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BANKRUPTCY REFORM AND THE "SWEAT BOX" OF CREDIT CARD DEBT

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Those that backed the 2005 bankruptcy reform law argued that it would protect creditors from consumer abuse and lack of financial responsibility. The substantial increase in the number of bankruptcies over the last decade combined with the perception of systemwide abuse apparently convinced legislators from both political parties that the backers had a point. Thus, Congress enacted amendments to the Bankruptcy Code that—if effective—would fundamentally change the core policies underlying the consumer bankruptcy system in this country. The rhetoric surrounding the reform debates pressed the idea that if borrowers had to repay more of their debts, creditors would achieve savings that—through pressures of competition—would be passed on to consumers in the form of lower interest rates and improved access to credit. This essay addresses some of the problems with this justification and considers what else creditors (and particularly credit card issuers) could have expected to achieve with the new law.

Professor Mann argues that the new law will benefit issuers substantially, though not for reasons commonly discussed in the negotiation and drafting of the statute. Means testing alone will not return enough in increased bankruptcy payouts to justify the lobbying expenditures and campaign contributions that led to the statute's enactment. Rather, the most important effect will be to facilitate the credit card lending business model, by slowing the time of inevitable filings

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by the deeply distressed and allowing issuers to earn greater revenues from those individuals. In a nutshell, the new law does little for creditors once they reach the courthouse. Its foremost effect will be to enable issuers to profit from debt servicing revenues paid by distressed borrowers who are not yet in bankruptcy. For issuers that depend on debt revenues, the benefits of the law could be dramatic.

I. INTRODUCTION

After extensive lobbying by banks and credit card companies,[1] Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) on April 14, 2005.[2] The Act radically altered the policies underlying consumer bankruptcy in this country, marking a significant shift in favor of creditors. This shift is demonstrated most clearly by the tremendous surge in filings in the days before the Act became effective.[3]

The core features of the consumer provisions[4] were debated at length during the eight-year period since the bill drafted by the credit industry was first introduced.[5] For the most part, the proponents relied on moral arguments—how shameful it is that Americans walk away so easily from their debts.[6] Proponents spent much less time discussing the economics of the consumer credit industry or the business models of those most affected by consumer bankruptcy.[7] In particular, the debates often focused on the concept of needs-based bankruptcy—or the concern that the skyrocketing bankruptcy filing rates indicate that consumers are using the bankruptcy system for financial planning purposes[8] rather than as

1. *See, e.g.*, 144 CONG. REC. H10225 (1998) (remarks of Rep. Nadler) (arguing that the bill was written "by and for" credit card companies); 144 CONG. REC. H9146 (1998) (remarks of Sen. Kennedy) ("All year long Congress has been teaming [sic] with credit card lobbyists pushing for legislation making it harder for consumers, for working Americans, to get relief from crushing debt woes.").

2. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). After struggling with bankruptcy reform for eight years, Congress passed the Act on April 14, 2005. President Bush signed the Act on April 20, 2005. Most provisions of the Act became effective on October 17, 2005.

3. *See* Eric Dash, *Debtors Throng to Bankruptcy as Clock Ticks*, N.Y. TIMES, Oct. 15, 2005, at A1 (describing massive lines outside federal courthouses on the final workday before the new law took effect). For graphic illustration, see *infra* Part IV fig.2.

4. The Act has its greatest impact in consumer cases, but affects businesses and farmers as well. *See* BAPCPA tit. IV, 119 Stat. at 104 ("General and Small Business Bankruptcy Provisions"); *id*. tit. X, 119 Stat. at 185 ("Protection of Family Farmers and Family Fishermen").

5. Bankruptcy reform legislation had been under consideration for about eight years, dating back to House Bill 2500. H.R. 2500, 105th Cong. (1997). BAPCPA and many of its predecessors received broad bipartisan majorities in both the House and Senate.

6. *See* Mechele Dickerson, *Regulating Bankruptcy: Ideology and Beyond*, 85 WASH. U. L. REV. (forthcoming 2007).

7. *See id.*

8. *See* 144 CONG. REC. S12141 (1998) (remarks of Sen. Grassley) ("[S]ome people use bankruptcy as a financial planning tool."); 144 CONG. REC. S10787 (1998) (remarks of Sen. Grassley) ("The fact is that some people use bankruptcy as a convenient financial planning tool to skip out on debts they could repay."); 144 CONG. REC. S10471 (1998) (remarks of Sen. Hatch) ("Bankruptcy has become a routine financial planning device used to unload inconvenient debts, rather than a last resort

a last resort.[9] The catch phrase in the legislative history was the "bankruptcy of convenience."[10]

Thus, the new law includes a "means test," designed to force consumers out of chapter 7 liquidation and into chapter 13, with the intention of limiting the ability of bankrupts to discharge debts while earning a substantial postdischarge income. The new law also increased the costs of filing, not only by raising filing fees,[11] but also by lengthening the period between permitted filings[12] and by imposing administrative hurdles related to credit counseling,[13] debt relief agencies,[14] and attorney certifications.[15] At the same time, the Act substantially limited the relief available in bankruptcy, with provisions that, for example, broaden the categories of debts that are not dischargeable.[16]

Significant empirical studies of the preexisting law have been used to make predictions about the expected impact of the new law.[17] Why is

for people who truly need it."); *see also* Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, *in* NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 11 (1997), *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html (complaining that bankruptcy becomes "just another tool of financial management").

9. *E.g.*, 144 CONG. REC. H10234 (1998) (remarks of Rep. Goodlatte) ("Under the current system, some irresponsible people filing for bankruptcy run up their credit card debt immediately prior to filing knowing that their debts will soon be wiped away."); 144 CONG. REC. S10190 (1998) (remarks of former Sen. Bentsen) ("With growing frequency, bankruptcy is being treated as a first choice rather than a last resort, a matter of convenience rather than necessity."). Also see Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463 (2005):

> [T]he cause of the consumer bankruptcy crisis is not an increase in consumer financial vulnerability but rather an increase in consumers' *propensity* to respond to financial problems by filing bankruptcy and discharging their debts instead of reining in spending or tapping accumulated wealth. The novelty, therefore, is not in the underlying problems but rather the increasing willingness of individuals to use bankruptcy as a *response* to those underlying problems.

Id. at 1526.

10. *E.g.*, 144 CONG. REC. H10238 (1998) (remarks of Rep. Chabot); 144 CONG. REC. H10224 (1998) (remarks of Rep. Linder); 144 CONG. REC. S10787 (1998) (remarks of Sen. Grassley) ("Bankruptcies of convenience are like shoplifting."); 144 CONG. REC. H4343 (1998) (remarks of Rep. McInnis).

11. BAPCPA, Pub. L. No. 109-8, § 325, 119 Stat. 23, 98–99 (codified at 28 U.S.C. § 1930).

12. *Id.* § 302, 119 Stat. at 75–77 (codified at 11 U.S.C. § 362(c)); *id.* § 312, 119 Stat. at 86 (codified at 11 U.S.C. §§ 727, 1328).

13. *Id.* § 106, 119 Stat. at 37–42 (codified at 11 U.S.C. § 109(h)).

14. *Id.* §§ 227–229, 119 Stat. at 67–72 (codified at 11 U.S.C. §§ 526–528).

15. *Id.* § 102(a)(4)(C), 119 Stat. at 27 (codified at 11 U.S.C. § 707(b)(4)).

16. *Id.* §§ 310, 314, 119 Stat. at 84, 88 (codified at 11 U.S.C. § 523). Those reforms favor creditors. The most salient "reforms" designed to protect consumers are new disclosure requirements, which are likely to be useless or even counterproductive. *See* H.R. REP. NO. 109-31, at 2 (2005) [hereinafter HOUSE REPORT] (discussing consumer protection goals of the Act). With respect to minimum payment disclosures, the new law requires that credit card companies provide the consumer examples of the estimated time for repayment under hypothetical conditions and a toll-free number to call to obtain an estimate of the time it would take to repay the actual balance. BAPCPA § 1301, 119 Stat. at 204–07 (codified at 15 U.S.C. § 1637(b)) (amending Truth in Lending Act of 1968 § 127, 15 U.S.C. § 1637(c) (2000)). With respect to teaser rates, it requires boilerplate warnings designed to ensure that the temporary nature of the rate is disclosed. BAPCPA § 1303, 119 Stat. at 209–11 (codified at 15 U.S.C. § 1637(c)) (amending Truth in Lending Act of 1968 § 127, 15 U.S.C. § 1637(c)). *See generally* RONALD J. MANN, CHARGING AHEAD ch. 14 (2006) (criticizing the new disclosures).

17. *See infra* Part II.B.

the number of bankruptcies rising? Is it because families are in worse financial condition and less able to withstand adverse events? Is it because of an increase in overall consumer debt or credit card debt? Alternatively, is it because the stigma associated with bankruptcy has decreased? Finally, are the abuses episodic or systemic? Depending on the reason or combination of reasons for the filing surge, "means testing" might be a credible response if it is likely to increase creditor payouts, lower interest rates, or enhance access to credit.[18] The focus will shift now to assessing the predictions about the impact of the new law, perhaps spawning a significant body of empirical scholarship to parallel the important studies conducted following the original enactment of the Bankruptcy Code in 1978.[19]

My goal here is to focus more narrowly on the new law's impact on the credit card industry. Some reform proponents argued that it would deter reckless borrowing and opportunism.[20] Because credit cards are the primary vehicle for discretionary spending and borrowing in our economy,[21] credit card issuers have a greater stake than other lenders in public policy related to profligacy. Therefore, the question is what the credit card company lobbyists actually were trying to achieve: To deter

18. In a statement commending Congress for passing the bill, President Bush explained: "These commonsense reforms will make the system stronger and better so that more Americans—especially lower-income Americans—have greater access to credit." Press Release, President George W. Bush, President Commends Congress for Passing Bankruptcy Reform Bill (Apr. 14, 2005), http://www.whitehouse.gov/news/releases/2005/04/20050414-5.html (last visited Oct. 2, 2006); *see also* HOUSE REPORT, *supra* note 16, at 4 (describing significant losses associated with bankruptcy filings and asserting the existence of a "bankruptcy tax").

19. Any analysis that purports to estimate the effects of any particular bankruptcy reform on filing rates must be met with at least some degree of skepticism. The point is underscored by the conflicting empirical assessments of the effects of the enactment of the Bankruptcy Code of 1978. *Compare, e.g.*, Lawrence Shepherd, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON. 419, 435–37 (1984) (finding a significant effect), *with* Jagdeep S. Bhandari & Lawrence A. Weiss, *The Increased Bankruptcy Filing Rate: An Historical Analysis*, 67 AM. BANKR. L.J. 1, 8–11 (1993) (finding no significant effect). From my perspective, it would be surprising if we could find strong quantitative links between reform measures and filing rates, because so many external factors are likely to influence filing rates. One such example is the concurrent change to minimum payment requirements—a change that issuers expect to increase bankruptcy filing rates substantially. *See infra* text accompanying notes 61–69 (discussing those changes and their effects). Only the most fundamental differences are likely to generate statistically cognizable differences in filing rates. *See* MANN, *supra* note 16, ch. 5 (concluding, based on comparative bankruptcy filing data, that filing rates in the United Kingdom, Australia, and Canada are significantly lower than they are in the United States). Thus, to understand the effects of BAPCPA on U.S. filings, studies that focus on the composition of filers are likely to be more useful. Those studies, however, will not be available for years to come.

20. *See* HOUSE REPORT, *supra* note 16, at 5 ("[T]he present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse.").

21. As of February 2006, credit cards were responsible for about $800 billion in outstanding debt, which represented about 37% of the total amount of nonmortgage consumer credit outstanding. Fed. Reserve Bd., Statistical Release-Consumer Credit G.19 (Apr. 7, 2006), *available at* http://www.federalreserve.gov/releases/g19/20060407/g19.pdf.

risky borrowing ex ante?[22] To increase bankruptcy payouts ex post?[23] To lower bankruptcy filing rates?

My thesis is that the Act well may have none of those effects, and is very unlikely to have either of the first two. Although it is possible that the Act will have a marginal effect on long-run filing rates (a topic addressed in Part IV), it is unlikely that the principal features of the Act will have any substantial effect on the borrowing decisions of consumers.[24] My focus here is on a more interesting possibility: that the Act will increase the bankruptcy payout, helping issuers to recover the losses reflected in the urban legend of a $400 per family "bankruptcy tax" that is a fixture in the Act's legislative history.[25] Thus, I argue that empirical studies of the finances of bankruptcy filers show that credit card issuers could not have expected that the new law would return enough in increased bankruptcy payouts to justify the lobbying expenditures and campaign contributions that led to its enactment. Rather, I suggest, the most important effect will be to slow the time of inevitable filings by the deeply distressed, allowing issuers to earn more revenues from these individuals before they file. Hence, because lenders have less incentive to limit the costs of financial distress than they did under prior law, the Act will encourage them to rely increasingly on business models that depend on distressed borrowing.

My discussion proceeds in three steps. First, I discuss the standard account—what the media and policy discussion leading up to the enactment of the Act suggested about the justifications for the bill. Second, I offer my assessment of what issuers reasonably should have expected from the bill. Finally, looking with hindsight, I try to assess, albeit tentatively, the early data about the reality of the Act's operations on the issues of most importance to credit card issuers: the total number of filings, the share of chapter 13 filings, and payouts to unsecured creditors in chapter 13 filings. On all of these fronts, it is still too early to discern any stable gains for credit card issuers.

II. THE STANDARD ACCOUNT AND ITS PROBLEMS

A. The Standard Account: Preventing Abuse

The "means test" has been described as the "heart" of the new law.[26] The means test essentially makes it harder to get a full discharge

22. Issuers might have thought that new incentives against reckless borrowing would minimize delinquency rates. If so, issuers could pass the savings to consumers in the form of lower interest rates and thus encourage additional borrowing by the financially stable.

23. Issuers might have been less concerned about altering the pattern of borrowing ex ante, hoping instead to minimize their losses in bankruptcy through payments pursuant to chapter 13 plans.

24. *See* Ronald J. Mann, *Optimizing Consumer Credit Markets and Bankruptcy Policy*, 7 THEORETICAL INQUIRIES L. 395, 427–29 (2006).

25. *See* Elizabeth Warren, *The Phantom $400*, 13 J. BANKR. L. & PRAC. 77 (2004).

26. HOUSE REPORT, *supra* note 16, at 2.

of all debts in chapter 7. Credit card issuers supported means testing because it forces more high-income borrowers into chapter 13, where those borrowers must repay some of their debts. In a way, means testing simply marks another step along the path to a changed conception of bankruptcy in this country. From the traditional view of consumer bankruptcy as a fresh start, where assets are distributed in exchange for a discharge, we have moved steadily towards a more modern view of consumer bankruptcy in which repayment is expected to come from income that the borrower earns in the years after the bankruptcy filing.[27] This approach is particularly valuable to card issuers, of course, because their customers are much more likely to have income than substantial unencumbered assets.

The concern with the high-income borrower is not new. A mechanism to force high-income borrowers into chapter 13 was introduced in 1984. Specifically, former § 707 authorized bankruptcy judges to deny relief under chapter 7 upon a finding of "substantial abuse."[28] Although the cases applying that provision did not adhere to a uniform standard,[29] courts generally held that excess income would be a sufficient factor to support such a finding.[30] The idea was that it was abusive for a high-income, low-asset borrower to discharge debts under chapter 7 instead of paying off at least a portion of the debts under a chapter 13 plan.[31]

The new law creates a presumption of abuse based on a debtor's income level.[32] The formula compares the debtor's monthly income (the average monthly income received during the previous six months) to the median income for a household of the same size in the state in which the debtor resides. If the debtor's monthly income exceeds the state median, a presumption of abuse arises. The means test then allows a debtor to subtract standardized amounts for permitted expenditures.[33] If the re-

27. *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 150–53 (5th ed. 2005) (discussing that change in philosophy).

28. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 335 (1984) (amended 2005). For discussion, see WARREN & WESTBROOK, *supra* note 27, at 150–52.

29. *See, e.g.*, David B. Harrison, *Bankruptcy: When Does Filing of Chapter 7 Petition Constitute "Substantial Abuse" Authorizing Dismissal of Petition Under 11 U.S.C.A. § 707(b)*, 122 A.L.R. FED. 141, 157–58 (2005).

30. *See* 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 (2005); Harrison, *supra* note 29; Eugene Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 235 (2005).

31. For discussion, see WARREN & WESTBROOK, *supra* note 27, at 152–58.

32. For a detailed discussion from the perspective of an experienced judge, see Wedoff, *supra* note 30, at 231–32. For a summary textbook discussion, see WARREN & WESTBROOK, *supra* note 27, at 158–65.

33. 11 U.S.C. § 707(b)(2) (2000); *see* Culhane & White, *supra* note 30, at 671–77 (describing the means test of § 707).

maining funds permit a substantial repayment to creditors over a five-year period, the court *must* presume abuse.[34]

To understand this provision, it is important to see that the old § 707 did not prevent a judge from finding abuse in every case in which the new § 707 creates a presumption of abuse. The problem from the card issuers' perspective was that bankruptcy judges applying the old § 707 did not often find abuse. Thus, the statute reflects Congress's attempt to cabin the discretion that judges were exercising with undue lenience. As Professors Warren and Westbrook explain, the old § 707 left "what constituted abuse in a particular circumstance to the judge who weighed all the facts and circumstances of the individual case," whereas the new provision "is semi-automated, employing a fixed formula to determine which debtors should be deemed ineligible."[35] Indeed, the legislative history refers to this specific point, emphasizing "the absence of effective oversight to eliminate abuse in the system."[36]

B. Problems with the Standard Account

The foremost question about the standard account is whether means testing will in fact produce increased returns for creditors. Anecdotal tales of abusive debtors are not the kind of evidence on which a sensible policymaker would rely heavily. Nor can we draw much from studies done after passage of the Act. For example, it is no surprise that a very high number of people covered by the provisions filed for bankruptcy shortly before the Act went into effect,[37] nor that few people covered by the provisions filed shortly thereafter.[38]

The best approach to understanding the Act would be to look at the case files of those who filed for bankruptcy in the years shortly before enactment. Given the rapid changes in the demographic and financial condition of bankruptcy filers, studies that sample older files will give less valuable information about the effect that the Act will have. Starting with the study that uses the most recent sample, consider the Consumer Bankruptcy Project, which has a great deal of information about the financial position of the typical American bankruptcy filer, and certainly

34. BAPCPA also amends § 707(a) so that it is enough to find "abuse"; there is no longer a need to find "substantial abuse." BAPCPA, Pub. L. No. 109-8, § 102(a)(2)(B)(i)(III), 119 Stat. 23, 27 (codified at 11 U.S.C. § 707).

35. WARREN & WESTBROOK, *supra* note 27, at 158.

36. HOUSE REPORT, *supra* note 16, at 2.

37. Culhane and White report a study of 11,000 bankruptcies filed during the summer of 2005, shortly before the statute went into effect, indicating that about 15% of the filers had income at or above the applicable median. Culhane & White, *supra* note 30, at 675 n.48.

38. For some early post-Act data, see NAT'L ASS'N OF CONSUMER BANKR. ATT'YS, BANKRUPTCY REFORM'S IMPACT: WHERE ARE ALL THE "DEADBEATS"? (2006), http://nacba.com/news/022206NACBAbankruptcyreformstudy.pdf [hereinafter NACBA STUDY] (3.3% of approximately 60,000 early post-Act filers were affected by the means test).

has the most substantial study of relatively recent pre-Act filers.[39] The data from that project suggest that about 8% of consumers filing in 2001 had incomes above the applicable median. Even among that subset, many had unusually high expenses that would leave them eligible for chapter 7 even under the Act. So a reasonable estimate from that study would be that about 5% of pre-Act chapter 7 filers could have been forced into chapter 13 by the Act.[40]

Looking to the studies that sample older files, an Ernst & Young study of 1997 filers concluded that about 10% of the filers would be covered.[41] Conversely, Culhane & White's project on 1995 filers suggested that 3–4% of filers would have been blocked from chapter 7 under a slightly different test than the one that passed.[42]

Moreover, the ease of planning to avoid those provisions suggests that no reasonable person would have expected the provisions to generate a substantial return.[43] For example, Michelle White's piece in this symposium offers a straightforward example of means-test planning, suggesting that fairly simple planning would eliminate a means-test obligation for debtors with less than $135,000 in annual income.[44]

Indeed, when I have discussed my puzzlement about the means test with executives at credit card issuers, I have heard to my surprise that

39. *See* TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989); TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (2000); ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP (2003).

40. *See* WARREN & WESTBROOK, *supra* note 27, at 161.

41. It is difficult to evaluate the data in the Ernst & Young study, which is not published or widely available, but it is discussed in detail in a report prepared by Ken Kowaleski at the Congressional Budget Office. *See* CONG. BUDGET OFFICE, PERSONAL BANKRUPTCY: A LITERATURE REVIEW (2000), *available at* http://www.cbo.gov/ftpdocs/24xx/doc2421/Bankruptcy.pdf; *see also* U.S. ACCOUNTING OFFICE, PERSONAL BANKRUPTCY: ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTOR'S ABILITY TO PAY 15 (1999), *available at* http://www.gao.gov/archive/1999/gg99103.pdf (discussing differences between two Ernst & Young studies). Though the 1998 Ernst & Young report estimated that 15% of filers would be covered, this study evaluated a previous bill that included a more aggressive means-testing provision. A 1999 Ernst & Young report estimating 10% coverage, however, evaluated provisions of a later bill that closely resembled BAPCPA.

42. *See* Culhane & White, *supra* note 30, at 665 (suggesting 5% as a high estimate); Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27 (1999) (empirical analysis suggesting 3.6% of debtors could pay something under a provision more generous than the provision in the Act).

43. When I attempted a back-of-the-envelope calculation of the investment that the issuers made in the statute, it suggested to me that it was quite difficult to believe that the means test would produce increased payouts sufficient to generate a good return on the lobbying dollars invested in the Act. To see this point, I assume that issuers would hope to obtain, at a minimum, a $10 million per year payout on the investment of approximately $100 million in a decade's worth of lobbying expenditures for the Act. If there were about 1.35 million bankruptcy filings the year before the Act, and only 10% were affected by the Act, those 135,000 files would have to generate $75/year/file in revenue for card issuers. If the actual payouts on chapter 13 plans were about 25% of promised payouts, the plans would need to promise about $300/year/file to unsecured creditors to generate the appropriate level of revenue. That seemed to me an exceedingly ambitious expectation.

44. Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. REV. 275; *see also* William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 156–58 (discussing nascent means-test planning strategies).

they do not expect that the means test will produce any substantial revenues for them. When asked why they supported the provision so strenuously, they explain that the means test as enacted is not at all the provision for which they lobbied. The problem, from their perspective, is that Congress progressively weakened the means test during the decade-long period of the Act's consideration.

TABLE 1
CHRONOLOGY OF THE MEANS TEST

Year	Bill	Congress	Changes
1997	H.R. 2500	105th	-
1998	H.R. 3150 (as passed by the House)	105th	Income floor changed from 75% of median to 100% of median
1998	H.R. Rep. 105-794 (Conf. Rep. passed by the House)	105th	20% repayment floor becomes lesser of 25% or $5,000
1999	H.R. 833 (as passed by the House)	106th	Major changes include additional deductions for estimated administrative expenses, attorney's fees, tuition, food and clothing; repayment floor raised to 6K
2000	S. 3186 (pocket vetoed)	106th	Major changes include raise repayment floor to 6K-10K window; new deductions for family violence, dependent care, and chapter 13
2002	H.R. 5745	107th	New deduction for housing and utilities
2005	S. 256 (as enacted)	109th	New deduction for health/disability insurance

To understand this point, it is useful to look at the history of the means test in its various forms. As table 1 illustrates, the means test went through seven substantially different forms over an eight-year period. In each case, the changes made the test's coverage substantially narrower, or made it substantially easier to evade. Most telling, even in 2005, when the bill was on a fast track for adoption, Senator Kennedy—not the closest ally of the Republican leadership—was able to obtain the amendment that added a deduction for health and disability insurance. As Michelle

White discusses, this amendment provides one of the largest "loopholes" in the means test.[45]

In the end, the story of the means test's legislative history is not one of Congress reflexively giving the credit card industry whatever it sought. Rather, the story is one of restive legislators, promising that they will support the bill when it comes to the floor, but constantly tinkering with it in response to conflicting policy arguments, ultimately robbing the bill of much of its promised bite.[46]

III. THE SWEAT BOX

If the most prominent feature of the statute is unlikely to generate a substantial increase in payouts to card issuers, how can we be sure that issuers will profit from the new law? My answer emphasizes an entirely different intersection between the statute and the business model of the credit card issuer. In my view, the most important aspect of the new law is not the increased payouts associated with means testing, but the way in which the law encourages debtors to defer bankruptcy filings. To explain, let me discuss the business models of credit card issuers and then explore how the Act interacts with those models at the point of the bankruptcy filing decision.

A. The Business Model

Although credit card issuers have different business models, it is reasonable to place them along a spectrum from transaction-based to debt-based. Transaction-based issuers (like American Express and Diners Club) try to earn interchange fees that exceed the cost of funds and their transaction costs. Thus, those issuers attempt to maximize the number of cardholders that use their cards frequently for high-value purchases. Debt-based issuers, by contrast, focus on debt servicing revenues. Thus, they attempt to maximize the number of customers who do not repay their account balances in full each month. That strategy would not seem unusual, but for the fact that the most profitable customers are sometimes the least likely to ever repay their debts in full.

For many other types of lenders—a commercial lender like a mortgage company, perhaps—the most profitable customers are the ones least likely to default. The lender sells a relatively static product, such as a thirty-year fully amortizing mortgage loan for 75% of the value of the property, with a price at a more or less fixed level above the cost of funds. That lender profits a small amount on each loan that is repaid in a timely manner, and loses substantially on the loans that are not. The model works because the number of loans paid in full in accordance with

45. *See* White, *supra* note 44.

46. For a more complete discussion of the conflicting policies, see Dickerson, *supra* note 6.

their terms is perhaps fifty times the number of loans that default. Competition in that market drives the major lenders to very similar prices. Profitability depends on lowering administrative costs, while at the same time limiting bad loans through the exercise of judgment about the quality of potential borrowers. In sum, the model works best if all borrowers retain robust financial health throughout the term of their obligations.[47]

The business model of the debt-based credit card is quite different. These lenders depend more heavily on automated techniques of data-mining and information analysis than on skills of subjective case-by-case judgment.[48] Thus, only the most technologically adept can hope to remain profitable in the industry. This competitive pressure[49] has led to a rapid increase in concentration in the industry, so that the ten largest issuers in the United States now hold about 88% of all credit card debt in the country; the top five hold more than 70%.[50]

The successful credit card lender profits from the borrowers who become financially distressed. Financially secure customers or "convenience users" do not generate any interest income, late fees, or overlimit penalties. The only source of revenue they provide typically comes from annual fees in some instances and interchange revenues.[51] These charges might be substantial in some cases, but they account for only about 20% of industry revenues.[52] Thus, for issuers that rely on lending, "convenience users" are useful only because of the possibility that they will mature into borrowers—as caterpillars mature into butterflies.[53]

For the credit card lender, the first hint of sustained profitability comes when the cardholder (now borrower) stops regularly paying her balance in full each month.[54] If we imagine that this is caused by some

47. For an example outside the credit card market, see Al Lewis, *Dawdling Banks Cost Homeowners*, DENVER POST, May 22, 2006, at K1 (discussing a bank that responded to financial distress of homeowner by refinancing the mortgage to increase the amount of the principal and thus the monthly debt service).

48. *Credit Scoring: Testimony Before the House Banking and Financial Services Comm. S. Comm. on Financial Institutions and Consumer Credit*, 106th Cong. (2000) (prepared statement of Peggy Twohig, Assistant Dir. Fin. Practices, Fed. Trade Comm'n), *available at* http://www.ftc.gov/os/2000/09/creditscoring.htm.

49. I refer here to the market in which credit card lenders compete for cardholders. That market is distinct from the markets in which card networks compete against each other and in which acquirers compete for merchants.

50. *Top Credit Issuers*, NILSON REP., Feb. 2006, at 9, 9. For what it is worth, the top five issuers and their shares are Bank of America (20%), JPMorganChase (19%), Citigroup (15%), American Express (10%), and Capital One (7%). *Id.*

51. Sophisticated issuers like MBNA can profit from those customers if they can collect substantial annual fees and at the same time succeed in earning a substantial amount of interchange revenue from each account, which happens only if their customers commonly use their cards.

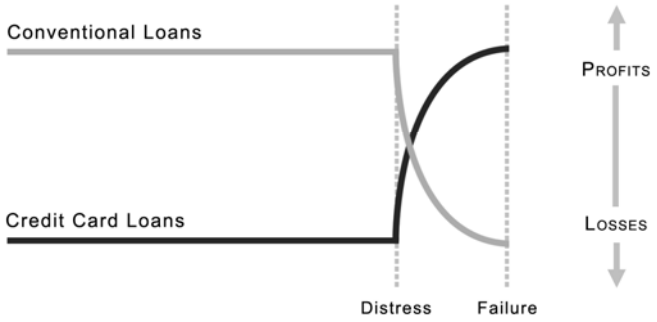
52. Burney Simpson, *Bank Card Profitability and Annual Report*, CREDIT CARD MGMT., May 2005, at 27.

53. There also is the possibility that their presence in a portfolio can compensate for the higher default-rate percentages among the customers more likely to carry large amounts of debt.

54. The Federal Reserve's most recent survey of consumer finances indicates that 46.2% of all families now carry a credit card balance—up from 44.4% in 2001. Consumers are also carrying higher balances—with the mean balance growing to $5100 from $4400 in 2001. The median income is cur-

adverse event affecting the borrower's wages or some unusual expenditure that the borrower hopes to amortize against future wages, we might analogize the situation to that of a commercial borrower that loses a major customer or suffers a drop in earnings because of poor cost controls. In the case of the commercial borrower, the adverse events, if material, will lower the loan officer's expectations of profit from the transaction. The analogy is not perfect, because the credit card borrower's problem might involve no adverse event, but simply a momentary bout of profligacy or exuberance, motivated perhaps by the hope of an increased income in months to follow. Still, whatever the basis for the decision to carry a balance, this is not an event of concern. Rather, it suggests imminent profit for the issuer because the decision to carry a balance leads immediately to interest charges on the cardholder's account, which accrue at a rate far exceeding the lender's cost of funds. Moreover, once the borrower begins to carry a balance, the likelihood of late and overlimit fees can increase substantially.

Figure 1
The Dynamics of Profitability



As the spiral increases, the distinction between the two models grows starker. When the first lost customer becomes the failure of an entire product line, the commercial loan will become a problem, probably suitable for a "special assets" division with officers particularly skilled at minimizing the losses from bad loans.[55] As the credit card borrower spirals downward, however, with the monthly balances growing to amounts that equal, or even surpass, the borrower's annual income, the issuer begins to earn large monthly profits on the relationship. The question for

rently $43,200. The typical credit card balance is thus now about 10% of the median annual income. *See* Brian K. Bucks et al., *Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finances*, FED. RES. BULL., Feb. 2006, at A1, A5 tbl.1, A26–A28 tbl.11, A31. I have been unable to find reliable information on the number of families that make only the minimum payment each month.

55. For detailed discussion, see Ronald J. Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 159 (1997).

the lender is how long the borrower will remain in the unstable position before failure occurs.

If this seems implausible, consider the evidence of the stark increases in chargeoffs related to the recent increases in minimum payments. In 2003, American regulators, acting through the Federal Financial Institutions Examination Council (an interagency group that oversees standards for federal examination of financial institutions), issued a "guidance" suggesting that lenders should not permit negative amortization and should require repayment in a "reasonable" time.[56] When I first read this guidance, it seemed a trivial policy event because it required so little that it seemed targeted primarily to the subprime lending market.[57]

Still, the annual reports of major American card issuers suggest that the guidance had an important effect even on mainstream lending practices. For example, MBNA reported that it promptly changed its standard procedure for calculating minimum payments from 2.25% of the principal balance to a requirement that each borrower pay 1% of their principal in addition to interest and fees.[58] Thus, assuming that the interest rate is 24%, the minimum payment on a $5000 balance would increase from $112.50 to $150.[59] Take note: this requirement that each borrower repay 1% of the principal each month does not mean that the loan will be repaid in 100 months. A borrower who made the minimum payments under that plan, and never made any future purchases, would not repay the outstanding debt for approximately 27 years, because the minimum payment would decline steadily as the outstanding balance declined.[60]

Yet even changes of this magnitude will apparently cause major disruption in the industry.[61] The basic problem is that even minimum-payment increases as slight as those mentioned above are likely to push many borrowers past the point of liquidity. Hard as it may be to believe, it appears that a change from a $112.50 to a $150 minimum payment will be a change from a difficult payment to an impossible payment for some

56. Press Release, The Federal Reserve Board, FFIEC Agencies Issue Guidance on Credit Card Account Management and Loss Allowance Practices (Jan. 8, 2003), *available at* http://www.federalreserve.gov/boarddocs/press/bcreg/2003/20030108/.

57. For comparison, consider that Britain formerly required cardholders to repay 15% of their balance each month. *See* MARGARET ACKRILL & LESLIE HANNAH, BARCLAYS: THE BUSINESS OF BANKING 1690–1996, at 188–89 (2001); *The Plastic-Money Would-Be Pre-Election Boom*, ECONOMIST, Sept. 9, 1978, at 107 (discussing rule imposed in 1973 and lifted in 1978).

58. *See* MBNA, LIKE NO OTHER ANNUAL REPORT 2004, at 33 (2005).

59. $112.50 is 2.25% of $5000; $150 is 3% of $5000. I reached this 3% figure because a 24% interest rate works out to 2% per month, and so the additional 1% brings the total required minimum monthly payment to 3%.

60. *See* MBNA, *supra* note 58, at 33. The annual report does not indicate that the minimum-payment has a floor. The text assumes that there is a minimum payment of $10 per month.

61. *See, e.g.*, JPMORGAN CHASE, 2004 ANNUAL REPORT 21 ("The Firm plans to implement higher minimum-payment requirements in the Card Services business in the third quarter of 2005; it is anticipated that this will increase delinquency and net charge-off rates . . . .").

borrowers. Thus, the increased payment minima are expected to increase delinquency and chargeoff rates markedly. Indeed, industry analysts expect the effects to be substantial enough to force major changes in the fee practices of card issuers.[62] The most salient example of this change was the 94% decline in MBNA's profits early in 2005, which sources in the industry link to the increase in MBNA's minimum payments.[63] The fact that such a slight alteration in minimum payment requirements has such a substantial effect on delinquency, chargeoff, and bankruptcy rates[64] suggests that those lenders are keeping an astonishing share of their portfolios balanced on a razor's edge.[65]

After obtaining a successful portfolio, the standard way to increase profits is to focus on those customers who are unable to take their business elsewhere. If the customers do not have realistic options, lenders are free to raise the interest rates and fees that they charge to those borrowers.[66] Ordinarily, a lender that unilaterally raises the fees that it is charging its most profitable customers might fear the loss of those customers to competitors. In this particular context, however, the risk that competitors will "poach" these profitable customers is relatively slight.

One problem, discussed by a group of researchers at the Federal Reserve Bank of Philadelphia in a recent paper, is that the "switching costs" are too high.[67] An issuer that tries to attract distressed customers from a competitor will face an adverse selection problem.[68] Recognizing that the existing issuer is likely to know more than the new issuer about the distressed customer, the new issuer must be concerned that the distressed customer that it attracts will be so close to failure that the relationship will be unprofitable.[69] The basic idea is that an issuer that targets the distressed customers will get the worst of them (those that are so

62. The requirement is expected to reduce the interest income available to issuers, which might cause issuers to raise fees. *See* Tom Ramstack, *Fees Put Squeeze on Credit Cards*, WASH. TIMES, July 4, 2005, at A1 (attributing recent fee increases of U.S. Bank and JPMorgan Chase to increased minimum payment requirement).

63. *See* Martin H. Bosworth, *MBNA Profits Plunge*, CONSUMER AFF., May 24, 2005, http://www.consumeraffairs.com/news04/2005/mbna_profits.html.

64. It is unfortunate for the empiricist that these minimum payment requirements went into effect so close to the effective date of BAPCPA, because they will cloud efforts to quantify the effects of BAPCPA, just as the effective deregulation of credit card interest rates and the Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (invalidating state bans on lawyer advertising), both of which coincided with the adoption of the Bankruptcy Code of 1978, have hindered efforts to quantify how that statute impacted bankruptcy filing rates. *See supra* note 19.

65. JPMorganChase and CitiBank expect similar problems for their portfolios. *See* CitiGroup, Inc., Annual Report (Form 10-K), at 29, 65 (2006); JPMorgan Chase & Co., Annual Report (Form 10-K), at 27 (2006); Joe Bel Bruno, *Minimum Credit Card Payments Scare Banks*, N.J. POST, Mar. 12, 2006, *available at* http://abcnews.go.com/Business/wirestory?id=171661&CMP=OTC-RSSFeedS0312.

66. This assumes, of course, that their contracts permit unilateral alterations in response to adverse financial events, which normally is the case.

67. Paul S. Calem et al., *Switching Costs and Adverse Selection in the Market for Credit Cards: New Evidence*, 30 J. BANKING & FIN. 1653 (2006).

68. *Id.*

69. *Id.*

close to complete failure that they will be unprofitable).[70] The best of the distressed customers (the ones far enough from complete failure to remain profitable) will remain with their existing lender.[71] That problem, they argue, makes it hard for competing issuers to make strong efforts to obtain their business and in turn makes it easier for existing lenders to earn more profits from their captive customers.[72]

Other practical problems complicate the job of attracting the distressed customers of another card issuer. For one thing, the typical way of attracting customers from another card issuer is to offer a low "introductory" rate for balance transfers—often near 0%. But when the customers are already in distress, it might be difficult to profit (even over time) from an advance at a very low interest rate. To be sure, the new issuer might be able to profit if it could undercut the existing issuer's rate and still charge a credible rate—beating a 24% or 30% rate with an offer of 18%—but as a marketing (or behavioral) matter, I doubt that a campaign targeting customers with a "great new rate of 18%" would be cost effective. The new lender also must confront the problem that it can obtain the customer only if it repays the entire nominal balance of the debt owed by the customer. As discussed below, that amount is likely to substantially exceed the issuer's "real" economic investment in the customer, and often will significantly exceed any amount that the issuer expects the borrower to repay. Collectively, those problems make me think that the issuer has quite a firm grip on its customers who have fallen into serious distress.

Another key part of the business model, related to the high switching costs for distressed borrowers, is the increasing ability of the leading issuers to collect substantial revenues in the form of late and overlimit fees. It is commonplace that the average amount of those fees has been rising over the last several years.[73] What is more interesting, and to the point, is that the aggregate amount of those fees, as a share of outstanding debt, has doubled since 1990, increasing from about 70 basis points per year in 1990 to 140 basis points per year in 2004.[74]

Referring back to figure 1, this landscape suggests a three-pronged business strategy for the credit card lender: (1) limit the share of financially stable customers (the left part of the curve); (2) maximize the share of the portfolio that is at any time in the central (rising) part of the curve; and (3) minimize losses from the borrowers who fail.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See, e.g.*, Liz P. Weston, *Bank Fees Are More Outrageous Than Ever*, MSN MONEY, http://articles.moneycentral.msn.com/Banking/BetterBanking/BankFeesAreMoreOutrageousThanEver.aspx.

74. I rely here on data kindly provided to me by Mark Furletti at the Payment Cards Center at the Federal Reserve Bank of Philadelphia.

The first prong (the left part of the curve) suggests that one strategy would be to use information technology to segment the market so that an issuer focused on lending revenues will have, at any given time, a relatively small share of customers who use the card only for payment transactions. More importantly, such an issuer hopes to attract the types of users who will use the card for borrowing transactions and thus become revenue-generating users. To be sure, some issuers offer products designed to be profitable even in the hands of nonborrowing users. The products might bear annual fees or higher interchange fees. But even here, the goal is to target frequent card users. Because the marginal interchange revenue from each payment transaction typically exceeds the marginal cost of processing and because there is a fixed cost for issuing and maintaining each account, high-volume users are more profitable than low-volume users. Hence, the *worst* customers are those who accept cards and use them infrequently. Conversely, a customer who uses the card constantly for multiple transactions each day with a large dollar volume each month can be reasonably profitable for a lender, even if the cardholder pays off her entire balance each month.

To be sure, if the lender seeking new customers cannot tell which of its nonborrowing customers are likely to mature into borrowing customers, the lender's strategy might be to acquire as many high-volume customers as possible, whether or not they borrow, hoping that the larger the portfolio of customers, the greater the number of highly profitable borrowing customers the issuer will have in the end.[75] But even that strategy focuses attention on the middle part of the curve, which clearly is where the real profits are made.[76]

The third prong (the right part of the curve) simply recognizes that issuers face the blood-from-a-stone problem discussed in the previous part of this essay.[77] Little can be done to increase the recovery from people in severe financial distress. Therefore, it is unlikely that the Act will substantially increase recoveries from that portion of the curve. If most bankruptcy filers are in severe financial distress, the obvious solution is for lenders to cut their administrative costs and liquidate the debt when distress becomes overwhelming. Although my thoughts on this topic are relatively impressionistic, discussions with industry sources suggest that

75. The profitability of this strategy is undermined by the problem that newer accounts that are not "seasoned" are less valuable to the issuer because the cardholder's behavior is less predictable.

76. For a detailed account of portfolio management strategy, from an issuer's perspective, see *Managing the Credit Life Cycle*, CARD INT'L, Mar. 31, 2006, at 14.

77. Although I do not have a definitive source for the risk assessment practices of card issuers, I do think it is clear that they are not trying to minimize delinquencies. For this reason, in a related paper I challenge the assumption that bankruptcy policy should focus solely on the incentives of borrowers to avoid financial distress and bankruptcy. Instead, I suggest, the proper approach should allocate losses between borrowers and lenders in a way that minimizes the net costs of financial distress. Generally, I argue that this calls for placing more risks on lenders, so that they will have an incentive to use information technology to limit the costs of distress. Accordingly, I believe that the Act is a move in the wrong direction. *See* Mann, *supra* note 24.

the major credit card issuers are increasingly moving towards selling defaulted credit card debt (at a price of approximately ten to twelve cents on the dollar).[78] The developing market appears to suggest that the debt is more valuable in the hands of the smaller companies that can collect more aggressively than reputable large companies.[79]

That leaves the second prong, or the central part of the curve. This part of the curve covers the spectrum from those who carry balances, to those who routinely make minimum payments, to those who miss payments altogether. As the discussion above suggests, the strategy makes sense only if the lenders can obtain an adequate return from their borrowers during the period they are in that part of the curve—the "sweat box" in my terms. If this inference seems implausible, notice that the interest rates that borrowers pay while they are in the sweat box greatly exceed the cost of the lender's funds. Thus, if the borrower resides in the sweat box for very long—making substantial interest payments at a high rate—the lender with a lower cost of funds in effect receives a return of the funds that it has lent each month.

To quantify this effect, I ran a simple experimental spreadsheet to see how hard it would be for a lender to recapture its investment. In general, the experiment[80] assumes the following:

- The lender's cost of funds is 3%.[81]
- The lender charges 18% per month for the first three months that the borrower pays the minimum payment, 24% per month for the next three months, and 30% per month thereafter.
- The monthly minimum payments are 2% while the annual interest rate is 18%, 2% + $50 when the annual interest rate is 24%, and 2.5% + $50 when the annual interest rate is 30%.
- The borrower incurs a $40 late or overlimit charge every other month starting with the seventh month that she makes the minimum payment.

Applying those assumptions to a borrower who starts out with a balance of $2000 and makes no new purchases, the stated balance at the

78. *See* Darren Waggoner, *Once Viewed as a 'Poison,' Bad-Debt Resales are Booming*, CARDS & PAYMENTS, Sept. 2005, at 42 (quoting rates of ten to twelve cents on the dollar for "[f]resh chargeoffs" and four cents on the dollar for loans being sold for the third time).

79. It is difficult to pin down the reasons for this development, but part of it surely has to be that reputational constraints would prevent the major credit card issuers from engaging in the kind of collection techniques that are typical of those smaller firms that collect debt for a living. For a discussion of new collection techniques, see Louis Berney, *Technology Brings a Kinder, Gentler Process to Collections*, CARDS & PAYMENTS, Oct. 2005, at 18. For graphic interviews, see MAXED OUT (2006) (a documentary exploring debt in contemporary America).

80. The spreadsheet is available on my Web site, http://www.utexas.edu/law/faculty/profile.php?id=mannrj1.

81. This figure is based on the cost of funds for leading credit card issuers in their most current annual reports.

end of twenty-five months is still $1270 (more than half the original loan). But looking at the "economic" balance—applying the lender's cost of funds to the monthly balance instead of the stated interest rate—the entire loan has been repaid (with $6 to spare). A slightly different example is arguably more provocative: if we assume that the borrower makes a $100 purchase every three months and run the example for 34 months, we have a stated balance of $2070 (slightly more than the initial balance), but in "economic" terms the entire loan has been repaid (with $26 to spare). A final experiment, assuming a more aggressive issuer, assumes that the interest rate is 30%, 36%, and 42%, and that there is a $50 late or overlimit fee every month starting in the sixth month; in this example the economic balance is repaid in the thirty-second month, whereas the total stated balance remains more than $2800. If we imagine borrowers who limp along, carrying those balances for decades—neither discharging them in bankruptcy, nor ever paying them off entirely, perhaps making an occasional minor purchase—we can see how profitable this business model can be.

I note that a recent survey of balance-carrying Americans suggests that the median family with a balance has been carrying it for thirty months (with an average of forty-three months).[82] The examples above suggest that this is just about long enough for the lender to recover its investment, but not nearly long enough for the cardholder to repay its debt.

B. The Effects of the Act

With that business model in mind, let us turn now to the Act. Although the Act might have a limited effect on transaction-based credit card issuers, I argue that the Act will have a major effect on debt-based issuers. Specifically, the dominant impact of the new law occurs in the central part of my curve, as the Act operates to delay the time of filing for a considerable group of financially distressed card users.[83] If those card users continue to make payments until shortly before they surrender and file for bankruptcy, the delay in filing—lengthening the time in the "sweat box"—will increase the profits the lenders receive from those accounts, or decrease the losses the lenders will face when those customers ultimately file for bankruptcy.[84]

Put simply, the issuers have persuaded Congress to take the line in figure 1 that demarcates the zone of high profitability from the zone of

82. DEMOS, THE PLASTIC SAFETY NET: THE REALITY BEHIND DEBT IN AMERICA 8 (2005).

83. Financial distress might seem like a harsh way to describe the predicament of this group. After all, many high-income borrowers will be able to mark time in the sweat box almost indefinitely.

84. William Widen suggests in comments on a draft of this paper that the delay is especially advantageous to issuers that securitize their debt receivables because it gives the issuer more time to manage the delinquency rate in the portfolio to prevent an early termination of the securitization financing.

failure, and move it over by several months. One economic perspective on this situation would view the consumer credit industry as a private wage insurer, providing emergency funds to households in distress, while the bankruptcy system provides consumption insurance, protecting against sharp income dropoffs.[85] The strengthening of the sweat box effect restricts the amount of consumption insurance that is provided publicly and thus increases the importance of wage insurance.

Once the point is made, it is easy to see that several of the Act's notable features are likely to defer the time of filing. Two distinct strategies are apparent: provisions that increase the cost of filing and provisions that decrease the benefit of filing. If we think of the bankruptcy decision as a determination of the point in time at which the benefits of bankruptcy are sufficient to overcome the natural aversion to the admission of failure that a bankruptcy filing represents, and if we expect that in most cases the starkness of financial distress will make the filing inevitable, we would expect these provisions to have the effect of delaying the time of filings, but not decreasing the aggregate number of them.[86]

The most obvious example, of course, is the stark increase in filing fees wrought by section 325 of the Act, so that it now costs $299 to initiate a chapter 7 bankruptcy proceeding.[87] The fee increase is a valuable example of the effect of the statute, because the large fee—going to the government not to creditors—directly reduces the recoveries to be expected for creditors. The only value it represents to creditors is that it can defer—or deter—bankruptcy filings.

Another simple and effective rule in this category is the extension of the period during which the debtor cannot file a new bankruptcy petition.[88] Thus, the well-counseled debtor who chooses to file in response to a particularly distressing situation must accept that a bankruptcy filing will not be possible in the years to come even if the subsequent situation becomes worse than the current one. This would seem a relatively small problem if we were still in a world in which a bankruptcy filing provided a substantially fresh start. But as studies show, a large share of bank-

85. *See, e.g.*, Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129 (2005); *see also* White, *supra* note 44.

86. Of course, if we believe that a substantial group of filings are not motivated by overwhelming financial distress, then the increase in the net costs of filing might deter some filings altogether. For reasons I have explained elsewhere, I doubt there are a large number of such filings. *See* Mann, *supra* note 24.

87. This figure was effective April 9, 2006, as calculated by the Administrative Office of United States Courts. *See* United States Bankruptcy Court Fees, http://www.uscourts.gov/bankruptcycourts/fees.html.

88. BAPCPA, Pub. L. No. 109-8, §§ 302, 312, 119 Stat. 23, 27–35 (codified at 11 U.S.C. §§ 362, 727, 1328). The refiling provisions are particularly interesting for my discussion because they create an extended window within which issuers can retain customers in a sweat box without any risk of bankruptcy discharge. *See* Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, N.Y. TIMES, Dec. 11, 2005, at 1 (discussing practice of lending to the newly bankrupt).

rupts continue to experience financial distress that is as bad as—or even worse—than the distress they faced before their filing.[89]

Another important obstacle is the increased bureaucratic responsibility of attorneys who represent borrowers, which flowed from the general congressional condemnation of the bankruptcy bar.[90] This was a favorite theme of Senator Grassley:

> Today, many lawyers who specialize in bankruptcy view bankruptcy as an opportunity to make big money for themselves. This profit motive causes bankruptcy lawyers to promote bankruptcy as the only option even when a financially troubled client has an obvious ability to repay his or her debts. In other words, this profit motive creates a real conflict of interest where bankruptcy lawyers push people into bankruptcy who don't belong there simply because they want to make a quick buck.
>
> . . . .
>
> Mr. President, I think there is a widespread recognition that bankruptcy lawyers are preying on unsophisticated consumers who need counseling and help in setting up a budget and who do not need to declare bankruptcy. Bankruptcy lawyers are the fuel which makes the engines of the bankruptcy mills run.[91]

The best example here probably is § 707(b). This provision—in the style of Sarbanes-Oxley—now requires the debtor's attorney to certify that the lawyer has investigated the accuracy of the borrower's filing information. One could say that this is nothing new, just a restatement of Rule 11 in another context. But provisions like § 707(b)(4)(A)—specifically requiring the debtor's attorney to pay the costs and attorney's fees incurred in connection with a successful motion to convert under § 707(b)—make it likely that consumer bankruptcy attorneys will in fact spend more resources collecting verifiable evidence of a prefiling investigation than they did under pre-Act law.[92] Indeed, some observers view much of the Act as laying an elaborate trap for those who make a living out of representing consumer bankrupts.[93] Regardless whether the heightened investigation requirement has other salutary effects, it seems likely to increase the cost of a bankruptcy filing. Those who supported

89. *See* Katherine Porter & Deborah Thorne, *Going Broke and Staying Broke: The Realities of the Fresh Start in Chapter 7 Bankruptcy*, 92 CORNELL L. REV. (forthcoming 2006).

90. *See* 144 CONG. REC. S12140 (1998) (remarks of Sen. Grassley) ("[T]he bankruptcy bar is not adequately counseling people as to whether or not they should be in bankruptcy, let alone discouraging them from being in chapter 7 when they should be in chapter 13.").

91. 144 CONG. REC. S10649 (1998) (remarks of Sen. Grassley); *see* 144 CONG. REC. S10569 (1998) (remarks of Sen. Grassley) (noting similar criticism). Perhaps Senator Grassley's most revealing comment is the following: "I know of attorneys in Alabama who are running advertisements, who are making $1,000 per bankruptcy case and filing 1,000 cases a year. They are making big bucks off this system." 144 CONG. REC. S10571 (1998) (remarks of Sen. Grassley).

92. BAPCA § 102, 119 Stat. at 27–35 (codified at 11 U.S.C. § 707).

93. Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283 (2005); *see* HOUSE REPORT, *supra* note 16, at 5 (suggesting that "misconduct by attorneys" was one of the principal factors motivating reform).

the Act suggested it would increase costs by about $150 to $200 per case, and there is little reason to think that they were exaggerating.[94]

Another example, typical of the drafting style of the Act, comes from the new rules in section 526 concerning debt relief agencies, which arguably apply to attorneys.[95] If they do, there is a new avenue for attorney liability in connection with assistance provided to consumers.[96] Even if they do not, those rules clearly will have the effect of limiting access to the bankruptcy courts previously provided by non-attorney petition preparers.[97]

Although it is too soon to know the impact of those rules—the magnitude of the impact probably will shrink over time, as attorneys adjust to the new system—they surely will raise filing costs in the short term. As filing costs rise, even the most desperately insolvent must delay bankruptcy, at least until they can save the amount necessary for the filing fee and the attorney's fee.[98]

The new rules about credit counseling interpose another hurdle. Codified in Bankruptcy Code § 109, these rules generally require borrowers to seek credit counseling shortly *before* filing for bankruptcy.[99] Given the urgency with which the financial position of consumers deteriorates, and Congress's effort to close any avenue by which judges might forgive noncompliance, these rules can lead to great hardship in particular cases, as judges already have noted.[100] But the major effect, it ap-

94. *See* HOUSE REPORT, *supra* note 16, at 45.

95. *See In re* McCartney, 336 B.R. 588 (Bankr. M.D. Ga. 2006) (declining to reach issue in case in which Office of United States Trustee filed a brief arguing that the provisions apply to attorneys). For a detailed argument that the provisions do apply to attorneys, see Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93.

96. *See* HOUSE REPORT, *supra* note 16, at 522 (statement of Sen. Watt) ("These provisions would also have a chilling effect on debtor's lawyers and their firms by requiring all of their newsletters, seminars, advertising materials to include awkward and misleading statements identifying themselves as debt relief agencies.").

97. *See In re* Barcelo, No. 03-22074, 2005 WL 3007104, at *1–2 (Bankr. E.D.N.Y. 2005) (enjoining a large bankruptcy petition preparer from most of its previously customary activities).

98. It is notoriously difficult to obtain reliable information about how much it costs to file for consumer bankruptcy. *See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 545–47 (1993) (suggesting a typical fee of approximately $1000 based on an empirical study of pre-Act fees). Still, it is hard to believe that fees will not eventually rise under the Act. The judges with whom I have discussed this question suggest that fees have risen substantially (by more than 20%) since the effective date of the Act.

99. For critical discussion, see Braucher, *supra* note 98; Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549 (2005).

100. The most prominent opinion probably is that of Judge Monroe in *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005) (characterizing the statute as "inane" and asking if "any rational human being [can] make a cogent argument that this makes any sense at all"). *See also In re* Dixon, 338 B.R. 383 (B.A.P. 8th Cir. 2006) (affirming dismissal of bankruptcy petition for violation of prefiling counseling requirement). The most successful loophole to date appears to be the view that the counseling obligation is jurisdictional, so that an attempt to file without counseling is ineffective. The result is that the court can dismiss the petition without opening a case that would bring the refiling rules into play. *See In re* Rios, 336 B.R. 177 (Bankr. S.D.N.Y. 2005); *In re* Valdez, 335 B.R. 801 (Bankr. S.D. Fla. 2005); *In re* Hubbard, 333 B.R. 377 (Bankr. S.D. Tex. 2005). *But see In re* Tomco, 339 B.R. 145

pears, will be to make it harder, more time-consuming, and more expensive for consumers to file for bankruptcy.[101]

As with the rules discussed above, it is difficult to predict exactly how much of a hurdle this will be. Early indications are that in many cases debtors will have access to expeditious credit counseling, often over the Internet.[102] But part of this hurdle surely is psychological: the humiliation of going through counseling doubtless will slow some cognizable group of people, for some time, from filing.

The second strategy is more indirect, but no less effective: to lower the benefits of bankruptcy. It is here that I see the most salient effect of the means-testing requirement. If filing will not provide as much of a fresh start as it formerly did, then well-counseled debtors might wait to file until they are in deeper distress. The other obvious example is the expansion of the categories of nondischargeable debts.[103] Here, for example, is one of the rare explicit references in the Act to the "open end credit plan" that is the regular product of the credit card issuer.[104] Specifically, post-Act § 523(a)(2)(B)(iv)(II) prevents a discharge of any cash advances exceeding $750 during the 70 days preceding bankruptcy. Given the frequency with which distressed borrowers might be borrowing on a credit card to repay other pressing obligations, this provision can convert garden-variety dischargeable unsecured debt into nondischargeable debt that will pass through bankruptcy unaffected.

The discussion in this section is speculative. It depends on a variety of empirical assumptions about the behavior of distressed borrowers that are difficult to verify empirically. For example, I assume that the bill will have only a minor effect on the number of people who choose to file, although it will have a noticeable effect on when they file.[105] That assumption makes sense if you believe (as the data indicate) that the overwhelming majority of filers are in such distress that they are all but compelled to file. As discussed above, there is data to support that assumption, but it certainly is not conclusive. Similarly, I assume that consumers are making payments right up to the moment that they file, and that the statute thus slows down both bankruptcy *and* the termination of revenues for the issuers. A contrary assumption certainly is plausible: the statute might defer the bankruptcy filing weeks or months past the

(Bankr. W.D. Pa. 2006) (rejecting the case/petition distinction); *In re* Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006) (same).

101. Nor does it appear that credit counseling will produce any great number of repayment plans, given the general level of financial distress of the relevant population. *See* Caroline E. Mayer, *Bankruptcy Counseling Law Doesn't Deter Filings*, WASH. POST, Jan. 17, 2006, at A1.

102. *See* 11 U.S.C. § 109(h)(1) (2000).

103. BAPCPA, Pub. L. No. 109-8, § 310, 119 Stat. 23, 84 (codified at 11 U.S.C. § 523(a)(2)(C)); *id.* § 314, 119 Stat. at 88 (codified at 11 U.S.C. § 523(a)).

104. *Id.* § 310, 119 Stat. at 84 (codified at 11 U.S.C. § 523(a)(2)(C)(i)(II)).

105. For some early evidence in support of that perspective, see NACBA STUDY, *supra* note 38 (suggesting that the great majority of filers are in such dire distress that bankruptcy would have been inevitable, without regard to changes made by the Act).

point of hopeless distress, but payments might stop at the same time as they would have before the Act.[106] These are, of course, empirical questions. I can imagine testing them, but I certainly acknowledge that it would be difficult.

IV. THE REALITY

Finally, I close with a few early assessments of the post-Act landscape, which tend to suggest, in hindsight, that credit card issuers overestimated the net profits they would earn from their investment in the Act. My discussion here is self-consciously tentative, resting as it does on data available in the first few months after the Act went into effect. I discuss three separate questions, in decreasing order of generality: (1) the overall filing rate, (2) the share of chapter 13 filings, (3) and the amount paid to unsecured creditors in chapter 13 cases.

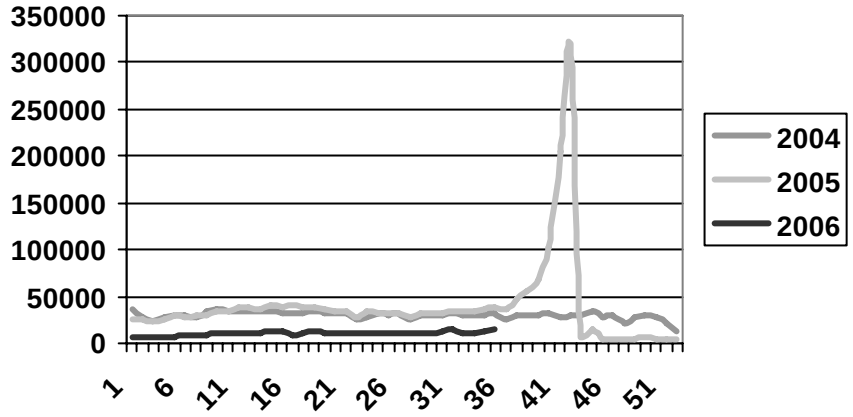
A. Filing Rates

The biggest question concerning the Act is what its long-term effect on filing rates will be. To shed some light on that question, figure 2 shows the weekly filing rates from January 2004 through the first thirty-five weeks of 2006 (the end of August).

Several things about that figure are noteworthy. First, it displays the massive spike in filings in October of 2005, just before the October 17 effective date of the bill. Logically, that spike would consist of the "normal" October 2005 filings, plus two groups of people: early filers and new filers. The early filers are those who eventually would have filed anyway, but who chose to file early because of concerns about the onerous provisions of the Act. The new filers are people who but for the Act would never have filed—who would have "toughed it out" without a bankruptcy filing—but chose to file because of concerns that the Act's procedures would be unduly harsh if they later turned out to need bankruptcy relief.

106. My intuition that the borrowers often pay until close to the bankruptcy date is supported by the rising complaints in the 1990s about "trapdoor" debtors. *See* Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 198–99 (1999) (discussing complaints by creditors about "trapdoor" debtors, who file for bankruptcy before they are even delinquent on their debts). As the text suggests, credit card issuers now recognize that it is to their advantage to have the trapdoor debtor, rather than the debtors that stop paying months before bankruptcy overtakes their affairs. Conversations with issuers suggest that in the present market about 20% of bankruptcy filers are current on their debt at the time of their bankruptcy filing. Although the issuers with whom I had this conversation collectively had only about a 20% market share of American credit card debt, they assured me that between them their portfolios surely included the overwhelming majority of American bankruptcy filers: each of the two indicated that their portfolio included about 75% of all American bankruptcy filers.

FIGURE 2
WEEKLY INDIVIDUAL FILINGS (2004–2006)



Source: Author's Calculations Based on Data from Lundquist Consulting

My conversations with industry sources suggest that the spike was much larger than expected. Thus, at the time, it was thought that much of the spike was comprised of new filings. But the shape of the curve in subsequent months suggests that a large share of the spike, at least, consisted of early filers. The reason for this conclusion is that ten months after the Act became effective, in August 2006, filings were still trending steadily upward from the preternaturally low level they reached shortly after the Act became effective. To see this point, consider figure 3, which shows weekly filings for the first thirty-five weeks of 2004 and 2006, as well as a "difference" line, which shows the excess of the 2004 filings over the 2006 filings.[107] As the trend line superimposed over the difference line illustrates, the difference has declined steadily during the first eight months of 2006.

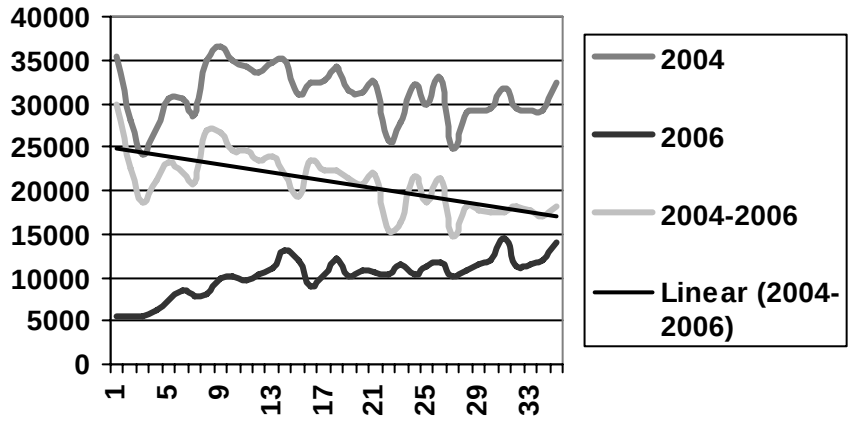
Two filing trends connected with the passage of the statute readily could explain those trends. First, the "early filing" effect discussed above: a lot of people filed before BAPCPA who otherwise would have filed later. That effect should depress filing rates after BAPCPA until it plays out. Second, the "deferral" effect discussed in Part III: the provisions that make filing more costly, more bureaucratic, and more humiliating should defer filings until people are deeper in distress. That effect should depress filings initially but ultimately fade away as well.

It is too early to assign any specific share to the two effects. It is provocative, however, to see the period over which those effects have

107. I construct the figure with 2004 rather than 2005 filings because the 2005 filings were affected by the adoption of BAPCPA even before it became effective in October 2005.

played out. I would not have expected pre-BAPCPA early filers to have filed ten months early. But if we discard that explanation, we have to think that the deferral effect operates over a similarly extended period. If so, the steady upward trend in filing rates reflects the period during which the deferred filings are slowly rising to their "normal" level. If we have not yet reached that level, BAPCPA is deferring some filings more than ten months.

FIGURE 3
WEEKS 1–35 INDIVIDUAL FILINGS (2004, 2006)



Source: Author's Calculations Based on Data from Lundquist Consulting

It is far too soon to be sure of the level at which filings will stabilize after BAPCPA. The data above illustrate graphically that the filing rates remain far below the pre-BAPCPA levels. Yet the steady convergence of post-BAPCPA filing levels with pre-BAPCPA filing trends suggests that we cannot yet be sure that the decline, if any, will be substantial.

B. Chapter 13 Filings

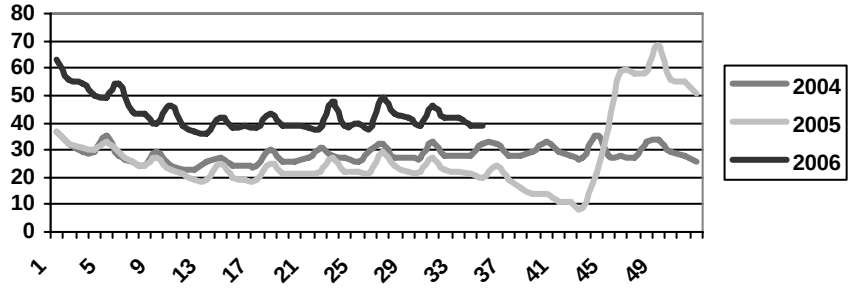
The second important question about the Act's effect on credit card issuers is how it will affect the share of filings made under chapter 13, as opposed to chapter 7. The purpose of the means test, after all, is to force borrowers into chapter 13. But the provisions of the Act that relate to chapter 13 provide a strong countervailing influence. As discussed by Bill Whitford and Jean Braucher in their contributions to this symposium, those provisions remove the incentives for most filers to choose chapter 13.[108] Thus, it is entirely possible that the Act as a whole will have the effect of lowering the rate of chapter 13 filings—a perverse out-

108. Braucher, *supra* note 95; Whitford, *supra* note 44.

come for credit card issuers used to receiving nothing in chapter 7, but a realistic one nonetheless.

Again, it is far too soon to tell, but the early data are instructive. figure 4 shows the percentage of chapter 13 filings (as a share of all bankruptcy filings) for the last two years. Not surprisingly, the share of chapter 13 filings immediately after the Act is unusually high: the overwhelming majority of early filers would have been chapter 7 filers (as we can see from the October 2005 datapoint). Those left behind would be chapter 13 filers.

FIGURE 4
CHAPTER 13 SHARE OF FILINGS (2004–2006)

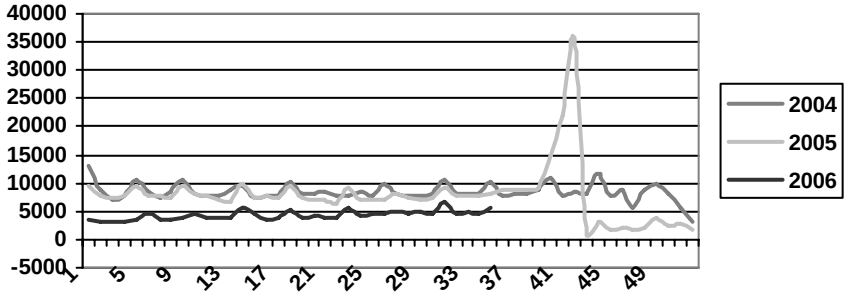


Source: Lundquist Consulting

What is interesting about figure 4 is that the chapter 13 rate is still falling steadily several months after the Act's effective date. Here, the data suggest a little more basis for a prediction than they did with respect to the overall filing rate. Although the chapter 13 share of filings has not yet fallen below the typical pre-Act share of about 30%, it is important to recognize that the higher rate in figure 4 is a share of an unusually low overall rate.

Thus, as figure 5 illustrates, the gross number of chapter 13 filings now is much lower than it was before the Act. That suggests to me the likelihood that, as the total number of filings returns to a stable level, the share of chapter 13 filings will stabilize at a level below the pre-Act level. As with the total filing data, it is too soon to be sure where the filings will stabilize, but it does seem clear already that BAPCPA is not going to cause a major shift in favor of chapter 13 filings.

FIGURE 5
WEEKLY CHAPTER 13 FILINGS (2004–2006)



Source: Lundquist Consulting

C. Returns in Chapter 13

The final question is what credit card issuers can expect to receive in the chapter 13 plans approved under the Act. Here, Bill Whitford's piece in this symposium provides a fascinating account of how the happenstance of a Michigan senator's political weight in the Republican Party led to car lenders getting an unusually strong provision for their benefit—one more instance of the credit card issuers failing to get the statute that they "paid for" back in 1998.[109]

The key here is the amendments to Bankruptcy Code § 1325.[110] That oddly written provision appears as a "hanging" unnumbered paragraph at the end of § 1325(a)—after § 1325(a)(9) but apparently operating to amend § 1325(a)(5):

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle.

Although the new language is so obscurely written that it could be interpreted in various ways—perhaps the intention is that there should be no allowed secured claims for car lenders[111]—the most likely intent[112] seems

109. *See* Whitford, *supra* note 44.

110. *See* BAPCPA, Pub. L. No. 109-8, § 306(b), 119 Stat. 23, 80–81 (codified at 11 U.S.C. § 1325).

111. *See In re* Ezell, 338 B.R. 330, 336 n.8 (Bankr. E.D. Tenn. 2006) (quoting 8 COLLIER ON BANKRUPTCY 1325.06[1][a] (15th ed. rev. 2005)); *In re* Carver, 338 B.R. 521, 526 (Bankr. S.D. Ga. 2006); *see also* Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 469–74 (2005) (providing a thorough discussion of readings less favorable to car lenders).

112. In gauging intent, I note, among other things, that the title of this section of the Act is "Giving Secured Creditors Fair Treatment in Chapter 13." Although courts that, like *In re Carver*, adopt a

to be that the entire amount of the car lender's claim should be treated as an allowed secured claim for purposes of § 1325(a)(5).[113] That interpretation would have the effect of placing car lenders in a position quite similar to the position home lenders have held since the decision in *Nobelman v. American Savings Bank*.[114]

What that means for credit card issuers, in turn, is that there is greater pressure in debtor budgets to pay funds to the holders of car loans, leaving lower amounts available for unsecured creditors.[115] Conversations with bankruptcy judges in the early days after the Act suggest to me that this particular provision is leaving unsecured creditors (including credit card issuers) with no recovery much more frequently than was the case in the pre-Act environment. Scholars herald the arrival of chapter 13 "zero-payment" plans—which pay nothing whatsoever to unsecured creditors.[116] Thus, there is good reason to think that credit card issuers in fact will do worse under post-Act chapter 13 plans than they did under pre-Act chapter 13 plans. Hence, even if the Act does increase the share of bankruptcy filings that fall under chapter 13, it is not clear that this will produce any increased recovery for card issuers.

V. CONCLUSION

The credit card is perhaps the most important financial innovation of the twentieth century; it introduced substantial efficiencies in both payment and borrowing markets. The credit card, however, is associated with increases in spending, borrowing, and financial distress.[117] It is not clear why that is the case, although academics have suggested it may be due to cognitive impairments, compulsive behavior, excessive or unfair advertising, or fraudulent contracting practices.[118]

Reform-minded governments around the world currently are struggling with how to respond to the problems with credit cards without undermining the efficiency of payment and lending markets.[119] Some re-

more restrictive reading are correct in noting that earlier versions of the bill would have more plainly articulated this intent, I think it is fairer to attribute the final version of the Act to sloppy drafting than to a decided intention to treat car lenders *worse* than all other secured creditors.

113. For cases following that reading, see *In re Horn*, 338 B.R. 110 (Bankr. M.D. Ala. 2006); *In re Robinson*, 338 B.R. 70 (Bankr. W.D. Mo. 2006); *In re Johnson*, 337 B.R. 269 (Bankr. M.D.N.C. 2006).

114. Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993).

115. Of course, some of the provisions will elevate the likelihood that credit card lenders will be repaid in bankruptcy before other unsecured creditors. The principal example is BAPCPA § 310, which revises Bankruptcy Code § 523 to broaden the types of credit card debt that are presumptively not dischargeable. Among other things, any cash advance of more than $750 will raise that presumption. So, if a borrower, in the ninety-day period before bankruptcy, obtains a cash advance to pay rent or a medical bill or to shift balances from one credit card to another, the previously dischargeable debt will become presumptively nondischargeable.

116. *See* Whitford, *supra* note 44.

117. *See* MANN, *supra* note 16, chs. 4–5.

118. *See id.* chs. 12–14.

119. *See id.* ch. 11.

sponses focus on the payment functionality. Because credit cards might encourage consumers to spend too much, and perhaps more than they can repay out of monthly incomes, credit card use can lead to unplanned debt. The best responses to this problem shift routine payment transactions to debit cards and include such things as point-of-sale disclosures and limitations on advertising, credit card surcharges, and limitations on teaser rates and affinity and rewards programs.[120]

Other responses focus on the credit function. Because the credit card is so easy to use (that is, the transaction costs of credit card lending are so low), borrowers underestimate the risks associated with future revenue streams. The response is to intervene in the market for consumer lending or adjust the types of relief available in bankruptcy.[121] Although policymakers around the world are loosening the rigor of their consumer bankruptcy systems—in large part due to the introduction of American-style consumer credit—the legislative desire to protect the credit card's unique place in the U.S. economy was one of the most important motivations for the bankruptcy reform statute. Oddly enough, the credit card industry successfully convinced bipartisan majorities in both the House and Senate that there were serious deficiencies in the American bankruptcy system within which the card has had its phenomenal success. Thus, the central idea behind the "fresh start"—the complete liquidation of all debts—has shifted towards a presumption in favor of repayment.

Given the difficulties of sorting out the various factors that influence consumer bankruptcy filings, even hindsight is unlikely to give us a confident understanding of the effects of the Act on bankruptcy filings. For example, I doubt that the Act will deter borrowing to any significant extent. I am also skeptical that it will reduce the number of bankruptcies in any substantial way. Moreover, I think it most improbable that consumers will see the benefit of any increased bankruptcy payouts in the form of interest rate reductions. Still, these assumptions will be hard to test with quantitative data alone, especially in the early years of the Act's operation. Thus, in the end, I expect that an informed sense of the actual impact of the Act will come only after years of experience. For now, I can offer just the speculations on which this essay is based.

120. *See id.* chs. 13–14.
121. *See id.* chs. 15–17.