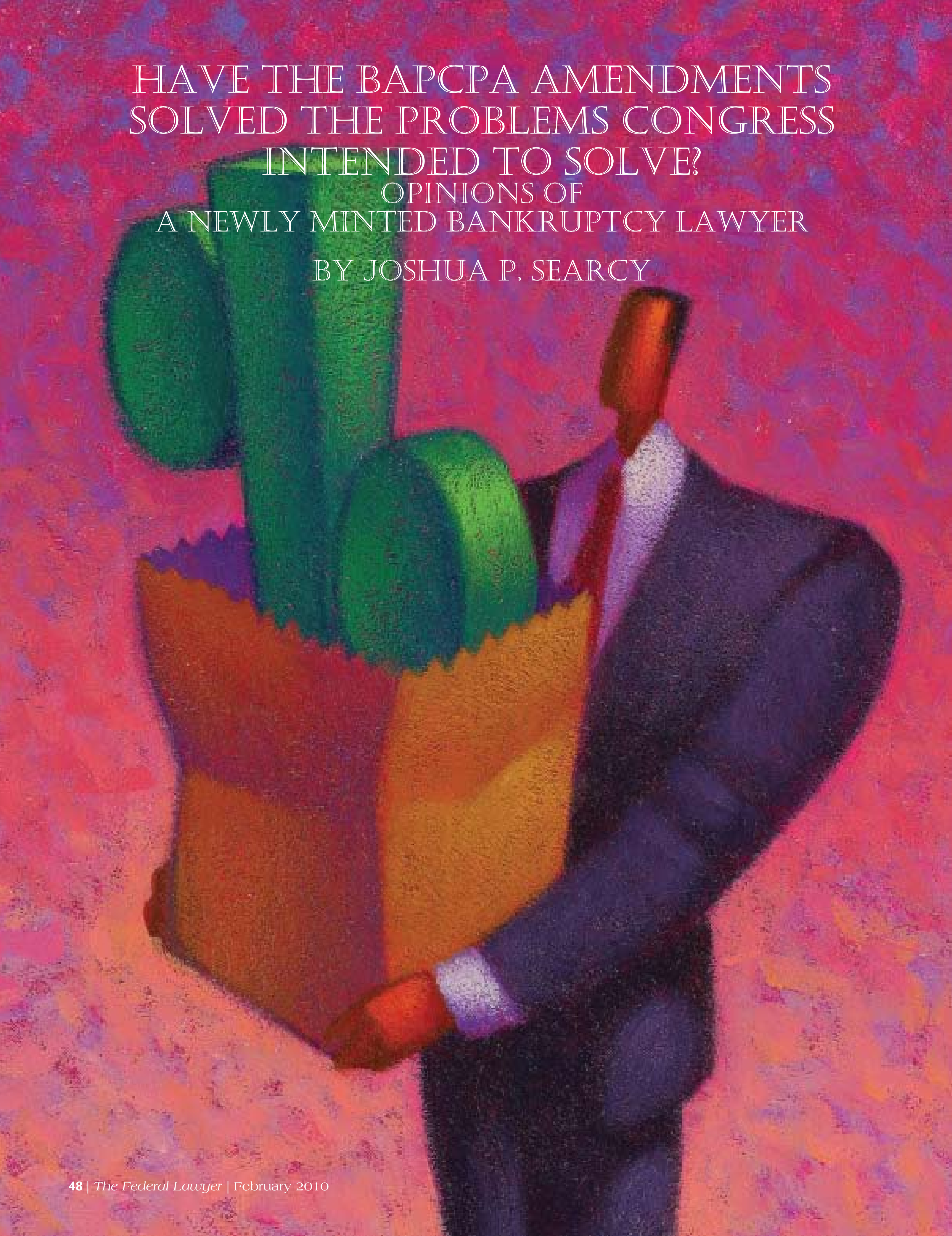
Have the BAPCPA Amendments Solved the Problems Congress Intended to Solve?

Opinions of a Newly Minted Bankruptcy Lawyer

By Joshua P. Searcy



Three and a half years ago, I began practicing bankruptcy law as a newly minted lawyer in a small town in East Texas. The start of my law career roughly coincided with the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA),[1] legislation that changed the practice of consumer bankruptcy law significantly. The new legislation meant two things: (1) that much of the law I painstakingly learned in bankruptcy class was no longer current, and (2) that few of the more experienced practitioners I knew could answer my questions relating to the changes. Among the questions precipitated by the statutory changes are the following:

- Can a debtor deduct education expenses on Form B22C—the new form designed to work through the new "means test"?
- Does the amount spent each month to repay a student loan or a loan from a 401k account constitute part of projected disposable income?
- Can the debtor deduct as an expense on Form B22C the mortgage payment on the house that the debtor has elected to surrender?
- Is a car creditor entitled to purchase money status for the entire balance due, even if part of the debt is not to purchase the car but to retire the debt on the vehicle that is traded in?
- From a practical standpoint, what is a "debt relief agency" and what does it do?

As I pondered these questions and many more, I noted that most experienced practitioners waxed nostalgic about the halcyon days before BAPCPA. "Of course," they might say, "you didn't have to *do* a means test before BAPCPA." Others opined that "This case would have been so much *easier* before disposable income was such a *major* consideration when filing for Chapter 7 bankruptcy."

As significant as these and other questions were, figuring out what numbers belonged where—if at all—in the means test was the most immediate mountain I had to conquer, because the means test must now be filed with the original petition. As I struggled with learning the intricacies of the means test, I could not help feeling that things really *had* been better before BAPCPA was passed, and I could not resist (not so) silently questioning the motives of Congress, which appeared to have run amok at the expense of consumer debtors. To deal with my immediate concerns, I found myself asking the following questions:

- Does the means test work?
- Has it accomplished the objectives it was intended to accomplish?
- Why was BAPCPA made law, and did its passage really mark the end of the golden age of consumer bankruptcy law?

These are not simple questions, and there are, unfortunately, no easy answers. And it may well be too soon to come to any definitive conclusion. This article is not intended to examine these questions scientifically. Rather, my conclusions are based solely on my personal experience, accompanied by a few additional resources.

The Basics for Nonbankruptcy Specialists

To answer these questions it is important to have some context. To the uninitiated, forays into a bankruptcy court or into the meeting room where the first meeting a debtor is required to have with creditors and the case trustee is conducted (called 341 hearings, pursuant to 11 U.S.C. § 341) can be intimidating. There are six chapters of bankruptcy, Chapters 7, 9, 11, 12, 13, and 15.[2] Consumers—that is, individuals like you and me—typically file for either Chapter 7 or 13 bankruptcy.

Chapter 7 consists primarily of liquidating nonexempt assets and finding undisclosed ones. Chapter 13 involves collecting payments from a debtor over a minimum of three—and a maximum of five—years and distributing those payments to creditors in accordance with a plan that must be approved by the bankruptcy court. Creditors must file a proof of claim to receive a distribution from the trustee and may take other actions to protect their interests and try to get their claims paid (or deemed nondischargeable, in some instances). Thus, the main players in bankruptcy (other than the judge, of course) are the debtor who files for bankruptcy, the creditors who are owed money, and the trustee who is appointed to oversee the case.

In both Chapter 7 and 13, the trustee has several important roles. The court appoints trustees to collect nonexempt assets and administer them for the benefit of creditors and also to make distributions to creditors from Chapter 13 plan payments. In some cases, trustees can even recover property that was transferred prior to a bankruptcy filing. Trustees also help protect and preserve the bankruptcy system against abuse by unscrupulous debtors and creditors and often assist the court by ferreting out debtors who may not be entitled or eligible to receive a discharge. In sum, trustees work to make the most of a debtor's circumstances for creditors while at the same time guarding the system to ensure that eligible debtors receive a fresh start so that they can move forward with their lives.

I have been fortunate to represent each of the main players in the process. I have filed cases for consumer debtors under both Chapters 7 and 13. The vast majority of bankruptcies involves consumers, and it can be personally rewarding to help down-on-their-luck debtors negotiate the obstacle course presented by modern bankruptcy. I have also represented creditors in Chapters 7, 11, 12, and 13 cases. However, the most eye-opening experiences in my practice have come from representing a Chapter 7 trustee. In that capacity, my duty is to watch out for the interests of both creditors and the bankruptcy system, as a whole.

The new means test, first seen in cases filed after Oct. 16, 2005, figures prominently in all three of these areas of consumer bankruptcy practice, and debtors are required to calculate this using official Form 22A or 22C, depending on the chapter elected. When I represent Chapter 13 debtors, I calculate the means test with an eye toward allowing my clients to make the smallest payment possible to unsecured creditors under the law, and when I represent debtors for whom Chapter 7 is the best option, I calculate the means test with an eye toward qualifying them for Chapter 7 relief. When I represent creditors, I review the means test as well as the debtor's income and expense schedules (Schedules I and J) to determine what, if anything, my client is likely to receive and to see if there is some way to use the means test to benefit my client. For a Chapter 7 trustee—or a Chapter 13 trustee, for that matter—the means test can be a useful tool to ferret out inconsistencies in the schedules that may lead to the discovery of an undisclosed or valuable asset that might be available for distribution to creditors.

In Chapter 13 bankruptcies, the means test is the paramount tool the trustee uses to determine what portion of a debtor's income must be dedicated to repaying unsecured creditors through a plan. The means test formula is, in many cases, determinative of what bankruptcy chapter a debtor may use and, if required to file Chapter 13, the amount that must be paid and over what time period it must be paid.

Because the means test is now so central to consumer bankruptcy law, it is startling to consider that, just three years ago, the Bankruptcy Code contained no means test. In fact, practice before BAPCPA was enacted was different in some other very important ways. First, although there were limits on eligibility based on the amount of debt owed pursuant to 11 U.S.C. § 109(e), there were no income-based restrictions on whether a debtor could file for Chapter 7 or Chapter 13 bankruptcy. Second, the U.S. trustee had to prove, by a preponderance of the evidence, that a case had been filed in bad faith based on the "totality of circumstances." There is now a "presumption of abuse" if the debtor's "projected disposable income" exceeds the amount of income allowed under the means test formula based on certain IRS guidelines. In lay terms, this generally means that a debtor making more than the median income for a family of that family's size in his or her state will not be able to file Chapter 7 and must file Chapter 13, unless the debtor is able to overcome this "presumption of abuse" by showing there exist very narrowly defined "exceptional circumstances."

In addition, prior to the implementation of BAPCPA, the Bankruptcy Code did not require a consumer debtor to obtain an individual or group briefing outlining the opportunities for available credit counseling and assisting the debtor in performing a budget analysis pursuant to 11 U.S.C. § 109(h)(I) or to complete a post-filing financial management course as a prerequisite to obtaining the holy grail—the discharge of all dischargeable debts.[3] The code had many fewer obligations for debtors to meet; literally pages of additional statutory text were added to 11 U.S.C. § 521, which is entitled "Debtor's Duties."

BAPCPA also significantly reduced the scope of judicial discretion that previously allowed bankruptcy judges to make decisions based on the unique facts and equities of a particular debtor's situation (within the confines of the statute). Instead, BAPCPA attempts to rely on a mechanical formula, although many courts are now finding that use of that formula is not necessarily required in every case.[4] Finally, Congress required dismissal much more frequently by the insertion of many more "shall dismiss" clauses in the code.

BAPCPA did not alter the level of importance the bankruptcy system has for both creditors and debtors. Both before and after BAPCPA was passed, the system has been designed to give honest debtors a fresh start. It is an exceptional legal process that helps thousands of debtors escape the burden of overwhelming debt with the hope that they may again become productive members of society. All this is accomplished without prison time or forced servitude. Just as crucial, bankruptcy also provides a method for the orderly liquidation and distribution of available assets for the benefit of creditors. The race to the courthouse can be an unsatisfying place for a creditor, and bankruptcy puts all creditors of like status on equal footing.

Despite the purposes of the Bankruptcy Code, during the 1990s, there was a growing perception that widespread abuse of the bankruptcy system existed at the expense of creditors. The sheer number of filings exacerbated the perception. According to the Government Accountability Office, the trend in the number of consumer bankruptcy filings from 1990 to 2004 was steadily upward.[5] As a result, there was a movement for reform, which was spearheaded by Sen. Chuck Grassley (R-Iowa), who was also the chief sponsor of BAPCPA. Sen. Grassley made the following statement at the opening of Senate hearings considering BAPCPA and perceived abuse of the bankruptcy system:

> [BAPCPA] provides new consumer protections, helps children in need of child support, and makes other necessary reforms to a system that is open to abuse. There is no need to re-open this bill. …
>
> As we hear from witnesses today, I recall the broad public support for reforming our bankruptcy system. The vast majority of people believe that individuals who file for bankruptcy should be required to pay back some of their debts if they have the means to do so. This is precisely what the bankruptcy reform legislation does.
>
> Most people think it should be more difficult for people to file for bankruptcy. Americans have had enough; they are tired of paying for high rollers who game the current system and its loopholes to get out of paying their fair share. …
>
> This legislation eliminates some of the opportunities for abuse that exist under the current system. Our current system allows wealthy people to continue to abuse the system at the expense of everyone else. People with good incomes can run up massive debts and then use bankruptcy to get out of honoring them.
>
> All of us end up paying for the unscrupulous who abuse the system. In fact, it has been estimated that every American family pays as much as $550 a year in a hidden tax as a result of the actions from these abuses. My bankruptcy reform legislation will help

eliminate this hidden tax by implementing a means test to make wealthy people who can repay their debts actually honor them. I suppose we can call this a tax cut for the responsible people in America. …

Bankruptcy abuse hurts our nation's small businesses. We will hear today about how small businesses have been hurt by losses due to bankruptcy. When businesses absorb these losses, they have to make up for the loss somehow through higher prices, or by laying off employees or going out of business.[6]

The reform movement led by Sen. Grassley sought both to limit "easy access" to bankruptcy and to lessen the losses experienced by creditors whose debts were routinely being discharged. One notable provision aimed at correcting perceived abuses was a limitation on the maximum amount of the homestead exemption available to some debtors. Certain states—Texas, Kansas, and Florida, to name three—broadly define what constitutes a homestead and allow debtors to exempt an unlimited amount of equity in their homesteads. Some detractors of the Bankruptcy Code suggested that its provisions allowed debtors to evade their creditors by moving to "unlimited homestead" states, purchasing extravagant homes, and then discharging their unsecured debts while using the homestead exemption to protect their assets.[7] A second notable change introduced by BAPCPA forbids Chapter 13 debtors from "cramming down" a secured lender's debt on a vehicle acquired for the debtor's personal use within 910 days of filing for bankruptcy.[8] The reform movement ultimately bore fruit (for creditors) with the passage of BAPCPA.

Opponents of reform—including many bankruptcy law professionals—disagreed with Sen. Grassley's characterization of these perceived abuses of the bankruptcy system by consumers. Critics worried that the new law ignored the underlying causes of the majority of bankruptcy filings in favor of correcting the abuses of a select few "wealthy" debtors.

Professor Elizabeth Warren, a leading authority on bankruptcy law and a professor at Harvard University Law School, testified at the congressional hearings that were held prior to the passage of BAPCPA amendments. She cautioned Congress as follows:

If Congress is determined to sort the good debtors from the bad, then it is both morally and economically imperative that they distinguish those who have worked hard and played by the rules from those who have shirked their responsibilities. If Congress is determined to sort the good from the bad, then begin by sorting those who have been laid low by medical debts, those who lost their jobs, those whose breadwinners have been called to active duty and sent to Iraq, those who are caring for elderly parents and sick children from those few who overspend on frivolous purchases. This Congress wants to set a new moral tone. Do it with the bankruptcy bill. Don't press "one-size-fits-all-and-they-are-all-bad" judgments on the very good and the very bad. Spend the time to make the hard decisions. Leave discretion with the bankruptcy judges to evaluate these families. Based on the Harvard medical study and other research, I think you will find that most debtors are filing for bankruptcy not because they had too many Rolex watches and Gameboys, but because they had no choice.[9]

Despite Professor Warren's advice, Congress chose to pass BAPCPA. How precisely then, did BAPCPA change consumer bankruptcy practice?

Pre-filing Credit Counseling Courses

The addition of pre- and post-filing debtor education requirements was a sea change for debtors. One of the worthy goals of the pre-filing requirement is to ensure that consumers considering bankruptcy both understand the consequences of filing bankruptcy and consider whether other options to bankruptcy exist.[10] The pre-filing course is intended to provide the consumer debtor with an analysis of his or her current financial condition, an explanation of the factors that led to that financial condition, an individualized budget analysis, and an appropriate action plan.[11] These courses are available over the telephone, on the Internet, or in person and typically can be completed in two to three hours.

Filing for bankruptcy is clearly a serious decision and those who need to do so should not take it lightly. Every debtor is entitled to fully understand the consequences of choosing to file a bankruptcy petition—or not to file one. I make sure to explore with all potential clients what their current financial situation is, how they got there, where bankruptcy can take them, and the long-term consequences of filing for bankruptcy. I have yet to meet with a potential consumer debtor who does not understand that bankruptcy can discharge unsecured debts and will require personal sacrifice. Moreover, I have never met a debtor who wanted to be met with and who had not tried to avoid bankruptcy.

In my practice, the two-hour class that must be completed before filing for bankruptcy does not seem to add much additional insight for debtors, and I have never had a client who, after completing the pre-filing course, magically became able to avoid a bankruptcy that my analysis indicated was likely to be in the client's best interest. My experience as a practitioner matches the conclusions of the GAO, whose recent report, titled "Value of Credit Counseling Requirement is Not Clear," stated that the "[a]necdotal evidence suggests that by the time most consumers receive the pre-filing counseling, their financial situations are dire, leaving them with no viable alternative to bankruptcy."[12] This is not to say that debtors cannot learn something that will assist them in their financial life after they have declared bankruptcy, but that, at that point in most debtors' lives, the course is too little, too late if the goal is to reduce the number of bankruptcies or spare a debtor the repercussions of filing for bankruptcy.

The Means Test

The central change to consumer bankruptcy practice as a result of BAPCPA amendments was the addition of the means test. The means test is simply a mathematical formula that compares the "current monthly income" of a potential debtor to his or her "projected disposable income" over the "applicable commitment period" to arrive at a determination of whether or not that debtor may file for Chapter 7 bankruptcy.[13] A Chapter 7 proceeding filed by a debtor with income above the median income for a family of his or her family's size in that state is subject to a "presumption of abuse"—that is, the debtor's filing is considered abusive or not done in good faith, unless he or she can show under the means test formula that his or her projected disposable income is insufficient to repay a defined portion of the debts were he or she forced into a Chapter 13 proceeding. The means test also determines the amount of the debtor's unsecured debt that must be repaid under a Chapter 13 bankruptcy, and, at least according to the majority of courts, over what period of time the debtor must remain subject to Chapter 13 provisions and make payments. In addition, a consumer bankruptcy case may be dismissed upon a motion by the U.S. trustee if there is either (1) a presumption of abuse that has not been rebutted or (2) if the case was filed in bad faith based on the totality of circumstances.

Application of the new means test has required some debtors—those who would have previously escaped paying any portion of their unsecured debts—to repay a portion of those debts. Before BAPCPA was enacted, debtors often filed under Chapter 13 in an effort to save their houses from foreclosure, to prevent the repossession of their cars, or to make a dent in nondischargeable debts such as taxes or unpaid and overdue child support payments. If a debtor had none of these problems but only a large amount of unsecured debt, filing for bankruptcy under Chapter 7 was typically in the best interest of his or her finances. However, a case could still be dismissed if the judge was convinced that it was abusive based on the totality of the debtor's circumstances. This standard gave the court and the U.S. trustee the discretion to consider the individual circumstances and track record of each individual debtor when considering dismissal of a potentially abusive filing.

In practice, the application of the means test has proven difficult mainly because of the code's definitions of "current monthly income" and projected "disposable income," upon which the means test relies. The way the Bankruptcy Code now defines these terms has caused unintended consequences that lead to unfair results in individual cases. For example, 11 U.S.C. § 101(10A) defines "current monthly income" as the average monthly income from all sources that the debtor receives during the six-month period ending prior to the month in which a bankruptcy case is filed. The main problem with this definition is that it fails to take into account a debtor who has recently lost a higher paying job or one who suffers a steep drop in income shortly after filing bankruptcy.[14] Similarly, the term fails to account for the debtor who has acquired a much higher paying job than the one he or she had during the six-month period before filing, and who, going forward, could make a higher payment to creditors than the means test reflects.

Early in my practice after BAPCPA was enacted, I represented a couple whose income exceeded the median for the state but who needed to file for bankruptcy because of the amount and type of debt they owed. The means test required them to file for Chapter 13 bankruptcy. Shortly after filing the case, but prior to confirmation, the chief breadwinner lost his job, drastically reducing the family's monthly income. Although he located substitute employment, he earned only one-half of his prior salary. Because the couple's Chapter 13 plan payments were predicated on the income from the job he had lost, as required by the statutory six-month period under 11 U.S.C. 707(b)(2)(A)(ii), the Chapter 13 plan was no longer feasible. These debtors were ultimately able to convert to Chapter 7, but only after additional expense and worry for the clients, because their filing was deemed to be an abuse.

The definition of "projected disposable income" also creates unexpected difficulties by forcing some debtors into unrealistic, yet mandatory, Chapter 13 cases. Projected disposable income is not defined in BAPCPA, and the circuits are split on their interpretation of the meaning of "projected disposable income."

The Fifth Circuit Court of Appeals, in which I practice, recently ruled on this question in *Nowlin v. Peake*,[15] deciding that the term refers to "disposable income" mechanically projected into the future for the duration of the Chapter 13 plan. Disposable income is defined as "current monthly income," which encompasses the average of the six-month period prior to filing, minus the amounts that are reasonably necessary to be expended for (1) the maintenance or support of the debtor, (2) charitable contributions, or (3) the payment of necessary business expenses.[16] All this bankruptcy jargon boils down to one simple fact: Under BAPCPA, a debtor who files for bankruptcy under Chapter 13 must make monthly payments in the amount of his or her income minus allowed expenses based on the income the debtor earned during the six months prior to the filing of the bankruptcy case—not the income he or she is currently earning.

Before BAPCPA was passed, the statute allowed the court to decide whether a plan sufficiently repaid creditors under more discretionary terms. The Fifth Circuit has decided that the means test used to calculate projected income may be rebutted with evidence of present or reasonably certain future events affecting the debtor's income or expenses, although at least one circuit has ruled that the means test is dispositive.[17] This legal question, among the dozens that BAPCPA amendments have raised, will probably be resolved this term by the U.S. Supreme Court, which recently accepted certiorari in *Hamilton v. Lanning*,[18] a case arising out of the Tenth Circuit Court of Appeals, on the limited question: "Whether, in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from the debtor's income or expenses during the pre-filing period."

The seeming intent of BAPCPA to disregard the actual circumstances of individual debtors is also evident in the way the means test allows deductions for payments of maintenance and support. The means test uses a set of expense guidelines promulgated by the IRS to determine projected disposable income. The expenses allowed under these guidelines do not always match the actual expenses incurred by debtors. An example of this problem can be seen in the case of a debtor who lives in an area that has no public transportation but needs to commute to a job that is many miles from home. In Texas, the IRS guidelines currently allow a debtor to deduct $489 from his or her income for monthly operation of a motor vehicle. It is not unusual for a person to drive many miles each day to and from work, and the monthly automobile costs can easily exceed the $489 per month allowed for expenses, especially when gasoline prices rise and when one combines the costs of fuel, insurance, registration, and maintenance for the car. The means test does not routinely take these individual circumstances into account, however. Nor does the means test allow a debtor to deduct expenses for more than two automobiles, despite numerous families who have more than two drivers and limited access to public transportation. Admittedly, some courts have grafted a solution onto BAPCPA that essentially allows a debtor to petition for an exception for "special circumstances"—which some districts refer to as a Motion to Deviate—but courts do not universally agree that the Bankruptcy Code authorizes such a deviation.

The result of the application of the means test is a fundamental shift in the way the consumer bankruptcy system operates. Under BAPCPA, numbers matter more than a debtor's circumstances do. Anecdotal evidence after over three years of practice under BAPCPA shows that the system now not only is less equitable to many debtors but also drastically reduced judicial discretion to hear evidence surrounding the special circumstances of debtors, to weigh that evidence, and to make a determination that takes into account the interests of debtors as well as creditors.

Another important change caused by the extensive BAPCPA amendments is the increase in the paperwork required to file a consumer bankruptcy case. Attorneys for consumer debtors must comply with numerous reporting requirements, including collecting documents from their clients to enable them to insert accurate numbers in Form B22C for the means test, documents certifying that credit counseling and financial management courses have been attended, and documents to be sent to the U.S. trustee should the case be selected for an audit.[19]

The consequences of failing to gather complete information and to document everything in the schedules, statements, and petition can be drastic for both debtor and attorney. For example, if a debtor fails to turn over tax returns and pay stubs at least seven days prior to a § 341 meeting in a Chapter 7 case, as required, the Bankruptcy Code now provides the case *shall* be dismissed. Few trustees regularly invoke this provision to seek dismissal of the case, but the fact that the provision even exists illustrates both the seriousness with which Congress took the purported abuses of the prior code and the importance of now gathering documents before filing for bankruptcy.

How Has BAPCPA Changed the Practice of Bankruptcy Attorneys?

For attorneys representing consumer debtors, the most drastic change introduced by BAPCPA is in the amount of time required to prepare and file a consumer bankruptcy case properly—particularly a Chapter 13 case. The means test, required in both Chapters 7 and 13, is an extensive form that requires calculating income and expenses—all of which must be based on documentation such as pay stubs, tax returns, and receipts. This documentation, in turn, must be collected, organized, and often produced during the course of preparing for and filing a bankruptcy case as well as when "defending" that filing when the assigned trustee or creditors seek documentation. Documentation is now considered even more important to debtors' attorneys, because both the debtors and their attorneys are required to attest to the accuracy of the information contained in the statements and schedules.[20] Debtors' counsel routinely now require their clients to produce, in writing, all the information required in the schedules and statements to be documented prior to filing the case. Obviously, for a client who needs to file quickly in order to stop a foreclosure sale or the sale of a repossessed vehicle, it is even more problematic to gather all these documents before his or her attorney will file the client's bankruptcy case.

Attorneys must also pay much closer attention to the details and timing of a bankruptcy case, because there are now even more traps for the unwary. Inconsistencies in the schedules that might have gone unnoticed can now mean the difference between a manageable and an impossible payment under Chapter 13 or even the difference between filing under Chapter 7 or filing under Chapter 13. In addition, because of the 910-day vehicle rule in 11 U.S.C. § 1325, a debtor's attorney who files a case on the 909th day after a car was purchased may have committed malpractice, because the debtor may be required to pay the entire debt that is due on the car instead of its current market value.

Another example of how the timing of filing can be critical can be found in the new venue requirements for claiming exemptions pursuant to 11 U.S.C. § 522(d)(3)(A). That statute requires a debtor to have been "domiciled" in a state for more than 730 days prior to filing for bankruptcy before he or she is entitled to claim that state's exemptions. Again, filing the case just a day before that period expires could be very costly to the debtor and therefore to that debtor's counsel if a claim is made that counsel did not explain that trap prior to filing.

All this means that, in order to make filing consumer bankruptcy cases a financially viable enterprise, fees had to increase substantially over the rates charged before BAPCPA was implemented. According to the GAO, the average fee charged for a consumer bankruptcy has increased by 50 percent since the enactment of BAPCPA.[21] This increase is attributable to the fact that fewer tasks in consumer bankruptcies can be delegated to staff members who are not attorneys, the law contains more requirements for filing consumer bankruptcies, and often there are now more motions to file (such as motions to extend the stay under 11 U.S.C. § 362(h) for repeat filers).

The impact of BAPCPA on consumers has also been dramatic. Debtors must supply more documents to corroborate the information they provide their attorneys for composing schedules. Counsel for debtors can no longer take their clients' word for many facts and must require actual documents—including pay stubs for the prior 60 days, copies of the last filed federal tax return for the most recent tax year, copies of information about domestic support obligations, and documents concerning contributions from nondebtors to the household where debtor resides. The result is frustration and headaches for consumers who are trying to get copies of documents for their attorneys at a time when the debtors are typically under severe financial pressure.

In addition, attorneys must charge more for the services they need to render, because more hours are required to responsibly file a consumer bankruptcy as a result of the changes of BAPCPA. Consequently, consumers are being forced to pay considerably more for their cases. The required credit counseling courses also add expense, although usually less than $150. And these are costs that consumers who are already in financial trouble need to pay. As a result of the Supreme Court case, *Lamie v. U.S. Trustee*,[22] many attorneys refuse to file Chapter 7 cases without payment in full, for fear that any unpaid work they do prior to the filing of the case will be deemed a dischargeable unsecured claim. This causes additional stress to consumers, although this is admittedly not unique to BAPCPA amendments.

The most drastic change for consumers, however, has been the new income-based restrictions on filing for Chapter 7 bankruptcy. Many debtors whose income is above the median are surprised to find out that Congress considers them "too rich" to file under Chapter 7 as a way to simply discharge their debts. A not atypical intake appointment with future clients finds me meeting with a couple making $6,000 a month, which qualifies them as debtors whose income is above the median income but with all the attendant expenses of raising their families; making house payments and car payments; paying their taxes, insurance, and basic living expenses. With these financial obligations, such couples have nothing left over at the end of the month with which to pay unsecured debt. Clients frequently wonder how their incomes can be considered above the median when they have no money left over at the end of the month.

Faced with such cases, I explain that this is how Congress set up the bankruptcy system effective Oct. 17, 2005, and I have had this or similar conversations countless times over the last three years. Sometimes the debtor will have enough allowable expenses to be able to file for Chapter 7 bankruptcy, but often they do not. They cannot understand how they can be facing the need to file for bankruptcy but yet be too rich to have their debts discharged unless they repay some of their previously dischargeable unsecured debt. Before BAPCPA, this kind of conversation would have never transpired.

BAPCPA has had an impact on the bankruptcy system itself as well, as most obviously demonstrated by a review of filing trends. As previously noted, from 1990 to 2004, the number of consumer bankruptcies filed each year steadily increased. According to the GAO, approximately 1.2 million consumer bankruptcies were filed in 2004.[23] The number of cases filed nationwide in 2007, after the BAPCA was enacted, was approximately 484,000—a substantial decrease.[24] Such a drastic decrease means fewer filing fees to fund the court system, fewer fees paid to compensate Chapter 7 trustees, and fewer cases in which the Chapter 13 trustee can charge a commission in order to operate their respective offices.

BAPCA has also meant a significant increase in work for Chapter 7 trustees, often with no additional compensation, because they are paid a small per-case fee unless they discover assets to administer. The Chapter 7 trustee must receive and review all the additional information and documentation that consumer debtors and their attorneys are now required to disclose. The U.S. trustee also reviews this information and often conducts audits of debtors' cases to verify the accuracy of the information reported in the schedules. From the standpoint of the system, these debtor audits may well deter debtors from filing inaccurate schedules and pleadings, which is clearly a positive development, but data show that the audits are finding little substantive "abuses," which Congress apparently had expected to find.[25]

Conclusion

What conclusions can be drawn about the success of BAPCPA? First, the sky did not fall either on consumer bankruptcy attorneys or consumer debtors with the enactment of BAPCPA, notwithstanding predictions to the contrary. Without question, processing consumer bankruptcies is now a more onerous, expensive, and less advantageous process than it once was for debtors. However, it is still possible for an honest debtor to obtain a fresh start and discharge debts that are beyond the means of the individual debtor to repay.

It is difficult to quantify the extent to which BAPCPA has prevented any of the abuses it was intended to eliminate. Certainly, some debtors must now file for Chapter 13 bankruptcy and pay debts (or some part thereof) that they might previously had discharged under Chapter 7, but there are also other debtors who choose not to file at all rather than endure the requirements set by Chapter 13 bankruptcies. I have found in my own practice that BAPCPA has not changed a debtor's need to file for bankruptcy; it has instead simply made the process more frustrating and expensive.

Professor Elizabeth Warren concluded her testimony to Congress about proposed bankruptcy reform with the following observation: "Overwhelmingly, American families file for bankruptcy because they have been driven there—largely by medical and economic catastrophe—not because they want to go there. Your legislation should respect that harsh reality and the families who face it." The jury is still out on whether BAPCPA prevents substantial abuse of the bankruptcy system, and, if it does so, whether it simultaneously respects the harsh realities that face most families who seek bankruptcy relief. **TFL**

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Endnotes

[1]Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, April 20, 2005, 119 Stat 23.

[2]Chapter 11 is available for certain individual debtors but is more commonly filed by corporate debtors needing reorganization rather than liquidation. Chapter 12 is also available for certain individual debtors but is specifically for debtors deriving the majority of their income from agricultural activities. Chapter 9 is the chapter used for municipal reorganization, and Chapter 15 is for foreign corporations.

[3]*See* 11 U.S.C. § 727(a)(11) for Chapter 7 debtors, and 11 U.S.C. § 1328(g)(1) for Chapter 13 debtors.

[4]*See, e.g., Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2009) *cert. granted in part*, 2009 WL 273221 (U.S. Nov. 2, 2009) (holding that the bankruptcy court may consider a debtor's actual and projected future income, rather than being constrained to look only at debtor's historical income based on the six-month look-back period).

[5]*Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Govt. Acct. Off. 08-697, at 9 (June 27, 2008).

[6]*Bankruptcy Reform: Hearing on S. 256 before the Senate Judiciary Committee*, 109th Cong. (2005) (statement of Sen. Charles Grassley).

[7]11 U.S.C. § 522(p) (West 2009).

[8]Known as the "hanging paragraph" of § 1325, this provision prevents a cram down by a debtor if "the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910 day [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle acquired for the personal use of the debtor, or if the collateral for that debt consists of any other thing of value, if the debt was incurred during the 1 year period preceding that filing."

[9]*Bankruptcy Reform: Hearing on S. 256 before the Senate Judiciary Committee*, 109th Cong. (2005) (statement of Elizabeth Warren).

[10]*Bankruptcy Reform: Value of Credit Counseling Requirement Is Not Clear,* Govt. Acct. Off. 07-203, at 1 (April 6, 2007).

[11]*Id.* at 3.

[12]*Id.* at 4.

[13]11 U.S.C. § 707(b) (West 2009).

[14]*See, e.g., Hamilton v. Lanning*, 545 F.3d 1269 (10th Cir. 2009), *cert. granted in part*, 2009 WL 273221 (U.S. Nov. 2, 2009) (affirming the bankruptcy court's use of a "forward-looking" approach, rather than the "mechanical approach" after the debtor's income fell precipitously during the six-month look-back period).

[15]*Nowlin v. Peake*, 576 F.3d 258 (5th Cir. 2009).

[16]11 U.S.C. § 1325(b)(2) (West 2009).

[17]*In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008) (holding that "projected disposable income" is not a freestanding concept divorced from the statutory definition of "disposable income" but is simply a debtor's "disposable income," as that term is now defined, based on the average of what the debtor earned in the six months preceding the petition date projected over the debtor's applicable commitment period).

[18]*Hamilton v. Lanning*, 545 F.3d 1269 (10th Cir. 2009), cert. granted in part, 2009 WL 273221 (U.S. Nov 02, 2009).

[19]28 U.S.C. § 586(f) (West 2009).

[20]28 U.S.C. § 1746(f) (West 2009); Fed. R. Bankr. P. 1008.

[21]*Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act,* Govt. Acct. Off. 08-697, at 21.

[22]*Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (holding that a Chapter 7 debtor's attorney may not be compensated from the bankruptcy estate unless the attorney is employed with approval of bankruptcy court).

[23]*Bankruptcy Reform: Dollar Costs Associated with the Bankruptcy Abuse Prevention and Consumer Protection Act,* Govt. Acct. Off. 08-697, at 36.

[24]*Id.* Although there was a precipitous decline in bankruptcies in the first two-plus years after full implementation of BAPCPA, a recent report notes the following: "Just nine months into the year (2009), consumer bankruptcy filings overshot the 1 million mark to reach 1,046,449. It's the first time since the passage of BAPCPA that bankruptcy filings exceeded 1 million before the fourth quarter, according to the American Bankruptcy Institute's analysis of National Bankruptcy Research Center data. The September 2009 consumer filing total reached 124,790, a 41% increase from the 88,663 consumer filings in September 2008, and a 4 percent increase over the previous month. The September totals were the fourth highest for a single month since the 2005 law change, the ABI said. Chapter 13 filings constituted 28 percent of all consumer cases in September, unchanged from the August rate." *See Consumer Filings Top 1 Million*, Bankruptcy Court Decisions Weekly News, vol. 52, no. 5, at 2 (Oct. 27, 2009).

[25]U.S. Department of Justice, Executive Office of the United States Trustee, *Public Report: Debtor Audits by the United States Trustee Program Fiscal Year 2008* (March 2009).