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Consumer Bankruptcy after the Fall: United
States Law under S.256

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Consumer Bankruptcy After the Fall: United States Law Under S. 256

by Charles J. Tabb, Alice Curtis Campbell Professor of Law and the Associate Dean for Academic Affairs at the University of Illinois College of Law

Forthcoming in CANADIAN BUSINESS LAW JOURNAL

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Consumer Bankruptcy After the Fall: United States Law Under S. 256
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On October 17, 2005, a new era came to pass in the history of the United States consumer bankruptcy laws, as S. 256, the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," took effect. Signed into law by President George W. Bush on April 20, 2005, S. 256 marks the retrenchment from a history of substantial bankruptcy protection for consumer debtors in the United States, and hails a long-sought legislative victory for the consumer credit industry. Indeed, the credit industry had vigorously attempted to reverse the pro-debtor thrust of the United States consumer bankruptcy law almost from the time the ink was dry on the Bankruptcy Reform Act of 1978.

The heart of the retrenchment is the enactment of a "means test" for consumer debtors, which test serves as a gate-keeping device to bar consumer debtors from immediate discharge of debts in a chapter 7 straight liquidation bankruptcy, if they have the supposed "means" to pay a small amount of their debts to unsecured creditors in a chapter 13 payment plan. In addition to the means test, S. 256 embodies a long laundry list of amendments that almost uniformly work to the disadvantage of consumer debtors.

This paper principally discusses and analyzes the means test. It also briefly reviews some of the other major changes to the United States consumer bankruptcy laws effected by S. 256. In doing so, I draw liberally on three of my previous works: an article, *The Death of Consumer Bankruptcy in the United States?*;¹ the 2005 Supplement to a law school casebook, *BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE*;² and a treatise, *THE LAW OF BANKRUPTCY*.³ I have not attempted herein to attribute by specific citation every reference or to or quotation from those works. At the end of the paper, I have attached as an Appendix a February 2005 letter to Senators Specter and Leahy in the United States Senate signed by 92 law professors (including me) urging

* Alice Curtis Campbell Professor of Law and Associate Dean for Academic Affairs, University of Illinois College of Law, Champaign, Illinois. Particular thanks and gratitude go to two people: my daughter and research assistant, Rebecca Tabb, B.A. with Distinction in Economics and Phi Beta Kappa, Stanford University 2004, and currently a Master's degree student in Economics, University College London; and Professor Ralph Brubaker, University of Illinois College of Law, my co-author.

¹ INTERNATIONAL PERSPECTIVES ON CONSUMERS' ACCESS TO JUSTICE, 264-299 (Cambridge University Press 2003, Ricketts & Telfer, eds.); also published at 18 BANKRUPTCY DEVELOPMENTS JOURNAL 1-49 (2001). This paper was originally presented as a principal paper the International Consumer Law Conference, Auckland, New Zealand, April 2001. It also was circulated to the European Economic and Social Committee, advisor to European Commission, Council & Parliament, in Stockholm, Sweden, June 2001.

² LexisNexis 2005 (with Ralph Brubaker).

³ Charles Jordan Tabb, Foundation Press 1997.

(unsuccessfully, of course) that the Senate not vote in favor of S.256.

S. 256 dramatically reshapes the contours of the United States consumer bankruptcy laws in favor of financial institutions and to the detriment of needy individual debtors. For many debtors the promise of a financial “fresh start” in life that the United States bankruptcy law has offered for over a century has become, as I once wrote, a “cruel and ephemeral illusion.”⁴

I. THE MEANS TEST

A. Introduction

The central tenet of the consumer bankruptcy system in America since 1898 has been to offer “honest but unfortunate” individual debtors a freely-available, immediate, unconditional debt discharge in exchange for the surrender of current non-exempt assets, if any. Debtors then may enjoy their future earnings free from the claims of their creditors. Since distributions are made to creditors in only about five percent of all liquidation bankruptcies, this trade is quite a good one for debtors: they give up almost nothing and yet are released from their debts. Debtors then may enjoy their future earnings free from the claims of their creditors. The vehicle for the realization of this debtor’s dream is “chapter 7” of the Bankruptcy Code (11 U.S.C. §§ 701 et. seq.).

Notably, since 1898 the consumer bankruptcy law in the United States has not required any of the following as a requisite of discharge:

- consent of creditors;⁵
- payment of a minimum percentage dividend or minimum amount of debt, either in the initial bankruptcy distribution or over time out of future earnings;⁶
- proof of financial need (e.g., insolvency, either on a balance sheet or ability to pay⁷ basis);
- proof that the bankruptcy was caused by unavoidable misfortune rather than the debtor’s

⁴ Supra note 1 at 266.

⁵ The 1898 Act was the first United States bankruptcy law that did not either require creditor consent or permit creditor dissent to discharge. See Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364 (1991). Earlier United States laws, in effect from 1800-1803, 1841-1843, and 1867-1878, contained such limitations. See id. at 346 (1800 law), 351-52 (1841 law), 356-57 (1867 law).

⁶ As with the creditor consent restriction, all American bankruptcy acts until 1898 imposed some minimum dividend limitation on the discharge. See id. at 346-47 (1800), 352 (1841), 356-57 (1867). The 1898 Act abandoned use of the minimum dividend. Id. at 364.

⁷ The notable exception to this is the “substantial abuse” barrier to chapter 7 relief, enacted as part of the 1984 Amendments. See § 707(b). While Congress eschewed any rigid “ability to pay” guidelines as indicative of per se abuse, courts have gleaned a congressional intent that payment ability at least be a factor in assessing abuse.

fault or improvidence; or

- suspension of the discharge for a period of time.⁸

Instead, the only restrictions on a debtor's discharge have been of three types. First, some debtors are *denied a discharge* upon proof of a statutory ground in 11 U.S.C. § 727(a), evidencing the debtor's failure to cooperate in connection with the bankruptcy case itself. Thus, for example, a debtor who hides assets, files false schedules, or lies under oath would be denied a discharge. Few debtors are denied a discharge outright, however. Second, under 11 U.S.C. § 523(a), some types of debts are *excepted* from a general discharge. These debts may arise out of the debtor's misconduct, such as debts for fraud, or from willful and malicious injury, or may favor worthy creditors, such as for alimony and child support. Third, a debtor is permitted to agree to *reaffirm* an otherwise dischargeable debt (11 U.S.C. § 524(c)), effectively waiving the discharge as to the reaffirmed debt.

An individual consumer debtor has another option. Instead of filing for immediate liquidation (and discharge) under chapter 7, she may file under chapter 13. In chapter 13, a debtor will retain all of her assets in exchange for paying creditors under a court-approved payment plan for a period of three to five years. Under the chapter 13 plan, the debtor must pay creditors at least as much as they would have received in a chapter 7 liquidation case (11 U.S.C. § 1325(a)(4)), and must devote all of her "disposable income" to the plan for three years (11 U.S.C. § 1325(b)). Importantly, the granting of the discharge is deferred until the completion of this payment plan (11 U.S.C. § 1328(a)). Of particular significance is the fact that filing under chapter 13 is *entirely voluntary with the debtor*; creditors have no power to force a debtor into a chapter 13 payment plan, either by filing an involuntary petition or by moving to convert a chapter 7 case to chapter 13. 11 U.S.C. §§ 303(a), 706(c).

Until S. 256, then, a debtor was largely free to play to her strengths in choosing the appropriate chapter under which to file. If she had significant future earning capacity but few existing nonexempt assets, she would choose chapter 7, but if she had substantial nonexempt property that she wanted to retain, she might instead select chapter 13. For most debtors, though, the preferred choice was chapter 7: as noted above, almost 95% of all chapter 7 cases are "no asset" cases that result in no payment to unsecured creditors out of current nonexempt assets. The most valuable "asset" most consumer debtors possess is their earning capacity, the future fruits of which are protected by the chapter 7 discharge.

B. The Push for Reform

As might be expected, creditors typically have exactly the opposite interests from the debtor. They would prefer a scheme in which a debtor could be forced to make payments on her debts over

⁸ English law has given the court discretion to condition or suspend a debtor's discharge since 1883. See Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. Pa. L. Rev. 69 (1982).

time out of her future earnings – in effect, an involuntary chapter 13 regime. The most common complaint levied against consumer debtors by creditors is that many consumer debtors file under chapter 7 and seek an immediate discharge of their debts, even though they (supposedly) could repay a significant portion of their debts out of future income under chapter 13. These debtors allegedly have significant income in excess of necessary expenses. As noted, though, a chapter 13 filing is entirely voluntary for debtors and cannot be compelled by creditors. What should be done with these “can-pay” debtors who do not elect to proceed under chapter 13? Courts have been extremely reluctant to find that the debtor’s prospect of future repayment ability constitutes “cause” to dismiss a chapter 7 case under 11 U.S.C. § 707(a). This is where the means test is supposed to apply, to bar these can-pay debtors from chapter 7.

The means test has deep historical roots, at least in terms of lobbying efforts. Indeed, one must almost admire the astonishing persistence of the consumer credit industry lobby. That industry waged an almost ceaseless battle to reshape consumer bankruptcy from the mid-1960's until achieving victory in April 2005. Indeed, the first seeds of the “can-pay” campaign were planted way back in the early 1930's, with hearings held in 1932 on a bill to establish wage earner plans.⁹ In 1938 Chapter XIII was enacted to permit such payment plans, but on a purely voluntary basis.¹⁰ In the 1960's Congress considered several bills that would bar from chapter 7 those debtors with the ability to pay.¹¹ At every turn, though, Congress rejected this approach, as I once put it, as “unwise, unsound, unworkable, and possibly unconstitutional”.¹²

The first blue-ribbon congressional bankruptcy review commission, reporting in 1973, concluded “that forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted.”¹³ Following this lead, in the 1978 total revision of the nation’s bankruptcy law,¹⁴ Congress declined to force supposed “can pay” debtors into involuntary payment plans.¹⁵

Soon after enactment of the 1978 law the consumer credit industry renewed its assault.

⁹ S. 3866, 72nd Cong. (1932).

¹⁰ Chandler Act, Ch. 575, 52 Stat. 840, § 621 (1938).

¹¹ H.R. 12784, 88th Cong. (1964); H.R. 292, 89th Cong. (1965); S. 613, 89th Cong. (1965); H.R. 1057, 90th Cong. (1967); H.R. 5771, 90th Cong. (1967).

¹² See discussion of this history in H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 120-21 (1977).

¹³ Report of the Commission on the Bankruptcy Laws of the United States, Part I at 159, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. (1973).

¹⁴ See Pub. L. No. 95-598, 92 Stat. 2549 (1978).

¹⁵ See S. Rep. 95-989, 95th Cong., 2d Sess. 32 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 120-21, 322 (1977).

Central to their efforts was the publication in 1982 of a study funded by the industry itself that asserted that many debtors could repay significant amounts of their debts without difficulty.¹⁶ Using this study as fodder, bills were introduced over twenty years ago, in the 97th and 98th Congresses, that included ability-to-pay screening tests for chapter 7.¹⁷

Responding to this push, in 1984 Congress added 11 U.S.C. § 707(b) to the Bankruptcy Code. Under that new rule, the bankruptcy court had the power to dismiss the chapter 7 case of an individual debtor whose debts were primarily consumer debts, if the court found that the filing was a “*substantial abuse*” of chapter 7. Once a debtor’s chapter 7 case was dismissed, that debtor had the choice either to forego bankruptcy relief entirely or to proceed voluntarily under chapter 13. Congress also added a provision in chapter 13 requiring a debtor to commit all of his “disposable income” to plan payments. 11 U.S.C. § 1325(b). In theory, then, debtors with meaningful repayment capacity could not proceed at all under chapter 7, and if they did choose to file under chapter 13, their creditors would receive the debtor’s disposable income.

The consumer credit industry, however, soon grew dissatisfied with the operation of the “substantial abuse” test as a method for screening out “can-pay” debtors from chapter 7. In a legislative compromise, Congress had declined to define “substantial abuse,” leaving it unclear just how much, and in what manner, that standard applied to debtors with the “means” to effect a meaningful repayment. Still, courts interpreted § 707(b) as permitting consideration of ability to pay as one factor in assessing substantial abuse.¹⁸ Nonetheless, in the credit industry’s view, the test became almost a dead letter in many parts of the country, and gave too much discretion to bankruptcy judges, who applied the substantial abuse standard unevenly. Furthermore, procedural barriers often meant that substantial abuse issues were not presented for consideration. The upshot, according to the credit industry lobby, was that significant numbers of can-pay debtors still were permitted to file under chapter 7.

The solution the industry proposed was to fashion a mechanical “*means test*” which would withdraw most of the discretion from the bankruptcy judges and presumptively deny access to chapter 7 relief for those individual consumer debtors who have sufficient excess income to repay

¹⁶ See Credit Research Center, Krannert Graduate School of Management, Purdue University, Monographs No. 23-24, Consumer Bankruptcy Study (1982). The study concluded that at least one-third of consumer debtors could repay a significant portion of their debts. *See id.* at 72. However, critics have pointed out a number of significant flaws in the study. See, e.g. Teresa A. Sullivan, et al., *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 Wis. L. Rev. 1087; Teresa A. Sullivan et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091.

¹⁷ Senator Dole introduced S. 2000 in 1982. Congressman Evans introduced H.R. 4786 the same year. These measures were reintroduced in the 98th Congress as H.R. 1169 and S. 445. See 146 Cong. Rec. S11683-02 (daily ed. Dec. 7, 2000).

¹⁸ See, e.g., *Green v. Staples (In re Green)*, 934 F.2d 568 (4th Cir. 1991).

at least \$100 a month on their debts over five years under a chapter 13 plan. As Representative George Gekas explained several years ago when introducing a very similar predecessor bill to what eventually became S. 256:

An important feature of the new bill, will be that certain provisions will be put into place which will make certain that those people who have an ability to repay some of their debts *will be compelled to do so*, so that instead of a Chapter 7 filing which will give that automatic almost-fresh start, we will be able to *shepherd some of those debtors into Chapter 13* and propose a plan and adopt a plan by which they could over a period of time repay some of the debt out of their then-current earnings.”¹⁹

The credit industry intensely lobbied Congress to enact this mechanical means test in place of the vague “substantial abuse” standard.²⁰ One chamber or the other passed differing versions of this legislation over the ensuing years. A new industry-funded study again concluded that some debtors could repay some of their debts.²¹ The industry thought it had the perfect vehicle to push its cause when Congress in 1994 established a second blue-ribbon bankruptcy study commission.²² However, the Review Commission, led by its Reporter, Professor Elizabeth Warren of Harvard, and its Chairman, Brady Williamson, rejected the notion of means testing when it issued its report in the fall of 1997.²³ Indeed, only two of the nine commissioners expressed support for means testing²⁴ – notwithstanding the credit industry’s determined promotion of that scheme.

In the end, though, the dissenters, and the consumer credit industry, prevailed. The handwriting could be seen on the wall in a 1999 Senate Report, which observed: “In sum, from its inception, section 707(b) was designed with serious defects which have rendered the section unusable.”²⁵ Decades of intense effort finally bore fruit with the enactment on April 20, 2005 of S. 256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. That law became effective for cases filed on or after October 17, 2005. After assessing the concept of and the case

¹⁹ 147 Cong. Rec. H133 (daily ed. Jan. 31, 2001) (remarks of Rep. Gekas) (emphasis added).

²⁰ These efforts (through the 105th Congress) are detailed in Charles Jordan Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998*, 15 Bankr. Dev. J. 343, 344-353 (1999).

²¹ See Tom Neubig, et. al., *Chapter 7 Bankruptcy Petitioners’ Ability to Repay: The National Perspective*, 1997 at <http://www.ey.com/tax/eyecon/bankruptcy.asp>.

²² Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

²³ National Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years*, 89-91 (Oct. 20, 1997).

²⁴ *Id.*, *Additional Dissent to recommendations for Reform of Consumer Bankruptcy Law* 10-25 (Commissioners Edith Jones and James Shepard).

²⁵ See S. Rep. No. 106-49, 106th Cong., 1st Sess. 6 (1999)

for (and against) the means test, the basic approach of the new law is analyzed.

C. Commentary on the Case for and against the Means Test²⁶

The means test checks for projected surplus income. Debtors whose income exceeds allowed expenses by a certain minimum amount are deemed to have the “means” to repay their creditors. A debtor who fails the means test is dismissed from chapter 7, thus leaving a chapter 13 repayment plan as the debtor’s only remaining bankruptcy alternative.

Means testing expands dramatically on the concept of “substantial abuse” dismissal under 11 U.S.C. § 707(b). According to the reformers, a debtor with even a modest amount of projected surplus income should *not* be permitted to obtain an immediate bankruptcy discharge simply by relinquishing her nonexempt assets in a liquidation bankruptcy under chapter 7. If the debtor wants a discharge, she should have to pay for the privilege by giving her creditors the income surplus. As Senator Grassley has argued, “It’s not fair to permit people who can repay to skip out on their debts.”²⁷

Superficially, means testing has some appeal. Accepting Grassley’s premise, it is hard to argue that “it *is* fair to permit people who can repay to skip out on their debts.” The specter of the proverbial rich doctor filing bankruptcy, stiffing his creditors, and then enjoying a life of luxury unfettered by his just debts, understandably draws our ire. That is the picture the consumer credit industry paints.

But is it an *accurate* picture? The case for means testing rests on several critical assumptions. If any of these assumptions do not hold, the seemingly obvious case for means testing falls apart. Means testing may be a simple answer to the wrong questions.

We need to ask if, to borrow an old maxim, “the game is worth the candle.” Is there a problem that needs to be fixed? If so, then we need to ask two follow-up questions. First, is it worth burning the means testing “candle”? That is, will the costs associated with means testing be worth any benefits that might be gained? Second, is means-testing the *right* candle to burn? Does the solution lie in stepping up the policing of consumer debtors – or in asking creditors to be a bit more diligent in handing out credit? Both?

What is the “game”? Reformers say the name of the game is “fixing the bankruptcy crisis.”²⁸ They assert that a crisis exists because of (1) the substantial rise in the *number* of consumer bankruptcy filings in the United States in recent years, and because of (2) the substantial losses allegedly “caused” by those filings. Reform advocates then take the leap of faith that *debtors* are causing the crisis – that debtors are abusing the law by taking out too much credit, living the high

²⁶ This section is taken almost entirely from Tabb, *supra* note 1, at 271-76.

²⁷ 146 Cong. Rec. S5383 (daily ed. June 20, 2000) (remarks of Sen. Grassley).

²⁸ See S. Rep. No. 106-49, 106th Cong., 1st Sess. 2 (1999).

life, and sliding down the easy path of discharge when they could repay a significant portion of their debts.

This portrait is exaggerated at best and factually unsupported at worst. There is no doubt that the number of consumer bankruptcy filings has increased substantially, indeed, exponentially. For example, in the two decades from 1980 to 2000, total bankruptcy filings went from 331,264 to 1,253,444, and consumer bankruptcies went from 287,570 in 1980 to 1,217,972 in 2000 – that is, both *quadrupled*.²⁹ Since 2000 filings have hovered at about 1 ½ million per year. About 70% of the consumer cases were filed under chapter 7.³⁰ Obviously, no one is happy about those numbers. But ascertaining the *cause* of this dramatic rise is not so easy.

Many studies have shown that the vast majority of chapter 7 bankruptcies are caused by medical problems, divorce, or job layoffs.³¹ Furthermore, the financial circumstances of debtors filing bankruptcy today are as desperate as they ever have been.³² Indeed, the *real* incomes of the bottom 60% of American families have actually declined since 1980. Thus, the “abuse” mantra is at least in some real sense a bit of a canard.³³

Furthermore, other studies show that the increase in the number of consumer bankruptcies is very closely correlated with the increase in the amount of outstanding consumer credit,³⁴ and with the rate of credit card defaults.³⁵ The level of personal debt has never been higher.³⁶ Credit issuers

²⁹ U.S. Bankruptcy Filings 1980-2000 (*Business, Non-Business, Total*), at <http://www.abiworld.org/stats/1980annual.html>.

³⁰ *Non-Business Bankruptcy Filings by Chapter 1990-2000, per quarter*, at <http://www.abiworld.org/stats/1990nonbuschapter.html>.

³¹ See *A Bad Bankruptcy Bill*, SAN FRANCISCO CHRONICLE, March 15, 2001, at A26.

³² See National Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years*, 83-84 (Oct. 20, 1997); see also Elizabeth Warren, *The Bankruptcy Crisis*, 73 Ind. L.J. 1081, 1094-1100 (1998).

³³ See Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 Am. Bankr. L.J. 483, 493 (1997).

³⁴ See, e.g., Robert M. Lawless, *The Relationship Between Nonbusiness Bankruptcy Filings and Various Basic Measures of Consumer Debt*, http://www.law.missouri.edu/lawless/bus_bkr/filings.htm (Version 1.0, October 1, 2000); see also National Bankruptcy Review Commission Final Report, *Bankruptcy: The Next Twenty Years*, 85 (Oct. 20, 1997).

³⁵ See Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 Am. Bankr. L.J. 249, 250 (1997).

³⁶ See *Debt pinches consumers*, CNN Financial News, at http://cnnfn.cnn.com/2001/06/20/news/wires/consumers_debt_wg/. Americans are spending 1/7 of their take-home pay on debts. *Id.*

in the United States have made credit readily available to debtors, flooding debtors with endless solicitations to take on more and ever more credit. In the last several years, approximately *three billion* solicitations for credit cards were mailed every year³⁷ – an average of nearly 20 offers for every single American between the ages of 18 and 64. Another study found that one-third of all college students had four or more credit cards! Credit card issuers do all of this for a very simple reason – they make a very large amount of money. Industry profits surged 44% from 1998 to 2000 alone. Yet, while inundating debtors with credit offers, credit issuers express consternation when some debtors are unable to pay the crushing debt load. While debtors may not all be blameless, neither are the creditors.

Nor is it necessarily accurate to assume that most debtors can repay a significant portion of their debts. An empirical study by Professors Culhane and White that was funded by the nonpartisan American Bankruptcy Institute concluded that *only 3.6%* of chapter 7 debtors in their study were possible “can pay” debtors.³⁸ A study by Bermant and Flynn for the Executive Office of United States Trustees concluded, “Only a small percentage of current chapter 7 debtors have income sufficient to repay any portion of their unsecured debts.”³⁹

The “candle” that reformers have persuaded Congress to burn is means testing. The game is worth the candle, reformers urge, on the assumptions that (1) means testing will recoup a significant portion of the illicit bankruptcy losses, and (2) step one can be effected at an acceptable cost. It is questionable whether either assumption is warranted. First, the reformers’ flat assertion that means testing will result in the collection of an additional \$3 billion a year from debtors⁴⁰ is very dubious. Respected nonpartisan studies would put the figure – *generously* – at less than \$1 billion. The Culhane and White study determined that “a more realistic estimate would be \$450 million,” and that “even under the overly optimistic assumptions” of the credit industry studies, creditors

³⁷ See *Credit Card Issuers Aggressively Expand Marketing and Lines of Credit on Eve of New Bankruptcy Restrictions*, Consumer Federation of America (Feb. 27, 2001), available at <http://www.abiworld.org/travpr.pdf> (hereafter CFA, “*Credit Card Issuers*”); see also Debra J. Saunders, *Of puppies, kittens, and huge credit-card debts*, SAN FRANCISCO CHRONICLE, May 22, 2001, at A21 (citing report by credit-card research firm BAI Global Inc.)

³⁸ Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 Am. Bankr. Inst. L. Rev. 27, 31 (1999). The Culhane and White study was based on an earlier bill, H.R. 3150, 105th Cong., which differed from S. 256 in several particulars. For example, that earlier bill did not have a safe harbor provision. These differences would suggest that the number of “can pay” debtors under S. 256 would be even *lower* than the 3.6% estimated by Culhane and White – perhaps even as low as 1% or 2%.

³⁹ Gordon Bermant and Ed Flynn, *Incomes, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors*, (Executive Office for United States Trustees, Jan. 1999), at <http://www.abiworld.org/legis/reform/eoust-99jan.html>.

⁴⁰ See S. Rep. No. 106-49, 106th Cong., 1st Sess. 2 (1999).

would “collect at most an additional \$930 million from can pay debtors.”⁴¹ The Bermant and Flynn study concluded, “we believe that the final return to unsecured creditors under means testing as proposed would be less than \$1 billion annually.”⁴²

Secondly, means testing will create a huge new bureaucratic burden for courts, trustees, debtors, and debtors’ attorneys – for everybody in the bankruptcy arena, that is, *except* creditors. The Congressional Budget Office estimated that a predecessor to S. 256 (H.R. 3150) would cost \$214 million in the first five years, plus \$8 to \$16 million more to pay the new judges that would be needed to apply means-testing.⁴³ As Professor Warren has pointed out, “someone would have to pay for means testing.”⁴⁴ Who will that be?

In light of these facts, Professors Culhane and White concluded that “the net gains to unsecured creditors, in sum, appear small relative to the costs likely to be imposed on the great majority of chapter 7 debtors, as well as trustees, judges, and taxpayers.”⁴⁵

Professor Warren, the Reporter for the National Bankruptcy Review Commission, laments:

With a means test in place, either the system would have to commit vastly more resources to reviewing the circumstances of each failing debtor in Chapter 13 or it would make bankruptcy relief unavailable for people who could not repay their creditors In the latter case, the safety valve that keeps consumer debt burdens in check would be lost. The consumer bankruptcy system would not be strengthened; it would be destroyed.⁴⁶

The candle that reformers have *not* wanted to burn is to require the consumer credit industry to monitor their own behavior. They could do this, first, by being more responsible and diligent in selecting those to whom they extend credit. In recent years many large credit issuers have become very active in marketing credit to debtors, often without worrying much about the debtor’s creditworthiness. The credit issuers engage in this policy for a simple reason – they like to make money. As noted earlier, credit card industry profits went up by 44% from 1998 to 2000. Credit card issuers can make a lot of money by charging extremely high interest rates to their legions of debtors. That a certain percentage of those debtors will default is *already* factored in to the high interest rates charged. Should it be any surprise that many of those debtors will default and then seek refuge in bankruptcy? And when they do, are the creditors really blameless? Yet, under S. 256, consumer lenders have been given the green light to proceed merrily along the careless path they have chosen.

Indeed, with means testing in place, credit issuers can be expected to become even *more* aggressive

⁴¹ Culhane & White, *supra* note 38, at 31.

⁴² Bermant and Flynn, *supra* note 39.

⁴³ Culhane & White, *supra* note 38, at 32 n. 21.

⁴⁴ Elizabeth Warren, *Principled Approach*, *supra* note 33, at 504.

⁴⁵ Culhane & White, *supra* note 38, at 61.

⁴⁶ Warren, *Principled Approach*, *supra* note 833 at 506.

in soliciting and extending credit, because the credit issuer would have less reason to fear a bankruptcy discharge. If past evidence is any guide, this expansion of credit in turn would cause more debtor defaults. But, with means testing in place, those economically burdened debtors will have no place to turn.

D. Summary of Means Test

The means test, as noted before, checks for projected surplus income. Debtors whose income exceeds allowed expenses by a certain amount are deemed to have the “means” to repay their creditors. The idea is to “requir[e] bankrupts to repay their debts when they have the ability to do so.”⁴⁷ A debtor who fails the means test will be dismissed from chapter 7, thus leaving a chapter 13 repayment plan as the debtor’s only remaining bankruptcy alternative.

Under S. 256, the old substantial abuse test of § 707(b) is eliminated and a new “abuse” test substituted in its stead. 11 U.S.C. § 707(b)(1). A detailed means test in § 707(b)(2)(A) spells out what level of excess income constitutes *presumptive* abuse. If presumptive abuse is found, then dismissal of the chapter 7 filing is mandated unless the debtor can prove “special circumstances.” 11 U.S.C. § 707(b)(2)(B).

If a presumption of abuse does not arise or is rebutted, the court still may dismiss the case as an abuse, considering whether the debtor filed the petition in bad faith, and looking at the “totality of the circumstances.” 11 U.S.C. § 707(b)(3). Judicial opinions prior to S. 256 described the “totality” test:

The "totality of the circumstances" approach involves an evaluation of factors such as the following:

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

Green v. Staples (In re Green), 934 F.2d 568 (4th Cir. 1991). An open question will be the extent to which courts apply the “totality” test differently post-S. 256 than before, given the introduction of a hard-line presumption of abuse test for “can-pay” debtors, whereas prior to S. 256 the “totality” test also had to deal with the can-pay debtor.

⁴⁷ S. Rep. No. 106-49, 106th Cong., 1st Sess. 4 (1999).

The following outlines the analytical steps taken in considering dismissal for “abuse” under 11 U.S.C. § 707(b)(1) and applying the means test presumption of abuse under 11 U.S.C. § 707(b)(2):

1. Dismissal for “abuse” under 11 U.S.C. § 707(b)(1) is possible only for an individual debtor whose debts are primarily *consumer* debts.
2. Only debtors whose combined family income is higher than the *state median income* for their family size are potentially subject to a presumption of abuse under the means test. 11 U.S.C. § 707(b)(7). However, all debtors, even those below the state median, have to calculate the means test in their schedule of current income and expenditures. 11 U.S.C. § 707(b)(2)(C).
3. A “presumption of abuse” arises if the debtor has sufficient projected excess income under the following formula, 11 U.S.C. § 707(b)(2)(A)(i):
 - A. Compute the debtor’s “current monthly income.” 11 U.S.C. § 101(10A)
 - B. Subtract the following expenses:
 - (i) living expenses, calculated by reference to Internal Revenue Service collection guidelines for delinquent taxpayers, 11 U.S.C. § 707(b)(2)(A)(ii)(I);
 - (ii) projected payments on actual secured debts, 11 U.S.C. § 707(b)(2)(A)(iii);
 - (iii) projected payments on actual priority debts, 11 U.S.C. § 707(b)(2)(A)(iv); and
 - (iv) a miscellany of special interest expenses, charitable contributions, and administrative charges, 11 U.S.C. § 707(b)(2)(A)(ii)(II)-(V), § 707(b)(1).
 - C. Multiply by the resulting net total by 60 (for 60 months: the means test projects out five years)
 - D. The debtor fails the means test if that total is not less than the *lesser* of:
 - (i) \$6,000 or 25% of the debtor’s nonpriority unsecured claims, whichever is *greater*, 11 U.S.C. § 707(b)(2)(A)(i)(I)
 - or
 - (ii) \$10,000, 11 U.S.C. § 707(b)(2)(A)(i)(II).

Thus, the range of repayment capacity that may demonstrate presumptive abuse ranges from a low of \$6,000 to a high of \$10,000 (depending on the amount of nonpriority unsecured claims). That means that any debtor with primarily consumer debts whose family income is above the state median who has \$100 per month in repayment capacity according to the means test would face a presumption of abuse.

4. The debtor may rebut the presumption of abuse if she demonstrates “*special circumstances*” that require adjustment of the excess income calculation, by reducing the income component or increasing the expense side, sufficient to pass the means test after the adjustments are made. The debtor must show that she has “no reasonable alternative” but to make the adjustment and must document the special circumstances. 11 U.S.C. §707(b)(2)(B).

The amendments to § 707(b) include detailed standing and procedural rules, concerning who may bring what types of motions to dismiss and in what manner. 11 U.S.C. § 707(b)(6), (7).

Finally, the new law added rules allowing the possibility of sanctions against a debtor’s counsel for filing a petition under chapter 7 that is later dismissed for “abuse.” 11 U.S.C. § 707(b)(4). Conversely, debtors may recover costs in certain circumstances where an unsuccessful dismissal motion is brought. 11 U.S.C. § 707(b)(5).

Now, for those who are gluttons for punishment by minutiae, let me turn to a more detailed examination of the complex and convoluted workings of the means test.

E. To whom does the means test apply?

The means test does not apply to all debtors. First, the means test only applies to an individual debtor. Thus, corporate and partnership debtors are not covered.

Second, the means test applies only to a debtor who has primarily consumer debts. 11 U.S.C. § 707(b)(1). “Consumer debt” is defined as a debt “incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8). This definition is a familiar one in commercial law. It means that an individual debtor is not subject to the means test if she has primarily business debts.

Even if an individual debtor has primarily consumer debts, she still may not be subjected to the means test if she is protected by one of § 707(b)’s safe harbors. The most important safe harbor is for debtors with low total income. Specifically, if the debtor and the debtor’s spouse combined have income below the state median income for a family of their size, they will not be susceptible to the means test. 11 U.S.C. § 707(b)(7). Another safe harbor is provided for disabled veterans whose indebtedness occurred primarily while the individual was on active duty or performing a homeland defense activity. 11 U.S.C. § 707(b)(2)(D).

The key question usually will be determining whether a debtor’s income falls below the state median. The first step is to determine the debtor’s income. This calculation is made by multiplying the debtor’s “*current monthly income*,” defined in § 101(10A), by 12, giving a figure for the debtor’s yearly income. Note that this test looks backwards, at the income the debtor received in the 6 months prior to bankruptcy. All income, taxable or not, is included, except for Social Security benefits. Second, the debtor’s current monthly income must be augmented by adding the income received by her spouse, even if the case is not jointly filed. 11 U.S.C. § 707(b)(7)(A). The only exception is if the debtor and the debtor’s spouse are separated, in which case the debtor must

submit a sworn statement reflecting as much. 11 U.S.C. § 707(b)(7)(B).

After the debtor's income (as augmented by spousal income) is calculated, the next step is to determine whether the debtor's estimated yearly income falls below the applicable state median. What are these medians? "Median family income" is defined in the Code as "the median family income calculated and reported by the Bureau of the Census" in the most recent year, or adjusted for inflation (reflected by the percentage change in the Consumer Price Index) in years the Census Bureau does not calculate state median incomes. 11 U.S.C. § 101(39A).

Note that the U.S. Census Bureau publishes two sets of median incomes for each state, one by family size and one by the number of earners in a family. See <http://www.census.gov/hhes/www/income/medincsizeandstate.html>. Which set applies in § 707(b)(7)? The distinction is important, as for example, in Illinois, the median family income in 2003 inflation adjusted dollars for a family of 2 was \$49,855, whereas the median income for a two-earner family was \$71,054, a difference of over \$20,000. The Code specifies exactly which median is applicable, and it varies depending on the size of the debtor's family. For a debtor in a household of just 1 person, the median family income of the applicable state for one earner is used. For a debtor with a family of 2, 3, or 4 individuals, the highest median family income of the applicable state for a family of the same number or fewer individuals is used, rather than the "earner" figure. If the debtor is in a household of more than 4 individuals, the highest median family income of the applicable state for a family of 4 or fewer individuals is used, plus an additional \$525 per month (or \$6300 per year) for each individual in excess of four. 11 U.S.C. § 707(b)(7)(A).

F. Income

The first step in applying the means test in any chapter 7 case for an individual debtor with primarily consumer debts is to calculate that debtors' current monthly income. The income calculation is used for two purposes: first, to determine whether the debtor's income level is above or below the state median, see 11 U.S.C. § 707(b)(7), and second, to determine the debtor's repayment capacity for determining whether a presumption of abuse arises, 11 U.S.C. § 707(b)(2)(A)(i).

This need to compute income arises even if the debtor may be sheltered from the means test presumption of abuse because his income falls below the applicable state income median, because (i) the only way to determine if the debtor's income is below the applicable state median is to calculate that income, and (ii) all individual debtors have to file a means test calculation with their schedule of current income and expenditures, see 11 U.S.C. § 707(b)(2)(C).

What is "current monthly income"? The first part of the definition, § 101(10A)(A), defines it as the average monthly income the debtor receives from all sources, whether or not it is taxable income, derived during the six month period *prior* to bankruptcy. In a joint case, the spouse's income is included. Significantly, note that only *historical* income is relevant in calculating *current* monthly income. The second component of the definition brings in any amount paid by any entity

other than the debtor (or in a joint case the debtor and debtor's spouse) on a regular basis for household expenses of the debtor and his dependents. 11 U.S.C. § 101(10A)(B). The only exclusion is for Social Security benefits and payments received by victims of war crimes, crimes against humanity, or terrorism. *Id.*

Using a purely historical approach to project future repayment capacity is fraught with problems. The past is not necessarily prologue; past income may go up, and it may go down. If the congressional game is to identify which debtors could make payments on unsecured debts over the next five years in a chapter 13 case, it would make sense to use as the income figure the best possible income forecast, and past income is anything but. The debtor could be laid off prior to bankruptcy, but his past income would still count as "current monthly income." Any adjustments would have to be made in rebutting the presumption of abuse. Conversely, the definition of current monthly income does not account for the prospect of future increased earnings, however likely. Thus, for example, a bright young law student who has accepted a job with a big city law firm for \$100,000 would not have to count that coming salary and probably could file chapter 7 bankruptcy without hindrance from the means test.

A purely historical approach also creates a perverse incentive for a debtor contemplating bankruptcy to keep his income artificially low. A debtor who had previously worked overtime would be well advised to stop overtime work for the six months prior to bankruptcy to lower his income.

One confusing aspect of the income calculation is whether a debtor's spouse's income must be included in a non-joint case. The statute is clear that it must be included for the purpose of determining whether the debtor falls below the applicable state median and thus comes within the safe harbor for below-median debtors. 11 U.S.C. § 707(b)(7). The only exception in that situation is if the debtor and his spouse are separated. For the purpose of making the means test calculation, however, the statute is a bit murky. The definition of current monthly income in § 101(10A) specifies that a debtor's spouse's income must be included in a joint case, which logically by negative inference argues that it is not included in a non-joint case. However, the second part of the current monthly income definition, which includes amounts regularly paid by other entities toward household expenses, possibly could bring at least part of the spouse's income back in.

G. Expenses

After a debtor's "current monthly income" is calculated, the next step in the means test is to determine what deductions should be allowed. The deductions are subtracted from current monthly income to arrive at the net monthly income that is used as the foundation for the means test presumption of abuse calculation. A debtor cannot contribute *all* of her monthly income to repaying debt; everyone needs something to live on for basic monthly expenses. The allowed deductions are as follows, 11 U.S.C. § 707(b)(2)(A)(ii),(iii), and (iv):

(1) *Living Expenses*. For purposes of the means test, Congress decided that the debtor's

allowed living expenses should be those specified in the Collection Standards of the Internal Revenue Service. See <http://www.irs.gov/individuals/article/0,,id=96543,00.html>. The IRS uses these Standards in setting up payment arrangements with delinquent taxpayers. In the Internal Revenue Manual, § 5.15.1.7, the IRS defines these allowable expenses as those “necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income” and as “the *minimum* a taxpayer and family needs to live.” (Emphasis added). *The underlying premise of the means test, then, is that consumer bankruptcy debtors deserve to be treated like income tax evaders and should live on the minimum necessary expenses for five years as they repay their consumer debts. A corollary concept is that private creditors are entitled to the many of the same rights and benefits the government has in collecting taxes.*

What are these Standards the IRS uses? The allowed living expenses fall into three categories: (1) National Standards; (2) Local Standards, and (3) Other Necessary Expenses.

Are debtors limited to their actual expenses, or may they deduct higher amounts specified in the Standards? For the National Standards, debtors may use the monthly expense amounts specified by the IRS, without regard to their actual expenses. Debtors are limited to their *actual* monthly expenses for categories under Other Necessary Expenses. 11 U.S.C. § 707(b)(2)(A)(ii). However, for the Local Standards, whether to use actual or specified standards is unclear. The language of the Bankruptcy Code suggests that the debtor would be able to claim the IRS-specified allowance without regard to her actual expenses. The Code permits a deduction for “the debtor’s applicable monthly expense amounts specified under the Local Standards,” in contrast to the rule for “Other Necessary Expenses,” which allows only “the debtor’s actual monthly expenses.” 11 U.S.C. § 707(b)(2)(A)(ii). Yet, the IRS rules state clearly that for Local Standards, “Unlike the National Standards, the taxpayer is allowed the amount actually spent or the standard, whichever is less.”

The National Standards establish allowances for: food, housekeeping supplies, clothing, and personal care, plus a fixed “miscellaneous” allowance. These Standards depend on the family size and are established on a national basis (except for Hawaii and Alaska, which are higher). See <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html>. Except for the “miscellaneous” allowance, all allowance amounts increase as a family’s monthly income increases. Thus, as the table below shows, for a family of 4, if the family has less than \$833 per month in income, their food allowance is \$468 a month, whereas a family of the same size with over \$5,834 in income per month was allowed \$868. Under the means test, debtors can add an extra 5% to the National Standards food and clothing allowances, if such an increase is demonstrated to be “reasonable and necessary.” The following table provides the National Standards for a family of 4:

**Four Persons National Standards
Based on Gross Monthly Income**

Item	less than \$833	\$833 to \$1,249	\$1,250 to \$1,666	\$1,667 to \$2,499	\$2,500 to \$3,333	\$3,334 to \$4,166	\$4,167 to \$5,833	\$5,834 and over
Food	468	525	526	527	528	640	722	868
Housekeeping supplies	42	43	44	50	54	61	109	110
Apparel & services	146	169	170	171	174	189	217	317
Personal care products & services	37	42	43	45	46	53	62	81
Miscellaneous	188	188	188	188	188	188	188	188
Total	\$881	\$967	\$971	\$981	\$990	\$1,131	\$1,298	\$1,564

The next set of IRS standards used are the Local Standards. These establish allowances for transportation (regional basis), <http://www.irs.gov/businesses/small/article/0,,id=104623,00.html>, and housing and utilities (county) <http://www.irs.gov/businesses/small/article/0,,id=104696,00.html>.

In choosing the appropriate region to use for a debtor, the area in which the debtor resides as of the date of the order of relief should be used. To illustrate the importance of where the debtor lives (and the potential for gaming the system via careful pre-bankruptcy planning), consider the following. For example, a debtor who lives in Cook County, Illinois has a housing allowance for a family of 4 of \$1,796; for neighboring DuPage County, the allowance is \$2,062 – \$266 per month higher. So, by moving across the county line, a debtor could insulate an additional \$15,960 of income over the 60-month means test calculation period, which could make the difference between failing and passing the means test.

The transportation allowance has two components—one for ownership costs and one for operating and public transportation costs. Different caps are set depending on the number of cars the debtor has, up to two cars. The ownership cost is based on a national standard of \$475 for the first car and \$338 for the second car. The operational/public transportation figures are given for zero, one, or two cars. For example, in the Midwest region, Chicago area, the operating allowances are \$257 for no cars, \$329 for one car, and \$422 for two cars. Here, the advantage to the debtor of buying additional cars is manifest. A debtor in the Chicago region with no cars would receive a total transportation allowance of a paltry \$257 per month. If that same debtor had two cars, she would receive an allowance of \$1235 (ownership allowance of \$475 for car one and \$338 car two and a \$422 operating allowance) – \$978 per month higher! So, over the 60-month period, that debtor could protect \$58,680 more in income.

Thus, our “planning” debtor who approached bankruptcy living in Cook County with no cars, who decided to move to DuPage County and buy two cars, would have an additional \$74,460 in permissible expense deductions to offset against income for purposes of the means test calculation! Of course, such a debtor still might be vulnerable to an “abuse” finding based on bad faith/totality of circumstances under 11 U.S.C. § 707(b)(3), but would be much less likely to fail the means test

and be facing a presumption of abuse under § 707(b)(2).

Under the means test, debtors are entitled to take a deduction for payment of secured debts in addition to that for the IRS standards. 11 U.S.C. § 707(b)(2)(A)(iii). However, § 707(b)(2)(A)(ii), which deals with the allowances pursuant to the Standards, states that “*Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments of debt.*” The apparent intent of this provision is to require the debtor to subtract from IRS living expenses all payments on secured debts that otherwise would fall within the IRS categories.

Thus, a debtor apparently cannot double count: that is, she cannot deduct both secured debt payments on a car *and* the full IRS transportation allowance, or the home mortgage payment *and* the full housing allowance. Since the IRS transportation allowance already is divided into ownership costs and operating costs, the easiest way to deal with this problem for secured debt payments on cars is simply to not give the debtor any deduction for the transportation ownership cost under the Local Standard but then give full credit under the secured debt deduction (11 U.S.C. § 707(b)(2)(iii)). The debtor could still take the full operating cost allowance. However, for the housing and utility allowance, the IRS does not similarly distinguish between ownership and maintenance costs, so it is unclear how a debtor’s mortgage payment is to be deducted from the allowance. One possibility would be to credit everything other than the mortgage payment as part of the IRS allowance (up to the allowed amount), then deduct the mortgage payment under the secured debt allowance.

The final category of IRS expenses allowed for use in the means test are those specified as an “Other Necessary Expenses.” Actual expenses of the debtor in these categories are allowed. No allowance is specified by the IRS. What sorts of expenses fall under “Other Necessary Expenses”? The IRS defines these as “the allowable payments you make to support you and your family’s health and welfare and/or the production of income.” Examples from the Internal Revenue Manual, § 5.15.1.10, include child care, health care, education (if required for one to keep her job), life insurance, and income taxes. In all categories, the basic requirement is that such expense must be necessary for providing for the health and welfare of the taxpayer and family or aid in the production of income. Note that § 707(b)(2)(A)(ii) specifically provides that “reasonably necessary health insurance, disability insurance, and health savings account expenses” may be deducted.

The bankruptcy judge will have to exercise discretion in determining how much to allow to the debtor as “Other Necessary Expenses.” This is of course necessary, but it flies in the face of one the primary goals of the means test, which was to take discretion out of the hands of the judge and instead institute a mechanical test.

(2) *Expenses for protection from family violence.* A debtor may deduct “reasonably necessary expenses incurred to maintain the safety of the debtor and the debtor’s family from family violence.” 11 U.S.C. §707(b)(2)(A)(ii)

(3) *Continued contributions for the care of non-dependent family members.* A debtor may subtract any continued actual and reasonably necessary expenses for the care and support of an

elderly, chronically ill, or disabled member of the debtor's household or member of the debtor's immediate family (includes parents, grandparents, siblings, children, and grandchildren of the debtor, dependents of the debtor and spouse of the debtor in a joint case). 11 U.S.C. § 707(b)(2)(A)(ii)(II).

(4) *Actual expenses of administering a Chapter 13 plan.* For debtors eligible for chapter 13, the debtor can deduct actual administrative expenses of administering a chapter 13 case in the district where the debtor resides. The Executive Office for the United States Trustees will determine schedules of expenses. The debtor is capped at deducting 10 percent of the projected plan payments. 11 U.S.C. § 707(b)(2)(A)(ii)(III). This deduction makes sense, as a test motivated by a desire to move "can-pay" debtors into chapter 13 must take into account the realities of a chapter 13 case.

(5) *Actual expenses up to \$1500 per minor child per year for debtor's minor children to attend private school.* This deduction only applies for dependent children under the age of 18. A debtor must provide documentation of the expense and a detailed explanation of why the expense is "reasonable and necessary," as well as why it is not already accounted for in the IRS Standards. 11 U.S.C. § 707(b)(2)(A)(ii)(IV).

Why are debtors who choose to send their children to private school rewarded in the means test? For each child in private school, over five years the parent receives a deduction totaling \$7500. In the means test, having over \$10,000 of excess income over five years will always lead to a presumption of abuse. A debtor might decide to send her children to private school in order to pass the means test.

(6) *Additional home energy costs.* If a debtor's actual home energy costs are higher than those allowed by the IRS Local Standards for housing and utilities, the debtor may deduct her actual expenses, provided she documents such expense and shows why the expense is reasonable and necessary. 11 U.S.C. § 707(b)(2)(A)(ii)(V).

(7) *Secured Debts.* A debtor is allowed to subtract the average monthly payments on account of secured debts due over the five years a chapter 13 plan would be carried out. First the debtor must compute the total payments due to secured creditors in the 60 months following the date of the petition, and then add payments necessary to retain her primary residence, motor vehicle, and any other necessary property. The second category is usually payments to cure arrearages. That total is divided by 60 to give the average monthly payments for secured debts. 11 U.S.C. § 707(b)(2)(A)(iii).

The deduction for secured debts in calculating the means test is understandable, since the Bankruptcy Code allows secured creditors to insist on full payment out of their collateral in chapter 13. Here again, given the premise of the means test to sort out of chapter 7 those debtors who could succeed under chapter 13, the test must take the realities of chapter 13 into account. The problem that arises is one of perverse incentives. The debtor may be *rewarded* for having large amounts of secured debt by getting a break on the means test.

Imagine a case of two debtors. In all regards but one they are identical: their current monthly

income is the same; they are allowed the same monthly expense deductions; their priority claim deductions are the same; they even have the same amount of unsecured debt. However, the first debtor has more secured debt than the second. In this hypothetical, assume that the first debtor passes the means test because of her higher level of secured debt, but the second debtor, with less secured debt, does not. Thus, the debtor with *less* debt is the one found to be a presumed abuser!

In applying the means test, the bankruptcy judge is not asked to examine the circumstances under which the debtor incurred secured debt. That inquiry would only arise in a general good faith assessment under § 707(b)(3). A debtor might try several strategies to help her pass the means test. First, she could take on additional secured debt in the months before bankruptcy. Second, the debtor could choose to pay down her *unsecured* debts, at the expense of her *secured* debts, leaving her with more secured debt when the means test is computed. Finally, the debtor could choose to let payments on her primary residence or motor vehicle lapse, since she could subtract any arrearages in the calculation of her secured debt.

(8) *Priority Claims.* A debtor is allowed to subtract expenses for payment of all priority claims (including priority child support and alimony claims). The amount is determined by summing the total payments on priority debt owed and dividing by 60. 11 U.S.C. § 707(b)(2)(A)(iv). The logic and problems associated with the priority claim deduction are similar to those for secured debt. Recall that priority claims are the first paid among unsecured claims after the satisfaction of secured claims. These claims cover payments of domestic support obligations, administrative expenses, pre-petition taxes, among other things. A chapter 13 plan can only be confirmed if it provides for the full payment of priority claims. 11 U.S.C. § 1322(a)(2). For the means test to be a fair assessment of the debtor's ability to pay unsecured creditors in chapter 13, debtors would have to be allowed to deduct of such payments.

The problem again is one of perverse incentives. A debtor who is considering filing chapter 7 and whose net income is close to the margin for triggering the presumption of a abuse might choose *not* to pay priority claims, paying her unsecured debt instead. Such actions would reduce the amount of unsecured debt that applied in the means test while increasing the allowable deduction for priority debts. A disturbing consequence, then, is that a debtor with significant alimony or child support debt – the very sorts of debts Congress cares most should be paid – might put off paying those very debts in order to pass the means test!

(9) *Charitable Contributions.* When the court is determining whether to dismiss a case because of either the presumption of abuse in § 707(b)(2) or general abuse under § 707(b)(3), the court *may not take into consideration* whether the debtor has made, or continues to make, charitable monetary contributions to a qualified religious or charitable organization. 11 U.S.C. § 707(b)(1). Exactly how the debtor's charitable contributions are figured into the means test is unclear, as such expenses are not explicitly included as any sort of deduction in the means test calculations. Note that the statutory exclusion does not specify any ceiling on the amount of charitable contributions a debtor may make for means test and dismissal purposes. Of course, for the purpose of fraudulent transfer immunity, a debtor may make charitable contributions up to 15% of her gross annual

income. 11 U.S.C. § 548 (a)(2).

As an example, assume that for purposes of the means test the applicable trigger payment amount was \$10,000 (under § 707(b)(2)(A)(i)), and the debtor had net monthly income of \$200, not including charitable contributions. Without more, this debtor would fail the means test (multiplying 60 months times \$200, she has \$12,000 in repayment capacity). Assume now that this debtor contributes \$100 a month to her church. The court, when examining the case of such debtor, would not be allowed to dismiss the case for presumption of abuse. Why? The court can only view the debtor's net monthly income as \$100 a month, not \$200. Multiplying this new net monthly income figure of \$100 by 60 gives \$6,000, less than the applicable \$10,000, meaning the debtor now passes the means test.

H. When is abuse presumed?

Once a debtor's current monthly income and allowable monthly deductions have been calculated, the means test is almost complete. The final step is to determine whether, based on those figures, a presumption of abuse exists. This calculation is done in three steps:

Step One: *Reduce* a debtor's current monthly income by all allowable monthly deductions as outlined in 11 U.S.C. § 707(b)(2)(A)(ii)-(iv), calculating a net monthly income.

Step Two: *Multiply* that "net monthly income" by 60 (representing the five years debtor would devote excess funds to paying unsecured creditors in chapter 13

Step Three: *Compare* that figure with the *lesser* of–

- 25% of the debtor's nonpriority unsecured claims *or* \$6,000, whichever is *greater*
- or
- \$10,000.

If the amount computed in Step Two (debtor's actual projected repayment capacity) is greater than the figure in Step Three (the trigger amount), then abuse is presumed. 11 U.S.C. § 707(b)(2)(A)(I).

A convenient way to think about the means test is to split debtors into three tiers based on the amount of unsecured debt they have. Tier One is for debtors with *less than \$24,000* of unsecured debt. For these debtors, abuse is presumed if their Step Two total of net monthly income over 60 months is more than **\$6,000**, regardless of their actual amount of debt. Tier Two is for debtors with unsecured debts *between \$24,000 and \$40,000*. Abuse is presumed if the debtor's Step Two total ("net monthly income" over 60 months) is more than 25% of the debtor's unsecured debts; the repayment range is **between \$6,000 and \$10,000**. The final tier, Tier Three, includes debtors with *more than \$40,000* of unsecured debt. For these debtors, abuse is presumed if the debtor's Step Two total of net monthly income over five years is **more than \$10,000**, without regard to how much unsecured debt such debtor actually has.

Another way to conceptualize the means test is in terms of "trigger points." Since \$6,000

is the minimum amount that can trigger a presumption of abuse, and because \$6,000 divided by 60 months (the projected presumption period) is \$100, if a debtor has net monthly income (current monthly income minus deductions) of **less than \$100 a month**, the means test presumption of abuse *never* arises. On the other hand, since any repayment capacity over 60 months in excess of \$10,000 always triggers the presumption, given that \$10,000 divided by 60 is \$166.66, the presumption of abuse *always* arises if a debtors net monthly income is **more than \$166.66**. These trigger points can be summarized by the following table:

"Current Monthly Income" after defined deductions	Presumption of Abuse
Less than \$100	Never Arises
\$100	Arises unless debt exceeds \$24,000
More than \$166.66	Always Arises

Note how small a margin a debtor has under the means test. A difference of \$67 of income over expenses a month can be the difference between abuse *never* being presumed and abuse *always* being presumed!

Consider some examples. Assume a debtor has current monthly income of \$5,125 and allowed deductions equal to \$5,000 a month, and thus her net monthly income is \$125. If the debtor has unsecured debts of \$30,000 or less, abuse is presumed. How does this calculation work? Take the debtor's net monthly income of \$125 (from Step One) and multiply by 60, giving \$7,500 (Step Two). Under Step Three, 25% of the debtor's nonpriority unsecured debts \$30,000 = \$7,500. Thus, if the debtor has \$30,000 of unsecured debt, the two amounts for the means test comparison are equal, meaning the debtor is an abuser (the Step Two amount must be "less than" the Step Three amount). One dollar more of unsecured debt, however, and the debtor no longer is abusive, as, for example, 25% of \$30,004 is \$7,501 (Step Three), which is more than \$7,500 (StepTwo).

In another example, assume the debtor has \$800,000 in unsecured debt (wow!), income of \$3970 a month and expenses of \$3800 a month. This debtor is a presumed abuser no matter how much debt she has, as her "net monthly income" is \$170, an amount that always triggers the presumption of abuse (\$170 times 60 equals \$10,200, more than \$10,000). Therefore, this debtor presumptively will be denied relief under chapter 7, even though over five years she could only afford to pay her creditors a little more than 1% of the debts she owes!

As a final example, assume a debtor has \$10,000 in unsecured debt, income of \$4,500 a month and expenses of \$4,405 per month. This debtor has "net monthly income" of \$95 a month. No matter what amount of unsecured debt she has, she would never be presumed an abuser, even though she can afford to pay 57% of her unsecured debt (60 times \$95 is \$5,700, 57% of \$10,000).

I. Rebuttal

Although Congress in BAPCPA sought to create as mechanical a means test as possible, and to limit sharply the discretion bankruptcy judges exercise in deciding which debtors "can pay" their debts, some discretionary flexibility in deciding "abuse" was inescapable. Without any discretion,

a totally mechanical means test could be unfair. A debtor who lost her job within six months of bankruptcy might fail the means test based on past income from a job she no longer had. A debtor with a serious medical condition and high medical expenses might fail the means test and be denied relief under chapter 7. As a safeguard to ensure that these sorts of debtors are not unfairly kept from chapter 7, Congress added a provision allowing debtor to rebut a presumption of abuse.

Section 707(b)(2)(B) outlines the guidelines for rebuttal. The debtor must demonstrate “special circumstances” that justify additional expenses or adjustments of current monthly income “for which there is no reasonable alternative.” The Code specifically cites a serious medical condition or a call or order to active duty in the armed services as acceptable examples of what might be reasonable “special circumstances.” Procedurally, the debtor must itemize each additional expense or adjustment of income and provide documentation of such expense or income adjustment along with a detailed explanation of why such changes to the means test calculation are reasonable and necessary. The debtor must attest under oath to the accuracy of these statements. The presumption of abuse is only rebutted if a judge allows the additional expenses or adjustments of income and such adjustment allows the debtor to pass the means test. Congress intended for it to be difficult for debtors to escape the rigors of the means test on an individualized basis. Furthermore, as discussed later, the possible sanctions against a debtor’s counsel if a debtor’s chapter 7 case is dismissed under the means test might chill attempts to rely upon the “special circumstance////s” exception.

J. Procedure

The consumer credit industry was concerned that the “substantial abuse” test had become largely a dead letter. One of the main aims of Congress in BAPCPA was to put more teeth into the abuse test for “can pay” debtors, both substantively and procedurally. Not only was the substantial abuse test vague on the merits, prior law did not require the court or the United States trustee to file a motion to dismiss the case, and no one else had standing. Congress found this result unsatisfactory and decided to enact the means test with the mandatory presumption of abuse and a presumptive directive to file a motion to dismiss if the debtor fails the means test.

Several provisions of the Code work to ensure that a motion for dismissal or conversion is usually filed if the debtor satisfies the presumption of abuse. The debtor is forced to facilitate the process on the front end by filing a statement of her calculations under the means test as part of the schedule of current income and expenditures under § 521. 11 U.S.C. § 707(b)(2)(C). This obligation applies regardless of whether the means test even applies to the debtor. And, failure to file the statement is itself grounds for dismissal of the case. Once the debtor has filed the calculation, the United States trustee is required to review the debtor’s materials and not later than 10 days after the first meeting of creditors, file with the court a statement as to whether the debtor’s case would be presumed to be abusive under § 707(b). 11 U.S.C. § 704(b)(1). If the United States trustee determines that the debtor’s case should be presumed to be an abuse and the debtor’s current monthly income multiplied by twelve is above the applicable state median (the debtor’s income is not augmented by the debtor’s spouse’s income in a non-joint case here), then not later than 30 days

after filing the statement under § 704(b)(2) that the presumption of abuse has arisen, the United States trustee is required either to file a motion to dismiss or convert under § 707(b), or to file a statement setting forth reasons why such motion is not appropriate. 11 U.S.C. § 704(b)(2). The Code does not give any examples as to what sorts of reasons might support finding that such a motion was not appropriate. One might surmise that an obvious case where the presumption would be rebutted might be such an instance.

This is not the end of the story, however. If the United States trustee decides that filing a motion for dismissal under § 707(b) is not appropriate, other parties still have standing to file a dismissal or conversion motion. Amended § 707(b)(1) allows not only the court or the United States trustee, but also *any* party in interest to file a motion for dismissal. This standing rule only applies if the debtor's income is above the applicable state median. If the debtor's income, augmented by the income of the debtor's spouse, is below the applicable state median, no one has standing to file a motion to dismiss under the means test presumption of § 707(b)(2). 11 U.S.C. § 707(b)(7). Further, in such a situation, only the judge or United States trustee may file a motion to dismiss for "abuse" more generally as outlined in § 707(b)(3). 11 U.S.C. § 707(b)(6).

New provisions of the Code also ensure that all creditors are given notice if a presumption of abuse arises. If the United States trustee's statement indicates that the presumption of abuse has arisen, all creditors must be notified within 5 days. 11 U.S.C. § 704(b)(1)(A). Additionally, § 342(d) provides that if the presumption of abuse arises in an individual case, the clerk must notify all creditors in writing not later than 10 days after the date of the filing of the petition.

If the presumption of abuse arises and a motion is filed to dismiss, then the burden shifts to the debtor to rebut the presumption of abuse by demonstrating special circumstances. 11 U.S.C. § 707(b)(2)(B). The debtor must document and justify those special circumstances.

In the event no presumption of abuse arises or if the presumption is rebutted, any party in interest may file a motion to dismiss for abuse on proof of bad faith or that the totality of the circumstances shows abuse. 11 U.S.C. § 707(b)(1), (3).

The Code still appears to leave the ultimate question of whether to dismiss or (with the debtor's consent) convert a case for abuse to the discretion of the judge, since § 707(b)(1) provides that the court "may" dismiss or convert. However, given the presumption under § 707(b)(2) and the history of the enactment, Congress surely intended for judges to dismiss (or convert with consent) unrebutted presumptive abuse cases where the motion is filed by the United States trustee. It is not as clear what the court should do if the United States trustee chooses *not* to file a dismissal motion as "not appropriate" under § 704(b)(2), even though the debtor fails the means test, but then a party in interest files such a motion. Under § 707(b)(2)(A)(I), the court "shall presume abuse exists" if the debtor fails the means test, leaving only the possibility of debtor rebuttal under § 707(b)(3). But surely some weight should be given to the United States trustee's decision not to file a dismissal motion. But how is unstated.

K. Sanctions

One very controversial new provision under revised § 707(b) imposes *sanctions* against debtor's counsel if the case is dismissed as an abuse under § 707(b) and the court finds the attorney violated rule 9011 of the Federal Rules of Bankruptcy Procedure. Rule 9011 is the bankruptcy equivalent to civil rule 11, and authorizes a court to impose sanctions against an attorney who commences a frivolous action or files other inappropriate documents in violation of the rule. Hence, if an individual debtor's case is dismissed as abusive, the debtor's attorney could be sanctioned for filing a frivolous lawsuit. An important component of the new sanctions legislation provides that the signature of a debtor's attorney constitutes a certification that the attorney has "performed a reasonable investigation" and determined that "the petition, pleading or written motion is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and does not constitute an abuse." 11 U.S.C. § 707(b)(4)(C). Additionally, the signature certifies that the attorney had no knowledge after inquiry that information filed in schedules filed with the petition is incorrect. 11 U.S.C. § 707(b)(4)(D).

The sanctions authorized are twofold. First, the court may order the debtor's attorney to reimburse the trustee for all reasonable costs the trustee incurred in prosecuting a motion under § 707(b), including reasonable attorney's fees. 11 U.S.C. § 707(b)(4)(A). Second, the court may award a civil penalty against the debtor's attorney, payable to the trustee, United States trustee, or bankruptcy administrator. 11 U.S.C. § 707(b)(4)(B). The court or any party in interest may move for sanctions to be imposed if the case is dismissed or converted after a trustee's motion. 11 U.S.C. § 707(b)(4)(A).

The sanctions rule serves as a deterrent against debtors filing under chapter 7 in the first place in close cases, especially if they know that they would fail the means test presumption and are hoping to prevail on rebuttal by citing "special circumstances." The sanctions rule is likely to have a number of consequences.

First, the cost to debtors of filing a chapter 7 case will increase substantially. Some estimates are that attorney's fees for chapter 7 consumer cases will double or triple. This result is unsurprising, as now that the debtor's attorney is essentially a guarantor of the petition, he will be sure to complete a thorough investigation of the debtor's finances before filing a petition. This investigation is not free. Much of the cost will be passed onto the debtor.

Second, some attorneys might refuse to file chapter 7 cases except in certain circumstances where risk of sanctions is negligible, such as when the debtor's income is below the state median, or the debtor easily passes the means test. Alternatively, an attorney might only be willing to file for a debtor whose income is above the state median for an increased fee to factor in the cost associated with the risk of being sanctioned. However, even if the cost of sanctioning was factored into an attorney's fees, few attorneys would want to be sanctioned regardless, and many still might refuse to file. A probable result is that many attorneys will be hesitant to file a case that has a presumption of abuse in hopes of rebutting the abuse with proof of "special circumstances," unless those circumstances are manifestly obvious and uncontroversial.

L. Other forms of "abuse"

The presumption of abuse under the means test of § 707(b)(2) is not the only reason a case might be dismissed under § 707(b). 11 U.S.C. § 707(b)(3) outlines other reasons a court might find a chapter 7 case to be an “abuse” and dismiss a case under § 707(b)(1). In cases in which the presumption of abuse does not arise or has been rebutted, the court should consider whether the debtor filed the petition in bad faith or whether the totality of the circumstances of the debtor’s financial situation demonstrate abuse in deciding whether to grant a motion to dismiss or convert under § 707(b)(1). Congress gave one factor of possible abuse: where the debtor seeks to reject a personal services contract and the financial need for such rejection. That situation is of course not exclusive, and one can expect courts to embrace many of the factors of the old “totality” test.

Any party in interest can file a motion under § 707(b)(3) if the debtor’s income exceeds the applicable state median; only the judges, U.S. trustees and bankruptcy administrators may do so if the debtor’s income is at or below the applicable state median. 11 U.S.C. § 707(b)(6).

2. *CREATING ENTRY BARRIERS*

The means test is only one aspect of S. 256's retrenchment regarding consumer debtors. That Bill also contains many provisions that will create entry barriers:

- *Every* individual debtor must complete credit counseling in the 180 days prior to bankruptcy as a condition of *eligibility* for bankruptcy relief. 11 U.S.C. § 109(h)(1). Exceptions may be allowed if access to such counseling is not readily available or if the debtor is incapacitated or away on military duty.
- The debtor must file lots of new documents and paperwork in addition to all the schedules and statements previously required. The sanction is harsh – if *all* of the paperwork requirements are not complied with by day 45 of the case, dismissal of the case is automatic. Among the paperwork debtors must file are:
 - tax returns for the most recent year. 11 U.S.C. § 521(e)(2)((A)(I). Note that this can be a major problem where spouses are separated or divorced and the non-debtor spouse has possession of the tax return.
 - certificate of credit counseling. 11 U.S.C. § 521(b)(1)
 - copy of the budget plan developed. 11 U.S.C. § 521(b)(2)
 - copies of all payment advices from employers received within 60 days of filing. 11 U.S.C. § 521(a)(1)((b)(iv)
 - itemized statement of monthly net income and any anticipated increases in income or expenses. 11 U.S.C. § 521(a)(1)(B)(v), (vi).
 - with the statement of the debtor's financial affairs, if § 342(b) applies, debtor must file a certificate of either (i) an attorney that delivered the appropriate notice of § 342(b) or (ii) of debtor that such notice was received and read by debtor in case no attorney indicated, and no bankruptcy petitioner preparer signed the petition. 11 U.S.C.

§ 521(a)(1)(B)(iii).

- statement of intention with respect to property securing consumer debts has been expanded to property securing all debts. § 521(a)(2).
- record of any interest that a debtor has in an educational individual retirement account or under a qualified State tuition program. 11 U.S.C. § 521(c).
- on request, debtor shall file (1) each tax return for tax years ending while the case is pending; (2) returns filed for tax years preceding the filing that are filed while the case is pending; (3) any amendments to returns. 11 U.S.C. § 521(f).
- At request of US trustee or trustee, debtor shall provide photo identification that establishes the identity of the debtor. 11 U.S.C. § 521(h).
- As discussed previously, sanctions are imposed on a debtor's attorney if a debtor's chapter 7 case is dismissed as an abuse under § 707(b). This new rule means that debtor's counsel cannot rely on the information provided them by debtors and must either (i) do their own investigative "due diligence" before filing a chapter 7 case, or (ii) simply refuse to risk filing a chapter 7 case at all. Choice 1 will drive up the costs of filing for debtors (most experts are predicting a 50-100% increase in chapter 7 attorneys' fees) and of course choice 2 will make it hard for debtors to file chapter 7 at all.

Aside from the substantial cost to debtors, one should not forget the massive costs to the bankruptcy system as a whole. Administering the means test and all of these attendant new rules will be expensive and burdensome. Is Congress trying to impose the worst of the welfare and tax systems on the bankruptcy bureaucracy? Given the absence of compelling evidence of abuse, the imposition of these massive costs and burdens is hard to justify.

3. *DISCHARGE WEAKENED*

S. 256 also weakens the discharge available to consumer debtors, in numerous ways:

- Time period between discharges extended : A debtor may receive a chapter 7 discharge only once every *eight* years. 11 U.S.C. § 727(a)(8). This time bar was extended from six to eight years by S. 256.
- New time bar when the *second* (pending) case is a chapter 13. Previously, there was no time bar for a pending case under any chapter except chapter 7. Under S. 256, if the second case is a chapter 13, discharge in the chapter 13 is denied if the debtor received a discharge (i) in a prior chapter 7, 11, or 12 case filed within four years before the filing of the current chapter 13 case, or (ii) in a prior chapter 13 case filed within two years before the filing of the current chapter 13. 11 U.S.C. § 1328(f). The policy behind this new restriction is puzzling, especially since debtors in chapter 13 must commit all disposable income to plan payments. The new rule seems to discourage debtors from attempting to proceed under chapter 13, and by eschewing bankruptcy relief, may only drive them into the underground economy.

- Deny discharge to debtor who fails to complete an instructional course concerning personal financial management after filing the petition. This educational requirement is applicable in both chapter 7 and chapter 13 cases. 11 U.S.C. §§ 727(a)(11), 1328(g). Note that this post-filing debtor education rule is in addition to the debtor eligibility rule of § 109(h), which requires a debtor to receive creditor counseling within 180 days prior to filing a petition in order to be eligible for bankruptcy relief. The discharge denial rule is subject to limited exceptions, (i) for debtors described in § 109(h)(4), e.g., debtors who are incapacitated, disabled, or on active military duty in a military combat zone; or (ii) if the United States trustee determines that adequate approved instructional courses are not available.
- The “loading up” presumption of fraud under 11 U.S.C. § 523(a)(2)(C) is greatly expanded, covering (i) luxury goods purchases of only \$500 (down from \$1225) and going back 90 days (up from 60 days), and (ii) cash advances of only \$750 (reduced from \$1225), with a reach-back period extending back 70 days (up from 60 days). This provision is an indirect way of making a lot of credit card debt nondischargeable. For example, a debtor who takes out cash advances of just \$75.01 per week for 10 weeks to buy groceries for her family would presumptively be a “fraud” and would have the burden of rebutting the presumption in order to discharge that credit card debt.
- All student loans are rendered nondischargeable (absent proof of undue hardship), even if the lender is not a governmental entity. 11 U.S.C. § 523(a)(8). The need to protect private lenders in this way is not obvious.
- “Super-discharge” in chapter 13 is virtually eliminated. The rule has long been that all of the § 523(a) exceptions apply to individual debtors who otherwise receive a discharge in a chapter 7 or chapter 11 case. By contrast, as originally enacted, the Code contained a powerful “super-discharge” in § 1328(a) for debtors who completed plan performance in a chapter 13 case, with most of the § 523(a) types of debts discharged. For example, even debts for taxes (§ 523(a)(1)), fraud (§ 523(a)(2)), and willful and malicious injury (§ 523(a)(6)) were potentially dischargeable in chapter 13. The idea was to provide an incentive for debtors to elect chapter 13. Over time, though, Congress has made steady inroads into the scope of the super-discharge, culminating in the elimination of several more types of debts in S. 256. Before S. 256, the types of debts not discharged in chapter 13 were for: alimony and support, student loans, DUI-related debts, and restitution or a criminal fine included in a sentence on the debtor’s criminal conviction. 11 U.S.C. § 1328(a). S. 256 added the following to that list:
 - some types of debts for taxes (§ 523(a)(1)(B) & (C), § 507(a)(8)(C), § 1328(a)(2))
 - fraud debts (§ 523(a)(2), § 1328(a)(2))
 - unsecured debts (§ 523(a)(3), § 1328(a)(2))
 - debts for fiduciary fraud or defalcation, larceny, or embezzlement (§ 523(a)(4), § 1328(a)(2))

- debts for restitution or damages awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused death or personal injury (§ 1328(a)(4)).

After S. 256, then, the only common types of debts that are still left as part of the so-called “super” discharge are for (i) income taxes due more than three years before bankruptcy, for which the debtor actually filed a timely return that was not fraudulent, and which tax the debtor did not attempt to evade or defeat (§ 523(a)(1)(A)), and (ii) debts arising from property settlements in divorce or separation proceedings (§ 523(a)(15)).

- Plan length in chapter 13 lengthened. The norm for plan length in chapter 13 prior to S. 256 was three years. That bill changes the required payment period to *five years* for debtors whose income is at or above the state median. 11 U.S.C. § 1325(b)(4). Debtors are not able to get a discharge in chapter 13 until completing plan performance. This provision ties in with the means test rule in chapter 7, which looks to payment capacity (of only \$100 per month) over five years as the standard for abuse.
- Chapter 11 made more of a chapter 13 clone for individual debtors. Before S. 256, an individual debtor could proceed under chapter 11 and propose a payment plan there, with certain advantages over chapter 13. For example, the debtor’s post-petition earnings were not made property of the bankruptcy estate; the debtor received an immediate discharge upon plan confirmation in chapter 11, rather than having to wait to complete performance; and the debtor was not required to pay all disposable income to creditors. The biggest downside was that creditors in chapter 11 could vote on the plan, which they could not do in chapter 13. Under S. 256, all of the prior advantages of chapter 11 over chapter 13 for individual debtors were eliminated:
 - the debtor’s discharge is deferred until plan completion. 11 U.S.C. § 1141(d)(5).
 - the debtor must commit all disposable income to plan payments for five years if over the state median income. 11 U.S.C. § 1129(a)(15).
 - the debtor’s post-petition earnings become property of the bankruptcy estate, 11 U.S.C. § 1115, and the plan must be funded from post-petition earnings. 11 U.S.C. § 1123(a)(8). Note that now debtors actually have a worse deal in chapter 11 than in chapter 13, because creditors are permitted to commence an involuntary case against an individual debtor under chapter 11, which they are not permitted to do in chapter 13.

4. SECURED CREDITOR WINDFALLS

The new law’s beneficence for non-debtor parties is not limited to *unsecured* creditors. Secured creditors join in the bounty as well. Several provisions provide significant benefits to secured creditors.

First, S. 256 comes close to eliminating “strip down” of secured debts. Some background

first: what is “strip down”? It is nothing more than the reduction of a secured claim to the value of the collateral itself.⁴⁸ Assume, for example, that a debtor buys an automobile on credit. Two years later, when the debtor files chapter 13, the debtor owes a total debt of \$12,000, but the automobile securing the debt is worth only \$8,000. Under the law prior to S. 256, the debtor would be allowed to “strip down” the secured debt to the \$8,000 collateral value. The debtor would do this by confirming a chapter 13 plan that would pay the secured creditor \$8,000 (plus interest) on the secured claim. The remaining unsecured balance of \$4,000 would be paid pro rata with all other unsecured claims. In so providing, chapter 13's plan confirmation rules were merely implementing the general rule in § 506(a) that defines the extent of a secured claim (to the value of the collateral, but no more). Note that if the debtor were to return the vehicle to the creditor, the creditor would not get any more money than under the strip down plan, assuming, not implausibly, that the creditor would only be able to sell the vehicle for its value.

S. 256 prohibits using the § 506 principle in a chapter 13 plan in order to strip down a secured debt on a motor vehicle if: the debt is purchase money (which it almost always is); the vehicle was acquired for the debtor's personal use; and the debt was incurred within *901 days* (~ 2 ½ years) of bankruptcy.

In addition, under S. 256, strip down is prohibited on *any* type of property (“any other thing of value”) if the debt was incurred within one year prior to bankruptcy.

The effect of this rule will be to make it much more difficult for debtors to confirm (and, if they somehow confirm, to complete performance under) a chapter 13 plan. The reason is that they will have to pay more to their secured creditors. In the example given above, the debtor would have to pay \$12,000 plus interest, rather than just \$8,000 plus interest plus any unsecured dividend on the \$4,000 unsecured balance. Ironically (for the unsecured creditor lobby), the rule would divert money from the pockets of unsecured creditors to the pockets of secured creditors. The anti-strip down provision will make chapter 13 even more problematic for debtors. This outcome is ironic (or even perverse), given that Congress in the very same bill is trying to force debtors into chapter 13 via the means test.

The enhanced difficulty for debtors to confirm and complete a chapter 13 plan under the Reform Bill is starkly demonstrated by the findings of a 1999 study by the National Association for Chapter 13 Trustees (NACTT).⁴⁹ The NACTT Study analyzed the impact of an earlier reform bill (S. 625) that contained very similar anti-strip down rules to those in S. 256. According to the

⁴⁸ See Tabb, *BANKRUPTCY*, supra note 3, § 7.29, at 555-62.

⁴⁹ *Results of Informal Survey on Impact of Section 306(b) of S. 625*, National Association of Chapter 13 Trustees (May 25, 1999) (copy on file with author). The bill that governed the study, S. 625, was quite similar to the current Reform Bill with regard to strip down, prohibiting strip down (1) if the debt was incurred within 5 years of filing and the collateral was a motor vehicle and (2) if the debt was incurred within 6 months of filing for any other type of collateral. The study was conducted by 13 trustees in 12 districts, who analyzed every tenth chapter 13 filing made in their district in January 1999.

NACFTT Study, over one-fifth of existing chapter 13 cases could not be confirmed. Furthermore, nearly half of existing chapter 13 cases that would be confirmed would propose substantially reduced distributions to unsecured creditors.

A second major windfall is provided to secured creditors by S. 256. A recurring issue in valuing collateral (for the purpose of ascertaining the amount of the secured claim under § 506, as explained above) is deciding what *standard* of valuation should be used.⁵⁰ That is, should the focus be on the *retail* or replacement cost (what it would cost the *debtor* to replace the item on the retail market), or should the focus be on *wholesale* or foreclosure cost (what the *creditor* could realize on the collateral at foreclosure)? Most of the time creditors want their collateral to be valued higher. Under the law prior to S. 256, though, the answer depended on the projected use or disposition of the collateral. If the debtor was retaining the collateral, then replacement value (to the debtor) might be appropriate.⁵¹ But if the concern is adequate protection to the creditor, due to the imposition of the stay, then perhaps foreclosure value (to the creditor) should be used, since that is all the creditor is losing.

Here again S. 256 changes the law in favor of creditors. For individual debtors in chapter 7 (who hope to redeem collateral under § 722) or chapter 13 (who must provide for secured creditors under a plan), personal property collateral is to be valued at the higher “replacement” value, which S. 256 defines as retail value. 11 U.S.C. § 506(a)(2). Since creditors could not get this much for the collateral if the debtor were simply to turn the collateral back to the creditors, this provision gives a windfall to secured creditors.

S. 256 provides a third major benefit to secured creditors. One of the major issues in consumer bankruptcy law has been what a debtor must do in order to retain collateral if she is current on her payments at the time of bankruptcy.⁵² The problem lies in § 521(2), which requires a debtor to state her intention with respect to personal property collateral that is consumer goods. The issue is whether the debtor may simply continue making required payments and retain the collateral (known as “ride through”), or whether instead she must either *redeem* the property under § 722 (which would require an immediate cash-out of the collateral value) or *reaffirm* the entire debt under § 524(c), in order to keep the collateral. Prior to S. 256, the circuit courts of appeal were about evenly divided.⁵³ Under S. 256, the creditor again wins. Under the new law, the debtor in this situation must either redeem or reaffirm, or the automatic stay is lifted and the secured creditor can foreclose. 11 U.S.C. § 521(a)(6).

⁵⁰ Tabb, BANKRUPTCY, *supra* note 3, § 7.27, at 549-52.

⁵¹ See *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

⁵² See Tabb, BANKRUPTCY, *supra* note 3, § 7.26, at 547-48.

⁵³ Compare *Capital Communications Federal Credit Union v. Boodrow* (In re Boodrow), 126 F.3d 43, 53 (2d Cir. 1997) (debtor may retain property without redeeming or reaffirming) with *Taylor v. AGE Federal Credit Union* (In re Taylor), 3 F.3d 1512, 1517 (11th Cir. 1993) (debtor may retain property only if she redeems or reaffirms).

5. *HOMESTEAD EXEMPTION LIMITATIONS*

One of the controversial practices in consumer bankruptcy under prior law concerned debtors who took advantage of potentially unlimited homestead exemptions available under the laws of some states, notably Texas and Florida. This was possible because a debtor is permitted to elect the exemption laws of her domiciliary state. 11 U.S.C. § 522(b). A debtor might thus be able to exempt enormous amounts of property by obtaining or enlarging a massive homestead in such a state. The debtor might either move to such a state on the eve of bankruptcy or enlarge an existing homestead by converting previously non-exempt property to exempt property by buying a new homestead or paying down a large mortgage. Courts struggled to impose meaningful restrictions on these unseemly practices.

Several provisions of S. 256 limit in some ways these exemption planning tactics. First, in reaction to the phenomenon of debtors changing their state of residence shortly before filing bankruptcy in order to opt into more generous state exemptions, the new law amended 11 U.S.C. § 522(b)(3)(A) to impose a more rigorous standard for determining a debtor's relevant domiciliary state for purposes of the state exemptions available to the debtor thereunder. The applicable state is the debtor's state of residence on the petition date only if the debtor was a domiciliary of that state for 2 years before the petition filing. If the debtor was not domiciled in one state for the entire 2-year period preceding the petition date, then the applicable state is that in which the debtor was domiciled during the 180-day period (approximately 6 months) *before* the 2-year prepetition period (*i.e.*, the period between 2½ and 2 years before the petition date). If the debtor was domiciled in more than one state during this 6-month period, then the applicable state is that in which the debtor was domiciled for a greater portion of the 6-month period than in any other state.

Second, under new 11 U.S.C. § 522(o), applicable to any conversion of nonexempt property into an exempt homestead within 10 years before the petition date, the debtor is denied a state homestead exemption to the extent the conversion was done “with the intent to hinder, delay, or defraud a creditor.”

Third, under new 11 U.S.C. § 522(p), a debtor's homestead exemption is capped at \$125,000 to the extent that additional value was added in the 1215 days (about 3 ½ years) before bankruptcy, unless that value came from a rollover of value from a prior homestead in the same state. This limit applies without the need to prove the debtor had a fraudulent intent

Finally, under new 11 U.S.C. § 522(q), a debtor's homestead is capped at \$125,00 if the debtor was convicted of certain felonies (under RICO) or owes a debt arising from securities fraud. This is sometimes called the “Enron rule” because of the notorious actions of senior Enron executives who allegedly committed such crimes but were able to purchase fabulous, and fully exempt, homesteads in Texas and Florida.

Conclusion

The long battle is over. The well-funded creditor lobby won. Individual consumer debtors

lost. The consumer bankruptcy regime in the United States has now become much more like that in much of the rest of the world. That might not be so objectionable, but the United States otherwise has a very limited social welfare system. For good or ill, for over a century the de facto system in the States was to utilize consumer bankruptcy as a back-stop social safety net, in lieu of meaningful social welfare. Now we may have the worst of both worlds – little social welfare, and weakened bankruptcy protection.

Appendix: Law Professors' Letter

February 16, 2005

Senator Arlen Specter
711 Hart Building, United States Senate
Washington, DC 20510

Senator Patrick Leahy
433 Russell Senate Office Building, United States Senate
Washington, DC 20510

Re: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S. 256)

Dear Senators Specter and Leahy:

We are professors of bankruptcy and commercial law. We are writing with regard to The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S.256)(the “bill”). We have been following the bankruptcy reform process for the last eight years with keen interest. The 92 undersigned professors come from every region of the country and from all major political parties. We are not members of a partisan, organized group. Our exclusive interest is to seek the enactment of a fair, just and efficient bankruptcy law. Many of us have written before to express our concerns about earlier versions of this legislation, and we write again as yet another version of the bill comes before you. The bill is deeply flawed, and will harm small businesses, the elderly, and families with children. We hope the Senate will not act on it.

It is a stark fact that the bankruptcy filing rate has slightly more than doubled during the last decade, and that last year approximately 1.6 million households filed for bankruptcy. The bill’s sponsors view this increase as a product of abuse of bankruptcy by people who would otherwise be in a position to pay their debts. Bankruptcy, the bill’s sponsor says, has become a system “where deadbeats can get out of paying their debt scot-free while honest Americans who play by the rules have to foot the bill.”

We disagree. The bankruptcy filing rate is a symptom. It is not the disease. Some people do abuse the bankruptcy system, but the overwhelming majority of people in bankruptcy are in financial distress as a result of job loss, medical expense, divorce, or a combination of those causes.¹ In our view, the fundamental change over the last ten years has been the way that credit is marketed to consumers. Credit card lenders have become more aggressive in marketing their products, and a large, very profitable, market has emerged in sub-prime lending. Increased risk is part of the business model. Therefore, it should not come as a surprise that as credit is extended to riskier and riskier borrowers, a greater number default when faced with a financial reversal. Nonetheless, consumer lending remains highly profitable, even under current law.

¹ Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (2001); Marianne Culhane and Michaela White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing for Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 28 n.8 (1999).

The ability to file for bankruptcy and to receive a fresh start provides crucial aid to families overwhelmed by financial problems. Through the use of a cumbersome, and procrustean means-test, along with dozens of other measures aimed at “abuse prevention,” this bill seeks to shoot a mosquito with a shotgun. By focusing on the opportunistic use of the bankruptcy system by relatively few “deadbeats” rather than fashioning a tailored remedy, this bill would cripple an already overburdened system.

1. The Means-test

The principal mechanism aimed at the bankruptcy filing rate is the so called “means test,” which denies access to Chapter 7 (liquidation) bankruptcy to those debtors who are deemed “able” to repay their debts. The bill’s sponsor describes the test as a “flexible . . . test to assess an individual's ability to repay his debts,” and as a remedy to “irresponsible consumerism and lax bankruptcy law.” While the stated concept is fine – people who can repay their debts should do so – the particular mechanism proposed is unnecessary, over-inclusive, painfully inflexible, and costly in both financial terms and judicial resources.²

- First, the new law is unnecessary. Existing section 707(b) already allows a bankruptcy judge, upon her own motion or the motion of the United States Trustee, to deny a debtor a discharge in Chapter 7 to prevent a “substantial abuse.” Courts have not hesitated to deny discharges where Chapter 7 was being used to preserve a well-to-do lifestyle,³ and the United States Trustee’s office has already taken it upon itself to object to discharge when, in its view, the debtor has the ability to repay a substantial portion of his or her debts.
- Second, the new means-test is over-inclusive. Because it is based on income and expense standards devised by the Internal Revenue Service to deal with tax cheats, the principal effect of the “means-test” would be to replace a judicially supervised, flexible process for ferreting out abusive filings with a cumbersome, inflexible standard that can be used by creditors to impose costs on overburdened families, and deprive them of access to a bankruptcy discharge. Any time middle-income debtors have \$100/month more income than the IRS would allow a delinquent taxpayer to keep, they must submit themselves to a 60 month repayment plan. Such a plan would yield a mere \$6000 for creditors over five years, less costs of government-sponsored administration.
- Third, to give just one example of its inflexibility, the means-test limits private or parochial school tuition expenses to \$1500 per year. According to a study by the National Center for Educational Statistics, even in 1993, \$1500 would not have covered the average tuition for any category of parochial school (except Seventh Day Adventists and Wisconsin Synod Lutherans).⁴ Today it would not come close for any denomination. In order to yield a few

² As one commentator has put it: “[T]he new means testing proposal . . . has . . . shifted to a command-and-control approach. Although means testing can be defended in principle – surely, debtors should repay some of their obligations if they can realistically do so – mechanical guidelines are both an artificial and manipulable strategy for inducing debtors to pay.” David A. Skeel, Jr., *Debt’s Dominion* (2001) at 210.

³ See, e.g., *In re Kornfield*, 164 F. 3d 778 (2nd Cir. 1999).

⁴ National Center for Educational Statistics, *Private Schools in the United States: A Statistical Profile, 1993-94* (Table 1.5), available at: <http://nces.ed.gov/pubs/ps/459t1050.asp>.

dollars for credit card issuers, this bill would force many struggling families to take their children from private or parochial school (often in violation of deeply held religious beliefs) for three to five years in order to confirm a Chapter 13 plan.

- Fourth, the power of creditors to raise the “abuse” issue will significantly increase the number of means-test hearings. Again, the expense of the hearings will be passed along to the already strapped debtor. This will add to the cost of filing for bankruptcy, whether the filing is abusive or not. It will also swamp bankruptcy courts with lengthy and unnecessary hearings, driving up costs for the taxpayers.
- Finally, the bill takes direct aim at attorneys who handle consumer bankruptcy cases by making them liable for errors in the debtor’s schedules.⁵

Our problem is not with means-testing *per se*. Our problem is with the collateral costs that this particular means-test would impose. This is not a typical means test, which acts as a gatekeeper to the system. It would instead burden the system with needless hearings, deprive debtors of access to counsel, and arbitrarily deprive families of needed relief. The human cost of this delay, expense, and exclusion from bankruptcy relief is considerable. As a recent study of medical bankruptcies shows, during the two years before bankruptcy, 45% of the debtors studied had to skip a needed doctor visit. Over 25% had utilities shut off, and nearly 20% went without food.⁶ If the costs of bankruptcy are higher, the privations will increase. The vast majority of individuals and families that file for bankruptcy are honest but unfortunate. The main effect of the means-test, along with the other provisions discussed below, will be to deny them access to a bankruptcy discharge.

2. Other Provisions That Will Deny Access to Bankruptcy Court

The means-test is not the only provision in S. 256 which is designed to limit access to the bankruptcy discharge. There are many others. For example:

- Sections 306 and 309 of the bill (working together) would eliminate the ability of Chapter 13 debtors to “strip down” liens on personal property, in particular their car, to the value of the collateral. As it is, many Chapter 13 debtors are unable to complete the schedule of payments provided for under their plan. These provisions significantly raise the cash payments that must be made to secured creditors under a Chapter 13 plan. This will have a whipsaw effect on many debtors, who, forced into Chapter 13 by the means-test, will not have the income necessary to confirm a plan under that Chapter. This group of debtors would be deprived of any discharge whatsoever, either in Chapter 7 or Chapter 13. In all cases this will reduce payments to unsecured creditors (a group which, ironically, includes many of the sponsors of this legislation).
- Section 106 of the bill would require any individual debtor to receive credit counseling from a credit counseling agency within 180 days prior to filing for bankruptcy. While credit

⁵ American Bar Association, *Fact Sheet: Congress Considers Imposing Harsh New Liability Standards Against Bankruptcy Attorneys* (December 2004), available at: http://www.abanet.org/poladv/priorities/brattyliabilityfactsheet_december2004_.pdf.

⁶ David U. Himmelstein, Elizabeth Warren, Deborah Thorne, and Steffie Woolhandler, *Illness and Injury as Contributors to Bankruptcy*, HEALTH AFFAIRS (2005), available at: <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1>.

counseling sounds benign, recent Senate hearings with regard to the industry have led Senator Norm Coleman to describe the credit counseling industry as a network of not for profit companies linked to for-profit conglomerates. The industry is plagued with “consumer complaints about excessive fees, pressure tactics, nonexistent counseling and education, promised results that never come about, ruined credit ratings, poor service, in many cases being left in worse debt than before they initiated their debt management plan.”⁷ Mandatory credit counseling would place vulnerable debtors at the mercy of an industry where, according to a recent Senate investigation, many of the “counselors” are seeking to profit from the misfortune of their customers.⁸

- Sections 310 and 314 would significantly reduce the ability of debtors to discharge credit card debt and would reduce the scope of the fresh start, for even those debtors who are able to gain access to bankruptcy. The cumulative effect of these provisions, and many others contained in S. 256 (along with the means-test) will be to deprive the victims of disease, job loss, and divorce of much needed relief.

3. The Elusive Bankruptcy Tax?

The proponents of S.256 argue that the bill is good for consumers because it will reduce the so-called “bankruptcy tax.” In their view, the cost of credit card defaults is passed along to the rest of those who use credit cards, in the form of higher interest rates. As the bill’s sponsor dramatically puts it: “honest Americans who play by the rules have to foot the bill.” This argument seems logical. However, it is not supported by facts. The average interest rate charged on consumer credit cards has declined considerably over the last dozen years. More importantly, between 1992 and 1995, the spread between the credit card interest rate and the risk free six-month t-bill rate declined significantly, and remained basically constant through 2001.⁹ A

t the same time, the profitability of credit card issuing banks remains at near record levels.¹⁰ Thus, it would appear that hard evidence of the so-called “bankruptcy tax” is difficult to discern. That the unsupported assertion of that phenomenon should drive Congress to restrict access to the bankruptcy system, which effectuates Congress’s policies about the balance of rights of both creditors and debtors, is simply wrong.

4. Who Will Bear the Burden of the Means-test?

The bankruptcy filing rate is not uniform throughout the country. In Alaska, one in 171.2 households files for bankruptcy. In Utah the filing rate is one in 36.5. The states with the ten highest bankruptcy filing rates are (in descending order): Utah, Tennessee, Georgia, Nevada, Indiana,

⁷ Statement of Senator Norm Coleman, Hearing of the Senate Permanent Commission on Investigations (March 24,2004), available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:93477.wais.

⁸ *Id.*

⁹ Mark Furletti, *Credit Card Pricing Developments and their Disclosure* (Federal Reserve Bank of Philadelphia, January 2003), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=572585.

¹⁰ Board of Governors of the Federal Reserve System, *The Profitability of Credit Card Operations of Depository Institutions* (June 2004), available at: <http://www.federalreserve.gov/boarddocs/rptcongress/creditcard/2004/ccprofit.pdf>.

Alabama, Arkansas, Ohio, Mississippi, and Idaho.¹¹ The deepest hardship will be felt in the heartland, where the filing rates are highest. The pain will not only be felt by the debtors themselves, but also by the local merchants, whose customers will not have the benefit of the fresh start.

The fastest growing group of bankruptcy filers is older Americans. While individuals over 55 make up only about 15% of the people filing for bankruptcy, they are the fastest growing age group in bankruptcy. More than 50% of those 65 and older are driven to bankruptcy by medical debts they cannot pay. Eighty-five percent of those over 60 cite either medical or job problems as the reason for bankruptcy.¹² Here again, abuse is not the issue. The bankruptcy filing rate reveals holes in the Medicare and Social Security systems, as seniors and aging members of the baby-boom generation declare bankruptcy to deal with prescription drug bills, co-pays, medical supplies, long-term care, and job loss.

Finally, it is crucial to recognize that the filers themselves are not the only ones to suffer from financial distress. They often have dependents. As it turns out, families with children – single mothers and fathers, as well as intact families – are more likely to file for bankruptcy than families without them. In 2001, approximately 1 in 123 adults filed for bankruptcy. That same year, 1 in 51 children was a dependent in a family that had filed for bankruptcy.¹³ The presence of children in a household increases the likelihood that the head of household will file for bankruptcy by 302%.¹⁴ Limiting access to Chapter 7 will deprive these children (as well as their parents) of a fresh start.

Conclusion

S. 256 contains a number of salutary provisions, such as the proposed provisions that protect consumers from predatory lending. Our concern is with the provisions addressing “bankruptcy abuse.” These provisions are so wrongheaded and flawed that they make the bill as a whole unworkable. We urge you to either remove these provisions or vote against the bill.

Sincerely,

[92 law professors]

¹¹ Source: American Bankruptcy Institute. Available at: <http://www.abiworld.org/statcharts/HouseRank.htm>

¹² Melissa B. Jacoby, Teresa A. Sullivan, & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 397-399 (2001); Elizabeth Warren, *Older Americans in Bankruptcy* (October 12, 2004)(working paper). See also, Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook, *The Fragile Middle Class: Americans in Debt* (2001) at 165.

¹³ Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1011 (2002).

¹⁴ *Id.* at 1013.