a national representative sample of Chapter 7 cases closed in 1998 and 1999 that less than 15.7% of debtors had incomes above state median). This is the median above which the presumed abuse test applies under the 2005 Act. See 11 U.S.C.A. § 707(b)(6)(A). The median gross income of Chapter 7 filers as of 2000 was \$26,400. See Ed Flynn & Gordon Bermant, *The Class of 2000*, AM. BANKR. INST. J., Oct. 20, 2001, at 20, 33 (providing statistical portrait of debtors in no-asset Chapter 7 cases closed in 2000).

137. See Flynn & Bermant, *Pre-Bankruptcy*, *supra* note 136, at 22 (in a sample of 1938 cases filed under the pre-2005 law, finding only two cases where debtors would no longer be eligible to stay in Chapter 7 after applying the presumed abuse test of the then-pending legislation).

138. See Norberg & Velkey, *supra* note 9 (finding that Chapter 13 debtors in a

both use more stringent thresholds than median income.¹³⁹ This is another decision for elected representatives, and if median income is thought to be too high a threshold, Congress might instead choose something lower, such as eighty percent of median income. This would of course “catch” more debtors and make them repay something to get a discharge. However, the lower the threshold is set, the more likely it becomes that debtors with reasonable but high expenses would have difficulty actually making “surplus” income payments for the benefit of old creditors. This point could militate in favor of using median income as the threshold for a repayment requirement, which would “catch” about fifteen percent of Chapter 7 debtors, assuming they would have the same incomes as their pre-2005 Act counterparts.¹⁴⁰

Yet another consideration is whether requiring repayment of all surplus income is desirable. Both Australia and Canada have determined that the answer to this question is “no.” Australia requires payment of half of excess income for twelve months.¹⁴¹ Less than three percent of debtors are liable for repayment.¹⁴² Canada has a stepped-up repayment requirement. The debtor gets to keep the first \$100 of excess monthly income and half of the income from \$100 to \$1000, and can be required to pay up to seventy-five percent above \$1000 of surplus income.¹⁴³ About a fifth of Canadian debtors

sample of cases filed in 1994 had a median gross household income of \$22,314 and gross household incomes of \$13,077 at the twenty-fifth percentile and \$26,436 at the seventy-fifth percentile, at a time when the median household income in the United States was \$38,119); see also *supra* note 9 (discussing plan completion rates in Chapter 13).

139. The Canadian threshold is based on low-income cut-offs, which is often regarded as an unofficial poverty line. Iain Ramsay, *Interest Groups and the Politics of Consumer Bankruptcy Reform in Canada*, 53 U. TORONTO L.J. 379, 410 (2003). The Australian threshold is also low, set at \$35,763 (Australian) for a debtor with no dependents as of 2004; even so, only 2.4% of debtors were liable to contribute in 2001. John King, *Moving Beyond the ‘Hard’-‘Easy’ Tug of War: A Historical, Empirical and Theoretical Assessment of Bankruptcy Discharge*, 28 MELB. U. L. REV. 654, 661 (2004).

140. See Flynn & Bermant, *Pre-Bankruptcy*, *supra* note 136, at 22 (finding 15.7% of Chapter 7 debtors in a sample were above state median income levels).

141. Bankruptcy Act, 1966, § 139S (Austl.) (Sept. 18, 2005), available at <http://www.comlaw.gov.au> (using the “Find Current Law” search engine, enter the phrase “Bankruptcy Act 1966”; then follow “Bankruptcy Act 1966, volume 1” pdf hyperlink).

142. See King, *supra* note 139, at 661 (noting that 2.4% of debtors were liable to contribute in 2001). This low level of liability reflects the fact that debtors in Australia also have the option of an agreement with creditors, with one option for low-income debtors and another for those above the low-income level. *Id.* at 667. In 2002-2003, 22,637 Australians went into bankruptcy, 4550 proposed the type of agreement available to persons above a low-income level, and 405 used the low-income agreement option. *Id.*

143. See Jacob S. Ziegel, *The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison*, 37 OSGOODE HALL L.J. 205, 225

have to pay surplus income, and the median payment in 2004 was just under \$200 a month (for an assessment period of nine months).¹⁴⁴

Allowing debtors to keep the first portion of surplus income, such as the \$100 a month permitted in Canada, provides leeway for higher than usual but still reasonable expenses, as does allowing debtors to keep half of surplus income amounts above that. The formula is kept simple by not routinely including expense deductions. Furthermore, when the required payment is only a portion of surplus income, debtors have an incentive to earn surplus income. A problem with an approach that does not take into account real, legitimately high expenses is that it would mean debtors with such expenses would not be able to afford to make surplus income payments and get a discharge. The tradeoff between simplicity and accommodating outliers is a difficult policy choice, but one needs to take into account that complexity can price more desperate debtors out of the system than it permits other deserving candidates for relief to remain. The means testing implemented by the 2005 Act is the worst of both worlds. It is exceedingly complex because it includes elaborate expense deductions, but because in many categories these are not based on actual expenses at the presumed abuse stage of review, those with higher expenses have to be able to afford to put on a rebuttal to stay in Chapter 7.

Another important point about setting repayment expectations is that it sends a bad message to make the amount of repayment to unsecured creditors out of income depend on the amount of the debtor's secured and unsecured debt, as is the case under current means testing. This approach rewards those who have more debt. Thus, the best policy may be to require repayment of unsecured debt independent of how much secured debt the debtor has and even though the amount collected would repay only a small portion of the debtor's total unsecured debt. If required repayment for the benefit of old unsecured creditors does not leave the debtor enough to also pay for collateral, the debtor would have to surrender the collateral.

(1999) (describing the directive of the Superintendent of Bankruptcy for repayment on a stepped-up basis).

144. See generally OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY, ANNUAL STATISTICS REPORT FOR THE 2004 CALENDAR YEAR (Can.) (2004), available at <http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/Home> (follow "Publications and Reports" hyperlink; then follow "Bankruptcy Statistics" hyperlink; then follow "Annual Statistics Report—2004"). As in Australia, the number of persons making an income contribution reflects the fact that there is an option for a consumer proposal, which as of 2003 represented about 15% of consumer bankruptcies. Ramsay, *supra* note 139, at 410. For discussion of the duration requirement for the surplus income contribution, see *supra* notes 132-33 and accompanying text.

This is another difficult policy choice, but making repayment expectations independent of amount of debt avoids the perverse incentives of the current means testing system, which allows above median income debtors to pass the presumed abuse test by having more secured and unsecured debt.

B. Straightforward Answers on Collateral

Some debtors with or without a surplus income obligation will be able to afford to pay for collateral. To deal with such cases, the Bankruptcy Code should take clear positions on the terms for keeping homes, cars, and other collateral, something that it has never done. If anything, many issues have become murkier under the 2005 Act.¹⁴⁵ Chapter 13 uses retention of collateral as a lure to get debtors to undertake a repayment plan. Under the 2005 Act, as before it, debtors in Chapter 13 can keep collateral without creditor consent,¹⁴⁶ make up arrearages over time,¹⁴⁷ and avoid personal liability on secured debts.¹⁴⁸ What remains unclear is how much debtors have to pay in some circumstances; Chapter 13 debtors must continue contract payments for homes where that is the only collateral and the loan term extends beyond the plan period,¹⁴⁹ but not necessarily for personal property, where cramdown to retail value is sometimes permitted¹⁵⁰ and cramdown to some other value may or may not be permissible for certain recently acquired collateral.¹⁵¹ Also, Chapter 7 has added a debtor right to keep collateral, even without creditor consent and perhaps including after making cure of arrearages,

145. See Braucher, *Cars, Homes*, *supra* note 77, at 477-78 (describing new complexities and uncertainties concerning issues of valuation of collateral and whether the debtor may ride through on collateral in Chapter 7 by continuing to pay the debt amount without reaffirming).

146. See 11 U.S.C.A. § 1325(a) (West 2006) (setting confirmation tests, which do not include creditor assent and which did not do so before the 2005 Act).

147. 11 U.S.C.A. § 1322(b)(5).

148. See *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962-63 (1997) (noting that creditors face a dual risk in Chapter 13 cases: collateral will deteriorate and debtors will default and not be personally liable).

149. 11 U.S.C.A. § 1322(b)(2), (5).

150. 11 U.S.C.A. §§ 506(a)(2), 1325(a)(5).

151. See Braucher, *Cars, Homes*, *supra* note 77, at 469-74 (providing textual and policy analysis supporting use of wholesale value at the discretion of the court under the hanging paragraph of 11 U.S.C.A. § 1325(a), which covers purchase money loans for motor vehicles for personal use incurred in the 910 days before filing and loans secured by any other thing of value incurred during the year before filing). *But see In re Ezell*, 338 B.R. 330, 340, 342 (Bankr. E.D. Tenn. 2006) (stating in dicta that full debt amount must be paid to have the right to keep such collateral, but suggesting that debtor could use a threat to surrender to negotiate something less).

where the creditor refuses the debtor's offer to reaffirm on the original contract terms.¹⁵²

Luring the worst-off into payment plans they cannot afford is a bad policy choice. Furthermore, the treatment of collateral in the two chapters is much too complex. It would be better to have one set of rules on collateral retention, and make repayment of unsecured debts an independent question, based on means measurement.

To set a unitary policy on collateral retention, several questions must first be answered. One is whether creditor consent should be required in all or some circumstances, such as when there are arrearages. Closely related to this concern is whether debtors should be permitted to make up arrearages. A uniform policy also would have to address how much should have to be paid—full debt amount or something less, such as collateral value to the debtor,¹⁵³ to the creditor,¹⁵⁴ or perhaps midpoint of these two values.

A single policy would also have to consider whether the debtor should have to take on personal liability or be able to keep the collateral while the creditor retains only in rem rights.

On the question of valuation of a home, the longstanding position in Chapter 13 has been that the full debt amount has to be repaid when the home is the only collateral.¹⁵⁵ This favorable treatment is to encourage home mortgage lending.¹⁵⁶ For personal property, a midpoint of wholesale and retail—the approach in Chapter 13 prior to the 2005 Act—roughly splits the difference between the value of the collateral to the creditor and the debtor and is easy to compute for motor vehicles using book values.¹⁵⁷ These values might be set as what must be paid to keep homes and cars.

Taking on personal liability undercuts the fresh start; this cuts against requiring it.¹⁵⁸ Whether to allow cure of payment defaults, as

152. See Braucher, *Cars, Homes*, *supra* note 77, at 477-78 (discussing new § 362(h)(1)(B), which provides for continuation of the automatic stay where the creditor declines to reaffirm on the original contract terms, and discussing possible interpretation that this includes cure and resumption of contract duties).

153. The value to the debtor is what the debtor would have to pay for a car like the one he is keeping, which is something less than the retail value, which typically reflects reconditioning and warranties.

154. The value to the creditor is the wholesale value less the costs of obtaining it.

155. 11 U.S.C.A. § 1322(b)(2).

156. See *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993) (noting that Congress intended to preserve the rights of mortgagees in order to secure a steady flow of capital into the market).

157. See Braucher, *Cars, Homes*, *supra* note 77, at 464 (noting that most bankruptcy courts adopted a midpoint approach after *Rash*, 520 U.S. 953 (1997), and that this approach has the advantage of being a simple method to value vehicles because of the existence of readily ascertainable book values).

158. This is arguably even the approach in Chapter 7. See *id.* at 474-77 (discussing

Chapter 13 now does, is the most difficult question, in that debtors are often desperate to keep their homes and cars, but the need for cure tends to suggest that the debtor cannot afford the collateral. Both the creditor and debtor might be better off if surrender occurs sooner rather than later.¹⁵⁹

While all these issues are debatable, the key point here is that they should be resolved in the Bankruptcy Code. There should not be multiple sets of provisions addressing them in different and ambiguous ways, as is the case now with two consumer bankruptcy chapters. A simplification project should come to one set of answers to the outstanding questions.

C. Keeping Assets

The key complexity problem concerning assets is the incorporation of state exemption laws in bankruptcy. Under the 2005 Act, as before, state exemptions can be used in bankruptcy, and states may opt out of federal bankruptcy exemptions, making state exemptions the only choice.¹⁶⁰ It is time for one set of federal bankruptcy exemptions. This approach would have the distinct advantage of eliminating the 2005 Act's complicated timing rules on what state's exemptions a debtor can use.¹⁶¹

With one set of federal bankruptcy exemptions, several policy questions would remain. A unitary set of exemptions would have to address how much equity in a home and value in household goods and other personal property¹⁶² a debtor could keep while getting a bankruptcy discharge. Another issue would be whether the debtor should be able to retain any liquid assets.¹⁶³ Presumably, bankruptcy

arguments that the 2005 Act has adopted ride-through by creditor acquiescence for cars and with court protection for homes).

159. On the other hand, sometimes debtors default on secured debts without defaulting on unsecured debts; with discharge of the unsecured debts, they may be capable of paying for collateral and making up payment defaults.

160. 11 U.S.C.A. § 522(b)(2), (3).

161. See 11 U.S.C.A. § 522(b)(3) (setting forth which state's exemption laws apply when the debtor has moved before bankruptcy); 11 U.S.C.A. § 522(p)(1), (2)(B) (concerning a homestead exemption cap to the extent of recent acquisition of the interest but protecting unlimited homestead exemptions where the debtor has not moved from another state or used assets other than a prior principal residence in the same state to acquire the interest).

162. Here, an indexed lump sum amount would reduce the complexity of the system.

163. For bank accounts, stock portfolios, and self-settled trusts, the best answer is probably that debtors should have to use those to pay creditors and not expect to shelter them in bankruptcy.

law would continue to protect non-transferable pension funds¹⁶⁴ and most other retirement funds.¹⁶⁵

Rather than having the answers depend to some extent on the debtor's state of residence, bankruptcy exemption questions should be resolved by Congress as part of bankruptcy law. In addition to producing greater uniformity of results in bankruptcy, this approach also is simpler.

D. A Variation on the Proposal

A variation on the single-portal proposal suggested here would be to add repayment of surplus income to Chapter 7, while rehabilitating Chapter 13 as a voluntary alternative. This would be better than means testing, in that gatekeeping for all would not be part of the Chapter 7 system. The variation would also be more like the Canadian and Australian systems, which provide for "consumer proposals," with creditor consent, as an alternative to straight bankruptcy, even though surplus income requirements are incorporated into the latter.¹⁶⁶ Whatever the merits of the "consumer proposal" alternatives in Canada and Australia, which are different from each other as well as from Chapter 13,¹⁶⁷ the U.S. has its own peculiar history with Chapter 13 that suggests it does not work here.

For most debtors, Chapter 13 means piling a second failure—the failure to complete a plan and get a discharge¹⁶⁸—on the initial financial failure that led to bankruptcy. We now have evidence than under the pre-2005 law, at least half of Chapter 13 debtors had tried bankruptcy one or more times before and that the failure rate in the current case rose with the number of prior cases.¹⁶⁹ Furthermore, Chapter 13 has never been purely voluntary; a central notion in the

164. 11 U.S.C. A. § 541(c)(2).

165. 11 U.S.C.A. § 522(b)(3)(C). This is a provision added by the 2005 Act that has the effect of creating a broader federal policy of protecting retirement funds.

166. Ziegel, *supra* note 19, at 46-47 (noting necessity of secured creditor consent to be included in a consumer proposal in Canada) and 104-105 (describing creditor voting procedure in Australia, requiring approval of the debtor's proposal by a majority of creditors in number and 75 percent in value).

167. An investigation of how well the "consumer proposal" option works in each country is beyond the scope of this article. *See supra* note 19 and accompanying text (noting some of the issues).

168. *See supra* note 9 and accompanying text (concerning the two-thirds nondischarge rate).

169. *See* Norberg & Velkey, *supra* note 9 (concerning repeat filings). Norberg & Velkey also found that those who had filed a previous case were significantly more likely to fail (reporting 38% completion rate for first-time filers, 22.5% completion rate for those who had filed one previous case, and 14% completion rate for debtors who had filed two or more previous cases). *Id.*

US consumer bankruptcy system is creating carrots and sticks to use Chapter 13. The 2005 Act showed the grip of this notion, leading to yet more pressure to use Chapter 13, despite its high failure rate and low rate of distribution to unsecured creditors, at a high administrative cost. If there are legitimate goals of debtors that propel them into Chapter 13, then means to achieve those goals—such as collateral retention—should be incorporated into the single consumer option. A two-chapter system is more complex, expensive, and difficult to understand. It creates risks that professionals, including trustees and debtors' lawyers, will steer debtors into one option or another for their own reasons rather than in the best interests of debtors or creditors.¹⁷⁰ Thus, although the variation would be better than no change, the more dramatic reform of instituting a single portal with a surplus income requirement is much more promising as a means to serve the dual bankruptcy policies of requiring repayment to the extent feasible and then providing a fresh start.

CONCLUSION

The 2005 Act is a failure, but it is a provocative failure. It has clarified that Congress does not envision a right to an immediate fresh start for debtors with the means to repay. Congress has also made Chapter 13 less effective and less about being a “good guy” who voluntarily repays. These steps help to reveal a simpler, more coherent approach—a single consumer bankruptcy chapter in which repayment by those with means is the condition for discharge. A single chapter, essentially Chapter 7 with a repayment feature added, would better accomplish the abuse prevention purpose of the 2005 Act, but without presumably unintended consequences of reducing bankruptcy access for those who need it most. As part of this structural simplification, it would also be possible to establish one set of federal bankruptcy policies on collateral retention and exemptions.

170. See Whitford, *Repeal Chapter 13?*, *supra* note 12, at 86 (concerning the problem of debtors' lawyers steering them into Chapter 13); Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 8, at 543-80 (concerning lawyers' financial and social concerns as these affect advice on Chapter choice).