

**THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005:
THE SOLUTION TO INHERENT INEQUALITIES EXISTS OUTSIDE THE BOX OF CONGRESS'
"SENSE" OF PERSONAL FINANCE EDUCATION**

TABLE OF CONTENTS

INTRODUCTION

I. WHO IS FILING FOR BANKRUPTCY AND WHY?

A. *THE PURPOSE AND GOALS OF BANKRUPTCY*

B. *STATISTICS DEMONSTRATE AN ENORMOUS INCREASE IN BANKRUPTCY
FILINGS OVER THE LAST TWO DECADES*

C. *THERE EXISTS A DISCREPANCY IN MINORITIES FILING FOR BANKRUPTCY
COMPARED TO THEIR WHITE COUNTERPARTS*

1. Minorities Will Benefit Less Than the Ideal Debtor Under the Homestead Exemption Based on Homeownership Statistics

2. White Median Family Income is Higher Than Minorities Based on Income Statistics

3. Whites Tend to Have More Retirement Savings Than Minorities That Will Endure Through Bankruptcy Based on Retirement Statistics

4. Whites are More Likely to Attend Private Schools and to Save for College Based on Education Statistics

II. THE BAPCPA IS PREDICTED TO SIGNIFICANTLY CHANGE THE CURRENT BANKRUPTCY LAW

A. *OVERVIEW OF BANKRUPTCY LAW IN THE UNITED STATES*

1. Origin of Bankruptcy Law in the United States

2. Structure of the Bankruptcy System in the United States

B. *THE BAPCPA IS A PRODUCT OF EIGHT YEARS OF CONGRESSIONAL DEBATE
RESULTING IN SIGNIFICANT CHANGES TO THE UNITED STATES BANKRUPTCY
SYSTEM*

1. Legislative History of the BAPCPA

2. Significant Changes to Chapter 7 Will Curb Debtor Abuse by Adding a "Means Test"

(a) Conversion Provisions Added by the BAPCPA

(b) The Means Test Extensively Modifies Section 707(b) and Increases the Role of the UST

(c) Calculation of the Means Test

3. The BAPCPA Provides Additional Property of the Estate Exclusions

(a) Additional Education Provisions Significantly Amend the Property Of The Estate Code Sections

(b) Retirement Contribution Plans Are a New Addition to Property Excluded From the Estate

4. Significant Changes Under the BAPCPA Alter and Provide Additional Exemptions

(a) Retirement Fund Exemptions are a New Addition Under the BAPCPA

(b) Homestead Exemption Provisions Have Been Amended to Reduce Abuse of the Bankruptcy System

III. THE BAPCPA WILL HAVE POSITIVE AND NEGATIVE AFFECTS ON MINORITY DEBTORS IN COMPARISON TO THEIR COUNTERPART WHITE DEBTORS

A. THE BAPCPA'S EXTENSIVE REVISION OF CHAPTER 7 PROVIDES SIGNIFICANT CODE CHANGES THAT WILL IMPACT ALL DEBTORS INCLUDING MINORITIES

B. EDUCATION PROVISIONS WILL INCREASE THE DISCREPANCY IN EQUAL TREATMENT OF MINORITIES AND WHITES UNDER THE BANKRUPTCY CODE AS AMENDED BY BAPCPA

C. THE BAPCPA PROVIDES FOR RETIREMENT FUNDS THAT WILL BE MORE FAVORABLE TO THE IDEAL DEBTOR THAN TO MINORITIES

D. HOMESTEAD EXEMPTIONS UNDER THE BAPCPA IN ATTEMPT TO REDUCE BANKRUPTCY SYSTEM ABUSE WILL HAVE NEGATIVE OR NO EFFECT ON MINORITIES

IV. THE SOLUTION TO INEQUALITIES TO MINORITIES IN THE BANKRUPTCY SYSTEM IS FOUND IN EDUCATION: IN ADDITION TO CONGRESS' "SENSE" OF EDUCATION IMPLEMENTED AT ELEMENTARY AND SECONDARY LEVELS

CONCLUSION

INTRODUCTION

Americans, in fear of the new Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹ (the "BAPCPA"), rush to file for bankruptcy before the October 17, 2005 effective date.² What is the cause of this fear?³ The people in these stories fear that when the BAPCPA takes effect it will be impossible to qualify for Chapter 7 which allows for liquidation,⁴ and alternatively, that they will fail to complete a Chapter 13 reorganization plan.⁵

This thin, short woman has had two serious accidents in the past four years. She has been raising two children after she and her husband divorced about 10 years ago.

She has no health insurance, and had none at the time of the first accident.

¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

² Marcia Bloomberg, *Bankruptcy Agonizing Decision, More Painful Process*, THE REPUBLICAN, May 22, 2005, at 2, available at 2005 WLNR 8287701; see also *id.* (the majority of the provisions are effective on October 17, 2005, however, several provisions have a later effective date).

³ Evan Pondel, *Debt in Stone? Consumers, Lawyers Unsure How Bankruptcy Changes Will Play Out in Fall*, DAILY NEWS OF LOS ANGELES, May 15, 2005, at 2, available at 2005 WLNR 7741499 (describing the reason for increased bankruptcy filings to be based on the amended changes resulting from the lobbying efforts of credit card companies. "The new legislation, quite possibly the most significant change to bankruptcy law in more than two decades, is backed by credit card companies and banks that argue the current laws skew too much in favor of the debtor. The law attempts to address this by making it more difficult for consumers to walk away from credit card bills or other loans that aren't secured."); cf. Bloomberg, *supra* note 2, at 2-3 (listing several major changes that encourage filing before the BAPCPA effective date to include "[a] new means test will apply to debtors whose income is above the state median. . . . [Also] [i]ndividuals filing for bankruptcy after Oct. 17 will have to prove they've gotten counseling from an approved credit counseling agency. . . . [Last] [t]he time period between Chapter 7 bankruptcy filings has been extended from six to eight years.").

⁴ See discussion *infra* Part II.A.2 (describing Chapter 7 liquidation).

⁵ Bloomberg, *supra* note 2, at 4 (stating, "[t]he goal of the means test is to make debtors who have higher incomes repay their debts. But even under the more flexible, and shorter current system, about two-thirds of people who file under Chapter 13 fail. Shear noted that 'unexpected expenses come up. . . . You want to maximize payments to creditors, but you can't do it in an unrealistic manner. To stretch the creditor so tight that they're doomed for failure is not going to help either side.'"); see also discussion *infra* Part II.A.2 (describing Chapter 13 reorganization).

The second accident, which fractured several vertebrae in her neck and threw her out of work for the past 17 months, at least is covered by workers' compensation, although her income - never more than \$20,000 a year - has taken a hit.

. . . .

"I don't know, I feel like I should be able to provide for my children," she said.

Cindy's case is fairly representative of the problems that drive the vast majority of debtors into bankruptcy - divorce, loss of job, a serious medical condition.⁶

In a trustee meeting recently, one family filing Chapter 7 had to explain [to] the trustee why they spent hundreds of dollars to fill a freezer full of meat. The answer: They have custody of several grandchildren and wanted to stock up.

That answer wouldn't pass the means test, which will allow for little, if any, wiggle room on individual circumstances.⁷

Rosalia Garcia never thought she would end up in bankruptcy court for money she never spent.

But when Garcia's son decided to buy a new \$20,000 car, the dealer required a co-signer, so the mother of four attached her name to what eventually became an insurmountable load of debt.

"This was a big mistake that I had to dig myself out of. My son had a job, and I thought he would be able to pay off the car," the 40-year-old Antelope Valley woman recalled. Garcia thought wrong.

⁶ Bloomberg, *supra* note 2, at 1-2.

⁷ Jennifer Plotnick, *Opinions Differ on Bankruptcy Law Changes*, THE BAKERSFIELD CALIFORNIAN, May 22, 2005, at 4, available at 2005 WLNR 8112216.

*The monthly car payments piled up, and filing for Chapter 7 bankruptcy protection - a provision that provides a clean break from credit obligations - became Garcia's only other option short of selling her home.*⁸

The BAPCPA's changes to the Bankruptcy Code⁹ are perceived to be significant enough that debtors are taking advantage of the current bankruptcy system before its effective date.¹⁰ The newly enacted BAPCPA promises to reduce the number of Americans that file for bankruptcy under Chapter 7 if they can make plan payments under Chapter 13.¹¹ For minorities, the solution to reforming the Bankruptcy Code may not be a Means Test¹² under Chapter 7, stricter exemptions,¹³ or additional exceptions to property of the estate.¹⁴ Instead, the solution will be found

⁸ Pondel, *supra* note 3, at 1-2.

⁹ Throughout this Note, the term "Bankruptcy Code" refers to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101-1330 (2000)).

¹⁰ Bloomberg, *supra* note 2, at 4 (demonstrating the increase in filing for Massachusetts following the enactment of the BAPCPA has increased, "[w]hile statewide filings in the first three months of the year rose by only 65, to 4,498, filings in April increased 38 percent to 2,353 from 1,700 in April 2004.").

¹¹ Clifford J. White III, *Bankruptcy Reform Implementation Now Underway at The USTP*, 24-JUN AM. BANKR. INST. J. 14, 14 (2005) (Clifford J. White III, as the Acting Director of the Executive Office for the United States Trustee, discusses the work that is being done at the United States Trustee's Office in order to prepare for the BAPCPA. The role of the United States Trustee is being increased in regulating the bankruptcy system. Mr. White describes this change in the law making it harder for a debtor to file for a Chapter 7 based on an increase in the integrity of the bankruptcy system. The BAPCPA will strengthen integrity of the system by assuring that credit counseling is provided to consumer debtors to help them analyze their financial situation in relation to bankruptcy and implementing a Means Test to determine whether consumer debtors have the ability to repay debts under Chapter 13 rather than liquidating under Chapter 7).

¹² Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (to be codified at 11 U.S.C. §707(b)). Throughout this Note the term "Means Test" refers to the mathematical equation to determine if a debtor is qualified under Chapter 7 that has been popularly named the Means Test.

¹³ See discussion *infra* Part II.B.4 (discussing the additional exemption provisions under the BAPCPA).

¹⁴ See discussion *infra* Part II.B.3 (discussing the additional property of the estate exclusion provisions under the BAPCPA); see also MICHAEL J. HUBERT, UNDERSTANDING BANKRUPTCY §§ 7.01-7.04 (Matthew Bender & Company 2000) (1995) (explaining what constitutes property of the estate to be the debtors assets that are acquired when an estate is formed upon the filing of a bankruptcy petition. The basic policy of the Bankruptcy Code is to include all of the debtor's property in the estate. This property can then be exempted, distributed or abandoned by

when Congress takes into account debtor inequalities.¹⁵ The characteristics of the Ideal Debtor,¹⁶ in comparison to minorities,¹⁷ filing for bankruptcy demonstrates the discrepancies in the Bankruptcy Code.¹⁸ The solution to this discrepancy is education.¹⁹ Not just education on how to invest, but education on the pre-bankruptcy means of achieving the highest return on post-bankruptcy ends.²⁰

The Bankruptcy Code's plain language is non-discriminatory.²¹ The inequities that arise in bankruptcy for minorities are not discoverable from a bankruptcy petition,²²

the estate. However, certain property is excluded from the estate in which the debtor retains the property under narrow exceptions).

¹⁵ See discussion *infra* Part IV.

¹⁶ A. Mechele Dickerson, *Race Matters In Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1743 (2004) (defining the term "Ideal Debtor" by the qualities the Ideal Debtor should have. The Ideal Debtor "should be a married, employed homeowner who (1) is the beneficiary of a spendthrift trust or has a large employer-provided retirement account; (2) has high, but reasonable, living expenses; (3) provides financial support only to legal dependents; and (4) has little (or no) student loan, alimony, or child support debt."). The term Ideal Debtor in this Note is used interchangeably with white debtors based on Dickerson's conclusion upon statistical data that whites overwhelmingly fit the description of the Ideal Debtor.

¹⁷ The term "minorities" in this Note refers to Latino/as and African-Americans. Also, the term "black" refers to African-Americans in this Note.

¹⁸ See *generally id.* (arguing "[b]ecause statistical data suggest that white people are more likely to fit the Ideal Debtor profile, race matters in bankruptcy.").

¹⁹ See discussion *infra* Part IV (arguing that the solution to discrepancies in the Bankruptcy Code towards minorities can be cured with an increase of personal finance education as well as an increase of minority awareness of the benefits that access to lawyers and accountants can provide during pre-petition planning).

²⁰ *Id.*

²¹ Dickerson, *supra* note 16, at 1726 (summarizes that indeed the Bankruptcy Code is not designed to redress racial wrongs. Dickerson states that "[b]ecause bankruptcy laws provide a complex set of remedies to financially distressed individuals and appear to be race natural, it is not surprising that they have never been examined through a racial lens even though blacks and Hispanics appear more likely to file for bankruptcy than whites. A critical examination of bankruptcy law suggests that, in designing the type of relief to make available to potential debtors, Congress either consciously or unconsciously exhibited a bias in favor of a specific demographic profile.") (citation omitted); see also Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1502 (2004) (Brown provides a comparative study analyzing tax policies and the racial implications behind the policy. The article describes an analogous scenario to the Bankruptcy Code found in the Internal Revenue Code in which the tax policies are on their face non-discriminatory but that "racial disparities are deeply imbedded in federal tax policy and that, with some hard work, the invisible appears.").

²² BLACK'S LAW DICTIONARY 526 (2d pocket ed. 2001) (defining a "voluntary petition" as "[a] petition filed with a bankruptcy court by a debtor seeking protection from creditors.").

since the debtor is not required to mark a box for race or ethnicity.²³ Theories of interpreting the inequalities between race and ethnicity have application in analysis of bankruptcy laws in the United States. One movement has emerged recently that analyzes the inadequacies of conventional legal theory based on race that is called "Critical Race Theory."²⁴ Bankruptcy has also been examined as a means of social insurance.²⁵ As a social insurance, bankruptcy first "mediates conflicts between and among individuals and groups. Second, it is frequently characterized as a public or governmental programs as well as a private or commercial system. Third it is both adjudicatory and regulatory."²⁶ Regardless of the theory used to analyze race and ethnicity in relation to the Bankruptcy Code,

²³ Carlos J. Cuevas, *The Consumer Credit Industry, The Consumer Bankruptcy System, Bankruptcy Code Section 707(b), And Justice: A Critical Analysis Of The Consumer Bankruptcy System*, 103 COM. L. J. 359, 398 (1998) (Cuevas argues that even though race is not listed on a bankruptcy petition that there are always ways to determine a debtor's race or ethnicity. Based on the segregated nature of metropolitan areas the author believes race can be determined by the area of town that the debtor lives in). I recognize, with emphasis, that Latino/as are not a race. The references made in this Note to the "Critical Race Theory" apply to blacks when referencing minorities. Further, the "Critical Race Theory" can be applicable to other minorities not discussed in this Note. *See Oquendo, infra* note 30 (providing a definition for Latino/as).

²⁴ *Id.* at 391-392 (describing the "Critical Race Theory" as "[o]ne of the more important jurisprudential movements in the last decade . . . [which] focuses on the manner in which the law adversely affects people of color. CRT has challenged the discourse of purported conventional legal theory because it inadequately addresses the needs of people of color in the United States. CRT challenges traditional schools of jurisprudence, and it contends that the neutral approach taken by legal scholarship is fundamentally flawed. The concept of "race" is fundamental to CRT, and it is treated differently by CRT scholars than critical legal studies or liberal scholars. CRT engages in the practice of deconstructing and reconstructing legal concepts. CRT views the judiciary as important participants in the law making process, and courts are only legitimate if they seek equality and racial justice.") (citations omitted).

²⁵ *See* Chapman, *infra* note 26.

²⁶ Robert B. Chapman, *Missing Persons: Social Science And Accounting For Race, Gender, Class, And Marriage In Bankruptcy*, 76 AM. BANKR. L. J. 347, 351 (2002). For an in depth social science discussion of bankruptcy based on race, gender, and income, review the numerous articles and books written or co-authored by Elizabeth Warren *see generally* *The Market for Data: The Changing Role of Social Science in Shaping the Law*, 2002 WIS. L. REV. 1, (2002); *see also* *What Is A Woman's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19 (2002); *see also* *The Bankruptcy Crisis*, 73 IND. L.J. 1079 (1998); *see also* *The Changing Demographics of Bankruptcy*, 10 NORTON BANKR. L. ADVISER 1 (1999).

there is an underlying discrepancy between the Ideal Debtor and minorities.²⁷

The distinction between the Ideal Debtor and minorities is primarily at the middle class level.²⁸ Professor Elizabeth Warren describes this as:

The bankruptcy data reveal a disturbing story of Hispanic and black middle classes that are at greater risk for economic collapse than their white counterparts. Bankruptcy is a middle class phenomenon, a place of escape for those who have good jobs, established credit, accumulated assets, and suffered sharp reversals. Hispanic and black families are no exception; those in bankruptcy are disproportionately middle class when measured by education, occupation, and homeownership. Even so, Hispanic families are nearly twice as likely to file for bankruptcy as their white neighbors, and black families are three times more likely to file.²⁹

This Note exemplifies the dilemma facing minorities in the middle class, specifically Latinos³⁰ and blacks. This Note argues that amendments to the Bankruptcy Code under the BAPCPA, in accordance to specific provisions, will create greater inequities between the Ideal Debtor and minorities. Though

²⁷ See generally Dickerson, *supra* note 16.

²⁸ See generally Elizabeth Warren, *The Economics of Race: When Making it to the Middle is Not Enough*, 61 WASH. & LEE L. REV. 1777 (2004).

²⁹ *Id.* at 1779; cf. Jennifer Connors Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307 (1996) (emphasizing that academic research in bankruptcy is based on government statistics). As Jennifer Connors Frasier indicates, bankruptcy statistics based on government studies are a replacement for the lack of bankruptcy petition questions raising issues of race or ethnicity. Government statistics are used in this Note.

³⁰ Angel R. Oquendo, *Re-Imaging The Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93, 97 (1995) (defining “Latino” as, ““Latino” is short for “latinoamericano,” which of course means Latin American in Spanish. Like its English counterpart, the term “latinoamericano” strictly refers to the people who come from the territory in the Americas colonized by Latin nations, such as Portugal, Spain, and France, whose languages are derived from Latin. People from Brazil, Mexico, and even Haiti are thus all “latinoamericanos.” Individuals who are decedents of the former British or Dutch colonies are excluded. . . . The strict interpretation of “Latino” is more inclusive than the term “Hispanic.” “Latino” encompasses those people who are descended from the onetime possessions of not only Spain, but also Portugal and France.”).

credit counseling provisions are provided for under the BAPCPA,³¹ they are not adequate requirements for personal finance education.³² Under BAPCPA, Congress asserts that it is a "sense of Congress" that personal finance education should be looked into for primary and secondary education levels.³³ This Note demonstrates that more education than this "sense of Congress" is necessary. In order for minorities to take full advantage of the bankruptcy system they need education on the benefits and availability of access to attorneys, accountants, and overall methods of pre-bankruptcy preparation including, but not limited to, primary and secondary education.³⁴

Part I of this Note provides a summary of the development of bankruptcy laws in the United States. It examines the progression of bankruptcy laws during the dramatic increase in filings over the last two decades. Part II focuses on the changes to the Bankruptcy Code under the BAPCPA. Part III discusses the positive and negative affects the BAPCPA will have on all debtors including minorities. Last, Part IV analyzes the likelihood of the BAPCPA to reduce the inadequacies in the law

³¹ See the Bankruptcy Abuse Prevention and Consumer Protection Act § 106 (to be codified at 11 U.S.C. §§ 10, 727, 1328, 521, and 111) (requiring debtors to complete an approved credit counseling course within 180 days before filing a bankruptcy petition).

³² See discussion *infra* Part IV.

³³ Bankruptcy Abuse Prevention and Consumer Protection Act § 222 (Congress states, "[i]t is in the sense of Congress that States should develop curricula relating to the subject of personal finance, designed for use in elementary and secondary schools.").

³⁴ *Id.*; see also *infra* Part IV.

for minorities in comparison to their counterpart middle class white bankruptcy filers.

In addition, this Note proposes a broader solution than the BAPCPA "sense of Congress" for developing personal finance education at primary and secondary levels such as education on access to the legal and accounting systems. This Note concludes that legislation alone is not the solution for reducing the number of minority debtors or inequalities under the Bankruptcy Code. The solution for minorities is a pre-bankruptcy petition ability to take the same advantages of the bankruptcy system as white petition filers. This is possible by early education on the benefits and access to professional services such as attorneys and accountants as well as an overall better understanding of the bankruptcy system. The necessity of education for minority debtors is magnified in light of the tremendous increase of bankruptcy filings over the last two decades.

I. WHO IS FILING FOR BANKRUPTCY AND WHY?

Two questions posed in today's society are who is filing for bankruptcy and why? The answer to who is filing for bankruptcy is overwhelmingly debtors from the middle class.³⁵ Why more people are filing for bankruptcy is due to an increase

³⁵ Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 115-116 (2002) (referencing the 2001 Consumer Bankruptcy Project Warren states that ninety percent of families in bankruptcy are middle class).

of consumer credit, specifically extended lines of credit by credit card companies to middle class Americans.³⁶ In light of the dramatic increase of bankruptcy filings over the last two decades, the bankruptcy system is challenged to incorporate its purposes and goals and adapt to this tremendous growth. In addition, the BAPCPA is proposed in part to reduce consumer credit card abuse.³⁷ Will the BAPCPA increase the inadequacies between the Ideal Debtor and minorities? The answer is not clear. Speculation has been prominent over the last eight years of Congressional debate on bankruptcy reform.³⁸ However, it is clear that Congress intends for the BAPCPA to improve the bankruptcy system's ability to ensure that the purposes and goals of bankruptcy are still applicable in light of economic changes.³⁹

³⁶ Cuevas, *supra* note 23, at 359-360 (describing consumer bankruptcy as the vast majority of bankruptcy cases. Also, Cuevas states that consumer bankruptcy cases are at an all time high).

³⁷ See discussion *infra* Part II.B.2 (discussing the Means Test).

³⁸ See discussion *infra* Part II.B.1 (this section's discussion focuses on the legislative history and the developments necessary to pass a bankruptcy reform bill).

³⁹ Zachary Price neatly summarizes Congress' rationale behind the BAPCPA:

The rationale for this package of reforms is twofold. First, proponents of the bill attribute the explosive increase in bankruptcy filing to abuse of current law by unscrupulous debtors. Easy access to Chapter Seven, the argument goes, has eroded the "stigma" traditionally associated with bankruptcy, leading to the use of the bankruptcy system as a tool of financial planning, rather than as a last resort. Bankruptcy laws, it follows, must be toughened to curb this practice. Second, proponents argue that reform will have beneficial effects for responsible borrowers who pay back their loans. Under current law, responsible borrowers pay high interest rates to subsidize losses from the discharged debt of their less responsible peers. A reform that limits access to debt discharge should lower interest rates, reformers argue, since it would prevent reckless borrowers from shifting the costs of their activity onto other borrowers. Lower interest rates, in turn, would benefit the economy by facilitating responsible spending and investment.

Zachary Price, *The Bankruptcy Abuse Prevention and Consumer Protection Act*, 39 HARV. J. ON LEG. 237, 243-244 (2002).

A. THE PURPOSE AND GOALS OF BANKRUPTCY

Bankruptcy has two purposes. The purposes are relief for the debtor of burdensome debt and the equitable treatment in the distribution of the debtor's estate to the creditors.⁴⁰ The first purpose, relief for the debtors, has commonly been called the "fresh start."⁴¹ The purpose of the fresh start is relief for the "honest debtor from the weight of oppressive indebtedness and permit[s] him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."⁴²

The two main characteristics of the fresh start are "the discharge of debts and exemption laws that permit debtors to keep a minimal amount of their current property."⁴³ The fresh start is made possible by the discharge⁴⁴ of the debtor's debt.⁴⁵

⁴⁰ CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 3 (1997).

⁴¹ BLACK'S LAW DICTIONARY (8th ed. 2004), available at <http://web2.westlaw.com/welcome/LawSchool/default.wl?MT=LawSchool&rs=LAWS2%2E0&vr=2%2E0> (defining the fresh start as "[t]he favorable financial status obtained by a debtor who receives a release from personal liability on pre-petition debts or who reorganizes debt obligations through the confirmation and completion of a bankruptcy plan."); see also HUBERT, *supra* note 14, § 1.01 (describing the fresh start as, "[i]t is common, in discussions of about bankruptcy, to see references to the concept of the 'fresh start.' This concept is absolutely central to modern American insolvency law. The debtor, having surrendered non-exempt assets to the trustee, receives a second ... chance at making a go of things."); see also Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49 (1986); see also Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L. J. 1047 (1987); see also Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

⁴² HUBERT, *supra* note 14, § 1.01; see also *Local v. Hunt*, 292 U.S. 134, 144-45 (1934). Discussion regarding the "fresh start" is extensive and can consume an entire note. In application to this Note, it is necessary to understand that the "fresh start" is an essential part of bankruptcy in which the debtor is able to start over new, but not ahead, without the burdens of debt. This Note discusses the Means Test and its application to minorities. In light of this discussion, the "fresh start" may be harder to achieve by minorities because of the stringent amendments under the BAPCPA. Also, minorities are less likely to be the Ideal Debtor who is able to get around the Means Test by having exempted property. Thus, minorities can have a harder time meeting Chapter 7 requirements which provide arguably a better "fresh start" because Chapter 7 frees the debtor of all debt instead of a Chapter 13 plan which requires the debtor make payment plans.

⁴³ TABB, *supra* note 40, at 3.

⁴⁴ 11 U.S.C. § 727.

The debtor's discharge of debt enabling a fresh start also gives rise to society's moral justification for the discharge.⁴⁶ Along with the discharge, the debtor is able to exempt property that is essential for living such as a house, car, clothing, and tools of the trade.⁴⁷ The three categories that exemptions are usually divided into include the "homestead exemption, specific exemptions of tangible personalty, and specific exemptions of income equivalents."⁴⁸ Thus, the fresh start allows the debtor

⁴⁵ THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 225 (1986) (describing the purpose of the discharge in regards to the fresh start, "[i]ndeed, the principal advantage bankruptcy offers a debtor that is an individual lies in the benefits associated with discharge. Unless he has violated some norm of behavior specified in the bankruptcy laws, an individual who resorts to bankruptcy can obtain a discharge from most of his existing debts in exchange for surrendering either his existing nonexempt assets, or more recently, a portion of his future earnings. Discharge not only release the debtor from past financial obligations but also protects him from some of the adverse consequences that might otherwise result from that release. For these reasons discharge is viewed as granting the debtor a financial fresh start.").

⁴⁶ Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 519-20 (1991) (describing the morality involved in bankruptcy as a "moral justification for debtor relief encompassing the attributes of social, distributive, and communitive justice, existing in harmony as a humanitarian response to the financially downtrodden."); *see contra* Adam Feibelman, *Defining The Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 166-67 (2005) (Feibelman does a comparative study of bankruptcy to other forms of social insurance. Specifically, the Feibelman focuses on bankruptcy. Contrary to the argument that there is an underlying morality and humanity to the discharge of debt, he argues that there is a "moral hazard – the hazard that an insured may have less incentive to make an effort to avoid the risk or to minimize losses if losses occur. Bankruptcy scholars have long recognized the potential moral hazard created by the availability of bankruptcy relief. The availability of bankruptcy relief presumably decreases individuals' incentives to constrain their consumption and to avoid incurring obligations that they may not be able to repay. This effect may be strongest in the period immediately before an individual files for bankruptcy protection; once an individual expects to actually obtain a discharge in bankruptcy, they may have particularly weak incentives to be careful in taking on financial obligations. Furthermore, bankruptcy also potentially decrease individuals' incentives to make the strongest efforts to repay obligations they have incurred once they experience financial troubles. These factors are arguably exuberated by the fact that bankruptcy is a no-fault regime. Any individual who resides, is domiciled, or has property in the United States can file for bankruptcy under chapter 7. The availability of bankruptcy relief is generally not related to the reasons for an individual's financial collapse; with few exceptions, it is equally available to the spendthrift as it is to the honest but unfortunate debtor.") (citations omitted).

⁴⁷ *See generally* 11 U.S.C. § 522.

⁴⁸ HUBERT, *supra* note 14, § 2.09 (Hubert summarized the three exemptions as, "[a]s suggested by its name, the homestead exemption has protected all or (more typically) a portion of the value of the debtor's home. In most state, the amount of the homestead exemption is too small to permit the debtor actually to keep his or her home; rather, it permits the debtor to keep a portion of the proceeds when the home is sold. The specific exemptions in tangible personalty are likewise often very stingy; there are typically caps on the value of the property that may be protected. Exemptions that encompass earned income substitutes (such as pension or life insurance proceeds) are typically somewhat more generous, in recognition of the debtor's need to have some source of income for personal needs and the support dependents.").

to discharge pre-petition debts and keep the essential property that will allow the debtor to start over.⁴⁹

However, as important as the fresh start is, it is the equitable treatment of creditors that is the most important purpose.⁵⁰ “The fresh-start policy is thus substantively unrelated to the creditor-oriented distributional rules that give bankruptcy law its general shape and complexity.”⁵¹ The Bankruptcy Code provides a list of priority and super priority positions for specified unsecured creditors to be paid.⁵² Though this intricate system is established for unsecured creditors⁵³ to be paid fairly, the system is believed to be flawed in that it is rare that unsecured creditors are actually paid despite the extensive language in the Bankruptcy Code establishing tiers of unsecured creditors.⁵⁴ The BAPCPA, through the Means Test,

⁴⁹ See discussion *infra* Part III (discussing that contrary to this ability to start over fresh with the essential assets, minorities do not fit the Ideal Debtor characteristics and may not enjoy the benefits that exemptions are to provide the debtor).

⁵⁰ TABB, *supra* note 40, at 3 (stating that “[t]he primary justification for bankruptcy is not the fresh start, laudatory though that goal may be. Rather, the core function of bankruptcy is as a collective creditors’ remedy that furthers the goal of efficiency and distributive justice.”).

⁵¹ JACKSON, *supra* note 45, at 227; see also HUBERT, *supra* note 14, § 1.01 (stating “[d]espite the fresh-start policy, a cursory reading of the Code gives the impression that the rights of creditors are paramount. It is certainly true that more of the statute deals with debt than with discharge.”); see also Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of “Substantial Abuse,”* 59 AM. BANKR. L. J. 335 (1984).

⁵² See generally HUBERT, *supra* note 14, §§ 10.01 – 10.09 (discussing the general principles and rules of priority).

⁵³ I use the term “unsecured creditors” based on my own definition that an unsecured creditor is a creditor gave the debtor money or property without any collateral for it.

⁵⁴ HUBERT, *supra* note 14, § 1.01, (summarizing the likelihood that an unsecured creditor will be paid after the debtor’s estates is liquidated, “[n]ote especially the fact that unsecured creditors, at least, rarely benefit from bankruptcy. A number of studies have confirmed that in the typical bankruptcy, which is an individual Chapter 7 case, there are no unencumbered, non-exempt assets to distribute to the unsecured creditors. This does not necessarily mean that the debtor retains all the property. To the contrary, a major reason why there is nothing for unsecured creditors is that there are secured creditors. At least one study found that nearly all non-exempt property was encumbered; thus, many bankruptcies are nothing more than the splitting of the debtor’s property between the debtor and the secured creditors, with the latter taking by far the larger share.”).

attempts to increase the amount recovered by unsecured creditors. This should have an impact based on the increase of filings. Thus, BAPCPA should arguably allow the bankruptcy system to achieve the purpose and goals behind bankruptcy.

B. STATISTICS DEMONSTRATE AN ENORMOUS INCREASE IN BANKRUPTCY FILINGS OVER THE LAST TWO DECADES

During the 1980s and 1990s, bankruptcy filings increased tremendously.⁵⁵ In 1980, the number of personal filings was 300,000.⁵⁶ By the year 2004, there were over 1,500,000 personal filings.⁵⁷ The bankruptcy profiles from the year 2004 include the average age of the bankruptcy petition filer to be thirty-eight, 44% of filers were couples, 30% were women filing alone, and 26% were men filing alone.⁵⁸ The filing of consumer bankruptcy cases has increased more than 700%.⁵⁹

The increase in bankruptcy filing is partially accredited to poor decisions and financially disastrous events including divorce, lack of health insurance, the spread of gambling, driving without auto insurance, and an increase in self-employment.⁶⁰ Specifically, statistics show more than one in every hundred adults in the United States file for bankruptcy

⁵⁵ Bankruptcy LawFirms.com, *Bankruptcy History*, <http://www.bankruptcylawfirms.com/History-Bankruptcy.cfm> (last visited Aug. 3, 2005).

⁵⁶ BankruptcyAction.com, *Bankruptcy Statistics*, <http://bankruptcyAction.com> (last visited Aug. 3, 2005).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Cuevas, *supra* note 23, at 359-360.

⁶⁰ *Bankruptcy Abuse Prevention and Consumer Protection Act: Hearing on S. 256 Before the Senate Comm. on Judiciary*, 109th Cong. 1 (2005) (statement of Mr. P. Michael Stewart Menzies, Sr., President and CEO East Bank and Trust Company), available at 2005 WL 319920.

each year.⁶¹ “Families with children are twice as likely to file. Research shows that approximately 50% of all families are forced to file bankruptcy due to medical expenses; and other 40% of families file bankruptcy due to divorce, job loss or death in the family.”⁶² Last, statistics show that women are the fastest growing group of bankruptcy filers.⁶³ Therefore, many reasons exist for the extreme increase in filings, and the need for reform before BAPCPA was clear. Whether reform under BAPCPA adequately addresses discrepancies between minorities and whites is less clear.

C. THERE EXISTS A DISCREPANCY IN MINORITIES FILING FOR BANKRUPTCY COMPARED TO THEIR WHITE COUNTERPARTS

The difference between the Ideal Debtor and minorities is reflected in statistics. The Ideal Debtor has property to

⁶¹ 151 CONG. REC. H2063 (daily ed. Apr. 15, 2005) (statement of Rep. Jackson).

⁶² *Id.*; *contra* 151 CONG. REC. H2063 (daily ed. April 15, 2005) (statement of Rep. Sensenbrenner). Rep. Sensenbrenner presents a statement that is contrary to Rep. Jackson’s:

We have heard an awful lot about medical bills. Well, the people who are complaining about medical bills put a tin ear on to the testimony that has been submitted in this extensive hearing record.

The United States trustees program, independent people who administer the Bankruptcy Code, collected data and made findings on medical debt. They drew a random sample and, of 5,203 debtors, 54 percent listed no medical debt. Those that did, medical debt accounted for 5.5 percent of the total general unsecured debt; 90.1 percent reported medical debts of less than \$5,000; 1 percent of the cases accounted for 36.5 percent of the medical debt; and less than 10 percent of all cases represented 80 percent of all reported medical debt. This is not the big problem that the people on the minority side have said it is. The data from the United States Trustees proves this.

Id.

⁶³ 151 CONG. REC. H2063 (daily ed. April 15, 2005) (statement of Rep. Solis) (stating “[t]housands of women and their children are affected by the bankruptcy system each year. This bill will only inflict additional hardship on over a million economically vulnerable women and their families. In fact, women are the fastest growing group to file for bankruptcy. More than 1 million women will find themselves in bankruptcy court this year, outnumbering men by about 150,000. Women who lose a job, have a medical emergency, or go through divorce make up more than 90 percent of the women who file for bankruptcy.”).

exempt, disposable income, and few or no dischargeable debts.⁶⁴ A significant difference exists in terms of a household filing instead of an individual filing based on family size.⁶⁵

In minority families the nuclear family structure differs, "[t]he rearing or informal adoption of children by members of their extended family for both short and long periods of time is more likely among blacks and Hispanics than among other racial groups."⁶⁶ The size of the nuclear family became important when the Bankruptcy Code allowed joint petition filings.⁶⁷ The method of petition counting used is important to determine how many people are filing bankruptcy as a joint petition or as one person.⁶⁸ Therefore, aside from an increase in filing, there are unknown numbers of individuals affected under a household filing that are not counted as part of a joint petition.

In conjunction with the method of counting the petition in relation to joint status and the number of people living in the household, it is also important to look at other social statistics that affect the role of minorities in bankruptcy. These include home ownership, income, education statistics, and retirement savings. Thus, Congress may not adequately be able to address discrepancies between minorities and the Ideal Debtor

⁶⁴ See Dickerson, *supra* note 16.

⁶⁵ See generally Chapman, *supra* note 26, at 362.

⁶⁶ Dickerson, *supra* note 16, at 1747-48.

⁶⁷ Chapman *supra* note 26, at 364.

⁶⁸ See generally *id.*

based on the information provided in joint petitions. Thus, it is necessary to look at government statistics from outside of bankruptcy to determine to what extent discrepancies exist between different races and ethnicities.

1. Minorities Will Benefit Less Than the Ideal Debtor Under the Homestead Exemption Based on Homeownership⁶⁹ Statistics

Homeownership statistics demonstrate lower ownership for minorities resulting in the likelihood that minorities will benefit from the homestead exemption compared to their white counterparts. In order to understand why minorities differ from the Ideal Debtor it is necessary to look at statistics behind each race or ethnic group. An applicable exemption for the Ideal Debtor is the homestead exemption.⁷⁰ In 2004, 76% of whites owned their homes.⁷¹ However, only 49.1% of blacks⁷² and 4.1% of Latinos⁷³ own their own homes.

A study analyzing the home ownership of retirees by race and ethnicity also provides insight to the inequalities in home ownership based on race and ethnicity. The statistics demonstrate that there are "large differences in homeownership

⁶⁹ See *infra* Part III (the purpose in providing statistics based on home ownership will be relevant in analyzing the inequities behind the homestead exemption).

⁷⁰ 11 U.S.C. § 522. The homestead exemption, as I define it, is an exemption which allows the debtor to exempt the equity in the house that is used as the primary residence up to a certain amount. This amount is set by state or federal limits depending on the election each state.

⁷¹ U.S. Census Bureau, Housing Vacancies and Homeownership, Annual Statistics: 2004, *available at* <http://www.census.gov/hhes/www/housing/hvs/annual04/ann04ind.html> (last visited Aug. 4, 2005).

⁷² *Id.*

⁷³ *Id.*

rates among the races or ethnic groups.”⁷⁴ The homeownership of white retirees was 81%.⁷⁵ In comparison, only 69% of blacks and 66% of Hispanics⁷⁶ owned their own homes.⁷⁷ Therefore, whites are more likely to take advantage of homestead exemptions.

The study also indicated that whites allocated 2.3% of their total retirement income on household operations.⁷⁸ In comparison, blacks spent only 1.4 percent and Hispanics spent 1.1% of their retirement income on household operations.⁷⁹

⁷⁴ Pierre Bahizi, *Retirement Expenditures For Whites, Blacks, And Persons of Hispanic Origin: The Relationship Between Income and Expenditure Level Reveals Differences in Spending Patterns Amount Retiree of Different Groups; Housing, Food, and Transportation are the Largest Expenditure Components* (2003), available at <http://www.bls.gov/opub/mlr/2003/06/art3full.pdf> (this study, though based on statistics for retirees, is used throughout this Note. It provides a wealth of information on expenditures based on race that are an important part of bankruptcy. Also, to determine what amount is reasonable to allocate to a debtor for monthly expenditures and in light of the new Means Test provided for in the BAPCA). Pierre Bahizi summarizes the role of these statistics in analyzing the differences in expenditures by race as:

In summary, although retirees are commonly treated as one group, in many ways they are as diverse as the general population. Some of the differences in spending among White, Black, and Hispanic retirees may be due to differences in income and spending patterns.

Hispanic retirees spend a larger percentage of their expenditures on food, shelter (rent), transportation, and Medicare payments. Black spent a greater share of their expenditures on utilities, used cars, personal insurance, personal care products, apparel, tobacco products. White retirees spend a greater share of their expenditures on food away from home, house furnishings, health insurance, entertainment, and public transportation.

Id.

⁷⁵ *Id.*

⁷⁶ I recognize there is an interchanging of the terms “Latino” and “Hispanic” throughout this Note and does not indicate that they are terms used interchangeably. The discrepancy is based on the fact that some statistics provided only an option for “Hispanics.” See Bahizi, *supra* note 74 at 22, n.2 (describing the selection of categories of race as limited “[a]t the time the CE data used here was collected, only one race could be selected by a respondent. White means “White, non-Hispanic.” Black means “Black, non-Hispanic.”); see also Oquendo, *supra* note 30, at 96 (doing a comparison of the term “Latino” to the term “Hispanic” indicating that the term “Hispanic” has been rejected because of its association with the Spanish colonial power from previous centuries. Oquendo further develops the definition of the adjective “Hispanic” through dictionary definitions stating, “The Barnart Dictionary of Etymology enters the following information for the adjective “Hispanic” from which the noun is derived: “probably shortened form earlier *Hispanical* of Spain or its people (1584, formed in English from Latin *Hispanicus* Spanish, from *Hispania* Spain + English suffix -ical.)”

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* (Note the statistics indicate that even though Hispanics tend to have the largest family size, they still spend the least on household operations).

Last, the statistics indicate that white retirees spend more on household appliances and furnishings.⁸⁰ White retirees allocated 3.4% of their income on household furnishing and equipment such as appliances and furniture.⁸¹ In comparison, blacks and Hispanics allocated only 2.7% of their income.⁸² Thus, minorities are less likely to fully benefit from the household exemption.

2. White Median Family Income is Higher Than Minorities Based on Income⁸³ Statistics

Income statistics demonstrate that the median family income of white families is higher than that of minorities. Income is the basis of determining whether the debtor can file for Chapter 7 or Chapter 13.⁸⁴ The total number of white households in the United States for the year 2004 was 62,609.⁸⁵ The median income of white families from 2003 figures was \$55,515.⁸⁶ There were

⁸⁰ *Id.* (This statistic is relevant in analyzing the household exemptions and the ability of minorities to take advantage of the full exemption amounts provided in section 522 if they do not spend as much as whites do on household items).

⁸¹ *Id.* (Allocation of income to spend on furniture is important because it can later be exempted under section 522. Thus, whites will keep more of their income as value in their furniture. Contrary, minorities spending less on furniture will have the income that they have saved go to the creditors unless it falls into the “wildcard” exemption).

⁸² *Id.*

⁸³ The purpose of statistics based on income is relevant in analyzing the adequacy of the Means Test added to Bankruptcy Code under the BAPCPA effective in October; *see infra* Part II.B.2.

⁸⁴ *See* discussion *infra* Part II.B.2.

⁸⁵ U.S. Census Bureau, Annual Demographic Survey: Table HINC-02, *available at* http://ferret.bls.census.gov/macro/032002/hhinc/new02_000.htm (last visited Aug. 4, 2005) (in order to access this information the user must select “Family Households, White”).

⁸⁶ *Id.* (The median family income amount is important because it is factored into the Means Test formula. The higher the income one has, the more the debtor can maintain in allowable expenses. Therefore, if the debtor has many monthly expenditures that they can qualify as essential under the Bankruptcy Code, then they will be able to keep more of their income to pay for those allowable expenses. This provides an advantage to a white family that has a higher median income than a minority family).

1,905 white households making between \$25,000 to \$27,499,⁸⁷ 1,845 white households making between \$40,000 to \$42,299,⁸⁸ and 13,172 white households making \$100,000 and over.⁸⁹

In comparison there were 8,912 black households counted.⁹⁰ There were 347 families making between \$25,000 to \$27,499,⁹¹ 271 families making between \$40,000 to \$42,299,⁹² and 793 families making \$100,000 and over.⁹³ The median income for the black household is \$35,872.⁹⁴

Last, there were 9,273 Hispanic families counted.⁹⁵ There were 419 Hispanic families making between \$25,000 to \$27,499.⁹⁶ There were 334 households making between \$40,000 to \$42,299.⁹⁷ There were 759 families making \$100,000 or over.⁹⁸ The median

⁸⁷ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the low range).

⁸⁸ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the medium range).

⁸⁹ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the highest income range).

⁹⁰ U.S. Census Bureau, Annual Demographic Survey: Table HINC-02, available at http://ferret.bls.census.gov/macro/032002/hhinc/new02_000.htm (last visited Aug. 4, 2005) (in order to access this information the user must select "Family Households, Black").

⁹¹ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the low income range).

⁹² *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the medium income range).

⁹³ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the highest income range).

⁹⁴ *Id.* (The median income is provided as a comparison between the different race/ethnic groups selected).

⁹⁵ U.S. Census Bureau, Annual Demographic Survey: Table HINC-02, available at http://ferret.bls.census.gov/macro/032002/hhinc/new02_000.htm (last visited Aug. 4, 2005) (in order to access this information the user must select "Family Households, Hispanic Origin").

⁹⁶ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the low range).

⁹⁷ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the middle range of income for Hispanics).

⁹⁸ *Id.* (Several income ranges were selected from these statistics to indicate the low, medium and high end ranges of income comparative by race, this provides the high range of income for Hispanics).

income for Hispanic households was \$35,976.⁹⁹ Therefore, whites are more likely to have a higher income. A higher income will allow whites to either put money into secured assets or to take on more allowable expenses. This will result in whites having an advantage over minorities in retaining a higher level of living.

3. Whites Tend to Have More Retirement Savings Than Minorities That Will Endure Through Bankruptcy Based on Retirement¹⁰⁰ Statistics

Retirement statistics demonstrate that overall whites tend to have more retirement savings that they will retain after bankruptcy than do minorities. Retirement statistics show that that social security has served as the foundation of the nation's retirement income system with 39 million people receiving social security retirement.¹⁰¹ Further, for one-fifth of the elderly in the United States social security is the sole source of income.¹⁰² Pension¹⁰³ plans are also an important source of retirement income. The United States Government

⁹⁹ *Id.* (This provides the median income to compare to other races. Note that the median income for white families is significantly higher than that of black or Hispanic families).

¹⁰⁰ The purpose of providing statistics based on retirement is in analyzing the newly added provisions under the BAPCPA granting allowance for exceptions of certain retirement funds as property of the estate. Further, statistics provided for by the Social Security Administration are important in indicating via retirees what the general trend of expenditures are in the United States based on race; *see also* discussion *infra* Part II.B.3.b.

¹⁰¹ Gov't Acct. Office, *A Secure Retirement for Older Americans*, available at <http://www.gao.gov/sp/html/stroobj14.html> (last visited Aug. 4, 2005).

¹⁰² *Id.* (In analyzing the BAPCPA affects on minorities compared to whites, it is important to note that Americans in general tend to not save for retirement as statistics demonstrate the amount of Americans completely relying on social security payments for retirement income).

¹⁰³ Gov't Acct. Office, *Sources of Income in the United States, Ages 65 and Over, 2000*, available at <http://www.gao.gov/sp/html/stroobj14.html> (last accessed Aug. 4, 2005) (defining "pensions" as "includes private pensions and annuities; government employee pensions; Railroad Retirement; individual retirement account (IRA), Keogh, and 401(k) payments.").

Accountability Office's analysis of reports from the United States Social Security Administration's Office statistics demonstrate that in the year 2000, social security provided 38% of retirement income, pensions provide 18% of retirement income, asset income provided 18% income, earnings provided 23% of income, and other sources provided 3% of retirement income.¹⁰⁴ Further, only half of the nation's workers have pension coverage by employer pensions and 48% do not receive any pension income.¹⁰⁵

The role of race and ethnicity in pension coverage is stated in the General Accountability Office Report to Congressional Requestors on pension plan as:

Race and ethnicity are also associated with a lack of pension coverage, although this relationship is not well understood. According to our analysis, blacks and non-Hispanic whites appear equally likely to lack pension coverage, whereas Hispanics and Asians are more likely than non-Hispanic white to lack pension coverage. There are a limited number of studies to

¹⁰⁴ *Id.* (No information was provided as to what the category "other sources" includes).

¹⁰⁵ Gov't Acct. Office, *GAO Analysis of Data From the Social Security Administration's Office of the Actuary (2002 Intermediate Assumptions of the 2002 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Disability Insurance Trust Funds)*, available at <http://www.gao.gov/sp/html/strobj14.html>; see also Brown *supra* note 21, at 1501 (summarizing pensions in the United States as "even though the majority of private sector workers are not participating in their pension plans, every study confirms the following observation: White workers are the most likely to participate and Hispanic workers are the least likely to participate in their pension plans. Second, even for those workers who do participate in their pension plans, with the proliferation of defined contribution plan that place the investment decision making on the worker, workers make different investment decisions based upon their race or ethnic background. As a result, in order to increase the likelihood that workers of color retire with similar pension account balances as their White counterparts, they will not only need to be encouraged to participate, but they will also need to receive education about various investment vehicles."); see GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: PENSION PLANS CHARACTERISTICS OF PERSONS IN THE LABOR FORCE WITHOUT PENSION COVERAGE at 4 (2000), available at <http://www/gao.gov/new.items/he00131.pdf> [hereinafter GAO PENSION PLAN] (stating "[a]bout 53 percent of the employed labor force lacked a pension plan in 1998, a decrease in those without coverage of 5 percentage points from 10 years earlier.").

explain these gaps in coverage, and more research is needed.¹⁰⁶

The statistics from this study demonstrate that based on income 23.6% of blacks, 25% of whites and 42.1% of Hispanics are without pension coverage.

Another study prepared by economist Pierre Bahizi for the Bureau of Labor Statistics analyzing the retirement expenditures based on race and ethnicity evaluating the relationship between income and expenditures distinguishes the spending patterns among retirees of the different groups.¹⁰⁷ The statistics show that food, housing, and transportation are the largest components of the budget of the retiree.¹⁰⁸ Under the food category, Hispanics spent the largest share on food equaling 20.5%.¹⁰⁹ Blacks spent 17.9% of their income on food.¹¹⁰ Last, whites spend 15.1% of their income on food.¹¹¹ The study indicates that part of the reason that Hispanic retirees spent the largest share on food due to the fact that the Hispanic households are larger.¹¹²

¹⁰⁶ GAO PENSION PLAN, *id.* at 17.

¹⁰⁷ Bahizi, *supra* note 74, at 1-3 (this study analyzes the spending of whites, Hispanics, and blacks based on their relationship to income. Note, that the higher the income the more expenditures the retiree has. The statistics for this article are from the Consumer Expenditure Interview Survey from the first quarter of 1996 through the first quarter of 2001).

¹⁰⁸ *Id.* at 21, Table 2: Expenditure Level and Shares of Total Expenditures for Retired White, Black, and Hispanic Consumer Units, Consumer Expenditure Interview Survey, 1996-2000 (compare this to the necessary exemptions in bankruptcy which include the necessities such as a home, food, and transportation).

¹⁰⁹ *Id.* (This study demonstrates that because Hispanics have larger families they spend a larger amount on food).

¹¹⁰ *Id.* (This statistic demonstrates blacks also spend more than whites on food).

¹¹¹ *Id.* (This statistic demonstrates whites spend the least on food).

¹¹² *Id.* (This demonstrates that Hispanics, as mentioned throughout this Note, tend to have larger families leading to more expenditures on items such as food).

The next category of expenditures provided for in this retirement expenditure article by Pierre Bahizi is housing. This area of expenditures is the largest expenditures for all groups.¹¹³ Blacks were found to allocate the largest amount of income on housing equaling 35% of their income.¹¹⁴ Whites spent 31.5% of their income on housing and Hispanics spent 33.9% on housing.¹¹⁵ Thus, these statistics demonstrate the disparities in retirement planning among different races as well as the disparities in expenditures among races.

4. Whites are More Likely to Attend Private Schools and to Save for College Based on Education¹¹⁶ Statistics

Education statistics demonstrate whites are more likely than minorities to attend private schools and to have individual retirement accounts ("IRA") for savings or credit tuition accounts. Two areas of education are expanded upon under the BAPCPA.¹¹⁷ These areas include private school monthly tuition allowances, IRA education accounts, and tuition credit accounts. First, the United States Department of Education provides statistics on the percentage of the population by race/ethnicity

¹¹³ *Id.* (The fact that all groups spend the highest percentage of income on housing makes sense because a house is a necessity for all).

¹¹⁴ *Id.* Table 2: Expenditure Levels and Shares of Total Expenditures for Retired White, Black, and Hispanic Consumer Units, Consumer Expenditure Interview Survey, 1996-2000.

¹¹⁵ *Id.*

¹¹⁶ The purpose of providing education statistics is for comparison of race and ethnicity in tuition savings accounts as well as the number of children by race that are sent to private schools as now allowed as a monthly expenditure under the BAPCPA.

¹¹⁷ *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

enrolled in the year 2001.¹¹⁸ The age range provided is from three to thirty-four.¹¹⁹ In the year 2001, there were 56.6% of the white population enrolled in school.¹²⁰ There were 59.5% of the black population enrolled in 2001.¹²¹ Last, 51.4% of the Hispanic population were enrolled.¹²²

In regards to public and private school education enrollment statistics demonstrate a disparity between white and minority enrollment at the elementary and secondary school levels.¹²³ The total white students enrolled in private schools in the year 2001 through the year 2002 is 75.9%.¹²⁴ The percent of black students enrolled in private schools at the elementary and secondary levels is 9.7%.¹²⁵ Last, the number of Hispanic students enrolled in private schools was 8.6%.¹²⁶

Along with private school enrollment at the elementary and secondary levels, also important is the number of students by race and ethnicity that have education tuition savings accounts.

¹¹⁸ National Center for Education Statistics, Digest of Education Statistics (2002), *available at* <http://nces.ed.gov/programs/digest/d02/dt006.asp> (last visited Aug. 4, 2005).

¹¹⁹ *Id.* This study applies to enrollment in any type of graded public, parochial, or other private schools.

¹²⁰ National Center for Education Statistics, Digest of Education Statistics Tables and Figures. *Table 6: Percent of the Population 3 to 34 Years Old Enrolled in School, by Race/Ethnicity, Sex, and Age: Selected Years, October 1980 to October 2001*, *available at* <http://nces.ed.gov/programs/digest/d02/dt006.asp> (last visited Aug. 4, 2005).

¹²¹ *Id.* (This indicates that there were more blacks than whites or Hispanics enrolled in school).

¹²² *Id.* (Hispanics had the lowest percentage of enrollment in school, which is significant in analyzing whether Hispanics will have education savings accounts if they are less likely to enroll in school).

¹²³ *Id.*, National Center for Education Statistics, Digest of Education Statistics Tables and Figures: *Table 2: Enrollment in Educational Institutions, by Level and Control of Institution: Fall 1980 to Fall 2005* (2002), *available at* <http://nces.ed.gov/programs/digest/d02/dt002.asp> (last visited Aug. 4, 2005).

¹²⁴ *Id.* (This demonstrates that a high percentage of whites attend private school and will benefit from the private school credit available under the BAPCPA).

¹²⁵ *Id.* (In comparison to whites, the number of blacks enrolled in private school is extremely low).

¹²⁶ *Id.* (The number of Hispanics enrolled in private schools demonstrates that Hispanics will be the least likely to take advantage of the allowed \$1,500 a month for private school tuition).

Statistics provided by the United States Department of Education analyzed the percentage of financial aid and family support received by graduate and first-professional students.¹²⁷ This study indicated that white students received 5.9% financial aid only, 47% self/family support only, and 31% combination of self/family support and financial aid.¹²⁸ In comparison, black students received 7.8% in financial aid only, 43.2% in self/family support only, and 27% in both self/family support and financial aid.¹²⁹ Last, Hispanics received 5.1% in financial aid, 43.5% in self/family support only, and 29.7% in combination of self/family support and financial aid.¹³⁰

In conclusion, because minorities lack the qualities of the Ideal Debtor based on assets, income, and family size, the impact of the BAPCPA may adversely affect the financial status of minorities.

II. THE BAPCPA IS PREDICTED TO SIGNIFICANTLY CHANGE THE CURRENT BANKRUPTCY LAW

The changes to the Bankruptcy Code under the BAPCPA are predicted in legislative debate to have a tremendous impact on the bankruptcy system.¹³¹ Minorities, in comparison to the Ideal

¹²⁷ NATIONAL CENTER FOR EDUCATIONAL STATISTICS, STUDENT FINANCING OF GRADUATE AND FIRST PROFESSIONAL EDUCATION (1993), <http://nces.ed.gov/pubs93/93076.pdf> (looking specifically at Table 6.2—Percentage of Graduate and First-professional Students who Received Financial Aid and Self/family Support, by Selected Student Characteristics: 1989-90).

¹²⁸ *Id.* (Stating 16.1% of support unknown).

¹²⁹ *Id.* (Stating that 22.1% of funds were unknown).

¹³⁰ *Id.* (Stating that 21.7% of funds were unknown).

¹³¹ See discussion *supra* Part II.B.1.

Debtor, statistically have fewer assets that are protected under the Bankruptcy Code.¹³² Eight years of Congressional debate to reform the BAPCPA demonstrates that the House of Representatives and the Senate are concerned with the changes the BAPCPA is implementing and whether the provisions are fair to all debtors.¹³³ Insight into the role of the BAPCPA is found in reflection upon the history of the bankruptcy system in the United States, the Bankruptcy Code today, and the significant consumer changes under the BAPCPA.

A. OVERVIEW OF BANKRUPTCY LAW IN THE UNITED STATES

The BAPCPA, as the predecessor amendments to bankruptcy laws in the United States, is a reflection of the changes of the economic and social conditions in the United States.¹³⁴ A review of the bankruptcy system in the United States provides context to the BAPCPA and the expectations of Congress for revamping the bankruptcy laws to prevent abuse. The context is provided for in the history of United States bankruptcy law and its structure, the legislative history of BAPCPA, and an overview of the pertinent provisions under the BAPCPA.

¹³² See *supra* Part I (statistics demonstrate that minorities have less likely to own a home, have tuition accounts, to have retirement accounts and to spend money on other property that is excluded or exempted under the Bankruptcy Code).

¹³³ See *infra* Part II.B.

¹³⁴ See *infra* Part II.A.1.

1. Origin of Bankruptcy Law in the United States

The United States' bankruptcy¹³⁵ laws originated from England.¹³⁶ In 1787, the Federal Convention proposed the "bankruptcy clause" granting Congress the power "to establish uniform laws on the subject of bankruptcies."¹³⁷ "In the Report of the Constitution, this power was inserted immediately after the power to regulate commerce as Clause Four of Section Eight, Article One."¹³⁸ In 1898, following debate over the function of federal bankruptcy laws in the United States, Congress enacted the Bankruptcy Act of 1898.¹³⁹ Thus, the United States'

¹³⁵ Charles Tabb provides an in-depth definition of bankruptcy:

The etymology of the word "bankrupt" suggests its original meaning. One view is that the word derives from the Latin words "bancus," meaning table or counter, and "ruptus," meaning broken. A merchant trader who went broke in medieval days would break his trading table, graphically signifying that he was out of business. Another suggestion is that the word comes from the French words "banque," meaning bench, and "route," meaning a trace; thus, a ruined trader would remove his trading bench without leaving a trace.

Bankruptcy laws in the United States have evolved considerably since the first federal bankruptcy law was passed in 1800. The term "bankruptcy" at that time had a very specific technical meaning. A bankruptcy law was one intended principally for the relief of creditors of a merchant trader who had committed an "act of bankruptcy," and a bankruptcy case could only be brought by creditors against the merchant debtor. An "insolvency" law, by contrast, was conceived as a debtor relief law, and could be commenced by the impoverished individual debtor.

Today in the United States the distinction between the two terms has largely evaporated. The term "bankruptcy" has come to encompass both notions of a remedy for creditors and of debtor relief.

CHARLES J. TABB ET AL., *BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE* 65-66 (2003).

¹³⁶ DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 2 (2001) (stating, "[w]hen the first U.S. bankruptcy law was enacted in 1800, for instance, Congress borrowed nearly the entire legislation for England"). See also William L. Norton, Jr., *The Development of American Bankruptcy Law: Chapter 1. History of Bankruptcy Laws*, 1 NORTON BANKR. L. & PRAC. 2D § 1:2 (2005) (emphasizing that as early as the thirteenth century individual creditor remedies existed in England).

¹³⁷ Norton *supra* note 136, § 1.3.

¹³⁸ CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 5 (1994); see also U.S. CONST. art. I, § 8, cl. 4.

¹³⁹ SKEEL, *supra* note 136, at 4 (stating "[a]s lawmakers wrestled over federal bankruptcy legislation, another insolvency drama unfolded entirely outside of Congress. During the course of the nineteenth century, the railroads emerged as the nation's first large-scale corporations. The early growth of the railroads was fraught with problems. Due both to overexpansion and to a series of devastating depressions, or panics, numerous railroads defaulted on their obligations – at times, as much as 20 percent of the nation's track was held by insolvent railroads. Rather than look to Congress, the railroads and their creditors invoked the state and federal courts. By the final decades of the nineteenth century the courts had developed a judicial reorganization technique known as the equity receivership. It

bankruptcy laws continued to exist in their original form until 1979.¹⁴⁰

Bankruptcy laws in the United States took a different role from this original role during the Great Depression and the New Deal, including adjustment to dealing with large corporations.¹⁴¹ The Chandler Act of 1938 amended the Bankruptcy Act of 1898.¹⁴² On November 6, 1978, the Bankruptcy Code was enacted and replaced the original laws established under the 1898 Act.¹⁴³

was this technique, rather than the Bankruptcy Act of 1898, that became the basis for modern corporate reorganization.”).

¹⁴⁰ HUBERT, *supra* note 14, §§ 3.01-3.04 (dividing the history of bankruptcy law into three categories: bankruptcy law prior to 1898, the time of The Bankruptcy Act from 1898 through 1979, and The Bankruptcy Code from 1979 until the present. Also, describing the period before the enactment in 1898 of the federal bankruptcy legislation in which “congress exercised its bankruptcy power only sporadically, to meet the periodic crises of a growing market economy. Federal bankruptcy legislation was viewed as a temporary and emergency measure, only appropriate to deal with the aftermath of economic depression. Routine debtor-creditor adjustments were left to the states. In ordinary times, state creditors’ rights law was viewed as sufficient to deal with the problems of debtor default. Temporary national bankruptcy laws were in force during 1800 to 1803, 1841 to 1843, and 1867 to 1872.”) (citation omitted); *see also* TABB ET AL, *supra* note 135, at 58-59, listing several bankruptcy acts that were passed before the 1898 enactment in the years of 1800, 1841, 1867m and 1874. The author also describes The Bankruptcy Act of 1898 as the beginning of the modern era for permanent federal bankruptcy law).

¹⁴¹ HUBERT, *id.* (summarizing that there were three stages in early Bankruptcy law: first, the earliest stage was that of the Bankruptcy Act of 1898. The second stages was the time of the Great Depression and the New Deal. Finally, the third stage was the 1978 Bankruptcy Code); *see also* TABB ET AL, *supra* note 135, at 59 (noting that there were some changes made to The Bankruptcy Act of 1898 during the Great Depression in which equity receivership was replaced, railroad reorganization was authorized, and corporate reorganizations were allowed).

¹⁴² Norton *supra* note 136, § 2:1 (describing the 70-year period of the Bankruptcy Act of 1898 as “a statute in terminology, structure, design and content directed toward an era of the distant past, reflecting a social context rooted in pre-World War II times, conditions and circumstances. It was a product of economic depressions and economic growth, of industrialization, of unionization and of an immature commercial credit system, and was a statute conceived in the horse and buggy era that was still performing in the jet age of high technology. The statute which served its purposes well during those 70 years, but was becoming counter-productive as the world changed. In particular, the growth of consumer credit, the development of modern concepts of commercial financing, and the construction and expansion of new and different systems of payment strained its application”); *see also* TABB ET AL, *supra* note 135, at 59 (stating that the Chandler Act overhauled most of the 1898 Act and that the most significant changes were the reorganization chapter of “chapter X governed corporate reorganizations, chapter XI dealt with arrangements, chapter XII applied to real property arrangements, and chapter XIII provided for wage earners’ plans.”).

¹⁴³ *Id.* § 2.3 (also tracking the legislative history of the bill from H.R. 8200 and S.2266); *see also* TABB ET AL, *supra* note 135, at 59 (describing the development of The Bankruptcy Code as “[i]n 1970, Congress created the Commission on the Bankruptcy Laws, which filed a masterful two-part report in 1973, recommending comprehensive reforms of federal bankruptcy law. Five years later, Congress passed the Bankruptcy Reform Act of 1978, replacing the 1898 Act with the Bankruptcy Code that, as subsequently amended, still governs bankruptcy law

The Bankruptcy Reform Act of 1978 is said to be “the first comprehensive reform of the federal bankruptcy law in the forty years since the passage of the Chandler Act and replaced the law that had been in effect since the end of the nineteenth century.”¹⁴⁴ The reform process took a decade and included the appointment of a commission which recommended changes to be made to the federal bankruptcy laws.¹⁴⁵ The Bankruptcy Reform Act of 1978 has been amended several times including the Bankruptcy Amendments and Federal Judgeship Act of 1984,¹⁴⁶ the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986,¹⁴⁷ and the Bankruptcy Reform Act of 1994.¹⁴⁸ The Bankruptcy Code has not faced substantive amendments since 1994 but will be substantively amended based on the BAPCPA when it takes effect in October of 2005.¹⁴⁹

in the United States.” The authors also note that a major issue in the 1970s was the status of bankruptcy judges including jurisdiction issues and whether to give Article III status which included lifetime tenure).

¹⁴⁴Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32 (1995) (commenting on the role of The Bankruptcy Reform Act of 1978 and characterizing it as the first major enactment to not be in response to an economic depression).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 38-40 (summarizing the purpose of the 1984 amendment as a result of the *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* case in which the court held that The Bankruptcy Act of 1978 violated Article III of the Constitution by granting the bankruptcy judges broad jurisdiction. The Bankruptcy Amendments and Federal Judgeship Act of 1984 resulted in dividing jurisdiction into “core” and non-core” matters, creating additional judgeships, and amendments to the Bankruptcy Code); *see also Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *see also* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

¹⁴⁷ Tabb, *supra* note 144, at 32 (summarizing the act as adding Chapter 12 for family farmers and making the United States Trustee System permanent nationwide); *see also* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986).

¹⁴⁸ *See generally* Norton *supra* note 136, §§ 2:11 – 2:14; *see also* Tabb, *supra* note 144, at 32 (summarizing the amendment as creating a second commission for reviewing bankruptcy and making substantive amendments to the Bankruptcy Code); *see also* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

¹⁴⁹ 11 U.S.C. §§ 101–1330 (2000) (several amendments as discussed in this Note have been added, but the Bankruptcy Code remains significantly similar to the original enactment).

A review of the last twenty-seven years¹⁵⁰ under the Bankruptcy Code provides insight as to the federal bankruptcy laws position facing this reform under the BAPCPA. Some scholars take the position that the Bankruptcy Code is relatively unamended after twenty-seven years and that an amendment would fail to adequately amend the Bankruptcy Code.¹⁵¹ The argument that an amendment would fail to accomplish the changes necessary in today's society places blame on Congress and its inability to understand the Bankruptcy Code as well as the politics behind reform legislation.¹⁵² Regardless of the view taken as to the success of the Bankruptcy Code of the last two and a half decades, there is no question that the phenomenal

¹⁵⁰ Numerous overviews of the Bankruptcy Code for the last twenty-five years have recently analyzed the success of the Bankruptcy Code. See generally Ralph A. Brubaker & Kenneth N. Klee, *Resolved: The 1978 Bankruptcy Code Has Been A Success*, 12 AM. BANKR. INST. L. REV. 273 (2004); see also David A. Lander, "It 'Is' The Best of Times, It 'Is' the Worst of Times": A Short Essay on Consumer Bankruptcy After the Revolution, 78 AM. BANKR. L.J. 201 (2004).

¹⁵¹ Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 221-23 (2004) (Jacoby takes a pessimistic view point of Congress' ability to amend the Bankruptcy Code adequately, "[o]rverzealous pursuit of legislative solutions to past problems limits flexibility and will not necessarily address the problems of the future. Furthermore, aspects of the federal legislative process may not be well suited to some of the oft-cited substantive goals of bankruptcy, such as equal treatment of similarly-situated creditors.").

¹⁵² Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & CONN. L.J. 361, 361-63 (2003) (supports the pessimistic view that Congress is unable to adequately reform the Bankruptcy Code by stating, "[t]hrough my work, I have been involved with the bankruptcy reform legislation for most of its history and I have become very cynical about the political process and the people who call themselves 'public servants' (though I do not recall hearing many use that term- they seem to like 'public official' better.)). The authors believe that along with problems with Congress, the Bankruptcy Code itself is flawed as stating, "there are problems with the Bankruptcy Code, with those that are most troubling arising in business bankruptcies under Chapter 11. Bankruptcy reform, however, addresses none of the real problems arising under the Code or the genuine abuses that the Code presently allows. Instead, bankruptcy reform has since its inception relied on a problem that is, in fact, largely nonexistent, specifically that too many consumer debtors – real ordinary Americans – are abusing the good graces of the Code. ¶ At its heart, bankruptcy reform is a useful example of the ever-widening gulf between the political leadership of this country and the people whom they are suppose to serve.") (citations omitted).

increase in filings¹⁵³ has led to a need for Congress to reform the Bankruptcy Code and adapt to the “unprecedented change in the political, social, and economic framework of bankruptcy.”¹⁵⁴ Thus, after twenty-seven years of the Bankruptcy Code, the BAPCPA deals with the changes in society that have occurred since 1978. However, the BAPCPA may not adequately solve problems such as inequalities between the Ideal Debtor and minorities.

2. Structure of the Bankruptcy System in the United States

The structure of the Bankruptcy Code provides the basic framework in which the BAPCPA attempts to build upon. The Bankruptcy Code is divided into several chapters. Chapter 7 and Chapter 13 are consumer debt chapters that are the focus of this Note. These chapters deal with consumer debt and means testing to determine whether the debtor can complete a plan under Chapter 13 or if the debtor should be allowed to liquidate under Chapter 7.¹⁵⁵

¹⁵³ See discussion *supra* Part I.B.

¹⁵⁴ Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2016 (2003) (discusses the failure of the 2003 bankruptcy reform act and the changes in bankruptcy facing Congress in 2003 and the likelihood of enactment in the near future by stating, “Congress once again failed to pass the bipartisan bankruptcy-reform bill, although many expect it to be enacted at some point in the near future. At the same time, WorldCom, Enron, Global Corrsing, and their igominous peers continue to set records for the size, expense, and public attention drawn to business bankruptcy. For the first time, consumer bankruptcies surpassed the 1.5 million per year mark, continuing an irresistible upward trend. Meanwhile, law firms announce layoffs and salary freezes in most departments, and bankruptcy professionals prosper amidst the despair, billing \$1 million per day on the Enron case alone – even as creditors and shareholders sit by awaiting payment. Clearly we are witnessing a profound and unprecedented change in the political, social, and economic framework of bankruptcy.”).

¹⁵⁵ See generally 11 U.S.C. §§ 101–1330 (2000); see also Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (to be codified at 11 U.S.C. § 707(b)).

Chapter 7 is "Liquidation" or what has also been referred to as "straight bankruptcy."¹⁵⁶ "Its purpose is to achieve a fair distribution to creditors of whatever nonexempt property the debtor has and to give the individual debtor a fresh start through the discharge in bankruptcy."¹⁵⁷ "When the debtor files a bankruptcy, all property becomes property of the bankruptcy estate. A trustee is appointed to take control of and sell all assets. An individual debtor may exempt some property from liquidation and those exemptions are set by state law."¹⁵⁸

Along with Chapter 7, Chapter 13 is a reorganization chapter that will be impacted under the BAPCPA changes.¹⁵⁹ Chapter 13 applies to the individual debtor who has a regular income in which a plan can be established by budgeting of the debtor's future earnings to satisfy creditors' claims in part or in full.¹⁶⁰ "Many debts that are not dischargeable under Chapter 7 may (under current law) be discharged under Chapter 13. . . . There are two types of Chapter 13 discharge - §1328(a) discharge when a plan is completed and §1328(b) as a hardship discharge when the debtor can not complete the plan."¹⁶¹

¹⁵⁶ TREISTER ET AL., FUNDAMENTALS OF BANKRUPTCY LAW 17 (4th ed. 1996); *see also* 11 U.S.C. §§ 101-1330 (2000).

¹⁵⁷ TREISTER ET AL. *supra* note 156, at 17.

¹⁵⁸ Mark S. Stern & Larry B. Feinstein, *Debts That Can Follow You To The Grave: Why You Can't Get Away With In Bankruptcy*, 22 NO. 3 GPSOLO 26, 27 (2005).

¹⁵⁹ *See* discussion *infra* Part III.

¹⁶⁰ TREISTER ET AL. *supra* note 156, at 19.

¹⁶¹ Stern & Feinstein, *supra* note 158, at 27; *see also id.* at 30-31.

Several remaining chapters not discussed in this Note include Chapter 9,¹⁶² Chapter 11,¹⁶³ and Chapter 12.¹⁶⁴ Chapters addressing the general provisions for application of the Bankruptcy Code include Chapters 1, 3, and 5.¹⁶⁵

The structure of the Bankruptcy Code will remain generally the same though the Chapters will be amended accordingly to the BAPCPA.¹⁶⁶ To commence a bankruptcy case the eligibility requirements¹⁶⁷ currently for filing a bankruptcy petition are liberal, requiring only the debtor be a "person"¹⁶⁸ and resides

¹⁶² TREISTER ET AL., *supra* note 156, at 17 (describing Chapter 9 as dealing with the "Adjustment of Debts of a Municipality"); *see also* 11 U.S.C. §§ 101–1330 (2000).

¹⁶³ TREISTER ET AL. *supra* note 156, at 17-19 (summarizing Chapter 11 as a "unified set of provisions for all kinds of "Reorganization," usually for debtors engaged in business, including individuals, partnerships, and corporations, and for both public and closely held companies. Its goal ordinary is to rehabilitate a business as a going concern rather than to liquidate it. The debtor is given a fresh start through the binding effect on all concerned of the order of confirmation of a reorganization plan."); *see also* 11 U.S.C. §§ 101–1330 (2000).

¹⁶⁴ TREISTER ET AL., *supra* note 156, at 19 (summarizing Chapter 12 as "designed to give special relief to a "family farmer with regular annual income," a defined term. Individuals, partnerships, and corporations are potentially eligible so long as the debtor's total indebtedness does not exceed \$1.5 million. Chapter 12 was originally enacted as a temporary measure with a sunset, or expiration, date of October 1, 1993, but this date has been extend."); *see also* 11 U.S.C. §§ 101–1330 (2000).

¹⁶⁵ TREISTER provides an overview of the general provision chapters:

Chapter 1 contains the definition section, sets forth some rules of construction, specifies who may be a debtor in different kinds of case under the Bankruptcy Code, has a broad abrogation and waiver of sovereign immunity section, includes a frequently relied upon provision that is comparable to an "all writs" statute, and provides for automatic adjustment at three year intervals beginning April 1, 1998 of many of the dollar amounts contained in the Code so as to reflect changes in the Consumer Price Index

Chapter 3, entitled "Case Administration," covers how a case is begun (voluntary and involuntary petitions); deals with officers and their compensation; and contains various administrative provisions and the very important "administrative Powers," including the automatic stay, the use sale, and lease of property, the obtaining of credit, and the assumption or rejection of executory contracts. . . .

Chapter 5 contains much of the bankruptcy substantive law, including "Creditors and Claims," the "Debtor's Duties and Benefits," what property constitutes the estate, and the trustee's avoiding powers.

TREISTER ET AL. *supra* note 156, at 19 -21.

¹⁶⁶ *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

¹⁶⁷ *See* 11 U.S.C. § 109 (titled "Who may be a debtor")

¹⁶⁸ 11 U.S.C. § 101(41) (defines a person to include "individual, partnership and corporation, but does not include governmental unit.").

or has a domicile in the United States.¹⁶⁹ A case is commenced “by the filing of a petition¹⁷⁰ in the proper form, with the proper fee, in the proper district.”¹⁷¹ The petition can be voluntary¹⁷² (where it is filed by the debtor) or involuntary¹⁷³ (where it is filed by the creditors of the debtor). The filing of the petition does many things for the debtor including operating as an automatic stay¹⁷⁴ preventing creditors from harassing debtors.¹⁷⁵ The Bankruptcy Code structure provides protection to debtors under a relatively simple process. However, as the need for reform by the BAPCPA indicates, several critics believe the structure of the Bankruptcy Code may be too lenient allowing for abuse of the bankruptcy system.

¹⁶⁹ 11 U.S.C. § 109 (stating “[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.”).

¹⁷⁰ TABB ET AL, *supra* note 135, at 79 (elaborates on what a petition is, “Form 1 of the Official Bankruptcy Forms is the standard form that a debtor should use for a petition. The petition should be filed with the “clerk” The petition must be verified or contain an unsworn declaration as provided by 28 U.S.C. § 1736. Rule 1008. Thus, the debtor must sign the petition and declare under penalty of perjury that the information provided is true and correct. It is a bankruptcy crime to knowingly and fraudulently make a false declaration, 18 U.S.C. § 152(3), punishable by a fine and up to 5 years imprisonment. Note that the debtor’s attorney would not be in a position to make this declaration, because the attorney would not have personal knowledge of the information contained in the petition. However, the debtor’s attorney does have to sign the petition as attorney of record. Rule 9011(a.)”; *see* Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

¹⁷¹ HUBERT, *supra* note 14, § 6.01.

¹⁷² 11 U.S.C. § 301 (stating “[a] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.”).

¹⁷³ 11 U.S.C. § 303 (stating that “[a]n involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed business, or commercial corporation, that may be a debtor under the chapter under which such a case is commenced.”).

¹⁷⁴ 11 U.S.C. § 362 (defining the scope of the automatic stay as “applicable to all entities”).

¹⁷⁵ *See* HUBERT, *supra* note 14, § 6.02 (stating “[t]he filing of the petition constitutes the “order for relief.” In other words, the court does not have to take any further action for the case to begin. The filing has many other implications. For example, it triggers the automatic stay of other proceedings against the debtor; it also determines many time limits, such as the preference period, the fraudulent transfer period, and the time the debtor has to file various documents with the court.”).

**B. THE BAPCPA IS A PRODUCT OF EIGHT YEARS OF CONGRESSIONAL DEBATE
RESULTING IN SIGNIFICANT CHANGES TO THE UNITED STATES BANKRUPTCY SYSTEM**

The BAPCPA presents numerous amendments to The Bankruptcy Act of 1978.¹⁷⁶ The BAPCPA proposes to increase the requirements for a debtor to file for Chapter 7 and places more stringent regulations on the debtor.¹⁷⁷ The BAPCPA, like the Bankruptcy Reform Act of 1978,¹⁷⁸ has years of developing significant legislative history which provides guidance as to Congress' intentions for the BAPCPA.¹⁷⁹ However, though the changes are a step in the right direction for reforming the Bankruptcy Code, there are still underlying inequities for minorities to be addressed by the bankruptcy system.

1. Legislative History of the BAPCPA

The BAPCPA was introduced on February 1, 2005, by Senator Chuck Grassley along with twelve co-sponsors.¹⁸⁰ On March 10, 2005, the bill passed in the Senate with a vote of 74 "yeas" to 25 "nays."¹⁸¹ The bill passed in the House of Representatives on April 14, 2005, with a vote of 302 "yeas" to 126 "nays."¹⁸² The

¹⁷⁶ See generally Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* Part II.A.1.

¹⁷⁹ Warren Statement, *infra* note 184.

¹⁸⁰ Thomas, *Bill Summary and Status for the 109th Congress* (2005), <http://www.thomas.gov> (last visited Aug. 4, 2005) (available upon search for S.256).

¹⁸¹ *Id.*

¹⁸² *Id.*

BAPCPA was signed into law by the President on April 20, 2005, and became Public Law 109-8.¹⁸³

The BAPCPA was first drafted eight years ago.¹⁸⁴ Starting with the 105th Congress, the bankruptcy reform legislation has passed in the House of Representatives on eight separate occasions.¹⁸⁵ In the 106th Congress, the House and Senate passed the bill and it was pocket-vetoed by President Clinton.¹⁸⁶ In the 107th Congress the House again passed the bankruptcy reform bill.¹⁸⁷ During the 108th Congress the bill passed once again.¹⁸⁸ Finally, the bill passed in both Houses during the 109th Congress and was signed into legislation by the President.¹⁸⁹

The purpose of the BAPCPA is described by the House as a:
comprehensive package of reform measures pertaining to
both consumer and business bankruptcy cases. The

¹⁸³ See Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502; see also The White House, *President Signs Bankruptcy Abuse Prevention, Consumer Protection Act*, ¶ 5 (Apr. 20, 2005), <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html> (President Bush stated, “Our bankruptcy laws are an important part of the safety net of America. They give those who cannot pay their debts a fresh start. Yet bankruptcy should always be a last resort in our legal system. If someone does not pay his or her debts, the rest of society ends up paying them. In recent years, too many people have abused the bankruptcy laws. They’ve walked away from debts even when they had the ability to repay them. This has made credit less affordable and less accessible, especially for low-income workers who already face financial obstacles. The bill I signed helps address this problem.”); see also 151 Cong. Rec. D389-01 (2005).

¹⁸⁴ *Bankruptcy Abuse Prevention and Consumer Protection Act: Hearing on S. 256 Before the Senate Comm. on Judiciary*, 109th Cong. ¶ 2 (2005) (statement of Elizabeth Warren) [hereinafter Warren Statement], available at 2005 WL 319921.

¹⁸⁵ *Prior Congressional Consideration of Bankruptcy Reform*, H.R. REP. NO. 109-031, pt. 1, at 1 (2005) (stating that the Comprehensive bankruptcy reform legislation as H.R. 2500 titled “Responsible Borrower Protection Bankruptcy Act” was introduced first in the House on September 18, 1997 during the 105th Congress and passed the Senate by a vote of 97 to 1).

¹⁸⁶ *Id.* (The vote on H.R.833 in the 106th Congress passed with a vote of 313 to 108 and passed in the Senate by a vote of 83 to 14).

¹⁸⁷ *Id.* (The House passed H.R. 333 titled the “Bankruptcy Abuse Prevention and Consumer Protection Act” during the 107th Congress with a vote of 306 to 108 and in the Senate with a vote of 82 to 16).

¹⁸⁸ *Id.* (The House passed the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2003” in the House as H.R.975 with a vote of 315 to 113 and in the Senate as S. 1920 with a vote of 265 to 99).

¹⁸⁹ Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.¹⁹⁰

The House in the House Report lists factors that were taken into consideration supporting the bankruptcy reform. The House states that the bill addresses the upward trend in bankruptcy filings in which the number of filings has nearly doubled over the past decade to 1.6 million cases filed in the year 2004.¹⁹¹ This increase in filings was interpreted to mean that Americans are too readily filing for bankruptcy.¹⁹² A second factor considered is the loss to creditors including utilities and credit card companies which has led to consumers paying for the loss in higher costs for these services.¹⁹³ The third factor listed as motivating the reform is the present loopholes in the bankruptcy system and the incentives to allow and encourage abuse of the system.¹⁹⁴ Last, the fourth factor listed is that some debtors are able to pay a significant amount of their debts.¹⁹⁵ These factors are some of the reasons motivating the last eight years of reform legislation.

¹⁹⁰ *Purpose and Summary*, H.R. REP. NO. 109-031, pt. 1, ¶ 1 (2005).

¹⁹¹ *Factors Supporting Bankruptcy Reform*, H.R. REP. NO. 109-031, pt. 1, ¶ 2 (2005).

¹⁹² *Id.*

¹⁹³ *Id.* ¶ 13, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the Senate Comm. on the Judiciary*, 109th Cong. (2005) (prepared statement of Prof. Todd Zywicki) (Listing other statistics provided by various reports included that in 1997 alone more than \$44 billion of debt was discharged by debtors who filed for bankruptcy relief and that the losses are over \$400 annual per household).

¹⁹⁴ *Factors Supporting Bankruptcy Reform*, H.R. REP. NO. 109-031, pt. 1, ¶ 26 (2005).

¹⁹⁵ *Id.* ¶ 31.

However, as the legislation has been presented year after year to Congress, some believe that events since the time the BAPCPA was originally drafted “have dramatically changed the economic and social environment in which you must consider this bill.”¹⁹⁶ Despite the view that social changes have occurred, it appears that Congress held adequate hearings to educate itself.¹⁹⁷ On February 10, 2005, a hearing on S.256 was held in which addressed the main concerns with the BAPCPA legislation.¹⁹⁸

¹⁹⁶ *Id.* ¶ 10 (Professor Warren makes a strong argument as to the rationale behind why this bill is seriously flawed by stating, “[w]hile the actual number of consumer bankruptcy cases has declined slightly in the past year, many of the largest corporate bankruptcy cases in American history have occurred since the Senate last reevaluated the bankruptcy laws. . . . Because it was written eight years ago, this bill has nothing to deal with these abuses, with these dangers, with the needs that these cases [such as Enron, Worldcom, Adelphia, United Airlines, and K-Mart] have made so painfully clear.”).

¹⁹⁷ *Prior Congressional Considerations of Bankruptcy Reform Act*, H.R. REP. NO. 109-031, pt. 1 (2005) (demonstrating that there has been adequate hearings, “The Committee and the Subcommittee on Commercial and Administrative Law (Subcommittee), beginning in the 105th Congress, have held a total of 18 days of hearings on the operation of the bankruptcy system and the need for reform. Eleven of these hearings were devoted solely to consideration of S. 256’s predecessors, H.R. 3150 (105th Congress), H.R. 833 (106th Congress), H.R. 333 (107th Congress), and H.R. 975 (108th Congress). Over the course of these hearings, nearly 130 witnesses, representing nearly every major constituency in the bankruptcy community testified. With regard to H.R. 833 alone, testimony was received from 69 witnesses, representing 23 organizations, with additional material submitted by other groups.” The Subcommittee then lists the hearings since the initial introduction of the bill that have taken place by the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary including “April 11, 1997: Hearing on the increase in personal bankruptcies and the crisis in consumer credit; August 1, 1997: Hearing to review the negative impact of bankruptcy on educational funding; August 8, 1997: Hearing regarding bankruptcy laws for family farmers; September 22, 1997: Hearing on the Bankruptcy Code’s effect on religious freedom and a review of the need for additional bankruptcy judgeships; October 21, 1997: Hearing to review the recommendations of the National bankruptcy Review Commission; December 7, 1997: Hearing regarding international bankruptcy laws; March 11, 1998: Hearing on S. 1301, ‘The Consumer Bankruptcy Reform Act: seeking Fair and Practical Solutions to the Consumer bankruptcy Crisis’; May 19, 1998: Hearing to review business bankruptcy issues; March 11, 1999: Hearing on H.R. 833, the ‘Bankruptcy Reform Act of 1999,’ held jointly with the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary; November 2, 1999: Oversight hearing on additional bankruptcy judgeship needs held jointly with the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary; and, February 10, 2005: Hearing on S.256, the ‘Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.’”).

¹⁹⁸ Specifically addressing:

- (1) the adequacy of the current bankruptcy system with respect to the detection of fraud and abuse;
- (2) how abuse and fraud in the current bankruptcy system impacts on American businesses and our nation’s citizens generally;
- (3) whether the legislation adversely impacts individuals deserving of bankruptcy relief;
- (4) whether the proposed reforms would assist those who are charged with administrative oversight of bankruptcy cases and law enforcement matters; and
- (5) whether, given current economic circumstances, the need for comprehensive bankruptcy reform still exists.

Id.

Along with an abundance of information provided for the Subcommittee on Commercial and Administrative Law, as published in the House Report, information regarding the costs of implementing the BAPCPA was provided.¹⁹⁹ The costs of implementing the BAPCPA was estimated by the Congressional Budget Office ("CBO") at \$392 million over the years 2006 through 2010.²⁰⁰ The main costs are attributed to expenditures granting greater allocation of responsibilities to the United States Trustee's ("UST") Office.²⁰¹ Additionally, the authorization of additional judges is estimated at "\$26 million over the next 5 years and \$45 million over the 2006-2015 period."²⁰² The CBO also estimated that an increase in budget deficits of about \$280 million over the years 2006 through 2015 would occur.²⁰³

However, the enactment of S.256 is estimated by the CBO to increase by the fees charged for filing bankruptcy cases about \$75 million in five years resulting in \$318 million net increase in discretionary spending.²⁰⁴ The CBO also estimates that there will be an increase of revenues by about \$60 million for the

¹⁹⁹ The costs of the BAPCPA demonstrate the high number of changes to the Bankruptcy Code as well as the costs in enforcing these changes in attempt to reduce abuse of the bankruptcy system.

²⁰⁰ *Summary*, H.R. REP. NO. 109-031, pt. 1, ¶ 1 (2005).

²⁰¹ *Id.*

²⁰² *Id.* ¶ 2 (increased regulation under the BAPCPA requires more bankruptcy judges to be appointed).

²⁰³ *Id.* ¶ 3 (the cost of implementing the BAPCPA will be expensive to ensure the bankruptcy system is not abused).

²⁰⁴ *Id.* ¶ 1

period of 2006 through 2010 and \$140 million over the 2006 through 2015 period.²⁰⁵

The extensive changes to the Bankruptcy Code by the BAPCPA are demonstrated by the eight years of debate that took place and the significant costs that the government will incur to implement these changes. More significantly, is the question of how these changes will affect minorities in bankruptcy. Will the new changes make the Bankruptcy Code more advantageous for the Ideal Debtor? Or will the gap of inequality for the poor increase from the Ideal Debtor²⁰⁶? Last, how can this facially non-discriminatory statute be adjusted, if at all?

2. Significant Changes to Chapter 7²⁰⁷ Will Curb Debtor Abuse by Adding a "Means Test"

Over the last eight years one of the most significant areas targeted for reform has been implementation of a Means Test reducing abuse of the bankruptcy system.²⁰⁸ Along with the Means

²⁰⁵ *Id.* (The increase in fees is a source of revenue, but arguably unfair to debtors who are filing for bankruptcy and cannot afford it).

²⁰⁶ See discussion *supra* Part I.

²⁰⁷ I have put these provisions primarily based on their location in the BAPCPA so that the reader can follow along easily in reviewing the BAPCPA. I have also used the following sources for guidance as to the important provisions and structure of outlining changes to the Bankruptcy Code. See Thomas J. Yerbich, Esq., *Synopsis of Bankruptcy Abuse Prevention And Consumer Protection Act of 2005: Reprinted By Permission of the American Bankruptcy Institute For Use By The San Diego Bankruptcy Forum*, (April 27, 2005), available at www.abiworld.org; see also Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of the 2005 Reform Legislation* (2005), available at www.abiworld.org; see also *25 Changes to Personal Bankruptcy Law* (2005), available at www.abiworld.org; see also *The San Diego Bankruptcy Forum Presents: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (April 27, 2005); see also *U.S. Trustee Program Begins Approval Process for Budget And Credit Counseling Agencies, Financial Management Instructional Courses*, <http://www.usdoj.gov/ust/bapcpa/ccde.htm> (last visited Aug. 4, 2004); see also *Changes To The Bankruptcy Code Affecting Consumer Bankruptcy Practice Including In The Bankruptcy Abuse Prevention And Consumer Protection Act of 2005*, NACTT QUARTERLY, VOL. 17, No. 3; see also Joseph Pomykala, *Bankruptcy Reform Principles and Guidelines*, www.cato.org.

²⁰⁸ See *supra* discussion Part II.B.

Test as a method of preventing bankruptcy filing abuse, several other sections have been added to Chapter 7 to ensure that the bankruptcy system is not abused.²⁰⁹

(a) Conversion Provisions Added by the BAPCPA

The first provisions added to the BAPCPA address dismissal or conversion.²¹⁰ The BAPCPA changes the Bankruptcy Code so that in a consumer case the court may dismiss, or with the consent of the debtor, may convert a case for abuse from Chapter 7 liquidation to reorganization under Chapter 11 or Chapter 13.²¹¹ In deciding whether to dismiss or convert a case the court may consider if the petition was filed in bad faith or the totality of the circumstances demonstrating abuse.²¹² Last, the court may not dismiss a case if filling the case was necessary to satisfy a claim for domestic support obligation.²¹³

²⁰⁹ See generally Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

²¹⁰ Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (sections added to the Bankruptcy Code dealing with dismissal or conversion are §707(b)(1), (b)(3), and (c)); see also 11 U.S.C. § 707(b) (the Bankruptcy BAPCPA substantially amends section 707(b) as demonstrated by the simple language of the old statute which states “(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request of suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4))”).

²¹¹ *Id.* (To be codified at 11 U.S.C. §707(b)).

²¹² *Id.*

²¹³ *Id.* (This is to prevent spouses who do not pay alimony from getting out of the payments).

**(b) The Means Test Extensively Modifies Section 707(b) and
Increases the Role of the UST**

The next provision added to Chapter 7 is the Means Test.²¹⁴ The Means Test provides a presumption of abuse based on a mathematical calculation of the debtor's income in respect to the debtor's allowable expenses.²¹⁵ Abuse of the system under Chapter 7 is presumed if the debtor's current monthly income exceeds the allowable expenses when multiplied by sixty if exceeds the lesser of either the greater of 25% of the debtor's non-priority unsecured claims or \$6,000, or \$10,000.²¹⁶

The third provision added to the Bankruptcy Code by the BAPCPA is a provision increasing the supervisory role of the UST by requiring a two part review process of the debtor's materials for abuse in which the case should be dismissed or converted based on the information provided.²¹⁷ First, the UST must review all materials that the debtor submits no later than ten days after date of the first meeting of creditors.²¹⁸ After the UST files this the statement, the court will then have five days to give a copy to all of the creditors.²¹⁹ Next, the UST shall no later than thirty days after filing this statement either file a

²¹⁴ *Id.* (To be codified at 11 U.S.C. § 707(b)(2).

²¹⁵ *Id.* (specifically stating that under the Means Test "the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lessor of - - (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or (II) \$10,000.").

²¹⁶ *Id.*

²¹⁷ *Id.* (To be codified at 11 U.S.C. § 704(b)(1)).

²¹⁸ *Id.*

²¹⁹ *Id.*

motion to dismiss or convert under section 707(b) or file a statement as to why the UST does not think there is a need for a motion to dismiss or convert based on abuse.²²⁰

The fourth provision added to Chapter 7 to reduce abuse of the bankruptcy system is the Clerk's duty to give a notice of presumption of abuse.²²¹ Under this requirement the Clerk shall give written notice no later than ten days after filing of the petition to all of the creditors according to the presumption of abuse in section 707(b).²²² If the presumption of abuse does not give rise within ten days of filing, the Clerk shall give notice to all the creditors within five days of the UST's statement of abuse filed with the court.²²³

(c) Calculation of the Means Test

In order to calculate whether the debtor, under the Means Test, has a presumption of abuse the court requires analysis of the current monthly income against the allowable expenses of the debtor.²²⁴ The BAPCPA adds to the definition section²²⁵ the definition of "current monthly income."²²⁶ The current monthly

²²⁰ *Id.* (To be codified at 11 U.S.C. § 342(d)).

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* (To be codified at 11 U.S.C. § 704(b)(1)(B)).

²²⁴ See discussion *supra* Part II.B.

²²⁵ The Bankruptcy Code provides definitions in section 101.

²²⁶ Bankruptcy Abuse Prevention and Consumer Protection Act § 102. Hereinafter current monthly income (newly added section 101(10A) defining "current monthly income as:

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –

income, according to its definition, looks at total income from every source the previous six months before the debtor filed the bankruptcy petition.²²⁷ This amount is then compared to the allowable expenses to see if there is an assumption of abuse.²²⁸

The allowable expenses are specified under the National Standards and Local Standards²²⁹ and Other Necessary Expenses²³⁰ as set by the Internal Revenue Service based on the residence of the debtor.²³¹ These allowed expenses include necessary health insurance, disability insurance, and health savings for the debtor, spouse of the debtor, and dependents of the debtor.²³² The calculation of expenses does not include payment of debts.²³³ If demonstrated to be necessary, the debtor can increase the monthly expenses for additional allowance for food and clothing up to five percent from the set National and Local Standards.²³⁴

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii);
(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

Id.

²²⁷ *Id.*

²²⁸ See discussion *supra* Part II.B.

²²⁹ Referred to in this Note as National and Local Standards.

²³⁰ Referred to in this Note as Other Expenses.

²³¹ Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (to be codified at 11 U.S.C. §§ 707(b)(2)(A)(ii)(I-IV)).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

Additional allowable expenses include the actual expenses paid by the debtor for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family.²³⁵ Next, the BAPCPA added a provision for each child younger than eighteen to be allowed up to \$1,500 a year for private or public elementary and secondary school.²³⁶ The debtor's utilities and housing expenses are also set by the Internal Revenue Service National and Local Standards.²³⁷ Additionally, secured debt monthly payments is to be calculated by looking at what the debtor owes over the next sixty months including what is necessary for support of debtor and debtor's dependents and dividing this amount by sixty.²³⁸ This amount also includes payments to cure any pre-petition arrearage. A separate calculation for the debtor's priority claims including child support and alimony should be calculated by dividing by sixty.²³⁹ The formula under the Means Test will determine whether the debtor can complete a plan under Chapter 13 and have the case converted or dismissed.²⁴⁰

If, under this Means Test calculation, there is a presumption of abuse it can be rebutted by demonstrating special

²³⁵ *Id.* (section 707(b)(2)(A)(ii)(II) defines immediate family as "includes parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent and who is unable to pay for such reasonable and necessary expenses.").

²³⁶ *Id.* (To be codified at 11 U.S.C. § 707(b)(2)(A)(ii) (IV)).

²³⁷ *Id.* (To be codified at 11 U.S.C. § 707(b)(2)(A)(ii)(V)).

²³⁸ *Id.* (To be codified at 11 U.S.C. § 707(b)(2)(A)(iii)(I-II)).

²³⁹ *Id.* (To be codified at 11 U.S.C. § 707(b)(2)(A)(iv)).

²⁴⁰ *See supra* Part II.B.

circumstances including a serious medical condition or active duty in the Armed Forces, but only up to the extent that it is justified as additional expenses or adjustments in monthly income.²⁴¹ Along with the rebuttal presumption, there is also an exception to the presumption of abuse of a disabled veteran whose debt was incurred primarily when on active duty or performing a homeland defense activity.²⁴²

The next provision in Chapter 7 is the definition of "median family income."²⁴³ The median family income will be based on the Consumer Price Index for All Urban Consumers as calculated by the Bureau of the Census.²⁴⁴ Using the median family income amount, the UST or the court may bring a motion to dismiss under section 707(b) if the current monthly income of the debtor times twelve is equal to or less than median family income of a family of equal or smaller size for the state.²⁴⁵ If the median family income times twelve exceeds that of a family

²⁴¹ *Id.* § 102 (To be codified at 11 U.S.C. § 707(b)(2)(B)).

²⁴² *Id.*

²⁴³ *Id.* § 102 (amending section 101 by adding the definition of "median family income" as section 101(39A) defined as:

(39A) 'median family income' means for any year –

(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and

(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

Id.

²⁴⁴ *Id.*

²⁴⁵ *Id.* (To be codified at 11 U.S.C. § 707(b)(6)).

of the same or smaller size, the court, the UST, or any interested party may bring a motion to dismiss.²⁴⁶

Another Chapter 7 provision apart from section 707(b) that reduce the abuse of the bankruptcy system provides for an extension of the discharge time requiring eight years in between Chapter 7 filings.²⁴⁷ Additionally, the BAPCPA adds the requirement that for discharge the debtor must complete an instructional course in personal financial management.²⁴⁸ Last, discharge can be denied if debtor makes a material misstatement or fails to provide the necessary records.²⁴⁹

3. The BAPCPA Provides Additional Property of the Estate Exclusions

Several other provisions can be viewed as disadvantageous to minorities that tend not to have the additional income to invest in excluded property. The post-petition property of the debtor goes to the estate except for the property that is exempt or excluded. Under the BAPCPA new exclusion provisions from the property of the estate have been added. However, based on statistics, minorities are less likely than whites to have this property to exclude.

²⁴⁶ *Id.*

²⁴⁷ *Id.* § 102; *see also* 11 U.S.C. §727(a)(8) (amending the Bankruptcy Code from six years to eight years under the Bankruptcy Reform Act).

²⁴⁸ *Id.* § 102 (to be codified at 11 U.S.C. § 727(a)(11)).

²⁴⁹ *Id.* (To be codified at 11 U.S.C. § 727(d)(4)).

**(a) Additional Education Provisions Significantly Amend the
Property Of The Estate Code Sections**

Under section 541 of the Bankruptcy Code, the property of the estate is determined.²⁵⁰ The first provision that has been added as exclusion to property of the estate is for an education account.²⁵¹ This provision allows the exclusion from the estate of funds placed in an education individual retirement account at least 365 days before bankruptcy petition was filed.²⁵² The designated beneficiary is to be a child, stepchild, grandchild, or step grandchild of the debtor for the year the funds were put into an account.²⁵³ The funds cannot be pledged to any entity for credit and cannot exceed contributions as described in the Internal Revenue Code section 4973(e).²⁵⁴ If the funds are placed into an account or accounts having the same beneficiary not earlier than 720 days or later than 365 days before the petition filing date cannot exceed \$5,000.²⁵⁵ The BAPCPA also provides specific guidelines for determining whether a relationship between the debtor and the beneficiary qualifies for the exclusion from the estate.²⁵⁶

²⁵⁰ 11 U.S.C. § 541.

²⁵¹ Bankruptcy Abuse Prevention and Consumer Protection Act § 224 (to be codified at 11 U.S.C. §§ 541(b)(5), (e)).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* (BAPCPA amended section 541(e) states, “[i]n determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legal adopted child of an individual (and a child who is a member of an individual’s household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child’s principle place of

The next section added as an exclusion of the estate is a tuition credit account.²⁵⁷ This allows the debtor to exclude from property of the estate funds used to purchase a tuition credit, certificate, or contributed to an account that meets the Internal Revenue Code of 1986 section 529(b)(1)(A) requirements no later than 365 days before the petition was filed.²⁵⁸ Other requirements for this exclusion are that the beneficiary of the amounts paid was a child, stepchild, grandchild, or step grandchild or step grandchild of the debtor the year the funds were contributed.²⁵⁹ If the accounts have the same beneficiary the total amount cannot exceed the total contributions permitted under section 529(b)(7) of the Internal Revenue Code as adjusted at the date of filing and incases where the funds are paid earlier than 720 days and more than 365 days from the filing of the petition cannot exceed \$5,000.²⁶⁰

(b) Retirement Contribution Plans Are a New Addition to Property Excluded From the Estate

The last provision excluded from the estate is contributions to qualified benefit plans.²⁶¹ Under this section, amounts excluded are wages by the employer or received from an employee for the contribution to an employment benefit plan

abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.”).

²⁵⁷ *Id.* (To be codified at 11 U.S.C. § 541(b)(6)).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* (To be codified at 11 U.S.C. § 541(b)(7)).

subject to ERISA under Internal Revenue Code section 414(d).²⁶² This section also applies to differed compensation plans under the Internal Revenue Code section 457.²⁶³ This section applies to tax-deferred annuity under Internal Revenue Code section 403(b).²⁶⁴ Last, contributions to health insurance plans regulated by state law are included as well.²⁶⁵

In line with exclusion from property of the estate provisions are exemption provisions. While exclusions allow property to not become part of the estate, exemptions allow the debtor to retain property that has equity.

4. Significant Changes Under the BAPCPA Alter and Provide Additional Exemptions

Under the BAPCPA several exemption sections were also added. Two are significant. The exemption provision under the Bankruptcy Code allows the debtor to retain property that has equity to help the debtor along with the fresh start. The BAPCPA adds a provision for retirement funds as well as imposes more stringent regulations on the homestead exemption.

(a) Retirement Fund Exemptions are a New Addition Under the BAPCPA

The first provision added was the exemption of retirement funds. This allows a retirement fund, regardless if whether

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

state or federal exemptions are elected,²⁶⁶ to be exempted if meets the qualifications set by the Internal Revenue Code.²⁶⁷ The Internal Revenue Code provides under section 7805 a list of funds that receive favorable determination.²⁶⁸ If the fund is not one that receives favorable determination by the Internal Revenue Code, the debtor can prove that it is exempt from the estate by demonstrating that the court has not made a prior determination to the contrary and the retirement fund is in substantial compliance with the Internal Revenue Code requirements, or if not in substantial compliance with those requires that the debtor is not materially responsible for the failure.²⁶⁹ The exemption further allows all direct transfer funds exempted from taxation under sections 401, 403, 408, 408A, 414, 457, or 501 under the Internal Revenue Code.²⁷⁰ Last, any distribution within meaning of section 402(c) that qualifies as eligible rollover distribution is an exemption regardless of the distribution.²⁷¹

²⁶⁶ The Bankruptcy Code gives the states the option to opt out and provide state exemptions instead of the federal exemptions. Also, some states allow the debtor to choose between either federal or state exemptions. The majority of states have opted out of the federal exemptions; *see* 11 U.S.C. §522.

²⁶⁷ Bankruptcy Abuse Prevention and Consumer Protection Act § 224.

²⁶⁸ *Id.*; *see also* 26 U.S.C. § 7805.

²⁶⁹ *Id.* § 224.

²⁷⁰ *Id.*

²⁷¹ *Id.*

(b) Homestead Exemption Provisions Have Been Amended to Reduce Abuse of the Bankruptcy System

The second relevant exemption is the changes made to the homestead exemption.²⁷² First, the definition of debtor's principal residence was added to broaden what qualifies as a principle residence.²⁷³ Next, a domiciliary requirement was added to increase the time of residency in a principal residence needed from 180 days to 730 days.²⁷⁴ If the debtor has not resided in one state for 730 days, then the state in which they resided in for 180 days or more is the debtor's domicile.²⁷⁵ If the debtor does not meet the requirement for any state then the debtor may use federal exemption under 522(d).²⁷⁶ Last, a reduction of homestead exemption for fraud was added.²⁷⁷ The value of an interest in real or personal property of the debtor used as a residence shall be reduced by the portion of the property that within the ten years prior to filing the petition

²⁷² *Id.* § 307 (homestead exemption changes include the addition of section 101(13A), amendment 522(b)(3), and amendment 522 adding sections (o), (p), and (q)).

²⁷³ *Id.* § 306. Defining "debtor's principal residence" as:

(A) means a residential structure, including incidental property, without regard to whether that structure is attached to real property; and

(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer." The amendment also adds the definition of "incidental property" with respect to debtor's principle residence as:

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds."

Id.

²⁷⁴ *Id.* § 307; *see also* 11 U.S.C. § 522.

²⁷⁵ *Id.* § 307.

²⁷⁶ *Id.* (Adding that "[i]f the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).").

²⁷⁷ *Id.* § 308 (to be codified at 11 U.S.C. § 522(b)(3)).

was disposed of with the intent to hinder, delay, or defrauded a creditor or could not be exempted.²⁷⁸

Also, two limitations were added to the homestead exemption.²⁷⁹ The first limitation is that to exempt under state law a debtor may not exempt any amount that was acquired by the debtor 1215 days before filing for bankruptcy that exceeds the aggregate value of \$125,000, including real or personal property used as a residence, a cooperative that owns property, a burial plot, or real or personal property claimed as a homestead.²⁸⁰

The second limitation added to the \$125,000 limitation by qualifying that debtor may not exempt under state law any amount over \$125,000, if the court determines that the debtor has been convicted of a felony or in violation of federal securities laws, for fraud or deceit under the sale of securities, any civil remedies under Title 18 section 1965, or any criminal act, intentional tort, or physical injury or death in the previous five years.²⁸¹

The BAPCPA provisions will affect all debtors. However, it is likely that the BAPCPA will have more of an adverse affect on minorities. This is due to minorities' inability to take advantage of the bankruptcy system.

²⁷⁸ *Id.* (To be codified at 11 U.S.C. § 522(o)).

²⁷⁹ *Id.* (To be codified at 11 U.S.C. §§ (p)-(q)).

²⁸⁰ *Id.*

²⁸¹ *Id.*

**III. THE BAPCPA WILL HAVE POSITIVE AND NEGATIVE AFFECTS ON MINORITY DEBTORS
IN COMPARISON TO THEIR COUNTERPART WHITE DEBTORS**

The application of statistics to the Bankruptcy Code provides an analysis of the impact that the BAPCPA will have on minorities in comparison to the Ideal Debtor. Minorities, as statistics demonstrate, do not invest their income in the same manner as whites. This results in minorities having less property to exempt. This inequity is heightened when viewed in light of governmental statistics.

**A. THE BAPCPA'S EXTENSIVE REVISION OF CHAPTER 7 PROVIDES SIGNIFICANT CODE
CHANGES THAT WILL IMPACT ALL DEBTORS INCLUDING MINORITIES**

Of the numerous provisions mentioned in this Note that will be changed under the BAPCPA, several are directly applicable to minorities and raise inequality issues under the Bankruptcy Code. These provisions include the Means Test, allowable expenses, and the "median family income."

The Means Test is provided for in the BAPCPA as an addition to section 707(b).²⁸² The Means Test states that there is a presumption of abuse if the current monthly income exceeds the allowable expenses by sixty exceeds the lesser of \$10,000 or the greater of 25% of unsecured non-priority claims of \$6,000.²⁸³ The plain language of this section is not discriminatory against minorities. The Bankruptcy Code has been modified to allow

²⁸² Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

²⁸³ *Id.* § 102 (to be codified at 11 U.S.C. § 707(b)(2)).

dismissal or conversion with the debtor's consent on "abuse" rather than "substantial abuse."²⁸⁴ The debate over means testing is mainly divided as credit card companies against consumers.²⁸⁵ Further, the view has been taken that section 707(b) is discriminatory²⁸⁶ as are the provisions provided for in the BAPCPA.²⁸⁷ The test for abuse will change from that of the current case law differing by circuits interpretation of section 707(b) to a standard presumption of abuse test.²⁸⁸ Though the

²⁸⁴ *Id.*

²⁸⁵ *Bankruptcy Abuse Prevention and Consumer Protection Act: Hearing on S. 256 Before the Senate Comm. on Judiciary*, 109th Cong. (2005) (statement of Elizabeth Warren), available at 2005 WL 319921. (Professor Warren argues against the Means Test as a flawed and based on the lobbying of the credit card companies by stating, "[c]redit card solicitations have doubled to 5 billion a year. Bankruptcy filings have increased 17%, while credit card profits have increased 163%, from \$11.5 billion to \$30.2 billion. . . . The means test in this bill, Section 102, has been one of the most controversial provisions. Proponents like to say that the means test will put pressure only on the families that can afford to repay. And yet, the bill has 317 sections that run for 239 pages. The means test aside, virtually every consumer provision aims in the same direction. The bill increases the cost of bankruptcy protection for every family, regardless of income or the cause of financial crisis, and it decreases the protection of bankruptcy for every family, regardless of income or the cause of the financial crisis."); see *Bankruptcy Abuse Prevention and Consumer Protection Act: Hearing on S. 256 Before the Senate Comm. on Judiciary*, 109th Cong. 9 (2005) (testimony of Mr. P. Michael Steward Menzies, Sr. President and CEO East Bank and Trust Company), available at 2005 WL 319920 (stating the position of the credit card company in favor of the Means Test explaining that it is not the credit card company's fault that there are so many consumer debtors, "I said earlier that credit cards cannot be blamed for the rise in total consumer debt, but what they have done is dramatically increase the credit lines that are available to people who may get into financial trouble for other reasons. . . . So, in our opinion, credit card issues are being unfairly treated by their critics in some regards, while on the other hand most of the critics haven't really noticed what the card issuers actually have done to exuberate the cost of bankruptcy. We have advised credit card issuers in our research publications to stop using large credit lines as a marketing tactic.").

²⁸⁶ Cuevas, *supra* note 23, at 394-395 (arguing that section 707(b) is fundamentally unjust and exploits people of color the working class and the poor. Further, the Cuevas blames the consumer credit industry has utilizing its economic and political power to enact this section to exploit the disadvantaged).

²⁸⁷ 151 CONG. REC. H2063 (daily ed. Apr. 15, 2005) (statement of Rep. Jackson) (stating, "[a]s an African American, I am troubled by the fact that both African American and Hispanic families, both of whom are over-represented in bankruptcy, would suffer disproportionately if this bill becomes law." He continues with the inequalities for minorities, "Hispanic homeowners are nearly three times more likely than White homeowners to file, and African American homeowners are nearly six times more likely than White homeowners. African Americans are also twice as likely to lose their homes due to foreclosures, often falling victim to the unscrupulous practices of predatory lenders. Furthermore, African Americans consistently have higher levels of debt. In a study of African American families, the typical family had debt of 30 percent of its assets, while the debt of the typical White family was 11 percent of its assets.").

²⁸⁸ The section 707(b) Means Test will change from the Bankruptcy Code's current split of authority on determination of what constitutes "substantial abuse" to a mathematical equation of determining if a presumption of abuse exists. See generally *United States Trustee v. Harris*, 960 F.2d 74 (8th Cir. 1992) (applying the "per se" test

Means Test provides a plethora of topics²⁸⁹ for debate as to the impact on minorities, the two main provisions that can provide inequities for minorities are allowable expenses and the median family income.

The BAPCPA establishes the debtor's monthly expenses is a calculation of the applicable monthly expenses specified in the National and Local Standard plus the debtor's actual monthly expenses and established in the Other Expenses issued by the Internal Revenue Service.²⁹⁰ This amount does not include any payments of debt.²⁹¹ The BAPCPA then provides for additional allowances that can be calculated into the monthly expenses of the debtor.²⁹² Three allowable expenses provisions will affect minorities.²⁹³ The first, if evidence proves necessary, the debtor's monthly expense may include for an additional allowance

for substantial abuse; *see generally In re Kelly*, 841 F.2d 908 (9th Cir. 1988) (also applying the "per se" test for substantial abuse; *see generally In re Green*, 934 F.2d 568 (4th Cir. 1991) (applying a "totality of the circumstances test" in the Fourth Circuit); *see generally In re Krohn*, 886 F.2d 123 (6th Cir. 1989) (applying a modified "totality of the circumstances test" in the Sixth Circuit).

²⁸⁹ For a brief overview of some of the debates that the Means Test introduces *see generally* Jean Braucher, *Means Measurement Rather Than Means Testing*, 22-FEB AM. BANKR. INST. J. 6 (2003); Gary Klein, *Means Tested Bankruptcy: What Would It Mean*, 28 U. MEM. L. REV. 711 (1998); Jean Braucher, *Increasing Uniformity In Consumer Bankruptcy: Means Testing As A Distraction And The National Bankruptcy Review Commission's Proposals As A Starting Point*, 6 AM. BANKR. INST. L. REV. 1 (1998); Eric A. Posner, *Should Debtors Be Forced Into Chapter 13*, 32 LOY. L.A. L. REV. 965 (1999); Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121 (2004); Michael J. Davis, *The New Bankruptcy Code: Goodbye Consumer Chapter 7 Cases*, 17 DCBARR 16 (2005); Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem Of Means*, 7 FORDHAM J. CORP. & FIN. L. 407 (2002).

²⁹⁰ Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (to be codified at 11 U.S.C. §§ 707(b)(2)(A)(ii)-(iv).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Bankruptcy Abuse Prevention and Consumer Protection Act § 102, (to be codified at 11 U.S.C. §§ 707(b)(2)(A)(ii)-(iv).

for food or clothing in up to five percent the categories for food and clothing.²⁹⁴

Second, is the continuation of expense that are to be paid in caring for elderly, chronically ill or a disabled member of the household.²⁹⁵ This allowable expense favors minorities based on the statistics that minorities tend to have larger families and to care for their elderly family members.²⁹⁶ This provision is fair to both minorities and the Ideal Debtor.

The third provision under allowable expenses that have been added is an allowance of up to \$1,500 per year for a minor child to attend private or public elementary or secondary school.²⁹⁷ This provision is a significant inequality favoring whites.²⁹⁸ The statistics for the United States Department of Education demonstrate that the majority of students who are sent to private schools and that are likely to incur expenses are overwhelmingly white students.²⁹⁹ Thus, this allowable expense, though nondiscriminatory on its face, creates an inequity among race and ethnicity.

In conclusion, the allowable expenses as amended by the BAPCPA provide a mixed interpretation of the affects on

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ See discussion *supra* Parts II-III.

²⁹⁷ Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (to be codified at 11 U.S.C. §§ 707(b)(2)(A)(ii)-(iv).

²⁹⁸ See discussion *supra* Parts II-III.

²⁹⁹ *Id.*

minorities. Minority families are more likely to care for the elder as stated in Social Security Administration statistics. However, United States Department of Education statistics demonstrate extreme inequalities in paying for private education.

The Means Test establishes that if the current monthly income of the debtor is in excess or equal in comparison to the same size family based on the median family income can result in the a motion to dismiss.³⁰⁰ The median family income is calculated and reported by the Bureau of the Census and to reflect the changes in the Consumer Price Index for all urban consumers.³⁰¹ Last, in addition to the median family income listed for the state, the debtor will be able to add an additional \$525.00 for each individual over the family median income for a four member family.³⁰² Thus, these calculations will take into account the fact that minority families tend to have more family members in a debtor's household.³⁰³

B. EDUCATION PROVISIONS WILL INCREASE THE DISCREPANCY IN EQUAL TREATMENT OF MINORITIES AND WHITES UNDER THE BANKRUPTCY CODE AS AMENDED BY BAPCPA

These provisions are inherently unequal for minorities. The United States Department of Education statistics analyze the

³⁰⁰ Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (to be codified at 11 U.S.C. §§ 707(b)(1), (6), (7))

³⁰¹ Bankruptcy Abuse Prevention and Consumer Protection Act § 102 (amending section 101 by inserting after 39 39(A)).

³⁰² *Id.* (To be codified as amended at 11 U.S.C. § 707(b)).

³⁰³ See discussion *supra* Parts II-III.

percentage of minorities who receive financial aid and self/family support.³⁰⁴ The statistics demonstrate that white students receive 5.9% only of financial aid,³⁰⁵ blacks receive 7.8% in financial aid,³⁰⁶ and Hispanics receive 5.1% in financial aid.³⁰⁷ This indicates that blacks are the most reliant on financial aid and government funding, while whites and Hispanics are less reliant. However, the larger discrepancy exists in analyzing the minorities that have self/family support in comparison to whites. Out of the number of whites that attended graduate school, 47% funded the school based solely on self/family support.³⁰⁸ In comparison, blacks received 43.2% in self/family support³⁰⁹ and Hispanics received 43.5% in self/family support.³¹⁰ These statistics indicate that whites will more likely benefit from education accounts and tuition credit accounts.³¹¹ Based on a 3.5% to 4% disparity between the minorities and the whites with self/family support, whites will be able to take advantage of these exclusions of the estates more than minorities.

³⁰⁴ See discussion *supra* Part I.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ I am deducing from the Department of Education Statistics out of the categories of financial aid only, self/family support only, and both financial aid and self/family support, that the only category that would include these education individual retirement account and tuition credit accounts would have to be the self/family support category because the restrictions on both these accounts are limited to family members as specified in the BAPCPA.

C. THE BAPCPA PROVIDES FOR RETIREMENT FUNDS THAT WILL BE MORE FAVORABLE TO THE IDEAL DEBTOR THAN TO MINORITIES

The two sections discussing compensation plans and retirement funds in general are applicable to only about half of the United States population.³¹² Without detailing the extensive Internal Revenue Code sections that are applicable to these two sections, the statistics indicate that Hispanics are the least likely to benefit from these provisions where black and whites are more equal in this category.³¹³

D. HOMESTEAD EXEMPTIONS UNDER THE BAPCPA IN ATTEMPT TO REDUCE BANKRUPTCY SYSTEM ABUSE WILL HAVE NEGATIVE OR NO EFFECT ON MINORITIES

Last, the statistics on homeownership demonstrate that minorities will not benefit from the increased stringency of the terms of homeownership.³¹⁴ Though the BAPCPA is increasing the length of time required to own a home and limiting the exemption amount to \$125,000,³¹⁵ minorities still own less homes than whites.³¹⁶ Further, minorities are less likely than whites to spend money on household goods³¹⁷ making them less likely to take advantage of the household good provisions.³¹⁸ The inequities in homeownership has been said to be based on racial

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ See discussion *supra* Parts I-III.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ 11 U.S.C. § 522.

discrimination, exclusionary zoning, and racial and wealth gap.³¹⁹

Overall, the application of government statistics demonstrates inequalities between the Ideal Debtor and minorities. However, these inequalities do not exist in the language of the Bankruptcy Code. It is the application of this language to other societal factors that results in a discrepancy. It appears that the solution exists in education, specifically, education for minorities on the access of legal and accounting systems. Cultural boundaries may be the reason for minorities investing less in property that can be exempt or excluded. Regardless of the reasoning, financial education on access should reduce this discrepancy.

IV. THE SOLUTION TO INEQUALITIES TO MINORITIES IN THE BANKRUPTCY SYSTEM IS FOUND IN EDUCATION: IN ADDITION TO CONGRESS' "SENSE" OF EDUCATION IMPLEMENTED AT ELEMENTARY AND SECONDARY LEVELS

The solution to disparities between the Ideal Debtor and minorities may be resolved in a single sentence of the BAPCPA. Congress states, "[i]t is the sense of Congress that States should develop curricula relating to the subject of personal finance, designed for use in elementary and secondary schools."³²⁰ What does this mean? Are there other statutes in

³¹⁹ Dickerson, *supra* note 16, at 1760.

³²⁰ Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

which Congress projects its "sense?"³²¹ What guidelines would Congress like elementary and secondary schools to follow? How would such a program be financed? These are all questions presented by this ambiguous language. However, it does provide insight, ever so slight, as to what societal and public policy changes need to be made to the bankruptcy system to close the gap between the Ideal Debtor and minorities.

Congress has provided a remedy to education regarding bankruptcy. However, it is provided at a point too late in the bankruptcy system. Congress, under the BAPCPA, will now require that all debtors receive consumer credit counseling in order to go forward with the filing of a bankruptcy petition.³²² This requirement is minimal. This requirement comes too late.

The disparity between the Ideal Debtor and minorities does not lie within income gaps. As statistics have shown, the overwhelming majority of debtors are from the middle class.³²³ The discrepancy is that proclaimed by the Ideal Debtor.³²⁴ The notion that debtors with the same amount of income can be treated despairingly under the Bankruptcy Code is disheartening.³²⁵ It is doubtful that Congress intended these discrepancies. Further, it is unlikely that allowing means

³²¹ I have not found a statute that uses Congress' "sense."

³²² Bankruptcy Abuse Prevention and Consumer Protection Act §§ 1-1502.

³²³ See discussion *supra* Part I.

³²⁴ *Id.*

³²⁵ *Id.*

testing to balance income with allowable expenses resulting in debtors that have more secured property to pay creditors less in comparison to minorities who tend to invest in less, resulting in more available income to pay creditors.³²⁶

An answer to this question regarding disparity appears to be founded in a lack of education as to using the bankruptcy system to its advantage. As, Congress stated, primary and secondary education should provide personal financial training. However, this disparity goes beyond financial education.

The difference between the Ideal Debtor and minorities appears to be the use of attorneys and accountants in pre-bankruptcy planning. How do you provide education as to accessing legal and accounting systems. The disparity between minorities and whites may be attributed to cultural differences. Statistics demonstrate that minorities are less likely to buy a house, to have retirement funds, and to invest in education.³²⁷ Thus, primary and secondary education needs to not only provide for education on finances, but needs to provide education on the benefits of taking advantage of the legal system and accounting system as a means of preventive care for personal finances rather than retrospective credit counseling. This should not only be implemented in education, but also through free

³²⁶ *Id.*

³²⁷ *Id.*

financial investment programs that specialize in educating minorities.

CONCLUSION

The speculation of the BAPCPA with regards to predictions as to its effects during the eight years of consideration by Congress. It is unclear that any of the provisions discussed here will result in increasing the gap of the Ideal Debtor and minorities. What is clear is that the bankruptcy system is developing in light of the dramatic increase of filings and consumer debt. The goals and purposes are to provide a fresh start for the debtor. However inconsistencies between the Ideal Debtor and minorities are resulting in white debtors exempting more property and contributing less income to unsecured creditors than are their minority counterparts. Change is to be made in educating minorities on how to use the bankruptcy system to their advantage. However, this requires planning quite a distance from the actual filing of the bankruptcy petition. Last, to truly comprehend these inequities, the methods of statistical data collection for bankruptcy are to be improved. Confusion occurs in analyzing a joint petition without individual characteristics. More confusion arises from applying social statistics gathered in a non-bankruptcy forum. In conclusion, it is apparent much change is necessary to truly

understand the characteristics of the debtors filing and the reasons behind them.