MEDICAL BANKRUPTCY REFORM: A FALLACY OF COMPOSITION

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ABSTRACT

Congress is considering adding special provisions to the Bankruptcy Code for individuals with medical debt. The pending legislation creates preferential rules for "medical bankruptcies." The reform is based on a premise that most consumer bankruptcies are caused by medical debt, so that most consumer bankruptcy cases are "medical bankruptcies." The authors analyze this premise and show that, although many debtors have some medical debt, most debtors with medical debt are not "medical bankruptcies." The premise of the pending legislation is shown to be nothing more than a classic case of a "fallacy of composition" and the reform will likely lead to abuse of the relief afforded under the Bankruptcy Code.

INTRODUCTION

Rhetoric is powerful. It is particularly powerful in debates that invoke emotion and anger, and raise serious moral questions. Policymakers often latch on to facts asserted in a policy domain, whether true or not, and characterize them in ways—through an effective use of rhetoric—to propel certain initiatives onto the agenda. This is the case in the healthcare and bankruptcy policy domains. Policymakers in both domains use data from their respective fields to advance reforms in the other domain,[1] often couching their arguments in terms of clear empirical causal connections.[2] The debates often turn into bipolar debates that pit consumer-oriented

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[1] Senator Max Baucus working on a healthcare bill used bankruptcy filing rates to support healthcare reform. He stated, "And, you know, one—if the coverage is at least 65 percent it's going to probably reduce the incidence of bankruptcies." *Sen. Max Baucus Holds a Markup on Health Care Reform*, CQ CAP. TRANSCRIPTS, Sept. 29, 2009, *available at* 2009 WLNR 19277273.

[2] In the bankruptcy policy domain, there has been great progress in empirical research over the last twenty years. *See* Jay Warren Westbrook, *Empirical Research in Consumer* Bankruptcy, 80 TEX. L. REV. 2123, 2124 (2002). The problem lies not in the empirical research done, but in the interpretation of such work and the implementation of sound policies based on that work. As with many areas of empirical research and the law, results are often mixed. Advocates on either side of a debate often point to empirical work to support their conclusion without critically examining the results. Couching the problem and solution as crystal clear based on empirical work leads to distortions of the empirical results found, and can often lead to policies that are misguided. This has occurred in both the healthcare and bankruptcy policy domains.

advocates and business-oriented groups against each other, with each casting blame on the other.[3]

For example, in the context of the healthcare reform debate, consumer bankruptcy reform was a sub-issue. In the 2009 State of the Union address, Barack Obama said, "we must also address the crushing cost of health care. This is a cost that now causes a bankruptcy in America every thirty seconds."[4] The President took the rhetoric a step further when he said, "The crushing costs of health care causes [sic] a bankruptcy in America every 30 seconds. And by the end of this year, it could cause 1.5 million Americans to lose their homes."[5] This assertion that healthcare costs are *the* cause of consumer bankruptcy has been repeated over and over again, to such an extent that it is accepted as fact without any qualification or context placed on the assertion.[6]

The connection between healthcare costs and consumer bankruptcy has been used as a justification for several bills pending in Congress that relax the requirements in the Bankruptcy Code for debtors with medical debts, *i.e.*, "medical bankruptcy." The problem is that the underlying justification—a clear causal connection between medical debts or healthcare costs and most consumer bankruptcy filings—is not as strong as the political rhetoric proclaims. Medical

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[3] For example, Professor Katherine Porter recognized in the consumer bankruptcy debate that "consumer advocates lay blame on the industry, and the industry responds by citing the same data to show consumer misbehavior." Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1369 (2008).

[4] President Barack Obama, State of the Union Address (Feb. 24, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-address-joint-session-congress.

[5] *White House Spotlights Health Care*, NPR News (Mar. 3, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=101368678. The Obama Administration repeatedly has relied on this connection. *See, e.g.*, President Barack Obama, Remarks at the White House Forum on Health Reform (Mar. 5, 2009), *available at* http://www.whitehouse.gov/assets/documents/White_House_Forum_on_Health_Reform_Report.pdf.

Many other politicians have asserted the same proposition. Senator Ted Kennedy wrote, "Every 30 seconds in the United States a family is forced into bankruptcy because of unexpected medical expenses." Senator Edward M. Kennedy, *Health Care as a Basic Human Right: Moving from Lip Service to Reality*, 22 HARV. HUM. RTS. J., 165, 166 (2009).

A countless number of scholars have asserted the same connection. *See, e.g.*, David U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 741 ("62.1% of all bankruptcies in 2007 were medical"); Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 408–09 (indicating increased correlation between medical and financial distress); Katherine L. Record, Note, *Wielding the Wand Without Facing the Music: Allowing Utilization Review Physicians to Trump Doctors' Orders, But Protecting Them from the Legal Risk Ordinarily Attached to the Medical Degree*, 59 DUKE L.J. 955, 964 (2010) ("Without drastic reductions in health care spending, an unprecedented number of Americans will face bankruptcy merely by seeking necessary treatment.").

[6] Even our own members of Congress assume the clear linkage exists without any question. Senator Max Baucus stated, "I saw figures someplace, every 30 seconds, someone in America goes into bankruptcy due to medical care costs or at least it's medical cost related." *Sen. Max Baucus Holds a Markup on Health Care Reform*, *supra* note 1. Congressman Phil Hare touted the same conclusions on *The Ed Show* recently. Congressman Hare stated, "I care about the price that the people are paying when they lose their home every 30 seconds because of health care. Every 30 seconds in this country, Ed, a bankruptcy." *The Ed Show* (MSNBC News, Jan. 26, 2010), *available at* 2010 WLNR 1682152.

debt does not necessarily lead to bankruptcy. But rather, "[m]edical bankruptcy is at the extreme end of the spectrum of medical debt."[7] Nor does a debtor with medical debt necessarily warrant characterizing it as a medical bankruptcy. Simply because some debtors with medical debt may justifiably be characterized as a medical bankruptcy, it does not mean all debtors with medical debt are medical bankruptcies—a classic case of the "fallacy of composition."[8]

The result is a legislative agenda in the bankruptcy policy domain that does not address the root causes of consumer filings. The medical bankruptcy reform proposed is a relaxation of the requirements for debtors with medical debt to file for bankruptcy relief. Assuming medical debts are the cause of the majority of consumer bankruptcies, the reform does not address the root cause of unpaid medical debt. Likewise, even if medical debt is not the root causal factor, but rather a factor among many others such as divorce and unemployment,[9] of consumer bankruptcy filings, medical bankruptcy reform does nothing to mitigate the incidence of consumer filings.

Following this Introduction is an overview of the current state of consumer bankruptcy in the U.S. and a summary of the medical bankruptcy reform legislation. Part II explores the empirical research on medical bankruptcies, the causal connection between medical debts and consumer bankruptcies, and the validity of that linkage based on empirical research in the field. The recent healthcare reform and its impact on medical bankruptcies, and the adequacy of the current consumer bankruptcy system are also examined. The problems that will likely arise with medical bankruptcy reform are explored in Part III. Part IV provides conclusions and identifies areas of needed research.

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[7] Robert W. Seifert & Mark Rukavina, *Bankruptcy is the Tip of a Medical-Debt Iceberg*, 25 HEALTH AFF. W89, W89 (2006), *available at* http://content.healthaffairs.org/cgi/content/full/25/2/w89.

[8] The fallacy of composition assumes "without proper warrant that what is true for individual members of a group is true for the entire group." Philip Harvey, *Is There a Progressive Alternative to Conservative Welfare Reform?*, 15 GEO. J. ON POVERTY L. & POL'Y 157, 170 (2008); *see also* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 348 (2004) (citations omitted) ("In his *Sophistical Refutations*, Aristotle described what has come to be known as the fallacy of composition, i.e., confusing the distributive and collective senses of a class. He gives several examples. A sitting man can walk, and a walking man can stand; ergo a man can walk and sit at the same time. A man can carry each of several burdens; ergo he can carry all of them at once."); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 339 (2003) (citations omitted) ("The fallacy of composition is the assertion that, if something is true for individual members of a group, then it must be true for the group as a whole.").

[9] The predominant causes of consumer bankruptcy typically are "medical debts, a divorce, or a job interruption." A. Mechele Dickerson, *Consumer Over-Indebtedness: A U.S. Perspective*, 43 TEX. INT'L L. J. 135, 146 (2008) (citation omitted); *see also* Jay L. Zagorsky & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?*, 16 AM. BANKR. INST. L. REV. 283, 295 (2008) (discussing financial distress and debt typically associated with "divorce, sickness-related expenses, [and] job loss"); Jean Braucher, *Middle-Class Knowledge*, 21 EMORY BANKR. DEV. J. 193, 207 (2004) (book review) ("[T]he 'big three' reasons debtors give for filing [bankruptcy petitions] are job loss, illness, and divorce.").

I. OVERVIEW OF CONSUMER BANKRUPTCY AND PROPOSED MEDICAL BANKRUPTCY REFORM

A. Consumer Bankruptcy in the U.S.

Most consumer bankruptcies are under chapter 7 or chapter 13.[10] In most chapter 7 cases, debtors receive a discharge of their debts, provided they liquidate any non-exempt assets.[11] Under chapter 13, a debtor can retain its non-exempt assets in exchange for repaying a portion of its debts, at least as much as would be paid in a chapter 7 case, through a court approved repayment plan.[12] After completion of the plan, most debtors receive a discharge of the remaining unsecured debts.[13]

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[14] went into effect.[15] BAPCPA was the most significant overhaul to the Bankruptcy Code[16] ("Code")[17] since its enactment in

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[10] *See* Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L.J. 17, 18 (1989) (discussing how individuals filing bankruptcy petitions face choice of filing under chapters 7 or 13); Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 127 n.32 (2004) ("Chapter 7 accounts for approximately seventy percent of all non-business bankruptcy filings with almost all of the remaining non-business bankruptcies filed in Chapter 13."); *see also Annual Non-Business Bankruptcy Filings by Chapter (2007-09)*, ABIWORLD.ORG, http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=60257 (last visited Jan. 17, 2011) (showing how majority of consumer bankruptcies are filed under chapters 7 or 13). A very small number of consumer bankruptcy cases are filed under chapter 11. *See id.* (highlighting relatively few number of bankruptcy cases filed under chapter 11 annually); *see also* Richard H.W. Maloy, *"She'll Be Able to Keep Her Home Won't She?"—The Plight of a Homeowner in Bankruptcy*, 2003 MICH. ST. L. REV. 315, 335 (2003) (discussing how, although chapter 11 is used mainly by businesses, individuals are also permitted to file under chapter 11); Elijah M. Alper, Note, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1913–14 & n.35 (2007) (discussing rarity of chapter 11 filings).

[11] *See* 11 U.S.C. § 727 (2006); Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367, 370–71 (2009) (describing chapter 7 bankruptcy procedures).

[12] *See* 11 U.S.C. §§ 1322, 1328; Lefgren & McIntyre, *supra* note 11, at 370–71.

[13] *See* 11 U.S.C. § 1328; Lefgren & McIntyre, *supra* note 11, at 370–71 (discussing when debts are discharged under chapter 13); *see also In re* Patton, 261 B.R. 44, 47–48 n.3 (Bankr. E.D. Wash. 2001) ("Discharge is not entered in Chapter 13 cases until completion of plan payments . . . If the debtors fail to complete the plan payments no discharge will be entered in their cases."); Maloy, *supra* note 10, at 331–32 (discussing discharge in chapter 13 and noting how chapter 13 "discharge is of all debts 'provided for by the plan' after the plan has been completed").

[14] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.) [hereinafter BAPCPA].

[15] For a discussion of the history and road to the legislation, see generally Susan Jensen, *A Legislative History of the Bankrutpcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

[16] *See* Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5, 5 (2009) [hereinafter Pardo, *An Empirical Examination*] ("The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA') represents the most significant overhaul of federal bankruptcy law since the Bankruptcy Code's enactment in 1978."). *See generally* Dorothy Hubbard Cornwell, *To Catch a KERP: Devising A More Effective Regulation Than § 503(c)*, 25 EMORY BANKR. DEV. J. 485, 486 (2009) (citation omitted) (noting how passage of BAPCPA was one of "the most comprehensive

1978.[18] BAPCPA did not modify the two primary avenues for consumers to seek relief: chapter 7 or chapter 13. However, BAPCPA created procedural hurdles designed to limit the number of chapter 7 filings by driving more individual consumer debtors to chapter 13 through a means test.[19] Prior to BAPCPA, individuals largely chose between chapter 7 or chapter 13 based on the circumstances and legal consequences of the choice. Most consumer filings were under chapter 7, and, in most chapter 7 cases, there was no return to unsecured creditors.[20] Debtors now must qualify for the relief they request.[21] In effect, the system prior to BAPCPA was an income-tax type of system with debtors largely self-reporting, but was transformed into a welfare type system that requires documentation to qualify for the relief requested.[22] The primary tool to steer debtors from chapter 7 to chapter 13 is the statutory means test.[23] The presumption in favor of debtors under the law prior to BAPCPA was eliminated and replaced with "an emphasis on repaying creditors as much as possible."[24] Most view the reform as favoring creditor interests.[25]

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overhauls of the Bankruptcy Code in more than 25 years"); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 478–79 (2007) [hereinafter Pardo, *Eliminating the Judicial Function*] (highlighting major changes resulting from passage of BAPCPA in 2005).

[17] 11 U.S.C. §§ 101–1527. Unless otherwise noted, all references to the Bankruptcy Code, Code, or section are to title 11 of the United States Code, including amendments made by BAPCPA.

[18] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). The Bankruptcy Reform Act of 1978 took effect on October 1, 1979. *See id.* § 402(a), 92 Stat. 2682.

[19] *See* 11 U.S.C. § 707(b); Bud Stephen Tayman, *After BAPCPA: New Challenges for Chapter 13 Filers and their Attorneys*, *in* BEST PRACTICES FOR FILING CHAPTER 13 (2010), *available at* 2010 WL 3934, at *2; *see also* Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCA*, 25 EMORY BANKR. DEV. J. 407, 419 (2008) (listing procedural requirements); Tally M. Wiener & Nicholas B. Malito, *On the Nature of the Chapter 7 Trustee Fee*, 18 NORTON J. BANKR. L. & PRAC. 211, 211 (2009) (describing effects of new procedures).

[20] *See* Pardo, *An Empirical Examination*, *supra* note 16, at 13 (noting unsecured creditors frequently received nothing simply because debtor filed chapter 7); *see also In re* Dumas, 419 B.R. 704, 707 (Bankr. E.D. Tex. 2009) (describing one goal of BAPCPA is to generate return to unsecured creditors not available under chapter 7); *In re* Krohn, 78 B.R. 829, 833 (Bankr. N.D. Ohio 1987) (noting potential for abuse of chapter 7 in avoiding payment to unsecured creditors).

[21] *See, e.g.*, *In re* Dionne, 402 B.R. 883, 887 (Bankr. E.D. Wis. 2009) (recognizing means test intended to standardize qualification for relief under chapter 7); *see also* Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191, 217 (2009) (describing effect of qualification); MacArthur, *supra* note 19, at 419 (listing procedural requirements).

[22] *See, e.g.*, 11 U.S.C. §§ 109(h)(1), 342(b), 521(a)(1)(B)(iv)–(vi), 521(b), 521(e)(2) (requiring various documentation and describing debtor's duties); *see also* MacArthur, *supra* note 19, at 419 (listing documents); Pardo, *An Empirical Examination*, *supra* note 16, at 14–15 (discussing self-reporting and new procedures).

[23] *See* 11 U.S.C. § 707(b)(2) (enumerating situations where court may force conversion of chapter 7 to chapter 11 or 13); *In re* Carrillo, 421 B.R. 540, 545 (Bankr. D. Ariz. 2009) ("Congress intended the means test as a mechanical formula for determining whether Chapter 7 debtors have the means to repay a portion of their debts and should therefore be required to do so by filing a Chapter 13 in order to obtain a discharge."); *In re* Littman, 370 B.R. 820, 828 (Bankr. D. Idaho 2007) (citing *In re* Mundy, 363 B.R. 407, 413 (Bankr. M.D. Pa. 2007)) (noting means test adopted to identify debtors who could repay debts and "steer them away from chapter 7 into chapter 13").

[24] *In re* Stubblefield, 430 B.R. 639, 645 (Bankr. D. Or. 2010), which wrote as follows:

The means test requires an examination of the chapter 7[26] debtor's monthly income in comparison with the median income in the state they reside.[27] If the debtor's income is higher, then the debtor must complete a detailed analysis of the debtor's expenses to determine if the debtor has sufficient funds to repay creditors.[28] If the debtor has sufficient funds, the case is presumed an abuse.[29] Absent the debtor rebutting the presumption of abuse, the case is due to be dismissed.[30] In effect, the means test "closes the chapter 7 door to individual debtors able to repay a certain amount of consumer debts, and restricts them to a choice between filing chapter 13

> Prior to BAPCPA, there was a presumption "in favor of granting the relief requested by the Debtor." 11 U.S.C. § 707(b) (2004). This presumption could be overcome if the court found that "granting of relief would be a substantial abuse" of Chapter 7. . . . BAPCPA produced a sea change. There is now no presumption favoring Chapter 7 relief, but an emphasis on repaying creditors as much as possible. H.R. REP. No. 109-31, pt.1 at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Id. (emphasis omitted) (quoting Egebjerg v. Anderson (*In re* Egebjerg), 574 F.3d 1045, 1048 (9th Cir. 2009)).

[25] *See, e.g.*, Porter, *supra* note 3, at 1371 (stating reform of bankruptcy law favored creditors' interests and obtaining consumer bankruptcy relief is now "more expensive, time-consuming, and difficult"); *see also* Arruda v. Sears, Roebuck & Co., 273 B.R. 332, 347 (D.R.I. 2002) (indicating Congress sought to strengthen protection for creditor in Bankruptcy Reform Act of 1978); *In re* Ott, 343 B.R. 264, 266 n.4 (Bankr. D. Colo. 2006) (emphasizing BAPCPA's creditor-friendly language serves to remedy "imbalance in the Code favoring debtors").

[26] The means test is employed in chapter 13 for above-median debtors as well. *See* 11 U.S.C. § 707(b)(2) (listing additional requirements for debtors eligible for chapter 13); 11 U.S.C. § 1325(b)(3)(A) (providing for adjustment of debts of individuals with regular incomes under chapter 13).

[27] *See* Lauren E. Tribble, Note, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 800–01 (2007) (stating first step of means test is to determine if current monthly income is greater than median income in state in which debtor resides); *see also* 11 U.S.C. § 1325(b)(3)(A) (relying on section 707(b)(2) to calculate amounts reasonably necessary to be expended if debtor's current monthly income, multiplied by twelve, is greater than median family income for one earner); *In re* Louis, No. 07-13019-SSM, 2008 WL 1777461, at *1 (Bankr. E.D. Va. Apr. 16, 2008) (explaining means test applies to consumer debtors whose household income exceeds statewide median for household of same size).

[28] *See* Tribble, *supra* note 27, at 800–01 (discussing mechanics of means test and stating it allows deduction of certain expenses from current monthly income to determine disposable income, which dictates whether or not debtor passes means test); *see also* 11 U.S.C. § 1325(b)(2)(A)(i) (defining "disposable income" and directing debtor to subtract "amounts reasonably necessary to be expended for the maintenance or support of debtor or a dependent of the debtor" from debtor's current monthly income); *In re Louis*, 2008 WL 1777461, at *1 (stating means test computation is current monthly income–average of income, with certain exclusions, received in six months pre-petition–minus specified living expenses).

[29] *See* Tribble, *supra* note 27, at 802 (stressing debtor is presumed to be abusing bankruptcy system if debtor is able to pay creditors); *see also* 11 U.S.C. § 707(b)(2)(A)(i) (stating judges "shall presume abuse exists" if income reduced by expenses and multiplied by sixty is not less than lesser of $6,000 or $10,000).

[30] *See* Tribble, *supra* note 27, at 802 (indicating "judges have no choice but to presume abuse" when debtor fails means test, and stressing difficulty of rebutting presumption); *see also* 11 U.S.C. § 707(b)(2)(B)(i) (stating special circumstances, such as serious medical condition or call to active duty may rebut presumption of abuse); *In re Louis*, 2008 WL 1777461, at *1 (stating, if case is presumed to be abuse of chapter 7, it must be dismissed unless debtor demonstrates special circumstances rebutting presumption or agrees to convert case to chapter 13).

(if they are eligible) and chapter 11,"[31] or addressing the situation outside of bankruptcy law.[32]

B. Medical Bankruptcy Reform

1. Political Environment

Currently, there are bills pending in both the House of Representatives and Senate, the Medical Bankruptcy Fairness Act ("MBFA"),[33] that create a special category of bankruptcy relief for medical debtors. Before discussing the specific proposed statutory reforms, recognizing the political environment and posture of such legislation is useful to appreciating the intent behind the MBFA. The proposition of providing special protections to such debtors is not new. Amendments attempting to provide some of these protections were proffered, but rejected, in the passage of BAPCPA.[34] In the political environment in which BAPCPA was passed, such an amendment could not win sufficient support; however, with the political landscape dramatically different, such legislative efforts will likely receive more support. This, coupled with the incremental nature of policymaking,[35] may make it a bit easier to move such legislation through.

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[31] Howard, *supra* note 21, at 217.

[32] There are a host of non-bankruptcy alternatives to deal with financial problems of an individual; however, the usefulness of each alternative may be very limited depending on the particular situation. For an overview of a wide range of alternatives, see 9 AM JUR. 2D *Bankruptcy* § 33 (2010).

[33] Medical Bankruptcy Fairness Act of 2009, S. 1624, 111th Cong. (2009) [hereinafter MBFA] (proposing title 11 amendment for protection of those whose debt arose from medical expenses).

[34] *See, e.g.*, 109 CONG. REC. S2324–25 (daily ed. Mar. 9, 2005) (statement of Sen. Clinton) (arguing in support of amendments for protection of families facing medical bankruptcy); Jensen, *supra* note 15, at 565–66 (discussing rejected amendments to expand means test safe harbor); Patricia A. Redmond & Jessica D. Gabel, *Summary of Certain Critical Consumer and Exemption Provisions*, *in* BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 40 (A.L.I.-A.B.A. 2005), *available at* Westlaw, SL068 ALI-ABA 25 (noting introduction and rejection of medical bankruptcy exemption).

[35] Most policymaking and legislation is a result of "incrementalism," rather than a "rational comprehensive method." Therefore, creating a special category or rules for one type of debtor is likely more feasible in the context of limited reform effort, as opposed to widespread reform of the bankruptcy system. For a discussion of "incrementalism," a watershed theory in public policy, see Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79, 81, 84–85 (1959); Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517, 517–18 (1979). A commentator succinctly summarized Lindblom's theory as follows:

> In complex areas of policymaking, Lindblom argued, humans are incapable of designing perfect systems because human rationality is inherently limited. Instead of striving to apply a universal theory to the task and hope that first efforts will yield a fully-formed, all-inclusive scheme, Lindblom advises, policy-makers should accept that incremental alterations will be required as the policy is tested, with each test yielding useful information about its utility.

Sharon B. Jacobs, *Crises, Congress, and Cognitive Biases: A Critical Examination of Food and Drug Legislation in the United States*, 64 FOOD & DRUG L.J. 599, 626 (2009).

For further discussion of Lindblom's theory in different areas of the law, see Cary Coglianese & Jocelyn D'Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate*

Even with the more favorable political environment, whether the MBFA will become law is still questionable. The key determinant will be politics. Policy decisions rely in large part, as identified by John W. Kingdon, on the convergence of three separate streams: problem, policy and political.[36] Whether there will be a convergence of the problem, policy and political streams for the MBFA is unknown at this juncture. The way a problem is defined is likely the determinative factor in "the likelihood of any eventual public policy formulation."[37] This is because the problem definition directly leads to the policy stream or solution.[38] The current problem stream, *i.e.*, the definition of the problem,[39] is not very convincing when it is closely scrutinized. The problem is defined by proponents of MBFA like most other problem streams—it is largely based on mainstream views or judgments in society.[40] This was the case with BAPCPA in which the problem was defined as too many consumer bankruptcies.[41] The problem is defined by proponents of MBFA as a high incidence of medical bankruptcy cases in which individuals are not afforded adequate bankruptcy relief.[42] The policy stream—the policy solution—offered by

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Change, 40 CONN. L. REV. 1411, 1411 (2008) (critiquing use of incrementalism in policies affecting climate change); Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 513 (2008) (discussing incrementalism and gun control policies); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Adminsitrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59, 72 (2010) (discussing role of incrementalism on how agencies address massive problems).

[36] *See, e.g.*, JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 16–20 (2d ed. 2003). For a concise overview of Kingdon's streams analogy, see Richard S. Whitt, *Adaptive Policymaking: Evolving and Applying Emergent Solutions for U.S. Communications Policy*, 61 FED. COMM. L.J. 483, 506 (2009) (explaining each element of streams analogy); see also William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 641 (2001) (discussing Kingdon's stream analogy in governmental decision making).

[37] Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 80 (2009).

[38] This point was recognized by Kingdon, and reiterated recently: "The 'problems' stream includes certain societal conditions that are defined by some as problems in need of a policy solution." Whitt, *supra* note 36, at 506 (citation omitted).

[39] *See* Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J.L. & POL'Y 119, 147–58 (2007) (discussing importance of problem definition).

[40] *See, e.g.*, William S. Blatt, *Missing the Mark: An Overlooked Statute Redefines the Debate Over Statutory Construction*, 64 U. MIAMI L. REV. 641, 657 n.119 (2010) (commenting Kingdon's "problem stream" is mainly formed by societal judgments); Blatt, *supra* note 36, at 644 (noting role of general public opinion in problem stream); Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509, 526 (2003) [hereinafter Landry, *The Policy and Forces*] (indicating problem definition and solutions are defined to gain public support necessary to complete problem stream).

[41] *See* Landry, *The Policy and Forces*, *supra* note 40, at 518–19 (commenting rise in consumer bankruptcy characterized by credit and lending industry as harmful to all consumers); Porter, *supra* note 3, at 1377 (discussing decade-long effort by creditors to enact bankruptcy reform to respond to rising consumer bankruptcy rate); Press Release, Sen. Chuck Grassley, Opening Statement of Sen. Chuck Grassley at the Bankr. Reform Hearing (Feb. 10, 2005), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=9716, (suggesting bankruptcy reform necessary because high level of consumer bankruptcies hurts businesses and society as whole).

[42] 155 CONG. REC. S9,022 (daily ed. Aug. 6, 2009) (statement of Sen. Whitehouse) (introducing legislation providing individuals greater protection from bankruptcy resulting from high medical bills); Press Release,

MBFA is to enhance bankruptcy protections for such debtors.[43] As discussed below, this policy solution is riddled with issues and may not even effectively address the problem definition,[44] assuming it is correct. And, even if the problem and policy streams coincide, there may be enough support—the political stream—to overcome opposition to the MBFA. Absent all three streams coinciding, there will not be a "policy window" for passing the MBFA.[45]

2. Summary of MBFA

The core of the MBFA is a newly defined class of chapter 7 debtor, the "medically distressed debtor."[46] First, an individual who has incurred or paid $10,000 or ten percent of his/her adjusted gross income in medical debt, which has not been paid by a third party, for the debtor or any immediate family member during any consecutive twelve-month period in the three years prior to filing bankruptcy qualifies as a medically distressed debtor.[47] Second, if an individual is a member of a household in which one of the household members lost his/her domestic support obligation income due to a medical problem of the person, and is obligated to pay the support for 4 or more weeks during any consecutive 12-month

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Senator Sheldon Whitehouse, New Legislation Would Help Families Struggling with Medical Debt (Aug. 6, 2009), *available at* http://whitehouse.senate.gov/newsroom/press/release/?id=3f03685e-913e-4c77-a395-e359466f2635 (indicating MBFA of 2009 would afford individuals more protection from bankruptcy resulting from high medical bills); John T. Orcutt, *Medical Bankruptcy Fairness Act of 2009*, N.C. BANKR. BLOG (Nov. 10, 2009, 11:16 AM), http://www.billsbills.com/bankruptcy-blog/medical-bankruptcy-fairness-act-of-2009/ (remarking MBFA would provide needed relief for individuals facing bankruptcy simply because of medical problems).

[43] 155 CONG. REC. S9,022 (daily ed. Aug. 6, 2009) (statement of Sen. Whitehouse) (stressing MBFA necessary to "help people who because of medical costs have no other choice but to file for bankruptcy" avoid complete poverty); Press Release, Senator Sheldon Whitehouse, New Legislation Would Help Families Struggling with Medical Debt (Aug. 6, 2009), *available at* http://whitehouse.senate.gov/newsroom/press/release/?id=3f03685e-913e-4c77-a395-e359466f2635 (stating MBFA would allow individuals with high medical debts they cannot pay to keep their homes and avoid poverty); Orcutt, *supra* note 42 (commenting MBFA common sense solution helps poor individuals keep their homes when faced with huge medical bills).

[44] *See infra* notes 116–80 and accompanying text.

[45] *See, e.g.*, Whitt, *supra* note 36, at 506 (citation omitted) (determining "policy window" works toward final legislation only when problem, policy, and political streams coincide); ANN M. GALLIGAN & CHRIS N. BURGESS, CULTURAL POLICY PROGRAM OCCASIONAL PAPER SERIES, MOVING RIVERS, SHIFTING STREAMS: PERSPECTIVES ON THE EXISTENCE OF A POLICY WINDOW 1 (2003), http://arted.osu.edu/publications/pdf_files/paper29.pdf (discussing combination and timing of streams necessary to change governmental policies); *Policy and Politics: Why do Windows of Opportunity Close*?, THE POLICY PRESS BLOG (Aug. 5, 2010), http://policypress.wordpress.com/2010/08/05/policy-politics-why-do-windows-of-opportunity-close/ ("The alignment of the problem, policy and politics streams opens a window of opportunity for change.").

[46] MBFA, § 2(a)(1) (2009).

[47] *See id.*; *see also Medical Debt: Can Bankruptcy Reform Facilitate a Fresh Start?: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the Senate Judiciary Comm.*, 111th Cong. 4 (2009) (statement of Aparna Mathur, Research Fellow) [hereinafter Mathur Statement], *available at* http://www.aei.org/speech/100089 (criticizing proposed Act's definition of "medically distressed debtor" in relation to amount of yearly income used to pay medical bills not covered by medical insurance).

period in the last 3 years, s/he also qualifies.[48] Third, an individual can be a medically distressed debtor if s/he lost work due to a medical condition or for caring for a nondependent immediate family member for at least 30 days during any consecutive 12-month period in the last 3 years.[49]

If a debtor qualifies as a medically distressed debtor s/he is afforded three specific protections not afforded to other chapter 7 consumer debtors. First, the medically distressed debtor is allowed enhanced exemptions.[50] Rather than being afforded the real property exemption under the Code of $20,200[51] or applicable state law,[52] medically distressed debtors are afforded a homestead exemption of up to $250,000.[53] Second, the requirement of pre-petition credit counseling[54] would be waived for medically distressed debtors.[55] And third, the presumption of abuse

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[48] *See* MBFA, § 2(a)(1) (protecting debtors from losing all or substantial amount of household income due to another household member's medical problems); *see also* Mathur Statement, *supra* note 47, at 4–5 (explaining inclusion of persons living in households with others who have lost week for four weeks in preceding twelve months for medical reasons into definition of "medically distressed debtors").

[49] *See* MBFA, § 2(a)(1) (including unemployed persons into "medically distressed debtor" definition if unemployment lasted 30 consecutive days and resulted from personal injury or providing care to immediate family member); *see also Medical Bankruptcy Fairness Act: Hearing on H.R. 901 Before the H. Subcomm. on Commercial and Admin. Law*, 111th Cong. 2 (2010) (statement of Peter Wright, Professor of Law, Franklin Pierce Law Center) [hereinafter Wright Statement] (reviewing MBFA definition of "medically distressed debtor" to include debtors who have lost or interrupted stream of income for medical reasons).

[50] *See* MBFA, § 3(a) (expanding upon exemptions listed in 11 U.S.C. § 522(b)(2)–(3) (2006) for medically distressed debtors); *see also* Mathur Statement, *supra* note 47, at 5 (arguing enhancement of exemptions for medically distressed debtors will change behavior of debtors allowing for abuse and harming bankruptcy system).

[51] *See* 11 U.S.C. § 522(d)(1) (exempting debtor real property interests not to exceed $21,625); Schwab v. Reilly, 130 S. Ct. 2652, 2661–62 (2010) (interpreting homestead exceptions to apply only to interests "up to a specified dollar amount" without distinguishing between different kinds of debtors such as medical debtors); *In re* Gebhart, 61 F.3d 1206, 1210 (9th Cir. 2010) (emphasizing exemption applies to debtor's interest in real property but only up to amount currently stated in 11 U.S.C. § 522(d)).

[52] States can opt out of the federal exemptions. *See* 11 U.S.C. § 522(b)(3) (allowing application of state law to exempt property of debtor if state law is applicable at time of petition); *In re* Schwartz, 362 B.R. 532, 535 (S.D. Fla. 2007) (exempting real property where state law recognized and exempted tenancy by entireties from bankruptcy creditors); *In re* Tevaga, 35 B.R. 157, 159–60 (Bankr. D. Haw. 1983) (prohibiting exemption of real property for failure to meet state statutory residence requirements).

[53] *See* Mathur Statement, *supra* note 47, at 4–5 (highlighting possible abuse of increased homestead exemption by illustrating how debtors may convert non-housing assets into housing to protect assets from bankruptcy creditors). *Compare* MBFA, § 3(a) (exempting medically distressed debtor homestead interests up to $250,000) *with* 11 U.S.C. § 522(d)(1) (limiting debtor homestead exemption to interests up to $21,625).

[54] *See* 11 U.S.C. § 109(h)(1) (stating debtor must receive credit counseling prior to filing bankruptcy petition); *see also In re* Ginsberg, 354 B.R. 644, 645–46 (Bankr. E.D.N.Y. 2006) (holding debtor's failure to comply with credit counseling requirements made debtor ineligible to be debtor under Code); *In re* Wallert**,** 332 B.R. 884, 891 (Bankr. D. Minn. 2005) (discussing section 109(h)(1) proscription against eligibility for relief under Coder if pre-petition credit counseling is not proven).

[55] *See* MBFA, § 5 (amending section 109(h)(4)). *Cf. In re* Winston, No. 07-20593-D-13L, 2007 WL 1650926, at *3–4 (Bankr. E.D. Cal. June 6, 2007) (finding disabled debtor failed to demonstrate (1) reasonable effort to participate in credit counseling and (2) disability rendered debtor incapable of participating in credit counseling, as required under current exemption provision); *In re* Hall, 347 B.R. 532, 536 (Bankr. N.D. W. Va. 2006) (finding debtor suffering from cancer, limited mobility, and severe hearing impairment sufficiently demonstrated inability to meaningfully participate in pre-petition credit counseling).

arising under the means test,[56] a cornerstone of BAPCPA,[57] would not be applicable to medically distressed debtors by eliminating statutory authority to bring dismissal motions for medically distressed debtors in which the presumption of abuse arises.[58] It is worth noting that the MBFA does not eliminate the need to comply with the means test if the debtor is required to; it simply eliminates the ability to rely on the means test to dismiss a case for abuse. Therefore, dismissal motions under the other tests for abuse would still be viable.[59]

II. FAULTY PREMISE: IS MEDICAL BANKRUPTCY REFORM REALLY NEEDED?

Medical bankruptcy reform is premised on two purported facts: (1) a clear connection between healthcare costs and most consumer bankruptcy filings, and (2) the assertion that the current consumer bankruptcy system is not providing adequate relief to debtors with medical debt. This section addresses each of these positions, as well as the impact of the recent healthcare reform on the strength of these arguments.

A. Medical Bankruptcy

It is clear that healthcare costs do contribute to filing consumer bankruptcy.[60] Disagreement lies in degree of influence that medical occurrences have on

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[56] *See* 11 U.S.C. § 707(b)(2) (delineating formula for determining if relief is presumptively abusive); *In re* Gilligan, No. 06-00885-5-ATS, 2007 WL 6370887, at *1 (Bankr. E.D.N.C. Jan. 24, 2007) (stating abuse is presumed if debtor's means test shows ability to repay portion of debts); *In re* Nockerts, 357 B.R. 497, 507 (Bankr. E.D. Wis. 2006) (requiring more than ability to pay be shown to demonstrate abuse).

[57] *See In re* Orawsky, 387 B.R. 128, 154 (Bankr. E.D. Pa. 2008) (noting statutory means test methodology viewed as cornerstone of BAPCPA reforms); *In re* Davis, 348 B.R. 449, 453 (Bankr. E.D. Mich. 2006) (stating BAPCPA's cornerstone is "formulaic Chapter 7 means test" redefining disposable income); Evan J. Zucker, Note, *The Applicable Commitment Period: A Debtor's Commitment to a Fixed Plan*, 15 AM. BANKR. INST. L. REV. 687, 711 (2007) ("The cornerstone of the BAPCPA reform was the creation of the chapter 7 means test.").

[58] *See* MBFA, § 4 (amending section 707(b) by disallowing dismissal of case for abuse based on means test where debtor is medically distressed).

[59] Such debtors would possibly be subject to motions for bad faith or under the totality of the debtor's financial circumstances tests. *See* 11 U.S.C. § 707(b)(1)–(3) (mandating court to consider whether debtor filed petition in bad faith and totality of circumstances in determining abuse as cause for dismissal); *In re* Hartwick, 359 B.R. 16, 20 (Bankr. D.N.H. 2007) (discussing section 707(b)(3) express requirement that, in determining abuse, court must consider bad faith and totality of circumstances); *In re* Polinghorn, 436 B.R. 484, 487 (Bankr. N.D. Ohio 2010) (characterizing section 707(b) bad faith inquiry as subjective test and totality of circumstances analysis as objective test); *see also infra* notes 170–76 and accompanying text.

[60] *See* Robert Landry, III & Amy K. Yarbrough, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Social Safety Net*, 16 MICH. ST. J. INT'L L. 343, 347 (2007) (citing empirical evidence demonstrating inability to pay heath care costs is leading cause of consumer bankruptcy); *see also* Robert M. Lawless, *The Paradox of Consumer Credit*, 2007 U. ILL. L. REV. 347, 350 (2007) (noting medical costs are generally accepted as major causes of consumer bankruptcy); David A. Skeel Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 53 (2004) (elaborating on connection between healthcare problems and bankruptcy).

consumer bankruptcy.[61] A 2005 study by Himmelstein and colleagues suggests that medical problems contribute to over half of all consumer bankruptcy filings.[62] This estimate is a bit extreme as it inflates the causal effect that medical issues actually have on bankruptcy filing rates. Critics assert that Himmselstein's definition of medical bankruptcy—any debtor with $1000 or more in medical debt during the last two years of filing bankruptcy—is overly broad in light of average annual private medical expenditures of nearly $2500.[63] The very low threshold, required to be classified as a medical bankruptcy, coupled without any distinction made for the magnitude of the medical debt in relation to other debts, lead to coding many filings as medical bankruptcies when in fact they may not really be medical bankruptcies.[64]

In 2006, Dranove and Millenson, in response to the Himmelstein study, suggested that medical related expenses more likely contribute to around 17% of consumer filings, and that the Himmelstein study neglected to incorporate the effects that job loss, existing debt, and housing costs have on filings.[65] The key concern that Dranove and Millenson proffer is simple: "All debt contributes to bankruptcy . . . [but] . . . Himmelstein and colleagues never establish the relative importance of medical bills in bankruptcy . . . ."[66]

Other studies and reports shed doubt on the prevalence of medical bankruptcies. The United States Trustee Program reported that 90% of consumers filing for bankruptcy have medical debt of less than $5000, accounting for only 13% of all

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[61] Himmelstein, *supra* note 5, at 742 (concluding through national random sample over sixty percent of all bankruptcies have medical cause); Jacoby et al., *supra* note 5, at 377–78 ("[M]ore than half a million middle-class families turned to the bankruptcy courts for help following a illness or injury in 1999."); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1517–18 (2005) [hereinafter Zywicki, *Economic Analysis*] (rejecting idea that rising healthcare costs have direct impact on increase in bankruptcy petitions).

[62] *See* David U. Himmelstein et al., *Marketwatch: Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF., Feb. 2, 2005, http://content.healthaffairs.org/content/early/2005/02/02/hlthaff.w5.63.full.pdf. The authors provide that a range of between 46.2 to 54.5 percent of bankruptcies are medical. *Id.* at W5-66 (citing study finding 46.2 percent of surveyed debtors met criteria for "major medical bankruptcy" and 54.5 percent met criteria for "any medical bankruptcy").

[63] *See* David Dranove & Michael L. Millenson, *Medical Bankruptcy: Myth Versus Fact*, 25 HEALTH AFF. W74, W77 (2006) [hereinafter Dranove & Millenson, *Myth Versus Fact*], *available at* http://content.healthaffairs.org/content/25/2/w74.full.pdf (discussing argument filings classified as "medical bankruptcies" may not be caused by healthcare costs); Gail Heriot, *Misdiagnosed: A Medical-Bankruptcy Study Doesn't Live Up to its Billing*, NATIONAL REVIEW, Feb. 11, 2005, *available at* http://old.nationalreview.com/comment/heriot200502110735.asp (denouncing study's "misleading" characterization of any case where debtor had more than $1000 in medical expenses as insolvency with medical causes); Zywicki, *Economic Analysis*, *supra* note 61, at 1518–19 (highlighting flaws in researchers' methods of classifying "medical bankruptcy").

[64] *See, e.g.*, Dranove & Millenson, *Myth Versus Fact*, *supra* note 63, at W78 (presenting data supporting conclusion that healthcare costs statistically represent small portion of total financial burden on debtors); Heriot, *supra* note 63 ("[T]he authors present the data in ways that encourage the reader to misidentify medical expenses as the leading cause of bankruptcy."); Zywicki, *Economic Analysis*, *supra* note 61 (criticizing study's omission of total debt to medical debt ratio).

[65] Dranove & Millenson, *Myth Versus Fact*, *supra* note 63, at W75.

[66] David Dranove & Michael L. Millenson, *Medical Bankruptcy: Dranove and Millenson Respond*, 25 HEALTH AFF. W93, W93 (2006) [hereinafter Dranove & Millenson, *Respond*], *available at* http://content.healthaffairs.org/content/25/2/w93.full.pdf.

unsecured debt.[67] A 2000 report of the Congressional Budget Office cites medical bills, divorce, loss of income related to unemployment, and poor debt management as causal factors for bankruptcy filings.[68]

The root of the discrepancies in the degree of influence that medical expenses have on consumer bankruptcies might lie in the methods used to measure the level of medical debt among bankruptcy filers.[69] The study by Himmelstein and colleagues attributes the largest degree of influence to medical debt of those studies previously cited. Data from a survey of consumer bankruptcy filers were used to determine the role that medical debts played in influencing consumer bankruptcy.[70] As survey data are self-reported by debtors, the role that medical debts play in bankruptcy might be overemphasized due to social pressures. Simply put, debtors might feel that medical debt is less shameful and more of a justification for bankruptcy filing. Therefore, they might be overzealous in listing medical expenses as their major reason for bankruptcy filing.[71]

In contrast, the study conducted by the U.S. Trustee Program reports that medical debt has a very low level of influence on consumer bankruptcy filing.[72] This study used court records for data collection.[73] Using court records might under-represent the level of influence that medical expenses have on bankruptcy filings, because many of these expenses may have been paid by credit cards, equity mortgages, or other forms of consumer debt that will not show up on the schedules as medical debt. In effect, the medical debt might be invisible on the filings.[74]

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[67] *See* Dranove & Millenson, *Myth Versus Fact*, *supra* note 63, at W78 (discussing Department of Justice's examination of 5203 cases from U.S. Trustee's files).

[68] *See* CONGRESSIONAL BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW (2000), *available at* http://www.cbo.gov/ftpdocs/24xx/doc2421/Bankruptcy.pdf.

[69] Researchers have primarily used two approaches to extrapolate the role that medical debt plays in consumer bankruptcy filings: survey methodology and court record data collection. *See* Melissa B. Jacoby & Mirya Holman, *Managing Medical Bills on the Brink of Bankruptcy*, 10 YALE J. HEALTH POL'Y L. & ETHICS 239, 240–41 (2010) (acknowledging some scholars measure medically-related bankruptcy using survey techniques, and some analyze court records); *see also* Melissa B. Jacoby, *Ripple or Revolution: The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 187–88 (2005) (explaining one study used post-bankruptcy interviews, while another analyzed court data); Zagorsky, *supra* note 9, at 290 (explaining study first analyzed court data, then expanded by sending questionnaire to filers). These two approaches often yield different results, and "skeptics of survey-based findings often cite studies of bankruptcy court records that yield more conservative estimates." Jacoby & Holman, *supra*, at 240–41.

[70] *See* Himmelstein, *supra* note 62, at W5-65.

[71] *See, e.g.*, Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481, 484–85 (2006) (discussing public's association of bankruptcy with "improvident, deceitful, or criminal behavior"); Jacoby & Holman, *supra* note 69, at 272 (asserting discrepancies in survey results can be attributed to social acceptance of medical debt as reason for bankruptcy); Jacoby et al., *supra* note 5, at 384–85 (arguing over time debtors have reported more acceptable reasons for bankruptcy, such as medical costs).

[72] *See* Dranove & Millenson, *Myth Versus Fact*, *supra* note 63, at W78 (asserting based on files of U.S. Trustee Program, data does not support claim that "almost 50 percent of consumer bankruptcies are 'medically related'").

[73] *See id.* (noting Department of Justice examined over 5203 cases from files of U.S. Trustee Program).

[74] *See* Jacoby & Holman, *supra* note 69, at 272 ("[S]ome existing medical bills might simply be missing from Schedule F . . . due to inadvertence, a mistaken belief that insurance would fully cover a pre-

The truth about the influence that medical debts have on consumer bankruptcy filings likely lies somewhere in the middle of the existent research. Judging from the evidence, the most likely case seems that individuals with existing debt are pushed over the financial edge when a medical problem occurs. Coupling the lost wages resulting from time away from work with the addition of medical debt, as well as other exogenous factors, certain individuals may not be able to meet their existing financial obligations and subsequently file for bankruptcy protection.[75] This suggests that a medical problem might exacerbate an individual's already tenuous financial picture to the point of bankruptcy, but does not suggest that medical problems are the primary cause of most bankruptcy filings.[76]

Even though there is not much agreement about the number of medical bankruptcies, it is crystal clear that the rhetoric that asserts that there is a medical bankruptcy every thirty seconds is simply not true. The math is simple: "this would mean more than 1 million [medical bankruptcies] per year when there were less than 825,000 actual American bankruptcies!"[77]

B. Adequacy of Current Bankruptcy System

The second basis for medical bankruptcy reform is that consumer bankruptcy is not providing adequate relief to medical debtors.[78] The validity of this proposition is not clear. Medical debtors, if a definition of such a debtor is accepted, are treated exactly like other individual debtors. The medical unsecured debts in chapter 7 and chapter 13 are treated the same. In the typical chapter 7 case, unsecured debts, including medical debts, are discharged.[79] In chapter 13, medical debt is treated the

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bankruptcy procedure [and other reasons]."); Zywicki, *Economic Analysis*, *supra* note 61, at 1492 (explaining medical debt may appear as credit card debt).

[75] The traditional model of consumer bankruptcy recognizes that consumer bankruptcy results from a convergence of facts. *See, e.g.*, Zywicki, *Economic Analysis*, *supra* note 61, at 1464 (discussing "factors such as heavy indebtedness or sudden and unexpected income or expense shocks, such as unemployment, medical problems, or divorce" that contribute to consumer bankruptcy); *see also* Efrat, *surpa* note 71, at 492 (discussing evolution of premise that "personal conditions beyond the debtor's control [precipitate] bankruptcy filings"); Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1074–75 (2005) [hereinafter Zywicki, *Institutions*] (noting traditional model "views consumer bankruptcies as arising from household financial distress"). The traditional model views consumer bankruptcy as an effort to "deal with insoluble financial problems brought on by exogenous factors such as heavy indebtedness or sudden and unexpected income or expense shocks, such as unemployment, medical problems, or divorce." Zywicki, *Economic Analysis*, *supra* note 61, at 1464.

[76] This calls into question whether a national health insurance solution to health reform would have any real influence on the country's consumer bankruptcy rate.

[77] David McKalip, *Rationed Care is Bad Care*, ST. PETERSBURG TIMES, Apr. 9, 2009, at 8A, *available at* http://www.tampabay.com/opinion/columns/article991071.ece.

[78] The assertion is that the means test and the current system is "drawing many needy Americans away from the financial relief in bankruptcy they require." Legislative Update, *Three ABI Members Testify During Busy Month for Congressional Hearings*, AM. BANKR. INST. J., Sept. 2009, at 71.

[79] *See* Mathur Statement, *surpa* note 47, at 7 (noting medical debts, including credit card debts incurred from medical costs are fully dischargeable under chapter 7); *see also In re* Carlisle, 205 B.R. 812, 820 (Bankr. W.D. La.1997) (discharging medical bills and consumer credit transactions); Zywicki, *Economic Analysis*, *supra* note 61, at 1473 (highlighting liberalization of discharge of debts).

same as other unsecured debts. Under a chapter 13 plan,[80] unsecured debts may be paid back in full, in part or not at all, depending on particular jurisdiction and treatment permitted under the Code.[81] The payments are based on an analysis of income and expenses, a liquidation analysis, and ultimately on what the debtor can afford.[82]

It has been argued that the means test does not distinguish medical debtors from other debtors, and medical debtors are not given any protection over and above other debtors.[83] That is true. All debtors with unsecured debt are treated the same under the means test.[84] The means test is designed to serve as a filter to detect abusive cases based on an ability to repay unsecured debts.[85] Only above-median debtors that are able to repay unsecured creditors would be subject to the

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[80] *See* 11 U.S.C. §§ 1321, 1322 (2006) (listing plan requirements).

[81] The exact return required to claimholders is not specified. The return to claimholders is governed by 11 U.S.C. § 1325(a)(4), which provides that a plan may be confirmed if "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 . . . ."

Some courts do not permit a zero percent plan or a minimal return to unsecured claimholders under the statutory good faith test under 11 U.S.C. § 1325(a)(3). *See In re* Rosencranz, 193 B.R. 629, 636 (Bankr. D. Mass. 1996) (denying chapter 13 plan because plan was not proposed in good faith after considering various facts including payment of only "10% to unsecured creditors"); *In re* Lattimore, 69 B.R. 622, 626 (Bankr. E.D. Tenn. 1987) ("Because the Debtors' Amended Plan proposes zero payment on unsecured claims, in abuse of the purpose and spirit of Chapter 13, the proposed plan fails to satisfy the good faith standard. Accordingly, pursuant to §1325(a)(1) and (3) confirmation must be denied."); *In re* Silva, 82 B.R. 845, 847 (Bankr. S.D. Ohio 1987) (denying confirmation of chapter 13 plan because it was not filed in good faith when debtors failed to make "a meaningful attempt to repay all creditors to the best of [their] abilities"). And other courts permit nominal or zero percent return to unsecured claimholders. *See, e.g.*, *In re* Slade, 15 B.R. 910, 911–12 (B.A.P. 9th Cir. Cal. 1981) (holding unsecured creditors only receiving nominal amount should not bar to confirmation of chapter 13 plan and noting "[a]bsent any showing of a willful attempt to misuse Chapter 13 in defraud of creditors, best effort plans should normally satisfy the good faith requirements of 11 U.S.C. § 1325(a)(3)"); *In re* Greer, 60 B.R. 547, 554 (Bankr. C.D. Cal. 1986) (holding unsecured creditors might receive nothing in confirmation of chapter 13 plan); *In re* Matter of Esser, 22 B.R. 814, 816 (Bankr. E.D. Mich. 1982) (stating zero payment plans under chapter 13 should be confirmed if they meet "best interests" test of section 1325(a)(4)).

[82] *See* 11 U.S.C. § 1325(a)(4) (stating unsecured creditors must receive more than they would receive in chapter 7); 11 U.S.C. § 1325(b)(1)–(2) (providing if debtor cannot satisfy claims in five years then all disposable income during period must be used to partially satisfy claims; disposable income defined as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended"); Mathur Statement, *supra* note 47, at 3 ("In most cases, the payments will be based upon what the individuals can afford, rather than what they owe.").

[83] *See, e.g.*, *Medical Debt: Is Our Healthcare System Bankrupting Americans? Hearing Before the Subcomm. on Commercial and Administrative Law*, 111th Cong. 58 (2009) (statement of John A. E. Pottow, Prof. of Law, Univ. of Mich. Law Sch.) ("What is important about the means test that is currently part of the Bankruptcy Code is that it does not distinguish 'medical debtors' or otherwise accord them any heightened protection that the average store charge-card junkie would enjoy.").

[84] *See* 11 U.S.C. § 707(b)(2) (making no classifications between types of unsecured creditors); Pottow, *supra* note 83, at 58 (noting "medical debtors" are treated same as every other debtor).

[85] *See* 11 U.S.C. § 707(b)(2) (blocking access to fresh start for consumers with above median gross income); *In re* Kibbe, 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007) ("The heart of [BAPCPA's] consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism . . . *to ensure that debtors repay creditors the maximum they can afford*."); *In re* Crink, 402 B.R. 159, 168 (Bankr. M.D. N.C. 2009) ("Section 707(b)(2) functions as an initial filter, disqualifying some debtors from Chapter 7 because they have an ability to pay.").

presumption of abuse.[86] In that instance the case would be dismissed or converted to chapter 13 to repay some or possibly no unsecured debts under a plan[87] and receive a discharge[88] of the remaining unsecured debts, including medical debts. Debtors with medical debt that are below the median income are not be subject to the presumed abuse[89] and likely will receive a discharge[90] like most chapter 7 consumer debtors.[91] Above-median debtors that cannot repay would not be subject to the presumed abuse[92] and receive a discharge, like most chapter 7 consumer debtors.[93] It is only above-median debtors with the ability to repay debts who are unable to

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[86] *See* 11 U.S.C. § 707(b)(2) (providing debtors with below-median gross income automatically pass means test and are not subject to presumption of abuse); Pottow, *supra* note 83, at 58 (noting debtors with below-median gross income pass means test automatically); Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 252 (2005) (stating if debtor is below state median income, debtor is not subject to means test presumption).

[87] *See supra* notes 80–81 and accompanying text; *see also In re* Gonzalez, 388 B.R. 292, 299 (Bankr. S.D. Tex. 2008) (stating section 707(b)(2)(A) test has practical effect of forcing debtors to file chapter 13 petitions); *In re* Knight, 370 B.R. 429, 434 (Bankr. N.D. Ga. 2007) (stating court may dismiss or convert case to chapter 13 if abuse is presumed); *In re* Pennington, 348 B.R. 647, 652 (Bankr. D. Del. 2006) (ruling abuse was presumed where debtor was able to repay partially).

[88] *See* 11 U.S.C. §§ 1321, 1322 (allowing debtor to file plan and contents therein); *In re Knight*, 370 B.R. at 434–35 (stating debtors are required to pay debt to extent they have ability to do so); *In re* Richie, 353 B.R. 569, 574 (Bankr. E.D. Wis. 2006) (acknowledging debtor may obtain immediate discharge of debt under chapter 7).

[89] *See* 11 U.S.C. § 707(b)(2)(A)(i) (listing income amounts giving rise to presumption of abuse); *see also In re Gonzalez*, 388 B.R. at 299 (noting presumption of abuse of relief under chapter 7 exists if debtor's section 707(b)(2) test exceeds statutorily provided amount); *In re Richie*, 353 B.R. at 571 (ruling presumption of abuse was not applicable because debtor's "current monthly income" was below applicable median income).

[90] *See* 11 U.S.C. § 727 (requiring court to grant debtor discharge with exceptions); *In re Knight*, 370 B.R. at 440 (stating presumption of abuse could preclude chapter 7 discharge); *In re* Singletary, 354 B.R. 455, 460 (Bankr. S.D. Tex. 2006) (stating below-median debtor could face section 707(b)(3) motion).

[91] Most typical chapter 7 debtors receive a discharge of most unsecured debts a few months after filing. *See* 6 COLLIER ON BANKRUPTCY, ¶ 700.05, at 700-6 (Alan N. Resnick et al. eds., 16th ed. 2010) (stating individual debtor receives court order of discharge shortly after passage of deadline for objections to discharge with exceptions); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 437 (1999) (discussing most chapter 7 cases remain pending for four to six months); Katherine M. Porter, *Life After Debt: Understanding the Credit Restraint of Bankruptcy Debtors*, 18 AM. BANKR. INST. L. REV. 1, 6 (2010) (noting debtors receive discharge of most unsecured debt within few months after filing chapter 7).

[92] *See* 11 U.S.C. § 707(b)(2)(B)(i) (stating presumption of abuse may only be rebutted by showing special circumstances); *In re* Sorrell, 359 B.R. 167, 179 (Bankr. S.D. Ohio 2007) (positing above-median debtor can rebut presumption by showing special circumstances such as serious medical condition); *In re Singletary*, 354 B.R. at 462 (listing having sufficient expense deductions and rebutting with special circumstances as two ways for above-median debtor to avoid presumption of abuse).

[93] Most typical chapter 7 debtors receive a discharge of most unsecured debts a few months after filing. *See* Porter, *supra* note 91, at 6 (stating debtors receive discharge of most unsecured debt within few months after filing chapter 7); *see also* Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 241 (2001) (noting debtors receive discharge in weeks or months for most chapter 7 cases); Jeffrey A. Logan, Comment, *The Troubled State of Chapter 13 Bankruptcy and Proposals for Reform*, 51 SMU L. REV. 1569, 1572 (1998) (stating chapter 7 debtor probably receives discharge within months of filing).

rebut the presumption,[94] which are subject to dismissal or conversion. These debtors are not refused relief under the Code as they can seek relief under chapter 13 or chapter 11,[95] if they are eligible.[96]

There is no logical basis to permit chapter 7 debtors with medical debt that can repay their debts to be exempt from the means test and receive a discharge. Whether the debt is medical or otherwise should not be the inquiry. Debtors that can repay some of their debts should be required to do so, and those that cannot—should be able to obtain a discharge. The current system is adequate and consistent with well-entrenched bankruptcy policy that balances a fresh start with the interest of creditors.[97] Consumer bankruptcy is designed to "serve the dual purposes of helping both debtors and creditors."[98] If the current system is in fact inadequate and the means test is not satisfactory,[99] reform should apply to all debtors. Otherwise, the reform will create more disparity in the treatment of debtors and creditors

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[94] *See* 11 U.S.C. § 707(b)(2)(B) (stating requirements to rebut presumption of abuse such as special circumstances for debtors who fail means test); *see also* Morse v. Rudler (*In re* Rudler), 576 F.3d 37, 40–41 (1st Cir. 2009) (reading dismissal under section 707(b)(2) as only applicable to above state median income debtors who fail means test); *In re* Siler, 426 B.R. 167, 171–72 (Bankr. W.D.N.C. 2010) (remarking above-median debtors who fail means test must have cases dismissed or converted).

[95] Section 707(b)(1) expressly provides for the conversion of a case to chapter 11 or chapter 13 with the debtor's consent. *See* 11 U.S.C. § 707(b)(1) ("[T]he court . . . may . . . convert such a case to a case under chapter 11 or 13 of this title."); *see also In re* Pageau, 383 B.R. 221, 231 (Bankr. D.N.H. 2008) (providing debtor with opportunity to convert case to chapter 13 after granting Trustee's motion to dismiss); *In re* Witek, 383 B.R. 323, 330 (Bankr. N.D. Ohio 2007) (granting Trustee's motion to dismiss chapter 7 for presumption of abuse subject to debtors' election to convert case to chapter 13).

[96] The Code sets forth the eligibility requirements for relief. *See* 11 U.S.C. § 109 (stating who may be debtor); *In re* Smith, 419 B.R. 826, 827–29 (Bankr. C.D. Cal. 2009) (discussing eligibility requirements of chapter 13); *see also In re* Rooney, 436 B.R. 454, 455 (Bankr. N.D. Ohio 2010) (allowing debtor to convert to chapter 11 if not eligible for chapter13 after granting motion to dismiss for abuse).

[97] There are two competing goals of consumer bankruptcy. First, consumer bankruptcy is designed to provide an equitable distribution of assets among creditors; and second, it is designed to provide debtors a fresh start via a discharge of their debts. *See, e.g.*, *In re* Supplement Spot, 409 B.R. 187, 207 (Bankr. S.D. Tex. 2009) (noting two competing goals of bankruptcy are payment of creditor claims and debtor's "fresh start"); Adam D. Herring, *Fixing the Broken Machine: Means Testing and Secured Debt Payments under BAPCPA*, 18 NORTON J. BANKR. L. & PRACT. 1, 14 (2009) (citations omitted) ("The 'fresh start' concept in favor of debtors is not the sole interest reflected in U.S. bankruptcy law. A competing interest for years has been the recognition of debtors' debt-repayment obligations to their creditors."); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 483 (1997) (describing concepts of "fresh start" for debtors and "equality of distribution" for creditors as "twin stars of consumer bankruptcy, reflecting the need for relief and the need for fairness, the balanced objectives of the system").

[98] Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 795 (2009).

[99] There are many different views of the effectiveness of the means test and its impact on consumer bankruptcy. *See, e.g.*, David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227 (2007) (concluding means test "either encourages bankruptcy abuse or has no effect"); Pardo, *Eliminating the Judicial Function*, *supra* note 16, at 472–73 (noting anti-debtor nature of "conventional story" of means-testing and problems of judicial discretion); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 15–16 (2001) (criticizing assumptions underlying means-testing reforms); Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 107–08 (1999) (discussing means-testing debate between those who argue it is unnecessary and burdensome and those who believe it is necessary to prevent abusive filings); Alper, *supra* note 10, at 1932 (detailing deterrence problems of means test).

without a strong justification. This will further the divide in similar treatment among similarly situated debtors and creditors and run counter to the core goals of consumer bankruptcy. Consumer bankruptcy attempts to balance the interests of debtors and creditors by providing a fresh start to debtors, coupled with an equitable distribution of assets to creditors.[100] Such reform will dilute the fundamental purpose of BAPCPA and means testing requirements—"to ensure that debtors repay creditors the maximum they can afford."[101]

C. Healthcare Reform

The connection between healthcare costs and consumer bankruptcies was used as a talking point surrounding the healthcare reform debate[102] that led to the passage of the Patient Protection and Affordable Care Act in March of 2010.[103] One of the main goals of the reform debate was to ensure that all citizens would have affordable access to healthcare via some form of health insurance coverage under the bill.[104] Theoretically, if all individuals have health insurance, their individual healthcare costs will be lower due to the coverage. However, the current healthcare financing system allows for cost sharing and direct liability even among insured patients.[105]

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[100] For a discussion of these basic goals, see generally Landry & Yarbrough, *supra* note 60, at 349–50 & n.32 (discussing policy orientation of bankruptcy legislation); see also Theresa M. Beiner & Robert B. Chapman, *Take What you Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 37 (2005) ("Most contemporary conceptions of a just bankruptcy law address two goals: one, the payment of creditors through a common pool; and two, the provision to the debtor of some sort of fresh start." (citations omitted)); Lawrence Ponoroff, *Exemption Impairing Liens Under Bankruptcy Code Section 522(f): One Step Forward and One Step Back*, 70 U. COLO. L. REV. 1, 1 (1999) ("There has always been a fundamental tension between the frequently recited twin goals of the consumer bankruptcy system: a fresh start for financially beleaguered debtors and equality of distribution for creditors." (citations omitted)).

[101] *See In re* Kibbe, 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007) (emphasis omitted) (citing H.R. REP. NO. 109-31, pt. 1, at 2 (2005)).

[102] *See supra* notes 4–5 and accompanying text.

[103] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[104] *See, e.g.*, David Deaton et al., *Distressed Healthcare: Significant Considerations for Buyers, Sellers and Lenders Arising from the Intersection of Healthcare and Bankruptcy Laws*, 3 J. HEALTH & LIFE SCI. L. 1, 4 (2010) ("The primary goal of healthcare reform is to increase affordable access to quality healthcare for all Americans, while reducing the growth in healthcare expenditures."); Wendy K. Mariner, *Health Reform: What's Insurance Got to Do With It? Recognizing Health Insurance as a Separate Species of Insurance*, 36 AM. J.L. & MED. 436, 439 (2010) (stating key goal of health reform is universal access to healthcare through health insurance for appropriate, affordable healthcare).

[105] *See* Jacoby & Holman, *supra* note 69, at 244 (positing current healthcare financing system imposes "cost-sharing and direct liability"); Dahlia K. Remler & Sherry A. Glied, *How Much More Cost Sharing Will Health Savings Accounts Bring?*, 25 HEALTH AFF. 1070, 1073 (2006), *available at* http://content.healthaffairs.org/content/25/4/1070.full.pdf ("[H]ealth care plans today already contain both substantial cost sharing and managed care measures that are likely to reduce spending."); Joseph White, *Gap and Parallel Insurance in Health Care Systems with Mandatory Contributions to a Single Funding Pool for Core Medical and Hospital Benefits for All Citizens in Any Geographic Area*, 34 J. HEALTH POL. POL'Y & L. 543, 549 (2009) (outlining current cost sharing policies).

Even given personal liability on behalf of insured individuals, the presence of individual insurance mandates should theoretically lower the total cost of healthcare in the country due to the elimination of artificially inflated charges by healthcare providers. The way the current system is structured, healthcare providers inflate charges to allow for the negotiation of favorable reimbursement rates with health insurance providers and federal payers.[106] This leaves uninsured individuals stuck with the full charges of healthcare services rendered, while an insurance company might reimburse a provider only 50% of charges incurred for the same services.[107]

Title I of the new health reform legislation mandates individuals have health insurance or pay a penalty.[108] Further, the legislation provides subsidies for individuals whose income does not allow them to afford health insurance.[109] The Congressional Budget Office estimates that, with implementation of this mandate, the number of uninsured Americans will be reduced from over fifty million to around twenty-three million by 2019.[110] While this will not totally eliminate the

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[106] *See* Landry & Yarbrough, *supra* note 60, at 361 (stating health insurance companies and health insurers negotiate favorable reimbursement rates with healthcare providers disadvantaging individuals); Abigail R. Moncrieff, *Federalization Snowballs: The Need For National Action In Medical Malpractice Reform*, 109 COLUM. L. REV. 844, 854–55 (2009) (listing policies behind healthcare industry's alarming inflation rate); Tamara R. Coley, Note, *Extreme Pricing of Hospital Care for the Uninsured: New Jersey's Response and the Likely Results*, 34 SETON HALL LEGIS. J. 275, 287 (2010) (describing system of negotiating reimbursement rates).

[107] *See* Beverly Cohen, *The Controversy Over Hospital Charges to the Uninsured – No Villains, No Heroes*, 51 VILL. L. REV. 95, 100 (2006) (noting private insurers negotiate discounts while self-insured and uninsured patients pay full price of services); Elizabeth A. Weeks, *Gauging the Cost of Loopholes: Health Care Pricing and Medicare Regulation in the Post-Enron Era*, 40 WAKE FOREST L. REV. 1215, 1275 (2005) (stating only uninsured patients exposed to non-discounted prices). *See generally* Christopher P. Tompkins, Stuart H. Altman & Efrat Eilat, *The Precarious Pricing System for Hospital Services*, 25 HEALTH AFF. 45, 52 (2006), *available at* http://content.healthaffairs.org/content/25/1/45.full.pdf (explaining consequence of pricing system is "patients who had the least ability to pay for their healthcare were charged higher prices").

[108] *See* The Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 1501 (2010) (proposing provision mandating every individual maintain minimum essential healthcare coverage); Kaiser Family Foundation, *Focus on Health Reform: Summary of New Health Reform Law*, at 1 (June 18, 2010), http://www.kff.org/healthreform/upload/8061.pdf (noting mandated minimum coverage provision); Jennifer Orr Mitchell & Matthew S. Arend, *Federal Court in Virginia Declares PPACA's "Minimum Essential Coverage" Provision Unconstitutional*, DINSMORE & SHOHL LLP (Dec. 15, 2010), http://www.jdsupra.com/post/documentViewer.aspx?fid=3816a351-2455-451a-85e7-fa87938c12d0 ("Under Section 1501 of PPACA, every U.S. citizen, other than those falling within certain exceptions, would be required to maintain a minimum level of health insurance beginning in 2014 or pay a fine included in the taxpayer's annual tax return.").

[109]
> It is in Title I that the national reform most closely resembles Chapter 58 in Massachusetts. The core elements include, first, systemic insurance market reforms altering both the individual and small-employer markets; second, a mandate for residents to purchase health insurance if affordable coverage is available to them; and third, subsidies for lower- and moderate-income individuals and families to purchase coverage.

Kavita Patel & John McDonough, *From Massachusetts to 1600 Pennsylvania Avenue: Aboard the Health Reform Express*, 29 HEALTH AFF. 1106, 1106 (2010).

[110] *See* Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Sen. Harry Reid, Majority Leader, U.S. Senate (Dec. 19, 2009), at 8, *available at* http://www.cbo.gov/ftpdocs/108xx/doc10868/12-19-Reid_Letter_Managers_Correction_Noted.pdf (noting expected decrease of uninsured by 2019); *see also*

problem of uninsurance, the increased number of insured Americans will help reduce the problem of the artificial inflation of charges for healthcare services[111] and decrease the cost of healthcare insurance premiums.[112]

Research demonstrates that state levels of uninsurance are significantly related to consumer bankruptcy filings.[113] Reducing the number of uninsured on a national level should also serve to reduce the number of consumer bankruptcies influenced by the lack of health insurance.

Based on the level of influence that medical debts have on consumer bankruptcy filings relative to other consumer debts[114] and the anticipated reduction in healthcare costs and uninsurance rates,[115] the necessity for a specific bill relevant to medical bankruptcy appears diminished. While all medical bankruptcies will certainly not be eliminated, they will no longer be a problem of the magnitude that requires legislative intervention that goes beyond the current system.

III. PROBLEMS WITH MEDICAL BANKRUPTCY REFORM

As outlined in Part II.B.2. above, the MBFA modifies the treatment of a debtor classified as a "medically distressed debtor."[116] Each area of reform will be addressed and the problems associated with each specific reform will be identified.

John Holahan & Bowen Garrett, *The Cost of Uncompensated Care with and without Health Reform*, THE URBAN INSTITUTE, Mar. 2010, *available at* http://www.urban.org/UploadedPDF/412045_cost_of_uncompensated.pdf?RSSFeed=UI_HealthPolicy.xml.

[111] *See generally supra* note 107.

[112] The individual mandate eliminates the issue of adverse selection, so that healthy individuals do not pass on health insurance leaving the insured risk pool to consist mainly of sick individuals who utilize greater amounts of health services. Diversifying the risk pool via an appropriate individual mandate will in essence cause premiums to decline because of the decrease in medical costs per insured individual.

[113] *See* Scott Fay et al., *The Household Bankruptcy Decision*, 92 AMER. ECON. REV. 706, 706–11 (2002) (discussing studies demonstrating link between rates of uninsured and bankruptcy rates); Himmelstein et al., *supra* note 62, at W5-66 (citing studies demonstrating link between consumer bankruptcy and healthcare costs); Amy K. Yarbrough & Robert J. Landry, III, *Navigating the Social Safety Net: A State-Level Analysis of the Relationships Between Medicaid, the Uninsured and Consumer Bankruptcy*, 35 POL'Y STUDIES J. 680, 683 (2007) (describing empirical evidence suggesting bankruptcy tied to rates of uninsured rates).

[114] *See* Dranove & Millenson, *Respond*, *supra* note 66, at W93 (acknowledging correlation between illness and financial hardship); David U. Himmelstein et al., *Discounting the Debtors Will Not Make Medical Bankruptcy Disappear*, 25 HEALTH AFF. W84, W85 (2006), *available at* http://content.healthaffairs.org/content/25/2/w84.full.pdf (asserting medical illnesses contribute to large number of bankruptcy filings). *See generally* Dranove & Millenson, *Myth Versus Fact*, *supra* note 63, at W75 (discussing causal connections between bankruptcy and healthcare costs).

[115] *See* Holahan & Garrett, *supra* note 110, at 1 (describing effect of anticipated decline in healthcare costs due to decreased numbers of uninsured individuals); *see also* Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Rep. John D. Dingell, U.S. House of Representatives (Nov. 20, 2009), at 1, *available at* http://www.cbo.gov/ftpdocs/107xx/doc10741/hr3962Revised.pdf (estimating reduction in federal deficit due to legislation that will decrease number of uninsured individuals); Letter from Douglas W. Elmendorf, *supra* note 110, at 8 (predicting substantial decrease in number of uninsured individuals by 2019).

[116] MBFA, § 2(a)(1) (2009) (defining term "medical debt" and describing debtor who qualifies as "medically distressed debtor").

A. The Definition of a "Medically Distressed Debtor"

The MBFA definition of medically distressed debtor is overly broad and riddled with opportunities for manipulation by debtors. There are three ways for an individual debtor to fit into this classification.[117] The primary way is for an individual to have incurred or paid $10,000 or ten percent of his/her adjusted gross income in medical debt during any consecutive twelve-month period in the three years prior to filing bankruptcy for the debtor, a dependent or nondependent immediate family member, which has not been paid by a third party.[118] The reality is that many debtors will fit in this category, even if they have a relatively small portion of medical debt.

First, sixty percent of debtors have between $24,000 and $36,000 in income and had on average about $20,000 in credit card debt.[119] Therefore, if typical filers had medical debt of $2400 to $3600, they would fit into the category of medically distressed debtor even if their primary debts were consumer-oriented debts.[120]

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[117] The MBFA amends 11 U.S.C. § 101 by specifically adding a new subsection (39C) that contains the definition of a "medically distressed debtor." That new subsection provides three alternate ways to qualify for this classification. MBFA § 2(a)(1) provides in relevant part as follows:

> (39C) The term "medically distressed debtor" means a debtor who, in any consecutive 12-month period during the 3 years before the date of the filing of the petition—
> (A) incurred or paid medical debts for the debtor or a dependent of the debtor, or a nondependent member of the immediate family of the debtor (including any parent, grandparent, sibling, child, grandchild, or spouse of the debtor), that were not paid by any third party payor and were in excess of the lesser of—
> (i) 10 percent of the debtor's adjusted gross income (as such term is defined under section 62 of the Internal Revenue Code of 1986); or
> (ii) $10,000;
> (B) was a member of a household in which 1 or more members (including the debtor) lost all or substantially all of the member's domestic support obligation income, taking into consideration any disability insurance payments, for 4 or more weeks, due to a medical problem of a person obligated to pay such domestic support; or
> (C) experienced a downgrade in employment status that correlates to a reduction in wages or work hours or results in unemployment, to care for an ill, injured, or disabled dependent of the debtor, or an ill, injured, or disabled nondependent member of the immediate family of the debtor (including any parent, grandparent, sibling, child, grandchild, or spouse of the debtor), for not less than 30 days.

MBFA § 2(a)(1).

[118] *Id.* (defining criteria to classify debtor as medically distressed); *see also* Mathur Statement, *supra* note 47, at 9 (defining medically distressed debtor); Pottow, *supra* note 83, at 3 (demonstrating how MBFA's broad definition of "medically distressed" will unintentionally include large numbers of debtors).

[119] *See* Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. REV. 275, 291 (2007) (displaying bankruptcy filing data and corresponding income in 2000–2002); *see also* Mathur Statement, *supra* note 47, at 9–10 (positing large number of debtors with proportionately small "actual" medical debt qualify as medically distressed).

[120] *See* MBFA, § 2(a)(1) (requiring only 10% of debtor's annual gross income have been used to pay medical debts).

Second, the timeframe in which to analyze the medical debt is very broad. The legislation looks back three years.[121] Most typical debtors will be able to fit within the definition with such a broad window in which to fit. Third, the definition applies not only to the debtor and dependents of the debtor, but even a nondependent immediate family member.[122] Pulling nondependent immediate family members into the definition will bring questions about who exactly fits into that category, and may result in manipulation of the broad category. Fourth, the medical debt must not have been paid by a third party.[123] This will be very difficult to show, particularly if a creditor, trustee, or other party is attempting to verify what medical debts have been paid by insurance or other government programs. It makes the enforcement and verification of the qualification very difficult and likely cost-prohibitive.

The second way to fit into the classification of a medically distressed debtor is if, within any consecutive twelve-month period in the three years prior to filing bankruptcy, the debtor was in a household in which all or substantially all of a domestic support obligation income was lost for four or more weeks because of a medical problem of the person obligated to pay the domestic support.[124] This is riddled with several significant problems. First, this qualification relies on a determination that a person outside the household who is responsible for a domestic support obligation experienced a medical problem for at least four weeks causing a loss of income. Second, this qualification looks back a full three years, and, the way the legislation is written, the lost income for 4 weeks or more may not have to be consecutive. Third, the qualification is based on loss of "all or substantially all" of the domestic support obligation income. Questions will certainly arise about what is substantial. Further, the qualification does not examine if the debtor seeking the qualification had other sources of income or employment during the timeframe. The temporary loss of a domestic support obligation may have very different impacts on different debtors depending on other aspects of their financial situation.

The final way to be classified as a medically distressed debtor is if the debtor in any consecutive twelve-month period in the three years prior to filing had a downgrade in employment with a reduction in wages, work hours, or unemployment due to care for a dependent or nondependent member of the immediate family who was ill, injured or disabled, for at least thirty days.[125] Again the broad time period and definition of "nondependent" is subject to abuse. More importantly, the qualification does not look to see if the time off of work was actually paid, as some employers permit the use of paid leave for care of sick family

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[121] *See id.* (looking to "any consecutive 12-month period during the 3 years before the date of the filing of the petition"); *see also* Wright Statement, *supra* note 49 (discussing provisions of MBFA).

[122] *See* MBFA, § 2(a)(1) (defining "immediate family member" as "including any parent, grandparent, sibling, child, grandchild, or spouse of the debtor").

[123] *See id.* (mandating debts "were not paid by any third party payor").

[124] *See id.* (considering any disability insurance payments in addition to other factors).

[125] *See id.* (requiring correlation between reduction of wages and illness or injury).

members. The qualification provides for reduction in "wages or work hours." Simply reducing work hours does not mean the person was not paid. And, as with the second qualification, it is unclear if the thirty days must be consecutive.

B. Enhanced Exemptions

The MBFA enhances the exemption rights for medically distressed debtors.[126] Rather than being afforded the real property exemption under the Code of $15,000[127] or applicable state law,[128] medically distressed debtors will have a homestead exemption of up to $250,000.[129] The legislative history and record do not specifically explain why enhancing exemptions is part of the MBFA and what the intended purpose is. It appears that the purpose is to protect the equity that medically distressed debtors have in their homes and other property. Otherwise, if there is equity over and above the applicable exemption level, the home and personal property are subject to liquidation in a chapter 7 case,[130] or the debtor may be required to pay the value of that equity position in a chapter 13 plan.[131]

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[126] MBFA § 3(a) provides:

> (a) Exempt Property.–Section 522 of title 11, the United States Code, is amended by adding at the end the following:
> "(r) For a debtor who is a medically distressed debtor, if the debtor elects to exempt property–
> "(1) listed in subsection (b)(2), then in lieu of the exemption provided under subsection (d)(1), the debtor may elect to exempt the debtor's aggregate interest, not to exceed $250,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; or
> "(2) listed in subsection (b)(3), then if the exemption provided under applicable law specifically for property of the kind described in paragraph (1) is for less than $250,000 in value, the debtor may elect in lieu of such exemption to exempt the debtor's aggregate interest, not to exceed $250,000 in value, in any such real or personal property, cooperative, or burial plot."

Id. § 3(a).

[127] *See* 11 U.S.C. § 522(d) (2006).

[128] States can opt out of the federal exemptions. *See* 11 U.S.C. § 522(b)(3) (permitting application of state law to exempt property of debtor if state law is applicable at time of petition); Storer v. French (*In re* Storer), 58 F.3d 1125, 1127 (6th Cir. 1995) (finding Congress vested states with authority to deny citizens ability to use federal exemption scheme); *In re* Tevaga, 35 B.R. 157, 159–60 (Bankr. D. Haw. 1983) (prohibiting exemption of real property for failure to meet state statutory residence requirements).

[129] MBFA, § 3(a).

[130] Under chapter 7, the trustee will liquidate non-exempt assets, if there are any, and distribute the proceeds to creditors pursuant to the priorities established in the Code. *See* 11 U.S.C. §§ 507, 704; *see also* Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal to Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 581 (2000) (stating chapter 7 debtor surrenders non-exempt assets to trustee, who liquidates property and distributes proceeds to creditors); John T. Brooks, Note,

The problem with this reform is that it ignores the effect that raising exemptions will really have. First, simply increasing exemption levels for the sake of raising them ignores the purpose of exemption laws in the first place. Exemptions are designed to provide basic necessities of life so the debtors are not destitute.[132] In light of this purpose of providing for "the essential needs of the debtor and his family, some statutes, both state and federal, limit the exemptions 'to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.'"[133] The MBFA raises the exemption level without considering this well-rooted purpose of exemptions. It seems that in many cases, this exemption may provide something more than the basic necessities of life to some debtors.

Second, this will shield assets that would otherwise be available to creditors in a bankruptcy case. Shielding these assets, if they are not needed to sustain basic necessities, runs counter to the goals of bankruptcy law.[134] It will in effect give some debtors not only a fresh start, but a head start. Simultaneously, it will violate the goal of an equitable distribution of assets among creditors.

Third, raising the exemption levels, without considering how this impacts human behavior, may lead to unintended results. The empirical research on the impact of homestead exemption levels and consumer filing is mixed.[135] Some research has shown that higher exemption levels actually lead to lower chapter 13 rates and higher chapter 7 rates.[136] These results are logical because higher

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Shopping Center Tenants in Bankruptcy: The Effect of the 1984 Code Amendments, 1988 U. ILL. L. REV. 725, 729 (1988) ("In a typical Chapter 7 liquidation, the court appoints a trustee to collect all of the debtor's non-exempt property, to convert that property into cash, and to distribute the cash to the creditors.").

[131] The Code requires that the plan provide a value of "not less than the amount that would be paid . . . under chapter 7." 11 U.S.C. § 1325(a)(4).

[132] Uriel Rabinovitz, Note, *Toward Effective Implementation of 11 U.S.C. § 522(d)(11)(E): Invigorating a Powerful Bankruptcy Exemption*, 78 FORDHAM L. REV. 1521, 1540 (2009) (discussing legislative purpose of bankruptcy exemptions); *see also* Laurencic v. Jones, 180 So. 2d 803, 805 (La. App. 4th Cir. 1965) (acknowledging exemptions are intended to protect debtor and family from becoming public charges); Amanda K. Bloch, Comment, *Approaching the Limits of the Bankruptcy Code: Does Surcharging a Debtor's Exempt Assets Go Too Far?*, 76 U. CHI. L. REV. 1747, 1753 (2009) (stating Congress intended exemption statutes as protective measures both for individual debtor's benefit and for public good).

[133] Rabinovitz, *supra* note 132, at 1541–42 (citation omitted).

[134] *See supra* note 100 and accompanying text.

[135] *See* Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 RUTGERS BUS. L.J. 2, 18, 25 (2006) [hereinafter Landry, *An Empirical Analysis*] (arguing higher homestead exemption levels may incentivize debtors to file chapter 7); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981- 1991*, 68 AM. BANKR. L.J. 121, 123 (1994) (finding no correlation between level of exemptions and chapter of bankruptcy filed by debtors); Lawrence A. Weiss, Jagdeep S. Bhandari & Russell Robins, *An Analysis of State-Wide Variation in Bankruptcy Rate in the United States*, 17 BANKR. DEV. J. 407, 417–18 (2001) (asserting home exemption levels are not statistically significant to predict chapter 7 or 13 filings).

[136] *See* Landry, *An Empirical Analysis*, *supra* note 135, at 40–41 (claiming negative correlation between level of homestead exemption and number of chapter 13 filings); *see also* Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 45–47 (1987) (citing empirical data showing increase in chapter 7 filings associated with increase in exemption levels). *But see* Chrystin Ondersma, *Are Debtors Rational Actors? An Experiment*, 13 LEWIS & CLARK L. REV. 279, 304 (2009) (finding no correlation between chapter 13 filings and low exemption levels).

exemption levels protect the homestead from creditors so there is less of a need to seek relief under chapter 13 to keep a home if the equity is protected under the exemption.[137] Other research has shown that higher exemption levels lead to higher consumer filings overall.[138] These findings indicate that the MBFA may encourage more chapter 7 filings. If more equity in a home is protected by filing bankruptcy than the typical state-level exemption, then individuals will have an economic incentive to file for chapter 7. What may very well occur is that higher income debtors, with greater equity positions in their homes, who can afford good legal counsel, will be able to plan and strategically position themselves to be able to qualify as medically distressed debtors and retain assets, over and above what is necessary for support and maintenance, that could be used to repay creditors.

C. Waiver of Pre-Petition Credit Counseling

The MBFA exempts medically distressed debtors from pre-petition credit counseling[139] that is required for most consumer debtors.[140] Procedurally, a debtor

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[137] Saving a home is the primary reason that individuals choose to file chapter 13. *See* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices – A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 186–87 (1997) (arguing chapter 13 gives debtors better chance of saving their home than chapter 7); Cheri L. Cohen, *Chapter 11 For Individual Consumer Debtors: Fresh Start or False Start?*, 13 N. ILL. U. L. REV. 401, 422–23 (1993) (commenting "chapter 13 was the chapter to choose when a debtor's primary reason for filing the petition was to save a home"); Michelle J. White & Ning Zhu, *Saving Your Home in Chapter 13 Bankruptcy*, 39 J. LEGAL STUD. 33, 56–57 (2010) (asserting nearly all chapter 13 filers do so to save their home from foreclosure, but most fail to save their homes when they otherwise would have defaulted). Therefore, if state law exemptions provide protection, chapter 13 may not be necessary. And, if the enhanced exemptions provide greater protection in chapter 7, this may increase the incentive to file under chapter 7.

[138] *See* Mathur Statement, *supra* note 47, at 12 (discussing relationship between high exemption levels, increased rates of bankruptcy filings, and adverse effect high exemption levels can have on credit markets); Zywicki, *Institutions*, *supra* note 75, at 1086 (explaining empirical evidence has shown correlation between increases in exemption levels and overall bankruptcy filings). *But see* David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 343 (1999) (asserting low exemption levels lead to less stringent lending, increased amounts of credit available to debtors, and increased bankruptcy filings).

[139] MBFA § 5 (2009) provides: "Section 109(h)(4) of title 11 United States Code, is amended by inserting 'a medically distressed debtor or' after 'with respect to'." This will add the medically distressed debtor to the existing applicable debtors whom are exempt from the credit counseling requirement.

[140] *See* 11 U.S.C. §§ 109(h), 521(b) (2006) (requiring credit counseling course). Section 109(h)(1) provides as follows:

> [A]n individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

See also In re Hedquist, 342 B.R. 295, 297–98 (B.A.P. 8th Cir. 2006) (explaining mandatory requirements of credit counseling); *In re* Allen, 378 B.R. 151, 153 (N.D. Tex. 2007) (stating individual debtors who file bankruptcy petitions are required to have credit counseling).

must obtain a certificate that evidences pre-petition credit counseling was obtained prior to filing, or the debtor must fit within a statutory exemption and fulfill the requirement within thirty days of filing.[141] The Code provides an exemption of this requirement in very limited circumstances, such as active military duty in combat zone, incapacity, or disability.[142] The MBFA adds the medically distressed debtor to the list of individuals subject to the exemption.[143]

Part of the rationale for expanding the exemption to a medically distressed debtor is based on the ramifications of failing to obtain a certificate as required by the Code. The ramifications can be quite extreme, including dismissal[144]or striking a petition.[145] Examining one particularly thorny issue that courts have had to address highlights the problem. Section 109(h) requires that the credit counseling be obtained "during the 180-day period preceding the date of filing."[146] Many debtors obtain the counseling on the same day as the filing and not "preceding the date of filing" as the Code provides. Debtors in this position are subject to having their case dismissed for not meeting the eligibility requirements of section 109(h).[147] Courts, when faced with this issue, have adopted two approaches. Some courts adhere to the plain reading of the statute and require the credit counseling to precede the date of filing,[148] and other courts find that as long as the credit

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[141] *See* 11 U.S.C. § 109(h)(1) (explaining requirements); *In re* Seaman, 340 B.R. 698, 700 (Bankr. E.D.N.Y. 2006) (disallowing debtor's case for not filing credit counseling certificate); *In re* Hubbard, 333 B.R. 377, 382 (Bankr. S.D. Tex. 2005) (describing credit counseling requirement and exemption).

[142] *See* 11 U.S.C. § 109(h)(4) (listing exemptions); *see also In re* Denger, 417 B.R. 485, 487 (Bankr. N.D. Ohio 2009) (setting forth exclusive grounds for waiver of credit counseling course); *In re* Tulper, 345 B.R. 322, 326–27 (Bankr. D. Colo. 2006) (waiving credit counseling due to physical impairment).

[143] *See* MBFA, § 5.

[144] *See, e.g., In re* Giles, 361 B.R. 212, 215 (Bankr. D. Utah 2007) (granting motion to dismiss debtor's chapter 13 case for failure to complete credit counseling within 180 days of filing); *In re* McBride, 354 B.R. 95, 97 (D.S.C. 2006) (denying debtor's request for waiver of credit counseling due to incarceration); *In re* Ross, 338 B.R. 134, 141 (Bankr. N.D. Ga. 2005) (finding debtor ineligible when failing to obtain credit counseling briefing).

[145] *See, e.g., In re* Cannon, 376 B.R. 847, 849 (Bankr. M.D. Tenn. 2006) (indicating striking petitions creates new burdens and uncertainties for case administration); *In re* Rios, 336 B.R. 177, 179 (Bankr. S.D.N.Y. 2005) (striking petition rather than dismissing when debtor neither sought pre-petition credit conseling nor asked for exemption); *In re Hubbard*, 333 B.R. at 388 (noting courts must consider whether to strike or dismiss a case filed by ineligible debtors).

[146] 11 U.S.C. § 109(h)(1) ("[A]n individual may not be a debtor . . . unless such individual has, during the 180-day period preceding the date of filing of the petition . . . received . . . credit counseling . . . .").

[147] *See id.* (stating individual may not be considered debtor without receiving credit counseling preceding date of filing); *In re* Ross, 338 B.R. at 136 (concluding upon determining ineligibility to be debtor, proper remedy is dismissal); *cf. In re* Pagaduan, 429 B.R. 752, 757 n.2 (Bankr. D. Nev. 2010) (noting court does not have authority to excuse debtor from complying with credit counseling requirement).

[148] *See, e.g., In re* Hammonds, No. 08-40928-JJR-13, 2008 WL 4830071, *4–5 (Bankr. N.D. Ala. Sept. 22, 2008) (stating plain language of Code is starting point, unless it would lead to absurd result and denying confirmation when debtor obtained credit counseling on same day as filing bankruptcy petition); *cf.* United States v. Ballinger, 395 F.3d 1218, 1237 (11th Cir. 2005) (presuming legislature acts with sensible, reasonable purpose, so statute should be read to avoid unjust conclusion).

counseling was obtained prior to filing, even if on the same day, the requirement is satisfied.[149] Exempting the medically distressed debtor avoids this issue.

The other argument for waiving this requirement for the medically distressed debtor is that it is not effective and serves no valid purpose.[150] Credit counseling of consumers was intended by Congress to provide an opportunity to learn of the consequences of filing for bankruptcy prior to deciding to actually file.[151] Indeed, the effectiveness of credit counseling has been called into question,[152] even before the legislation was passed.[153] Early "anecdotal evidence suggests that by the time most consumers receive the counseling, their financial problems are dire and they have few viable alternatives to bankruptcy."[154] If most consumers are in such a position at the time of required credit counseling, the effectiveness of this

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[149] *See, e.g., In re* Francisco, 390 B.R. 700, 705 (B.A.P. 10th Cir. 2008) (concluding debtor satisfies section 109(h) if "he or she completes the required credit counseling at any time between 180 days before, and the moment of, filing the petition"); *In re* Barbaran, 365 B.R. 333, 336 n.4 (Bankr. D.C. 2007) (denying trustee's motion to dismiss case because "in § 109(h), Congress failed to accord the term 'date' its usual meaning of calendar day, and instead intended 'date' to mean the moment of the filing of the petition"); *In re* Moore, 359 B.R. 665, 675 (Bankr. E.D. Tenn. 2006) (recognizing "§ 109(h)(1) governs not the period of time for doing an act after a bankruptcy case is commenced but rather describes the requisite time for taking a step to establish eligibility to file a case" and denying dismissal when debtor completed credit counseling on same day as filing petition).

[150] Representative John Conyers characterized credit counseling meaningless. *See Medical Debt: Is Our Health Care System Bankrupting Americans? Before the Subcomm. on Commercial and Admin. Law of the Comm. on the Judiciary H.R.*, 111th Cong. 111-56 (July 28, 2009) (statement of Rep. John Conyers), *available at* http://judiciary.house.gov/hearings/pdf/Conyers090728.pdf.

[151] The legislative history clearly states the intended purpose of the pre-petition credit counseling:

> The legislation's credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy – such as the potentially devastating effect it can have on their credit rating (citation omitted) before they decide to file for bankruptcy relief.

H.R. REP. NO. 109-31, pt. 1, at 18 (2005), *reprinted in* 2005 U.S.C.C.A.N. 104, 104.

[152] For a discussion of some of the problems with the requirement and ramifications of not meeting this requirement, see Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV 349, 367–69 (2008).

[153] *See, e.g.*, Richard L. Stehl, *The Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998*, 7 AM. BANKR. INST. L. REV. 133, 148–50 (1999) (discussing several practical difficulties with enforcing mandatory credit counseling); Winton E. Williams, *Resolving the Creditor's Dilemma: An Elementary Game - Theoretic Analysis of the Causes and Cures of Counterproductive Practices in the Collection of Consumer Debt*, 48 FLA. L. REV. 607, 642–44 (1996) (describing burdens of credit counseling process). For an analysis of the effectiveness of credit counseling generally, see Michael E. Staten & John M. Barron, *Evaluating the Effectiveness of Credit Counseling* 25 (May 31, 2006), http://www.consumerfed.org/elements/www.consumerfed.org/file/finance/Credit_Counseling_Report061206.pdf ("[E]ven after controlling for risk scores at the outset, the regression model estimates . . . indicate that those who visited a counseling agency had an increased likelihood of a subsequent bankruptcy or derogatory public record.").

[154] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-203, VALUE OF CREDIT COUNSELING REQUIREMENT IS NOT CLEAR 19 (2007); *see also* U.S. GOV'T ACCOUNTING OFFICE, GAO/T-GGD-99-58, PERSONAL BANKRUPTCY: METHODOLOGICAL SIMILARITIES AND DIFFERENCES IN THREE REPORTS ON DEBTORS' ABILITY TO PAY 4 (1999) (discussing background of personal bankruptcy); Dickerson, *supra* note 9, at 148–49 (criticizing credit counseling measures for placing obstacles before debtors in dire need of relief).

requirement is assuredly very small.[155] The mode of the credit counseling for debtors in this position is often a phone call or internet session, which raises serious questions about its usefulness and effectiveness.[156]

One court has equated the requirement for debtors in this position as akin to requiring spouses in a bitter divorce to attend counseling as a condition of obtaining a decree for divorce.[157] It is likely too little, too late. And when the explicit and implicit costs imposed on consumer debtors are considered, regardless of having medical or non-medical debt, with no strong empirical evidence showing its effectiveness,[158] the requirement certainly appears to be a waste of resources. As such, the requirements should be eliminated for all debtors, not just the medically distressed debtor.[159]

D. Waiver of Means Test

The fundamental purpose behind BAPCPA was to reduce the number of chapter 7 consumer-bankruptcy filings, which have continued to grow at dramatic rates

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[155] There is other anecdotal evidence, albeit very thin, that suggests credit counseling may be steering some consumers away from bankruptcy. *See* Dickerson, *supra* note 9, at 147 (noting significant decrease in bankruptcy filings in response to legislation); Clifford J. White, III, *Making Bankruptcy Reform Work: A Progress Report in Year 2*, AM. BANKR. INST. J., June 2007, at 51 ("While available USTP data show that there are 10 percent more certificates than bankruptcy filings, which may suggest that some debtors find nonbankruptcy alternatives, further research is necessary to determine the overall effectiveness of credit counseling.").

[156] *See* Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1561 (2006) (questioning manner and late stage at which credit counseling occurs); MacArthur, *supra* note 19, at 427–28 (doubting usefulness of counseling conducted over telephone or through internet); Joseph Satorius, Note, *Strike or Dismiss: Interpretation of the BAPCPA 109(h) Credit Counseling Requirement*, 75 FORDHAM L. REV. 2231, 2238 (2007) ("The fact that the counseling requirement can be satisfied with a phone call or Interenet session in the final days of a petitioner's financial distress has caused many scholars to question the usefulness of the counseling.").

[157] *See In re* Wilson, 346 B.R. 59, 62 (Bankr. N.D.N.Y. 2006) ("[C]ompelling an individual already buried in a financial morass to undergo credit counseling . . . as a condition precedent to . . . filing a petition, makes about as much sense as requiring spouses locked in a bitter divorce proceeding to attend a marriage counseling . . . before . . . dissolving their marriage.").

[158] *See, e.g.*, Braucher, *supra* note 152, at 365–66 (stating General Accounting Office's 2007 study suggests late timing of credit counseling requirement provides little assistance to consumers); Dickerson, *supra* note 9, at 148 (noting commentators' conclusions credit counseling has little value for most consumers); Robert J. Landry, III & Amy K. Yarbrough, *An Empirical Examination of the Direct Access Costs to Chapter 7 Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, 82 AM. BANKR. L.J. 331, 337 (2008) (examining evidence suggesting additional cost of credit counseling does not render any tangible benefit to consumers).

[159] Congress has considered eliminating this requirement for other specific debtors, such as homeowners facing foreclosure. *See* Home Owners Mortgage and Equity Savings Act, H.R. 3778, 110th Cong. § 4 (2007) (permitting delay of credit counseling requirement until post-filing for debtors in foreclosure); Emergency Home Ownership and Mortgage Equity Protection Act of 2007, H.R. 3609, 110th Cong. § 5 (2007) (proposing elimination of credit counseling requirement for Ch. 13 debtors in foreclosure); A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership is not Always a Good Thing*, 84 IND. L.J. 189, 223 (2009) (citing legislation waiving or delaying requirement for homeowners in bankruptcy). The burden of this requirement should not be linked to special cases, but eliminated for all consumer debtors.

each year over the last decade.[160] The means test was designed to hold people more accountable for their debts and give creditors more of what they are owed.[161] The basic goal was to shut the door on chapter 7 for consumer debtors who can afford to repay all or some of their debts.[162] Creating a special category for medical debtors, so they are exempt from the requirements of the means test, without any regard to whether the debtors can actually repay some of their debts or considering the magnitude of the medical vs. consumer debt, is inconsistent with the policy behind the implementation of the means test in 2005.

Consideration of how the means test works is needed to appreciate the potential for abuse if the MBFA becomes law. A presumption of abuse in chapter 7 cases is determined by the debtor's ability to repay a portion of general unsecured debts.[163] This computation is based on the debtor's current monthly income, less allowed deductions, utilizing an IRS standard for expenses.[164] If the debtor's current monthly income is at or below the median family income in the debtor's state, there is no presumption that the debtor is abusing the system.[165] If the debtor's current monthly income is above the median family income in the debtor's state, then a presumption of abuse can arise in two ways. First, if the debtor's monthly disposable income, based on the debtor's current monthly income less statutorily prescribed expenses is greater than $182.50, then the case is presumed abusive.[166] Second, if the debtor's

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[160] *See* Top Rank, Inc. v. Ortiz (*In re* Ortiz), 400 B.R. 755, 770 (C.D. Cal. 2009) ("The purpose of the BAPCPA was to reduce the number of consumer bankruptcy filings and ensure that debtors repay their creditors as much money as possible."); Warren v. Wirum, 378 B.R. 640, 644 (N.D. Cal. 2007) (noting BAPCPA's avowed purpose was to reduce excessive amount of bankruptcy filings); *see also* Michelle J. White, *Bankruptcy and Small Business*, 24 REG. 18, 18 (2001) (positing purpose of BAPCPA was to reduce consumer bankruptcy filings by making these filings less appealing to consumers above median income level).

[161] *See* Landry & Yarbrough, *supra* note 60, at 356 (noting use of means test as accountability mechanism); Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 377 (2007) (stating means test was designed to limit ability of consumers to discharge debts); Shaun Mulreed, Note, *In re Blair Misses the Mark: An Alternative Interpretation of the BAPCPA's Homestead Exemption*, 43 SAN DIEGO L. REV. 1071, 1079 n.54 (2006) (positing goal of means test to ensure debtors pay creditors maximum amount they can afford).

[162] *See supra* note 85 and accompanying text.

[163] *See, e.g.*, *In re* Champagne, 389 B.R. 191, 200 (Bankr. D. Kan. 2008) (suggesting, if debtor's expenses exceed those permitted by means test, presumption of abuse may be rebutted); *In re* Patterson, 392 B.R. 497, 502 (Bankr. S.D. Fla. 2008) (noting courts can dismiss chapter 7 cases when presumption of abuse is rebutted or does not arise); Landry & Yarbrough, *supra* note 60, at 357 (indicating special circumstances are required for debtor to obtain chapter 7 relief when presumption of abuse exists).

[164] *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006) (stating how debtor's monthly expenses are to be calculated with IRS Standards); *In re* Wisham, 416 B.R. 790, 798–99 (Bankr. M.D. Fla. 2009) (applying IRS Local Standards for vehicle operation expense to determine disposable income).

[165] *See In re* Hageney, 422 B.R. 254, 257 (Bankr. E.D. Wash. 2009) (recognizing below median income debtors are not subject to presumption of abuse.); *In re* Justice, 404 B.R. 506, 512, 517 (Bankr. W.D. Ark. 2009) (applying statutory means test to debtor and his family and finding no presumption of abuse); *In re* Mestemaker, 359 B.R. 849, 852 (Bankr. N.D. Ohio 2007) (stating presumption of abuse arises if monthly income is greater than median family income).

[166] *See* 11 U.S.C. § 707(b)(2)(A)(i) (providing for when court shall presume abuse based on disposable monthly income); *In re* James, 414 B.R. 901, 907 & n.1 (Bankr. S.D. Ga. 2009); *see also In re* Burggraf, 436 B.R. 466, 470 (Bankr. N.D. Ohio 2010) (outlining means test for presumption of abuse under chapter 7). The

current monthly net income lies between $100 and $166.67, and the product after multiplying by 60 results in at least 25% of the debtor's general unsecured claims, then it is presumed to be an abuse.[167] The presumption of abuse can be rebutted by showing special circumstances.[168]

Medically distressed debtors would not be subject to this test at all,[169] regardless of their income or the magnitude of the other debts a debtor may have. The filter of the means test would not be available to detest abusive filings. The MBFA would create a free-pass for such debtors, at least as far as the means test. Higher income debtors, those that are currently subject to the requirements of the means test, would arguably be able to "walk away from not only their medical debts, but also other debts such as credit card debts."[170]

An issue, not addressed by the MBFA, is that although the bill would create a waiver from the presumption of abuse of the means test by not permitting motions to be filed as to medically distressed debtors, that waiver and limitation applies only to presumed abuse cases under section 707(b)(2). MBFA section 4 expressly limits the standing or ability to bring a motion to dismiss for abuse of medically distressed debtors under section 707(b)(2).[171] Section 707(b)(2) is limited to cases of presumed abuse resulting from the means test.[172] However, there are two statutory methods for determining abuse under section 707(b)(1). The means test of section 707(b)(2) is one way to find abuse. Section 707(b)(3) is applicable to cases in which the presumption of abuse under section 707(b)(2) does not arise or is

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dollar amounts in the Bankruptcy Code are adjusted periodically and reflect the change in the Consumer Price Index for all Urban Consumers. For more information see *Adjustments to Certain Dollar Amounts in the Bankruptcy Code and Official Forms*, U.S. BANKR. CT. DIST. WYO., http://www.wyb.uscourts.gov/court-information/court-news/adjustments-to-certain-dollar-amounts-in-the-bankruptcy-code-and-official-forms (last visited Feb. 15, 2011); Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed Under Section 104(A) of the Code, 75 Fed. Reg. 8747, 8747–49 (Feb. 25, 2010), *available at* http://www.thefederalregister.com/d.p/2010-02-25-2010-3807.

[167] *See* 11 U.S.C. § 707(b)(2)(A)(i) (stating means test); *In re* Fonash, 401 B.R. 143, 146 (Bankr. M.D. Pa. 2008) (explaining means test); Wedoff, *supra* note 86, 241–42 (containing table explaining means test).

[168] *See* 11 U.S.C. § 707(b)(2)(B)(i) ("In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances . . . ."); Morse v. Rudler (*In re* Rudler), 576 F.3d 37, 41 n.3 (1st Cir. 2009) (offering examples of "serious medical condition or active duty military service" as rebutting presumption of abuse).

[169] *See* MBFA, § 4 (2009) (indicating trustees and others may not claim chapter 7 abuse against "medically distressed debtors"); *Medical Bankruptcy Fairness Act: Hearing on S. 111-114 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) (statement of Rep. Steve Cohen, Chairman, S. Comm. on Commercial and Admin. Law) (stating bill would exempt medically distressed debtors from chapter 7 means test); *see also Medical Bankruptcy Fairness Act: Hearing Before the Subcomm. on Commercial and Amdmin. Law*, H.R. 901 No. 111-141, at 97-98 (2d Sess. 2010) (statement of Aparna Mathur, Resident Scholar, Amer. Enterprise Inst.) (testifying bill's exemption of medically distressed debtors from means test can lead to abuse by debtors).

[170] Mathur Statement, *supra* note 47, at 11.

[171] *See* MBFA § 4 (adding no judge, United States trustee, trustee, or other party in interest may move to dismiss case under section 707(b)(2)).

[172] *See* 11 U.S.C. § 707(b)(2)(A)(i) (describing only means test as creating abuse presumption); *In re* Haman, 366 B.R. 307, 317 (Bankr. D. Del. 2007) (describing Congressional intent to create mechanical means test for presumptive abuse); *In re* Singletary, 354 B.R. 455, 465 (Bankr. S.D. Tex. 2006) (requiring totality of circumstances motion before considering facts external to means test).

rebutted.[173] The MBFA will prevent the presumption of abuse under the means test as serving as a basis for dismissal for abuse for medically distressed debtors; however, the bill does nothing to limit motions for abuse under section 707(b)(3). It is well settled that, even when the presumption of abuse does not arise, section 707(b)(3) is applicable.[174] And, even in cases where the Code expressly exempts a debtor from application of the means test and the presumption of abuse as a basis for dismissal,[175] such debtors are still subject to motions under section 707(b)(3).[176] The result is that medically distressed debtors will still be subject to motions to dismiss based on abuse under section 707(b)(3) for bad faith or the totality of financial circumstances test. And, in fact, probably more so in light of the opportunity for manipulation and abuse that MBFA will present. The bill may actually cause more problems and hurdles by increased litigation by the United

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[173] *See In re* Reed, 422 B.R. 214, 230 (C.D. Cal. 2009) (noting section 707(b)(3) applies when presumption of abuse does not arise or is rebutted); *In re* Henebury, 361 B.R. 595, 601 (Bankr. S.D. Fla. 2007) (reciting section 707(b)(3) applies when means test fails or is rebutted); *In re* Nockerts, 357 B.R. 497, 507 (Bankr. E.D. Wis. 2006) (describing application of totality of circumstances test when means test passed or proper excuse given). Section 707(b)(3) provides:

> In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption . . . does not arise or is rebutted, the court shall consider —
>
> (A) whether the debtor filed the petition in bad faith; or
>
> (B) the totality of the circumstances . . . .

11 U.S.C. § 707(b)(3).

[174] *See In re Reed*, 422 B.R. at 230 (stating case may still be dismissed even without abusive presumption); *In re Henebury*, 361 B.R. at 604 (indicating when no presumptive abuse, then either bad faith or totality of circumstances tests apply); *In re Singletary*, 354 B.R. at 461 (recognizing if debtor passes means test or rebuts presumption, debtor could still face motion to dismiss under section 707(b)(3)); *In re Nockerts*, 357 B.R. at 507 (warning of potential manipulation of means test as safeguarded by totality of circumstances test). The Ninth Circuit Court of Appeals stated that "[e]ven if a debtor's financial situation does not create a presumption of abuse (or if the presumption is rebutted), the bankruptcy court may still dismiss the petition if the debtor filed the petition in bad faith or if the 'totality of the circumstances' demonstrates 'abuse' of Chapter 7." Egebjerg v. Anderson (*In re* Egebjerg), 574 F.3d 1045, 1048 (9th Cir. 2009); *see also* Blausey v. U.S. Trustee, 552 F.3d 1124, 1127 n.1 (9th Cir. 2009) ("If the presumption does not arise, the bankruptcy court may still find abuse under § 707(b)(3) based on the totality of the circumstances."). Likewise, the Seventh Circuit has interpreted the statutory framework of section 707(b) in this same way. *See* Ross-Tousey v. Neary (*In re* Ross-Tousey), 549 F.3d 1148, 1161–62 (7th Cir. 2008) (stating when there is no presumption of abuse, "dismissal [can still be requested] . . . either for bad faith or based on the totality of circumstances").

[175] *See* 11 U.S.C. § 707(b)(2)(D) (stating debtor is exempt from means test and presumption of abuse and court may not dismiss case); *cf. In re* Fox, 370 B.R. 639, 642 (Bankr. D.N.J. 2007) (listing disabled veterans exception to means test); *In re* Batzkiel, 349 B.R. 581, 584 (Bankr. N.D. Iowa 2006) (describing exception from means test for disabled veterans).

[176] *See In re* Green, 431 B.R. 187, 193 (Bankr. S.D. Ohio 2010) (holding veterans exception to means test inapplicable to totality of circumstances test); Craig D. Robbins, *Disabled Veterans Exempted from Bankruptcy Means Test*, LONG ISLAND BANKR. BLOG (Apr. 3, 2009, 11:37 AM), http://longislandbankruptcyblog.com/disabled-veterans-exempted-bankruptcy-means-test (noting veterans exemption but also need for lack of income to qualify for bankruptcy).

States Trustees,[177] Bankruptcy Administrators,[178] and other parties[179] in cases of medically distressed debtors to ferret out abuse under the tests employed in section 707(b)(3). As it is now, the tests employed under section 707(b)(3) are an area of significant litigation,[180] even without creating the additional potential loopholes for medically distressed debtors.

CONCLUSION

We can all agree that healthcare costs are a causal factor of consumer bankruptcy. Regardless of the disagreement on to what extent healthcare costs actually cause bankruptcy, if we step back from the rhetoric and assume that half of bankruptcies are caused by illness or medical bills, bankruptcy law is not the problem. Professor Warren, a co-researcher on some of the most persuasive empirical studies showing a causal connection between healthcare costs and bankruptcy, wrote prior to the passage of BAPCPA in 2005: "The problem is not in the bankruptcy laws. The problem is in the healthcare finance system and in

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[177] The United States Trustee ("UST") program operates in all judicial districts other than those in Alabama and North Carolina. *See* 28 U.S.C. §§ 581–589b (2006). It has standing to bring motions for abuse. *See* 11 U.S.C. § 707(b)(1). Most motions are brought by the UST, as opposed to other parties, in their districts in light of the costs associated with private parties prosecuting such motions. *See, e.g.*, *In re* Passis, 235 B.R. 562, 567 (Bankr. D.N.J. 1999) (explaining how trustees are in best position to bring abuse motions).

[178] The Bankruptcy Administrator Program ("BA") operates in North Carolina and Alabama. *See In re* Miles, 330 B.R. 861, 865 (Bankr. D. Ga. 2005) (discussing how North Carolina and Alabama use BA program). The BA program is part of the Judicial Branch, whereas the UST program is part of the Executive branch. *See generally* 10 COLLIER ON BANKRUPTCY ¶ 9035.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). The BA program performs many of the same functions as the UST program, including prosecuting motions for abuse as the BA. *See* 11 U.S.C. § 707(b)(1); Schultz v. United States, 529 F.3d 343, 348 (6th Cir. 2008) (stating trustee or bankruptcy administrator can take action and file statements); Mann v. Am. Federated Life Ins. Co., 215 B.R. 822, 822 (S.D. Miss. 1997) (indicating BA or trustee may move for dismissal under certain circumstances). Most motions in BA districts are brought by the BA rather than other parties in light of the costs associated with prosecuting such motions.

[179] Other parties, including case trustees, have standing to bring abuse motions. *See* 11 U.S.C. § 707(b)(1) ("[A]ny party in interest [] may dismiss a case filed by an individual debtor under this chapter . . . ."). However, standing is limited in cases involving below median debtors. *See* 11 U.S.C. § 707(b)(6).

[180] Scores and scores of published opinions exist on how to interpret and apply the two enumerated grounds a court must consider under section 707(b)(3): bad faith and totality of the debtor's financial circumstances. For example, see *In re* Cardona-Pereira, No. 08-18337, 2010 WL 500404, at *3–6 (Bankr. D.N.J. Feb. 4, 2010) (considering both faith and totality tests and factors to employ under each); *In re* Mestemaker, 359 B.R. 849, 855–58 (Bankr. N.D. Ohio 2007) (applying totality test and relevant factors); *In re* Henebury, 361 B.R. 595, 597–99 (Bankr. S.D. Fla. 2007) (providing extensive review of statutory framework and application of totality test). And hundreds of pages have been written in dozens of law review articles on this same issue. For example, see Robert J. Landry, III, *The Means Test: Finding a Safe Harbor, Passing the Means Test, or Rebutting the Presumption of Abuse May Not Be Enough*, 29 N. ILL. U. L. REV. 245, 256, 262–63 (2009) (reviewing statutory framework and application of two tests in practice); Adam J. Ruttenberg, *The Totality of What Circumstances? How Courts Determine Whether Granting Bankruptcy Relief Would Be an Abu*se, 2009 NORTON ANN. SURV. OF BANKR. LAW PART II § 4 (June 2009) (discussing various approaches courts employ); Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing is Presumptive, But "Totality" is Determinative*, 45 HOUS. L. REV. 901, 922–23 (2008) (discussing approaches courts employ in applying two tests).

chronic debates about reforming it."[181] This statement is as true today as it was then. Rather than continually tinkering with the bankruptcy system, policymakers need to confront, in a meaningful way, the other policy domains that are connected to bankruptcy. Similarly, scholars need to focus on those policy connections in their research.[182] As Professor Warren recognizes, healthcare reform should be a priority, but so should reforms that increase financial literacy and access to high quality education or minimum wage laws.[183] The medical bankruptcy reform is just another incremental reform to consumer bankruptcy that fails to address the root causes of consumer bankruptcy. It is a reform that is based on a fallacy of composition. Such a reform is misguided and leaves the social safety net in the same tattered state as that in which it was found.

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[181] Elizabeth Warren, *Sick and Broke*, WASH. POST, Feb. 9, 2005, at A23.

[182] *See, e.g.*, Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963, 1078 (2006) (recognizing whole host of policy areas intersecting with bankruptcy system and importance of empirical research on relationship between those areas and consumer bankruptcy).

[183] *See* Warren, *supra* note 181, at A23 (mentioning difficulties with healthcare reform).