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Symposium

Interdisciplinary Perspectives on Bankruptcy Reform

Foreword

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In 2003, over 1.6 million consumers filed for bankruptcy protection, surpassing the previous record of 1.5 million bankruptcy filings set just one year earlier.¹ In an effort to reverse the spiraling upward trend of consumer bankruptcies, and to prevent abusive debtors from using the bankruptcy system to avoid paying their debts,² in April, 2005, Congress voted overwhelmingly in favor of passing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).³ Widely heralded as the most sweeping bankruptcy reform legislation in over a quarter of a century,⁴ BAPCPA was designed in large part to force debtors with the ability to pay their debts out of Chapter 7 liquidation bankruptcy and into Chapter 13, the Bankruptcy Code's rehabilitation provision.⁵ In addition, the Act sought to prevent certain abusive bankruptcy practices, such as the unfettered use of serial filings⁶ and debtors' abuse of Chapter 13's cramdown provisions to strip down secured debts incurred shortly before filing for bankruptcy protection.⁷

It is no secret that banks and credit card companies lobbied Congress very hard to pass BAPCPA.⁸ Some commentators have gone so far as to say that these special interest groups purchased the legislation, which commentators argue largely helps banks and credit card companies receive higher pay-

1. Karen Redmond, *Bankruptcy Filings Hit New Records in Run Up to New Bankruptcy Law Implementation*, Dec. 1, 2005, http://www.uscourts.gov/Press_Releases/bankruptcyfilings120105.html (last visited Nov. 27, 2006).

2. See, e.g., H.R. REP. NO. 109-31, pt. 1, at 18 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 104; see also Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html>.

3. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.). The act passed in the Senate by a vote of 74 to 25. 151 CONG. REC. S2474 (daily ed. Mar. 10, 2005). One month later the House voted to pass the act by a vote of 302 to 126. 151 CONG. REC. H2076 (daily ed. Apr. 14, 2005); see also Mario A. Mata, *Asset Protection Techniques for Real Estate Owners*, SL 033 ALI-ABA 605, 611 (2005); James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 863-64 nn.7-8 (2006).

4. See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005); Bruce C. Scalabrino, *Bankruptcy Reform for Non-Bankruptcy Lawyers*, 93 ILL. B.J. 518, 518 (2005).

5. H.R. REP. NO. 109-31, pt. 1, at 18 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 104; see also A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 935-36 nn.98-102 (2006).

6. See 11 U.S.C. § 362(c)(3), (4) (Supp. V 2005).

7. See *id.* § 1325(a) (hanging paragraph).

8. See, e.g., Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963, 967 nn.22-23 (2006).

ments in consumer bankruptcies than they did under previous legislation, to the great detriment of debtors.⁹

Most of the Act's provisions took effect on October 17, 2005. Since the passage of the Act, banner headlines have regaled readers with stories of unsuspecting couples losing their homes because they could not qualify for bankruptcy due to the harsher procedural hurdles that must be met before filing for bankruptcy protection.¹⁰ Bankruptcy judges are speaking out against BAPCPA, oftentimes through their judicial opinions,¹¹ which some decry as judicial activism.

With the tumultuous period after the enactment of BAPCPA as our backdrop, hundreds of academics, practitioners, and judges gathered together for a two-day symposium to explore the positive and negative aspects of bankruptcy reform from a variety of interdisciplinary perspectives. This volume of the *Missouri Law Review* is devoted almost exclusively to that symposium. Not only does it include the ten participants' written scholarship that emerged from that extraordinary setting, during which we all benefitted tremendously from the input of others who had thought about, written about, and worked with the provisions of BAPCPA, but it also contains a fascinating roundtable discussion entitled *The Future of Bankruptcy*, during which the panelists, bankruptcy judges, and scholars debate the thorny subject of how to create a better bankruptcy system.¹²

In his keynote address and lead article, *Abuse Prevention 2005*, Professor James White characterizes the bankruptcy system as a complex organism that comprises bankruptcy judges, lawyers representing both creditors and debtors, non-attorney bankruptcy petition preparers, bankruptcy trustees, creditors, and corporate and individual debtors.¹³ He notes that all participants in the bankruptcy organism, except creditors and their attorneys, have openly opposed BAPCPA. After discussing the interplay among the various actors that compose the bankruptcy organism, Professor White outlines both the procedural and substantive changes made to the Bankruptcy Code by BAPCPA. He argues that, in the end, it will be the Act's procedural costs, including credit counseling, the requirement that debtors provide tax returns and pay stubs, and increased attorneys' fees, rather than the substantive changes, such as means testing, that will ultimately affect the bankruptcy process. Professor White concludes that "[t]ime will tell whether BAPCPA is

9. See, e.g., Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 45-49 (2001).

10. See, e.g., Loren Steffy, *What are the Odds of Losing Your Home?*, HOUS. CHRON., June 15, 2006, available at <http://www.chron.com/disp/story.mpl/business/steffy/3974430.html>.

11. See, e.g., *In re Sosa*, 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005); *In re Valdez*, 335 B.R. 801, 801-03 (Bankr. S.D. Fla. 2005).

12. *The Future of Bankruptcy: A Roundtable Discussion*, 71 MO. L. REV. 1079 (2006).

13. White, *supra* note 3, at 866.

only an additional, small step in the continued retreat from the heady day of the debtor in 1978, or whether it is a large step that will not only reduce the number of filings, but will, perhaps, even mark the dawn of 21st century debtor thrift.”¹⁴

Four of the symposium’s panelists consider the impact of bankruptcy reform on other social and political issues, including health care, labor legacy costs, race, and tax. In her article entitled *Bankruptcy Reform: What’s Tax Got To Do With It?*, Professor Michelle Cecil examines an important tax issue left unresolved by BAPCPA: the tax consequences of property abandonments in bankruptcy.¹⁵ She proposes that if property in the debtor’s bankruptcy estate appreciates in value, that value should be taxed to the debtor as discharge of indebtedness income, rather than the bankruptcy estate, as is the case under current law. Professor Cecil argues that her proposal harmonizes competing bankruptcy and tax policies and, if adopted, will improve the bankruptcy system.¹⁶

Professor Melissa Jacoby analyzes how BAPCPA will affect debtors who seek bankruptcy protection because of health care issues in *Bankruptcy Reform and the Costs of Sickness: Exploring the Intersections*.¹⁷ Professor Jacoby begins the article by explaining that recent empirical studies have determined that direct medical debt represents only a portion of the financial distress suffered by debtors with chronic medical conditions. She then discusses the provisions in BAPCPA designed to assist debtors with medical-related financial distress, including the exemption for disabled individuals from the credit counseling requirement, the inclusion of health-related expenses in the means test,¹⁸ and the appointment of an ombudsman for patients of hospitals facing bankruptcy. Professor Jacoby suggests that, despite these beneficial provisions, BAPCPA is likely to harm debtors facing financial crises caused by medical issues in two distinct ways. First, she predicts that the procedural provisions of BAPCPA, which impose additional costs on those seeking bankruptcy relief, will have the effect of redistributing resources away from health maximizing goods and services and toward lawyers, bankruptcy trustees, and the federal government. Second, Professor Jacoby posits that, in the future, the bankruptcy system will serve less of a social insurance function for families struggling with medical-related debt than it did before the passage of BAPCPA.¹⁹

14. *Id.* at 878.

15. Michelle Arnopol Cecil, *Bankruptcy Reform: What’s Tax Got To Do With It?*, 71 MO. L. REV. 879 (2006).

16. *Id.* at 889-93.

17. Melissa B. Jacoby, *Bankruptcy Reform and the Costs of Sickness: Exploring the Intersections*, 71 MO. L. REV. 903 (2006).

18. These expenses include health savings account expenses, as well as health and disability insurance and long-term care expenses. *Id.* at 906-11.

19. *Id.* at 916-17.

In *Race Matters in Bankruptcy Reform*,²⁰ Dean Mechele Dickerson revisits an issue that she had examined earlier in an article published in the Washington and Lee Law Review, *Race Matters in Bankruptcy*. In her latest article, Dean Dickerson first asserts that BAPCPA is aimed primarily at preventing abusive debtors from using the bankruptcy system to avoid paying their debts. She identifies the characteristics of such an “Abusive Debtor,” stating that it is more likely to be a person with above-median income, easy access to the internet in order to satisfy the Code’s credit counseling requirement, funds available to pay significantly higher filing fees and other related costs, and large secured debt payments. Based on these characteristics, Dean Dickerson ascertains that “many of the Abusive Debtor attributes are more likely to be found in whites.”²¹ Nevertheless, she concludes that race still matters in bankruptcy, even after BAPCPA’s reform efforts, based on several factors. First, BAPCPA’s restrictions on the dischargeability of student loans and child support debts will have a larger negative effect on minorities because the wealth gaps between minorities and whites cause minorities to have significantly higher student loan debt, and the fact that blacks and Hispanics have higher fertility rates and lower rates of marriage causes minorities to be more adversely impacted by the nondischargeability of virtually all domestic support obligations.²² Dean Dickerson also notes in her article that Congress’s failure to afford relief from BAPCPA’s provisions to victims of hurricanes Katrina and Rita has also had a disparately negative impact on minorities. She concludes that “[t]he racist economic patterns caused by historical social and institutional practices and habits make it imperative that politicians and scholars consider whether facially neutral laws have racially disparate effects and avoid enacting or revising laws that perpetuate economic racial disparities. Congress failed to do this when it enacted BAPCPA. One hopes that the next time members of Congress consider revising bankruptcy laws, they will remember that race matters.”²³

In the symposium’s first commentary, *The Potential and Peril of BAPCPA for Empirical Research*,²⁴ Professor Katherine Porter asserts that the most positive aspect of BAPCPA is that it requires the government to complete a number of studies and compile myriad statistics that will “advance bankruptcy policy-making based on empirical reality, rather than theoretical speculation.”²⁵ Professor Porter calls on the federal government to collaborate with the scholarly community in its research efforts, and to conduct its empirical research with transparency and accountability. She concludes that “transparent and cooperative data collection could eliminate tensions between

20. Dickerson, *supra* note 5.

21. *Id.* at 955.

22. *Id.* at 956.

23. *Id.* at 960-61.

24. Porter, *supra* note 8.

25. *Id.* at 964.

academic and industry researchers and provide a foundation for a new level of bankruptcy knowledge.”²⁶

The second half of this symposium volume begins with an article by Dean Daniel Keating, a leading expert on the intersection of labor law and bankruptcy. In *Why the Bankruptcy Reform Act Left Labor Legacy Costs Alone*,²⁷ Dean Keating explores why BAPCPA did nothing to solve such major national issues as underfunded pensions, retiree medical benefits, and union labor contracts. As he explains in the article, these issues have been at the forefront of bankruptcy in the new millennium, as companies in the airline, steel, and auto manufacturing industries threaten to (and often do) file for bankruptcy as a way to obtain concessions from their employees and retirees. Dean Keating poses three explanations for why Congress left labor legacy issues virtually untouched in BAPCPA. First, he argues that the focus of the Act was on consumers, not businesses, largely because bankruptcy reform efforts were being pushed by the credit card industry, which is not interested in the issue of labor legacy costs. Second, Dean Keating argues that the Bankruptcy Code has already provided as much protection as it can in this arena. Finally, he argues that labor legacy costs are not bankruptcy problems at all; instead, the root of these problems can be traced back to unrealistic promises made by employers to their workers.²⁸ Dean Keating suggests that the solution to this vexing issue might be as simple as requiring employers to provide full disclosure to their employees about the benefits that will be provided to them so that employees can be more realistic in planning for their futures.²⁹

A group of social psychology scholars, led by Dr. Richard Wiener, present their original empirical research on debtor behavior in bankruptcy in *Psychology and BAPCPA: Enhanced Disclosure and Emotion*.³⁰ In the article, the authors first examine BAPCPA’s requirement that credit card companies must enhance certain disclosures to consumers regarding their use of credit cards, including minimum payment obligations, teaser rates, and how long it will take consumers to pay off their credit card balances if they make only the minimum required payments on their credit card bills each month.³¹ Through an empirical study, the authors question BAPCPA’s assumption that enhanced credit card disclosure requirements will lead to consumers’ wiser use of credit. In the article, they describe a study that they conducted in which demographically-diverse subjects were given a fictional credit card and allowed to go on an online shopping spree. Half of the participants were provided unenhanced credit card disclosure information (pre-BAPCPA require-

26. *Id.* at 983.

27. Daniel Keating, *Why the Bankruptcy Reform Act Left Labor Legacy Costs Alone*, 71 MO. L. REV. 985 (2006).

28. *Id.* at 1000.

29. *Id.* at 1001.

30. Richard L. Wiener et al., *Psychology and BAPCPA: Enhanced Disclosure and Emotion*, 71 MO. L. REV. 1003 (2006).

31. *Id.* at 1008.

ments) and the other half were provided enhanced disclosure information (post-BAPCPA requirements). They were also given a survey to measure their emotions. The authors' empirical study revealed several startling conclusions. First, they determined that there was no significant correlation between enhanced knowledge of the dangers of credit card overuse and spending patterns.³² Even more surprising was their conclusion that, for consumers who shopped to lift their spirits and end a bad mood, enhanced disclosure "had a boomerang effect Those who shopped to end a bad mood displayed higher expected expenditures than those who did not shop to end a bad mood, but only in the enhanced disclosure condition."³³ The authors conclude their article by inviting other researchers to test the assumptions underlying BAPCPA, "as well as research that emphasizes the role of more psychological factors in the wise use of credit."³⁴

In *Judicial Discretion to Find Abuse Under § 707(b)(3)*,³⁵ Judge Eugene Wedoff discusses a small provision added to the Bankruptcy Code by BAPCPA that has been the subject of much controversy. Section 707(b)(3) of the Code allows a bankruptcy judge to find that a debtor has abused the bankruptcy system, thus preventing the debtor from seeking relief under Chapter 7, by looking at "the totality of the circumstances . . . of the debtor's financial situation."³⁶ In his article, Judge Wedoff disagrees with a contention made by professors Marianne Culhane and Michaela White in an article published in the *American Bankruptcy Institute Law Review*, in which they argued that under this provision, a judge cannot consider a debtor's financial condition in determining abuse, but rather can only find abuse based on the debtor's dishonesty or serious misconduct.³⁷ Using both the specific statutory language added by BAPCPA, as well as a hypothetical bankruptcy scenario, Judge Wedoff contends that a judge has not only the authority to consider a debtor's financial circumstances in determining abuse, but indeed has the affirmative duty to do so.³⁸

In the symposium's second commentary, Professor John Pottow attempts to reconcile the opposing positions on the debtor abuse issue taken by Judge Wedoff and professors Culhane and White. In *The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World*:

32. *Id.* at 1030.

33. *Id.* at 1031.

34. *Id.* at 1033.

35. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under § 707(b)(3)*, 71 MO. L. REV. 1035 (2006).

36. 11 U.S.C. § 707(b)(3) (Supp. V 2005).

37. Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 666, 687 (2005).

38. Wedoff, *supra* note 35, at 1036.

Trying to Bridge the Wedoff/Culhane & White Divide,³⁹ Professor Pottow argues that because the means test focuses on the debtor's monthly income in determining whether the debtor is entitled to seek relief under Chapter 7 of the Bankruptcy Code, perhaps professors Culhane and White are correct in their assertion that if a debtor passes the means test, her income should not be considered in determining whether she has abused the bankruptcy system. Conversely, he argues that Congress's reference in section 707(b)(3)(B) to the debtor's "financial situation" suggests that Judge Wedoff is correct when he argues that a debtor's finances are relevant in determining abuse.⁴⁰ Professor Pottow reconciles these two seemingly inconsistent positions by arguing that judges should focus on the debtor's assets, rather than her income, under section 707(b)(3)(B). He concludes that his approach "would give meaning to this provision of the Code in a way that grants judges the discretion they need but does not tread on Congress's clear occupation of the income scrutiny field."⁴¹

In the symposium's final commentary, *Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*,⁴² Professor Wilson Freyermuth uses the means test outlined in Judge Wedoff's article as the lens through which to observe the bankruptcy system following BAPCPA. He argues that before the Act was passed, abusive debtors were denied access to Chapter 7 through the rather amorphous concept of "substantial abuse," a fuzzy concept that Professor Freyermuth likens to "mud."⁴³ Conversely, under BAPCPA's means test, Congress attempted to move the system toward "crystal" by providing greater clarity in identifying those debtors that were abusing the bankruptcy process.⁴⁴ Despite this attempt at achieving greater clarity, Professor Freyermuth notes that the debate between Judge Wedoff and professors Culhane and White demonstrates that there is still plenty of mud surrounding this issue, and that there are going to be substantial costs incurred before a final resolution is reached. He uses this example to explore whether Congress might have conceived a better system of bankruptcy dispute resolution than the multi-tiered system of judicial review currently in place. Professor Freyermuth concludes that a "predominantly administrative bankruptcy model. . . might have provided for more consistent application of the Code's standards . . . [and] would have permitted more frequent and effective refinement of the applicable regulations over time."⁴⁵

39. John Pottow, *The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World: Trying to Bridge the Wedoff/Culhane & White Divide*, 71 MO. L. REV. 1053, 1056 (2006).

40. *Id.* at 1057.

41. *Id.* at 1066.

42. R. Wilson Freyermuth, *Crystals, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*, 71 MO. L. REV. 1069 (2006).

43. *Id.*

44. *Id.* at 1070.

45. *Id.* at 1077.