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Margaret Romero

University of New Mexico

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KILLING WITH KINDNESS: THE MYTH OF "CONSUMER PROTECTION"
IN THE BANKRUPTCY ABUSE AND CONSUMER PROTECTION
ACT OF 2005
KILLING WITH KINDNESS:

MARGARET Y. ROMERO
Juris Doctor Candidate, 2006
University of New Mexico School of Law
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Faculty Advisor: Dean Suelyn Scarnecchia
Introduction

The United States Congress considered bankruptcy reform for eight years before George W. Bush signed the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BACPA") into law on April 20, 2005. Congressional proponents alleged that rampant and abusive practices required substantial reform measures to combat a staggering economic crisis that burdened every honest citizen. In signing the legislation, the President explained, "too many people that can pay walk away from their bills and the rest of society is forced to pay." Bankruptcy reform offered the promise of "greater stability and fairness" in the American financial system.

Statistical data supported the argument for reform. During the decade preceding enactment of the legislation, bankruptcy filings increased seventy percent. More than 1.6 million bankruptcy petitions were reportedly filed by consumer debtors in 2004, and debts discharged in bankruptcy were estimated to total tens of billions of dollars every year. To illustrate the cost, Senator Hatch reported on the congressional floor that the amount was sufficient to fund thirteen million Pell grants or the entire United States Department of Transportation for one year.

As implied by the bill's name, legislators attributed the escalating use of the bankruptcy system to abuse. Proponents alleged that abusive practices were common due to an endemic breach of personal responsibility among American consumers. As the social stigma of

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3 Id.
5 Id.
bankruptcy abated, they reasoned, society’s values had deteriorated to the point where opportunistic debtors used bankruptcy relief simply as a preferred method of financial planning. For example, after recording two albums that earned $170 million in sales, musical artist Toni Braxton filed a bankruptcy petition, in part, because she wanted to be released from her contract with the record producer. On the Oprah Winfrey program, Braxton acknowledge that despite contemplating the discharge of her debts, she purchased thousands of dollars in Gucci flatware the day before filing her petition. Other testimony indicated that technical provisions of the code allowed debtors to legally retain substantial wealth at the expense of discharged creditors. For example, the actor Burt Reynolds, a resident of the State of Florida, legally shielded his 2.5 million dollar estate while his creditors wrote-off several million dollars in debts. Arguably, the bankruptcy system created a mechanism for debtors lacking personal integrity to compare the burden of repayment to the benefit of discharge, even when the debtor arguably had the financial means to satisfy his debts.

Armed with abundant illustrations and staggering statistics, reform proponents argued that debtors lacking in conscience and personal responsibility flourished in the bankruptcy system at the expense of truly honest citizens who lost by living within their means. Discharged debts were estimated to cost each family approximately five hundred fifty dollars each year in the form of a “hidden tax” that was passed on to consumers through higher prices and interest

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11 Bankruptcy Revision: Hearing Before the S. Comm. on the Judiciary, 109th Congress (Feb 10, 2005) (statement of Professor Todd J. Zywicki, Visiting Professor of Law, Georgetown University Law Center).
12 Id.
13 144 Cong. Rec. S12145 (daily ed. Oct. 9, 1998) (statement of Sen. Hatch) (alleging that a Virginia multimillionaire discharged “massive” consumer debt while retaining a race horse valued at six hundred forty thousand dollars); (See also statement of Sen. Kohl alleging that the actor, Burt Reynolds, a resident of the State of Florida, legally shielded his 2.5 million dollar estate while his creditors wrote-off several million dollars)
rates. Effectively, reform proponents argued, a remedy originally designed to give an honest but unfortunate debtor a second chance had deteriorated into an economic game in which bankrupt debtors spent freely and without obligation or consequence. Proponents consistently promised that reform legislation would correct the problem by restoring personal responsibility and integrity in the bankruptcy system.

Additionally, legislators argued that bankruptcy attorneys were culpable for the abusive practices of their clients. The charge arose from the claim that bankruptcy practitioners conducted little or no investigation into the merits of a petition but “willy-nilly cart[ed] their client[s] off to bankruptcy court and pocket[ed] a nice profit.” Bankruptcy specialists were criticized as “view[ing] bankruptcy as an opportunity to make big money for themselves” while willingly assisting their clients’ legalized theft. Thus, in addition to identifying the need to restore personal responsibility in the bankruptcy system, proponents argued that integrity needed to be restored in the bankruptcy bar.

Accordingly, a reform policy evolved in which the overall objective was to ferret out the so-called deadbeat and fraudulent debtors and force those debtors to recognize their moral obligation to satisfy their prior promise. In other words, reform mandated repayment under certain circumstances by compelling more debtors to pay more of their debts before a legal fresh

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15 Bankruptcy Revision: Hearing Before the S. Comm. on the Judiciary, 109th Congress (Feb 10, 2005) (statement of Professor Todd J. Zywicki, Visiting Professor of Law, Georgetown University Law Center, “Like other business expenses, when creditors are unable to collect debts because of bankruptcy, some of those losses are inevitably passed on to responsible Americans who live up to their financial obligations. Every phone bill, electric bill, mortgage, furniture purchase, medical bill, and car loan contains an implicit bankruptcy “tax” that the rest of us pay to subsidize those who do not pay their bills.”


20 Id.

start could be awarded. To accomplish this, discretionary provisions of the former law, (which allowed a debtor to select the form of bankruptcy with the greatest advantage to the debtor), were replaced with systemic mechanisms to determine whether a debtor has the “means” to pay his debts. Under the new law, a debtor deemed with the means to pay must file a Chapter 13 petition, which requires debt repayment over a period of three to five years. A second tier of the reform policy made bankruptcy practitioners liable and accountable for the statements and representations of their clients.

Notwithstanding the clear policy to compel payment and to make bankruptcy a difficult option of last resort, BACPA was also promoted as consumer protection legislation. While conceding that not all filings constitute abuse, legislators asserted that many debtors sought bankruptcy relief as a result of the debtor's financial illiteracy. Senator Hatch reasoned, “except for those with evil motivations and a willingness to take advantage of the system, no one likes to be in debt.” Proponents also claimed that innocent and uninformed debtors were virtually forced into the system by self-serving attorneys who ignored the needs of, or consequences to, their debtor clients. They argued that bankruptcy practitioners preyed upon “unsophisticated consumers who ... [did not] need bankruptcy.”

Thus, provisions were drafted in the bankruptcy code to ostensibly protect consumers. Legislators argued that credit card disclosures and financial management programs could help

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22 Under the former law, the debtor had the option to file under Chapter 7, in which the debtor surrendered all non-exempt assets in exchange for a discharge of eligible debts, or Chapter 13, in which the debtor was permitted to retain certain assets if the debtor completed a court-approved repayment plan. Under the former law, the debtor could not be forced into Chapter 13, which was entirely voluntary.
28 id.
debtors avoid the “spiral that often leads to bankruptcy.” BACPA also seeks to financially educate debtors as to their options, in or outside of bankruptcy, so the debtor is able to address the problems underlying their financial crisis. Perhaps most notably, the bill includes a “debtor’s bill of rights” that is intended to protect debtors from “shady legal advisers who take their fees and run.”

In sum, BACPA supporters promised that the massive reform measures were designed to curb abusive practices while protecting innocent consumers. However, despite apparently decent and compassionate intentions, some consumer protection measures may have the unintended result of penalizing the truly honest debtor. This article discusses how certain mechanisms, designed to protect consumers, impose unintended barriers to critical relief. The article also discusses how reform measures, intended to curb abusive practices, impose hardships on debtors needing the system most. The specific code provisions are identified and explained, and the intended goals, as expressed in the legislative history, are analyzed and compared to the practical or actual result. The author also offers ameliorative proposals to ensure that the “consumer protection” provisions of the act realize the promise that BACPA will “protect those who legitimately need help.”

**The Credit Counseling Prerequisite**

A central theme of the legislation involved educating debtors about their responsibility to pay their debts and manage their finances. Except in the case of abusive or opportunistic filings, legislators expressed relative compassion for truly unfortunate debtors. However, proponents

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32 George W. Bush, *supra*.
33 *Id.*
alleged that many able debtors filed bankruptcy petitions either because they were financially
dysfunctional or merely misinformed. The Bankruptcy Reform Commission, which was
established to study bankruptcy's causes among other matters, reported that evidence suggested
that the decision whether or not to seek bankruptcy relief was often not made in a rational way.34
Thousands of debtors reportedly found themselves in bankruptcy without informed knowledge or
consent, and bankruptcy lawyers were blamed for the result.35 In a Congressional speech,
Senator Grassley argued that bankruptcy lawyers virtually forced debtors into the system,
because, rather than consider the clients best interests, the attorney's efforts were aimed toward
creating "bankruptcy mills" that processed petitions in high volumes.36 To curb these practices,
legislators proposed third-party counseling to ensure that the so-called honest debtor was fully
informed of his options for repayment, with or without bankruptcy, as well as the consequences
of the respective choices:

Under the new law, absent exigent circumstances, a debtor is not eligible for bankruptcy
relief until he has completed a credit counseling class.37 The counseling requirement is
described as a tool that allows a consumer to make an informed choice as to whether or not to
proceed to bankruptcy after considering all of the alternatives and consequences.38 One
proponent said it is analogous to the informed consent that a patient gives before agreeing to a
medical operation.39 The debtor may meet the requirement by consulting with an approved
agency on the internet or over the phone.40 By requiring counseling as a prerequisite to filing,
the new law presumably eliminates the occasion for accidental bankruptcy filing and protects the

39 Id.
BAR OF MINNESOTA (May/June 2005).
debtor from “bankruptcy mills” that maximize their own profit without conducting an analysis of the debtor’s various options. However, the pre-petition requirement is detrimental to bankruptcy debtors for three reasons: First, like some bankruptcy attorneys, credit counselors may be self-serving; second, the effort to determine speculative long-term benefits effectively delays the immediate relief provided by the automatic stay and may ultimately impair the debtor’s ability to repay his debts; and third, the language and interpretation of the exception for exigent circumstances penalizes the debtor making every effort to avoid the need for bankruptcy.

1. Credit Counselors

Unquestionably, BACAP advocates strived to reduce the number of bankruptcy petitions filed and compel debtors to be financially responsible for their debts. Proponents argued that the counseling requirement has the benefit of educating debtors about money management and a moral obligation to pay just debts. They seemed to reason that if evidence indicated that some debtors found themselves accidentally in bankruptcy, perhaps others could discover that with proper financial management their debts could be resolved without the necessity for bankruptcy.

Although the credit counseling requirement supports the BACPA policy to compel repayment, it may fail to protect the most vulnerable consumers from self-serving counselors. Credit counseling services were created by creditor banks and credit card companies in an effort to stem the growing volume of personal bankruptcies during the mid-1960’s. Counseling agencies assist consumers who cannot afford to make all of their scheduled payments by enrolling the debtor in “debt management plans,” which in some circumstances allow the debtor

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41 Bankruptcy Revision: Hearing Before the S. Comm. on the Judiciary, 109th Congress (Feb 10, 2005) (statement of Professor Todd J. Zywicki, Visiting Professor of Law, Georgetown University Law Center).

42 See Grassley, Hatch supra.


to consolidate debts, lower interest rates and reduce the attendant monthly payments. Although credit counseling efforts may seem altruistic, Congressional reports indicate counselors are often motivated to compel debt-ridden consumers to sign onto debt management plans to meet sales or performance goals of the agency. By imposing the burden pre-filing, the debtor is vulnerable to practices calculated to advance performance objectives rather than determine the debtor's most appropriate option. Effectively, the debtor is forced to consult with a third-party whose motives may be inconsistent with the debtor's best interests.

Proponents would counter that the consumer is protected from unscrupulous practices, because the approved agencies must be not-for-profit entities, but the claim is without merit. A corporation qualifies as not-for-profit under the Internal Revenue Code if it is organized and operated for certain purposes, such as education or charity. The organization may earn revenue, but no part of the corporations earnings "may inure to the benefit of any individual or any private shareholder in the corporation." Although approved counseling agencies are legally organized as not-for-profit corporations, much of the credit counseling industry is alleged to be "a network of not-for-profit companies linked to for-profit conglomerates." There is no mechanism within the code to ensure that only qualified credit counseling agencies are approved. Hence, there are no mechanisms to ensure that debtor interests trump credit counseling objectives. Apparently, no effective mechanisms exist to protect debtors, because not-for-profit organizations are even reportedly exempt from industry regulations enabled by the

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45 Id.
47 Id.
49 Tony Anderson, Bankruptcy Reform Act to have significant effect on lawyers as well as debtors, WISCONSIN LAW JOURNAL (August 10, 2005) (LexisNexis Academic 2005).
Credit Repair Organizations Act of 1997.\textsuperscript{50}

The concern is not speculative. The credit counseling industry is reportedly “plagued with consumer complaints about excessive fees, pressure tactics, nonexistent counseling and education, promised results that never materialize, ruined credit ratings [and] poor service.”\textsuperscript{51}

Data indicate that under the current credit counseling system, some debtors emerge from counseling in worse financial condition than they began.\textsuperscript{52} Consequently, rather than providing objective financial analysis and counseling, the credit counselors are in the position of profiting from the misfortune of their creditors.\textsuperscript{53} The ironic result is that legislation intended to protect debtors from unscrupulous lawyers instead places them before potentially dishonest counselors, who, unlike attorneys, have no fiduciary duty to the debtor.

2. \textbf{Delays Automatic Stay Relief}

Proponents will argue that in addition to informing the debtor of his repayment options, the new law gives the debtor leverage to negotiate debt reduction and a reasonable payment plan. This is because the bankruptcy court may penalize a creditor who refuses to negotiate a good faith settlement prior to the debtor’s bankruptcy.\textsuperscript{54} Thus, at least in theory, credit counseling protects the debtor, because it improves the debtor’s financial literacy, may reduce the debtor’s financial burden, and it eliminates the need to file a bankruptcy petition.\textsuperscript{55} Arguably, such a result preserves the debtor’s financial integrity by avoiding the bankruptcy blemish.

However, this logic assumes that every debtor in need of bankruptcy relief has not ever attempted to reconcile his financial troubles or negotiate a solution with his creditors.

\begin{itemize}
\item \textsuperscript{50} \textit{Profiteering in an non-profit industry: Report: Permanent Subcommittee on Investigations Senate Committee on Governmental Affairs.} April 13, 2005 S. Rpt. 55.
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{55} \textit{Bankruptcy Revision: Hearing Before the S. Comm. on the Judiciary. 109th Congress (Feb 10, 2005) (statement of Mr. P. Michael Steward Menzies, Sr. President & CEO East Bank and Trust Company).}
\end{itemize}
Unfortunately, many debtors facing the prospect of bankruptcy have already exhausted their negotiation alternatives and any delay in filing could result in permanent loss. Legal action toward the collection of a defaulted obligation is often regarded as the triggering cause that leads to bankruptcy. Notwithstanding the sensational stories of individual debtor abuse, a study conducted for legislative hearings indicated that during the two years prior to bankruptcy, “45% of the debtors studied had to skip a needed doctor visit, over 25% experienced termination of their utilities by the utility company, and 20% went without food.” Simply expressed, most debtors file for bankruptcy relief because they have no choice, “not because they have too many Rolex watches or Gameboys.”

For those debtors, the credit counseling requirement may create a permanent barrier to needed relief. Section 362 provides that a filed petition operates as a stay, “applicable to the commencement or continuation, including the issuance or employment of process of a judicial administrative, or other action or proceeding against the debtor.” Effectively, upon filing of a petition, the stay temporarily prevents all collection efforts, including execution, levy, foreclosure or garnishment. Although the stay stops collection, the purpose of the provision is to preserve the asset, either for the debtor or for the bankruptcy estate. The rights of the secured creditor continue, subject to relevant bankruptcy law. In other words, the automatic stay does not relieve the debtor of the responsibility to pay a secured debt, it merely suspends collection efforts until the issues are equitably resolved. Since credit counseling is now a prerequisite to filing, the relief afforded by the code is ordinarily delayed until the debtor successfully

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60 George H. Singer, Michael P. Warren, supra
completes the course then files his petition. If the debtor is coerced to make a final effort to reconcile and pay all existing debts, the debtor remains susceptible to collection efforts by individual creditors.

Conceivably, while a debtor is learning of his rights to negotiate repayment with his creditor, his car could be removed from his driveway by that very creditor executing its lien. If the creditor sells the vehicle before the debtor files his petition for bankruptcy, the asset is permanently lost. Under this scenario, the provisions compelling a creditor to negotiate are irrelevant, because that creditor’s claim would not be subject to a subsequent bankruptcy filing, and the bankruptcy court would have no power or authority to penalize the creditor.

Consequently, the counseling prerequisite could cause a financially stressed debtor to lose not only an asset that would be legitimately protected by the code, but also an asset that may be necessary to obtain employment revenue to repay his debts. By barring every debtor from even filing a petition until he is educated on how to create a personal budget or plan to repay the existing debt without the need for bankruptcy, the new law could actually impair the debtor’s ability to repay his debts.

3. Exigent Circumstances

A similar situation arises when the debtor is unable to schedule counseling before a pending foreclosure sale. Under those circumstances, the debtor may obtain a waiver of the pre-petition counseling requirement by leave of the court. To obtain such leave, the debtor must file with his petition a certification that: a) describes exigent circumstances that merit a waiver of the pre-petition requirements; b) states that the debtor requested credit counseling services but was unable to obtain the services during the five day period beginning on the date on which the
debtor first made the request; and c) is satisfactory to the court. If the waiver is granted, the debtor is given an extension of time in which to obtain counseling. The effect of a waiver is to declare the debtor "eligible to be a bankruptcy debtor," which commences the automatic stay protection, subject to the debtor's subsequent compliance with the credit counseling requirement.

The exception for exigent circumstances is almost certainly intended to temporarily relieve the debtor of the filing prerequisite when circumstances warrant. In one recent case, the debtor sought a waiver, because she was unaware of the counseling requirement until she sought assistance from a bankruptcy attorney the day before the scheduled foreclosure sale of her home. When she attempted online and telephone counseling, she was informed that she would need to make an appointment on a date that occurred after the scheduled sale. In another similar case, a debtor facing foreclosure the following day contacted a credit counseling agency, and, pursuant to the counselor's instruction, downloaded, completed and submitted the forms to the counseling agency on the very same day. When she contacted the agency the following day they informed her that the counseling could not be completed for a "couple of days." In each of these cases, the court found that the debtor met the first requirement by describing exigent circumstances that merit a waiver of the pre-petition requirements.

However, a finding of exigent circumstances is not sufficient to obtain a waiver, because the debtor must also prove that he has attempted, but has been unable to obtain, counseling, for a

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62 Id.
64 Id.
66 Id.
68 Id.
period of five days. Hence, a debtor facing the prospect of foreclosure must anticipate and plan counseling at least six days before the scheduled foreclosure sale. If the debtor does not anticipate the requirement, and the debtor is unable to receive counseling before the scheduled sale, the debtor will be disqualified from filing the bankruptcy petition. Accordingly, in the cases described above, both courts denied the waiver requests, because neither debtor was denied counseling for five days. Since the debtors could not meet the statutory requirement to complete counseling or obtain a waiver, the debtors were ineligible for bankruptcy relief. As a result, the bankruptcy cases were dismissed, and the debtors’ assets were presumably lost.

Unfortunately, the loss of an asset is not the only harm to the debtor. Although the debtor may file a second petition after meeting the filing requirements and paying a second filing fee, the automatic relief afforded by right is reduced when a subsequent petition is filed. Thus, if a debtor files a second petition, the automatic stay, (which never went into affect after filing the first petition), is now limited to a period of thirty days, and the debtor receives no automatic relief when three or more petitions are filed within a one year period. Though the statute provides for an extension of the stay if the debtor can establish that the subsequent petition was filed in good faith, a presumption of bad faith arises when multiple petitions are filed within one year.

According to legislative history, these amendments were made to combat the abusive practices of debtors that repeatedly filed bankruptcy petitions simply to stay collection efforts of legitimate creditors. These amendments were clearly aimed at discouraging abusive practices
by gradually extinguishing relief when manipulative practices warrant. Because the code does not distinguish a case that is dismissed when a waiver is denied, the provisions have the effect of foreclosing the original stay, even when the debtor did not receive even one day of relief as a result of the first petition. As one legislator commented, "this bill takes the phrase, 'kick them when they are down' to a whole new level."76

Although it would seem that exigent circumstances would inherently prevent the opportunity to plan and anticipate an unknown requirement, many recent decisions have concluded that the result is reasonable. In one case, the court reasoned that the law should not protect a debtor simply because he has declined to act despite notice of the creditor’s action.77 In a second case, the court explained, "the statute does nothing more than mandate debtors to recognize and start dealing with their straits of insolvency squarely, at least a week before they will bloom out to an actual; permanent economic loss."78 While it is reasonable for the court to decline to create a parachute for irresponsible debtors, the arguments ignore the fact that debtors may have many legitimate reasons for delaying a bankruptcy filing. For example, the debtor may have a reasonable expectation of refinancing the debt or selling the asset to satisfy the obligation. Under these circumstances, the debtor's conscientious efforts to resolve the debt, without the need for bankruptcy, are penalized, because the debtor failed to consider bankruptcy in time to identify and comply with the statutory requirements. Consequently, the legislation effectively punishes the ignorant debtor attempting to repay his obligations while granting full protection to a debtor who lacks personal responsibility but is plentiful in bankruptcy knowledge.

77 In Re Talib, 335 B.R. 417.
78 In re Waller, 332 B.R. 884.
Attorney Certification and Liability

The attorney certification and liability provisions also impose barriers to debtor relief. Although the provisions were aimed at curbing practices of bankruptcy practitioners, the legislation’s impact eventually trickles to the debtor. This is because the reform measures create attorney obligations that are likely to be passed on to the debtor through increased costs and potential filing delays.

1. Reform Measures

The BACPA imposes investigative requirements upon attorneys and makes attorneys liable for the debtor’s statements and representations. The attorney must certify that she has investigated the circumstances giving rise to the debtor’s need for relief, has determined that the pleading is well grounded in fact, has inquired as to the correctness of the information, and has no knowledge that the information is incorrect. Under certain circumstances, if the information in the petition is subsequently proven incorrect, the court may order the debtor’s attorney to reimburse the trustee for all reasonable costs in prosecuting a motion, including trustee’s attorney’s fees. The court also has the discretion to assess civil penalties against the attorney.

In addition to being liable to the court, the debtor’s attorney may be liable to the debtor if the petition is converted or dismissed. Although a penalty cannot be assessed absent a finding of intentional or negligent failure by the attorney to file a required document, the threshold for dismissal or conversion is low. For example, section 521 provides that the case is automatically dismissed on the forty-sixth day after the petition is filed if all required information was not filed.

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80 Id. at § 707 (C).
81 Id. at § 707 (4)(A)
82 Id. at § 707 (4)(B).
83 Id. at § 526(c)(2).
84 Id. at § 526(c)(2)(B).
within the first forty-five days, or if the debtor fails to attend a specific hearing. Similarly, section 707 provides that a petition may be converted if the court determines that the petition is abusive. A petition for relief is presumed to be abusive if monthly income exceeds monthly expenses. In sum, a lawyer who files a petition on behalf of a debtor could be, under certain circumstances, liable to the court for the costs of the case, to the debtor for damages, and to both the court and debtor for civil penalties.

2. Congressional Intent

Taken in whole, legislative history indicates that the certification and liability provisions were also intended to compel debt payment by effectively charging the attorneys with the responsibility of keeping debtors honest. Proponents alleged that debtor abuse resulted, in part, from the failure, by attorneys, to investigate the reliability of client statements. Senator Grassley alleged that practitioners conducted little investigation into the merits of a petition and manipulated the system by “steer[ing] high income people who can repay their debt into chapter 7.” Moreover, minority members of the National Bankruptcy Commission claimed that lawyers willingly assisted their clients’ legalized theft. Consequently, although the former system had no mechanism to control access to Chapter 7, lawyers were targeted as villains who advised their clients on “gaming” the system. Although the law was amended to restrict access to Chapter 7, the certification provisions were presumably implemented to ensure the honesty and accuracy of debtor’s statements by effectively making attorneys gatekeepers to the bankruptcy system.

85 Id. at § 521 (i)(1).
87 Id.
89 Catherine Vance, Corinne Cooper, supra.
90 Sen. Grassley, supra.
Further, the punitive measures seem to be intended to ensure the honesty of the preparing attorney. Although the legislative history indicates that attorneys assisted their clients in utilizing favorable provisions of the law, it does not suggest that attorneys were implicated for assisting clients prepare fraudulent petitions. Recall however, that attorneys were strongly criticized for dishonesty in dealings with their clients as many debtors reportedly did not intend to enter bankruptcy. Reform proponents apparently combined that fact with evidence showing numerous Chapter 7 filings. In other words, proponents inferred that but-for attorneys, debtors who could pay would pay. Although that reasoning is incorrect, (because the former system afforded a debtor the discretion to choose Chapter 7 or Chapter 13 regardless of his or her ability to pay), proponents successfully argued that the regulation of attorney practice was essential to reform. Because attorneys were so negatively characterized for their role in the former system, punitive measures were arguably warranted and reasonable.

Therefore, by requiring an attorney to certify the client's statements, reform measures arguably ensure that statements in attorney-prepared petitions are reliable. Because repayment is compelled under certain circumstances, the provision may have the secondary benefit of ensuring that only honest and deserving debtors may file in chapter 7. Thus, the underlying policy to compel payment is achieved, because the attorney prevents improper Chapter 7 filings by investigating and certifying the debtor's statements. Since the attorney may be liable if a chapter 7 petition is converted to chapter 13, the attorney is bound to verify the accuracy of the statements or face substantial and intended consequence. "Why shouldn't the lawyer pay" Senator Grassley reasoned, "if the lawyer was not substantially justified in filing?"

3. Impact on Bankrupt Debtors

Numerous scholars have suggested that the attorney certification and liability provisions

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are likely to increase debtor costs. To protect themselves from the additional risk and liability, practicing attorneys are predicted to increase their retainer fees and require documents or expert opinions to support the valuations suggested by their clients.92 The Congressional Budget Office estimated that the costs of complying with reform provisions are likely to increase attorney costs by one hundred fifty to five hundred dollars per filing.93 This is because attorneys are likely to act conservatively by investing more time or, in some cases, hire accountants or other experts to verify the information provided.94 One analyst suggested, effectively, financially struggling debtors will pay more to their lawyers for gathering documents and certifying worthless assets.95 As a result, those who are least likely to be able to pay their bills will be the least likely to afford a bankruptcy attorney.

Regrettably, the cost of access to the bankruptcy system was previously recognized as a barrier to relief:96 The additional expense necessary to confirm a debtor’s dire financial condition is almost certain to exclude even greater numbers of deserving debtors. Additionally, ordinary market conditions may increase costs as many attorneys are predicted to eliminate Chapter 7 cases from their practices altogether.97 Sadly, increased responsibilities and the increased possibility for attorney sanctions, fines, and penalties are also predicted to result in fewer volunteer efforts offered in pro bono representation programs.98

Additionally, attorneys may be compelled to delay the filing of a petition until the attorney is reasonably certain he can comply with the filing requirements. Because the attorney

94 Id.
95 Keith M. Lundin, supra.
97 Jeanne Sahadi, supra.
98 George H. Singer and Michael P. Warren, supra.
is required to perform a reasonable investigation, the delay might span a substantial period of
time that is necessary to obtain third-party assessments and certifications. Thus, a consumer
seeking bankruptcy protection will not have the immediate relief provided by the automatic stay,
unless the debtor has the forethought, prior to his first appointment, to obtain asset valuations
and documents in support of his financial disclosures. Consequently, reform measures that were
calculated to “clamp down on bankruptcy mills that make their money by advising abusers on
how to game the system”99 merely inhibit or delay legitimate debtors from obtaining necessary
relief. The relief afforded by the code is unavoidably delayed until the debtor can not only prove
that he is indeed in need of relief, but can also provide evidence in support his claim and the
representations of his assets’ values.

In signing the act into law, George W. Bush proclaimed, “the act of Congress I sign today
will protect those who legitimately need help.”100 On the contrary, attorney certification and
liability provisions create barriers for financially strapped consumers that legitimately need help.
As a result, these provisions of the BACPA make debtors extremely vulnerable to collecting
creditors, because they not only increase the debtor’s costs but potentially delay relief designed
to help debtors obtain a fresh start. Although the new law seems intended to make relief
difficult, these provisions have the potential to entirely exclude low income debtors from the
system. That result most certainly does not protect those who legitimately need help.

Debtor’s “Bill of Rights”

Throughout the years legislators debated bankruptcy reform, proponents consistently
described debtors as “deadbeats” who voluntarily incurred substantial debt without the intention
or ability to repay those debts. Legislators had little sympathy for these debtors, because they

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99 George W. Bush, supra.
100 Id.
viewed them as merely lacking in personal responsibility. However, legislative history indicates that not all debtors were in bankruptcy solely of their own volition. Instead, most debtors were faced with bankruptcy after experiencing a job loss, divorce, or substantial medical expense. Critics argued that reform measures were unduly harsh on these and other legitimately struggling debtors. In an apparent response to the criticism, proponents countered that many of the measures, commonly referred to as the “Debtor’s Bill of Rights,” were designed to protect debtors.”

1. Criticism of Attorney Practice

Although the bill of rights imposes some requirements upon credit card companies, most provisions are largely directed toward bankruptcy attorney practice. As previously discussed, legislative proponents alleged that reform measures were required to restore professionalism in the bankruptcy bar. Practice restrictions were drafted in response to claims that debtors did not intend bankruptcy or even understand that they were consulting with an attorney. Apparently, many lawyers advertised euphemistically as “debt reduction” or “federal repayment” agencies to disguise the nature of their business or downplay the consequence of bankruptcy. Senator Grassley argued that the practices of some attorneys [were] “so deceptive and sleazy that … the Federal Trade Commission [issued] a consumer alert warning consumers of misleading ads promising debt consolidation.” Other consumers reported that attorneys failed to provide significant services after the fees were paid and the petition was filed.

104 142 Cong. Rec. at E 1738.
105 Id.
106 Id.
107 Bankruptcy Revision: Hearing Before the S. Comm. on the Judiciary, 109th Congress (Feb 10, 2005) (Statement of Professor Todd J. Zywicki, Visiting Professor of Law Georgetown University Law Center).
Legislators also continued the theme alleging that lawyers counseled their clients to manipulate the system and maximize the so-called “benefit” of bankruptcy. Proponents argued that attorneys must be encouraging free spending on credit during the period the debtor contemplated bankruptcy, even though such practice was expressly in violation of the former law. In response, these measures were ostensibly drafted to ensure the debtor had the opportunity to understand the consequences of bankruptcy, as well as his acts in contemplating bankruptcy, while giving the debtor the opportunity to make fully informed decisions when employing counsel. The primary impact is on legal practice, because legislators argued that reform measures were necessary to curb the practices of a bankruptcy bar that [was] seriously out of control.”

2. Reform Measures

The code imposes specific rules to identify attorneys offering bankruptcy services. Any person who provides any bankruptcy assistance in return for money or valuable consideration is deemed a “debt relief agency” under the new law. Thus, an attorney who engages in any practice involving bankruptcy is arguably a debt relief agency, unless the practitioner offers only pro bono services. Further, all advertisement of bankruptcy services must include the statement: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” In light of the foregoing, the new law seems to ensure that all consumers seeking debt relief assistance from an attorney are fully informed that the services offered are within the context of bankruptcy.

The debt relief agencies are also required to provide specific disclosures to all counseled debtors. The attorney must provide written notice describing the various bankruptcy chapters,

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110 Id. at § 528(a)(4).
the types of services available from credit counselors, and the penalties applicable for fraudulent representations or statements. A second disclosure informs the debtor that his statements must be complete and accurate and are subject to audit. Finally, the attorney must provide a statement entitled, "Important Information About Bankruptcy Assistance Services From An Attorney or Bankruptcy Preparer." The mandatory statement is apparently intended to inform the debtor of the bankruptcy process so the debtor may discern whether professional services are appropriate for his case. At least in theory, these disclosures educate the debtor about the types of bankruptcy, the minimum requirements to enter bankruptcy, and the debtor's obligations and also give the debtor the opportunity to decide whether professional services are necessary.

Finally, reform measures direct specific legal practices. For example, if the debtor retains the attorney, the debtor and attorney must execute a written fee agreement describing the costs, fees and services. Further, the code prohibits a debt relief agency, and thus the attorney, from failing to perform any service offered. To enforce these provisions, the code gives the debtor the exclusive right to void the agreement if the attorney fails to comply with certain requirements.

3. Problems Created by the "Bill of Rights"

Clearly, there is a nexus between the described problems and the reform measures. Debtors facing bankruptcy are vulnerable and some reform measures seem to protect them from exploitation. However, certain disclosure requirements may be problematic or inadequate. This is because the disclosure requirements were designed in the context of the former system.

111 Id. at § 572 (a)(1).
112 Id. at § 527(a)(2).
113 Id. at § 527(c).
114 Id. at § 528(a)(1).
115 Id. at § 526(a).
116 Id. at § 526(c).
Because the new system is substantially more complex and contains many hazards that did not exist previously, reform measures intended to protect debtors may actually expose them to substantial risk. That is, the disclosure fails to fully inform the debtor of the processes' complexities and may give the debtor an inaccurate impression about the need for legal assistance.

Prior to executing a contract for services, the attorney is required to provide a disclosure containing mandatory statements purported to give the debtor an opportunity to "help ... evaluate how much service [is] need[ed]."117 If the debtor decides to seek bankruptcy relief, the statement informs, "you can represent yourself, you can hire an attorney... or you can get help ... from a bankruptcy petition preparer..."118 The disclosure also describes the general documents to file and the basic bankruptcy requirements, including the payment of a filing fee and attendance at a creditor's meeting.119 Finally, the disclosure explains that a bankruptcy case may involve litigation, but the debtor is generally permitted to represent himself in bankruptcy court.120 Arguably, the complete disclosure gives debtors a reasonable opportunity to determine whether legal counsel is a necessary or appropriate expense, which is certainly a legitimate question for individuals with limited resources.

However, because the mandatory language only describes routine activity, the disclosure supports an inference that counsel is generally unnecessary. Such inference may be inaccurate for many debtors. The disclosure is notably deficient, because it fails to warn the debtor of the potential hazards ahead. Under the previous system, the debtor was not at risk of procedural peril unless the debtor was found to have substantially abused the system. Under the new

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117 Id. at § 527(c).
118 Id. at § 527 (b)
119 Id.
120 Id.
system, a debtor faces an array of provisions, which if not satisfied, result in automatic dismissal on the forty-sixth day after the petition is filed. The debtor also faces dismissal if, among other things, he fails to provide a copy of a tax return to any requesting creditor or fails to timely file a tax return or extension. None of these procedural facts are included in the disclosure. Of equal concern, the disclosure fails to inform the debtor that within forty-five days after filing the petition, the debtor must both disclose his intent to reaffirm or redeem secured debt and perform upon the intent. It also does not notify the debtor that if, after declaring an intent to redeem or reaffirm a debt, the debtor fails to do so by the forty-fifth day after filing, the automatic stay on those debts are terminated, and the petition is automatically dismissed. As mentioned earlier in this article, when a petition is dismissed and subsequently refilled, the debtor may forfeit certain protections. Finally, the disclosure fails to inform debtors of the system’s mechanisms that are designed to provide the financial protection that is necessary to obtain a fresh start. For example, in every jurisdiction, a debtor is awarded exemptions that exclude certain assets or a certain amount of equity in particular assets. Thus, a disclosure intended to protect debtors from lackluster attorneys may have the inadvertent result of rendering the debtor unprepared to plead his case.

While this argument may appear to be designed to protect attorney revenues, the core issue is whether the debtor obtains adequate justice. Although the judicial system should always afford litigants the option to proceed with or without legal assistance, the rules underlying the system must be balanced, accurate and fair. As a general rule, the lack of legal representation

\[\text{121 Id. at § 521(i)(1).} \]
\[\text{122 Id.} \]
\[\text{123 Id. at § 521 (e)(2)(C).} \]
\[\text{124 Id. at § 521 (a)(6)(B).} \]
\[\text{125 Id. at § 521 (a)(6).} \]
\[\text{126 Id at § 521(i)(1) (regarding compliance with § 521(a)(6)).} \]
\[\text{127} \]
often results in the failure of debtors to resolve their legal issues, or the debtor's propensity to abandon their legal rights.\textsuperscript{128} Reportedly, \textit{pro se} litigants are more likely to neglect time limits, miss court deadlines and have problems understanding the procedural and substantive law relating to their claims.\textsuperscript{129} Therefore, the disclosure has the potential to lure a debtor into thinking he is able to proceed \textit{pro se} but neither arms nor informs the debtor of the adversarial battle that awaits him.

Finally, the code restricts the attorney’s client counseling. Section 526(a)(4) prohibits the attorney from advising a debtor to incur additional debt in contemplation of bankruptcy.\textsuperscript{130} While presumably intended to prevent a debtor from incurring debt he has no intention to pay, many scholars have argued that a narrow interpretation prohibits the debtor’s attorney from accepting payment by charge on the debtor’s credit card.\textsuperscript{131} Those scholars suggest that a strict reading of the code allows only debtors with the financial means to pay cash to obtain legal representation.\textsuperscript{132} Moreover, Professor Chemerinsky has suggested that the legislation “effectively imposes restrictions that prevent the lawyer from providing accurate, legal and desirable advice.”\textsuperscript{133} As an example, he argues, the provision restricts the attorney from advising a debtor to seek a lower interest mortgage loan or consolidate unaffordable loans into a new loan with manageable monthly payments.\textsuperscript{134} If this interpretation proves true, not only is the debtor’s access to legally desirable counseling seriously diminished, the value of the counseling may also be diminished. Ironically, if the attorney cannot advise about financing options, the attorney seems to be restricted to counseling only about options \textit{within} bankruptcy. Clearly this result is

\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at § 526 (a)(4).
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
unintended, because it is contrary to the underlying policy to encourage repayment and resolution without bankruptcy. Admittedly, this argument requires a very narrow reading of the law, but reform’s aggressive assault on bankruptcy attorneys is likely to result in very conservative practice. Within that context, this interpretation is certainly plausible.

Reform is Essential

Professor Nathalie Martin explains that bankruptcy systems are “value-laden social systems that must be drafted with care to reflect the particular values of a culture.”135 The American bankruptcy system juxtaposes two competing, and sometimes contrary, visions. On the one hand, the American economic system relies on economic risk and entrepreneurialism to propel its capitalistic system.136 Early bankruptcy policies favored forgiveness when a debtor’s default resulted in bankruptcy, because continued spending was necessary to support the overall economic system.137 On the other hand, moral norms support the position that voluntarily made promises should be recognized with good faith efforts to satisfy those promises.138 For that culture, society should be sympathetic to the financial perils of the legitimately disadvantaged debtor, but should not be responsible for the reckless abuses of irresponsible debtors.139

The fundamental tenet of American bankruptcy law historically supports the later view. The bankruptcy system traditionally offers an honest but unfortunate debtor “a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”140 Proponents consistently promised that those who legitimately needed help would not be denied relief under the new law. “We’re a nation of fairness and compassion,” the

136 Id.
137 Id.
138 Id.
139 Id.
President stated when signing the legislation, “where those who need it most are afforded a fresh start.”

The BACPA is not compassionate or fair legislation, because its affects are most harshly borne by the debtors most needing the system. The current system wrongly presumes that any debtor contemplating bankruptcy is simply fiscally irresponsible or morally reprehensible, and it erroneously assumes that every debtor entering bankruptcy has made virtually no other effort to resolve the financial crisis. Consequently, the new law imposes harsh results upon the most earnest debtors and may have counter-productive results. The legislation needs to be revamped to consider the needs of the debtor who seeks emergency relief as a last resort after persistent efforts to resolve their financial crisis.

Even purportedly kind and compassionate provisions impose barriers to vital protection and have the potential to kill the debtor’s prospects for financial recovery: the consumer counseling prerequisite delays the automatic stay relief; the attorney certification and liability provisions probably increase cost and delay filing; and the mandatory disclosure statement inadequately prepares debtors for pro se litigation. Moreover, reform measures that were designed to combat problems in the context of the former system apparently did not consider how new provisions would be integrated. Consequently, the legislation contains duplicate remedies and sometimes results in situations that are counter to the policy expressed by legislative history.

To ameliorate this result, reform is essential. First, the credit counseling prerequisite should be abolished, because it imposes the greatest burden upon the most desperate debtors. Because the credit counseling industry was designed to assist creditors, the industry is not impartial. Debtors may be vulnerable to the ulterior motives of the counselors, the individual

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141 George W. Bush, supra.
agencies, or the creditors funding the not-for-profit organizations. The debtor is also at risk of permanently losing assets, the ability to earn income, and the legal protection afforded by the code.

In addition to the harsh effects the requirement imposes upon debtors, the requirement sometimes results in situations that are counter to reform policy or simply absurd. If the debtor is unable to obtain the counseling, the requirement delays the automatic stay, which may result in the loss of income or assets and limit the debtor’s ability to repay his debts. Further, the exigent circumstances exception harshly penalizes debtors who are making every effort to avoid the need for bankruptcy. If the debtor truly makes every effort to avoid bankruptcy and is unable to obtain counseling before filing, recent cases indicate that the debtor will be denied the exigent circumstance exception. Ironically, the federal common law also indicates that the exception rewards debtors with the foresight to “plan” their bankruptcy. This provision also has the absurd result of penalizing debtors for “multiple filings” even when the debtor did not obtain even one day of relief from the first petition.

The prerequisite is also redundant, because other reform provisions accomplish similar purposes. Thus, eliminating the requirement will not open the door to abuse, because under the new law, debtors who are determined to have the means to pay their debts are required to pay. In fact, once the debtor enters bankruptcy, the debtor is required to direct one hundred percent of disposable income to his debts. Effectively, the means test accomplishes the result intended by the counseling, because it evaluates whether or not the debtor is able to pay and compels payment when the mathematical standards so warrant. Similarly, other concerns addressed by the counseling requirement are remedied by provisions of the new law. For example, the new disclosure requirements virtually eliminate the occasion for an “accidental” bankruptcy filing,
and because a debtor is required to complete a financial management class before grant of
discharge, the educational purpose is fulfilled. Furthermore, eliminating the prerequisite
eradicates absurd results that penalize earnest debtors. Therefore, a reform proposal that
eliminates the counseling prerequisite restores some measure of fairness in the system without
jeopardizing the goals of reform.

Secondly, the attorney certification requirements must be amended to ensure that they do
not delay the debtor's relief. Under the current system, the attorney may be compelled to wait to
file a petition until she receives evidence supporting the debtor's disclosures, because the
attorney is substantially liable for the debtor's statements and representations. The law should be
amended to allow the attorney to certify the statements at any time before the creditor's meeting,
rather than when the petition is filed. This would provide automatic relief upon filing of the petition
and allow the debtor sufficient opportunity to provide current statements to his attorney. It would
also eliminate the absurd result under the current system that rewards debtors who have the
foresight to "plan" their bankruptcy while penalizing those who do not.

Finally, the mandatory disclosure statement must be substantially revised to properly
inform debtors of the role of the attorney, the debtor's obligations and the consequences of
failing to meet those obligations. Because current disclosure requirements were designed for the
former system, the information contained in the disclosure substantially misrepresents the
potential complexity of the process. Reform measures need to ensure that the disclosure
properly informs the debtor of his obligations in bankruptcy and the various means in which his
petition may be dismissed. Although this could be accomplished by reforming the law, a change
in the law is not essential, because there does not appear to be any provision which limits the
attorney disclosure to the mandatory statements. Accordingly, attorneys could conceivably
provide a disclosure statement, which meets the requirements imposed by the law but also provides adequate information. Perhaps the American Bar Association could draft a form to serve this purpose. Thus, if the debtor elected to represent himself in bankruptcy, at least the debtor would have an accurate map to guide him in his journey.

Clearly, the BACPA is an ambitious piece of legislation with substantial reform intentions. Unless it was intended to virtually eliminate the relief historically provided in bankruptcy, additional reform is essential. The current system fails legitimately struggling debtors and renders the long-standing policy of discharging debt to honest but unfortunate debtors a mere footnote in history.

THE END