
YALE LAW & POLICY REVIEW

From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)

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INTRODUCTION

On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) went into effect. Enacted after twelve years of intense lobbying by unsecured lenders, BAPCPA represents the most sweeping set of amendments to the Bankruptcy Code in over a century. BAPCPA imposed a large number of new requirements on all consumer debtors.¹ From a consumer perspective, the most dramatic change is that debtors who have incomes above their state's median and who fail a "means test" are

1. For a list of debtors' duties, see 11 U.S.C.A. § 521 (West 2004 & Supp. 2007).

presumed to be abusing the system. If they wish to file a Chapter 7 liquidation, they instead are channeled into filing Chapter 13 plans.²

Prior to the enactment of BAPCPA, most consumer debtors could elect whether to file a petition for relief under Chapter 7 or Chapter 13.³ The benefits of consumer bankruptcy vary depending on what type of credit has been extended to the debtor. At its most basic level, a Chapter 7 liquidation discharges the majority of unsecured debt that a debtor owes, but it may require the debtor to sell certain assets in which the debtor's estate has equity. In a Chapter 13 bankruptcy, a debtor forms a plan for the repayment of certain debts. Unsecured credit, such as credit card debt, is generally dischargeable in a Chapter 7 bankruptcy.⁴ Conversely, secured debt, such as home mortgages, home equity loans, automobile loans, security interests in personal property, and layaway plans are not dischargeable in consumer bankruptcy.⁵ Similarly, "informal credit arrangements, such as [personal] loans from family members, which [were] historically the dominant source of consumer credit," are not dischargeable.⁶ Despite the obvious advantages of discharging a debtor's unsecured debt, a debtor might still strategically prefer to file a Chapter 13 case in these circumstances.

A consumer's choice whether to file a Chapter 7 case or a Chapter 13 case was, before BAPCPA, a strategic decision made based on the particular financial circumstances of the debtor and the debtor's goals following the discharge. With the enactment of BAPCPA, Congress and President Bush rhetorically established a strong dichotomy between irresponsible debtors, on the one hand, who, undeterred by the stigma of bankruptcy, increasingly

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2. Under means-testing, a debtor is not eligible for a Chapter 7 discharge and, therefore, must file in Chapter 13 and formulate a repayment plan if (1) the debtor's annual income exceeds his or her state's median income for families of comparable size, *see id.* § 707(b)(7)(A); (2) after subtracting out certain allowed expenses, the debtor has sufficient income remaining to repay a substantial portion of the his or her obligations, *see id.* § 707(b)(2)(A); and (3) the debtor does not have any "special circumstances, such as a serious medical condition or a call or order to active duty . . . that justify additional expenses or adjustments of current monthly income," *id.* § 707(b)(2)(B)(i).
 3. *See id.* § 109.
 4. *See id.* § 523 (listing certain types of debt that are not dischargeable in bankruptcy, even if such debt is owed to a general, unsecured creditor). In the context of credit card debt, for example, a debtor's obligation to repay might not be dischargeable if the debtor used the credit card to purchase a certain amount of unnecessary luxury items shortly before seeking bankruptcy protection. *See id.* § 523(a)(2)(c)(i)(I), (ii)(II).
 5. *See id.* § 506.
 6. Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1111 (2005).

file Chapter 7 liquidations to discharge their unsecured debt and, on the other hand, Chapter 13 debtors who are responsible individuals who wish to repay those who extended them credit. By forcing more individuals to file Chapter 13 repayment plans, this logic suggests that more debtors will be forced to take personal responsibility and repay their unsecured creditors.

This reasoning raises a series of important empirical questions that researchers and social scientists should examine. First, were Congress and the President responding to an actual crisis? What do we know empirically about the triggers that cause debtors to seek bankruptcy protection? Have bankruptcy filings increased because individuals feel less constrained by the stigma of filing relative to the benefit of a Chapter 7 discharge of most of their unsecured debt? Or are increased filings instead due to social and economic issues, such as a rise in the number of people who lack health insurance, lose their jobs, act as the sole care-giver of their children, or fall victim to aggressive lending? Second, maintaining an agnostic perspective with regard to the reasons for enacting the changes, has BAPCPA accomplished its goals? Have the changes given rise to unintended consequences?

This Article contributes to the literature and research on the causes and effects of BAPCPA in five principal ways. Using a proportional, stratified, random sample of bankruptcy cases from 2004 and the twelve months after BAPCPA went into effect, we have created an original database of cases for every state in the Tenth Circuit. We collected a simple random sample from 2002 population data in order to confirm that 2004 was a reasonable benchmarking year. We also created an original population database for Colorado in regard to attorneys who represented Chapter 7 and Chapter 13 debtors in 2002, 2003, 2004, and for the year post-BAPCPA.

In this Article, we first synthesize the available empirical evidence on the triggers for filing for bankruptcy protection and the debates and findings from the Congressional Record. We analyze whether Congress and the President were responding to an increasing trend toward irresponsible behavior or, instead, to a trend toward more social and economic crises. We discuss filing rates as well as prior empirical research on Chapter 13 debtors. We contextualize the findings of our study within this literature.

Second, we test whether the financial profile of debtors filing Chapter 13 repayment plans has changed pre- and post-BAPCPA. Compared with 2004 data, post-BAPCPA debtors have more debts. We find dramatic increases in the mean value of real property, the mean value of personal property, the mean amount of debt secured by an interest in real property, and total debt.

Third, we test whether unsecured creditors are doing better as a result of BAPCPA. We find qualified success for unsecured creditors. The confirmed plans of post-BAPCPA Chapter 13 debtors provide for a dramatic 77% increase in payments to general unsecured creditors as compared to 2004 debtors. Debtors who filed Chapter 13 cases are repaying a greater percentage of their unsecured debt than they would have under either Chapter 7 or