

## THE CHALLENGE TO THE BENCH AND BAR PRESENTED BY THE 2005 BANKRUPTCY ACT: RESISTANCE NEED NOT BE FUTILE

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*Congress enacted the 2005 Bankruptcy Act in a climate of unfair accusations against bankruptcy judges and debtors' lawyers. In addition, because the Act is badly designed and drafted, bench and bar have had to struggle to attempt to achieve the legislation's announced goals—abuse prevention and consumer protection. This article reviews the initial reactions of the profession to this extraordinary set of challenges.*

*In the first part of the article, Professor Braucher explores the early judicial responses to the 2005 Act. She categorizes decisions of judges in ascending order of effectiveness: vanquished venting of frustrations with the Act, without offering solutions to achieve consumer protection and abuse prevention; nihilistic nitpicking at the Act's imperfections, thwarting its few clear moves toward more principled debt relief; torturing the text in ways that are unlikely to be followed; and subtle subversion of the designs of the credit industry, designs that fortunately were not actually expressed in the legislation.*

*The second part then examines how debtors' lawyers have dealt with (or challenged) the many new burdens under the 2005 Act, including the requirements apparently imposed upon them as "debt relief agencies" and the need to generate a great deal of new paperwork and handle many new issues at once, while keeping fees affordable. The author ultimately concludes that there is good news despite the waste and chaos inflicted by the legislation. Professional organizations as well as a sense of professionalism have helped many judges and practitioners deal with a poorly crafted and conceived piece of legislation. She urges professionals to stay focused on the stated purposes of the legislation, abuse prevention and consumer protection, as*

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*the best means to keep the consumer bankruptcy system running effectively on behalf of the hopelessly overindebted.*

They're part of . . . the problem. They are not real judges, Article 3 judges.<sup>1</sup>

—Jeff Tassey  
Credit industry lobbyist, March 2005

[N]ot only is the law intended to greatly restrict a debtor's rights, it is also aimed at the legal profession generally and debtor's counsel in particular.<sup>2</sup>

—Geoff Giles  
Bankruptcy attorney practicing in Reno, Nev.,  
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#### INTRODUCTION

The subtext of the 2005 Bankruptcy Act<sup>3</sup> was the view that bankruptcy judges and consumer debtors' lawyers needed to be reined in to keep them from facilitating abuse by consumer debtors. Means testing supposedly would take away judicial discretion. Never mind that the 2005 Act created a thousand or more new opportunities for judges to exercise discretion, some of them in means testing itself,<sup>4</sup> or that means testing catches few debtors because the overwhelming majority are below median income and can barely cover their regular expenses, let alone pay back old debts.<sup>5</sup>

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1. See Peter G. Gosselin, *Judges Say Overhaul Would Weaken Bankruptcy System*, L.A. TIMES, Mar. 29, 2005, at A1 (quoting Tassey as making these comments about bankruptcy judges).

2. See Geoff Giles, *The New Bankruptcy Law: Bad News for Debtors, Worse News for Lawyers*, NEV. LAW., Sept. 2005, at 8.

3. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 19 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). The name of the act may reflect congressional intent, but the legislation is not well designed for the professed purposes, and I have therefore adopted a more neutral short name, the 2005 Bankruptcy Act (or the 2005 Act), in the text.

4. See *id.* § 102(b), 119 Stat. at 32 (codified at 11 U.S.C. § 707(b)(2)(B), (3)) (involving judicial discretion to find that the presumption of abuse has been rebutted and also providing for a "totality of the circumstances" stage of review, in which debtors arguably might be found to be abusers based on a finding of ability to pay despite passing the means test); Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 70 AM. BANKR. L.J. 231, 236–38 (2005) (arguing that the "totality of the circumstances" test in § 707(b)(3)(B) can also be used for means testing). *But see* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 666 (2005) (arguing against use of the "totality of the circumstances" test to permit another review of ability to repay, absent fraud or manipulation, concerning a debtor who is not a presumed abuser).

5. Although means testing takes these facts into account to some extent, see BAPCPA § 102(b) (codified at 11 U.S.C. § 707(b)(2)(A)(ii)–(iv)); *id.* (codified at 11 U.S.C. § 707(b)(2)(B)) (listing permitted deductions and permitting rebuttal based on real expenses); *id.* (codified at 11 U.S.C. § 707(b)(7)) (not permitting a presumed abuse challenge against a debtor at or below median income), it does so in a very complicated fashion, and the burden of the new law is not just in this provision, but in many others as well.

At least bankruptcy judges escaped an embarrassing new name (presiding debt relief enabler, perhaps?). In the perspective reflected in the 2005 Act, judges are softies and dupes, but debtors' lawyers are worse—slapdash con artists, genuine bad guys.<sup>6</sup> The new name, “debt relief agency” (DRA),<sup>7</sup> presumably was dreamed up to humiliate them, and it has led lawyers who did not want to rebrand under that label to stop doing bankruptcy work.<sup>8</sup> However, the drafters—in an error typical of the whole enterprise—failed to take into account that the term “debt relief agency” might sound inviting to a person struggling under a mountain of debt. Attempting to make lemonade out of lemons, some lawyers are advertising themselves as “a congressionally-designated debt relief agency.”<sup>9</sup> However, the modifier might be misleading in suggesting either that the DRA is a government agency or that there has been specific congressional designation of the particular law firm to provide debt relief. The DRA label, which also applies to nonlawyer petition preparers,<sup>10</sup> could have the negative impact of confusing the public about the differences between attorneys and petition preparers.<sup>11</sup>

The consumer debtor bar is likely to consolidate as a result of the 2005 Act,<sup>12</sup> but some lawyers will continue to serve this type of client and

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6. See *id.* (codified at 11 U.S.C. § 707(b)(4)) (apparently moving regulation of the bar into the text of the Bankruptcy Code).

7. See *id.* § 226(a)(3), 119 Stat. at 67 (codified at 11 U.S.C. § 101(12A)); *infra* notes 109–34 and accompanying text (discussing whether the DRA provisions apply to lawyers); *infra* notes 207–12, 276–90 and accompanying text (concerning constitutional challenge by several bar organizations).

8. See *infra* notes 131–34 and accompanying text and Part II.B (discussing possibility that attorneys are not DRAs). Particularly likely to get out of consumer bankruptcy practice after the 2005 Act were those lawyers who used to do only a little of it. The increased complexity makes this a field for experts. Compliance with the debt relief agency provisions is an example of a new burden that makes doing a little bankruptcy work infeasible. Similarly, the many new paperwork requirements make it more feasible to do a volume practice, in that the costs involved in figuring out how to comply can be spread over many cases in the future. For example, lawyers now have to worry about collecting payment advices for the last sixty days before filing, BAPCPA § 315(b)(1), 119 Stat. at 89 (codified at 11 U.S.C. § 521(a)(1)(B)(iv)), and tax returns, *id.* § 315(b)(2), 119 Stat. at 90–91 (codified at 11 U.S.C. § 521(e)(2), (f)(1)–(3)), and they have to prepare a “statement of the amount of monthly net income,” *id.* § 315, 119 Stat. at 89–90 (codified at 11 U.S.C. § 521(a)(1)(B)(v)), and a certificate of receipt of notice, *id.* (codified at 11 U.S.C. § 521(a)(1)(B)(iii)(I)). As a result of the requirement that they certify that they have made a “reasonable investigation” of the circumstances giving rise to the case and made a determination that the petition is “well grounded in fact,” *id.* § 102(a)(2)(C), 119 Stat. 27–32 (codified at 11 U.S.C. § 707(b)(4)(C)(i)–(ii)), lawyers are gathering and storing vast amounts of financial paperwork that they get from clients and other background information. See *infra* Part II.A, II.C.

9. See, e.g., Law Office of Carol A. Morrison, <http://www.carolamorrison.com> (last visited Sept. 18, 2006) (law firms using this description on the internet); see also *infra* text accompanying note 230 (discussing drawbacks of the modifier “congressionally-designated”).

10. BAPCPA § 226(a)(3), 119 Stat. at 67 (codified at 11 U.S.C. § 101(12A)) (explicitly covering petition preparers in the definition of DRA).

11. See *id.* § 226(a)(2), 119 Stat. at 66–67 (codified at 11 U.S.C. § 101(4A)) (stating in definition of bankruptcy assistance that “document preparation” is covered); *id.* § 226(a)(3), 119 Stat. at 67 (codified at 11 U.S.C. § 101(12)(A)) (defining debt relief agency to include anyone who is a bankruptcy petition preparer under § 110 and who provides bankruptcy assistance).

12. See John Caher, *New Law Raises Stakes for Debtors' Attorneys*, N.Y.L.J., Oct. 14, 2005, available at <http://www.law.com/jsp/article.jsp?id=1129280709784> (discussing probable impact on bar, prediction that bankruptcy will become a niche or boutique specialty, and possibility that the impact

perhaps even gain from the Act. In a sign of predicted trends, a continuing legal education session at the 2005 annual meeting of the National Conference of Bankruptcy Judges was devoted to “How to Run a ‘Mill’: Ethically and Effectively.”<sup>13</sup>

The climate of accusation against bench and bar that produced the 2005 Act raises the interesting question how the profession should respond. What should judges and lawyers do when unfair accusations against them are in the air? The old-fashioned answer is: rise above the fray and just do your job. Judges should continue to try to make sense, even out of nonsense,<sup>14</sup> and debtors’ lawyers should be zealous advocates, taking aggressive legal positions where necessary and figuring out strategies to serve clients’ needs while keeping down costs, and thus fees, as much as possible. The purported objectives of the 2005 Act were “abuse prevention and consumer protection,” as the title states,<sup>15</sup> and those are principles worth implementing. There was no announced intention to burden the honest but unfortunate debtor with the cumulative effect of many changes in paperwork and substantive requirements. Thus, as Part I will discuss, bankruptcy judges are in a position to resist the worst intentions of the credit industry representatives who wrote early drafts of the legislation,<sup>16</sup> intentions they fortunately failed to express in the statutory language in many instances. Debtors’ lawyers will have to be willing to fight for the feasibility of bankruptcy practice, the subject of Part II. In the early months under the 2005 Act, one can find signs that professionalism lives, and this article will highlight that good news in an otherwise dismal story.

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will be greatest in smaller and more rural areas where there is not enough debtor work for a full-time bankruptcy practice).

13. Audio CD Order Form, National Association of Bankruptcy Judges Seventy-Ninth Annual Meeting, <http://www.ncbj.org/documents/AudioCDOrderForm.pdf> (last visited Sept. 17, 2006) (order form for CDs of programs from the 79th NCBJ annual meeting, held in the fall of 2005).

14. See 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 (2005) (making the same point about what consumer debtors’ lawyers should do).

15. See *supra* note 3.

16. Those responsible do not seem to be taking credit. One account is that the law was written by five lawyers working for the credit industry. See Brian J. Rogal, *Bankruptcy Law in Shambles*, IN THESE TIMES, June 5, 2006, <http://www.inthesetimes.com/site/main/article/2662> (reporting that Professor Kenneth N. Klee said that about five people, including Professor Todd J. Zywicki and several lobbyists, wrote the legislation and also that a group that small cannot coherently revise something as intricate as the Bankruptcy Code); see also Sommer, *supra* note 14, at 192 & n.3 (stating that the 2005 legislation’s consumer provisions were largely drafted by lobbyists, including George J. Wallace for the American Financial Services Association); Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 193 n.6, 200–02 (1999) (noting that the bill was reputedly drafted at a law firm for the credit industry and also that the industry thereafter largely resisted experts’ efforts to fix even technical errors); cf. NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 89 (1997) [hereinafter NBRC REPORT], available at <http://govinfo.library.unt.edu/nbrc/reportcont.html> (indicating that the credit industry had urged means testing during the commission’s debates but that details were never presented to it, and also that the industry’s desires were spelled out in legislation introduced in 1997—before the commission issued its report).

## I. LEVELS OF RESISTANCE IN THE EARLY BANKRUPTCY COURT OPINIONS

The problems with the 2005 Act are breathtaking. There are typos,<sup>17</sup> sloppy choices of words,<sup>18</sup> hanging paragraphs,<sup>19</sup> and inconsistencies.<sup>20</sup> Worse, there are largely pointless but burdensome new requirements,<sup>21</sup> overlapping layers of screening,<sup>22</sup> mounds of new paperwork,<sup>23</sup> and structural incoherence.<sup>24</sup> These are dark days for all bankruptcy pro-

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17. See, e.g., BAPCPA, Pub. L. No. 109-8, § 306(b), 119 Stat. 23, 80 (codified at 11 U.S.C. § 1325(a)) (hanging paragraph and omitting the word “period” after “910-day”); *id.* §§ 332(b), 802(c)(2), 119 Stat. at 103, 145–46 (codified at 11 U.S.C. § 303(l), skipping (k)); see also Justin Scheck, *Bankruptcy Rewrite Predicted to Bring a Flood of Appeals*, THE RECORDER, Feb. 8, 2006 (quoting Professor Kenneth Klee as saying that the Republican congressional staff “largely spurned” the efforts of the National Bankruptcy Conference “to work out linguistic issues, even when we showed them pages and pages of grammatical and typographical errors,” and that a great deal of litigation is likely because “the new law is so poorly crafted and so internally inconsistent”).

18. See BAPCPA § 106(a), 119 Stat. at 37–38 (codified at 11 U.S.C. § 109(h)) (using two different words, “waiver” and “exemption,” to refer to being excused from obtaining credit counseling until after filing); *id.* § 302(3), 119 Stat. at 75–77 (codified at § 362(c)(3)(A)) (using the phrase “with respect to” four times and in the process keeping property of the estate, as opposed to property of the debtor, subject to the automatic stay, according to the opinions in *In re Womack*, 253 B.R. 247 (Bankr. W.D. Wash. 2006), *In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C. 2006), and *In re Johnson*, 335 B.R. 808 (Bankr. W.D. Tenn. 2006)).

19. See BAPCPA § 308(2), 119 Stat. at 81–82 (codified at 11 U.S.C. § 522(o)); *id.* § 306(b), 119 Stat. at 80 (codified at 11 U.S.C. § 1325(a)).

20. See *id.* §§ 226–229, 119 Stat. at 66–71 (codified at 11 U.S.C. § 101(3), (4A), (12A)) (potentially treating as “debt relief agencies” attorneys who represent creditors whose debts are primarily consumer debts and with exempt property of less than \$150,000 with requirements that they make untrue disclosures—“We help people file for bankruptcy relief. . .”; BAPCPA § 229, 119 Stat. at 71 (codified at 11 U.S.C. § 528(a)(4)); see also *id.* § 226, 119 Stat. at 69 (codified at 11 U.S.C. § 527(b)) (requiring a disclosure that “[y]ou will have to pay a filing fee . . .,” even though there is a new provision for waiver of fees in BAPCPA § 418, 119 Stat. at 108 (codified at 28 U.S.C. § 1930(f)); *id.* § 106, 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)(1), (4)) (in which paragraph (1) lists exceptions to the counseling requirement in paragraphs (2) and (3) but not (4)); *id.* § 102, 119 Stat. at 27 (codified at 11 U.S.C. § 1325(b)) (using the phrases “projected disposable income” as well as “disposable income,” with the term “disposable income” referring to “current monthly income” determined by a six-month lookback on the debtor’s income and not by future income); *id.* §§ 304–305, 119 Stat. at 78–79 (codified at 11 U.S.C. § 521(a)(2)(B), (a)(6)) (providing different ways to measure when a stay lifts due to failure to perform a stated intention with respect to personal property collateral); *id.* § 102, 119 Stat. at 27 (codified at 11 U.S.C. § 707(b)(4)(D)) (applying attorney certification requirement to schedules filed with a petition but apparently not to schedules filed after the petition).

21. See *id.* § 106, 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)) (credit counseling); *id.* (codified at 11 U.S.C. §§ 727(a)(11) and 1328 (g)) (debtor education); see also NAT’L ASS’N OF CONSUMER BANKR. ATTORNEYS, *BANKRUPTCY REFORM’S IMPACT: WHERE ARE ALL THE “DEADBEATS”?* (2006) [hereinafter *NACBA STUDY*] (reporting on a survey of credit counseling agencies that have provided the briefing required for eligibility under the 2005 Act and finding that these agencies reported that 0.5 to 5%, an average of 3.3%, of debtors qualified for a debt management plan).

22. See BAPCPA § 102, 119 Stat. at 27 (codified at 11 U.S.C. § 707(b)(2)–(3)) (providing for three layers of screening, presumed abuse, rebuttal, and totality of the circumstances).

23. See *id.* § 228, 119 Stat. at 69 (codified at 11 U.S.C. § 527) (debt relief agency disclosure requirements); *id.* § 315, 119 Stat. at 88 (codified at § 521(a)(1)(B)(iv)) (filing of payment advices); *id.* (codified at § 521(e)(2), (f)(1)–(3)) (providing copies or transcripts of tax returns).

24. For example, chapter 13 is being pushed even as it becomes less likely to result in plan completion, which occurred in only about one-third of cases prior to the 2005 Act. See NBRC REPORT, *supra* note 16, at 90. Reduced plan completion is likely to the extent that debtors must pay more to keep collateral under section 306(b)’s hanging paragraph and are put on tighter budgets for longer under section 318(2), with its new use of a mandatory five-year commitment period and IRS expense

professionals, and both judges and debtors' lawyers are on the frontlines. Resistance is key to self-respect as well as necessary to keep the system operating in ways that catch abusers while providing bankruptcy relief, at the lowest possible cost, to those who need it. Thus, a judge seeking to carry out the purposes of the law stated in its title should try to prevent abuse, while minimizing supposedly unintended consequences in the form of barriers to entry into bankruptcy for the worst off.

A few words must be said about the "plain meaning" approach to statutory interpretation, also known as textualism.<sup>25</sup> In its strongest version, textualism is the notion that a text can have a meaning independent of the intention of its author(s).<sup>26</sup> What sincere textualists in fact do when they claim to find a text's "plain meaning" is to make assumptions about the authors' intentions without being aware that they are doing so.<sup>27</sup> Furthermore, textualism is a naïve theory that does not take into account what cognitive psychologists know—that humans routinely use contextual cues, verbal and nonverbal, to understand what other humans mean.<sup>28</sup>

While sincere textualists lack self-consciousness about the initial step in their analysis, insincere textualists either use literalism to make a point that authors should be more careful or to get to their own desired results.<sup>29</sup> An implication of this point is that textualism is not necessarily less subject to abuse than pragmatic interpretation in light of context. In an insightful analysis, Bankruptcy Judge Marjorie O. Rendell has noted that the Supreme Court's sporadic use of "plain meaning" has made bankruptcy judges reluctant to identify ambiguity in statutory language.<sup>30</sup> Instead, bankruptcy judges are prone to insist—against the evidence—that there is a plain meaning of a provision under review, but often the

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guidelines for debtors above median income. BAPCPA § 306(b), 119 Stat. at 80 (codified at 11 U.S.C. § 1325(a)); *id.* § 318(2), 119 Stat. at 93 (codified at 11 U.S.C. § 1325(b)); see Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295 (2006) (arguing that, in order to achieve coherence, we need a simpler structure for consumer bankruptcy, involving one consumer chapter with a repayment feature within it for those who can afford it).

25. See, e.g., Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 890 (2000); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235, 245–46.

26. See Stanley Fish, *There is No Textualist Position*, 42 S.D. L. REV. 629, 630–31 (2005).

27. *Id.* at 632–33; see also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 61 (1994) ("Words take their meaning from contexts, of which there are many—other words, social and linguistic conventions, the problems the authors were addressing."); *id.* at 64 ("[W]ords have no natural meanings."); *id.* at 67 ("'Plain meaning' as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed, and the choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures.").

28. See Solan, *supra* note 25, at 237 (noting that advances in linguistics and cognitive psychology have demonstrated that we understand language contextually).

29. See Fish, *supra* note 26, at 633.

30. See Marjorie O. Rendell, *2003—A Year of Discovery: Cybergenics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 888 (2004).

“plain” interpretation is backed up with pragmatic reasoning based on the full context, including legislative history and policy considerations.<sup>31</sup>

The enduring lesson of legal realism is that the law cannot be predictable when judges do not give their real reasons for decision.<sup>32</sup> From that perspective, textualism has contributed to uncertainty in bankruptcy law because bankruptcy judges feel pressured to dress up their decisions as based on plain meaning when self-awareness and candor would demand recognition either that the language is not clear on its face or that consideration of context undercuts a first impression about Congress’s probable meaning. Fortunately, most Supreme Court judges have lost patience with rigid textualism and regularly resort to legislative history, pre-Code practice and policy.<sup>33</sup> Bankruptcy courts should no longer feel compelled to engage in the fiction of finding plain meaning. Of course it makes sense to start any exercise in statutory interpretation by reading the statute closely.<sup>34</sup> Judges should consider the operative language, the language of other provisions, and structural cues in the statute. But then it is equally appropriate to pan back from the statute itself to its context, including legislative history, prior law and practice, and policy considerations, to make an interpretation of the intended meaning. Otherwise, courts are likely to err and to bring on unintended consequences.<sup>35</sup>

With the 2005 Act, there is a peculiar, if not necessarily unusual, difficulty with full candor in statutory interpretation. It is beyond the range of normal advocacy and opinion writing to identify, as the purpose of a statute, a congressional desire to satisfy special interests in order to keep a flow of campaign contributions coming. Furthermore, that was not the argument of this legislation’s proponents (and rarely, if ever, is); the winning side had laudable professed goals, although the diagnosis of a problem was not fact based<sup>36</sup> and the means-testing “solution” was not well

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31. *Id.* A good example of the confusion brought on by giving in to perceived pressure to find a plain meaning is the decision in *In re Virissimo*, 332 B.R. 201, 206 (Bankr. D. Nev. 2005) (finding a plain meaning first, then discussing an alternative plain meaning, and finally admitting ambiguity, justifying resort to legislative history).

32. See K. N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939) (“Covert tools are never reliable tools.”).

33. See Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court’s Bankruptcy Jurisprudence, 1979–2004*, 78 AM. BANKR. L.J. 373, 386–93 (2004) (discussing resort to extratextual sources and exasperation of Justice Scalia that the court often does so).

34. See Rendell, *supra* note 30, at 903–05 (cautioning advocates to back up plain meaning arguments with pragmatic ones based on history and policy).

35. See Bussel, *supra* note 25, at 889 (finding Congress amends statutes more frequently to override textualist interpretations as opposed to pragmatic interpretation that considers history and policy as well).

36. See Elizabeth Warren, Address, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 13–20, 40 (discussing the overwhelming evidence against the phony “fact” that bankruptcy costs every American family \$400 a year, and also discussing the general problem of resistance to facts in legislative policy analysis, especially concerning bankruptcy). The House Judiciary Committee Report, H.R. REP. NO. 109-31, pt. 1 (2005), notes the view that “abuse in the system is not widespread and that most bankruptcy filings result from causes beyond debtors’ control, such as family illness, job loss or disruption, or divorce” and then provides a remarkably weak

designed to address abuse.<sup>37</sup> The credit industry representatives who reputedly did much of the behind-the-scenes drafting<sup>38</sup> presumably intended to reduce access to bankruptcy for all, including the worst off, and came up with abuse prevention and consumer protection as cover stories. But industry intent should not be imputed to Congress when no such purpose was admitted by its members or even by the special interests promoting the law. The sheer complexity of the changes made the law hard to understand and its effects difficult to predict. Candor demands only so much of judges. Of course there is reason to suspect congressional disrespect not only for bankruptcy judges and debtors' lawyers, but also for the bankruptcy system itself. However, because members of Congress did not openly pursue a goal of derailing the system, the courts are justified in taking Congress at its word, that it intended to prevent abuse and to protect consumers, as stated in the name of the legislation, not to set up nonsensical, expensive burdens and barriers for all. The latter type of consequences should be treated as presumptively unintended and be minimized to the greatest extent possible.

Another difficulty is that the 2005 Act's legislative history is thin, making it hard to glean much from this part of context. On the other hand, although the House Judiciary Committee Report largely paraphrases the Act, it also contains some glimmers concerning broad congressional purposes.<sup>39</sup> The report repeatedly states a goal of addressing abuse by pushing those with means into chapter 13.<sup>40</sup> On the other hand, one also finds quotation of a compelling summation of the original purpose of the fresh start in the 1897 legislative history:

When an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.<sup>41</sup>

One also finds statements about "consumer protection" purposes in certain provisions, including those concerning new disclosures required of professionals and petition preparers; new disclosures concerning reaffirmation agreements; expanded ability to exempt retirement accounts and pensions; and credit counseling and financial education require-

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rebuttal. *See id.* at 4–5. It also cites the supposed \$400 cost to every household without mentioning the discrediting evidence concerning that figure. *Id.*

37. *See Braucher, supra* note 24, at 1321–22 (arguing that reform can only catch abusers without burdening all filers if the system is simplified so that there is one consumer chapter in which those who can afford to repay are required to do so, according to a simple formula, rather than gatekeeping in chapter 7 that burdens even those who clearly are not abusers).

38. *See supra* note 16.

39. *See* H.R. REP. NO. 109-31, pt. 1, at 2–5 (2005).

40. *See id.* at 2, 5, 12.

41. *Id.* at 11 & n.42 (quoting H.R. REP. NO. 55-65, at 43 (1897)).

ments.<sup>42</sup> Courts are justified in favoring interpretations of these provisions that protect consumer debtors, rather than interpretations that trip them up.

Four levels of judicial resistance to the worst intentions of the credit industry can be identified in the early opinions interpreting the 2005 Act. They are discussed in ascending order of effectiveness.

#### A. *Venting (but Vanquished)*

A great deal of early litigation under the 2005 Act largely concerned the new eligibility requirement necessitating a briefing on available credit counseling.<sup>43</sup> There are two common scenarios in the cases. In the first scenario, the debtor shows up at a lawyer's office a day or two before a scheduled foreclosure sale and, after learning of the counseling requirement, cannot find prefiling counseling available in time to receive it and then file to stop the sale of her home. The other scenario involves a debtor who files pro se in ignorance of the counseling requirement<sup>44</sup> and only then retains a lawyer, who tries to salvage the situation.

The only broad exception to getting a prefiling briefing is in cases of exigent circumstances,<sup>45</sup> but this exception is devilishly constructed to potentially hinder uninformed debtors. This is because the exception requires a request for counseling services to an agency and an inability to obtain services within five days of the request.<sup>46</sup> This could leave the last-minute debtor whose problem is inability to get counseling before the foreclosure sale out of luck because counseling services might be available within five days but not in time to get counseling before filing to stop the foreclosure. For the pro se debtor, the problem is not knowing about the counseling requirement before filing. As we shall see, the remedy for ineligibility could be fashioned so as not to burden debtors in need of bankruptcy, allowing them to file an amended petition, while al-

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42. See *id.* at 2 (concerning “consumer protection reforms”); *id.* at 18 (listing the following: disclosures about reaffirmation; new protections for retirement assets; credit counseling, stating a purpose to “give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating”; and financial management education of debtors, stating a purpose to “provide them with guidance about how to manage their finances, so that they can avoid future financial difficulties”).

43. See BAPCPA, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37 (codified at 11 U.S.C. § 109(h)).

44. Notice of “the types of services available from credit counseling agencies” is required under BAPCPA § 109, 119 Stat. at 35 (codified at 11 U.S.C. § 342(b)(1)(B)). The form to comply with the notice requirement, Notice to Individual Consumer Debtor under § 342(b) of the Bankruptcy Code, available at [http://www.uscourts.gov/rules/Revised\\_Rules\\_and\\_Forms/b201\\_1005.pdf](http://www.uscourts.gov/rules/Revised_Rules_and_Forms/b201_1005.pdf), attempts to do something useful with the disclosure about available credit counseling. The form tells debtors, especially pro se debtors, about the requirement of credit counseling and does not interpret the notice requirement as entailing a description of services provided by credit counseling agencies. However, some pro se debtors do not understand or heed the notice to get prefiling credit counseling.

45. See BAPCPA § 106, 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)(3)) (providing for temporary eligibility without prefiling counseling in some circumstances).

46. *Id.*

lowing those who belatedly learn they do not need bankruptcy to move to strike their cases.<sup>47</sup>

Section 109(h) could be read as creating a trap for debtors who are desperate, uninformed, or both. *In re Sosa* is a case in which this trap played out; on the eve of foreclosure, the debtors filed pro se without first requesting credit counseling services.<sup>48</sup> The opinion provides a classic example of the venting but substantively vanquished judge. Venting is probably better than submission in silence, but unless there is something helpful for good faith, down-and-out debtors in the reasoning, even as dicta, venting accomplishes little. The opinion contains this extraordinary editorializing (emphasis added where venting is most pronounced):

The Congress of the United States of America passed and the President of the United States of America signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"). It became fully effective on October 17, 2005. *Those responsible for the passing of the Act did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country. It is not surprising, therefore, that the Act has been highly criticized across the country. In this writer's opinion, to call the Act a "consumer protection" Act is the grossest of misnomers.*

*One of the more absurd provisions of the new Act makes an individual ineligible for relief under the Bankruptcy Code unless such individual, "has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in § 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis." See 11 U.S.C. § 109(h)(1). No doubt this is a truly exhaustive budget analysis.*

An individual who does not receive such counseling can only receive an exemption from such requirement if such debtor "submits to the court a certification that—(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1); (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but

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47. See *infra* notes 67–70, 77–87, 145–51 and accompanying text.

48. See *In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005). Although they filed pro se, the debtors had called a lawyer and been told of the credit counseling requirement before filing. They filed without it anyway. See *id.* at 114.

was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and (iii) is satisfactory to the court.” See 11 U.S.C. § 109(h)(3)(A). In the event such waiver is granted, the debtor must complete such counseling within 30 days after the petition date. See 11 U.S.C. § 109(h)(3)(B).

Simply stated, if a debtor does not request the required credit counseling services from an approved nonprofit budget and credit counseling service before the petition is filed, that person is ineligible to be a debtor no matter how dire the circumstances the person finds themselves in at that moment.

*This Court views this requirement as inane.* However, it is a clear and unambiguous provision *obviously designed by Congress to protect consumers. . . .*

[B]ecause the Debtors did not request such counseling before they filed their case, Congress says they are ineligible for relief under the Act. *Can any rational human being make a cogent argument that this makes any sense at all?*

But let’s not stop there. If the Debtors’ case is dismissed and they re-file a new case within the next year, it may be that some creditor will take the position that the new case should be presumed to be filed not in good faith. See 11 U.S.C. § 362(c)(3)(C). Section 362 further states that if subsection (c)(3)(C) applies, then the stay in that second case will only be good for thirty days unless the debtor (i) files a motion, (ii) obtains a hearing and ruling by the Court within such thirty-day period and (iii) proves by clear and convincing evidence that the second case was filed in good faith. *It should be obvious to the reader at this point how truly concerned Congress is for the individual consumers of this country. Apparently, it is not the individual consumers of this country that make the donations to the members of Congress that allow them to be elected and re-elected and re-elected and re-elected.*

The Court’s hands are tied. The statute is clear and unambiguous. The Debtors violated the provision of the statute outlined above and are ineligible to be Debtors in this case. It must, therefore, be dismissed.

An Order of even date will be entered herewith. *Congress must surely be pleased.*<sup>49</sup>

No doubt the judge felt better for his sarcastic venting. He got his frustration off his chest. However, by talking about campaign donations as the impetus for the 2005 Act, he went over the line of fair judicial comment and potentially provides fodder to those who think bankruptcy judges are not fair-minded. Worse, there was no help in this opinion for debtors in future cases, other than as a cite for the policy point that the exigent circumstances exception will be unavailable to many debtors

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49. See *id.* at 114–15 (emphasis added).

needing bankruptcy in an emergency because of the requirements that the debtor make a prior request for services and that such services not be available for five days.<sup>50</sup>

In the *Sosa* case, the debtors had been working with the mortgage company, which then refused to accept payment at the last minute, necessitating an emergency filing.<sup>51</sup> The court did not discuss these facts and thus missed an opportunity to point out a possible means to address a bad faith strategy of mortgagees. A mortgagee could appear to cooperate after sending notice of foreclosure, lulling the debtor into not seeking help until it is too late to get prebankruptcy credit counseling. There are legal theories that may help when a creditor acts in an unfair and deceptive manner, something the judge might have mentioned.<sup>52</sup>

A look at other cases concerning credit counseling shows that the judge in *Sosa* missed several additional opportunities to help the particular debtors in the case as well as future debtors who file without getting a briefing on credit counseling first. Here is a list of legal issues under § 109(h), putting last in each item the position that would be taken by a judicial resister to unintended consequences (those burdensome to nonabusers):

- What does it mean to require a “certification” (an undefined term) of exigent circumstances, in order to qualify for a “waiver” or “exemption”<sup>53</sup> from counseling?<sup>54</sup> Does the certification requirement mean a declaration under penalty of perjury,<sup>55</sup> an attested statement or verified motion,<sup>56</sup> or merely that the debtor

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50. *Id.*

51. *Id.* at 115.

52. State consumer protection statutes concerning unfair and deceptive acts and practices, for example, could provide a cause of action. Also, because foreclosure is an equitable remedy, it might be denied to a lender who acted in this way. See CAROLYN L. CARTER ET AL., NAT'L CONSUMER LAW CTR., REPOSSESSIONS AND FORECLOSURE § 16.9, at 553–55 (2002) (noting equitable nature of foreclosure actions and defenses to foreclosure based on lack of good faith).

53. See *In re Dixon*, 338 B.R. 383, 388 & n.4 (B.A.P. 8th Cir. 2006) (noting that neither term is particularly accurate and that the best description would be a “deferral,” since the debtor who meets the requirements of § 109(h)(3)(A) must still obtain the counseling briefing within thirty days); BAPCPA, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37 (codified at 11 U.S.C. § 109(h)(3)(A)(i), (B)) (using both the words “waiver” and “exemption” to describe the exigent circumstances exception that makes the debtor temporarily eligible without counseling).

54. See BAPCPA § 106 (codified at 11 U.S.C. § 109(h)(3)(A)) (providing for a “certification” of exigent circumstances as one requirement for use of this exception to the credit counseling requirement).

55. See *In re Wallert*, 332 B.R. 884, 887 n.3 (Bankr. D. Minn. 2005) (finding that “certification” means a declaration under penalty of perjury as required under 28 U.S.C. § 1746).

56. See *In re Davenport*, 335 B.R. 218, 220 n.4 (Bankr. M.D. Fla. 2005) (requiring that the debtor file a verified motion or an affidavit or testify at the hearing on a motion under § 109(h)); *In re Cleaver*, 333 B.R. 430, 434 (Bankr. S.D. Ohio 2005) (requiring a written statement with the debtor signing and attesting to or affirming the truth of the statement).

must sign his motion requesting an extension or testify at the hearing on it?<sup>57</sup>

- Does the language “exigent circumstances that merit a waiver” set two requirements or one? Must the debtor file immediately and also have a justification—other than ignorance of the requirement—for not having requested credit counseling sooner,<sup>58</sup> or is imminent creditor action sufficient to show exigent circumstances that merit a waiver?<sup>59</sup>
- Does the timing of the pre-filing requirement of a credit counseling briefing preclude obtaining counseling on the day of filing (by, for example, getting counseling in the morning and filing in the afternoon)? Must counseling be obtained at least by midnight of the day before filing, or should the language “180-day period preceding the date of filing” be read to measure the 180-day period back from the time of day the debtor filed?<sup>60</sup>
- Does the requirement that a request for services be made and the debtor be unable to obtain the services within five days of the request mean that the request must be made at least five days before filing, or is the debtor eligible for deferral of the briefing if

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57. See *In re Graham*, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005) (finding certification requirement is met when debtor signs the motion requesting an extension); see also *In re Davenport*, 335 B.R. at 220 n.4 (allowing certification requirement to be met by testifying at a hearing on the § 109(h) motion).

58. See *In re Valdez*, 335 B.R. 801, 802 (Bankr. S.D. Fla. 2005) (interpreting the statute as apparently referring to circumstances that prevented the debtor from obtaining counseling); *In re Talib*, 335 B.R. 417, 421–22 (Bankr. W.D. Mo. 2005) (stating that debtors requesting a waiver must address the imminence of property loss and explain why counseling services could not be obtained).

59. See *In re Cleaver*, 333 B.R. at 435 (“[T]he common reality is that many debtors file at the last minute just before a foreclosure sale or the loss of their money or possessions to creditors. . . . [I]t is difficult to conceive of any exigent circumstances related to bankruptcy that would not involve impending creditor action.”); see also *In re Childs*, 335 B.R. 623, 630 (Bankr. D. Md. 2005) (finding that the requirement of “exigent circumstances” is met, for example, by imminent sale at foreclosure).

60. See *In re Warren*, 339 B.R. 475 (Bankr. E.D. Ark. 2006) (holding that “date” in context refers to the exact time of the filing, so that day-of-filing counseling is permissible). The argument that a day-of-filing briefing is permissible could be further supported by a comparison to the timing language of the preferential transfer section, in § 547(b)(4)(A), “on or within 90 days before the date of the filing of the petition.” 11 U.S.C. § 547(b)(4)(A) (2000). This phrase clearly measures the ninety days back from the day before the filing, but also includes transfers on the day of filing (although perhaps not transfers on the day of filing but after the filing because those are covered by § 549 as postpetition transfers). Section 109(h) does not say that the credit counseling briefing must be obtained in the 180 days before the date of filing; it says the briefing must occur in the 180-day period before the date of filing, suggesting that the measurement could include the part of the day that occurs before the filing. BAPCPA, Pub. L. No. 108-9, § 106(a), 119 Stat. 23, 37–38 (codified at 11 U.S.C. § 109(h)(1)). Furthermore, the dictionary meaning of “date” is not necessarily a day, but a time—“the time at which an event occurs” or “an appointment for a specified time.” WEBSTER’S NEW COLLEGIATE DICTIONARY 286 (1980).

she makes a request the day before filing and gets an immediate answer that services are not available for more than five days?<sup>61</sup>

- Is the debtor required to request services from multiple agencies, or only one?<sup>62</sup> The latter interpretation has textual support<sup>63</sup> and results in the debtor meeting the request requirement if she makes a request of one agency that says it will not be able to provide services within five days. Thus, she would not need to canvas more potential providers.
- What should be made of the fact that § 109(h)(1) begins by listing two grounds for deferral of counseling services (with the language, “[s]ubject to paragraphs (2) and (3), and notwithstanding any other provision of this section”)?<sup>64</sup> Does this language eliminate the exception in subsection (h)(4), concerning persons who cannot complete counseling due to incapacity, disability, or “active military duty in a military combat zone,” or is the omission of a reference to paragraph (4) in paragraph (1) an obvious scrivener’s error that should be corrected by courts?<sup>65</sup> And for good measure, we might wonder whether use of the phrase “active military duty in a military combat zone” means military personnel en route to a combat zone are subject to a pre-filing counseling requirement, or not.<sup>66</sup>
- What is the remedy for ineligibility for bankruptcy due to a failure to get a credit counseling briefing before filing a petition? Section 109 is silent on this point. Must the case be dismissed,<sup>67</sup> or are less drastic remedies possible, such as striking the case or amending the petition?<sup>68</sup> If eligibility is raised by a creditor or

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61. See *In re Cleaver*, 333 B.R. at 435 (noting the issue); see also *In re Graham*, 336 BR. at 298 n.6 (taking the position that the debtor does not have to wait five days to file after a request if counseling cannot be obtained within five days).

62. See *In re Cleaver*, 333 B.R. at 435 (stating that “a literal reading” of the language compels the conclusion that the debtor need only certify that a single agency was not able to provide services within five days). The language of § 109(h)(3)(A)(ii) is in the singular, requiring a request to “an approved nonprofit budget and counseling agency” and inability to obtain services within five days of when the debtor made “that request.” BAPCPA § 106, 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)).

63. BAPCPA § 106.

64. *Id.*

65. See *In re Dixon*, 338 B.R. 383, 386 (B.A.P. 8th Cir. 2006) (noting the issue).

66. BAPCPA § 106 (codified at 11 U.S.C. § 109(h)(4)).

67. See, e.g., *In re Sosa*, 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005) (dismissing the case, without analysis of other possibilities).

68. See, e.g., *In re Carey*, 341 B.R. 798, 804 (Bankr. M.D. Fla. 2006) (striking the petition); *In re Rios*, 336 B.R. 177, 180 (Bankr. S.D.N.Y. 2005) (striking the case); *In re Valdez*, 335 B.R. 801, 803–04 (Bankr. S.D. Fla. 2005) (dismissing the petition); *In re Childs*, 339 B.R. 623, 631 (Bankr. D. Md. 2005) (dismissing the petition). An advantage of not dismissing the case is that a later filing within a year will not trigger 11 U.S.C. § 362(c)(3) and force the debtor to make an affirmative showing of good faith to keep the automatic stay in place after thirty days, a point noted for example in *In re Valdez*, 335 B.R. at 803–04. The judge in *In re Sosa*, 336 B.R. at 115, was also aware of this consequence of dismissal of a case, but did not come up with any way to avoid it. On the other hand, if striking rather

trustee, must a court decide the issue immediately, or would it be appropriate to give the debtor time to prepare a certification of exigent circumstances or to obtain credit counseling?<sup>69</sup> A lack of credit counseling is a curable defect, and perhaps the debtor should be able to get it and, if he still wants bankruptcy relief, then file an amended petition without the need for a new case and new filing fee.<sup>70</sup> If the debtor obtained counseling after filing and decided that bankruptcy was ill-advised, the debtor could move to strike the case for ineligibility.

- Furthermore, when an ineligible debtor files a petition, does that mean no stay goes into effect, or does a stay take effect until a court rules on eligibility?<sup>71</sup> The remedy and stay issues will be discussed further below.<sup>72</sup>

In summary, *In re Sosa* is a disappointment in that the judge clearly understood problems with § 109(h) but did not use available interpretive techniques to minimize presumptively unintended consequences of that provision. Instead, the judge assumed bad intentions and wrote an editorial criticizing Congress.

An interesting contrast is provided by the approach of the judge in *In re Rios*,<sup>73</sup> a case also interpreting the credit counseling provision. In a powerful demonstration that assuming congressional good faith yields sensible results, the judge attributed only the purest of motives to Congress and skillfully used that assumption to bolster a textual analysis that

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than dismissing the case is appropriate, another implication could be that there is no automatic stay in place when an ineligible debtor files a petition. See *In re Salazar*, 339 B.R. 622, 630 (Bankr. S.D. Tex. 2006) (holding that when an individual debtor files without meeting the requirements of § 109(h), there is no case and no automatic stay, making the appropriate remedy striking or dismissing the petition, and also conceding that this approach creates considerable uncertainty in the time between filing and a ruling on eligibility).

69. See *In re Graham*, 336 B.R. 292, 298 (Bankr. W.D. Ky. 2005) (noting confusion over interpretation of 11 U.S.C. § 109(h)(3)(A), allowing debtor fifteen days to amend her motion and describe her attempts to seek prepetition credit counseling, and also suggesting that if debtor has by now received counseling, she should let the court know by filing a certificate to that effect).

70. The 2005 Act adds a reference to the idea of amending a petition, see BAPCPA § 106, 119 Stat. at 37 (codified at 11 U.S.C. § 362(c)(3)(C)(II)(aa)), so perhaps filing an amended petition after getting counseling would make a debtor eligible under BAPCPA § 106 (codified at 11 U.S.C. § 109(h)).

71. See, e.g., *In re Salazar*, 339 B.R. at 622 (no stay because there is no case); *In re Ross*, 338 B.R. 134 (Bankr. N.D. Ga. 2006) (stay in place until case is dismissed). By permitting an amended petition, see *supra* note 70 and *infra* notes 77–82 and accompanying text, bankruptcy courts could find that a stay is put in place by the initial petition but that the amended petition after counseling cures the ineligibility problem. See also *In re Parker*, No. 06-61224, 2006 WL 2642119 (Bankr. N.D. Ga. Sept. 13, 2006) (in a case where the debtor sought dismissal to head off a trustee sale of an asset, holding that eligibility requirements of § 109 are not jurisdictional and can be waived and also finding that the debtor in the particular case had waived the issue by getting counseling after filing and then not moving for dismissal for almost four months, particularly since the particular debtor held substantial property and had substantial business litigation and was not an unsophisticated individual in need of the consumer protection that Congress had in mind in providing for credit counseling).

72. See *infra* notes 73–87 and accompanying text.

73. *In re Rios*, 336 B.R. at 177.

the remedy for ineligibility for bankruptcy under § 109(h) is striking the case, not dismissing it.<sup>74</sup> After quoting legislative history stating that the purpose of counseling is “to give consumers . . . an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating,”<sup>75</sup> the court summarized the intent of Congress as follows:

In enacting § 109(h)(1), Congress sought to enlarge debtors’ options in the face of financial difficulty, not limit them. Congress intended that debtors would inform themselves of their options prior to bankruptcy filing by participating in credit counseling, and if bankruptcy continued to be the best option, debtors could avail themselves of that alternative. It is therefore apparent that Congress did not intend the credit-counseling requirement to limit the availability or extent of bankruptcy relief for debtors, which dismissal would accomplish, and thus, dismissal is inappropriate. The Court instead finds that because the Debtor was ineligible for bankruptcy relief, the bankruptcy case was never properly commenced and is therefore stricken.<sup>76</sup>

Although the interpretive technique in *Rios* is dramatically superior to that in *Sosa*, further refinements of its analysis may be possible. The *Rios* court suggested that the automatic stay operates in the period between filing and a determination of the debtor’s ineligibility.<sup>77</sup> Building on this analysis, perhaps a debtor who filed without getting counseling first could then get counseling and either file an amended petition (the best approach to achieve consumer protection) or file a new case, getting an automatic stay throughout this process. For debtors who decide after counseling that bankruptcy is not the right course, in view of its impact on their credit ratings, the congressional purpose would be fulfilled by dismissing their petitions and striking their cases, so that no case would appear in court records to be included in credit reports or to affect the automatic stay in a later case.<sup>78</sup> Notably, there is no explicit statement in the Bankruptcy Code about the remedy for ineligibility, particularly a

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74. *Id.* at 180. Furthermore, the court suggests that the stay is in place until a ruling on eligibility. *Id.* at 180 n.2; *see also In re Jones*, No. 06-33790, 2006 WL 3020477 (Bankr. S.D. Tex. Oct. 20, 2006) (noting problems with approach that does not recognize stay during period until court rules on eligibility and collecting cases to its date on the issue of striking versus dismissing the case but not considering the possibility of a hybrid, asymmetrical approach in the interests of fulfilling the consumer protection purpose of Congress, as is discussed *infra* notes 83–85, 145–51 and accompanying text).

75. *In re Rios*, 336 B.R. at 180 (citing H.R. REP. NO. 109-31, pt. 1, at 104 (2005)). This comment is factually questionable; most debtors considering bankruptcy already have devastated credit ratings. Debtors may actually improve their ability to get credit by filing, because they will discharge old debt and be better able to afford new credit and also because creditors know that after a chapter 7 filing and discharge, debtors cannot get another discharge in chapter 7 for eight years, a wait that was raised from six years by the 2005 Act. BAPCPA § 330, 119 Stat. at 101 (codified at 11 U.S.C. § 727(a)(8)).

76. *See In re Rios*, 336 B.R. at 180.

77. *Id.* at 180 n.2.

78. *See* BAPCPA § 106, 119 Stat. at 37 (codified at 11 U.S.C. § 362(c)(3)–(4)).

curable ineligibility.<sup>79</sup> *Rios* favors striking the case for ineligibility, not dismissing it, but presumably striking the case means the debtor would need to file a new case rather than just a new petition. Rather than striking the case, the court might have permitted the filing of an amended petition.<sup>80</sup> When a debtor gets counseling after filing and then concludes that bankruptcy relief *is* needed, the advantage of allowing an amended petition, rather than requiring the filing of a new case, is that the debtor can avoid a new filing fee.<sup>81</sup> Filing fees have gone up and are not cheap.<sup>82</sup> Some might take the position, formalistically, that if the case is to be stricken on the debtor's motion, it must also be stricken even though the debtor wants to proceed after counseling. But the argument for symmetry can be refuted with the congressional consumer protection purpose: Congress wanted to expand debtors' knowledge of options,<sup>83</sup> not to create a trap. In light of silence on remedies, there is certainly no plain meaning, if there ever is, and it is appropriate for the courts to fashion remedies to protect consumer debtors. In light of the consumer protection purpose of counseling, when courts strike cases on the motion of a debtor after counseling (likely an unusual event because debtors generally want to go ahead with bankruptcy), courts might even enjoin credit reporting agencies from listing the stricken case.<sup>84</sup>

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79. See *In re Ross*, 338 B.R. 134, 136–37 (Bankr. N.D. Ga. 2006) (discussing cases concerning effect of ineligibility under 11 U.S.C. § 109(e), (g)); *In re Salazar*, 339 B.R. 622, 633 (Bankr. S.D. Tex. 2006) (noting that some pre-2005 Act cases under § 109(g) support dismissal of the case for ineligibility, but also noting that prior to the 2005 Act and the addition of BAPCPA § 106, 119 Stat. at 37 (codified at § 362(c)(3), (4)), the remedy question involved “a difference without a distinction” so that perhaps eligibility issues need fresh thinking and careful choice of words).

80. See *supra* note 70 (concerning new statutory reference to amending a petition).

81. The definition of petition in 11 U.S.C. § 101(42) refers to a petition as a document that “commences a case,” raising an issue whether an amended petition can be filed in the same case. The definition could be intended to clearly include an initial petition commencing a case, but not to rule out a later amended petition. The 2005 Act adds a reference to amending a petition, see BAPCPA § 302, 119 Stat. at 76 (codified at 11 U.S.C. § 362(c)(3)(C)(i)(II)(aa)), so it seems that filing of an amended petition is permissible. The debtor would then meet the requirement of obtaining counseling before filing the second petition. See *id.* § 106, 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)(1)). Even if an amended petition is not accepted as a way to cure counseling ineligibility, there is still a way to cure ineligibility, albeit at a higher cost. The debtor can file a new case with a new petition and new filing fee, after obtaining counseling. If the first case had been dismissed in the meantime, the debtor would also have to jump through the hoop of a motion to extend the automatic stay. *Id.* § 302, 119 Stat. at 75–76 (codified at 11 U.S.C. § 362(c)(3)). If the second case were filed before dismissal of the first, however, this would not seem to be necessary.

82. Effective April 10, 2006, filing fees are \$245 for chapter 7 and \$235 for chapter 13. Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 10101, 120 Stat. 4, 184 (codified at 28 U.S.C. § 1930(a)(1)(A)–(B)).

83. See John Fitzgerald & Mark Neal, *USTP Addresses New Issues in Approving Credit Counseling and Debtor-Education Providers*, AM. BANKR. INST. J., Oct. 2005, at 14, 14.

84. This could be done under 11 U.S.C. § 105(a) (giving bankruptcy courts power to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code), using by analogy § 303(l)(2). See BAPCPA § 332, 119 Stat. at 103 (codified at 11 U.S.C. § 303(l)(2)) (providing for the court to enter an order prohibiting consumer reporting agencies from reporting fraudulent involuntary petitions). Also, the court could take into account the need to protect trustees and purchasers from trustees while the case was pending. See *In re Jones*, No. 06-33790, 2006 WL 3020477 (Bankr. S.D. Tex. Oct. 20, 2006) (discussing this problem with treating a case as though it never existed). The court

The aftermath of the *Sosa* case shows the appeal of an asymmetrical approach that allows debtors to cure a failure to get counseling by filing an amended petition, but that strikes the case if the debtor does not wish to proceed with bankruptcy after getting counseling. Alfonso Sosa filed again and held on to the mobile home he shared with his wife and three young children, but this cost him an extra \$1000 in attorney fees.<sup>85</sup> Furthermore, his lawyer told a reporter that he was surprised that the judge “came out swinging” because he is known as a calm, careful judge who writes moderate opinions.<sup>86</sup> Another judge, Leif M. Clark, provided the reporter with an explanation that judges are not “comfortable doing something they know is unjust.”<sup>87</sup>

With so many issues concerning credit counseling not clearly answered by the statutory language, the damage to sensible results done by § 109(h) can be minimized through careful interpretation to avoid burdening those needing bankruptcy relief. *In re Sosa* fails to help, although it at least raises a protest. A case that helps on many of the issues concerning credit counseling will be discussed below in Part I.D concerning “subtle subversion” of the credit industry’s designs, the highest form of judicial resistance to presumptively unintended consequences of the 2005 Act.

### B. Nihilistic Nitpicking

Any resistance to an unannounced credit industry agenda to burden access to consumer bankruptcy by those who need it is arguably good. The more interpretations of the 2005 Act that do not give the industry the legislation it thinks it paid for, the more the pressure there is on Congress to clean up the mess. Although one cannot rule out the possibility that new legislation might give the credit industry everything it wants, and this time clearly, there is at least some possibility of good faith reexamination of policy, particularly of unintended consequences, if Congress again turns to bankruptcy reform. Even if Congress does not act, when courts interpret the law to minimize presumptively unintended burdens on the hopelessly overindebted, this resistance pays off immediately.

On the other hand, some judicial resistance in the early case law seems to take on even the limited steps in the 2005 Act toward a more principled bankruptcy law, such as the provisions capping the dollar amount of a state homestead exemption that can be used in bankruptcy in some instances. Congress failed to take the fully principled approach

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might strike the case but not treat reasonable trustee actions while it was pending as wrongful and permit purchasers from trustees to retain title; these issues are not likely to arise often because usually the debtor will seek to cure a lack of credit counseling quickly and will then seek to proceed with the case).

85. See Rogal, *supra* note 16.

86. *Id.*

87. *Id.*

of setting an across-the-board cap applicable in bankruptcy.<sup>88</sup> Instead, the 2005 Act sets a \$125,000 cap on use of a state homestead exemption in limited circumstances under §§ 522(p)–(q).<sup>89</sup>

Under § 522(p), a \$125,000 cap applies to any amount of interest acquired in a homestead in the 1215-day period preceding the filing of the petition (except for rollover of equity from one house to another in the same state).<sup>90</sup> Under § 522(q), certain kinds of criminal and civil fraud give rise to a cap in the same amount.<sup>91</sup>

One can certainly complain that these provisions do not go far enough to prevent abuse in the form of keeping a substantial dollar amount of assets while not paying creditors and getting a bankruptcy discharge. A debtor who has owned her home for 1216 days before filing can keep the palace in Dallas.<sup>92</sup> Obviously there is another principle at work in this cap: perhaps recently moving will line up with deliberately planning to take advantage of an unlimited homestead. However, sometimes those who did not plan nonetheless will be caught in the snare of § 522(p). A debtor who moved from Texas, with its unlimited homestead exemption,<sup>93</sup> to Arizona, with a \$150,000 homestead exemption,<sup>94</sup> in the 1215 days before filing would get caught by the cap. (This assumes—as will be discussed—that the cap applies in a state that opted out of federal bankruptcy exemptions, therefore only allowing state exemptions.)<sup>95</sup> If the same debtor had not moved, she could keep unlimited value in the Texas homestead. But overall, most sensible people would think the more debtors who are limited to keeping \$125,000 in a homestead, the better, even though not all debtors are so capped.

Perhaps some might support a principle of states' rights to set exemptions, and one finds evidence of judicial resistance seeking to save that principle to the greatest extent possible. The prohibition on exempting “any amount of interest” acquired in the last 1215 days might seem to apply to the amount of an interest acquired by regular mortgage payments in that period. Yet, a Texas bankruptcy court has ruled to the con-

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88. The National Bankruptcy Review Commission apparently unanimously favored putting an end to the use of unlimited state homestead exemptions in bankruptcy. The majority recommended a federal cap on the amount of a state homestead exemption that could be used in bankruptcy. See NBRC REPORT, *supra* note 16, at 97 (recommending \$100,000 cap); see also EDITH H. JONES & JAMES I. SHEPARD, RECOMMENDATIONS FOR REFORM OF CONSUMER BANKRUPTCY LAW BY FOUR DISSENTING COMMISSIONERS 1068–72, available at <http://govinfo.library.unt.edu/nbrc/report/24commvi.pdf> (primarily focusing on floor of \$20,000 for a homestead exemption in bankruptcy as too high and suggesting that other four commissioners were willing to support uniform federal bankruptcy exemptions, so that unlimited state exemptions would not be available in bankruptcy).

89. See BAPCPA § 322, 119 Stat. at 96–97 (codified at 11 U.S.C. § 522(p)–(q)).

90. See *id.* (codified at 11 U.S.C. § 522(p)(2)(B)).

91. See *id.* (codified at 11 U.S.C. § 522 (q)(1)).

92. Texas is one of the states with an unlimited homestead exemption as to dollar amount. TEX. PROP. CODE ANN. § 41.001 (2000).

93. See *id.*

94. See ARIZ. REV. STAT. ANN. § 33-1101 (2000).

95. See *infra* notes 98–100 and accompanying text.

trary; a Texas debtor can keep increases in equity due to mortgage payments in the 1215 days before filing.<sup>96</sup>

The resistance exhibited in *In re McNabb*<sup>97</sup> is of a different kind; it does not reflect adherence to any principle and thus is of a low level. It involves nihilist nitpicking over language. Rather than resisting presumptively unintended consequences, the resistance seems to extend even to principled intended consequences and to involve engaging in insincere literalism in order to score points against the 2005 Act's proponents on account of its bad drafting. Furthermore, this kind of resistance to the 2005 Act involves a refusal to vindicate any good impulse in it. The bankruptcy court in *McNabb* held that the "clear and unambiguous" language of § 522(p), making the \$125,000 homestead cap applicable only to debtors claiming exemptions "as a result of electing under subsection (b)(3)(A)," refers only to debtors using state exemptions of states that have not opted out of federal bankruptcy exemptions.<sup>98</sup> The court went on to explain that this result "makes little sense" but also insisted that it is up to Congress to fix it.<sup>99</sup> In short, the court did not even pretend to think that it had discovered the intention of Congress. We see here the ineffectiveness of rigid and insincere textualism, along with resistance to principled change in the 2005 Act (albeit not fully principled change).

At least four other bankruptcy court judges have had no trouble coming to a different conclusion, applying § 522(p) in states that have opted out of federal bankruptcy exemptions.<sup>100</sup> (Two of the four cases were from Florida, a jurisdiction where judges might have been tempted by the states' rights principle to protect the unlimited homestead exemption enshrined in the Florida Constitution.)<sup>101</sup> These judges all found ambiguity or outright error in § 522(p) and concluded that Congress intended to say that when the debtor chooses to use state exemptions,

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96. See *In re Blair*, 334 B.R. 374, 376–77 (Bankr. N.D. Tex. 2005) (holding that debtors who had not moved and who elected Texas exemptions could exempt all equity in their Texas homestead, including amounts attributable to mortgage payments in the last 1215 days before filing, because "one does not actually 'acquire' equity in a home. One acquires title to a home."). Debtors who liquidated nonexempt property and moved it into their homestead, however, might run afoul of 11 U.S.C. § 522(o), except that there is an issue about whether simply making use of a state homestead exemption qualifies as involving "the intent to hinder" creditors, an issue on which there is a great deal of case law in the denial of discharge provision of 11 U.S.C. § 727(a)(2).

97. See *In re McNabb*, 326 B.R. 785, 791 (Bankr. D. Ariz. 2005).

98. See *id.* at 789–91.

99. See *id.* at 791.

100. See *In re Kaplan*, 331 B.R. 483, 486–87 (Bankr. S.D. Fla. 2005) (identifying ambiguity in the use of the word "electing" and finding that, in context, it meant choosing to use state law exemptions, even if there is no alternative to use federal exemptions); *In re Wayrynen*, 332 B.R. 479, 483 (Bankr. S.D. Fla. 2005) (finding an "incongruity" in the statute but a clear intention to have the cap apply in opt-out states); *In re Virissimo*, 332 B.R. 201, 206 (Bankr. D. Nev. 2005) (finding two plain meanings and then conceding ambiguity); *In re Kane*, 336 B.R. 477, 489 (Bankr. D. Nev. 2006) (finding a scrivener's error but a "crystal clear" congressional intent to cover instances of use of state exemptions even in opt-out states).

101. See FLA. CONST. art. X, § 4.

whether or not there is a choice of federal bankruptcy exemptions, the subsection's cap applies.

The real objectives of the *McNabb* decision seem to be twofold. First, the decision gives the judge an opportunity to complain about the deceitful way in which the 2005 Act was sold and about its terrible drafting and incoherent policy. The court noted: "It has been reported that a 'technical amendments' bill is in the works to fix various glitches in BAPCPA, notwithstanding Congressional testimony that it was so perfect that not a word need be changed. Perhaps this is one of those glitches. If so, Congress can easily fix it."<sup>102</sup> Second, the judge seemed to hope that by applying language mechanically, he would contribute to a reopening of the bankruptcy debate. In this goal he is unlikely to be successful, given that there is a fairly easy way to interpret § 522(p), evidenced in four other decisions,<sup>103</sup> to vindicate abuse prevention at least to the limited degree that the 2005 Act did. As the National Bankruptcy Review Commission recommended, debtors in a few states should not be able to keep unlimited amounts of home equity while getting a bankruptcy discharge,<sup>104</sup> and the broadest possible reading of the homestead cap provisions is therefore justified on policy grounds.<sup>105</sup>

### C. Torturing the Text

Sometimes judicial resistance, although principled, is too bald and thus perhaps unlikely to hold up. An example of this form of resistance is the order and opinion<sup>106</sup> issued by the chief judge of the United States Bankruptcy Court for the Southern District of Georgia in a shot across the bow at 9:35 a.m.<sup>107</sup> on October 17, 2005, the general effective date of the 2005 Act.<sup>108</sup> The court stated:

I rule that attorneys regularly admitted to the Bar of this Court or those admitted *pro hac vice* are not covered by the provisions of the Code regulating debt relief agencies, including without limitation §§ 101(12A), (4A), 526, 527 and 528, and are excused from compli-

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102. See *In re McNabb*, 326 B.R. at 791; see also *In re Kane*, 336 B.R. at 481 n.7 (quoting Professor Todd Zywicki, testifying before the Senate Judiciary Committee, who said, "There is no word that I would change in this particular piece of legislation.").

103. See *In re Kane*, 336 B.R. 477; *In re Wayrynen*, 332 B.R. 479; *In re Virissimo*, 332 B.R. 201; *In re Kaplan*, 331 B.R. 483.

104. See NBRC REPORT, *supra* note 16, at 125.

105. *Id.*

106. See *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66 (Bankr. S.D. Ga. 2005). This case was appealed to the U.S. District Court by the U.S. trustee for the district; the court held that the trustee had no standing to challenge the order because there was no case or proceeding as required by 11 U.S.C. § 307 and refused to vacate the order. *In re Attorneys at Law and Debt Relief Agencies*, No. CV405-206, 2006 WL 2925199 (S.D. Ga. Aug. 25, 2006). It thus appears that the U.S. trustee may have to bring a motion under 11 U.S.C. § 526(c)(5) to enjoin violation of the DRA provisions to raise the issue whether lawyers are DRAs.

107. This was the time stamp on the original order and opinion.

108. See BAPCPA, Pub. L. No. 109-8, § 1501, 119 Stat. 23, 216.

ance with any of those requirements or provisions, so long as their activities fall within the scope of the practice of law . . . .<sup>109</sup>

A striking feature of this opinion is that the court acted on its own motion. It claimed authority to do so both under a provision on DRAs and under the general power of the court under § 105(a) to issue orders to carry out the provisions of the Bankruptcy Code.<sup>110</sup> Perhaps this activism is preferable to the reverse—a judge refusing to decide the issue in a case brought by an attorney seeking guidance on whether he had to comply with the DRA provisions. In a case of the latter type, the court acknowledged that an attorney who fails to comply with the DRA provisions potentially faces actions initiated by the court, the U.S. trustee, a debtor, or the “chief law enforcement officer of a state.”<sup>111</sup> Yet the chief judge for the United States Bankruptcy Court for the Middle District of Georgia ruled that an attorney in a chapter 7 case had no standing to challenge the debt relief agency provisions in the absence of threatened enforcement.<sup>112</sup> Interestingly, the judge never cited the opinion by the bankruptcy court just to the south, in the Southern District of Georgia, a sign that the opinion lacks persuasive power.

The analysis in *In re Attorneys* focuses on both the language of the Act and on the policy implications of treating attorneys as DRAs. The textual analysis is problematic. The 2005 Act added a definition of “debt relief agency” in § 101(12A).<sup>113</sup> The court’s strongest point is that this definition of a DRA explicitly lists as covered “a bankruptcy petition preparer” under § 110, but does not list a person who is an “attorney,” a defined term under § 101(4).<sup>114</sup> It certainly would have been easy to refer to attorneys in the definition. On the other hand, the court notes that the DRA definition refers to “any person who provides any bankruptcy assistance” and that the definition of “bankruptcy assistance” under § 101(4A) includes “providing legal representation with respect to a case or proceeding under this title.”<sup>115</sup> The court even concedes that this language “suggests that attorneys are covered” by the DRA provisions and that much legal commentary has assumed as much.<sup>116</sup>

The court goes on, however, to find that the reference to “providing legal representation” refers not to law practice by attorneys but rather to unauthorized practice of law. It concludes:

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109. See *In re Attorneys*, 332 B.R. at 71.

110. See *id.* at 68 n.1 (citing 11 U.S.C. §§ 526(c), 105).

111. See *In re McCartney*, 336 B.R. 588, 589 (Bankr. M.D. Ga. 2006).

112. See *id.* at 590–92; see also *Geisenberger v. Gonzales*, 346 B.R. 678 (E.D. Pa. 2006) (also finding lawyer lacked standing to challenge the constitutionality of certain “debt relief agency” provisions). But see *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 (D. Or. Aug. 11, 2006); *Hersh v. United States*, 347 B.R. 19, 22 & n.3 (N.D. Tex. 2006) (both finding standing on basis of alleged suppression of free speech due to enactment of the debt relief agency provisions).

113. BAPCPA § 226, 119 Stat. at 67 (codified at 11 U.S.C. § 101).

114. See *In re Attorneys*, 332 B.R. at 67, 69.

115. See *id.* at 67.

116. *Id.* at 67–68.

I hold that Congress intended to establish regulation of entities who interface with debtors in shadowy, gray areas not already covered by bankruptcy petition preparer regulations and to bolster the existing regulation of bankruptcy petition preparers, but it did not intend to regulate attorneys. The interpretation of a statute that is logical or sensible is preferred over interpretation that is illogical or absurd.<sup>117</sup>

Yet another problem for the interpretation that DRAs do not include lawyers is § 526(d)(2), which provides that nothing in §§ 526, 527 or 528 shall be deemed to limit or curtail the authority of a state “to determine and enforce the qualifications for the practice of Law under the laws of that state,” or the authority of a Federal court “to determine and enforce qualifications for the practice of law before that court.”<sup>118</sup> If the DRA provisions do not apply to lawyers, these statements would hardly seem necessary. Yet the court made reference to § 526(d)(2) only as making “clear that there is no effort to curtail the states’ role” in regulating qualification for the practice of law.<sup>119</sup>

The torturing of the text, particularly the court’s conclusion that “providing legal representation” refers only to unauthorized practice of law,<sup>120</sup> seems to rest on the absurdity of treating bankruptcy lawyers as DRAs. This *is* absurd, but by issuing an opinion sua sponte without any factual support or argument provided by affected attorneys and clients,<sup>121</sup> the judge did not make the point as strongly as possible.

This brings us to the policy analysis in the opinion. The court noted the point that if lawyers are DRAs,

[a] new layer of regulation will be superimposed on the bar of this Court, and evaluation of new risks and liabilities will preoccupy them as they strive to represent their clients, comply with existing state regulation of their practice, learn the new substantive and procedural mandates of this new law, and adhere to the separate professional standards applicable to members of the Bar of this Court. See Local Rule 83.5(d). This is a burden which should not be borne by the Bar needlessly or merely out of an abundance of caution. . . . Equally intolerable is needless uncertainty in the minds of the Bar as to their duty under this new statute.<sup>122</sup>

Clearly the court is right that the DRA provisions are burdensome to attorneys. But that does not show that these provisions were not intended to apply to attorneys “providing legal representation” in bankruptcy cases.

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117. *Id.* at 70.

118. See BAPCPA § 227, 119 Stat. at 67, 69 (codified at 11 U.S.C. § 526(d)(2)(A)–(B)).

119. *In re Attorneys*, 332 B.R. at 70.

120. *Id.* at 69–70.

121. See *infra* text accompanying notes 131–33 and Part II.B. (concerning a Connecticut case where these elements are present).

122. *In re Attorneys*, 322 B.R. at 68.

The court ultimately concluded that it would be a breathtakingly expansive interpretation of federal law to usurp state regulation of the practice of law via the ambiguous provisions of this Act, which in no clear fashion lay claim to the right to do any such thing. It could possibly violate the Tenth Amendment to the Constitution as well. I cannot conceive that as long as this bill has been pending any such intent could have gone unnoticed and undebated by the states. Nor can I conceive that Congress would ever take such an astounding step toward the federal regulation of professionals without forthrightly and expressly stating its intent.<sup>123</sup>

Here the opinion flails. Yes, the DRA provisions are confusing<sup>124</sup> or just plain wrong, as when they require a disclosure without qualification that “[y]ou will have to pay a filing fee . . .,” despite the addition in 2005 of a provision for waiver of the filing fee.<sup>125</sup> But ambiguity and error do not cut against application of the DRA provisions to attorneys in particular. Rather, as a policy matter, perhaps no one should be subjected to these provisions because they are likely to increase the fog in which most debtors enter our overly complex bankruptcy system.<sup>126</sup> Some of the “model” language encourages debtors to think they do not need lawyers to file in bankruptcy, a highly dubious proposition given the new complexity of the law.<sup>127</sup>

The claim of an attempt to usurp state regulation of the bar is contradicted by § 526(d)(2), discussed by the court, and the claim of unconstitutionality under the Tenth Amendment was refuted by Erwin Chemerinsky.<sup>128</sup> Furthermore, the applicability of the DRA provisions to attorneys was certainly debated during pendency of the 2005 Act; the American Bar Association tried hard to get Congress to exclude lawyers from the DRA provisions.<sup>129</sup> The court’s final footnote undercuts the idea that the DRA provisions are inconsistent with other regulation of

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123. See *id.* at 71 (footnote omitted).

124. See Sommer, *supra* note 14, at 206–11 (concerning numerous problems with the DRA provisions).

125. 28 U.S.C. § 1930(f) (2000 & Supp. V 2005) (new fee waiver provision).

126. See Braucher, *supra* note 24, at 1331 (concerning the problem of complexity in consumer bankruptcy law, with the effect that its users do not understand it).

127. See BAPCPA, Pub. L. No. 109-8, § 228, 119 Stat. 23, 69–70 (codified at 11 U.S.C. § 527(b)) (providing for disclosure: “If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer who is not an attorney. . . . The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine.”).

128. See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 582–83 (2005).

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

the bar, noting that some of the DRA provisions actually reflect “best practices” that attorneys should observe.<sup>130</sup>

Although the court is correct that many of the DRA provisions are bad, it failed to make a convincing case that Congress did not mean to place attorneys within their coverage. As a result, the decision is unlikely to be followed, and thus the value of the resistance is not great.

For a contrast in approach, the action for injunctive relief brought in Connecticut is revealing.<sup>131</sup> As will be discussed in Part II.B, this suit argued that attorneys are not DRAs, and it backed this argument up with a great deal of factual detail about the impediments to sound legal advice that result from a conclusion of coverage and also with a First Amendment free speech argument.<sup>132</sup> The detail is enough to raise a real question about whether Congress could have meant to both gag lawyers in some ways and compel them to say false and misleading things.<sup>133</sup> Ultimately, however, the constitutional issue must be reached, and the case for unconstitutionality under the First Amendment appears strong, as two bankruptcy courts have already held concerning the gag provision.<sup>134</sup>

#### D. Subtle Subversion

The highest form of resistance to the presumptively unintended consequences of the 2005 Act is that which is most effective. Occasionally the subversion is subtle indeed; it may not even look like resistance. A good example of this approach is *In re Dixon*, an Eighth Circuit Bankruptcy Appellate Panel (BAP) case dealing with exigent circumstances and the prefiling credit counseling requirement when the debtor first visited a lawyer the day before a scheduled foreclosure sale of his home.<sup>135</sup> The BAP upheld a bankruptcy court decision dismissing a debtor’s case after the court determined that the debtor was ineligible for bankruptcy

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130. See *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 71 n.5 (Bankr. S.D. Ga. 2005).

131. See Complaint, Conn. Bar Ass’n v. United States, No. CIV.A. 3:06CV729 (D. Ct. May 11, 2006), available at [http://www.nacba.org/files/main\\_page/complaint.pdf](http://www.nacba.org/files/main_page/complaint.pdf); Plaintiff’s Motion for Preliminary Injunction, Conn. Bar Ass’n, No. CIV.A. 3:06CV729, available at [http://www.nacba.org/files/main\\_page/Plaintiffs%20Motion%20for%20Preliminary%20Injunction.pdf](http://www.nacba.org/files/main_page/Plaintiffs%20Motion%20for%20Preliminary%20Injunction.pdf); Plaintiffs’ Memorandum in Support of Their Motion for Preliminary Injunction, Conn. Bar Ass’n, No. CIV.A. 3:06CV729, available at [http://www.nacba.org/files/main\\_page/Memorandum%20in%20Support%2005-11-06%20final.doc](http://www.nacba.org/files/main_page/Memorandum%20in%20Support%2005-11-06%20final.doc). The request for preliminary injunctive relief was still pending when this article was published.

132. See *infra* Part II.B.

133. See *id.*; see also *Milavetz, Gallop & Milavetz v. United States*, No. 05-CV-2626(JMR/FLN), 2006 WL 3524399 (D. Minn. Dec. 7, 2006) (holding that under the doctrine of constitutional avoidance, attorneys are not subject to the debt relief agency provisions because it would be a denial of their First Amendment rights to apply these provisions to them).

134. Two bankruptcy cases have held that lawyers are debt relief agencies but that the restriction on advice to incur debt in contemplation of bankruptcy violates the First Amendment. See *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 (D. Or. Aug. 11, 2006); *Hersh v. United States*, 347 B.R. 19 (N.D. Tex. 2006); see also *infra* notes 288–90 and accompanying text.

135. See *In re Dixon*, 338 B.R. 383, 385 (B.A.P. 8th Cir. 2006).

due to failure to obtain credit counseling services and failure to qualify for an exception based on exigent circumstances.<sup>136</sup> The result might deflect attention from the many useful things said to empower bankruptcy court judges to allow an exception based on exigent circumstances or, if no exception applies, to design remedies for ineligibility that do not burden the uninformed and desperate.

First, the BAP opinion collected the case law on whether the certification of exigent circumstances must be sworn.<sup>137</sup> Since the certification was sworn in that particular case, the certification was sufficient either way.<sup>138</sup> Thus, the function of the listing of authority was to show an early lead for the approach that the certification need not be sworn. The decision also helped to flag the issue for lawyers and make more of them aware that having a sworn certification avoids any issue.

Next, the BAP opinion discussed the three tests for an exigent circumstances exception, taking them up in reverse order and thus starting with the requirement that the certification be “satisfactory to the court.”<sup>139</sup> The method in using this order of analysis was to permit the BAP to focus on the discretion given to bankruptcy judges by Congress and thus the appropriateness of using an “abuse of discretion” standard of review on appeal. The second test discussed was whether the debtor was unable to obtain a briefing within five days of a request.<sup>140</sup> Before noting that the bankruptcy court “apparently accepted” the debtor’s certification on this point, the BAP opinion noted the facts: the debtor requested services from one agency;<sup>141</sup> the agency said it would not provide services on the telephone for at least two weeks and on the internet for at least twenty-four hours; and, because the debtor did not have a computer, the debtor had no access to the internet.<sup>142</sup> The recital of these facts created authority that bankruptcy judges can use their discretion to find an inability to obtain a briefing online within five days, even though a provider could serve someone within twenty-four hours online, if a debtor does not have his own computer and internet services. Thus, not having a computer or internet services seem to be valid excuses.

The third test, exigent circumstances meriting a waiver, was also discussed in terms of bankruptcy court discretion.<sup>143</sup> When the debtor is facing imminent foreclosure, according to the BAP, a bankruptcy judge can choose whether to find exigent circumstances. The effect was to tell bankruptcy judges that they can treat imminent foreclosure as sufficient

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136. *See id.* at 384–85, 388.

137. *See id.* at 387.

138. *See id.*

139. *See id.*

140. *See id.* at 387–88.

141. *See supra* notes 62–63 and accompanying text (concerning the analysis that this is all that the statute requires).

142. *In re Dixon*, 338 B.R. at 387–88.

143. *See id.* at 388–89.

to establish grounds for an exception and not have their judgment questioned on appeal. The test for “exigent circumstances that merit a waiver” could be read as involving two parts, the exigent circumstances themselves and whether they merit a waiver. If the court has discretion to treat imminent foreclosure as meriting waiver, the two components collapse into one highly discretionary test.

The BAP opinion did not stop here. It also noted that an order concerning whether the debtor is eligible for bankruptcy is interlocutory and not appealable as of right, but that it was proper to analyze the issue of eligibility in this case because the case was later dismissed on that basis, and the debtor appealed.<sup>144</sup> The suggestion may be that a finding of eligibility would not be appealable.

A final point is particularly intriguing and has implications that go beyond cases of exigent circumstances. The BAP opinion noted the issue of the appropriate remedy for debtor ineligibility for bankruptcy, while also noting that the issue did not need to be decided in this case because the debtor “has not really challenged” the decision to dismiss the case as opposed to striking the case or dismissing the petition.<sup>145</sup> The opinion once again gathered case law and helped to educate the bench and bar about a legal issue that many may have missed.<sup>146</sup> It underscored that dismissal of the case is not necessarily the answer and that some courts have made the choice to do something less, such as (1) dismiss the petition to let the debtor get counseling and file a new petition, or (2) strike the case to let the debtor get counseling and file a new case, but without having a dismissal of a case recorded, potentially triggering the new stay provisions in § 362(c)(3) and (4) concerning serial cases.<sup>147</sup> As discussed above, the best resolution of the remedy issue may be to permit the debtor who failed to get counseling before the initial petition to do so and then file an amended petition to establish eligibility, while reserving the remedy of striking the case for debtors who decide, after getting counseling, that their best interests are not to file, at least not yet.<sup>148</sup> This interpretation fulfills the professed consumer protection purpose of the counseling requirement, keeping the debtor who filed imprudently from having a case to be included on credit reports or from having the stay impaired if a case later becomes necessary, but not burdening a debtor who needs bankruptcy now and has filed an amended petition after get-

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144. *See id.* at 389.

145. *See id.*

146. *See id.*; *see supra* text accompanying note 137 (concerning another point on which the decision gathers the case law).

147. *See supra* notes 67–71, 77–84 and accompanying text; *see also In re Dixon*, 338 B.R. at 388 n.4 (underscoring the shoddy drafting of the 2005 Act, noting an inconsistency between § 109(d)(1) and (4)); *supra* notes 53, 65 and accompanying text (also noting the inaccuracy of calling the exigent circumstances provision either a “waiver” or “exemption,” in that this provision in fact defers counseling but does not excuse it entirely (discussing 11 U.S.C. § 109(h)(3))). The provision is, however, an exception to the requirement of pre-filing counseling services.

148. *See supra* notes 67–71, 77–84 and accompanying text.

ting counseling.<sup>149</sup> With consumer protection in mind, the purpose stated in the legislative history,<sup>150</sup> it makes sense to let the debtor get counseling and then make a decision about whether to stay in bankruptcy. This approach minimizes negative consequences regardless of the choice. Because most debtors who file do not qualify for debt management plans and already have spoiled credit ratings, it makes sense to let them correct their eligibility problem and let them proceed in bankruptcy.<sup>151</sup>

*Dixon*<sup>152</sup> is also helpful as a case to use in law school bankruptcy courses. In some ways, bankruptcy law has become a subject hardly fit for teaching; the many technical errors are depressing fare for budding lawyers. Furthermore, so many of the policy choices seem to be the work of special interests that cynicism comes too easily, always a hazard with law students. But the *Dixon* case shows careful craftsmanship and an open-minded consideration of issues, model behavior for professionals.

Yet another good teaching case is *In re Ezell*,<sup>153</sup> one that also involves subtle subversion of possible creditor designs that were not clearly expressed and thus should not necessarily be imputed to Congress. Before getting to its good points, let me quibble that *Ezell* assumes a conclusion to the issue whether § 1325(a)'s "hanging paragraph" requires full payment on so-called 910 claims, that is secured claims on purchase money loans obtained in the 910 days before filing to acquire motor vehicles for personal use.<sup>154</sup> It does this by calling the hanging paragraph the "anti-cramdown paragraph."<sup>155</sup> But what the hanging paragraph actually states is that § 506, which determines the amount of a secured claim,<sup>156</sup> "shall not apply" to 910 claims for purposes of the confirmation test for secured claims in § 1325(a).<sup>157</sup> Section 1325(a)(5) is still applicable, but there is no statutory provision saying how much of the claim is secured; courts are left to figure something out using their discretion, and I have argued for wholesale value less the costs of obtaining it.<sup>158</sup>

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149. See *supra* notes 75–84 and accompanying text.

150. See *supra* notes 75–76 and accompanying text.

151. See NACBA STUDY, *supra* note 21, at 2.

152. *In re Dixon*, 338 B.R. 383.

153. See *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

154. See BAPCPA, Pub. L. No. 109-8, § 306(b), 119 Stat. 23, 80 (codified at 11 U.S.C. § 1325(a)) (hanging paragraph at end).

155. See *In re Ezell*, 338 B.R. at 333.

156. See 11 U.S.C. § 506 (2000).

157. BAPCPA § 306(b).

158. See Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 469–74 (2005) (discussing valuation of collateral for purposes of retention in chapter 13, advocating use of wholesale value for 910 claims, and also noting these two other possible interpretations: treating the whole claim as unsecured, since § 506 does not apply, or treating BAPCPA § 306 (codified at 11 U.S.C. § 1325(a)(5)) as inapplicable, so that the claim may be modified under 11 U.S.C. § 1322(b)(2)); see also *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006) (holding that a creditor with a 910 claim does not have an "allowed secured claim" and rather has an allowed claim for the entire prepetition debt that must be paid in full but without postpetition interest).

Leaving aside this quibble, the court uses an appealing bit of reasoning to say that if the effect of the hanging paragraph is to make a creditor fully secured when the debtor keeps the collateral,<sup>159</sup> then the creditor is also fully secured when the debtor surrenders the collateral. The court's analysis is sound in noting that the hanging paragraph applies equally to the provisions of § 1325(a)(5)(B)(ii) (value to be paid when the debtor keeps the collateral) and 1325(a)(5)(C) (providing for surrender of collateral), in both instances making § 506 inapplicable.<sup>160</sup> One might instead take the position that courts have to use their discretion for valuation of secured claims in either a case of retention or of surrender of collateral. In surrender cases, they might well choose to value secured claims in terms of what the creditor actually recovers on the collateral, in other words, typically wholesale value less the cost of obtaining it, so that there is an unsecured deficiency claim.<sup>161</sup> Courts might rely by analogy on the Supreme Court's reasoning in *Associates Commercial Corp. v. Rash*,<sup>162</sup> in which the court justified using a higher value in cases of retention because of the dual risks of debtor default and depreciation of the collateral.<sup>163</sup> Similarly, they might use midpoint of wholesale and retail values in retention cases, as was the usual approach post-*Rash*.<sup>164</sup>

The subversive moment in the *Ezell* case comes at the end of its analysis of valuation in surrender cases:

To the extent an actual disparity might exist between the value of the collateral and the amount of the creditor's allowed secured claim, perhaps negotiation between the debtor and creditor would allow the "holder of such claim" to accept a treatment under the plan pursuant to Revised § 1325(a)(5)(A) that is more akin to the traditional cramdown permitted under Revised § 1325(a)(5)(B) for secured creditors whose claims do not fall within the ambit of the Anti-Cramdown Paragraph. This approach appears to the court as one that could prove advantageous to both debtors and creditors.<sup>165</sup>

In other words, debtors can threaten (that is, offer) to surrender the collateral and put creditors to the test whether they really want it back, with the prospect of recovering wholesale value minus the cost of obtaining it. *Ezell* holds that the deficiency upon surrender is reduced to zero and thus the creditor does not get a pro rata share of the distribution to unsecured creditors.<sup>166</sup> This gives debtors leverage to make a retention deal for less than full debt amount.

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159. See *In re Ezell*, 338 B.R. at 340.

160. See *id.* at 342.

161. See Braucher, *supra* note 158, at 473 (discussing usual practice of creditors, which is to sell cars at wholesale after a title-clearing foreclosure sale).

162. See *Assoc. Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

163. See *id.*

164. See Braucher, *supra* note 158, at 464 n.32.

165. See *In re Ezell*, 338 B.R. at 342.

166. See *id.*

Whether a bankruptcy court decides against a debtor, as in *Dixon*,<sup>167</sup> or for him, as in *Ezell*,<sup>168</sup> the highest form of resistance to the worst of creditor intentions is not to assume that Congress gave into them when it passed the 2005 Act. *Dixon* is interesting for its identification and exploration of many debatable issues, without resolving most of them. Early in the implementation of the new law, this strategy helped to prompt debate over sensible resolutions, while also educating the bar about ways to steer clear of problems. The interpretive strategy of *Ezell*, on the other hand, is to use an assumption of congressional even-handedness in case of doubt, and in that way to resist giving creditors advantages that are not set forth in the statutory language.

## II. EARLY RESPONSES OF THE DEBTORS' BAR

In comparison to other consumer law, a remarkable aspect of consumer bankruptcy prior to the 2005 Act was the existence of a bar of lawyers competing to represent individual debtors in chapters 7 and 13 at relatively affordable flat fees.<sup>169</sup> In the weeks before October 17, 2005, the general effective date of the new law,<sup>170</sup> fear of the coming changes produced a huge spike in filings.<sup>171</sup> Attorney advertising and media accounts about the new law had tended to make consumer debtors think they should act fast to avoid higher costs and new barriers.<sup>172</sup> The result was a busy fall for bankruptcy lawyers, as they prepared record numbers of cases for filing, followed by a busy winter as they shepherded those cases through the system. Meanwhile, new filings fell off dramatically at first and then began a gradual climb.<sup>173</sup> It is too soon to say when the

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167. *In re Dixon*, 338 B.R. 383, 390 (B.A.P. 8th Cir. 2006).

168. *In re Ezell*, 338 B.R. at 342.

169. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L. J. 501, 504-05 (1993) (noting that it was remarkable that middle-class and even poor debtors could find bankruptcy lawyers when they often could not find lawyers to represent them in consumer disputes, in context of study of strengths and weaknesses of lawyers' practices when counseling consumer debtor clients).

170. See BAPCPA, Pub. L. No. 109-8, § 1501, 119 Stat. 23, 216.

171. See David D. Bird, *Implementation of BAPCPA—Making It Work*, AM. BANKR. INST. J., Mar. 2006, at 28 (noting that 625,000 bankruptcy cases were filed in the first sixteen days of October 2005).

172. See, e.g., Stephen Labnton, *House Passes Bankruptcy Bill Awaits President's Signature*, N.Y. TIMES, Apr. 15, 2005, at C5 (discussing possible access problems).

173. See Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the Twelve Month Period Ended June 30, 2006, [http://www.uscourts.gov/bnkrpctystats/bankrupt\\_f2table\\_jun2006.xls](http://www.uscourts.gov/bnkrpctystats/bankrupt_f2table_jun2006.xls) (showing nonbusiness filings of 1,142,958 in chapter 7 and 309,298 in chapter 13 during the twelve-month period ending June 2006). One sees the drop in a comparison of the filings in the first three months of 2005 and 2006. See Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the Three Month Period Ended Mar. 31, 2006, [http://www.uscourts.gov/bnkrpctystats/bankruptcy\\_f23mos\\_mar2006.xls](http://www.uscourts.gov/bnkrpctystats/bankruptcy_f23mos_mar2006.xls) (showing for that period in 2006 nonbusiness filings in chapter 7 of 63,250 and in chapter 13 of 49,314); Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the Three Month Period Ended Mar. 31, 2005, [http://www.uscourts.gov/Press\\_Releases/bankrupt\\_f2\\_3mos\\_mar2005.pdf](http://www.uscourts.gov/Press_Releases/bankrupt_f2_3mos_mar2005.pdf) (showing for that period in 2005 nonbusiness filings in chapter 7 of 289,239 and in chapter 13 of 103,646). Comparing the second three months of 2006 and 2005, we find nonbusiness

transition period will be over, giving us a picture of the impact of the 2005 Act, including the effect on the overall number of filings, the proportion of cases filed in chapter 7 as opposed to chapter 13, and the demographics and finances of filers, let alone the effect on consumer credit volume and nonbankruptcy default rates.

An important factor affecting continuing access to consumer bankruptcy will be the reaction of the debtors' bar and whether enough lawyers will continue to do this kind of work at an affordable price to give consumer debtors access to legal representation. It is also too soon to assess quantitatively whether lawyers are deserting this area of practice. Some practitioners may let others bring the early cases and wait for the dust to settle but eventually return to this area. Also, even though debtors can file without a lawyer, under the new law they are more likely to make a mistake that will result in dismissal or denial of discharge;<sup>174</sup> so while pro se filings may grow, they are not necessarily a good alternative to having a lawyer.

This Part draws on two important resources that reflect the bankruptcy bar's early reaction to the new law. One is a wealth of bar journal material written by practitioners, and the other is attorney and bar association Web sites. Part A discusses the considerations that went into individual lawyers' decisions whether to continue to represent consumers in bankruptcy cases in the immediate aftermath of the new law. For those who decided to remain in the field, there were new compliance burdens. Two of the obvious areas of concern for lawyers are compliance with the new DRA provisions<sup>175</sup> and the new attorney certification

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cases as follows: 91,674 in chapter 7 and 59,170 in chapter 13 in the second quarter of 2006, compared to, respectively, 356,389 and 102,017 in the same quarter the year before. However, despite the showing of lower numbers, it is notable that the number of filings increased substantially from the first three months to the second three months of 2006 and that chapter 7 filings increased more than chapter 13 filings. *See also* Survey: Bankruptcy Filings on the Rise Again, Likely to Return to Pre-2005 Law Levels During Next Year (Oct. 4, 2006) [hereinafter Survey: Bankruptcy Filings] (based on survey of debtors' attorneys conducted by National Association of Consumer Bankruptcy Attorneys, predicting gradual increase in filings to old levels), available at [http://www.nacba.org/files/main\\_page/100406NACBASurveynewsrelease.doc](http://www.nacba.org/files/main_page/100406NACBASurveynewsrelease.doc).

174. *See, e.g., supra* Parts I.A, D (concerning litigation prompted by debtors, some filing pro se, filing without first getting credit counseling as required under BAPCPA § 106(h)(1), 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)); *see also* 11 U.S.C. § 521(a)(1), (i)(1) (listing items the debtor must file and providing for "automatic dismissal" for failure to do so within forty-five days of filing the petition); 11 U.S.C. § 521(e)(2)(A)–(B) (providing that the debtor shall provide a tax return or tax transcript at least seven days before the date first set for the first meeting of creditors or the case is subject to dismissal); 11 U.S.C. §§ 727(a)(11), 1328(g)(1) (making failure to complete financial management education grounds for denial of discharge).

175. *See* BAPCPA § 226(a), 119 Stat. at 67 (codified at 11 U.S.C. § 101(3), (4), (12A)); *id.* §§ 227–229, 119 Stat. at 68–71 (codified at 11 U.S.C. §§ 526–528); *infra* Part II.B. Although they will not be discussed for the most part, it should be noted that there are some new remedial provisions worth worrying about in some contexts, such as liability for fees paid by a client and for "an appropriate civil penalty" in cases of intentional violations or a clear and consistent pattern of violations. *See* BAPCPA § 227(a), 119 Stat. at 68 (codified at 11 U.S.C. § 526(b)(2), (5)(B)); *infra* note 245 (discussing possible low risk in instances when a client declines to sign a consultation agreement).

provision in chapter 7,<sup>176</sup> which typically has prompted significantly more gathering of financial records and other documents.<sup>177</sup> These two areas are addressed in Sections B and C below. In these areas, individual lawyers have had to cope, but there have also been important collective efforts by the organized bar to reduce the negative impact on the feasibility of representing consumer debtors.

A. *The Individual Lawyer's Choice to Flee or Fight*

In the months before and after the general effective date of the 2005 Act, many bar journals published short articles written by bankruptcy practitioners about the new law. In these pieces, one sees both fear and resistance in the form of determination not to be driven out of bankruptcy practice.<sup>178</sup> An article capturing both reactions stated:

Yes, the sky is falling, and it is slated to land directly on bankruptcy counsel. . . . Once the fear subsides, practitioners will just have to decide whether to jump in with both feet or steer away from bankruptcy cases. . . . As unworkable and bizarre as so many of the amendments seem to regular bankruptcy practitioners, [the law] offers just another obstacle to overcome. That is what lawyers do.<sup>179</sup>

This attorney also told a story about meeting with a desperate client the day after the Senate's passage of the new legislation; the client's uninsured house had burned down and her husband of thirty-two years had then left her to live on an annual salary of \$18,000, and her lawyer wrote:

I had spent most of the morning whining about the new bill with my colleagues as we considered alternative occupations. But then the client brought everything into perspective. . . . I suspect that most experienced bankruptcy counsel will find themselves unable to turn a blind eye and will find a way to continue to practice and minimize their risks while doing so.<sup>180</sup>

176. See BAPCPA § 102, 119 Stat. at 27 (codified at 11 U.S.C. § 707(b)(4)); *infra* Part II.C.

177. See *infra* Part II.C.

178. See, e.g., Ole Bly Pace III, *Accomplishments, Challenges, and Opportunities*, 93 ILL. B.J. 272 (2005) (discussing changes in attorney certification and DRA provisions and concluding, "The attorney-client privilege is trashed."); Randall D. Crocker & Rebecca H. Simoni, *Fundamental Changes: Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, WIS. LAW., July 2005, at 14 (noting wide criticism of many provisions by bankruptcy specialists and adding, "Nonetheless, these modifications have now become law, and it will be the responsibility of everyone who practices in the area to understand the changes and to operate effectively under them."); Giles, *supra* note 2, at 8 (containing heading, "THE NEW LAW WILL BE CATASTROPHIC FOR DEBTORS' LAWYERS"); Bruce Moyer, *Bankruptcy Law Snares Attorneys with New Duties*, FED. LAW., May 2005, at 14 ("The new law also imposes unprecedented requirements upon lawyers, especially those who represent debtors in bankruptcy proceedings. . . . Critics respond that the lawyer-related provisions will interfere with the attorney-client relationship, increase malpractice premiums and overhead costs, and ultimately leave many low-income clients without bankruptcy representation."); Joel B. Weinberg, *Debtor Beware*, L.A. LAW., Oct. 2005, at 22 ("The key beneficiaries of the new act appear to be creditors. . . . Those who may come up short under the new law are . . . consumer bankruptcy practitioners . . .").

179. Jennifer Emens-Butler, *Bankruptcy Reform—Gather 'Round Children, Yes, the Sky Is Falling*, 31 VT. B.J. 26, 29 (2005).

180. *Id.* at 30.

The 2005 Act directly burdens lawyers in both the provisions apparently turning lawyers into “debt relief agencies” and in the provision for attorney certification of petitions and schedules,<sup>181</sup> discussed in Sections B and C below. It also adds new burdens more indirectly, by requiring debtors to produce a great deal more paperwork and by creating various traps and hurdles that add to the complexity of representing consumer debtors.<sup>182</sup> Passing the means test is less of a challenge under the new law than producing and storing the paperwork backup to make an attorney comfortable enough to certify that the debtor’s petition is “well grounded in fact.”<sup>183</sup> Furthermore, with so many changes, another challenge is in adapting to them all at once.<sup>184</sup> In addition to means testing<sup>185</sup> and new paperwork required of debtors,<sup>186</sup> the areas of significant change include the automatic stay,<sup>187</sup> exemptions,<sup>188</sup> dischargeability,<sup>189</sup> issues

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181. BAPCPA, Pub. L. No. 109-8, § 102(a), 119 Stat. 23, 30 (codified at 11 U.S.C. § 707(b)(4)).

182. *Id.* § 315(b), 119 Stat. at 89 (codified at 11 U.S.C. § 521(a)(1)).

183. See also Tom Shean, *Bankruptcy Law is Making for More Deliberate Filing*, VIRGINIAN-PILOT (Norfolk, Va.), Mar. 17, 2006, at D2 (quoting Harry W. Jernigan III, a Virginia Beach attorney who specializes in bankruptcy, as stating that his firm installed \$150,000 in office and computer equipment to scan and store additional documents, that “you had to gear up for the changes in bankruptcy law or get out,” and also that his fees in chapter 7 have about doubled under the new law); Greg Stiles, *Bankruptcy Changes Discourages Attorneys*, MAIL TRIB. (Medford, Or.), Aug. 23, 2005 (quoting Ashland attorney Joe Charter as saying he was leaving the field primarily because of the expense associated with new due diligence obligations and because of the risk of liability); *infra* Part II.C.

184. See George H. Singer & Michael P. Warren, *A New Playing Field: Changes in the Rules of Bankruptcy*, BENCH & B. OF MINN., May–June 2005, at 20 (“The sheer volume of changed provisions makes the new law difficult to succinctly describe or intuitively grasp”).

185. See BAPCPA § 102(a), 119 Stat. at 27 (codified at 11 U.S.C. § 707(b)); *id.* § 102(h), 119 Stat. at 34 (codified at 11 U.S.C. § 1325(b)(3)); see also Culhane & White, *supra* note 4; Wedoff, *supra* note 4.

186. See, e.g., BAPCPA §§ 315(b)(1), 316, 119 Stat. at 89–90, 92 (codified at 11 U.S.C. § 521) (listing required paperwork and providing for “automatic dismissal” for failure to file it within forty-five days after filing a petition); see also Sommer, *supra* note 14.

187. See, e.g., BAPCPA § 302, 119 Stat. at 76 (codified at 11 U.S.C. § 362(c)(3), (4)) (providing for stay to lift or not to go into place absent motion and court action in certain serial cases); *id.* § 305(1)(C), 119 Stat. at 79 (codified at 11 U.S.C. § 362(h)) (providing for lifting of stay as to personal property collateral if debtor does not file statement of intention to surrender, redeem or reaffirm and take the action specified); see also Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749, 750–51 (2005).

188. See, e.g., BAPCPA §§ 307, 308, 322(a), 119 Stat. at 81, 97 (codified at 11 U.S.C. § 522(b)(3)(A), (C), (p), (q)) (providing, for example, for: two-year waiting period to use a state’s exemption law, even if the debtor moved to a state with less generous exemptions; federal exemption of most retirement funds, even if otherwise using state exemptions; and homestead cap of \$125,000 in limited circumstances); see also Lawrence R. Ahern III, *Homestead and Other Exemptions Under the Bankruptcy Abuse Prevention and Consumer Protection Act: Observations on “Asset Protection” After 2005*, 13 AM. BANKR. INST. L. REV. 585, 591–609 (2005); Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 399–408 (2005).

189. See, e.g., BAPCPA §§ 215, 310, 119 Stat. at 54, 84 (codified at 11 U.S.C. §§ 523(a)(2)(C), (15)) (decreasing dollar threshold, increasing applicable period for treating certain consumer debts as nondischargeable, and making property and debt-division obligations to a spouse, former spouse, or child nondischargeable without weighing benefit and harm); *id.* § 314(b), 119 Stat. at 88 (codified at 1328(a)(2), (4)) (adding to list of debts nondischargeable in chapter 13, thus reducing the broader discharge); see also William Houston Brown, *Taking Exception to a Debtor’s Discharge: The 2005 Bankruptcy Amendments Make It Easier*, 79 AM. BANKR. L.J. 419, 420–24 (2005).

concerning collateral,<sup>190</sup> and credit counseling and financial education.<sup>191</sup> Each of these areas of change has been the subject of one or more articles of its own in three law review issues rapidly published by bankruptcy professional associations in 2005.<sup>192</sup> The cumulative effect of all these changes has hit debtors' lawyers hard because they have to worry about them all as applied to each individual case.<sup>193</sup>

Figuring out the new law is a daunting, time-consuming, and expensive task.<sup>194</sup> It is also dispiriting because of the evident hostility to debtors and their lawyers reflected in all the new burdens.<sup>195</sup> The startup costs associated with learning the new law and instituting new office procedures to comply with it are large, making those lawyers who did little bankruptcy work before the new law particularly likely to drop out of this area.<sup>196</sup> Even once they have gone through a compliance review, lawyers need to spend more time per case. A common estimate is that two to three times as much time is needed for each case.<sup>197</sup> Most lawyers

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190. See BAPCPA §§ 304, 305(1)(C), 119 Stat. at 78, 79 (codified at 11 U.S.C. §§ 362(h), 521(a)(6)) (providing for lifting of stay on personal property collateral if the debtor attempts to ride through); *id.* § 327, 119 Stat. at 100 (codified at 11 U.S.C. §§ 506(a)(2), 722, and 1325(a)) (setting valuation of collateral in individual cases in chapter 7 and 13 at replacement value and defining that in terms of retail value for consumer collateral for purposes of redemption and for cramdown in chapter 13, thus creating considerable uncertainty about whether cramdown is possible for certain recently acquired personal property collateral); see also Braucher, *supra* note 158, at 465–74.

191. See BAPCPA § 106(a), 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)) (making credit counseling a requirement for eligibility of individuals for bankruptcy); *id.* § 106(b)–(c), 119 Stat. at 38 (codified at §§ 727(a)(11), 1328(g)) (making failure of an individual to obtain financial management education after filing grounds to deny a discharge in chapters 7 and 13); see also Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Pre-Petition Credit Counseling and Post-Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549, 549–51 (2005).

192. See *supra* notes 185–91 for the articles on each of the listed issues. Two of the law review issues were published by the American Bankruptcy Law Journal, which is the journal of the National Conference of Bankruptcy Judges (issues 2 and 3 of Volume 79, 2005), and the other was published by the American Bankruptcy Institute Law Review, which is the journal of the American Bankruptcy Institute (issue 2 of Volume 13).

193. See Caher, *supra* note 12, at 1 (noting “a minefield of new obligations, responsibilities and liabilities”).

194. See Singer & Warren, *supra* note 184, at 20, 25.

195. See Ann D. Zeigler, Heather H. McIntyre & Cheryl R. Brown, *Heads Up! Major Changes Made to Consumer Bankruptcy Practice*, HOUS. LAW., July–Aug. 2005, at 25 (“There will be major financial exposure for missteps by lawyers . . .”); *id.* at 35 (“Please feel free to be as depressed and/or panicked as regular bankruptcy practitioners are.”); Helen W. Gunnarson, *The Bankruptcy Abuse Reduction Fiasco?*, ILL. B.J., June 2005, (referring to “consternation to many members of the bar” caused by the new law); Emens-Butler, *supra* note 179 (noting the new law’s DRA provisions are “insulting”).

196. See Caher, *supra* note 12, at 4 (concerning likelihood of greatest access problem in small and rural areas without enough debtors to support a fulltime bankruptcy practice); Singer & Warren, *supra* note 184, at 50.

197. See Giles, *supra* note 2, at 17 (noting that each case is going to be two or three times more difficult to prepare correctly); Michael J. Davis, *The New Bankruptcy Code: Goodbye Consumer Chapter 7 Cases*, DCBA BRIEF, June 2005, at 16 (predicting cost of a consumer bankruptcy case will triple because of the vastly increased procedural requirements), available at <http://www.dcba.org/brief/junissue/2005/art20605.pdf>; see also Survey: Bankruptcy Filings, *supra* note 173 (concerning survey of debtors’ lawyers in which respondents variously estimated the extra time at 50–75% (26.5%), 75–100% (23.1%), and “more than 100 percent in increased time” (27.1%)).

seem to be absorbing a certain amount of that time in the short term, not charging clients for all of it, while hoping to get more efficient with experience.<sup>198</sup> Fees are kept down in part because, with filings way down,<sup>199</sup> most lawyers were seeing fewer prospective clients than they saw before the new law and did not want to scare them away with high fees.

Also, some lawyers were concerned about a popular perception that bankruptcy is no longer available. As a result, some lawyers began promoting the idea that bankruptcy is still an option, as in this startling presentation from a North Carolina bankruptcy firm's Web site:<sup>200</sup>

That New Bankruptcy Law?

We Figured It Out.

NO MORE BANKRUPTCY?

NOT TRUE!

NO MORE HELP WITH DEBTS?

NOT TRUE!

TOO LATE TO FILE BANKRUPTCY?

NOT TRUE!

You can still get the help you need.

The Truth Is. . . You Can Do Almost Everything

Under The New Law That People Did Under The Old Law!

GOT DEBT? NEED HELP? CALL US!

And get the "fresh start" that  
only bankruptcy can provide.

The firm even went on to promote how hard it worked to master the new law; obviously, this firm had decided to continue practicing under the 2005 Act and to try to draw in clients despite a long bout of negative publicity about decreased access to bankruptcy.<sup>201</sup>

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198. See Caher, *supra* note 12, at 4 (noting that increased costs of additional checking up on clients will be absorbed by law firms or passed on to clients and quoting high-volume Buffalo, N.Y., attorney Jeffrey Freedman as saying, "We are going to try to do this without a huge increase in fees. There will be increases, but we don't want to price clients out of the market. We have to do more work, and we have to figure out a way to be more efficient.").

199. See *supra* note 173.

200. See The Law Offices of John T. Orcutt, <http://www.billsbills.com> (Web site of a firm with four offices in North Carolina).

201. The pitch continues as follows:

The main difference between the OLD Bankruptcy Law and the Brand NEW Bankruptcy Law is this . . . There is some extra paperwork, but we even have that figured out, . . . to make filing bankruptcy as easy and painless as possible. Sure, there are some small changes here and there that will affect some people, and . . . in certain ways . . . the NEW Law is more strict. But . . . and you need to know this . . . we have thoroughly read, studied, dissected, picked apart, analyzed and examined all 500+ pages of the new law, and we can now state with confidence that, for the most part, if you have debt problems, we can still help. In fact, what you will find is that many of you will get exactly the same great result under the new law, as you would have received under the old law.

*Id.* (omissions in original).

In a similar vein, a Florida firm put this legend on its home page:<sup>202</sup>

**IMPORTANT NOTICE REGARDING CHANGES TO  
THE BANKRUPTCY LAWS**

***Changes to the bankruptcy laws became fully effective on October 17, 2005. Many people are under the impression that bankruptcy relief is no longer available. In fact, the new bankruptcy laws will have little or no effect on most people and in some cases, the new laws are even more favorable than they were before. Contact our offices and we will explain the many benefits you will enjoy upon filing bankruptcy.***

Other firms were also using Web sites to promote the continuing availability of bankruptcy.<sup>203</sup>

*B. Debt Relief Agency Compliance*

Looming large among the new attorney compliance burdens are the DRA provisions, which consist of three definitions and three long and detailed new sections.<sup>204</sup> Because the focus of this Section is on how the consumer debtor bar is coping with the new law, it will not explore in detail the issue of whether the DRA provisions might apply to creditors' lawyers or lawyers in overlapping fields, such as family law, where bankruptcy considerations might need to be discussed.<sup>205</sup>

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202. See Debt Relief Legal Centers, <http://www.debtrelieflegalcenters.com> (Web site of Feinberg, Isaak & Smith, P.A.).

203. See Tommy Andrews, Jr., P.C., <http://www.andrewslaw.net> ("Over 90 % of Americans who need to file . . . may still be eligible under Chapter 7."); Bayer, Wishman & Leotta, <http://debt-relief-bankruptcy.com> (stating that "Bankruptcy *still* works").

204. See BAPCPA, Pub. L. No. 109-8, § 226, 119 Stat. 23, 66-67 (codified at 11 U.S.C. § 101(12A)) (definition of debt relief agency) and (3) and (4A) (definitions of "assisted person" and "bankruptcy assistance" incorporated into the DRA definition); *id.* §§ 227-229, 119 Stat. at 67-72 (codified at 11 U.S.C. §§ 526-528) (sections captioned "Restrictions on debt relief agencies," "Disclosures," and "Requirements for debt relief agencies."). Throughout this article, the analysis proceeds in terms of whether lawyers are DRAs, not dealing with the nuance that if the lawyer is an employee, officer, director, or agent of a covered entity such as a law firm, it is the law firm that might be a DRA. See *id.* § 226, 119 Stat. at 67 (codified at 11 U.S.C. § 101(12a)(A)) (excluding from the definition of DRAs "any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer").

205. The problem arises from the definitions of BAPCPA § 226 (codified at 11 U.S.C. § 101(12A), (3), (4A)). A DRA under § 101(12A) is a provider of "bankruptcy assistance," which under § 101(4A) covers bankruptcy representation, without any explicit limitation that the assistance be to a debtor, and that is provided to an "assisted person," who under § 101(3) is a person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000, but not necessarily a person who comes to a DRA seeking advice as a debtor. *Id.* A creditor or landlord might fall within this definition. See Sommer, *supra* note 14, at 207 (arguing that lawyers for creditors, including nondebtor spouses with claims, and landlords, fall within the DRA definition). *But see* ABA TASK FORCE ON ATTORNEY DISCIPLINE, REPORT: ATTORNEY LIABILITY UNDER § 707(b)(4) OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 11 (2005), *available*

### 1. The “Debt Relief Agency” Label

To get to the big picture first, a central problem with the DRA provisions is the label itself. Section 528 calls for DRAs to set forth in any advertising of bankruptcy assistance or of assistance with “credit defaults, mortgage foreclosures, eviction proceedings, excessive debt, debt collection pressure, or inability to pay any consumer debt” either the statement: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code,” or “a substantially similar statement.”<sup>206</sup> Sometimes a lawyer advertising help with debt collection problems or foreclosures might not in fact help people file for bankruptcy relief; the courts should obviously avoid the absurd result of requiring lawyers who do not help people file for bankruptcy relief to say that they do. But even as applied to consumer bankruptcy lawyers, this disclosure is problematic.

As discussed in Part I.C, one bankruptcy court has already issued an order stating that lawyers are not debt relief agencies under the new definition in the Bankruptcy Code, and a U.S. District Court has come to the same conclusion.<sup>207</sup> Reading only the language of the various DRA provisions,<sup>208</sup> that court’s reasoning seems difficult to defend and looks like torturing of the text.<sup>209</sup> However, once one gets a full sense of context by reading all the documents in an action brought in Connecticut by two bar organizations, the Connecticut Bar Association and the National Association of Consumer Bankruptcy Attorneys,<sup>210</sup> one feels more doubt. The plaintiffs get to an essential truth in this analysis of the disclosure, “We are a debt relief agency . . . .”<sup>211</sup>

The required statement is not factually accurate and is misleading. Lawyers are not “debt relief agencies,” however that term may be defined by statute, and they differ dramatically from other entities required to provide this language in identical terms. As Plaintiff Attorney Melchionne has testified, “The required language forces me to make statements that impede my ability to distinguish myself from non-attorneys or government agencies.”<sup>212</sup>

The key point is that, other than in the never-land of the 2005 Act, lawyers are not debt relief agencies. If lawyers must use this label in advertising to the general public, they are being forced to engage in deceptive advertising. Courts ought to pause before concluding that Congress

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at <http://www.abanet.org/genpractice/ReasonableInquiry.pdf> [hereinafter ABA REPORT ON § 707(b)(4)] (taking the position that the new provision applies only to attorneys representing consumer debtors).

206. See BAPCPA § 229, 119 Stat. at 71–72 (codified at 11 U.S.C. § 528(a)(4), (b)(2)(B)).

207. See *supra* Part I.C and notes 109, 133.

208. See *id.*; see also *supra* note 134 (citing two cases holding that lawyers are DRAs).

209. See *supra* note 121.

210. See *supra* note 131 (concerning *Connecticut Bar Ass’n v. United States*).

211. See BAPCPA § 229, 119 Stat. at 71–72 (codified at 11 U.S.C. § 528(a)(4), (b)(2)(B)).

212. See Plaintiff’s Memorandum in Support, *supra* note 131, at 25.

intended to require deceptive advertising by lawyers. We do not need a poll of consumers (asking them, “What is a debt relief agency?”) to be confident few would answer “a bankruptcy lawyer.” Bankruptcy lawyers have no power to provide debt relief. They give legal advice and represent clients in cases. Debt relief can be given by creditors or by courts under law, but not by lawyers. The term may make lawyers sound like debt counselors who arrange debt management plans. Section 528(b)(1)(B) shows a specific concern with advertisements that, in order to avoid the word “bankruptcy,” instead use the phrases “federally supervised repayment plan” or “[f]ederal debt restructuring help” to describe chapter 13 because these phrases “could lead a reasonable consumer to believe that debt counseling was being offered.”<sup>213</sup> Congress explicitly meant to avoid confusion of bankruptcy attorneys with debt counseling,<sup>214</sup> yet it chose a phrase that tends to create exactly that confusion. There is the same problem with the term “debt relief agency” as applied to petition preparers; they also do not provide debt relief, but rather fill out bankruptcy forms.

One might argue that the public will eventually learn that lawyers and petition preparers are “debt relief agencies” under bankruptcy law, but then there is another problem. Assuming coverage of lawyers, the statutory disclosure statement for both lawyers and petition preparers is: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” The use of the same label and the same disclosure for both attorneys and nonlawyer petition preparers<sup>215</sup> predictably will mislead members of the public into confusing the two. Furthermore, some of the actions required of DRAs seem to entail legal advice and thus seem to prompt unauthorized practice of law by petition preparers.<sup>216</sup>

Unfortunately, Congress appears to have intended the absurd, that is, to require or at least to authorize use of a deceptive label; although the intent probably was to impose the label, it is unlikely that Congress thought that it would be deceptive. Reading the § 528 disclosure as a whole (“We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”), the main purpose seems to be to ensure that those providing bankruptcy assistance mention the word bankruptcy, so that the debtor does not think that the provider has in mind only nonbankruptcy solutions, such as a debt management plan or consolidation loan involving debt forgiveness or workout over a longer

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213. BAPCPA § 229, 119 Stat. at 72 (codified at 11 U.S.C. § 528(b)(1)(B)).

214. *See id.*

215. The definition of DRA explicitly includes petition preparers. *See id.* § 226, 119 Stat. at 67 (codified at 11 U.S.C. § 101(12A)).

216. *See id.* § 228, 119 Stat. at 70–71 (codified at 11 U.S.C. § 527(c)); *see Sommer, supra* note 14, at 210 (concerning the disclosures required by § 527(c), noting “all of these subjects constitute legal advice about very complicated issues,” so that either petition preparers should not give them or they are being encouraged to engage in unauthorized practice of law).

term with lower payments. In the early 1990s, there was a phenomenon (which may or may not have continued through 2005) of some bankruptcy lawyers for consumer debtors avoiding the word “bankruptcy” in their advertising and sometimes using the phrase “debt relief” instead.”<sup>217</sup> This phrase is less misleading than “debt relief agency” because a bankruptcy lawyer does provide representation to seek debt relief, even though it cannot itself give it. Other lawyers advertised in such a way as to suggest that chapter 13 is not bankruptcy, for example by listing options to deal with debt problems as either “bankruptcy” or “chapter 13.”<sup>218</sup> Section 528(b)(1)(B) indicates a concern with advertisements that, in order to avoid the word bankruptcy, use the phrases “federally supervised repayment plan” or “[f]ederal debt restructuring help” to describe chapter 13.<sup>219</sup> The concern was that these phrases could cause consumers to confuse lawyers and debt counselors.<sup>220</sup>

Arguably, it is sound policy to require lawyers that advertise help with debt problems to mention bankruptcy, if indeed that is a service they provide. On the other hand, unless one thinks that bankruptcy is something to be avoided, even by those in desperate straights who already have a ruined credit rating, it may be silly to require use of the “B” word, sort of like requiring a lawyer who advertises help after auto accidents to mention the possibility of a “negligence lawsuit.” As long as the client learns that bankruptcy is an option before making a decision to file, there may be little harm in the absence of the word from a lawyer’s advertisement. Furthermore, it is possible that aversion to use of the word “bankruptcy” in bankruptcy lawyer advertising had faded away by the time the new law was enacted; certainly we can find many lawyers aggressively touting bankruptcy.<sup>221</sup>

At any rate, the 2005 Act’s legislative history, including the House Judiciary Report<sup>222</sup> and unheeded protests by the organized bar,<sup>223</sup> seem to indicate that Congress meant to apply the term DRA to lawyers as well as to petition preparers. A stated purpose in the House report is “strengthening professionalism standards for attorneys and others who

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217. See Braucher, *supra* note 169, at 552 (finding, in a study of consumer debtors’ lawyers, published in 1993, that five out of thirty-five lawyers who advertised in the Yellow Pages listed “debt relief” without mentioning bankruptcy).

218. See *id.* (reporting that eight of thirty-five lawyers listed their services as “Bankruptcy-Chapter 13”).

219. BAPCPA, Pub. L. No. 109-8, § 229, 119 Stat. 23, 71–72 (codified at 11 U.S.C. 528).

220. *Id.*

221. See *supra* notes 200–03 (concerning content of Web sites promoting availability of bankruptcy).

222. See H.R. REP. NO. 109-31, pt. 1, at 5 (2005) (noting a problem of “misconduct by attorneys and other professionals”); *id.* at 17 (“The bill’s consumer protections include provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases. S. 256 mandates that certain services and specified notices be given to consumers by professionals and other others who provide bankruptcy assistance.”).

223. See Evans, *supra* note 129 (letter sent by the ABA to the Senate in March 2005).

assist consumer debtors with their bankruptcy cases.”<sup>224</sup> By putting this goal immediately after the heading “Consumer Debtor Bankruptcy Protections,”<sup>225</sup> Congress, it would seem, thinks debtors need protection from their own lawyers. Given this evidence of congressional intent, the courts may have to reach the constitutional issue of whether the First Amendment prohibits compelling lawyers to make deceptive statements with which they disagree.<sup>226</sup> There is the possibility of avoiding that issue as to the DRA label, however, by focusing on the fact that there is an alternative: “a substantially similar statement.”<sup>227</sup> Lawyers who represent consumer debtors might still comply with the law if they do not use the phrase “debt relief agency” and instead advertise, “We are a law firm that provides advice on bankruptcy law, including representing debtors in bankruptcy cases when that is appropriate.”<sup>228</sup> Although lawyers’ Web sites often do use the statutory safe-harbor DRA language, some are opting for a hybrid solution of also emphasizing that they are lawyers.<sup>229</sup> Another practice, use of the modifier “congressionally-designated” before “debt relief agency,”<sup>230</sup> is probably not a good idea because of the risk of misleading potential clients. The statement may be literally true in the sense that Congress came up with the term, but it should be avoided because of the potential to confuse the public into thinking that the lawyer is a government agency or that the particular law firm has gone through some sort of government approval process to provide debt relief.

In sum, two solutions to deal with the misleading nature of the DRA label are possible. One is to use the DRA label and safe-harbor language but to attempt to clear up confusion by emphasizing that the DRA is a lawyer or law firm that represents debtors in bankruptcy. This approach may be less risky legally because it involves using the safe-harbor language, but it is also less effective in avoiding confusion than the choice to avoid the DRA label entirely. This choice involves making use of the alternative permitted by the statutory language, a “substan-

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224. See H.R. REP. NO. 109-31, pt. 1, at 17.

225. See *id.*

226. See Chemerinsky, *supra* note 128, at 572–76 (discussing regulation of deceptive commercial speech, but not discussing whether the “debt relief agency” label is itself deceptive); see also *supra* notes 131–34 and accompanying text.

227. BAPCPA, Pub. L. No. 109-8, § 229, 119 Stat. 23, 71–72 (codified at 11 U.S.C. § 528(a)(4), (b)(2)(B)).

228. See Sommer, *supra* note 14, at 211 (arguing that it should be permissible for lawyers to omit the DRA phrase if they make clear that bankruptcy services are offered).

229. See The Law Offices of John T. Orcutt, *supra* note 200 (explaining, at bottom of home page, “**WE ARE A DEBT RELIEF AGENCY. OUR DEBT RELIEF LAWYERS HELP PEOPLE FILE FOR BANKRUPTCY UNDER THE UNITED STATES BANKRUPTCY CODE. IF YOU NEED DEBT RELIEF, OUR LAWYERS ARE READY TO HELP.**”); RGS Legal, Inc., <http://www.rgslegal.us/Home/tabid/69/Default.aspx> (last visited Sept. 18, 2006) (stating at top of home page: “We are a Washington Law Firm as well as Debt Relief Agency proudly helping people file for bankruptcy relief under the United States Bankruptcy Code.”).

230. See Law Office of Carol A. Morrison, *supra* note 9.

tially similar statement,”<sup>231</sup> to the effect that the lawyer practices bankruptcy law and represents debtors in bankruptcy cases. A lawyer can even include the words “debt relief” while avoiding the additional term “agency,” such as stating, “We represent clients in bankruptcy cases, seeking court-ordered debt relief.” Either solution, however, fails to cure a number of other problems with the DRA provisions, problems that raise both policy and constitutional issues.

## 2. *Problematic Elements of Other Required Disclosures*

In addition to the DRA disclosure required under § 528, there are numerous disclosure requirements in § 527. Unfortunately, § 527 makes some outright legal errors and incorporates them into required disclosures.

A DRA is required to provide a clear and conspicuous written notice that “all assets . . . are required to be completely and accurately disclosed in the documents filed to commence the case,”<sup>232</sup> when the only document filed to commence a case is the petition,<sup>233</sup> which does not list assets. Schedules of assets are required to be filed,<sup>234</sup> but not necessarily with the petition<sup>235</sup> and not to commence the case.

A DRA is also supposed to disclose that the assets should be listed in schedules at replacement value under § 506,<sup>236</sup> but § 506 only applies to secured claims, and neither the Bankruptcy Code nor Schedules A and B, for listing real property and personal property, call for use of “replacement value” as defined in § 506.<sup>237</sup> Exempt property should be valued at fair market value under the definition of § 522(a)(2),<sup>238</sup> yet § 527(c)(3) instructs DRAs to advise assisted persons to value exempt property at “replacement value” as defined in § 506, which in the case of household collateral calls for use of retail price.<sup>239</sup> Nothing in § 522(a)(2)

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231. See BAPCPA § 229, 119 Stat. at 71–72 (codified at 11 U.S.C. § 528(a)(4), (b)(2)(B)).

232. See *id.* § 228, 119 Stat. at 69 (codified at 11 U.S.C. § 527(a)(2)(B)).

233. 11 U.S.C. §§ 301–303 (2000 & Supp. IV 2004).

234. See *id.* § 315(b), 119 Stat. at 89 (codified at 11 U.S.C. § 521(a)(1)(B)(i)).

235. See FED. R. BANKR. P. 1007(c) (giving debtors the option to file schedules with the petition or to file them within fifteen days thereafter if the petition is accompanied by a list of all the debtor’s creditors and their addresses and also providing for an extension on a motion for cause shown).

236. See BAPCPA § 228, 119 Stat. at 69–70 (codified at 11 U.S.C. § 527(a)(2)(B), (c)(3)).

237. See *id.* Section 521(a)(B)(i) is silent on valuation issues; Schedules A and B call for listing “the current value of the debtor’s interest,” which—given that the purpose of these schedules is to see what is available for creditors—should be what the debtors’ property can be sold for, not the cost to the debtor to replace the property. A way to finesse the problem in the case of personal property is to tell debtors to value the property at “flea market value,” which is both a sale value and a replacement value, but it is not “replacement value” under § 506(a)(2), which for consumer collateral is the price a retail merchant would charge considering the age and condition of the property. On the other hand, retail merchants do not necessarily sell all types of used personal property, so flea market value may be the only market value.

238. 11 U.S.C. § 522(a)(2). Since the question for the trustee is what could be realized for creditors if the property is sold, that fair market value should be sale value, not replacement value if the debtor were trying to buy the property.

239. See *id.* § 228, 119 Stat. at 79 (codified at 11 U.S.C. § 527(c)(3)(B)).

requires use of retail price as opposed to price on some other market, such as sale through classified ads or in a flea market, where there is no markup for the costs and profit of a retailer.<sup>240</sup> Lawyers probably should not give the § 527 directions to value exempt property at replacement value as defined in § 506.<sup>241</sup>

There are two more errors in the § 527 direction to advise debtors in chapter 13 that “disposable income” is required to be determined in accordance with § 707(b)(2).<sup>242</sup> Under § 1325(b)(3), the expense part of the disposable income determination is only measured by the IRS guidelines used in § 707(b)(2) if the debtor is above median income.<sup>243</sup> For debtors at or below median income, expenses are those that are “reasonably necessary,” as under prior law.<sup>244</sup> Furthermore, the income part of the disposable income determination is confused by the conflict between the forward-looking language of § 1325(b)(1)(B), “projected disposable income to be received,”<sup>245</sup> and the use in § 1325(b)(2) of “current monthly income,”<sup>246</sup> a defined term that is not in fact based on current income but rather on an average of the last six months’ income.<sup>247</sup> One court has held that a forward-looking measure should be used in chapter 13,<sup>248</sup> an approach that has the advantage of basing the plan on actual expectations, rather than on information that may be out of date and thus inaccurate. The effect of this interpretation is to make inaccurate the § 527 disclosure that disposable income in chapter 13 will be based on the § 707(b)(2) approach, which uses a six-month lookback to measure income.<sup>249</sup> Thus, in the case of a debtor at or below median income, the disclosure is inaccurate in two ways.

These errors pose a dilemma for lawyers, assuming that they comply with the DRA provisions. They can give the disclosures as boilerplate and live with an uncomfortable feeling that they have given bad, error-ridden advice, or they can sit down with clients and try to correct all the errors. The choice just to give the disclosures, errors and all, may be the most practical one, until courts find the DRA provisions either inappli-

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240. The case law on valuation for exemption purposes for the most part requires use of the price a willing buyer would pay a willing seller. *See, e.g., In re Sumerell*, 194 B.R. 818, 825 (Bankr. E.D. Tenn. 1996). One case notes that the trustee can get only liquidation value and so the fair market value for chapter 7 liquidation purposes is liquidation value. *In re Walsh*, 5 B.R. 239 (Bankr. D.D.C. 1980). There is no authority that exempt property must be valued at retail price.

241. Corinne Cooper & Catherine E. Vance, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 292–331 (2005).

242. *See* BAPCPA § 527, 119 Stat. at 69 (codified at 11 U.S.C. § 527(a)(2)(C)).

243. *See id.* § 102(h), 119 Stat. at 39 (codified at 11 U.S.C. § 1325(b)(3)).

244. *See id.*, 119 Stat. at 33 (codified at 11 U.S.C. § 1325(b)(2)).

245. *Id.* § 102(h)(1), 119 Stat. at 33 (codified at 11 U.S.C. § 1325(b)(1)(B)).

246. *Id.* § 102(h)(2), 119 Stat. at 32, 33 (codified at 11 U.S.C. § 1325(b)(2)).

247. *Id.* § 102(b), (h), 119 Stat. at 32, 33 (codified at 11 U.S.C. §§ 101(10A), 1325(b)(1)–(2)).

248. *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006) (holding that “projected disposable income” refers to income the debtor “reasonably expects to receive during the term of her plan”).

249. *See* BAPCPA §§ 102(a)(2)(C), 228(a), 119 Stat. at 27–28, 69 (codified at 11 U.S.C. §§ 707(b)(2)(A)(i), 527(a)(2)(C)).

cable to lawyers or unconstitutional. One of the lawyers in the Connecticut case explained:

I have stopped trying to explain all the inaccuracies in the disclosures because the few times that I tried this, the client's reactions were so negative that I lost the client. Additionally, there simply isn't enough time to do it during the consultation. I know that I am providing them with incorrect information, but if I am a debt relief agency, that is what the law requires me to do.<sup>250</sup>

The mistakes discussed above are easy to live with, however, compared to a problem with a long disclosure statement set forth in § 527(b). This disclosure statement begins, "If you decide to seek bankruptcy relief, you can represent yourself, you can hire an attorney to represent you, or you can get help in some localities from a bankruptcy petition preparer."<sup>251</sup> It also states, "The following information helps you understand what must be done in a routine bankruptcy case to help you evaluate how much service you need. Although bankruptcy can be complex, many cases are routine."<sup>252</sup> What follows would not, in fact, help a client figure out whether an attorney is needed.<sup>253</sup> It does not mention the potential traps that could result in dismissal or no discharge under the 2005 Act.<sup>254</sup> It makes at least two legal errors. One is to state that a debtor "will have to pay a filing fee," even though the 2005 Act added a new fee waiver provision.<sup>255</sup> The other is to state that chapter 13 allows debtors to "repay your creditors what you can afford," when that may not be how the disposable income test plays out, particularly for some above-median-income debtors who must make use of IRS expense guidelines unless they can engage in successful rebuttal of a presumption of abuse.<sup>256</sup>

The worst part of this disclosure statement is requiring a lawyer to give a statement to a client that "you can represent yourself" or that "you can get help . . . from a bankruptcy petition preparer."<sup>257</sup> This statement is likely to conflict with the lawyer's professional opinion in more than one way. First, attorneys often have seen cases botched by petition pre-

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250. See Plaintiffs' Motion for Preliminary Injunction, *supra* note 131, Exhibit B, Declaration of Eugene S. Melchionne, at para. 21.

251. BAPCPA § 228(a), 119 Stat. at 69 (codified at 11 U.S.C. § 527(b)).

252. *Id.*

253. See Sommer, *supra* note 14, at 209 (noting that "the statement gives no information that would help someone to evaluate how much service is needed").

254. See *supra* note 174 (identifying some traps for pro se debtors).

255. BAPCPA § 228(a); *id.* § 418, 119 Stat. at 108–09 (codified at 11 U.S.C. § 1930(f)) (providing for fee waiver).

256. See BAPCPA § 102(h)(2), 119 Stat. at 33 (codified at 11 U.S.C. § 1325(b)(3)) (incorporating § 707(b)(2) to determine "reasonably necessary" expenses for above-median-income debtors); *id.* § 102(a), 119 Stat. at 27 (codified at 11 U.S.C. § 707(b)(2)(A)) (providing for a presumed abuse review based on "current monthly income," meaning the average of income over the last six months, even if not accurate now, minus various deductions, some of which do not reflect actual expenses); *id.* § 102(a) (codified at 11 U.S.C. § 707(b)(2)(B)) (allowing rebuttal based on "special circumstances," perhaps including the situation where the debtor actually has less income and more reasonable expenses than the presumed abuse calculation assumes).

257. BAPCPA § 228(a), 119 Stat. at 69 (codified at 11 U.S.C. § 527(b)).

parers and believe that clients should not use them. Congress was sufficiently concerned about petition preparers to add regulation of them in § 110 in the 1994 Act.<sup>258</sup> Second, the 2005 Act has created so many traps that even a sophisticated debtor would have trouble negotiating them without an attorney.<sup>259</sup> Many debtors are not sophisticated; some are illiterate or suffering from mental infirmities. It is not a good way to practice law to give a stock “disclosure” that is obviously wrong for the particular debtor, and perhaps for all debtors, and then try to correct it. A lawyer in the Connecticut challenge to the DRA provisions explained:

If I am a debt relief agency, I am required by the law to make statements with which I do not agree, that violate my ethical duty, and that are not in the best interest of my clients. For example, § 527 requires me to tell my client that they do not need an attorney to file for bankruptcy even if I think that they really do need an attorney. This requirement has not only created confusion for potential clients, but in some cases has caused irreparable harm to their ability to obtain a fresh start from the bankruptcy process. In these cases, potential clients have chosen to proceed without an attorney, but have failed to fully comply with the Code and as a result, they have had their cases dismissed. . . . They may have already been evicted or foreclosed . . . so there is nothing left to save.<sup>260</sup>

Furthermore, a declaration by a client in the same action gives a sense of the potential confusion:

[T]he disclosures we received stated that bankruptcy does not require an attorney. In fact, the description of what needs to be done in the disclosures makes it seem like you just fill out paperwork, send it in, go to court, and you’re done. My husband even asked me why we should pay an attorney if we could do it ourselves.<sup>261</sup>

The disclosures seem designed to prompt this sort of reaction, and under the new law, could lead some debtors to file pro se and neglect various requirements that must be met to avoid dismissal and to get a discharge.<sup>262</sup>

### 3. *The Requirement That the Client Execute a Contract*

Another element of the DRA provisions is a requirement in § 528(a) that a DRA “shall,” not later than five business days after providing any bankruptcy assistance to an assisted person and at any rate before a petition is filed, “execute a written contract with such assisted per-

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258. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 308, 108 Stat. 4106, 4135–37 (codified as amended at 11 U.S.C. § 110). Section 110 was extensively revised by the 2005 Act.

259. See *supra* note 174.

260. See Plaintiffs’ Motion for Preliminary Injunction, *supra* note 131, Exhibit B, Declaration of Eugene S. Melchionne, at para. 22.

261. See *id.* Exhibit E, Declaration of Anita Johnson, at para. 10.

262. See *supra* note 174.

son.”<sup>263</sup> Key terms must be addressed in this contract.<sup>264</sup> For lawyers who sometimes either talk to debtors on the phone or give them initial free consultations, this requirement poses a barrier.<sup>265</sup> The definition of “bankruptcy assistance” is long and grammatically problematic, but it seems to cover giving “advice” whether or not a case is ultimately filed.<sup>266</sup> Thus, any discussion with a debtor may give rise to the requirement of a written contract. However, unless the attorney gets the client to sign a contract before speaking to her, there will be no way to be sure to “execute” a contract “with” the client because the client is free to refuse to sign a contract. A person can be a DRA only if there is “payment of money or other valuable consideration”<sup>267</sup> in return for the advice, but given the breadth of the concept of “consideration,” including any bargain,<sup>268</sup> it is not clear that a free initial consultation is necessarily without consideration, because what the lawyer gets is a chance to sell his services. The bargain is, “If you will come see me and let me have a chance to impress you with what a great lawyer I’ll be for you, I won’t charge you for the first meeting.” The same can be said about a free telephone session—that even if there is no charge, the lawyer is getting something for his advice, which is the chance to impress and land a new client. Obviously, if there is a charge for telephone advice or a first meeting, the lawyer would be a DRA, assuming lawyers are covered at all.

In sum, compliance with the requirement of an executed contract may rule out initial telephone advice (absent an e-mailed or faxed contract before the telephone advice).<sup>269</sup> For in-person first sessions, the safest course would be to have the prospective client execute a written contract before the lawyer speaks to him, although this could scare away clients if the lawyer insists on it.<sup>270</sup> The initial contract might be short and state that the lawyer has not yet agreed to provide representation in a case, that no further services are promised, that no fee is yet agreed to, and that the client is free not to retain the attorney.<sup>271</sup> If attorneys attempt to use such agreements and the clients refuse to sign them, the at-

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263. BAPCPA, Pub. L. No. 109-8, §§ 102, 229, 119 Stat. 23, 71 (codified at 11 U.S.C. § 528(a)(1)).

264. *Id.* § 229(a), 119 Stat. at 71 (codified at 11 U.S.C. § 528(a)(1)(A)–(B)) (providing for explanation of services, fees, and terms).

265. See Plaintiffs’ Motion for Preliminary Injunction, *supra* note 131, Exhibit G, Declaration of Henry J. Sommer, President of the National Association of Consumer Bankruptcy Attorneys, at para. 6 (concerning executed contract requirement deterring consumer bankruptcy attorneys from giving advice on the phone, even in emergencies without charge).

266. See BAPCPA § 226(a)(2), 119 Stat. at 66 (codified at 11 U.S.C. § 101(4A)).

267. See *id.* § 226(a)(3), 119 Stat. at 66 (codified at 11 U.S.C. § 101(12A)).

268. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (defining consideration in terms of bargain). Courts should interpret the Bankruptcy Code reference to payment of other consideration as referring to in-kind payments.

269. See *supra* note 265.

270. See Plaintiffs’ Motion for Preliminary Injunction, *supra* note 131, Exhibit A, Declaration of Charles A. Magliere, at para. 14; *id.* Exhibit B, Declaration of Eugene S. Melchionne, at para. 23 (concerning the difficulty of getting clients to sign anything, even an initial consultation agreement).

271. See BAPCPA, Pub. L. No. 109-8, §§ 102, 229, 119 Stat. 23, 71 (codified at 11 U.S.C. § 528(a)(1)(A), (B)) (concerning required terms).

torney's risk of enforcement activity or liability may not be great, in light of the consumer protection purpose of the requirement.<sup>272</sup> There would be no intentional violation or clear and consistent pattern of violations to trigger a civil penalty.<sup>273</sup> Furthermore, even if the client did sign an agreement, it is not clear that the attorney could produce it in defense of an enforcement action, given the attorney-client privilege.<sup>274</sup> Interestingly, a leading bankruptcy organization recommends only that the attorney provide the debtor with a written retainer agreement setting forth the duties and obligations of both the attorney and the client "no later than the time when the initial fee payment is made or, if the petition is filed before payment of a fee, prior to the petition being filed."<sup>275</sup>

#### 4. *The Gag Rule on Advice About Incurring Debt*

The DRA provision that has caused the most consternation is the gag rule that DRAs "shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney . . ."<sup>276</sup> There is a grammatical ambiguity with this language, as it seems on the most natural reading to bar a DRA from advising an assisted person to pay an attorney.<sup>277</sup> Under this reading, if attorneys are DRAs, they cannot advise clients to pay them. Even if the language is read to prevent a lawyer only from advising a client to incur debt to pay the lawyer,<sup>278</sup> the prohibition is problematic. Lawyers often tell clients they can borrow for fees, for example from a relative. The first part of the gag rule, barring advice on incurring debt for other purposes, is also contrary to standard legal advice.<sup>279</sup>

A lawyer cannot advise a client to incur more debt with intent not to pay it because that would make the debt nondischargeable as fraudulently obtained.<sup>280</sup> Still, the debtor may have urgent needs that require

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272. See *supra* note 42.

273. See BAPCPA § 227, 119 Stat. at 67 (codified at 11 U.S.C. § 526(c)(5)).

274. See Complaint, *supra* note 131, at para. 41 (noting that because of their confidentiality obligations, unless clients waive confidentiality, lawyers would be compromised in their ability to assert defenses).

275. See CONSUMER PRACTICES SUBCOMM., FELLOWS OF THE AM. COLL. OF BANKR., BEST PRACTICES FOR CONSUMER BANKRUPTCY CASES (INCLUDING COMMENTARY) 1 (2006) [hereinafter BEST PRACTICES], available at <http://www.amercol.org/images/BPC%20Update%20and%20Consumer%20Practices%20Subcommittee%20Report%20with%20Commentary%20and%20Questionnaire%20.PDF>.

276. BAPCPA § 227(a), 119 Stat. at 67–68 (adding 11 U.S.C. § 526(a)(4)).

277. A grammatical rescue operation, and not the simplest reading of the language (which involves parallel infinitives "to incur. . . and "to pay"), is to try to make the phrase "to pay an attorney" be an alternative to "in contemplation of such person filing a case under this title," so that the prohibition is only on advising a client to incur debt to pay any attorney. See Plaintiffs' Memorandum, *supra* note 131, at 15 n.8.

278. The Justice Department has taken this position. See *id.* at 12–13.

279. See *id.* at 6–15.

280. 11 U.S.C.A. § 523(a)(2)(A) (2005).

borrowing, including to hire an attorney, for a reliable car, for emergency medical treatment, or to pay back child support or taxes.<sup>281</sup> The debtor might borrow from a relative, with disclosure, and plan to repay after filing even though the debt will be discharged.<sup>282</sup> Other legitimate sources of credit would be borrowing against a pension that would either not be property of the estate or that would be exempt, or borrowing against exempt home equity.<sup>283</sup> In chapter 13, it is common to put most of the debtor's attorneys fees in the plan, and the lawyer thus would be advising the client both to pay her and to incur debt to do so.<sup>284</sup> A debtor might borrow against a home, planning to pay the debt in full in chapter 13, as is required.<sup>285</sup> Similarly, if the full debt amount must be paid for a car in chapter 13,<sup>286</sup> or if the debtor plans voluntarily to pay the full debt, there would be no fraud in buying a reliable car before filing in that chapter. If the debtor planned to file in chapter 7 and reaffirm a car debt in full, there would also be no intent to defraud the lender. Perhaps a closer case would be buying a car with an intent to ride-through on the loan, but not reaffirming and thus not taking on personal liability. Even though such a debtor would discharge personal liability, the debtor would have an intent to repay in full, so there is likely no fraud, even without disclosure of the planned bankruptcy. Furthermore, because a creditor could ask about bankruptcy plans as a standard loan application question, there may be no justifiable reliance on a debtor's omission of a statement about such an intent.<sup>287</sup>

In sum, there are many legitimate reasons and ways to borrow in contemplation of bankruptcy, and § 526(a)(4), if applicable to lawyers, prevents them from telling clients about lawful activities. Several bankruptcy courts and a U.S. District Court have found this provision unconstitutional on First Amendment grounds in that it chills truthful speech about lawful behavior.<sup>288</sup> In his article on constitutional issues under the 2005 Act, Professor Erwin Chemerinsky has concluded that this gag pro-

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281. Child support is nondischargeable. See BAPCPA § 215(1)(A), 119 Stat. at 54 (codified at 11 U.S.C. § 523(a)(5)); *id.* § 314(b), 119 Stat. at 88 (codified at 11 U.S.C. § 1328(a)(2)). Certain tax debts are nondischargeable in chapter 7, § 523(a)(1), and they must be paid in full in chapter 13, § 1322(a)(2) (providing for full payment of priority claims, unless claim holder agrees otherwise).

282. 11 U.S.C. § 524(f) (permitting voluntary repayment after discharge).

283. See Plaintiffs' Memorandum, *supra* note 131, at 9.

284. See *id.* at 13–14 (concerning practice of paying a portion of attorney's fees through the plan).

285. See *id.* at 9 (concerning fact that mortgage debt is typically paid in full during and after chapter 13); see also 11 U.S.C. § 1322(b)(2), (5) (not providing for modification of claims secured only by the debtor's principal residence and allowing for maintenance of payments on mortgage loans on which the last payment is due after the final payment on the chapter 13 plan).

286. See Braucher, *supra* note 158, at 471–73 (concerning issue of whether hanging paragraph of 11 U.S.C. § 1325(a) mandates full debt repayment).

287. See *Field v. Mans*, 516 U.S. 59 (1995) (holding that dischargeability under 11 U.S.C. § 523(a)(2)(A) requires justifiable reliance by the creditor and noting relevance of whether the creditor is naïve, as opposed to sophisticated, to the subjective standard of justifiability).

288. See cases cited *supra* notes 133–34.

vision is the strongest basis for a constitutional challenge.<sup>289</sup> Until the issue is resolved at least at the circuit court level, lawyers will be unsure what to do about giving lawful advice concerning incurring more debt in contemplation of bankruptcy. It is in this context that organized bar groups, namely the Connecticut Bar Association and the National Association of Consumer Bankruptcy Attorneys, have brought test litigation in U.S. District Court in Connecticut.<sup>290</sup>

### C. Attorney Certification Compliance

The organized bar has taken on another major issue directly affecting attorneys, which is what lawyers should do in the way of investigation under the new attorney certification provision in § 707(b)(4).<sup>291</sup> Groups within the American College of Bankruptcy (ACB)<sup>292</sup> and the American Bar Association (ABA)<sup>293</sup> have sought to tamp down the extreme anxiety in the profession<sup>294</sup> about this new provision and have issued advice and analysis. This brief discussion will not attempt to analyze the legal issues in detail, something that has been done elsewhere,<sup>295</sup> but will rather distill the essence of the advice that bar groups are giving to worried consumer debtor practitioners.

The ACB, on the issue of “Investigating the Facts,” states:

The debtor client is, of necessity the primary source of information in a consumer bankruptcy case, and the client’s statement of the facts, obtained in a thorough and probing interview, should be presumed to be true absent particular circumstances that give rise to a suspicion that it is not. The debtor’s attorney should also obtain all documents reasonably available that are necessary to complete the petition, statement and schedules as fully and accurately as is reasonably possible. The debtor should be advised that all information presented to the court must be truthful and complete.<sup>296</sup>

The commentary on this point suggests the following course of action.<sup>297</sup> The attorney should have the client fill out and sign (as “true and com-

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289. See Chemerinsky, *supra* note 128, at 580 (also noting that the court is not likely to declare this provision facially unconstitutional, but rather to find it constitutional as applied to truthful, lawful information).

290. See *supra* note 131.

291. BAPCPA, Pub. L. No. 109-8, § 102(a), 119 Stat. 23, 30 (codified at 11 U.S.C. § 707(b)(4)).

292. See BEST PRACTICES, *supra* note 275.

293. See ABA REPORT ON § 707(b)(4), *supra* note 205.

294. See Giles, *supra* note 2, at 8 (labeling the impact on lawyers as “catastrophic”); Moyer, *supra* note 178, at 14–15 (describing the requirements as “unprecedented” and likely to raise overhead costs and malpractice premiums and, as a result, fees to debtors, thereby pricing out low-income clients).

295. See CORINNE COOPER & CATHERINE E. VANCE, ATTORNEY LIABILITY IN BANKRUPTCY (2006).

296. See BEST PRACTICES, *supra* note 275, at 1.

297. See *id.* at 2.

plete”) a detailed questionnaire. The ACB document even includes an eighteen-page sample questionnaire as an appendix.<sup>298</sup>

The attorney should then interview the client, going over the questionnaire with him. The attorney should collect documents such as bills, collection letters, loan papers, pay stubs, tax returns, and public records. In addition, “[a] credit report and a check of electronic court files for prior bankruptcy cases are examples of documents that are reasonably obtainable at little or no cost and should be obtained in every case.”<sup>299</sup> When evidence collected appears to contradict information given by the debtor, or if the debtor has given conflicting statements, or if the debtor’s answers seem implausible, the lawyer should ask “probing questions.”<sup>300</sup> When the debtor’s responses still do not “comport with other known facts,” then “further investigation is necessary.”<sup>301</sup> Ultimately, unless the debtor’s statements are clearly not supportable in light of other known evidence, the debtor is entitled to present his version of the facts to the court.<sup>302</sup>

The ACB “Best Practices” go on to discuss emergency cases, generally recommending doing as much of the usual investigation as possible, with some bare minimum steps recommended.<sup>303</sup> The final topic is “Preparing Schedules and Statements,” and it takes the position that unless there is reason for suspicion that the debtor is not disclosing significant assets, there is no need for an appraisal or visit to the debtor’s residence.<sup>304</sup> The document describes listing of expenses as “an exercise in estimation.”<sup>305</sup> Once again, the general approach is to encourage the attorney to ask many questions and use her experience to make a best estimate.<sup>306</sup> Overall, in five pages of practical suggestions, and without legal analysis, the ACB has laid out practices that sound time-consuming and challenging, but doable with a certain amount of dedication to the task.

The ABA’s report<sup>307</sup> focuses more on legal analysis. Thus, it makes a good companion piece to the ACB’s report, with its somewhat more concrete attention to techniques and procedures. The first of two key points made by the ABA report is that the “reasonable investigation” expected under § 707(b)(4) should be governed by case law interpreting and applying the “reasonable inquiry” standard under Rule 9011, the bankruptcy analogue to Rule 11 of the Federal Rules of Civil Proce-

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298. *Id.* at app. 1.

299. *Id.* at 2.

300. *Id.*

301. *Id.*

302. *Id.*

303. *See id.* at 2–3 (in particular, recommending a call to the attorney for the creditor, an electronic check of prior bankruptcy filings, and a credit report).

304. *See id.* at 3.

305. *See id.* at 5.

306. *See id.* at 4–5.

307. *See* ABA REPORT ON § 707(b)(4), *supra* note 205, at 7.

dure.<sup>308</sup> This in turn means taking in account time and cost constraints on the investigation but expecting that the attorney will ask “probing and pertinent questions,” check that responses are “internally and externally consistent,” and demand full and honest disclosure before signing and filing the petition.<sup>309</sup> The second key point is that the attorney’s certification that the case is “not an abuse under Section 707(b)(1)” should not be analyzed with the benefit of hindsight, but rather based on what the attorney knew or should have known from the prefiling investigation.<sup>310</sup> The attorney must apply the presumed abuse, rebuttal, “good faith,” and “totality of the circumstances” reviews to the facts, with the last test “not often readily or reliably predictable,” with the attorney free to proceed based on a “non-frivolous argument.”<sup>311</sup>

What comes through in these two reports is that reviewing courts will have a great deal of discretion. Practitioners can certainly expect to see varying “local legal culture.” The messages that come through are “do the best you can,” as well as “expect to be second guessed.” The subtext, however, may be that bankruptcy judges are not looking to ruin consumer debtors’ lawyers by holding them to impossible burdens of inquiry in small cases. Judges have problems of their own.

#### CONCLUSION

The 2005 Act has challenged the professionalism of both bankruptcy judges and debtors’ lawyers. The Act reflects assumptions that both bench and bar were part of the problem. At the same time, it handed them the job of cleaning up after the mess that Congress made with a poorly drafted and designed piece of legislation. Although there have been some lapses from the highest professional standards, individual judges and lawyers and professional organizations have stepped up to make the best of a bad situation and keep the consumer bankruptcy system running on behalf of both creditors and the overindebted. Judges have done the most good when they have focused on the supposed purposes of the law (abuse prevention and consumer protection) as they interpret it, thus thwarting credit industry objectives to throw a monkey wrench in the system’s gears. Lawyers for debtors have had to work overtime to develop workable procedures while also mastering the law’s many new technical twists and turns. Bench and bar have both been handed a rotten assignment, but there is good news about professionalism in their willingness to take it on.

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308. *See id.* at 6, 12–17.

309. *See id.* at 12, 14.

310. *See id.* at 6.

311. *See id.* at 19–21.