(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion -

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1). n101

The "reasonable investigation" the attorney is required to conduct isn't problematic. The "gave rise to" language suggests causation, meaning the attorney must look at the reasons underlying the motion, which is in keeping [*317] with the general tenor of Code 707(b)(5) to allow sanctions for improper motions. Unlike Code 707(b)(4), where the "circumstances that gave rise to the petition" makes little sense in relation to the rigid means test for consumer debtors, the phrase "reasonable investigation" actually makes sense here. n102 The real problem is in the last phrase of the section: the motion "does not constitute an abuse under paragraph (1)."

"Paragraph (1)" of course was the rallying point of BAPCPA for supporters and opponents alike; it commands the dismissal or conversion of abusive chapter 7 consumer cases, with the means test and a good faith provision defining just what constitutes "abuse." n103

But what could it possibly mean to say that a motion filed by the creditor - the whole purpose of which is to dismiss the debtor's case as an abuse of chapter 7 - "does not constitute an abuse under paragraph (1)?" Consider the two possible interpretations of the language:

. The creditor's attorney must certify that the motion to dismiss is not an abuse of the provisions of chapter 7 as defined by the means test or the good faith standard, or

. The creditor's attorney must certify that, notwithstanding the motion to dismiss, the debtor's case in which the motion was filed is not abusive.

[*318] The second interpretation puts the motion at odds with itself and the attorney between the proverbial rock and the hard place. Given the overall tilt of BAPCPA in favor of creditors (despite BAPCPA's lofty sounding official title), it's hard to imagine that Congress meant to put creditors' lawyers in such an impossible situation. So the first interpretation must be the correct one, right?

Wrong. The first interpretation of the "paragraph (1)" language is just as problematic, but for a different reason. The first interpretation comes closer to what we think Congress meant to do: they wanted to punish creditors, and their lawyers, for filing abusive motions. But instead of making compliance impossible, the first interpretation makes it meaningless.

All of the provisions that are relevant to the "not an abuse under paragraph (1)" language - paragraphs (1), (2) and (3) of 707(b) - are expressly tied to the debtor's finances or conduct, and they cannot be read in a way that allows for sensible application to a creditor's motion to dismiss. How can the court apply them to determine if the creditor's motion is an abusive filing? It can't. The result is a standard empty of meaning.

There is a third possibility: Congress made a mistake, not just any mistake, but one that produces an absurd result. If a court draws this conclusion, then it would be free to implement the intent behind the language - discouraging creditor abuse and giving the debtor a remedy when a creditor crosses the line - rather than being limited to enforcing the language strictly according to its terms.

We're not going to speculate as to how the courts will define "abuse" or what sort of standard they might fashion if absurdity is found because making sense of the "paragraph (1)" language isn't the end of the analysis. Where there's a violation of the attorney's certification requirement, the court must also find that the pleading was not filed solely to cause the debtor to waive rights under the Code.

4. The motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under Title 11

The "solely to coerce" language puts us in mind again of that scene from Platoon. After you undertake a painstaking reading of the language of 707(b)(5), carefully trying to ascertain a meaning that is both plausible and consistent with its purpose, you reach the end and - boom - there's a requirement that destroys your hard work and everything you thought you understood about the statute.

Read literally, the language means that a creditor's attorney is relieved of nearly all the standards of conduct that govern other lawyers and all parties. We know from court decisions interpreting "solely" that it means "only" and [*319] not "mostly," "materially" or "substantially." n104 So if an attorney signs a motion to dismiss that has any purpose other than coercion, no matter how slight, the attorney gets a free pass for certification violations under 707(b)(5).

Less clear but equally important is figuring out how the "solely to coerce" language can be read harmoniously with the general provision of 707(b)(5)(A)(ii)(I), which allows for sanctions if "the position of the party ... violated Rule 9011." Coercion most assuredly is an "improper purpose" under the Rule but because it is a Rule violation, the whole statute runs into a superfluity problem. That is, a violation of the certification and solely to coerce provision, by definition, triggers sanctions under its more general counterpart found in subclause (I), causing the latter to swallow the former.

[mg f:'abk20401.eps',w12.1,d15.7] Adding even more confusion is the manner in which Congress has separated "the party" in subclause (I) from "the attorney" in subclause (II). As we state above, this could mean that the attorney is completely off the hook unless the motion is made solely to coerce the debtor. But it could also mean that in any case in which the creditor is represented by counsel, (I) will not apply at all, leaving a very narrow range of circumstances in which the debtor could actually recover after defeating a motion to dismiss.

None of this is logical because it leads to results that thwart the apparent intent of the section: to discourage abusive creditor motions and to punish creditors who abuse their right to seek dismissal or conversion of the debtor's case.

We offer a plausible solution, a reading of the section's language that [*320] gives meaning to all of its parts, clarifies the confusion and effectuates the legislative intent. We think (II) applies only to rogue attorneys whose actions in the bankruptcy case are made with neither the knowledge of their creditor clients nor a due regard for the law. That is, the language should be limited to extraordinary cases where the attorney's conduct does not represent "the position of the party" as described in (I).

Consider the facts of a case decided in a Texas bankruptcy court. n105 Myers & Porter represented creditors in a number of dischargeability complaints filed in consumer cases that alleged fraud. In these cases, the attorneys failed to serve the complaint on the debtor, who often learned of the complaint only after the attorneys moved for default judgment. The complaints generally failed to plead fraud with particularity, and supporting documents, like the contract or payment records, were not attached. The proposed order accompanying the motion for default judgment ordered the debtor to pay attorney's fees, but no evidence was offered to prove that the debtor was liable for those fees. n106

In one case, the debtor's lawyer received a letter threatening dischargeability litigation unless the debtor reaffirmed a substantial portion of the debt. Debtor's counsel filed an answer and served interrogatories, which were never answered. When this case was called for trial, neither the creditor nor Myers & Porter appeared, as was common in proceedings on these dischargeability complaints. n107

After handling a few of these cases, the court noticed a pattern and issued a notice to show cause to the creditors and the law firm's principals, Ms. Myers and Mr. Porter. Through evidence and court filings, the court learned that Myers & Porter was engaged by the creditors' national counsel and that, despite the written contract, Myers & Porter had acted without informing national counsel or the creditors, and without obtaining any requisite consent. n108

The court made an express finding that the creditors and their national counsel "were not responsible for the problems caused by Myers & Porter." n109 The Myers & Porter attorneys, on the other hand, were dealt with severely: each was suspended from practicing in the United States Bankruptcy Court for the Northern District of Texas for a period of not less than four years. n110

As unusual as it is to distinguish between the conduct of the creditor and [*321] its agent, the attorney, the Texas court did the right thing; the lawyers in that case truly were rogue attorneys, and they victimized not just debtors, but the court, the system and even their own clients.

Subclause (II), with the attorney certification and the "solely to coerce" standard, can be read as codifying the case of the rogue attorney and doing so resolves most, if not all, of the interpretive problems with 707(b)(5).

First, the rogue attorney interpretation allows subclauses (I) and (II) each to have an independent meaning and application. Subclause (I) would apply to cases that follow the usual course of a party asserting a position through the attorney, who serves as the party's agent. That is, a creditor's motion that violates Rule 9011 triggers sanctions, which the court can apportion between attorney and client as the situation warrants, just as courts do now under Rule 9011.

Second, subclause (II) would be limited to the exceptional cases, like that presented in Texas, where an attorney files motions to dismiss or convert without the creditor's knowledge or consent, with the sole intent of coercing the debtor into waiving a right.

The rogue attorney interpretation also avoids the problem of superfluity that arises when interpreting the "solely to coerce" provision and the general violation of Rule 9011.

Finally, and most important, this interpretation avoids the disastrous result that the class of attorneys who represent creditors in consumer cases would be somehow exempt from the requirements of Rule 9011 that are intended to keep the process honest, orderly and respectable.

TRAP #7: NO GOOD DEED GOES UNPUNISHED

It would be easy to assume that the provisions of BAPCPA only apply to debtors' attorneys who receive payment. After all, what incentive could there be to subject pro bono attorneys to increased liability?

If one assumes that the law is intended only to apply to "bad" debtors' attorneys - that is, those who are assisting their clients to abuse the system - then it would make sense to exclude attorneys who receive no fee. But the more likely intent of the attorney liability provisions is to decrease the number of consumer bankruptcies resulting in a discharge. All the consumer provisions (and the political rhetoric behind them) point to this goal:

. the means test will decrease the number of Chapter 7 filings;

. new barriers to entry, such as requiring credit counseling and demanding extensive documentation, will decrease the overall number of filings, and result in many more dismissals; and

. imposing advertising restrictions and increasing liability on consumer debtors' [*322] attorneys will drive up the price of bankruptcy, and decrease the number of available attorneys.

All these provisions will increase the number of debtors who enter bankruptcy without counsel. If that is the objective, discouraging even pro bono practice makes some sense.

Many of these provisions apply only to DRAs as defined in Code 101. n111 To qualify as a DRA, the attorney must provide "bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration ... ." n112

So, for example, the attorney advertising provisions do not apply to pro bono bankruptcy attorneys and they wouldn't have to refer to themselves as "debt relief agencies" in their advertising. But the certification and reaffirmation provisions do apply to pro bono practice, since they apply to all attorneys who sign documents, regardless of whether they receive a fee.

Rules affecting attorney conduct regardless of payment are not new. Rule 11 and Rule 9011 are not limited to attorneys receiving payment.

But when new, onerous liability provisions are added to the obligations imposed upon debtors' attorneys, the likelihood that lawyers will volunteer their services to assist debtors out of the goodness of their hearts plummets. Even those who are not faint-hearted are likely to be instructed by their malpractice insurers that this area of practice is outside the scope of their coverage. n113 How many attorneys will put their homes on the line to assure that debt-ridden consumers have assistance to file bankruptcy? Only consumer debtor bankruptcy experts (who are likely to be insured for this practice) will continue in the practice, and fewer of them will take on pro bono cases intentionally. n114 And creditors' attorneys, who constitute a large segment of the pro bono bankruptcy providers, are almost certain to give up these cases.

The American Bar Association pointed to this problem in its opposition to the attorney liability provisions in the bill:

[*323]

These provisions will greatly reduce pro bono representation for the poorest Americans. Although the "debt relief agency" provisions in Sections 227-229 only apply to attorneys who receive payment for their services, the new certification requirements of Sections 102 and 203(a) apply to all debtor bankruptcy attorneys, whether or not they charge a fee. As a result, these provisions will strongly discourage attorneys and law firms from providing essential pro bono bankruptcy services to the very debtors who need them most. n115

What's particularly sad about this is that the American Bar Association, under the leadership of the Standing Committee on Pro Bono and Public Service, and the Section of Business Law Pro Bono Committee, has been nurturing a pro bono bankruptcy practice program, to provide legal service to consumers unable to afford attorneys. n116 As we said, no good deed goes unpunished in BAPCPA.

TRAP #8: A SCAPEGOAT FOR THE SERIAL FILER

Let's face it: Although they represent just a small minority of bankruptcy filers, there are people out there who know the Bankruptcy Code better than their lawyers and use the Code, the courts, and honest lawyers to game the system. These are bankruptcy's serial filers.

None of the many voices that joined the chorus of opposition to BAPCPA took up the cause of the serial filer. Their tactics are abusive and some of them are very clever when it comes to navigating through the bankruptcy system.

Section 302 of BAPCPA attempts to curb serial filing by limiting the automatic stay where the individual debtor filed one or more previous bankruptcy cases within a year of the current one. n117 Recognizing that serial filings can arise from circumstances other than abuse, Section 302 allows any party in interest to move for an order making effective or continuing the [*324] stay. n118 To get relief, the moving party must demonstrate that "the filing of the later case is in good faith as to the creditors to be stayed." n119

The section sets out three situations in which the case "is presumptively filed not in good faith," including when:

a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court. n120

The crafty serial filer will no doubt seize upon the reference to the attorney to evade the effect of this provision. The debtor might fail in his effort to shift attention away from himself and toward his allegedly negligent counsel, but the attorney will still have to dedicate time and money in defending herself and her reputation.

If the debtor succeeds in proving his attorney's negligence and, thus, rebutting the presumption of bad faith, and the debtor is an "assisted person," then the attorney is subject to Code 526(c):

(2) Any debt relief agency shall be liable to an assisted person in the amount of any fees or charges in connection with providing bankruptcy assistance to such person that such debt relief agency has received, for actual damages, and for reasonable attorneys' fees and costs if such agency is found, after notice and a hearing, to have -

... .

[*325] (B) provided bankruptcy assistance to an assisted person in a case or proceeding under this title that is dismissed or converted to a case under another chapter of this title because of such agency's intentional or negligent failure to file any required document including those specified in section 521.

To put the result in simpler terms, an attorney's negligent failure to file a single document in a prior case could lead to:

1. a free pass into bankruptcy for the serial filer;

2. disgorgement of all amounts the attorney received from the debtor in the prior case; and

3. the attorney's payment of the serial filer's costs of rebutting the bad faith presumption in the later case.

Yikes.

TRAP #9: NO LAWYER LEFT BEHIND!

Supporters of BAPCPA took particular delight in emphasizing how favorable the new law would be to women and children, especially the amendment to Code 507(a) that moved support obligations from seventh to first priority. Senator Hatch's statement in the 106th Congress was typical:

This bill also protects our children... . Under my provisions, the obligation to pay child support and alimony is moved to a first-priority status, as opposed to its current place at seventh in line, behind attorney's fees and other special interests. If you really want to know the truth, my measures make improvements over current law in this area that are too numerous to mention here at this time, but they work to facilitate the collection of child support and alimony and effectively prevent deadbeats from getting their obligations discharged. n121

The phrase "attorney's fees and other special interests" was meant to be derisive, and for a time this priority trumped even administrative expenses.

In near unanimity, commentators decried the change because of its practical effect: If trustees and their professionals - including attorneys - couldn't get paid, they wouldn't administer assets and support creditors would get nothing, leaving them worse off than they were before the change. n122 Congress [*326] agreed and further amended the support priority to provide the following carve-out:

The administrative expenses of the trustee ... shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims. n123

The trap here is different than those discussed elsewhere in this article because rather than facing sanctions or otherwise being punished for some statutory violation, attorneys and other professionals may find themselves rendering services on behalf of the trustee on a volunteer basis. The highlighted language is ambiguous, and courts might interpret it as limiting the trustee's administrative expenses to property that the support creditor could reach had the bankruptcy never been filed.

A bankruptcy trustee's powers exceed those of any creditor, even the justifiably favored support creditor. If "assets that are otherwise available" is interpreted to mean only those assets that a support creditor could pursue under nonbankruptcy law, the carve-out may not apply to assets administered through powers available only to the trustee in bankruptcy.

Here's an example: A fraudulent transfer can be avoided by a support creditor under a state law, and the trustee enjoys the same right in a bankruptcy case. The trustee's expenses for avoiding the transfer would be covered by the carve-out because the action is one that is "otherwise available" to the support creditor.

Suppose that, instead of a fraudulent transfer, the asset to be administered is a personal injury claim the debtor has arising out of an automobile accident. Upon filing a bankruptcy petition, this claim becomes property of the estate and the trustee becomes the real party in interest with the exclusive right to prosecute the personal injury claim. A support creditor generally has no right to step into the debtor's shoes and sue another person for the debtor's damages. In other

words, the personal injury claim may not be an asset "otherwise available" to the support creditor and, as a result, the trustee's expenses in prosecuting the claim in bankruptcy might fall outside of the carve-out. n124

[*327] When seeking compensation, the trustee's professionals will contend that the support creditor is entitled to the unencumbered proceeds of every action the trustee undertakes and so the "assets otherwise available" language presents a facial, but not an actual, limitation. The problem with such an argument is that the new administrative carve-out does not expressly include proceeds of administered assets. In other sections of the Code, such as 541, n125 proceeds are specifically mentioned, so Congress knows how to include proceeds, but declined in the case of the support priority carve-out.

We acknowledge that the analysis may become murkier when the priority debt at issue is for child support, which is the subject of myriad state and federal statutes. Child support creditors are armed with pretty powerful weapons and in some respects their power approaches that of a bankruptcy trustee. n126 But this only expands the category of assets that are "otherwise available" to the support creditor, not the ability of the trustee to be paid for administering other assets that the support creditor has no nonbankruptcy right to pursue.

As written, the expense carve-out doesn't fix the problem. The trustee won't be able to hire professionals to administer an asset if there's no assurance of payment. The result is hardly the super-priority for support creditors trumpeted by the bill's sponsors. In fact, because professionals will be disinclined to represent the trustee on a voluntary basis, it becomes less likely that assets will be administered, leaving support creditors worse off, because if assets are not administered, the support creditors are put first in line to collect nothing.

IV. AND NOW, THE SLAP: THE UNKINDEST CUT OF ALL

For the most part we've avoided policy discussions and focused on the language of BAPCPA, particularly where the drafting is confusing or just plain sloppy. But when you take a step back and look at all the provisions aimed at debtors' attorneys, the policy implications are inescapable. Congress has convicted an entire class of lawyers whose only crime is dedication to the welfare of their clients and providing competent and affordable representation to ordinary people whose lives are desperate because they are deeply in debt.

We acknowledge there are exceptions; some attorneys fail to live up to professional standards of conduct. There are bankruptcy lawyers who are [*328] incompetent, and those who aid their clients in committing fraud. But they are few in number. The same is true of every profession: doctors, CEOs, judges, and even members of Congress have ignored their professional obligations. Here, however, Congress has legislated based on these exceptional cases. All consumer debtors' attorneys are treated as suspect and in need of regulation.

But the real insult - the slap in the face to all consumer debtors' attorneys - is in BAPCPA's treatment of these lawyers in comparison to two groups with a demonstrated record of preying on the financially vulnerable: credit counseling agencies and bankruptcy petition preparers.

While Congress was considering BAPCPA, much was learned about the credit counseling industry and the news was not good. According to a Business Week report in 2001 (the mid-point between introduction and enactment of BAPCPA):

> The billion-dollar credit-counseling industry is deeply troubled. Some clients end up in worse financial shape after using agencies. The fees they pay, usually labeled "voluntary contributions," are often steep. Some agencies are fraudulent; others are run by executives with questionable backgrounds. The agencies, which mostly operate as nonprofits, often pay their executives lavish salaries and make cushy deals for goods or services with related companies. They also steer consumers to affiliated for-profit companies that make debt-consolidation or home-equity loans. "This whole industry is fertile ground for scams," says Eric S. Friedman, a Montgomery County (Md.) consumer-protection official who with colleague Myriam A. Torrico has been tracking credit-counseling fraud. n127

In 2003, the Federal Trade Commission announced it had filed suit against AmeriDebt, which has become the Enron of the credit counseling scandal.

"We will not allow consumers to be duped into 'contributing' hundreds of dollars to these so-called 'non-profits,'" said Howard Beales, director of the FTC's Bureau of Consumer Protection. "There was nothing voluntary and nothing charitable about these payments. Consumers' money didn't go to [*329] creditors, it just ended up lining the pockets of the defendants." n128

Also in 2003, the first comprehensive report on the credit counseling industry was released. n129 Among the findings of the report, prepared by the Consumer Federation of America and the National Consumer Law Center, is abuse by these agencies of their "non-profit" status:

Nearly every agency in the industry has non-profit, tax-exempt status. Nevertheless, many of these agencies function as virtual for-profit businesses, aggressively advertising and selling DMPs [Debt Management Plans] and a range of related services. Some agencies appear to be in clear violation of Internal Revenue Service (I.R.S.) rules governing eligibility for tax-exempt status. n130

The Congressional response to this abundant evidence of a systemic problem in the credit counseling industry is inexplicable. Not only are these agencies expressly excluded from the "debt relief agency" provisions as nonprofits, BAPCPA requires that all consumer debtors be channeled through credit counselors as a condition of bankruptcy eligibility!

The insult to attorneys is worse when attention is turned to bankruptcy petition preparers. Unlike credit counseling, this field has always carried the taint of illegitimacy. Indeed, when Congress enacted 110 of the Code in 1994, it was motivated by concern

that debtors would be at the mercy of fly-by-night "typing mills" that would lull the unsuspecting public into thinking that they had the expertise to offer valuable legal (or at least quasi-legal) bankruptcy assistance. Congress' fear was that bankruptcy petition preparers might "take unfair advantage of persons who are ignorant of their rights both inside and outside of the bankruptcy system." In short, one specific target of the statute was the inherently dangerous unauthorized practice of law by bankruptcy petition preparers. n131

Courts have consistently set out a very narrow range of permissible activities [*330] for bankruptcy petition preparers: they are scriveners who may type the debtor's information on the official forms and not much else. n132

BAPCPA threatens to undermine this body of case law and the protections that have long been afforded unsophisticated debtors. The Act requires all "debt relief agencies," including bankruptcy petition preparers, to provide consumer debtors information that is unquestionably legal advice, such as information about the advantages and disadvantages of filing under different chapters and instructions on valuing assets. In other words, Congress has carved out a range of activities that bankruptcy petition preparers may - indeed must - provide even though this constitutes the unauthorized practice of law.

It would be nice to pretend that this treatment was unintentional, the result of poor drafting or a poor understanding of bankruptcy practice. But you cannot escape the conclusion that this result is intentional.

Congress, in the many ways outlined in this article, means to punish consumer bankruptcy lawyers for representing their hapless clients. While purporting to level the playing field, this law has created a pigsty, lowering the practice of law to the level of petition preparers:

. by branding lawyers - and requiring them to describe themselves - as "debt relief agencies,"

. by forcing them to give bad legal advice, and preventing them from offering some good advice, and

. by placing unnecessary burdens, risk, and expense on the practice of bankruptcy law

In the same stroke, Congress has offered an imprimatur to petition preparers engaged in the unauthorized practice of law, and anointed credit counseling agencies the gatekeepers to the bankruptcy courts.

There's no question that the cumulative effect of all these provisions will be to drive lawyers who file consumer bankruptcies out of business, to increase the number of pro se filers, to increase the number and business of bankruptcy petition preparers, and, most remarkably, to force debtors to undergo "re-education" with consumer credit counselors. n133

[*331] Let's acknowledge here that creditors control - to the penny - how much debt consumers can incur. If they want to reduce excess debt, and thereby reduce the risk of bankruptcy, creditors could return to the golden days when creditors only permitted consumers to borrow what they could reasonably repay. But lending to overextended consumers has turned out to be an extremely profitable business, as shown by the record profits of credit card companies in recent years. n134 No, this counseling is just another punitive measure to make it more difficult for people to get to the courthouse and discharge their debts. n135

Here's what Senator Hatch, a prime mover of the bill, had to say on the Senate floor the day of the bill's passage by that body:

It is getting to the point where some might even forget why we initiated this legislation. We have been at it for 8 years now. Some of those who oppose the bill and are offering final postcloture amendments are flying in the face of years and years of hard work and bipartisan compromise. By the way, the ones who bring up the amendments will never vote for this bill no matter what you do, unless it is a complete cave-in, so we cannot solve the problems that are eating our country alive in bankruptcy. And they do it under the guise that they are trying to protect the weak and the infirm and those who really cannot help themselves.

Give me a break. We over here get so tired of those populist arguments. . . .

[*332] Yet it happens every time - they get up and act like the world is coming to an end because their populist rhetoric is not being listened to. Unfortunately, there are people out there who really believe this stuff when somebody starts yelling, screaming, and shouting on the Senate floor. n136

We began this Section admitting that there are cases of abusive bankruptcy filing. But none of the conduct alleged by BAPCPA's supporters is borne out by the facts: there is no empirical evidence of a significant growth in these problems, nor any other practices that justify this punitive reaction. Congress has reached out and slapped the face of an entire segment of the profession, with no more justification than that it suited their contributors to do so.

In the final analysis, what's most troubling is that lawyers who practice in other fields are oblivious to the dangerous precedent this sets.

FOOTNOTES:

n1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The Act is euphemistically titled, "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005." Some opponents of the law refer to it as the Bankruptcy Act Reform Fiasco, or BARF. The editors of this publication have asked that we use "BAPCPA" to be consistent with the usage in other articles included in this issue. Each reference hereafter to a section of BAPCPA will include the provision to be codified. All references to the Code mean the Bankruptcy Code, which is codified at Title 11 of the United States Code. One suggestion to our readers: as you read this article, having available a copy of the Banrkuptcy Code redlined to show BAPCPA amendments will probably prove useful.

n2. The authors mean no disrespect. But as the text will make clear, Congress has declared war on bankruptcy attorneys in this Act, not only those who represent consumer debtors, but those representing trustees and consumer creditors as well.

n3. When you do, we hope you will e-mail us at UCC2@mac.com with your newly-discovered liability traps, so we can include them in our forthcoming book, Attorney Liability In Bankruptcy (Corinne Cooper ed. forthcoming 2006) with proper attribution, of course!

n4. See id. for our complete discussion of BAPCPA's history.

n5. 1 Nat'l Bankr. Review Comm'n, Final Report: Bankruptcy: The Next Twenty Years (1997) [hereinafter "Commission Report"].

n6. Id. at 81.

n7. See generally Hon. Edith H. Jones & James I. Shephard, Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners, Commission Report, id. at chapter 5 [hereinafter "Minority Report"]. Commissioners John A. Gose and Jeffrey J. Hartley concurred with many of the substantive proposals in the Minority Report but did not write separately. Id.

n8. According to the Commission Report:

Some creditors also have found ways to take advantage of the system. Abusive post-bankruptcy debt collection, documented in the courts and reported widely in the news media, led the Commission to recommend banning the reaffirmation of unsecured debt and providing more supervision for the reaffirmation of secured debt. The 1970 Commission recommended similar restrictions that might have avoided many of the current problems. Some creditors reportedly threaten to bring unfounded non-dischargeability actions that debtors cannot afford to defend as another way to collect dischargeable debt through reaffirmations. They would lose this option with the Commission's recommendation to set clear dischargeability rules for credit card debt.

Commission Report, supra note 5, at 81.

n9. Minority Report, supra note 7, at 8.

n10. There's also a little-noticed provision dealing with creditors in Section 102. See Trap #6 infra.

n11. See BAPCPA Section 102(a)(2)(C) adding 11 U.S.C. 707(b)(4) (2005).

n12. Fed. R. Bankr. P. 9011; Fed. R. Civ. P. 11.

n13. Id.

n14. BAPCPA Section 102(a)(2)(C), amending Code 707(b) by adding paragraph (4)(C). See generally, Catherine E. Vance, Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition of Sanctions Against Debtors' Counsel, 106 Com. L.J. 241 (2001).

n15. See BAPCPA Section 102(a)(2)(C) adding Code 707 (b)(4). As Ms. Vance noted in her 2001 article on the attorney liability provisions:

Neither Rule 9011 nor Rule 11 has been interpreted to penalize an unsuccessful litigant, or his attorney, for the lack of success alone. Even the probability of losing is not enough. As the court in Taylor v. United States stated, although "sanctions are clearly appropriate whenever a reasonable inquiry has or would have indicated that the legal or factual basis of the claim is untenable, when such inquiry merely reveals a likelihood of losing, a lawyer does not violate Rule 11 by maintaining the claim." Indeed, courts have been mindful to avoid using the wisdom of hindsight, testing the signor's conduct by examining what was reasonable for counsel to believe at the time the document was presented. Zealous advocacy should not be unduly chilled, and there should be a healthy respect for the resultant contribution to the continued evolution of the law. All doubt should be resolved in favor of the signor.

Vance, supra note 14, at 265.

n16. BAPCPA Section 102(a)(2)(C), amending Code 707(b) by adding paragraph (4)(D).

n17. To make matters worse, the attorney probably can't bill time spent litigating the sanctions issues because, by referring specifically and only to the attorney, BAPCPA takes the client out of the fight.

n18. BAPCPA Section 102(a)(2)(C), amending Code 707(b) by adding paragraph (4)(B).

n19. This change was the result of intense lobbying by the American Bar Association. It's only one word, from "shall" to "may," but an important one.

n20. See BAPCPA Section 102(a)(2)(C), amending Code 707(b) by adding paragraph (4)(A). Code 707(b) already permits dismissal of a consumer bankruptcy case that is a "substantial abuse." Section 102 of BAPCPA recasts abuse from a concept that looks at the debtor's conduct and purpose in filing for Chapter 7 relief into one premised on need, which is elaborately set forth in BAPCPA's means test.

n21. BAPCPA Section 226(a)(1), amending Code 101 to add Subsection (3). It is beyond the purview of this article, but nonetheless interesting, to note in passing that the definition of "assisted person" appears to be a failed attempt to identify small consumer bankruptcies, thus limiting the reach of these provisions to lawyers who represent poorer debtors. In fact, substantial wealth can still be shielded through state exemptions (even with BAPCPA's homestead exemption cap) and asset protection trust statutes. Even with the changes to the unlimited homestead, some wealthy debtors (who have not moved or committed fraud, or whose assets are in an asset protection trust) will fall into the scope of the DRA provisions. Of course, some of those cases will fall outside of the provision if the debts are not primarily consumer debts (for example, if they consist of personal guaranties of business obligations), but some will undoubtedly remain. One can only assume that the attorney who represented Bowie Kuhn does not advertise.

n22. That "otherwise provided" language is ripe to cause trouble. See Trap #1 infra.

n23. See BAPCPA Section 226(a)(2), amending Code 101 to add subsection (4A).

n24. BAPCPA Section 226(a)(3), amending Code 101 to add subsection (12A).

n25. This includes assistance in connection with a Chapter 13 plan, whether or not Chapter 13 is specifically mentioned. BAPCPA Section 229(a) adding Code 528(b)(1).

n26. BAPCPA Section 229(a) adding Code 528, subsections (a)(3)-(4) and (b). See Trap #2 infra for a discussion of this provision.

n27. See BAPCPA Section 228(a) adding Code 527(a)(1) and BAPCPA Section 315(b) adding Code 521(a)(1)(B)(iii). The content of the notice is governed by Code 342(b) as amended by BAPCPA Section 104.

n28. See BAPCPA Section 228(a) adding Code 527(a)(2), which, under subparagraph (D), requires the following disclosure: "information that an assisted person provides during their case may be audited pursuant to this title, and that failure to provide such information may result in dismissal of the case under this title or other sanction, including a criminal sanction."

n29. BAPCPA Section 229(a) adding Code 528(a)(1) and (2).

n30. See BAPCPA Section 228(a) adding Code 527(b).

n31. See BAPCPA Section 228(a) adding Code 527(c). See Trap #5 infra.

n32. See BAPCPA Section 227(a) adding Code 526(b) and (c).

n33. BAPCPA Section 227(a) adding Code 526(a)(1).

n34. See BAPCPA Section 227(a) adding Code 526(a)(2). See Trap #4 infra.

n35. See BAPCPA Section 203(a), amending Code 524 by adding subsection (k)(6)(A).

n36. BAPCPA Section 203(a), amending Code 524 by adding subsection (k)(5). This assurance does not apply to a reaffirmation agreement entered into with a credit union. See id.

n37. BAPCPA Section 203(a)(2), amending Code 524 by adding subsection (k)(5)(B).

n38. This is a policy problem and a source of potential liability, but not precisely a trap because there's nothing hidden in the language of the statute. However, it does require the attorney - in the same document - to certify that the reaffirmation does not impose an undue hardship on the debtor, and to acknowledge that there is a presumption of undue hardship under the statute.

n39. BAPCPA Section 226(a), amending Code 101(3).

n40. BAPCPA Section 226(a)(2) adding Code 101(4A).

n41. BAPCPA Section 226(a)(3) adding Code 101(12A).

n42. Id.

n43. BAPCPA Section 226(a) adding Code 101(12A)(C).

n44. See BAPCPA Section 226(a) adding Code 101(12A)(B). This raises an interesting question: can debtors' attorneys opt out of the DRA provisions by creating non-profits that pay them big salaries? Courts aren't likely to condone a deliberate attempt to evade the impact of the law. Are clinics set up to help debtors who cannot find counsel also exempt from this provision? The answer for legitimate clinics is complex. If they don't charge, there's no problem. Suppose they operate within a law school, but not as an independent legal entity? If they have a sliding scale for clients, as many clinics do, this may trigger DRA coverage. If they were operating as non-profits before BAPCPA was enacted, it's hard to argue that they are trying to evade the statute. Bankruptcy clinics that charge anything for their assistance should clarify their status as non-profit entities before the statute goes into effect.

n45. See our discussion of this outrageous result in the Slap Section infra.

n46. BAPCPA Section 226(a) adding Code 101(12A).

n47. But they are bound by other provisions of the Act, including the certification and reaffirmation provisions. See Trap #7 infra on pro bono practice.

n48. See BAPCPA Section 226(a)(3) adding Code 101(12A).

n49. BAPCPA Section 226(a) adding Code 101(4A). This situation gets surprisingly complex. No money changes hands yet, so maybe the DRA definition hasn't kicked in. If the attorney realizes the problem and declines to represent her, no consideration has been paid. But isn't the client a prospective assisted person? Here and elsewhere, to the extent that BAPCPA attempts to regulate an attorney-client relationship where no bankruptcy has been filed, and where there may never be one, Congress may have exceeded its constitutional authority.

n50. http://www.wethepeoplema.com/services.asp.

n51. Press Release, We the People, "New Do-It-Yourself Bankruptcy Book Helps Consumers File for Bankruptcy Before Recently Enacted Federal Law Closes the Door Forever," (May 4, 2005), available at http://news.findlaw.com/prnewswire/20050504/04may2005094701.html.

n52. Id.

n53. http://www.dfg.com.

n54. Id.

n55. The authors wonder, what about the author of the website?

n56. One last thought: If you found your sense of decency rattled by the WTP scenarios, be sure to read the Slap Section infra, which is the concluding section of this Article.

n57. See text accompanying notes 27-31 supra for a complete list of the required disclosures.

n58. This includes assistance in connection with a Chapter 13 plan, whether or not Chapter 13 is specifically mentioned. BAPCPA Section 229(a) adding 11 U.S.C. 528(b)(1)(A).

n59. Both are found in BAPCPA Section 229 adding Code 528.

n60. BAPCPA Section 229(a) adding Code 528(a)(3)-(4) and (b).

n61. See id.

n62. There will be a chapter by Professor Barbara Glesner Fines in our forthcoming book on this issue. See note 3 supra. In the interim, here's what she says about this issue:

One obvious question emerges from this discussion of the attorney liability provisions. Can the Congress regulate, to this degree, the attorney-client relationship, a field historically left to the states? And specifically, are these proposals constitutional under the First Amendment? This section attempts to analyze just one part of that question, specifically, whether the advertising provisions violate the First Amendment.

...

Restrictions on consumer bankruptcy advertising would be constitutional only if the restrictions:

. are justified by a government interest in preventing the significant possibility of consumer deception;

. advance that interest; and

. are narrowly tailored... .

Without some demonstration that there is a significant risk of deception of consumers by attorneys in this field, the regulations imposed by the [BAPCPA] are overbroad and a court is likely to find that they represent unjustified restrictions on the First Amendment expression by attorneys.

Corinne Cooper, Catherine E. Vance & Barbara Glesner Fines, Attorney Liability in Bankruptcy 9 (program materials from Bankruptcy Update, ABA Annual Meeting (2003)) (citations omitted).

n63. See note 49 supra. Here and elsewhere, to the extent that BAPCPA attempts to regulate attorney conduct where no bankruptcy has been filed, and where the assisted person is not the debtor, Congress may have exceeded its constitutional authority.

n64. There is plenty of law on what "conspicuous" means. For example, it is a defined term under the Uniform Commercial Code. See U.C.C. 1-201(b)(10) (2001).

n65. See BAPCPA Section 229(a) adding Code 528(b)(1). The phrase defined, "An advertisement of bankruptcy assistance services or of the benefits of bankruptcy directed to the general public" appears in 528(a)(3); in 528(b)(2), the phrase used is "An advertisement, directed to the general public." But given the structure of the provisions, and the duplication, it's impossible to tell with certainty what this definition defines!

n66. Both BAPCPA Sections 227(a) and 229(a) are entitled "Enforcement," but Section 229(a) doesn't contain any enforcement provisions.

n67. The statute says "void" but means "voidable." A void contract is a nullity; it can't be enforced by either party, but this provision permits the debtor to enforce it, at her option.

n68. BAPCPA Section 227(a) adding Code 526(c)(1).

n69. There's also a provision applicable to a dismissed or converted case, but that applies to failure to file, not ads. BAPCPA Section 227(a) adding Code 526(c)(2)(B).

n70. BAPCPA Section 227(a) adding Code 526(c)(2)(A). It's not clear from this provision if "intentionally or negligently failed to comply" modifies only the award of attorney's fees and costs, or all the measures of damages. We believe it applies to all the measures, although a careful drafter would have placed a comma after "costs" since there are commas after each of the other two categories of damages.

n71. BAPCPA Section 227(a) adding Code 526(c)(3).

n72. See e.g., Rittenhouse v. Eisen, 404 F.3d 395, 395-96 (6th Cir. 2005).

n73. Actually, we thought of one: Careful attorneys should be delineating in their engagement contracts exactly what documentation and cooperation the debtor is required to provide. This will be essential for the attorney's protection, since she cannot fail to provide promised services. See Trap #3 infra. So theoretically, if the attorney has failed to comply with the advertising provision, this obligation of the debtor is discharged. But we're not sure that a court can enforce this obligation, and protect the attorney from liability for failure to file a promised document, even if there's no voidability issue.

n74. See BAPCPA Section 227(a) adding Code 526(c)(2)(A).

n75. Just to make the reading easier, we're going to assume away all the problems raised in "Trap #1" and focus on attorneys as DRAs here.

n76. We'll deal with subsection (2) on false or misleading statements, and subsection (4) on incurring debt and/or asking for payment in Traps # 3 and 4 infra.

n77. BAPCPA Section 227(a) adding Code 526(a) and (b).

n78. See Trap #1 supra.

n79. BAPCPA Section 227(a) adding Code 526(a)(1).

n80. See BAPCPA Section 227(a) adding Code 526(a)(3).

n81. There is, however, a large body of case law on "misrepresentation" including from the Code itself under Code 523(a)(2).

n82. See BAPCPA Section 227(a) adding Code 526(a)(3).

n83. Plenty of debtors go into bankruptcy knowing that some battles lie ahead, such as dischargeability litigation.

n84. This scenario is made more plausible because of the certification requirement for the schedules under Code 707(b)(4)(D). There's a double whammy if the failure to file the schedules results in dismissal, an express condition for DRA liability.

n85. See BAPCPA Section 227(a) adding Code 526(c)(1). Technically, the contract is both void and unilaterally enforceable. This is another drafting mistake: under contract law, a contract that is "void" is a nullity, incapable of enforcement at all. The proper term would have been "voidable" at the option of the AP.

n86. See BAPCPA Section 227(a) adding Code. 526(c)(2)(A). See note 70 supra.

n87. We restate our concern, outlined in note 63 supra, that Congress may have exceeded its authority when it attempted in BAPCPA to control an attorney's conduct with a prospective client for whom no bankruptcy is ever filed.

n88. Code 526(a)(4).

n89. This section has more "ors" than the Olympic rowing team!

n90. For an article on small firms accepting credit cards, see Dan Hudson, "Accepting Credit Card Payments: A Primer", GP<abso>Solo, Apr./May 2005, at 10.

n91. BAPCPA Section 227(a) adding Code 526(a)(4). It's also important to remember that this is not a prohibition on the debtor incurring debt but a prohibition against the attorney advising the debtor to do so.

n92. There's another trap lurking in the "shall not advise" prohibition: If the attorney complies with Code 526 and tells the client she can't incur the debt, it is reasonably foreseeable that she will forego the doctor's visit for her son because she can't pay for it and he will become sicker, making an emergency room visit necessary. The public policy consequences here are obvious, but what's more relevant for the attorney is that he might face tort liability if his "advice" is the proximate cause of the child's worsened condition. Can it be a tort (or malpractice) to do what a bad statute requires you to do? We sincerely hope not.

n93. BAPCPA Section 228(a) adding Code 527(a)(2)(B).

n94. BAPCPA Section 228(a) adding Code 527(c)(1), (3).

n95. BAPCPA Section 327 adding Code 506(a)(2).

n96. Id.

n97. BAPCPA Section 102(a)(2)(C) adding Code 707(b)(5)(A). We want to keep attention focused on the application and interplay of clauses (i) and (ii) of this new Code section, but its exceptions deserve some explanation. The "subparagraph (B)" reference in subparagraph (A) creates an exception from sanctions for small business creditors, defined by reference to the number of people the creditor employs full-time and a claim aggregating less than $ 1,000. Attorneys for these creditors will still have their conduct scrutinized. "Paragraph (6)," also mentioned in subparagraph (A), generally prohibits most parties in interest from moving to dismiss or convert a case where the debtor's income is below the statutory threshold.

n98. See Code 523(d).

n99. See Code 362(k) (Code 362(h) prior to BAPCPA).

n100. Code 303(i)(2).

n101. BAPCPA Section 102(a)(2)(C) adding Code 707(b)(4)(C)(i) and (ii).

n102. See Vance, supra note 14, at 259-60. As Ms. Vance's article explains, when applied to the debtor, a prefiling investigation into the "circumstances that gave rise to" the petition is difficult to understand:

To a large extent, however, the reason why a debtor files for bankruptcy is irrelevant, especially in consumer cases. Neither current law nor even the means test is all that concerned with the particular misfortune that has befallen any given debtor, and eligibility does not turn on normative value judgments. There are exceptions in both the Code and the legislation, but as a general rule the prepetition circumstances that compelled the debtor to seek bankruptcy relief bear little on whether the debtor is eligible for such relief under the Code.

If the debtor is seeking bankruptcy protection with inappropriate motives, the circumstances that gave rise to the petition may become relevant. It is entirely appropriate to examine whether the debtor's bad faith or improper conduct, rather than financial distress, have resulted in the filing of a bankruptcy petition. But these cases are already proscribed by Rule 9011's requirement that a paper not be presented for an improper purpose, such as harassment, unnecessary delay, or increased costs to the other parties and the courts.

Id.

n103. Specifically, amended 707(b)(1) says that the court "may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts ... if it finds that the granting of relief would be an abuse of the provisions of this chapter." The means test, codified at 707(b)(2), creates a presumption of abuse that may be rebutted only by "demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that (sic) justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." Id. 707(b)(2)(B)(i). If the means test provision does not arise or has been rebutted, 707(b)(3) requires that the court consider whether the debtor filed the petition in bad faith or whether the totality of the circumstances of the debtor's financial situation demonstrates abuse.

n104. See e.g., White v. Kentuckiana Livestock Mkt., Inc., 397 F.3d 420, 425-26 (6th Cir. 2005).

n105. Household Credit Servs., Inc. v. Dragoo (In re Dragoo), 219 B.R. 460 (Bankr. N.D. Tex. 1998).

n106. Id. at 461-64.

n107. Id. at 461-62.

n108. Id. at 464-65.

n109. Id. at 466.

n110. Id. at 467.

n111. BAPCPA Section 226(a)(3), amending Code 101 by adding subsection (12A).

n112. Id. Bankruptcy petition preparers are not defined as DRAs by reference to the receipt of consideration in this section: "'debt relief agency' means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110 ... ." Id. However, the definition of a petition preparer in Code 110 requires compensation. See Code 110(a)(1).

n113. The malpractice issue is very real. Even before BAPCPA became effective, there were reports of coverage being cancelled for consumer bankruptcy practice. E-mail on file with the author reporting a cancellation by Great American Insurance in Texas, from the Bankruptcy Roundtable Listserv dated April 18,

2005; e-mail on file with the author from Robert Minto, president and CEO of ALPS, a professional malpractice insurance company.

n114. Of course, many attorneys take on pro bono cases when they represent consumer debtors, because the check bounces or the work vastly exceeds that anticipated by the attorney. Perhaps one benefit of the pre-bankruptcy debt prohibition will be a reduction in such cases.

n115. Letter from Robert D. Evans, Director, American Bar Association Governmental Affairs Office, to members of the Senate (Mar. 1, 2005), available at http://www.abanet.org/poladv/letters/109th/bankrupt/bankrupt030105.pdf.

n116. See, e.g., Bus. Law Section Bus. Bankr. Comm. Subcommittee on Pro Bono Legal Servs. & Section of Litig. Bankr. and Insolvency Litig. Comm. Subcommittee on Pro Bono, How to Begin a Pro Bono Program in Your Bankruptcy Court: A Starter Kit for Lawyers and Judges (2nd ed. 1999), available at http://www.abanet.org/legalservices/probono/publications/bankruptcy starterkit.html.

n117. BAPCPA Section 302, amending Code 362(c). The new serial filer provisions actually come in two parts. BAPCPA adds paragraphs (3) and (4) to Code 362(c), with the former dealing with cases in which there was one prior bankruptcy pending within a year of the current one and the latter addressing the more serious situation of there being two or more prior cases within the preceding year.

n118. Id. Where only one case was pending within a year of the current bankruptcy, the automatic stay is effective, but only for 30 days after the filing of the current case. No stay is effective upon the filing of the current case if there were two or more cases pending during the previous year. See BAPCPA Section 302(3) adding Code 362(c)(3)(A) and Code 362(c)(4)(A)(i).

n119. BAPCPA Section 302(3) adding Code 362(c)(3)(B) and Code 362(c)(4)(B).

n120. BAPCPA Section 302(3), amending Code 362(c)(4)(D)(i)(II)(emphasis added). We have quoted here the language applicable when two or more cases were pending in the year prior to the commencement of the current case, but the language is the same under Code 362(c)(3). The difference is in how the two paragraphs are structured. See BAPCPA Section 302(3) adding Code 362(c)(3)(C)(i)(II)(aa)-(cc). Note also that this presumption also sets a huge trap for pro se debtors. A failure to file any of the myriad documents required under BAPCPA results in automatic dismissal of the case. Innocent debtors who can't afford a lawyer (a result BAPCPA makes more likely) could inadvertently omit a document and not realize until much later that the case had been dismissed. A logical reaction upon discovering the dismissal would be to refile, which not only brands the innocent debtor as a serial filer, but the presumption of bad faith also denies the pro se debtor the defense of inadvertence or negligence.

n121. 146 Cong. Rec. S50 (daily ed. Jan. 26, 2000)(statement of Sen. Hatch).

n122. Bankruptcy experts also recognized that the priority elevation of support debts was largely cosmetic. Only in the rarest of bankruptcy cases in which there is a distribution to creditors did support creditors compete with any claimants, other than those with administrative claims, who were higher on the 507(a) priority list. Even in those rare cases, the "special interests" to which Senator Hatch referred include workers who are owed back wages and consumers who paid a deposit but didn't get their goods before the company filed for bankruptcy.

n123. BAPCPA Section 212(9), amending Code 507(a)(1) (emphasis added).

n124. Why wouldn't the debtor have pursued a personal injury claim? Several reasons. First, it might be hard to find an attorney who will pursue a claim on a contingent fee basis if a looming bankruptcy could deliver all the proceeds to the support creditor. Or the claim might be against a family member or friend. And there is no incentive for the debtor to pursue a claim if all the proceeds will go to his creditors, including his ex-wife.

n125. 11 U.S.C. 541 (2000).

n126. The child support creditor possesses a power of intimidation that appears to be unmatched in the law, except, perhaps in the Internal Revenue Code. A recalcitrant child support obligor can, for example, be threatened with the loss of a professional license or even jail time.

n127. Christopher H. Schmitt, Heather Timmons and John Cady, "A Debt Trap for the Unwary," Business Week Online, (Oct. 29, 2001), available at http://www.businessweek.com/magazine/content/01 44/b3755094.htm.

n128. Press release, Federal Trade Commission, "FTC Files Lawsuit against AmeriDebt; Agency Alleges that 'Credit Counseling' Firm Misrepresents Costs and Nature of its Services, ("Nov. 19, 2003), available at http://www.ftc.gov/opa/2003/11/ameridebt.htm.

n129. Dean Loonin & Travis Plunkett, Credit Counseling in Crisis: The Impact on Consumers of Funding Cuts, Higher Fees and Aggressive New Market Entrants (2003) (Report by the National Consumer Law Center & Consumer Federation of America).

n130. Id. at 2.

n131. See In re Guttierez, 248 B.R. 287, 295-96 (Bankr. W.D. Tex. 2000) (citation omitted).

n132. See id. at 297-98.

n133. We call this 'the Barn Door" provision because it comes a tad late! If we genuinely want to educate consumers about the danger of excessive debt, a laudable objective, we'd probably pick a time earlier than the eve of bankruptcy for these lessons. This provision is not intended to provide consumers with much-needed insight into the nature of debt, its individual and social costs, or to discourage in any way the excessive consumer borrowing that has been driven in large part by the barrage of credit cards that are offered to American consumers.

In fact, the credit industry fought every attempt to give real information to consumers that might curb their hunger for debt. See, e.g., the vote on proposed Senate Amendment 15 to Senate Bill 256, the Bill that became BAPCPA. This amendment, which was offered by Senator Akaka, was entitled: "To require enhanced disclosure to consumers regarding the consequences of making only minimum required payments in the repayment of credit card debt, and for other purposes." This proposed amendment was defeated in the Senate on March 2, 2005 by a vote of 59-40.

n134. As reported in Business Week,

Last year, credit-card issuers reported record profits of $ 30 billion - much of it earned on liberal lending policies and punishing fees that often exacerbate the financial woes of cardholders who have gotten in over their heads. Borrowers who make a late payment - whether it's for the phone bill, a credit card, or a house payment - often are charged punitive rates averaging 29% on all their cards. These on-the-edge borrowers are the most profitable part of any bank's card operations, as long as they don't default.

Mara Der Veanesian, "Tough Love for Debtors," Bus. Week, Apr. 25, 2005, at 98. As this article goes to press, the Senate is holding hearings on the practices of the credit card industry, which Republicans promised to do during BAPCPA debate. See U.S. Senate Committee on Banking, Examining the Current Legal and Regulatory Requirements and Industry Practices for Credit Card Issuers With Respect to Consumer Disclosures and Marketing Efforts, May 17, 2005, available at http://banking.senate.gov/index.cfm?Fuseaction=Hearings.Detail&HearingID=154.

n135. It's also corporate welfare in two ways: This law will pour money into the hands of the credit counseling industry at a time when it has been subject to repeated inquiry and criticism for abusive practices. And it pours money into the hands of credit card companies who have received, in some cases, over 25% interest to lend to high-risk borrowers.

n136. 151 Cong. Rec. S2339 (daily ed. Mar. 9, 2005) (Statement of Sen. Hatch).