BEFORE AND AFTER THE *BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005* EXAMINED UNDER RECENT CASE LAW: A CURSE IN DISGUISE FOR CONSUMERS?

I. INTRODUCTION

The *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (*BAPCPA* or *Act*) is the most recent reform by Congress to overhaul and tighten abuse and fraud regulation within the bankruptcy system.[1] While this spells fortune for creditors and credit card companies, it ultimately may hinder and punish genuine debtors in its crusade against escalating bankruptcy filings and abusers of the old bankruptcy system. Although the *BAPCPA* reforms countless areas of the Bankruptcy Code, my focus in this comment is the impact of major Chapter Seven provisions on consumers. At the heart of the *BAPCPA* is an array of provisions aimed at preventing abuse, disallowing debts obtained through fraud or crime, and disabling loopholes that existed in the past. Therefore, I will analyze those provisions enacted to prevent abusive filings and limit the abuse of the homestead exemption. Moreover, I will examine the purpose behind each application of the provision that has been mentioned in recent case law as well as some future fundamental provisions of the lengthy *Act*, which will reveal whether those provisions ultimately serve the intent of Congress in enacting the change in the Bankruptcy Code. In addition, I will examine abuse, fraud-crime, and homestead provisions before and after the *BAPCPA* to determine the path that consumer bankruptcy law will take and its likely effect on debtors in the future.

In Part II, I will introduce the *BAPCPA* through its public policy goals. In Part III, I will emphasize the differences between the "substantial abuse" test under the old bankruptcy regime to the newly refined abuse test. Furthermore, I will look at the structure and the varying types of provisions related to preventing abuse and

1. 11 U.S.C. § 101, et. seq. (2005).

encouraging repayment of debts and those related to the homestead exemption. In addition, I will discuss the recent criticism of the provisions of the *Act*. In Part IV, I will thoroughly examine the main provisions of the *Act* as they relate to consumers, debtors, creditors, and the legal system. Furthermore, and most importantly, I will discuss the consequences of these particular provisions of the Act, focusing on its effect on consumers, but including, in some detail, its effect on the legal system. In Part V, I will then conclude how the *Act*, for all its best intentions and desires to restrain filings gone awry, ultimately will not provide the best solution to the problems it was set out to solve.

II. PUBLIC POLICY GOALS OF THE *BANKRUPTCY ACT*

Many authorities cite that the source for the *BAPCPA* has it beginnings in 1997 from congressional legislation[2] and the National Bankruptcy Review Commission Final Report.[3] Since then, there have been a series of active bankruptcy legislation reforms.[4] According to congressional reports on the *BAPCPA*, its purpose is to "improve the bankruptcy system by deterring abuse, setting enhanced standards for bankruptcy professionals, and streamlining case administration."[5] Some of the other factors discussed by Congress and the President were: To prevent fraud and abuse by serial filers and those who were able to pay some or all of their debts but instead discharged their debt; to give honest and needy filers for bankruptcy greater access to the system; to make the system more fair for both debtors and creditors with checks on each; and to encourage a stronger and more stable economy.[6]

A. *FRAUD AND ABUSE*

Possibly one of the strongest concerns of Congress in enacting the *BAPCPA* is the problem of fraud and abuse, specifically by Chapter

2. H.R. Rpt. 109-31 (I) at 6 (Apr. 8, 2005) (reprinted in 2005 U.S.C.C.A.N. 88, 92-93).

3. *In re McNabb*, 326 B.R. 785, 788 n. 8 (Bankr. D. Ariz. 2005).

4. H.R. Rpt. 109-31 (I) at 6 (Apr. 8, 2005) (reprinted in 2005 U.S.C.C.A.N. 88, 92-93).

5. *Id.* at 47 (reprinted in 2005 U.S.C.C.A.N. at 118).

6. George W. Bush, *Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 2005 Pub. Papers 1.

Seven filers with consumer debts.[7] First, Congress was responding to the growth of bankruptcy as a legal remedy of first, instead of last, resort.[8] Bankruptcy filings increased from approximately one million in 1998, to over 1.6 million in 2004.[9] Second, the *Act* seems to have been a reaction to the many loopholes that existed in the old Bankruptcy Code, particularly, " 'instances where a debtor's discharge should be challenged.' "[10] Next, some debtors in the old system were able to repay their debts and should have more properly filed a Chapter Thirteen Bankruptcy or converted from their Chapter Seven to a Chapter Thirteen.[11] Since the old system did not require repayment as part of the program,[12] the new *Act* was retrofitted with repayment provisions linked to the means test.[13] Moreover, under the old system, judges used the ability to repay debt as just one factor in determining whether there was substantial abuse, yet there was no consensus as to the extent of which to rely on the repayment factor.[14] Given a past intention of attempted bankruptcy reform leading to the final passage of this bill,[15] Congress's intent was to prevent excessive serial and abusive filers and increase oversight in the bankruptcy process.[16]

B. *GREATER ACCESS TO NON-ABUSERS*

Another pivotal goal of the *BAPCPA* is to give honest and needy bankruptcy filers greater access to a clogged and overused bankruptcy system.[17] The primary goal of the *Act*—to prevent abuse and fraud in the bankruptcy system—impliedly and ostensibly makes it easier for honest debtors to discharge their debts and give them the "fresh start"

7. H.R. Rpt. 109-31 (I) at 2 (Apr. 8, 2005) (reprinted in 2005 U.S.C.C.A.N. at 89).

8. *Id.* at 4 (reprinted in 2005 U.S.C.C.A.N. at 90).

9. *Id.* at 3-4 (reprinted in 2005 U.S.C.C.A.N. at 90).

10. *Id.* at 5 (reprinted in 2005 U.S.C.C.A.N. at 92) (citing Antonia G. Darling & Mark A. Redmiles, *Protecting the Integrity of the System: the Civil Enforcement Initiative*, Am. Bankr. Institute J. 12 (Sept. 2002)).

11. *Id*. (reprinted in 2005 U.S.C.C.A.N. at 92).

12. *Id*. (reprinted in 2005 U.S.C.C.A.N. at 92).

13. Jennifer Emens-Butler, *Bankruptcy Reform: Gather 'Round Children, Yes, the Sky is Falling*, 31 Vt. B. J. 26, 26 (2005).

14. H.R. Rpt. 109-31 (I) at 5 (Apr. 8, 2005) (reprinted in 2005 U.S.C.C.A.N. at 92).

15. *Id.* at 6 (reprinted in 2005 U.S.C.C.A.N. at 92).

16. *Id.* at 2 (reprinted in 2005 U.S.C.C.A.N. at 118).

17. 151 Cong. Rec. H2801 (daily ed. May 3, 2005).

that is the hallmark of the bankruptcy system.[18] By "streamlining case administration" through the improvements made under the *BAPCPA*, [19] there will not only be less bankruptcy filings, but speedier bankruptcies. Therefore, under the new system, it will be easier and less timely for those who are non-abusive debtors to have the last resort of bankruptcy.

C. *DEBTOR AND CREDITOR FAIRNESS*

Congress also intended to make the bankruptcy process more "fair for both debtors and creditors."[20] Most of the provisions of the new *Act* are supposed to relay adequate consumer protection, while at the same time confer certain protections on creditors.[21] Some of the consumer protection reforms of the *Act* include compelling greater disclosure by credit card companies on the terms of a credit agreement as well as greater cooperation by creditors, who are penalized for failure to negotiate certain payment plans with a debtor.[22] On the creditor side, the means test, [23] credit counseling programs, [24] and extending the time period that a debtor can file for successive bankruptcies under the *BAPCPA*, all attempt to make the system more fair.[25]

D. *STRENGTHEN ECONOMY*

One of the last and broadest of the goals of the *BAPCPA* is to promote financial responsibility and bring stability to the American economy. After signing the bill, President Bush asserted that the bill was intended to "bring greater stability and fairness to our financial system." [26] Likewise, Congress stated two main reasons associated with the economy for enacting the *BAPCPA*. First, increased bankruptcy filings will ultimately hurt consumers through greater

18. 151 Cong. Rec. H1975 (daily ed. Apr. 14, 2005).
19. H.R. Rpt. 109-31 (I) at 47 (reprinted in 2005 U.S.C.C.A.N. at 118).
20. *Id.* at 2 (reprinted in 2005 U.S.C.C.A.N. at 89).
21. *Id*. (reprinted in 2005 U.S.C.C.A.N. at 89).
22. *Id.*
23. Emens-Butler, s*upra* n. 13.
24. H.R. Rpt. 109-31 (I) at 18 (reprinted in 2005 U.S.C.C.A.N. at 104).
25. *Id.* at 16 (reprinted in 2005 U.S.C.C.A.N. at 102).
26. Bush, *supra* n. 6.

economic loss.[27] The losses consumers will face will be manifested in creditors' inability to collect debts due to bankruptcy and the raising interest rates and prices for goods and services.[28] Thus, financially responsible Americans in some way pay the costs that bankruptcy filers defray.[29] It has been estimated that the abuse of the bankruptcy system equates to a four hundred dollar tax on each household in America.[30] Second, the increase in bankruptcy filings has other "adverse financial consequences" for the American economy.[31] Not only do the losses from bankruptcy discharges ultimately affect consumers, but they also directly affect businesses that are the framework of the American economy.[32] For instance, according to a 2003 report, the credit card industry lost $18.9 billion due to bankruptcy in 2002.[33] Therefore, when debtors escape paying back debt they could rightfully pay, the gain of a fresh start for those debtors is a loss for credit card companies, credit unions, and other financial companies. Even more, the loss is then transferred to the American economy and thus, to every American.

III. BACKGROUND ON THE CHAPTER SEVEN BANKRUPTCY BEFORE THE *ACT*

The changes to the Bankruptcy Code differ substantially from the old bankruptcy provisions in the limitations they exact on consumers and the bankruptcy process. First, it is essential to understand the changes Congress has made under the *BAPCPA* in achieving its goal of preventing bankruptcy abuse by analyzing the old Bankruptcy Code's threshold test of "substantial abuse." Moreover, the *BAPCPA*'s new provisions on exemptions and debts dischargeable differ noticeably from the old system of exemptions. The structures and types of provisions in the *BAPCPA* are the result of many attempts at reforming the bankruptcy system. Chiefly, they aim at satisfying Congress's goal of eliminating abuse of the system, whether by unreasonably discharging debts that can be paid or through loopholes such as the

27. H.R. Rpt. 109-31 (I) at 4 (reprinted in 2005 U.S.C.C.A.N. at 91).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id*. at 4-5 (reprinted in 2005 U.S.C.C.A.N. at 91).
33. *Id.*

homestead exemption. Finally, though some have seen the *BAPCPA* as a panacea in preventing abuse, increasing access to honest filers, promoting fairness amongst creditors and debtors alike, and strengthening the economy, the *Act* has its share of critics who, for the most part, find its provisions unreasonable, unfair, and unlikely to achieve the goals that it set out to accomplish.

A. *"SUBSTANTIAL ABUSE" TO "ABUSE"*

A major change under the *BAPCPA* is lowering the threshold by which judges can decide that a debtor is filing "abusively." Under the previous Bankruptcy Code, a Chapter Seven case could be dismissed if the court found that granting relief of primarily consumer debts would be a "substantial abuse" of the bankruptcy provisions.[34] The *BAPCPA* amends the old code by taking out "substantial" and leaving "abuse" in its stead as the threshold by which judges should determine whether granting relief is proper.[35] Under section 707(b), the presumption favors the debtor in granting relief.[36] Since the statute does not define the factors judges should consider in dismissing or converting a Chapter Seven, many courts have examined what constitutes a "substantial abuse."[37] Therefore, courts have looked to a variety of factors, resulting in many circuit courts utilizing the same general test but with often different underlying factors.[38]

Although the various tests for substantial abuse have arisen mainly from federal circuit courts, they have all looked to somewhat overlapping factors in establishing debtor abuse of the bankruptcy process. Thus, while the old Bankruptcy Code did not define "substantial abuse," federal circuit courts and bankruptcy courts jointly sought to define what factors determined whether a debtor was abusing the bankruptcy process. In *In re Hill*, the court examined the different views of the circuit courts on substantial abuse.[39] The Fifth Circuit, in which the case was heard, had not yet decided the test for substantial

34. 11 U.S.C. § 707(b) (2000).

35. Pub. L. No. 109-8, § 102(a)(2)(B)(i)(III), 119 Stat. 23 (2005).

36. 11 U.S.C. § 707(b) (2000).

37. David B. Harrison, *Bankruptcy: When Does Filing of Chapter Petition Constitute "Substantial Abuse" Authorizing Dismissal of Petition Under 11 U.S.C.S. §707(b)*, 122 A.L.R. Fed. 141, 141 (1994).

38. *Id*.

39. *In re Hill*, 328 B.R. 490, 495 (Bankr. S.D. Tex. 2005).

abuse, but deferred to the Sixth Circuit's "totality of the circumstances" standard.[40] In examining the "totality of the circumstances," courts in the Sixth Circuit asked whether a debtor was honest in his relationship with his creditors by being honorable and not deceptive.[41] In addition, courts question whether the debtor is needy or that his financial situation warrants discharging his debts as against his assets.[42] In discovering whether a debtor is needy, courts have looked to the debtor's disposable income and if it is sufficient to pay off debts under a Chapter Thirteen.[43] Other courts, like the Eighth Circuit, have used a debtor's ability to make payments under a Chapter Thirteen plan as the primary factor in determining substantial abuse in addition to other factors such as the debtor's "good faith and any unique hardships."[44] Likewise, the Ninth Circuit's test for substantial abuse has focused on the ability of the debtor to make payments for a Chapter Thirteen plan as the sole factor on which to determine substantial abuse.[45] The Eleventh Circuit also follows the "totality of the circumstances" test.[46] Eleventh Circuit courts used the debtor's ability to pay, economics, and failure to disclose income and expenses.[47] Moreover, these courts, as well as others, have looked at disposable income and "exempt" income that can meaningfully be called "disposable income" under the meaning of the Bankruptcy Code.[48]

In sum, courts have looked to about nine factors under the "totality of the circumstances" test. First, courts have examined

40. *Id.; see In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989).

41. *In re Hill*, 328 B.R. at 494-95 (citing *In re Krohn*, 886 F.2d at 126).

42. *Id.*

43. *Id.* (citing *In re Koch*, 109 F.3d 1285, 1288 (8th Cir. 1997)).

44. *In re Reeves*, 327 B.R. 436, 440 (Bankr. W.D. Mo. 2005) (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989); *In re Scobee*, 269 B.R. 678, 680 (Bankr. W.D. Mo. 2001); *In re Regan*, 269 B.R. 693, 699 (Bankr. W.D. Mo. 2001)).

45. *In re Kelly*, 841 F.2d 908, 914 (9th Cir. 1988); *see also In re Price*, 353 F.3d. 1135, 1140 (9th Cir. 2004); *In re Bannish*, 311 B.R. 547, 549 (Bankr. C.D. Cal. 2004); *In re Voelkel*, 322 B.R. 138, 145 (Bankr. 9th Cir. 2005); *In re Morse*, 164 B.R. 651, 653 (Bankr. E.D. Wash. 1994).

46. *In re Meyn*, 330 B.R. 286, 289 (Bankr. M.D. Fla. 2005).

47. *Id.* (citing *In re Shields*, 322 B.R. 894, 896-97 (Bankr. M.D. Fla. 2005); In *re Luikart*, 319 B.R. 1 (Bankr. M.D. Fla. 2003)).

48. *In re Shields*, 322 B.R. 894, 898 (Bankr. M.D. Fla. 2005) (explaining that "exempt" income is income exempt from claim by creditors and may include "[s]ocial security benefits, disability benefits, and retirement benefits," and deferring to 11 U.S.C. §1325 to define whether a debtor has disposable income).

whether a Chapter Seven petition was filed because of an unforeseen or disastrous event, such as illness, becoming disabled, or unemployed.[49] Second, courts examined whether the debtor's standard of living would be substantially improved through the bankruptcy discharge or the debtor's health, age, dependents, and family responsibilities.[50] Moreover, courts also employed a combination of other factors: The debtor's eligibility for Chapter Thirteen; whether the creditors "would receive a meaningful distribution" through a Chapter Thirteen; whether the debtor has made excessive purchases or cash advances; whether the debtor's budget was "excessive or unreasonable;" and whether the debtor's financial reporting of income and expenses "reasonably and accurately reflect the true financial condition of the debtor."[51] While the former list of factors is not exhaustive,[52] courts have generally looked either to the "totality of the circumstances" or the ability of the debtor to enter into a Chapter Thirteen plan.[53]

B. *EXEMPTIONS AND DEBTS UNDER THE OLD CODE*

At the heart of bankruptcy law and the *BAPCPA* are certain types of debts that are exempt from discharge, along with exemptions on both real and personal property. Some of the most important debt and exemption provisions of the *BAPCPA* relate to the homestead exemption, fraudulent transfers, and securities fraud violations.[54] The first distinction the Bankruptcy Code draws is between federal and state exemptions. Many states have chosen to opt-out of the federal exemptions with their own specific array of exemptions on personal and real property.[55] A minority of states, however, have decided to allow the debtor to choose between federal or state exemptions to exempt a total or partial interest in property.[56] Thus, under the

49. *In re Meyn*, 330 B.R. at 289.

50. *Id*.

51. *Id.* at 289-90. (including factors already mentioned, such as "whether the petition was filed in good faith and [] whether the debtor has the ability to repay creditors").

52. Harrison, *supra* n. 37 at 280 (naming miscellaneous factors that courts have sometimes utilized).

53. *Id.* at 141.

54. Pub. L. No. 109-8, §§ 307, 308, 322, 330, 1404, 119 Stat. 23 (2005). Collectively, the "abuse, homestead exemption, and fraud provisions." *Id*.

55. *Infra* nn. 90-91.

56. Richard I. Aaron, *Bankruptcy Law Fundamentals* §7.4 (West 2005).

previous Bankruptcy Code, the use of exemptions as applied to its most important exemption provisions would depend in part on the state where the debtor was filing for bankruptcy.

1. *Homestead Exemption*

The homestead exemptions under the old system were less restrictive and more favorable towards debtors. The homestead provisions amended under the *BAPCPA*—namely sections 307, 308, and 322—make it significantly more difficult for a debtor to manipulate the homestead exemption.[57] Under the old system, a debtor was eligible to claim a homestead exemption on property that the debtor had resided for the 180 days immediately before filing for bankruptcy.[58] If the debtor moved to one or more places of residence within the 180-day period, the debtor would be allowed to choose the homestead exemption in the state that the debtor resided for the majority of the 180-day period.[59] The new provisions amend the 180-day period and add many limitations to prevent debtors from utilizing the homestead exemption based on timing, fraudulent transfers, or the committing of civil, criminal, or securities law violations.[60]

2. *Securities Fraud Violations*

The changes made by *BAPCPA* stiffen the ability of a debtor to discharge debts arising from federal or state securities law violations. Pre-*BAPCPA*, the Bankruptcy Code prohibited a debtor from discharging any debt that arose from a violation of a state or federal securities fraud law and "common law fraud, deceit or manipulation" related to the buying or selling of any security.[61] However, the old code did not specify when a debt that arose from the violation of securities fraud laws could no longer be discharged.[62] Instead, the code stated that any violation of securities fraud laws that resulted from judicial proceedings, settlement agreements, or other orders could not

57. Emens-Butler, *supra* n. 13 at 30.
58. 11 U.S.C. § 522(b)(2)(A) (2005).
59. *Id.*
60. Pub. L. No. 109-8, §§ 307, 308, 322, 119 Stat. 23 (2005).
61. 11 U.S.C. § 523(a)(19)(A)(i)-(ii) (Supp. 2002).
62. *Id*. at § 523(a)(19)(B).

be discharged.[63] Arguably, this gap in the language, on which types of securities fraud debts could be discharged under the old Bankruptcy Code, likely allowed judges to deny the discharge of any debts resulting from securities fraud violations.

Under the new code, Congress has denied the ability of any debtor filing a petition after July 30, 2002 to discharge any securities fraud debt.[64] Unlike the old code, the new code after section 1404 determines when securities fraud fines or other judgments can be dischargeable in bankruptcy. Therefore, in amending the Bankruptcy Code, Congress aimed to prevent white-collar criminals, or other securities violators, from escaping debts they incurred because of fraud. Moreover, the new code specifically settles the period for determining which debts are dischargeable, whereas the old code was vague and may have allowed debtors to amend their petitions to include debts created by securities fraud. Ultimately, the introduction of this amendment into the bankruptcy exceptions to discharge demonstrates congressional dislike of securities violators and prevention of post-petition manipulation.

3. *Delay of Discharge*

In addition to preventing securities fraud violators from discharging debts, the *BAPCPA* amends section 727 of the old Bankruptcy Code, dealing with dismissal or delay of discharge of a Chapter Seven bankruptcy. Under the old code, a debtor could be prevented from discharging his debts if the debtor made fraudulent transfers,[65] concealed or manipulated financial records affecting the bankruptcy,[66] made false claims or statements,[67] failed to adequately explain any loss or deficiency in assets,[68] had been granted a discharge,[69] or the trustee or creditor makes a motion to deny discharge.[70] Under the amendments, certain crimes committed either

63. *Id*. at (i)-(iii).
64. Pub. L. No. 109-8, § 1404(b), 119 Stat. 23 (2005).
65. 11 U.S.C. § 727(a)(2) (2000).
66. *Id.* at § (a)(3).
67. *Id.* at § (a)(4).
68. *Id.* at § (a)(5).
69. *Id.* at §§ (a)(8)-(9).
70. *Id*. at §§ (c)-(e).

before or during the bankruptcy proceeding could disable the ability of the debtor to discharge their debts in a Chapter Seven proceeding.[71]

C. *STRUCTURE & TYPES OF PROVISIONS IN THE* BAPCPA

The fundamental provisions of the *BAPCPA* related to consumers are the abuse prevention, homestead exemption, securities, and other criminal violation provisions. These provisions took effect at different times. Some became effective when Congress enacted the *BAPCPA*,[72] whereas most became effective on October 17, 2005.[73] One provision related to securities fraud violations takes effect well before all of the other provisions of the *BAPCPA*.[74] The three types of provisions of the *BAPCPA* may elucidate Congress's intent on applying the abuse, homestead exemption and fraud provisions at different times.[75]

1. *Abuse Provisions*

One of the prominent effective date provisions is section 102 of the *Act* that makes many changes to section 707(b) of the United States Bankruptcy Code. Section 102 makes certain alterations to allowing bankruptcy filings, discouraging substantial abuse, and creating a "means test" to determine whether the debtor qualifies for Chapter Seven bankruptcy.[76] One major change to section 707 of the United States Bankruptcy Code is an assumption that a debtor is abusing Chapter Seven bankruptcy if the debtor's current monthly income, reduced by monthly expenses and multiplied by sixty, is greater than predetermined amounts.[77] The predetermined amounts are the greater of either twenty-five percent of the debtor's non-priority unsecured claims in the bankruptcy case, or $6,000, or alternatively, $10,000[78] In terms of allowable expenses, the primary method of calculating

71. Pub. L. No. 109-8, § 330, 119 Stat. 23 (2005).

72. Pub. L. No. 109-8, § 1501(b)(2), 119 Stat. 23 (2005).

73. *Id.* at § 1501(a).

74. *Id.* at § 1404(b), 119 Stat. 23 (2005).

75. *Id.* at § 1501(a).

76. *Id.* at § 102; s*ee*, e.g. *In re Hill*, 328 B.R. 490 (Bankr. S.D. Tex. 2005) (discussing the application of the changes section 102 of the *BAPCPA* makes to the existing bankruptcy code, particularly § 707(b)); s*ee generally* Emens-Butler, *supra* n. 13 (examining section 102 of the *BAPCPA*)).

77. Pub. L. No. 109-8, § 102(2)(A)(i), 119 Stat. 23 (2005).

78. *Id.* at § 102(2)(A)(i)(I).

expenses is the Internal Revenue Service's National Standard and Local Standards on monthly expenses.[79] Some of the additional expenses included are: Health and disability insurance expenses; care and support for the ill or elderly in the debtor's household; school expenses if the debtor has dependents under the age of eighteen; and additional allowances for "housing and utilities" and "food and clothing," as detailed in the *Act*.[80] This entire test is known as the "means test" and importantly has changed the language in the previous Bankruptcy Code, which used the word "substantial abuse" to decide whether to dismiss or convert a case to Chapter Thirteen. The *Act* now employs the term "abuse," making it easier to filter out abusive filers.[81] Notably, this provision became effective on October 17, 2005, 180 days after the date of enactment of the *BAPCPA*.[82]

2. *Homestead Provisions*

The first type of provisions, "effective date provisions," went into effect October 17, 2005, which was 180 days after they received approval in the Senate and the House of Representatives and were signed into law by the President.[83] The first of the provisions, discussed by judges before the October 17, 2005 effective date, is section 307 of the *Act*. This section amended the Bankruptcy Code to extend the 180-day period. At present, the courts look to where the debtor has lived for the 730 days prior to the date of filing the bankruptcy to determine which state or local exemption law applies. In particular, courts will use this provision to determine the amount of one's real property that will be exempt from creditors.[84] If a debtor has not lived in one state for the 730-day period before filing for bankruptcy, then exemption law is determined based on where the debtor resided for a total or a majority of the 180 days before those 730 days.[85]

Additionally, if the above two rules make a debtor ineligible to take any state or local exemption law, then they must take drastically

79. *Id.*
80. *Id.*
81. Emens-Butler, *supra* n. 13 at 26.
82. Pub. L. No. 109-8, § 1501(a), 119 Stat. 23 (2005).
83. *Id.*
84. *Id.* at § 307. Commonly referred to as the "Homestead Exemption."
85. *Id.*

reduced exemption amounts under the Bankruptcy Code pursuant to United States Code section 11-522(d).[86] Thus, a debtor who desires to qualify under a state homestead exemption must have resided in that state for a continuous 730-day period prior to filing for bankruptcy.[87]

Alternatively, a debtor may be eligible for the state homestead exemption, if he or she desires, by having lived in the state for most or all of the 180 days prior to the 730 days before filing for bankruptcy. In the later case, a debtor may have to spend ninety or more days of the 180-day period in a certain state in addition to not filing for another additional 730 days, totaling 910 days.

The next enactment provision, section 322 of the *BAPCPA*, involves limitations on the homestead exemption. Under this section, a debtor who elects to exempt property under state or local law cannot exempt any amount of interest in property greater than $125,000 the debtor acquired 1215 days prior to filing for bankruptcy.[88] If a debtor makes a state or local law property exemption, in a "non-opt out state" (where the state bankruptcy law does allow the option of using the federal exemption) then section 322 of the *BAPCPA* does apply.[89] As of 2005, more than half of the states have chosen to opt out of the federal exemptions.[90] Thus, for example, if a debtor lives in California, a state that does not allow a choice between state and federal exemptions, but has its own state exemption, the section 322 restriction will not apply.[91] However, if the debtor lives in Wisconsin, and has the choice to elect between the Wisconsin state law exemption or the federal exemption, then that debtor is restrained by the section 322 limitation.[92]

The second types of provisions in the *Act* are the dates of enactment provisions, which went into effect April 20, 2005.[93] The

86. 11 U.S.C. § 522(d) (allowing debtors to exempt only $18,450 of real property in cases commenced after April 1, 2004).

87. *Id.* at § (b)(3).

88. Pub. L. No. 109-8, § 322, 119 Stat. 23 (2005).

89. *Id.; In re McNabb*, 326 B.R. 785, 788 (Bankr. D. Ariz. 2005).

90. William Houston Brown, Lawrence R. Ahern III & Nancy Fraas Maclean, *Bankr. Exemption Manual*, § 3.02 (West 2005).

91. *Id.*

92. *Id.*

93. Pub. L. No. 109-8, § 308, 119 Stat. 23 (2005). This is included in the homestead provision section because it is primarily relevant to the homestead and secondarily relevant to fraud.

first of these is section 308 of the *BAPCPA*. These provisions reduce the amount of the homestead exemption in cases where a debtor attempts to defraud creditors or avoid payment.[94] Specifically, this section allows a judge to reduce the value of the homestead exemption due to fraudulent transfers.[95] Moreover, if a debtor sells or transfers any property ten years before the date of filing with the intent to avoid payment to creditors, on nonexempt property or that portion of the debtor's property that remains nonexempt, a resulting reduction in the exemption allowance will occur.[96] In particular, the homestead exemption is "reduced to the extent that such value is attributable to any portion of any property that that debtor disposed of . . . ."[97]

As already mentioned, this provision is applicable to all cases filed on or after the date of enactment.[98] While judges have infrequently applied this provision, an example may highlight the discretion the provision gives to judges in reducing the amount of the exemption. For instance, if a debtor claims a $500,000 homestead exemption on their bankruptcy petition for their residence and they have disposed of $250,000 by taking out a loan on the equity in their residence in the ten years before filing a bankruptcy petition, a judge may decide that the debtor had the intent to "hinder, delay or defraud" a creditor. To do so however, a judge must also have knowledge of the non-exempt debt the debtor owed at the time of that transfer.[99] In this instance, the homestead exemption may be reduced by $250,000 from an original $500,000 homestead allowance.

Another example may be that a debtor uses $50,000 worth of stock fraudulently obtained to pay for the debtor's residence. If that person lives in a state with a $75,000 homestead exemption, a court may reduce that exemption by the $50,000 in stock fraudulently obtained.[100] In proving the intent to "hinder, delay or defraud,"[101]

94. *Id.*

95. *Id.*; *see e.g. In re McNabb*, 326 B.R. at 787-88 (discussing whether § 308 of the *BAPCPA* applies to cases and what can be inferred from the statutory language of that section).

96. Pub. L. No. 109-8, § 308, 119 Stat. 23 (2005).

97. *Id.*

98. *Id.* at § 1501(b)(2).

99. *Id.* at § 308.

100. *Id.* Note that the stock may or may not be non-exempt property depending on the state and its exemption laws.

101. *Id.*

many courts have looked to both objective and subjective factors in determining what qualifies as a fraudulent transfer.[102] Lastly, section 308 covers property classified as real or personal property of the debtor or his dependent used as a residence or claimed as a homestead, a cooperative that owns the real or personal property, and even a burial plot for the debtor or his dependent.[103]

3. *Felonies and Fraud Crimes Provisions*

The last date of the enactment provision under section 330 of the *Act* details which debts may not be immediately discharged while awaiting information on certain proceedings for felonies and securities fraud law.[104] The section 330 change to the existing Bankruptcy Code refers to United States Code section 11-522(q)(1), also added by the *BAPCPA*.[105] Section 330 states that debts arising from being convicted of a felony, owing a debt under securities fraud laws, and causing serious bodily injury or death to a person in the five years before filing for bankruptcy through a civil or criminal act, are not dischargeable.[106] Therefore, if a debtor commits a felony or causes the death of a person by either tortuous or criminal conduct, the fines imposed by those acts are not dischargeable and must be paid.[107] Moreover, if the debtor's criminal proceeding involving felony charges, security fraud, or death, occurs before or during a bankruptcy proceeding, a judge will likely delay discharging the debtor's debts pending final judgment and sentencing of the criminal proceeding.

102. *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 484 (4th Cir. 1992) (determining whether a fraudulent transfer exists depends on subjective evaluation of debtor's motives and other objective determinations); *see also In re Taubman*, 160 B.R. 964, 988 (Bankr. S.D. Ohio 1993) (explaining that debtor's incurring debts beyond ability to pay is subjective fraudulent intent factor); *In re Warner*, 87 B.R. 199, 202 (Bankr. M.D. Fla. 1988) (objective indications of fraud, also called "badges or indicia of fraud," exist if there is a relationship between debtor and transferee, lack of consideration for transfer, secrecy of transfer, debtor control over property transfer, and pending or threatened litigation at the time of transfer).

103. Pub. L. No. 109-8, § 308, 119 Stat. 23 (2005) (became 11 U.S.C. § 522(o)(1)-(4) (2005)).

104. *Id.*; *see* 11 U.S.C. § 522(q)(1) (2005).

105. *Id.*

106. *Id.*

107. *Id.*

Another type of provision in the Bankruptcy Code is specifically tailored towards disallowing debts incurred by fraud or misrepresentation. For instance, section 1404 of the *Act*, entitled "Debts Nondischargeable if Incurred in Violation of Securities Fraud Laws" to become effective upon the enactment of the *Sarbanes-Oxley Act*, on July 30, 2002.[108] Presumably, Congress retroactively applied section 1404 from July 30, 2002 forward to be coterminous with the *Sarbanes-Oxley Act* and prevent securities fraud judgments, orders or settlements from being excepted from discharge due to the time securities fraud cases may take in reaching a conclusion and decreeing a securities fraud judgment. Therefore, if a bankruptcy filer violates a securities fraud law and is subsequently penalized civilly or criminally with fines, those fines incurred on or after July 30, 2002 are nondischargeable debts under the terms of the *BAPCPA*.

D. *CRITICISM OF THE* BANKRUPTCY ACT

Although many praise the *BAPCPA* as the solution to abuse and fraud within the bankruptcy system, the *Act* has had many vocal critics. Among them are consumer groups, lawyers, judges, academics and politicians, who find that while many provisions of the *Act* will prevent abuse, the changes will ultimately hurt consumers in unanticipated ways.[109] Their primary grievance is that the limitations on abuse and fraud will not only prevent dishonest filers from discharging debts in bankruptcy, but wrongly block access to honest and needy debtors as well.[110] Another criticism of the *BAPCPA* is that the bill was poorly drafted and will not achieve the result that the credit card industry wanted to achieve through modification of the Chapter Seven bankruptcy.[111] Moreover, the *Act* fails to consider the abuse of credit card companies on consumers, thereby allowing irresponsible behavior and practices to continue uninhibited.[112] In the end critics say that the

108. Pub. L. No. 109-8, § 1404(b), 119 Stat. 23 (2005).

109. Emens-Butler, *supra* n. 13 at 26.

110. Sen. Jud. Comm., *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Testimony of Professor Elizabeth Warren*, 109th Cong. (Feb. 10, 2005) [hereinafter Sen. Jud. Comm. (1)].

111. Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 Am. Bankr. L.J. 191, 191 (2005).

112. 151 Cong. Rec. E754-03, E754 (daily ed. Apr. 14, 2005).

burdens imposed by the *BAPCPA* fall on the shoulders of honest and needy filers.

1. *Prevents Honest Debtors from Filing*

The primary criticism of the *BAPCPA* is that in the process of tightening up loopholes and preventing abuse, it ends up hurting many honest and needy debtors. First, it will negatively affect the middle class, elderly, and families with children.[113] The enactment of the means test, to curb abuse, while created with the best intentions, "treats all families alike."[114] Since the new means test established a fixed boundary in determining whether a Chapter Seven is abuse without many provisions for special circumstances or judicial discretion, it arbitrarily deprives needy and genuine debtors from a Chapter Seven discharge.[115] Not only will bankruptcy relief become more expensive, but less effective and less accessible for many debtors.[116] One Congresswoman from Minnesota explained that many Americans do face real and difficult financial problems brought on by "personal or family healthcare crisis, unemployment, drastic changes in life situations, such as divorce and family death, and even military service."[117] On the other hand, proponents of the bill believe that it will be "addressing the real bankruptcy problems facing America . . . ."[118] Nevertheless, those proponents of the system who praise the means test as curbing abuse and weeding out the dishonest debtors, fail to see that in effect they are hurting honest consumers in the process of preventing abuse in a "one-size-fits-all" abuse prevention system.[119] Specifically, many debtors are those with expensive medical bills.[120]

113. Emens-Butler, *supra* n. 13 at 26; s*ee also* 151 Cong. Rec. at E754.

114. Sen. Jud. Comm. (1), *supra* n. 110.

115. Emens-Butler, *supra* n. 13 at 26-28; *see also* 151 Cong. Rec. E838-04, E838 (daily ed. May 2, 2005).

116. Sommer, *supra* n. 111 at 191.

117. 151 Cong. Rec. at E754 (daily ed. Apr. 14, 2005).

118. Sen. Jud. Comm., *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Testimony of Kennety Beine*, 109th Cong. (Feb. 10, 2005) [hereinafter Sen. Jud. Comm. (2)].

119. Sen. Jud. Comm. (1), *supra*, n. 110.

120. 151 Cong. Rec. at E754 (daily ed. Apr. 14, 2005) (noting that about fifty percent of all families who need to file for bankruptcy do so because of medical bills).

One additional problem with *BAPCPA* is that it fails to take into account special circumstances. For instance, it may leave veterans and victims of identity-theft helpless under the *Act* because there are no provisions specifically tailored to those situations and little discretion for judges to make special exceptions under a plain reading of the statute.[121] The *BAPCPA* will leave returning or disabled veterans with significant debt and scrutiny under the means test.[122] Lastly, the *Act* does not deal with the growing problem of identity-theft. Instead, it will make victims of identity-theft responsible "for the debt accrued by someone else."[123] Together, all these instances provide ample support for the conclusion that the means test and the lack of specialized provisions will weed out certain abusers, but overwhelmingly derail the stream of genuine consumers and debtors who need bankruptcy for a fresh start.

2. *Poorly Drafted*

Another prominent attack on the *BAPCPA* is that it was poorly drafted, particularly the consumer provisions of the *Act*.[124] In order to understand this criticism, it is important to understand that the *BAPCPA* was the result of millions of dollars in spending and lobbying by the credit card industry and an eight-year wait.[125] Thus, one practitioner found that, while bankruptcy experts wrote previous bankruptcy legislation, the consumer provisions of *BAPCPA* were devised and drafted largely by "lobbyists with limited knowledge of real-life consumer bankruptcy practice."[126] As mentioned before, it is expected that the consumer provisions of the bill aimed at preventing abuse and fraud will prevent access to some dishonest debtors at the expense of some genuine debtors. However, another line of thinking holds that because it was so poorly drafted, it will struggle to accomplish much of what the lobbyists and credit card companies wanted it to because it will be difficult for judges to discern and interpret the poorly drafted statutes.[127] On the other hand, because the

121. 151 Cong. Rec. at E838 (daily ed. May 2, 2005).
122. *Id.*
123. *Id.* at E839.
124. Sommer, *supra* n. 111 at 191.
125. Emens-Butler, *supra* n. 13 at 26.
126. Sommer, *supra* n. 111 at 191-92.
127. *Id.* at 192.

statutory amendments and additions are poorly drafted, judges will be forced to use their discretion, even in cases where they are not afforded any discretion by Congress. [128]

3. *Lack of Credit Card Regulation*

The last criticism of the *BAPCPA* is that it regulates consumers through its provisions, but does little or nothing to regulate credit card company behavior. Early on in the deliberation of the *BAPCPA*, one politician noted, "[T]he bill completely fails to address consumer abuses by the credit card industry."[129] Another echoed that concern by stating that it unnecessarily strengthens creditors with provisions favorable toward repayment.[130] The overriding problem with the *BAPCPA* is that it does not consider or regulate the credit card industry's behavior nor claim that it is partially at fault for increased bankruptcy filings, increased credit, and deceptive trade practices.[131] Specifically, credit card companies target vulnerable families and college students with preexisting debt loads with "easy credit at low rates that later increase," thereby continuing unrestrained with their irresponsible business practices.[132] While most of the critics of the *BAPCPA* do not see credit card companies as the sole problem for bankruptcy abuse, the failure of the government to install adequate protections for consumers makes many suspicious that the credit card industry lobbied, paid for, and wrote the *BAPCPA*.[133] Although there are some "salutary provisions, such as the proposed provisions that protect consumers from predatory lending," the *BAPCPA* does not go far enough to protect the consumer, according to lawyers, politicians, and others.[134] In effect, it aims to regulate consumers much more heavily in its abuse provisions than the credit card companies, where abuse is enduring and widespread.

128. *Id.* at 193.

129. 151 Cong. Rec. at E754.

130. *Id.* at E838.

131. *Id.* at E754.

132. *Id.; see also* 151 Cong. Rec. H1974-05, H1975 (daily ed. April 14, 2005) (voicing dismay at "predatory lending" and that the bill does not afford adequate protection).

133. Sommer, *supra* n. 111 at 191-92; s*ee also* Emens-Butler, *supra* n. 13 at 26.

134. 151 Cong. Rec. at H1985 (daily ed. April 14, 2005) (letter from a large group of law professors to Senators Arlen Spector and Patrick Leahy (Feb. 16, 2005)).

IV. ANALYSIS OF BANKRUPTCY CODE UNDER THE *ACT*

Although the time between when Congress passed the *Act* and the October 17, 2005 effective date was relatively short, many judges examined the applicable provisions of the *Act* and applied it to recent bankruptcy cases. In particular, issues related to the abuse, homestead, and felony and fraud crime provisions were examined and applied by courts, depending on whether the type of provision had been effective at the time of the debtor's filing for bankruptcy. In this section, I will thoroughly analyze the provisions that have been applied in case law and those that have not yet been applied. Moreover, for those provisions discussed in case law, but not yet applied because they were not effective, I will briefly highlight the possible outcome of the case under the *BAPCPA*. Last, I will discuss the future of the abuse, homestead, and fraud crime provisions on the bankruptcy system.

A. *THE ABUSE PROVISIONS OF THE* ACT *AND CASE LAW*

Since the enactment of *BAPCPA*, many courts have applied the abuse provisions of the *Act* to consumer bankruptcy cases, focusing on section 102 of the *BAPCPA*, which overhauled the "substantial abuse" section 707(b) of the bankruptcy code and installed the "means test" to root out abuse and determine available income. Some courts only briefly mentioned the *BAPCPA*, while one court went into a detailed analysis of the case as it stood at the date of judgment under the old code and the effect the new code would have had on the case.[135]

In re Hill is the only case that mentioned the abuse changes spurred by the *BAPCPA*, and is the best predictor of the future line of these types of cases. There, the United States Trustees (UST) filed a motion to dismiss the Hills' Chapter Seven petition on the grounds of substantial abuse.[136] Subsequently, the Hills filed a response to the UST's motion to dismiss and a series of hearings were scheduled.[137] The Hills's Chapter Seven bankruptcy petition was evaluated during these hearings to determine if the UST's motion was valid.[138] Following precedent, the court decided that substantial abuse rested on

135. *In re Hill*, 328 B.R. 490 (Bankr. S.D. Tex. 2005).

136. *Id.* at 492. (The memorandum opinion is jointly entered and discusses both the Hills and Heers).

137. *Id.*

138. *Id.* at 492-497.

"either lack of honesty or want of need."[139] Further, the court stated that the honesty prong of the substantial abuse test looked retrospectively at circumstances that caused the debtor to file for bankruptcy and the need prong looked prospectively to the debtor's ability to pay back debts and the possibility of a stable future source of income, among other factors.[140] Moreover, if the trustee could prove either prong, there was a substantial abuse.[141]

After analyzing the substantial abuse method to determine the trustee's burden of proof, the court analyzed the Hills's situation. The Hills had $104,822.24 of unsecured debt, mainly derived from a judgment awarded against the Hills and the rest being credit card debt.[142] Mrs. Hills' income in 2004 was about $142,737 and Mr. Hills' income was uncertain, although he was still being paid at the close of the evidentiary hearing.[143] Their monthly expenses on their Chapter Seven amounted to $13,382.22.[144] Their assets included retirement accounts, with a value of about $58,000, 401(k) plans valued at approximately $60,000, an insurance policy of $23,000, a few nice cars, and a home valued at about $380,000.[145] Applying the two prongs of the substantial abuse test, the court found the Hills had honestly filed for bankruptcy because their future income was potentially unstable, the Hills were not "erratic spenders," and the filings were accurate representations of their finances.[146] Likewise, they had not made any unusual purchases or "eve of bankruptcy purchases."[147] However, while they may have satisfied the honesty prong of the *In re Krohn* analysis, the court's conclusion under the need prong was different.[148] First, the court established that the Hills's projected monthly income of $13,635.59 exceeded their monthly expenses of $13,382.22.[149] Moreover, the court found that a reduction

139. *Id.* at 496 (citing *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989)).
140. *Id.*
141. *Id.*
142. *Id.* at 492 n.1.
143. *Id.* at 492-93.
144. *Id.* at 493.
145. *Id.*
146. *Id.* at 496.
147. *Id.*
148. *Id.* at 497.
149. *Id.*

in their monthly expenses would not significantly hurt their lifestyle.[150] In part, the court found their charitable contributions accounted for about ten percent of their monthly expenses, and that this amount was not as necessary as the $350 and $500 they spent on electricity and food.[151] On the other hand, the court said that the evidence with respect to their job security initially demonstrated that it would be unpredictable in the future.[152] Nevertheless, the court concluded that payments made to reaffirm a Porsche 911 Carrera that was "inoperable and in need of perhaps $10,000 in repairs" were unnecessary payments and money that could have been used to pay back creditors.[153] Thus, by eliminating luxurious and unreasonable expenses from their monthly budget, the Hills had a foreseeable stream of income to repay creditors.[154] Relying on this, the court concluded that the Hills were not in need of Chapter Seven protection and that the filing was a substantial abuse.[155]

The bankruptcy court then embarked on an analysis of the Hills's situation under the section 102 amendments of the *BAPCPA* to section 707(b) of the Bankruptcy Code. The court succinctly explained what minimum thresholds section 102 of *BAPCPA* posed for a debtor. First, a debtor can file a Chapter Seven if the debtor's income, less expenses, multiplied by sixty is less than $6,000 (all references to monthly income and/or monthly expenses).[156] Second, a debtor is prohibited from filing a Chapter Seven if the debtor's income reduced by expenses multiplied by sixty is more than $10,000.[157] Third, if the debtor's income less expenses multiplied by sixty is between $6,000 and $10,000, that result must be less than twenty-five percent of the nonpriority unsecured claims in order to continue under a Chapter Seven.[158] The Hills had a gross monthly income of $21,540 and under the allowed expense provisions of *BAPCPA*, the Hills would have had

150. *Id.*
151. *Id.* at 496.
152. *Id.* at 497.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 501.
157. *Id.*
158. *Id.* (revealing the means test rule, the court explained: A debtor can file Chapter Seven if the income less expenses each month is less than $100 and cannot file if the result is $167 or greater).

total expenses of $15,522.[159] This left $6,108 of available income to pay off creditors.[160] Using these figures under the amended provisions of *BAPCPA* revealed that the Hills were still abusive filers.[161] The court came to this conclusion because under one threshold of the section 102 means test, an abuse is defined as occurring when a debtor's income less expenses and adjustments multiplied by sixty is greater than $10,000.[162] The court went on to describe other ways that abuse can be established under the *BAPCPA.* Specifically, a court has discretion to incorporate " 'bad faith' " and " 'totality of the circumstances' " into its analysis under section 707(b)(3).[163] Therefore, a court does not even have to rely exclusively on the means test to find abuse under the new code, but rather has further discretion on how much to rely on the fixed means test or flexible "good faith" and "totality of the circumstances" standards.[164]

In re Hill also incorporated discussions on another Chapter Seven petition filed by the Heers, who are jointly entered into the memorandum opinion because both cases involved the issue of whether to dismiss under section 707(b).[165] The Heers filed their Chapter Seven petition on August 27, 2004, and on December 14, 2004 the UST filed a motion to dismiss under 707(b).[166] Following the motion, to which the Heers failed to respond, a hearing was held on the motion, and the Heers also failed to appear at that hearing.[167] One issue that may have prompted the UST to file a motion to dismiss was that the debtors had filed an amended Schedule B and C.[168] On their original Schedule B and C, they had not included a 401(k) plan of about

159. *Id.* at 505-06.

160. *Id.* at 505.

161. *Id.*

162. *Id.* The court calculated that the income less expenses multiplied by 60 is $361,104 over 60 months. *Id.* (under section 102, this is the only test that applies to the Hills and they failed it).

163. *Id.* at 506.

164. *Id.* (stating that the *BAPCPA* directs judges to first use the means test and then add in considerations of "good faith" and "totality of the circumstances," presumably to give the judges discretion on allowing abuse to be found where the debtor passed the means test).

165. *Id.* at 492.

166. *Id.* at 493.

167. *Id.* at 494.

168. *Id.* at 493.

$17,000, to which they were contributing $333.25 monthly.[169] The Heers had gross earnings of $75,576, net monthly income of $4,537, and monthly expenses of $3,788.[170] Additionally, they had $69,259 of unsecured nonpriority claims.[171]

Under the old "substantial abuse" test, the court found that the Heers had filed honestly.[172] However, the court examined the Heers's financial situation under the need prong of the substantial abuse test in which they examined and weighed various factors, including the future stream of income, the ability to enter a Chapter Thirteen plan, not depriving the Heers of basic necessities, the need to fund a retirement plan instead of pay back creditors, the Heers' age, and the failure to show up to a court-ordered hearing.[173] The court stated that the general rule with regard to 401(k) plans is that a debtor's voluntary payment to a retirement plan without any corresponding payment to creditors under the Chapter Seven should caution courts to be suspicious and disallow the voluntary payments and instead funnel them to paying back creditors.[174] Applying this rule, the court found that since the Heers were relatively young and had time to pay back their creditors with the funds they were voluntarily using to support their retirement plan and that they already had a substantial amount in their retirement account, these payments could have been used to pay back creditors.[175] Moreover, the court concluded that the Heers' Chapter Seven should be dismissed as a substantial abuse because they failed to show up to a court-ordered hearing that would have given them an opportunity to defend the UST's motion.[176]

The court then hypothetically applied the new provisions under section 102 of the *BAPCPA* to the Heers case, just as it did for the Hills. The court calculated the Heers' gross monthly income at $6,298,[177] and that their total allowed monthly expenses were

169. *Id.* at 494.
170. *Id.*
171. *Id.*
172. *Id.* at 498.
173. *Id.* at 498-99.
174. *Id.* at 499.
175. *Id.*
176. *Id.*
177. *Id.* at 504-05. (using the *BAPCPA*, a debtor's gross monthly income is calculated by the six months preceding the bankruptcy filing).

$7,058.[178] Under the means test, the Heers would have a negative amount of money available for creditors. Based on the three prongs of the means test, "no abuse would be presumed" for the Heers and presumably they would be able to continue with their Chapter Seven bankruptcy.[179] However, the court later analyzed the discretionary measures such as the "totality of the circumstances" and "good faith" given to judges under the *BAPCPA*.[180] With regard to "good faith," the court concluded that it was not applicable to the Heers's situation because no bad faith was alleged or apparent.[181] The court, however, failed to discuss the "totality of the circumstances" approach that remains under the *BAPCPA* section 707(b)(3) because the court was directed to first look to the means test.[182] Since the court found that no abuse was presumed under the means test, it did not have to immerse itself in looking to other diverse factors and did not need to theorize what effect the "totality of circumstances" would have had on the results of the means test.[183]

The court later commented that, "if the present cases . . . are any indication, the *Act* will have no effect on the vast majority of [C]hapter [Seven] filers."[184] Previously, the court had entered its analysis with the idea "to determine if [the] decision produced results that would be inequitable" and that "[t]he results would not change under the *Act* . . . ."[185] Moreover, the court noted that under the *Act*, debtors whose current monthly income fell below the median income for their household size in the state are not evaluated under the means test.[186] The court predicted, despite warnings that the *BAPCPA*'s means test will be more restrictive and push many debtors into Chapter Thirteen reorganization plans, the true effect of the means test remains to be seen and will likely result in far fewer debtors being forced into Chapter Thirteen plans.[187] Interestingly, the court utilized a program designed to perform the extensive calculations under the means test

178. *Id.* at 505.
179. *Id.*
180. *Id.* at 506.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 508.
185. *Id.* at 499.
186. *Id.* at 500.
187. *Id.* at 500.

that show the debtor's income and adjustments,[188] expenses and adjustments,[189] and the difference between the income and expenses that effectively yields the amount that is available to creditors.[190] Additionally, the abuse spreadsheet performs the nonpriority secured claims and the $10,000 amount calculations to determine whether substantial abuse is presumed.[191]

While *In re Hill* is by far the most significant exploration into the abuse provisions of the *BAPCPA*, two other cases have briefly mentioned the abuse provisions. First, *In re Reeves* examined the issue of whether the income of a debtor's new spouse should be included in the substantial abuse test.[192] In that case, the UST brought a motion to dismiss arguing that not only should the income of the debtor be included in the analysis of abuse under section 707(b), but that the debtor's spousal income should be included and evaluated as well.[193] According to the UST, the debtor underreported income on his schedules, based upon an examination of the debtor's tax returns.[194] After analyzing the debtor's income and expense schedules from the Chapter Seven petition and the UST's calculations, the court settled on the debtor's net monthly income as $3,503.89 and the spouse's income as $2,991.69, thus yielding a total income of $6,495.58.[195] In formulating the debtor's total income, the court considered that it was "not only appropriate but necessary" to include a non-filing spouse's

188. *Id*. at Appendix. (The income section includes: Applicable median income, actual income, an adjustment for social security income, and available income broken down by the debtor's income and then income of the non-filing spouse.) (The Westlaw case has images of the appendix and the Lexis cite has an actual breakdown that looks more like a financial statement.)

189. *Id.* The expenses and adjustments include housing and utilities, standard living expenses, additional living expenses, transportation, trustee expenses, an optional adjustment for food and clothing, secured debt payments, and priority claim payments. *Id*.

190. *Id.* (showing how much income left over is available for creditors for one month and for sixty months).

191. *Id.* (demonstrating what percentage of the debtor's unsecured claims is available, as well as the calculations of the lesser of the nonpriority security claim percentage or $6,000 (the greater of these two) or $10,000).

192. *In re Reeves*, 327 B.R. 436, 440 (Bankr. W.D. Miss. 2005).

193. *Id.* at 437.

194. *Id*. at 437-38.

195. *Id.* at 445.

income in determining whether there was substantial abuse.[196] The court then used trial evidence to conclude that the debtor had $5,001.66 of monthly expenses, which left sufficient disposable income to pay creditors.[197] Lastly, the fact that the debtor's failure to report his income accurately, did not demonstrate good faith on the part of the debtor, in conjunction with the disposable income revealed by the UST's financial analysis, the court found that the debtor's Chapter Seven case should be dismissed or converted into a Chapter Thirteen.[198]

Applying the means test with the guidance of *In re Hill* reveals that the result in *In re Reeves* is similar. *In re Reeves* noted that the *BAPCPA* does not include the debtor's spousal income in the "current monthly income" of a Chapter Seven, if that spouse is not jointly filing with the debtor.[199] If that is the case, then the debtor's gross monthly income is only $5,066.80.[200] However, *In re Hill* suggested that under section 101, which states that current monthly income "includes any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor," the non-filing spouse's earned income should be included.[201] Thus, one possible reading of the amended statute is that if a spouse earns income and assists in the regular payment of household expenses, then the spouse's income should be included in determining abuse.[202] Assuming monthly expenses of $3,836, [203] the difference between the income and

196. *Id.* at 441.

197. *Id.* at 445.

198. *Id.* at 447.

199. *Id*. at 443.

200. *Id.* at 438. The court agreed upon a standard median gross monthly income of $5,066.80, which is a gross annual earnings of $60,801.60 for the debtor's family and size (relying on the UST's suggestion). Assuming a court would find that the debtor had a three person family (including spouse and daughter with automobile insurance), the applicable median income would be $49,134. *See* U.S. Census Bureau, 2003 Median Family Income by Family Size. Thus, the debtor would be subject to the means test.

201. *In re Hill*, 328 B.R. 490, 501 (Bankr. S.D. Tex. 2005); *see* 11 U.S.C. § 101(10)(A)(B) (West 2005).

202. *Id.*

203. *Id.* Calculating the debtor's allowed expenses under the new system yields $560 a month in secured debt, $591 in priority claims from child support obligations, $213 in automobile insurance for the daughter, which may be considered "additional payments . . necessary for the debtor . . . to maintain possession the debtor's primary

expenses would be $1,230.80. The $1,230.80 available for creditors per month multiplied by sixty equals $73,848 of available money for creditors for sixty months. Additionally, twenty-five percent of Reeves' $141,751 of nonpriority unsecured debt would be $35,437.15.[204] The lesser of the non-priority unsecured claim amount or the $10,000 amount under the means test is clearly $10,000. Therefore, the $73,848 available for creditors was significantly greater than $10,000 and precluded Mr. Reeves from Chapter Seven relief. Under this analysis, Mr. Reeves was still an abuser and could not continue on the Chapter Seven path, but must convert to a Chapter Thirteen or have the case dismissed.

Another important case in demonstrating Congress' intent when it enacted section 102 to amend section 707(b) of the bankruptcy code is *In re Meyn*.[205] There, a debtor with about $900,000 in exempt assets and about $1,000 in monthly disposable income filed for Chapter Seven relief.[206] Subsequently, the UST filed a motion to dismiss, arguing that the debtor had the ability to repay a great deal of his debts and did not accurately disclose his true financial situation.[207] The UST believed that allowing the debtor to discharge under Chapter Seven would be a "substantial abuse" under section 707(b).[208] Under the old section 707(b) analysis, the court focused on the debtor's "ability to fund a meaningful Chapter [Thirteen] plan from his disposable income."[209] Although the ability to repay under a Chapter Thirteen was the court's primary focus, it also factored in the debtor's lack of good faith evidenced by his filing of inaccurate schedules and financial

residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependants, that serves as collateral for secured debts." 11 U.S.C. § 707(b)(2)(A)(iii)(II) (West 2005). Under the National Standard, given the family size of three and gross monthly income, the expense is $1,002 for food and clothing, $1,125 for housing and utilities, and transportation costs of $345. Moreover, it is likely from the facts that the debtor would qualify for additional expenses under the new expense regime. *See* I.R.S., Natioal Standards for Allowable Living Expenses, http://www.irs.gov/business/small/article/05id=104627,00.html, (last updated Feb. 8, 2005) (refer to *Three Person National Standards Based on Gross Monthly Income* chart).

204. *In re Reeves*, 327 B.R. 436, 439 (Bankr. W.D. Mo 2005).

205. *In re Meyn*, 330 B.R. 286 (Bankr. M.D. Fla. 2005).

206. *Id.* at 287.

207. *Id.* at 290.

208. *Id.* at 287.

209. *Id*. at 290.

statements and failure to disclose certain amounts of money that he had received before filing the Chapter Seven.[210] Likewise, the court noticed that the debtor had filed a Chapter Seven eight months after his Chapter Thirteen filing was dismissed.[211] The court presumably added this to the extensive list of factors under the totality of circumstances that warranted a dismissal. In a footnote of the court's discussion, it explained that the case was governed by section 707(b) prior to the enactment of the *BAPCPA* and that, therefore, the new provisions on abuse under the *BAPCPA* did not apply because the case was decided before October 17, 2005, which was before the new provisions took effect.[212]

Although the court in *In re Meyn* did not discuss how the amendments to section 707(b) by the *BAPCPA* would change the case, it is important in demonstrating Congress's intent on preventing abuse. *In re Meyn* involved a debtor who was a senior executive with a salary over $300,000 a year, $750,000 in an IRA, and a large home in a gated community in Tampa.[213] However, the debtor had been faced with "a costly divorce, a job loss, and periods of un- and under- employment," which presumably propelled him to try to discharge his debts through a Chapter Seven.[214] The court also analyzed recent changes in the debtor's financial situation. The debtor had obtained new employment with another company and remarried, which yielded additional income from the new spouse.[215] The debtor, according to the court, had unsecured debts of $173,572[216] and expenses of $7,693.[217] Following

210. *Id.* at 291.

211. *Id.* at 288.

212. *Id.* at 289 n.10.

213. *Id.* at 287, 290.

214. *Id.* at 287. Meyn wanted to discharge his former spouse's claims, which included permanent monthly alimony and a cash payment of almost $60,000. *Id.* at 288.

215. *Id.* at 288.

216. *Id.* at 289.

217. *Id.* The debtor's reported expenses were $8,683, which the court downsized by $700 per month due to the debtor's overstatement. The expenses included $3,000 a month of mortgage payment, $2,700 a month in alimony, and other expenses amounting to $2,983. *Id.* According to *In re Hill*, mortgage payments and alimony priority claims survive as expenses. *In re Hill*, 328 B.R. 490, 508 (Bankr. S.D. Tex. 2005). Using the National Standards, the debtor is entitled to $691.00 of expenses, and under the Local Standards, since the debtor lives in the Tampa suburbs, which is in Hillsborough County, he is entitled to another $1,047; transportation costs would be

In re Reeves, with regard to including spousal income in a Chapter Seven proceeding where both spouses are not joint debtors, Mr. Meyn's total monthly income would be $6,000.[218] Thus, the amount available to creditors would be negative $1,693 and over sixty months that amount would be negative $119,580. Under this analysis, and using the information given, there would be no substantial abuse presumed in Mr. Meyn's case after the *BAPCPA* amendments.

A significant problem underlying the section 102 provision is that the discretionary measures given to judges may lead to a lack of uniformity among courts. For example, the court in *In re Hill* found that under the means test, the Hills were presumed to be substantial abusers and the Heers were not.[219] However, the court pointed out that it can utilize discretionary measures such as the "good faith" and the "totality of the circumstances" test.[220] It found that there was no bad faith alleged so its first discretionary measure was moot, but failed to utilize the "totality of the circumstances" test because it did not need to, given that only the old substantial abuse test applied to the case.[221] Yet, given that the court found substantial abuse for the Heers utilizing factors from the substantial abuse test such as future ability to pay, ability to enter a Chapter Thirteen plan, and their failure to show up to a court order hearing, one might wonder why the court was hesitant to apply these factors after applying the means test.[222]

Congress specifically allowed courts to use discretion in applying these two tests after utilizing the means test. Thus, while the Heers were not presumed to be abusers under the means test, a court could conceivably find that their ability to pay and their failure to show up to a court ordered hearing would prompt a finding of abuse under the "totality of the circumstances" approach.[223] Thus, the means test is not a perfect system for determining abuse. Moreover, *In re Hill* showed how the discretionary measures afforded to judges could create a lack of uniformity among judges. Perhaps some judges will look strictly to

$255 without a car.

218. *In re Meyn*, 330 B.R. 286, 289 (Bankr. M.D. Fla. 2005) (calculating his gross annual earnings for 2004 at $72,000.00, which is $6,000.00 gross monthly income).

219. *In re Hill*, 328 B.R. at 506.

220. *Id*.

221. *Id.* at 506-07.

222. *Id.* at 498-99.

223. *Id*.

the means test, as the court did in *In re Hill* when analyzing the Heers case under section 102, and other judges will find a way to apply the "good faith" and "totality of the circumstances" test to find abuse even when the means test failed to demonstrate abuse. Unfortunately, this will result in some fortunate debtors getting judges who look strictly to the means test, and other unfortunate debtors getting judges that include the discretion afforded to them by Congress.

Another conclusion that is inescapable from the analysis of the above section 102 cases is that the means test may yield anomalous results. *In re Hill* is just one example of how discretionary measures may result in diverse and unfair rulings. Moreover, the substantial abuse presumed for such dissimilar cases as *In re Meyn* and *In re Reeves* indicated that section 102 is sometimes indiscriminate in presuming substantial abuse. Whereas *In re Meyn* involved a debtor who clearly had the assets and income to pay back creditors despite having problems with job security and a recent divorce, *In re Reeves* involved a debtor with substantially different financial circumstances. However, under the means test analysis, the debtor in *In re Reeves* would be presumed an abuser, whereas the debtor in *In re Meyn* would not. Of course, a court could utilize its discretionary measures, but this anomalous result demonstrates that the means test is far from perfect. Another issue with the means test is the split that may result among courts on whether to include a spouse's income even if that spouse is not filing for bankruptcy. The court in *In re Reeves* suggested that including a debtor's spousal income was not necessary under the *BAPCPA*.[224] However, based on case law prior to the *BAPCPA*, courts found that it was appropriate to include a spouse's income.[225] Unfortunately, this unresolved split may create anomalous results among courts and ultimately hurt some debtors in the process of figuring out whether it is proper to include a spouse's income after the *BAPCPA*.

The last problem is that since the case law applying the new means test is relatively sparse, it is unclear what effect it may have on those forced into bankruptcy because of medical bills or disability due to military service or other unforeseen circumstances. Yet, based on the current line of cases applying the means test, it is reasonable to conclude that in many instances it will eliminate the abuses that

224. *In re Reeves*, 327 B.R. 443 (Bankr. W.D. Mo. 2005).
225. *Id.*

Congress intended to curb. However, it is unclear whether in the process of curbing abuse it will unintentionally include honest and needy debtors and leave unfulfilled Congress's goal of providing easier and speedier access to bankruptcy for the good debtors.

B. *HOMESTEAD PROVISIONS OF THE* ACT *AND CASE LAW*

The *BAPCPA* provisions that amended the homestead exceptions are similar to the abuse provisions because they attempted to eliminate abuse of the state homestead-exemption laws. The first provision under section 307 of *BAPCPA* changed the applicable state exemption law based on domicile.[226] Second, section 308 reduced the value of the homestead exemption due to fraudulent transfers.[227] Third, section 322 imposed a cap on certain debtors' homesteads that acquired a set number of days before the debtor's petition was filed.[228] Combined, these provisions aimed at eliminating the old loopholes common in the Florida and Texas homestead exemption laws and demonstrated the efforts that Congress took to prevent abuse of the bankruptcy system.[229] Recent case law applying these provisions demonstrated that some provisions accomplished the goals that Congress intended, while others led to confusion among courts.

In re McNabb discussed the homestead exemption limitation created via section 307 of the *BAPCPA*.[230] The case primarily dealt with homestead exemption issues. In *In re McNabb*, the debtor lived in California from October 2001 through April 2004 when he purchased a home in Arizona.[231] This house was listed on the debtor's schedule A as having a $330,000 current market value with a lien on the property for $205,500, leaving $124,500 in equity.[232] The debtor filed for Chapter Seven protection on April 28, 2005.[233] Since Arizona is an

226. *Infra*, (C)(2) at nn. 84-87.

227. *Infra*, (C)(2) at nn. 93-103.

228. *Infra*, (C)(2) at nn. 88-92.

229. Pub. L. 109-8, § 256, 2005 U.S.C.C.A.N. (88 Stat.) 92. The House Report goes into an in-depth discussion of the states that have unlimited homestead exemptions and particularly striking examples of the abuses.

230. *In re McNabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005); *see generally*, *In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005) (finding § 308 not applicable because there was no allegation of bad conduct).

231. *Id.* at 786.

232. *Id.*

233. *Id.*

opt-out state, which requires a debtor to elect the state exemptions and since the Arizona statute allows a homestead exemption up to $150,000, the debtor's house was exempt from creditors.[234] Subsequently, the creditors argued that section 307 of the *BAPCPA* required the debtor to claim exemptions under California law.[235] The court then analyzed whether the section 307 amendment to section 522(b)(3) applied to the debtor's case.[236] If section 307 applied, it would mean that a debtor who "moved from one state to another within 730 days prepetition" would be required to use the "applicable state exemption law. . . of the state where the debtor was domiciled for the greater part of days 731–910 prepetition."[237] If the rule applied, then the debtor would be required to use California law that allows a $50,000 exemption for a single debtor and $75,000 if the debtor is married or has dependents.[238] However, since section 307 did not become effective until October 17, 2005 the amendments did not apply.[239] Therefore, the old rule that established that the correct homestead exemption was the debtor's place of domicile within the 180 days before filing, the petition resulted in the debtor's house being exempt from attack by creditors.[240] The court later deferred settling the ultimate question of whether the debtor's residence would remain exempt from creditors based on its appraisal by setting an evidentiary hearing.[241]

In re McNabb also explored the application of section 308 of the *BAPCPA*, which created section 522(o) of the Bankruptcy Code that reduces the value of the property claimed as a homestead to the extent that it is attributable to fraudulent transfers of any property that the debtor disposed within ten years of filing his petition.[242] The creditors in *In re McNabb* claimed the debtor was their certified financial advisor and that by fraud and breach of fiduciary duty had prompted the creditors to lend the debtor $250,000 on an interest only unsecured

234. *Id.*
235. *Id.*
236. *Id.* at 787.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 791.
242. Pub. L. No. 109-8, § 308, 119 Stat. 23 (2005).

note.[243] They further claimed that section 308 should apply because some of the funds they had lent the debtor were used to purchase the home at issue.[244] The creditors argue that section 308 required the debtor's homestead to be reduced to "the extent of the value obtained through such fraud and invested in the homestead."[245] However, since the court required an evidentiary hearing to determine the value of the residence, the court did not determine what extent to reduce the value of the homestead exemption under section 308.[246]

The last provision limiting the abuse of the homestead exemption is section 322. Since the enactment of the *BAPCPA*, the issue arose in recent case law as often as the section 102 means test in establishing substantial abuse. *In re McNabb* is the first case to explore the application of section 322.[247] The creditors in *In re McNabb*, in addition to the section 307 and 308 claims, also argued that the amendments to the Bankruptcy Code, under the *BAPCPA*, imposed a $125,000 cap on a homestead claim because the debtor had acquired his home less than 1215 days before filing his bankruptcy petition.[248] Under the language of section 322, the court found that the $125,000 cap on the homestead claim only occurs when the debtor elects to exempt property under state or local law.[249] However, many states have chosen to "opt-out" of the Bankruptcy Code's exemptions.[250] The court concluded that since the debtor was from Arizona, a state that "does not permit debtors to make any elections of which exemptions to claim," section 322 did not apply.[251] Thus, the court ruled that if a debtor cannot make an election, no cap can be applied.[252] Therefore, given the plain meaning of the statute, the debtor's homestead exemption was not limited to $125,000, but remained at the $150,000 homestead exemption under Arizona state exemption law.[253]

243. *In re McNabb*, 326 B.R. at 786-87.
244. *Id.* at 787.
245. *Id.*
246. *Id.* at 791.
247. *Id*. at 785.
248. *Id.* at 786.
249. *Id.* at 788.
250. *Supra* n. 54.
251. *In re McNabb*, 326 B.R. at 791.
252. *Id.*
253. *Id.* at 786, 791.

The court's analysis into the legislative history, clarity and limitations of section 322 is even more fascinating. The court began by remarking that legislative history "is virtually useless as an aid to understanding the language and intent of *BAPCPA*."[254] The court also found that the 1997 Commission Report and the Report of the House Committee on the Judiciary was of little help.[255] The court then looked to general bankruptcy law history, which demonstrated that where the language of a statute is unambiguous, the court should not speculate on Congress's purposes.[256] According to the court, "the last time Congress attempted to impose uniform federal exemption laws" was the *Bankruptcy Act of 1841*, which was repealed one year later.[257] Thereafter, bankruptcy law permitted states to have their own exemption laws, demonstrating that Congress may not have imposed a uniform federal homestead cap under the *BAPCPA* for fear that the states would not allow its passage.[258] Additionally, the court found support for its reading of section 322 by looking to sections 308 and 330, which do not have the "as a result of electing" language that limits the application to non opt-out states.[259]

Second, the court noted that greater than two thirds of the states have chosen to opt-out of the federal exemptions and that the only non-opt-out states that allow election of the federal exemptions with state homestead exemptions greater than $125,000 are Texas and Minnesota.[260] The court believed that limiting the cap to $125,000 is a "[glitch]" that needs to be fixed, stating that "it makes little sense to limit the cap to the few remaining non-opt out states."[261] Moreover, the court criticized the provision because it might allow debtors to protect their assets by obtaining a homestead in another state "because the state precludes the alternative of claiming far less generous federal exemptions."[262]

254. *Id.* at 789.
255. *Id.* at 789 nn. 9-10.
256. *Id.* at 789.
257. *Id.*
258. *Id.*
259. *Id.* at 790.
260. *Id.* at 788-89.
261. *Id.* at 791.
262. *Id.* For example, a debtor from New Mexico, which is a non-opt out state that allows an election and a homestead exemption of $30,000, might provoke the debtor to move to Arizona, a non-opt out state with a more favorable homestead of $150,000.

Finally, the court concluded that despite the problems with section 322, "Congress can easily fix it."[263] The court believed that despite congressional testimony that the *BAPCPA* did not need to be changed because it was so perfect, there were various problems with the *BAPCPA* and there was evidence that amendments to the bill to fix those problems were forthcoming.[264] Although the court is clearly a proponent of amending section 322 to make it more practical, it consistently voices its frustration in deciding what section 322 means based on its plain reading without any other guidance from Congress.[265] Ultimately, the court does not seem entirely comfortable with its conclusion since it was the first court to apply section 322 and it had to do so almost entirely under its own discretion.

In *In re Kaplan*, the debtor claimed her condominium in Florida, valued at $280,000, as exempt.[266] After considering a mortgage of $181,000 remaining on the property, the debtor had $99,000 in equity.[267] The trustee objected, claiming the property was worth between $325,000 and $350,000, leaving equity between $144,000 and $169,000, considering the mortgage.[268] The trustee asserted that any equity over the $125,000 cap under section 322 was not exempt because the debtor acquired the condominium within 1215 days of filing for bankruptcy.[269] In return, the debtor stated that under *In re McNabb*, section 322 was not applicable in Florida and that the trustee's valuation of the property was incorrect.[270] The case was then heard before valuation of the property to discuss the "importance of the legal issue presented," namely whether section 322 was applicable in Florida.[271]

In deciding whether section 322 of the *BAPCPA* was applicable in Florida, the court looked to *In re McNabb*. The *Kaplan* court found that statutory interpretation in *In re McNabb* was "very narrow and

The debtor still has to deal with the 1,215-day period prepetition requirement. N.M. Stat. Ann. § 42-10-9 (2005).

263. *In re McNabb*, 326 B.R. at 791.
264. *Id.*
265. *Id.*
266. *In re Kaplan*, 331 B.R. 483, 484 (Bankr. S.D. Fla. 2005).
267. *Id.* at 485.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*

mechanical."[272] The court then bluntly stated that the result in *In re McNabb* was wrong when viewed through the "time-tested rules of statutory construction . . . ."[273] In particular, the court found that the decision in *In re McNabb* forgot that the, "canons of statutory construction permit the Court to consider legislative intent," especially when there was "more than one plausible reading."[274] Moreover, the court found that Congress's intent was clear to have the homestead limitations imposed by section 322 to apply to all states where a debtor could exempt amounts greater than $125,000.[275] Therefore, since Florida and Arizona are opt-out states that give homestead exemptions greater than $125,000, Congress intended the section 322 cap to apply.[276] In resolving the clear language of "as a result of electing" the *McNabb* court was prompted to find that the cap did not apply to opt-out states. The *Kaplan* court offered an alternative explanation: Congress intended the phrase to describe debtors using state law exemptions under the opt-out provision "whether they have a choice or not."[277] Finally, the court stated that the suggestion in *In re McNnabb*, that homestead limitations under the *BAPCPA* were limited to Texas and Minnesota, is wrong because it failed to take into account legislative intent including other states such as Florida.[278]

The *Kaplan* court did not only criticize the *In re McNabb* decision, but the *BAPCPA* in general. The court in *In re Kaplan*, having read the hundreds of pages of provisions of the *BAPCPA*, concluded that it was "not a model of clarity."[279] Moreover, the court recognized that "[i]mplementing the changes will present a daunting challenge to judges, clerk's offices, attorneys and parties who seek relief in the bankruptcy court . . . ."[280] In criticizing *In re McNabb*, the court also conceded that Congress did not select the best language to accomplish its goals, especially with regard to section 322.[281] Later the *Kaplan* court admonished that a court's role is "not to be vindictive

272. *Id.* at 484.
273. *Id.*
274. *Id.* at 486.
275. *Id.* at 487.
276. *Id.*
277. *Id.*
278. *Id.* at 488.
279. *Id*. at 484.
280. *Id.*
281. *Id.* at 488.

to its legislative colleagues when it can and should interpret and apply a statue as intended."[282] Moreover, the court stated that in the future many other courts will have to struggle with some interpretation issues of the *BAPCPA*, but hoped that Florida judges will uniformly apply the section 322 cap in Florida bankruptcy cases, notwithstanding the *In re McNabb* decision.[283]

The *Kaplan* court, calling for uniformity in applying section 322, was partially answered in a subsequent Florida bankruptcy court case.[284] In *In re Wayrynen*, the trustee asserted that the section 322 cap was applicable to the debtor's home worth $150,000 because the homestead cap applied in Florida and because the debtor acquired the property within the 1215 day period.[285] The debtor on the other hand, contended that the debtor's failure to elect according to the statute eliminated the $125,000 cap under section 322.[286] Furthermore, the debtor asserted that even if the cap did apply, the debtor should be afforded an exclusion of the equity in the debtor's present home resulting from the sale of the previous home within the state of Florida that he had purchased more than 1215 days before the bankruptcy filing.[287] Although the court did not cite to *In re Kaplan*, it resolved the first issue by demonstrating that while the plain reading of section 322 would make the limitations on Florida residents the same after the *BAPCPA*, it could not be interpreted in that way.[288] Instead, the court reconciled the section based on Congress's clear intention for the exemption limitations to apply to all debtors to force a debtor to "elect[ ] to invoke the exemption provisions under Florida law."[289] Under that reasoning, section 322 would apply.

282. *Id*.

283. *Id.*

284. *In re Wayrynen*, 322 B.R. 479 (Bankr. S.D. Fla. 2005). In another provocative case, *In re Virissimo*, the court applied the *Kaplan* legislative intent test to Nevada debtors who ordinarily would receive a $350,000 homestead exemption. 322 B.R. 201 (Bankr. D. Nev. 2005) The court concluded that the homestead cap applied to an opt-out state like Nevada, which was similar to Florida and Arizona, because there is an election under the provision, regardless of the state. *Id.* at 205.

285. *In re Wayrynen*, 322 B.R. at 481.

286. *Id.* at 482.

287. *Id.*

288. *Id.* at 483.

289. *Id.* at 484.

With regard to the second issue, the court provided a masterful analysis of the scope and intent of the previous principal residence exclusion under section 322.[290] The debtor in May 1989 had purchased a Lake Worth property for $99,500 and sold it on August 20, 2002 for $250,000.[291] In September 2002, the debtor purchased a Double Tree property, which he subsequently sold on March 14, 2005.[292] The debtor's current residence was purchased in March 2005.[293] According to the trustee, the debtor's interest transferred from his Double Tree property, as the previous principal residence, to his current residence should be excluded because the sale of the Double Tree property occurred within the 1215 days prepetition.[294] However, the court disagreed with the trustee's narrow interpretation of the statute.[295] The court reasoned that the statute applied to the value over $125,000 of the residence acquired within 1215 days of the bankruptcy petition.[296] Then, the value of the debtor's current residence was deducted by that portion of the current residence value attributable to the debtor's ownership of a prior residence.[297]

Applying those rules to the case, the court found that since the Lake Worth property was purchased so that it conformed to the requirement that the interest transferred be from the debtor's previous principal residence and that residence be acquired prior to the beginning of the 1215-day period. By logical deduction, the Double Tree property, while a previous principal residence, could not satisfy the exclusion requirements. Furthermore, since the interest transferred by the sale of the Lake Worth property amounted to $150,500,[298] exceeding the value of the debtor's homestead claim of $125,000 on his present principal residence, there was no portion of the principal

290. 11 U.S.C. § 522(p)(2)(B) (2005) (providing, "For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.").

291. *In re Wayrynen*, 322 B.R. at 486.

292. *Id.* at 481.

293. *Id.*

294. *Id.* at 485.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* (the sales price of $250,000 reduced by the purchase price of $99,500).

residence left to constitute nonexempt property.[299] The trustee then argued that the Lake Worth residence was not the debtor's previous principal residence, as the section 322 exclusion requires, but the court overruled the trustee's objections stating that the trustee's view of the limitation was too narrow.[300] In short, the section 322 exclusion was meant to prevent abusers of exemption provisions by relocating and to benefit those like the debtor who had not tried to take advantage of exemption laws to shelter his funds.[301] Thus, while the court in *In re Wayrynen* reached the same result as *In re Kaplan* on whether section 322 applied to Florida, it applied the section 322 exclusion to exempt the debtor's residence in its entirety.[302]

As the above homestead cases demonstrate, the new provisions create a few problems. First, as the contrary decisions of *In re McNabb* and *In re Kaplan* demonstrate, courts may not agree on how much to focus on a statute's meaning compared to the legislative intent behind the statute. As *In re Kaplan* and subsequent cases proved, the courts applied section 322 as Congress intended. However, this may pose a threat to a state's sovereignty, especially since the courts have read the section to apply a universal cap of $125,000 to all states regardless of election. The history of bankruptcy law makes evident that previous attempts by Congress to impose uniform federal exemptions have failed because these attempts have been met with stiff state resistance.[303]

Second, some of the homestead limitations, such as section 308, will require a court to establish the intent of the debtor on whether the debtor used fraudulently-obtained funds to purchase his residence. In *In re McNabb*, the court delayed determining whether the allegedly fraudulent funds were used to purchase the debtor's house, but it is likely that courts will face significant hardship in tracing funds obtained fraudulently to the purchase of the debtor's residence.[304] Two challenges will create a hardship for judges: Determining whether the funds were obtained fraudulently and then tracing those funds that

299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Supra* nn. 256-257.
304. *In re McNabb*, 326 B.R. 785, 791 (Bankr. D. Ariz. 2005).

will be pooled from other sources of income to the purchase of the debtor's home.

As *In re Wayrynen* illustrated, debtors will find ways out of the section 322 limitation. The court in *In re Wayrynen* used the previous principal residence exclusion to the benefit of the debtor, despite the trustee's argument that the exclusion should be narrowly construed.[305] Instead, the court found that the exclusion should benefit the debtor because there was no evidence of the debtor's bad faith.[306] The court looked at Congress's intent instead of the plain meaning of the statute, thus abrogating the trustee's incessant attack to make the debtor pay back his debts from the equity on his residence. In this instance, the court sided with the debtor and stretched section 322's exclusion to be construed more broadly. In so doing, the court preserved Congress's intent by finding that although the section 322 limitation applied in Florida, the section 322 exclusion applied to the debtor's case. Lastly, it is possible that if the surrounding circumstances in *In re Wayrynen* displayed some bad faith on the part of the debtor, the court would not be so willing to apply the section 322 exclusion to the debtor; rather, the court might have sided with the trustee.

C. *FRAUD PROVISIONS OF THE* ACT *AND CASE LAW*

The provisions of the *BAPCPA*, which is directed at individuals who have a criminal history, demonstrate Congress's intent on not only preventing abusers of the old Bankruptcy Code homestead provisions, but also those who accumulated debts through state or federal proceedings resulting in a judgment against them for their criminal behavior. Although the case law dealing with these issues is sparse and the issue of securities fraud judgments or debtors wishing to discharge fines resulting from a felony does not arise often, these provisions are, nevertheless, useful in understanding the *BAPCPA*. Applying both sections 1404 and 303 to a recent decision will demonstrate how Congress not only intended to punish those who had abused the bankruptcy system through use of the homestead loopholes, but also that Congress intended to punish those who had violated the legal system.

305. *In re Wayrynen*, 332 B.R. 479, 486 (Bankr. S.D. Fla. 2005).
306. *Id.*

The novel issue of whether securities fraud claims arising during, instead of before, a bankruptcy filing are dischargeable in *In re Weilein*, which invoked the provisions of section 1404 of the *BAPCPA*.[307] The case involved a motion to reconsider which was filed by a creditor of the debtor's bankruptcy estate.[308] Specifically, the creditor had filed a lawsuit in state court over securities fraud claims that were still pending when the debtor had filed for bankruptcy.[309] The bankruptcy court previously entered an order stating that securities fraud claims arising during the bankruptcy proceeding were excepted from discharge.[310] The creditor requested reconsideration on the ground that section 1404 of the *BAPCPA*, which amended section 523(a)(19) of the Bankruptcy Code, should be applied to the case.[311] Section 1404 of the *BAPCPA* would disallow the debtor's discharge of securities fraud debts.[312] The creditor further argued that Congress, by the express terms of the provision, made section 1404 applicable to cases as of July 30, 2002, the date of the *Sarbanes Oxley Act*.[313] More importantly, Congress made debts incurred from securities fraud violations nondischargeable either before or after the filing of the Chapter Seven petition.[314] The court found that the section 1404 amendments to the Bankruptcy Code applied and the state court action could continue.[315] Thus, favored by the timing of the *BAPCPA* changes to securities fraud claims, the creditor was able to prevent the debtor from discharging his pending state court claims in bankruptcy.

Section 330 of the *BAPCPA* has a similar but broader effect than section 1404 because it not only focused on securities fraud violations but also on a host of other crimes.[316] Section 330 not only delayed the discharge of debts awaiting the outcome of proceedings related to securities fraud, but also to debts arising from a felony, breach of fiduciary duty, criminal acts, intentional torts, or reckless or willful

307. *In re Weilein*, 328 B.R. 553, 554 (Bankr. N.D. Iowa 2005).
308. *Id.*
309. *Id.* at 553.
310. *Id.* at 554.
311. *Id.* at 554-55.
312. *Id.*
313. *Id*.
314. *Id.* at 555.
315. *Id.*
316. Pub. L. No. 109-8, § 330, 119 Stat. 23 (2005).

misconduct causing serious physical injury or death.[317] Therefore, section 330 overlaps section 1404 by prohibiting the discharge of debts arising from securities fraud violations. However, section 1404 seems to allow a denial of discharge well after an order for discharge is entered, whereas section 330 seems to require a motion ten days before the order granting discharge to disallow the dischargeability of debts incurred by the proscribed crimes and acts. For instance, earlier in the Weilein's bankruptcy proceeding, a discharge was entered on June 16, 2004.[318] Later, a consideration of the impact the *Sarbanes Oxley Act* would have on the debtors pending securities fraud violations indicated that it was inapplicable at the time, mostly because the *BAPCPA* section 1404 had not been enacted. On further motion, in 2005, the creditor was able to except the pending state court securities fraud judgments against the debtor from discharge many months after the court had given the order for discharge.[319]

In contrast, section 330 operates to require notice and hearing on pending court action that might delay discharge in the ten days preceding the final order for discharge.[320] It is more likely under section 330 that a creditor might fail to give the court adequate notice and avail itself of a hearing to prevent the debtor from discharging the types of debts that are excepted from discharge because of this time constraint. Therefore, under section 330, the creditor in *Weilein* would have to give notice of the pending state court action resulting in a possible nondischargeable debt in the ten days preceding the anticipated discharge order.

Among the provisions of the *BAPCPA* as applied to case law, sections 330 and 1404 serve as models of clarity and effectiveness. Though the case law applying these sections is hardly developed, these provisions do not appear to have the discretionary or interpretative problems that the abuse or homestead provisions seem to have. While many debtors may not like the extreme limitations of sections 330 and 1404, they serve a public policy end to prevent criminals from escaping the financial liability that comes with securities fraud violations, criminal conduct or other civil transgressions. These sections understandably curb abuse by those who under the old Bankruptcy

317. Id. (§ 330 refers to 11 U.S.C. §§ 522(q)(1)(A)-(B) (2005) for other violations).
318. *In re Weilein*, 319 B.R. 175, 176 (Bankr. N.D. Iowa 2004).
319. *In re Weilein*, 328 B.R. 553, 555-56 (Bankr. N.D. Iowa 2005).
320. Pub. L. No. 109-8, § 330, 119 Stat. 23 (2005).

Code were able to discharge debts incurred by committing crimes and are, therefore, in keeping with congressional intent.

V. CONCLUSION

The recent case law analyzing and applying the substantial abuse, homestead exemption, and fraud provisions demonstrates some of the inadequacies and limitations of the *BAPCPA*. In the process of deciphering these particular provisions of the *BAPCPA*, consumers will undoubtedly be victims of judicial discretion, or the lack thereof, because of poor drafting, arbitrary standards, and lack of uniformity among bankruptcy courts regarding congressional intent and statutory interpretation. Additionally, the trend of cases, particularly for substantial abuse, appears to create some anomalous results for cases that have similar underlying facts. Yet, for all the negative consequences that the *BAPCPA* might have for consumers in the future, some of the provisions already discussed will not hurt consumers any more under the *BAPCPA* and are superior provisions, both in form and effect. Thus, the few positive qualities of these provisions are generally outweighed by the major provisions such as sections 102, 307, and 322, that will hurt consumers and dually fail to accomplish Congress's goals of providing access to consumers and maintaining fairness for debtors and creditors.

Some of the criticism over the *BAPCPA* has yet to become apparent in case law. Perhaps it will not limit the ability of honest filers from attaining a fresh start. Yet, as many judges have commented, the *BAPCPA* is replete with poorly written provisions. Moreover, the *BAPCPA* fails because it creates increased debtor accountability without corresponding creditor accountability. Though creditor accountability is not an issue raised in recent case law that applied the *BAPCPA*, it is arguably one of Congress's biggest failures. Save for a few kind provisions, it seems as if the *BAPCPA* focuses intensely on weeding out abusers and provides little permanent benefit to debtors in need. However, when compared to the slight limitations imposed on creditors, the cage that some consumers will find themselves in is remarkable and unfortunate.

In conclusion, many of the abuse and homestead provisions of the *BAPCPA* will purge countless amounts of abusive filers at the expense of some honest and needy filers. Clearly, this is a result of the poor language of the *BAPCPA*, which will force judges to scramble in

efforts to provide uniform standards in applying the means test and the homestead limitation provisions. Yet, there is hope that the provisions of the *BAPCPA* that need fixing will be cured by amending them in the future. Hopefully, an amendment will also recognize the deficiencies of the *BAPCPA* in failing to curb the practices of the credit industry, which ultimately fueled and helped pay for the *BAPCPA*. If Congress fails to patch up the gaps and deficiencies in the *BAPCPA* it will most certainly continue to harm consumers. Additionally, it may endanger the legal system by favoring creditors over debtors which will harm individual rights. Therefore, the future of the *BAPCPA* for consumers is dependent on congressional willingness to accept that it was not perfect legislation, that it creates ambiguity among courts, and that it unfavorably burdens consumer-debtors relative to creditors. Until that time comes, consumers will have to look to the power of courts to protect their rights and ensure their fair access to a fresh start.

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* J.D. candidate 2008, Whittier Law School; Member, Whittier Law Review; B.A. in Political Science with a minor in Public Policy, University of California, Los Angeles, 2003. I would like first to thank my family for their love, support, and never-ending guidance: Discipline, Attitude, Perseverance! Likewise, I want to express my thanks to editors Brian, Alaleh, and Janine for their tireless efforts on this lengthy article and to Sarin, Orit, and Lisa for not only research assistance, but making me feel at home with law review. Last, I would like to thank Sammy for supporting and believing in me through the long hours, days, weeks, and months of work that have gone into this article.