BANKRUPTCY REFORM AND HOMEOWNERSHIP RISK

*Melissa B. Jacoby**

The personal bankruptcy system is part of a larger system of household risk management. Much of the discussion about personal bankruptcy has focused on bankruptcy's insurance role with respect to unsecured obligations like credit cards and medical bills. The passage of omnibus bankruptcy legislation coupled with dramatic changes in the home mortgage market indicate, however, that it is time to devote more study to the role of the bankruptcy system in managing home mortgage related risks. In this article, Professor Melissa Jacoby identifies and begins to evaluate chapter 13 as a mortgagor protection law. She explores questions we should ask to determine whether bankruptcy is prolonging unsustainable homeownership. Professor Jacoby then considers the impact of two recent revisions to the Bankruptcy Code relating to credit counseling and repeat filers. She concludes that these kinds of revisions may promote sorting based on homeownership sustainability.

I. INTRODUCTION

All U.S. administrations and congresses in recent history have managed some kind of private party risk.[1] The personal bankruptcy system plays a role in this risk management scheme. To the extent that legal scholarship has evaluated bankruptcy law within this larger framework, it has tended to focus on risk associated with unsecured obligations, such as credit cards, rent, medical bills, or tort judgments. Those debates often

* Professor of Law, University of North Carolina at Chapel Hill. For helpful comments on earlier stages of this project, thanks to Frank Alexander, Scott Baker, Susan DeJarnatt, Mechele Dickerson, Jill Family, Adam Feibelman, Elizabeth Gibson, Mary Holder, Kim Krawiec, Keith Lundin, Bill Marshall, Richard Myers, Katherine Porter, Steve Rhodes, Mark Weidemaier, Mark Weisburd, Bill Whitford, participants in faculty workshops at various law schools in the summer and fall of 2006 and participants in the University of Illinois College of Law symposium on Bankruptcy and Consumer Credit in the Wake of the 2005 Act. I also appreciate the research assistance of Elisha Johnson and Rachel Miles, the library assistance of Nick Sexton, and the financial support of the University of North Carolina School of Law. As usual, I take responsibility for all errors. Special thanks to Charles Tabb for inviting me to participate in the symposium.

1. *See generally* DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER (2002).

have centered on whether and how filers should be screened for the ability to pay such obligations out of future income or wealth even if they would prefer not to pay those debts.[2]

In contributing to this symposium, I hope to foster a distinct debate about the role of bankruptcy law in managing housing-related risks, particularly relating to mortgage debt and foreclosure. The time for this debate is ripe, if not overdue. The 2005 enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), the impetus for this symposium, represents the most significant revision of the Bankruptcy Code in a generation.[3] We need to closely examine how BAPCPA, as implemented in the real world bankruptcy system, affects the use of the system to address various kinds of household financial distress, including mortgage problems. In addition, due to dramatic changes in the mortgage credit market and a governmental push for increased rates of homeownership, a record number of people have obtained mortgage credit that would have been unavailable to them several decades ago.[4] Incurring home mortgage debt has expanded their opportunities, but it has also expanded their risk—for many individuals, the largest financial risk of their lifetimes.[5] Thus, some scholars have suggested that

2. For examples of proposals, see Jean Braucher & Charles W. Mooney, Jr., *Means Measurement Rather Than Means Testing: Using the Tax System to Collect from Can-Pay Consumer Debtors After Bankruptcy*, AM. BANKR. INST. J., Feb. 2003, at 6, 6; Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 1050–51 (2004); Hung-Jen Wang & Michelle J. White, *An Optimal Personal Bankruptcy System and Proposed Reforms*, 29 J. LEGAL STUD. 255, 255–57 (2000).

3. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

4. *See, e.g.*, HARVARD UNIV. JOINT CTR. FOR HOUS. STUDIES, THE STATE OF THE NATION'S HOUSING 2005, at 16–17 (2005), *available at* http://www.jchs.harvard.edu/publications/markets/son2005/son2005_bw.pdf (describing change in home mortgage finance that results in broad array of mortgage products); Brian K. Bucks et al., *Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finance*, FED. RES. BULL., Mar. 22, 2006, at A1, A5–A6 tbl.1, A22 tbl.8 (2006); Howard Lax et al., *Subprime Lending: An Investigation of Economic Efficiency*, 15 HOUS. POL'Y DEBATE 533, 534 (2004) (reporting characteristics of subprime borrowers); William C. Apgar & Allen J. Fishbein, *The Changing Industrial Organization of Housing Finance and the Changing Role of Community-Based Organizations* 1–2 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper BABC 04-09, 2004) (linking technological changes with opportunities and risks for low-income and minority borrowers); Zhu Xiao Di & Xiaodong Liu, *The Importance of Wealth and Income in the Transition to Homeownership* 12 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. W05-6, 2005) (discussing role in expansion of homeownership of underwriting and products with relaxed down payment requirements).

5. The research on this point is extensive and multidisciplinary. *See* Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L. J. 1231, 1232–33 (2005); Dennis R. Capozza & Thomas A. Thomson, *Optimal Stopping and Losses on Subprime Mortgages*, 30 J. REAL EST. FIN. & ECON. 115, 130 (2005) (noting that weak borrowers have a higher default rate but impose higher losses per default due to lower sales prices, higher interest expenses, and higher legal and maintenance expenses); A. Mechele Dickerson, *Bankruptcy and Mortgage Lending: The Homeowner Dilemma*, 38 J. MARSHALL L. REV. 19, 49 (2004); Dan Immergluck & Geoff Smith, *Measuring the Effect of Subprime Lending on Neighborhood Foreclosures: Evidence from Chicago*, 40 URB. AFF. REV. 362, 385 (2005); Lax et al., *supra* note 4, at 537–39 (documenting mortgage trends, including increasing subprime first mortgages); Orla O'Sullivan, *New Foreclosure Phenomenon*, ABA BANKING J., Nov. 2003, at 77, 77–78 (Nov. 2003) (citing subprime lending as a "key reason" for record foreclosures); Apgar & Fishbein, *supra* note 4, at 2–3, 7 (reporting a rise in subprime lending in both

homeownership and mortgage debt "can as easily be a route to poverty and debt as a guarantor of financial gain."[6] Just as bankruptcy has become a legal system of last resort for other types of financial distress, it may be serving that role for mortgage delinquency as well.

This article focuses in particular on whether chapter 13 (repayment plan) bankruptcy is necessary, desirable, and effective as antiforeclosure mortgagor protection, and how two provisions of BAPCPA might alter the answer to that question. In Part II, I start by explaining chapter 13's on-the-books mortgage-protection function: it not only stops a foreclosure, but also allows the filer to try to cure a mortgage arrearage over a several year period.[7] To the several hundred thousand filers who may be pursuing this approach each year, the discharge of personal liability on unsecured obligations is likely to be of lesser import.[8] This mortgagor protection role of chapter 13 has not been well recognized or studied by

dollar amount and volume stemming from structural changes to industry); Robert G. Quercia et al., *The Cost-Effectiveness of Community-Based Foreclosure Prevention* 2 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper BABC 04-18, 2004) (noting that foreclosure rates of subprime, ARMs and subsidized products are higher than the market as a whole). The timing of foreclosure may be different as well for subprime loans. Capozza & Thomson, *supra*, at 126–27.

6. *See* A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273, 1286 (2005) (arguing that data reveal that "middle-class parents can no longer afford to pay the segregation tax without placing themselves at risk financially"); Donna Easterlow et al., *Housing for Health: The Role of Owner Occupation*, 15 HOUS. STUD. 367, 379 (2000); Sarah Nettleton & Roger Burrows, *When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England*, 15 HOUS. STUD. 463, 478 (2000) ("[T]here is now an urgent need to recognise that for significant numbers of people the costs of homeownership in a society marked by increasing levels of individualisation, insecurity and risk can be very great, indeed not just in terms of their wealth, but also in relation to their health."); Eric S. Belsky et al., *The Financial Returns to Low-Income Homeownership* 17 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. 05-9, 2005) ("[G]iven the considerable number of years during the study period when renting was a better option than owning over a variety of shorter holding periods, the constant drum beat for expanded low-income homeownership should be carefully and discriminatingly evaluated."); *see also* Julia Patterson Forrester, *Mortgaging the American Dream: A Critical Evaluation of the Federal Government's Promotion of Home Equity Financing*, 96 TUL. L. REV. 373, 378 (1994) (recommending "that the federal government permit home equity financing without encouraging it").

7. *See* Melissa B. Jacoby, *Collecting Debts from the Ill and Injured: The Rhetorical Significance, but Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 266–69 (2001) (discussing chapter 13's "home-saving function"). For more information on chapter 13 filers, see Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473 (2006) (reporting on longitudinal study of debtors who filed chapter 13 in 1994).

8. Although the proportions vary by district with respect to chapter choice and homeownership, the available data suggest that roughly 30% of nonbusiness cases are in chapter 13, and about half of chapter 13 filers are homeowners. Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, *in* CREDIT MARKETS FOR THE POOR 73 (Patrick Bolton & Howard Rosenthal eds., 2005) (finding that a bankrupt homeowner is almost 50% more likely to choose chapter 13 than chapter 7); Teresa A. Sullivan et al., *Who Uses Chapter 13?*, *in* CONSUMER BANKRUPTCY IN A GLOBAL PERSPECTIVE 279–80 tbls.2 & 3 (Johanna Niemi-Kiesiläinen et al. eds., 2003) (finding in regression that the largest single effect on chapter choice is homeownership among samples of debtors from 1981, 1991, and 1999). Norberg and Velkey's repeat filing findings, however, suggest that the actual number of people using chapter 13 is smaller than the filing rate suggests because many individuals are filing multiple petitions. *See* Norberg & Velkey, *supra* note 7, at 496–503.

real estate scholars.[9] Indeed, some real estate finance researchers have suggested a federal override of state foreclosure laws to *reduce* the mortgagor protection offered by state law without acknowledging that chapter 13 has long been a federal override in the opposite direction.[10] If nothing else, this article prompts those scholars to pay attention to chapter 13.

In Part III, I consider whether chapter 13 is a sensible component of the overall mortgage debt risk management scheme. To fully explore this issue, we will need to know more about how the existence of chapter 13 affects lending and workout decisions, and must compare chapter 13 to alternate antiforeclosure interventions such as loss mitigation programs, mandatory foreclosure insurance, emergency loan and other community organization antiforeclosure approaches, and state laws.[11] Although in-depth research on these issues is beyond the scope of the agenda-setting discussion in Part III, I conclude that there is a risk that chapter 13 has been prolonging unsustainable homeownership in certain situations.

In Part IV, I discuss how two BAPCPA provisions could produce more upfront screening of homeownership sustainability. One provision conditions bankruptcy eligibility on receipt of a credit counseling briefing.[12] The second provision requires early judicial review of the circumstances of repeat filers. Although the drafting is less than ideal, provisions of this nature have the potential to encourage use of more targeted antiforeclosure interventions when appropriate and to discourage home saving in chapter 13 when doing so is likely futile.

9. *See, e.g.*, Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403–11 (2004). *But see* Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 319 (1993) (recognizing that bankruptcy law stays foreclosures and gives debtors the opportunity to cure a mortgage default); *id.* at 323 (noting that federal legislation that indirectly displaces portions of state real estate law have made real estate finance practice more complex).

10. In 1990, Clauretie and Herzog, a finance professor and an FHA actuary, respectively, proposed that Congress provide a federal override of state foreclosure laws to prevent state mortgagor protection provisions from creating large losses. Terence M. Clauretie & Thomas Herzog, *The Effect of State Foreclosure Laws on Loan Losses: Evidence from the Mortgage Insurance Industry*, 22 J. MONEY, CREDIT & BANKING 221, 229, 231 (1990). In another article, Clauretie and Jameson, another finance professor, studied the timing of the foreclosure process to determine whether lenders have insufficient incentives to proceed expeditiously through the process, with no acknowledgement that chapter 13 could delay the process without the mortgagee's consent. *See* Terrence M. Clauretie & Mel Jameson, *Interest Rates and the Foreclosure Process: An Agency Problem in FHA Mortgage Insurance*, 57 J. RISK & INS. 701 (1990).

11. For the importance of comparing bankruptcy to other risk management schemes, see Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 131 (2005) ("[S]cholars of social insurance have largely neglected the connections between their own field and the operation of consumer bankruptcy law . . . [and] economists have been very slow to consider these issues as well."); *id.* at 157 (noting the omission of the bankruptcy system from otherwise comprehensive comparative social insurance studies); *id.* at 161 ("[S]ome scholars of social insurance have addressed this question with respect to nonbankruptcy social insurance programs, but they have not factored the role of bankruptcy into their evaluations."). *See also* Kartik Athreya, *Unemployment Insurance and Personal Bankruptcy*, ECON. Q., Spring 2003, at 33, 33.

12. *See* BAPCPA, Pub. L. No. 109-8, § 106, 119 Stat. 23, 37–38 (codified at 11 U.S.C. § 109(h)); *id.* § 302, 119 Stat. at 75 (codified at 11 U.S.C. § 362(c)).

II. CHAPTER 13 AND MORTGAGOR PROTECTION: THE BASIC LEGAL MECHANISM

Given the relative obscurity of chapter 13 to general readers, a few words are in order about this chapter's mortgagor protection features. When a defaulting mortgage borrower is adamant to keep a home, and the mortgagee is adamant to pursue foreclosure, a chapter 13 repayment plan has legal tools that chapter 7 does not.[13]

When a defaulting mortgage borrower files for bankruptcy, an injunction known as the "automatic stay" almost always will stop a foreclosure in its tracks.[14] Unlike chapter 7, chapter 13 permits a defaulting mortgage borrower to propose a plan to cure the mortgage arrearage over time while she continues with regular mortgage payments in accordance with the contract.[15] If the plan satisfies chapter 13's statutory and case law requirements and conforms to local norms, a mortgagee's objection to the plan is not determinative.[16] Assuming the court confirms the filer's plan, the automatic stay continues to protect the borrower until the plan is completed or the plan fails and the case is dismissed or converted.[17] Thus, chapter 13 overrides mortgagees' contractual and state law rights to pursue foreclosure. Chapter 13 relief is not waivable in advance, and thus the chapter's mortgagor protection components are a tacit part of every mortgage loan agreement.

As noted in the introduction, chapter 13's antiforeclosure elements have not received as much attention as they probably should. When economists have studied the relationship between bankruptcy and home mortgage credit, they have focused on the protection of nonexempt home equity from unsecured creditors rather than on foreclosure prevention.[18] As a practical matter, it is important to study the antiforeclosure aspects of chapter 13 and not just the equity protection aspects because

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13. *See, e.g.*, Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 542 (1993) ("Lawyers say that the number one reason to use chapter 13 is the need to save the home by paying arrearages on a home mortgage."); Susan L. DeJarnatt, *Once Is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L.J. 455, 495 (1999) (referring to home saving over objection of a foreclosing lender as "chapter 13's greatest significance"); Henry E. Hildebrand III, *Consumer Corner: The Sad State of Mortgage Service Providers*, AM. BANKR. INST. J., Sept. 2003, at 10 n.3 (noting that chapter 13 trustees report that home saving is "the" principal reason they see debtors filing chapter 13).

14. 11 U.S.C. § 362 (2000).

15. *Id*. § 1322(b)(5).

16. *Id*. §§ 1325(a), 1327(a) (providing for judicial approval of plan that meets statutory criteria regardless of creditors' position).

17. *Id*. § 362(c) (describing duration of automatic stay). For a discussion of the resolution of chapter 13 plans, see *infra* text accompanying notes 39–41.

18. A nondefaulting mortgage borrower (or outright homeowner) who has home equity to protect might file chapter 13 to pay unsecured creditors out of future income and to receive a discharge if she finishes her repayment plan. For research reaching different conclusions, compare Jeremy Berkowitz & Richard Hynes, *Bankruptcy Exemptions and the Market for Mortgage Loans*, 42 J. L. & ECON. 809 (1999), with Emily Lin & Michelle J. White, *Bankruptcy and the Market for Mortgage and Home Improvement Loans*, 50 J. URB. ECON. 138 (2001).

the available empirical data suggest that the equity-rich bankruptcy filer is a rare occurrence.[19]

Chapter 7, the more frequently utilized bankruptcy option for individuals, is also relevant to housing policy even though its primary function—the discharge—relates to unsecured debt. Consider a borrower who has not (yet) defaulted on a mortgage but is having serious financial trouble, or a borrower who has defaulted on a mortgage but has reached an agreement with her mortgagee. These borrowers might file chapter 7 to discharge unsecured debt, leaving them with more available income to make their mortgage payments and less likely to have their homes encumbered by judgment liens. A defaulting mortgage borrower also might use chapter 7 to part with her home in the hopes of obtaining a better sale price than a state law process would command.[20] Or, a former homeowner might use chapter 7 to shed personal liability on a deficiency judgment from a foreclosure prior to bankruptcy.[21]

All of these approaches to dealing with mortgage issues intersect in important ways; changing the contours of one option may affect others. For conceptual clarity, however, I concentrate on the strongest form of mortgagor protection that federal bankruptcy law offers, namely the antiforeclosure feature of chapter 13.[22]

III. CHAPTER 13 MORTGAGOR PROTECTION AND UNSUSTAINABLE HOMEOWNERSHIP

Chapter 13 generally seems to enjoy support among many bankruptcy professionals. Even when system insiders or scholars criticize chapter 13, they rarely question the justification for chapter 13's strong

19. In an analysis of homeowners in the 2001 Consumer Bankruptcy Project, Bahchieva, Wachter, and Warren found that 2001 filers' homes were highly leveraged and more so than those who filed for bankruptcy in 1991; one third reported having no home equity at all (e.g., mortgage debt equaled or exceeded home values), and more than 60% had loan-to-value (LTV) ratios of 90% or higher. *See* Bahchieva et al., *supra* note 8, at 96–97. The high LTV ratios were not due to short tenure in homes. *See id.* at 97 tbl.4.9. The filers' mean mortgage debt had increased about 17% from the time of home purchase to the time of the bankruptcy filing. *Id.* at 94 (reporting mean mortgage debt of $88,000 at time of home purchase and $103,000 at bankruptcy filing). Home-owning debtors in the 1991 CBP had a median home equity of $5500. TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 200, 221 (2000).

20. *See* Richard H. W. Maloy, *"She'll Be Able to Keep Her Home, Won't She?" The Plight of a Homeowner in Bankruptcy*, 2003 MICH. ST. L. REV. 315, 332–33 (explaining the options available to homeowners under Chapter 7); *cf.* Alex M. Johnson, Jr., *Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy*, 79 VA. L. REV. 959, 959 (1993) (noting foreclosure sale prices are inadequate, causing debtor to lose home equity or exposing debtor to deficiency judgment); Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV. 77 (1996) (discussing lender appropriation of debtor equity in state foreclosure).

21. For data on filers who lost their homes prior to filing for bankruptcy, see Bahchieva et al., *supra* note 8, at 93.

22. *See supra* text accompanying notes 14–17.

form of federal antiforeclosure protection.[23] Some scholars have suggested that chapter 13 does not go far enough to prevent home loss triggered by default on certain kinds of mortgage products.[24] It is possible that proposals to enhance chapter 13's antiforeclosure protection will prove to be desirable. But first we should take a closer and more critical look.

A. Does Chapter 13 Promote Unsustainable Homeownership?

The real estate finance literature suggests that mortgage creditors should want to enter into workouts with sustainable homeowners because workouts in such circumstances are cheaper than foreclosure.[25] By contrast, terminating the lending relationship is preferable if the home-

23. As a slightly different matter, scholars have raised questions about whether home mortgage debt has contributed to the financial collapse of households and thus whether it is sensible for bankruptcy filers to fight to keep their homes. *See* SULLIVAN ET AL., *supra* note 19, at 200 ("For some, the refusal to abandon a home that is no longer affordable brings them to collapse."); Braucher, *supra* note 13, at 542 (indicating, through interviews with lawyers, that it was difficult to convince debtors to give up their home even when they had no home equity and it would be much cheaper to rent); Dickerson, *supra* note 5, at 46 (referring to the "sunk cost trap" that leads people to "cling to their past decisions and then incrementally make overly optimistic but good faith decisions"); Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725, 728 (2005) (applying prospect theory to individuals' fear of home loss); *see also* Hazel Christie, *Mortgage Arrears and Gender Inequalities*, 15 HOUSING STUD. 877, 896 (2000) (reporting reluctance of households with children to move notwithstanding house-related financial problems in a U.K. study).

24. *See, e.g.*, DeJarnatt, *supra* note 13, at 497; Dickerson, *supra* note 5, at 51–55 (proposing that refinance loans be treated differently than purchase money loans); Forrester, *supra* note 6, at 379, 452; David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 50 (2004) (supporting a slightly different proposal than Dickerson); Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 33–37 (2004).

25. *See, e.g.*, Brent W. Ambrose & Charles A. Capone, Jr., *Cost-Benefit Analysis of Single Family Foreclosure Alternatives*, 13 J. REAL EST. FIN. & ECON. 105, 106 (1996) ("Secondary market agencies and insurers are now actively encouraging the use of foreclosure alternatives to control losses on mortgage defaults . . . ."); Ko Wang et al., *Nondiscriminating Foreclosure and Voluntary Liquidating Costs*, 15 REV. FIN. STUD. 959, 960–61, 976 (2002) (theorizing that "a bank should be more likely to work out a solution with the mortgage borrower than to foreclose" and finding that "a bank is more likely to negotiate with borrowers when the liquidating cost is high"); Amy Crews Cutts & Richard K. Green, *Innovating Servicing Technology: Smart Enough to Keep People in Their Houses?* 9 (Freddie Mac Working Paper No. 04-03, 2004) ("Workout options have been widely adopted throughout the mortgage industry, and home retention workouts have risen dramatically in recent years."); *id.* at fig.3 (tracking growth of workouts among FHA, Freddie Mac and Fannie Mae loans); *see also* Apgar & Fishbein, *supra* note 4, at 38 ("[M]any large lender/servicers are partnering with [community based organizations] to develop more effective foreclosure avoidance efforts."); Quercia et al., *supra* note 5, at 10 (describing workout programs, and citing an unpublished study finding that the Minneapolis program saves "industry players an average of $16,000 per avoided foreclosure"); U.S. Dep't of Hous. and Urban Dev., How to Avoid Foreclosure, http://www.hud.gov/foreclosure/index.cfm (last visited Oct. 30, 2006) (including special forbearance, mortgage modification, partial claim, preforeclosure sale, and deed in lieu of foreclosure, all with conditions). HUD maintains a list of approved counseling agencies to help homeowners in distress. *See* Julie L. Williams, Acting Comptroller of the Currency, Remarks Before the Regional Interagency Committee (May 3, 2005) (describing foreclosures as the most immediate community development challenge and stressing the need for multidimensional mortgage delinquency intervention programs), *available at* http://www/occ/treas.gov/ftp/release/2005-94a.pdf; U.S. Dep't of Hous. and Urban Dev., Find a HUD Approved Housing Counseling Agency, http://www.hud.gov/offices/hsg/sfh/hcc/hccprof14.cfm (last visited Oct. 11, 2006).

owner is unsustainable.[26] Mortgage loan servicers have technology to assess homeowner sustainability to some extent.[27]

If it is cheaper for mortgage creditors to do workouts with sustainable borrowers, and if servicers have the technology to identify sustainable borrowers, who are the homeowners with mortgage delinquency who resort to chapter 13? One possibility is that the defaulting mortgage borrowers who proceed to chapter 13 to save homes from foreclosure are the borrowers with the weakest prospects, as they have been turned down for a workout and are unable to obtain replacement financing.[28]

Readers unfamiliar with chapter 13 may be surprised by the expense associated with trying to save homes in this system. Although it is difficult to assess these costs in a vacuum (as opposed to comparing them with alternative interventions), the chapter 13 price tag may be unduly high for solving a discrete mortgage problem, perhaps because chapter 13 is priced and structured to deal with collective problems.[29] The chapter 13 costs include: a growing court filing fee;[30] a trustee's fee;[31] a lawyer's fee (in the several thousand dollar range);[32] a fee for prebankruptcy

26. *See* Richard A. Phillips & James H. VanderHoff, *The Conditional Probability of Foreclosure: An Empirical Analysis of Conventional Mortgage Loan Defaults*, 32 REAL EST. ECON. 571, 573 n.4 (2004) (noting that losses are reduced by foreclosing as quickly as possible in situations where foreclosure is inevitable).

27. *See, e.g.*, Cutts & Green, *supra* note 25, at 14–15. From an analysis of the conditional probability of foreclosure among home mortgage borrowers in default, Ambrose and Capone concluded that lenders who are seeking to maximize profits should "offer[ ] loss-mitigation foreclosure-avoidance options only to true trigger-event defaulters who have a demonstrated hardship and commitment to the property." Brent W. Ambrose & Charles A. Capone, *Modeling the Conditional Probability of Foreclosure in the Context of Single-Family Mortgage Default Resolutions*, 26 REAL EST. ECON. 391, 407, 428 (1998).

28. Some courts and trustees have opined that chapter 13's structure may increase the likelihood of mortgage reinstatement. *In re* Perez, 339 B.R. 385, 391 (Bankr. S.D. Tex. 2006). Yet, this assertion is far from universally accepted. *See* Gordon Bermant, *Chapter 13: Who Pays the Mortgage?*, AM. BANKR. INST. J., June 2001, at 20 (finding no evidence that plans in which ongoing mortgage payments are funneled through a trustee are completed at a higher rate).

29. Feibelman, *supra* note 11, at 162–63 (reviewing public and private administrative costs of personal bankruptcy and comparing to other systems). Norberg and Velkey found that the costs of administering chapter 13 were a "sizable portion" of distributions to creditors, ranging from 15% to 18% of trustee disbursements and, in some years, nearly rivaling the distributions to unsecured creditors. *See* Norberg & Velkey, *supra* note 7, at 536 tbl.41.

30. *See* 28 U.S.C. § 1930 (2000).

31. *See, e.g.*, Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 409 & n.10 (2001) (referring to "hefty administrative expense" of chapter 13); Ed Flynn & Gordon Bermant, *Distributions and Expenses in Chapter 13*, AM. BANKR. INST. J., May 2000, at 22.

32. *See, e.g.*, *In re* Mullings, No. 06-80164, 2006 WL 2130648 (Bankr. E.D. Okla. July 26, 2006) ($3750 "no-look" fee); *see also In re* Larson, 376 B.R. 693 (Bankr. E.D. Va. 2006) ($175 per hour fee); *In re* Murray, 348 B.R. 917 (Bankr. M.D. Ga. 2006) (explaining chapter 13 fee approval procedures). *See generally* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 194 (1997) (noting that chapter 13 legal services generally cost more than chapter 7 legal services, and that "chapter 13 is not necessarily the best buy of legal services"); Braucher, *supra* note 13, at 550–52 ("My best estimate is that, in a majority of chapter 13 cases, lawyers collect at least as much or more as in most chapter 7 cases, and that the increased time and overhead is not significant for many lawyers, so that on average a chapter 13 case is more lucrative than a chapter 7 case.").

credit counseling and a fee for a postbankruptcy financial management course;[33] higher cost of credit due to a reduced credit score;[34] promised repayment of unsecured debt;[35] the mortgage arrearage, interest, and ongoing mortgage payments;[36] and, of course, all ongoing expenses. In addition, the local rules of some districts require that ongoing mortgage payments be funneled through chapter 13 trustees, which can add several thousand dollars of extra expenses.[37] Potential filers' upfront awareness of these costs is unknown and itself deserves closer study.[38]

No one has specifically tracked the outcomes for chapter 13 filers who file for the purpose of saving their homes from foreclosure, but researchers have collected and analyzed data on chapter 13 outcomes more generally.[39] In a newly-released longitudinal study, Professors Scott Norberg and Andrew Velkey found, consistent with prior studies, that two-thirds of the cases in the sample did not result in completed plans.[40] In addition, at least half of the debtors in the sample were cycling

33. *See* BAPCPA, Pub. L. No. 109-8, § 106(a), 119 Stat. 23, 37 (codified at 11 U.S.C. § 109(h)); *id.* § 106(c) (codified at 11 U.S.C. § 1328(g)).

34. Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 186 (2005).

35. *See* 11 U.S.C. § 1325(a)(4), (b) (2000). How much they actually are required to pay to unsecured creditors depends in part on whether they had nonexempt equity because chapter 13 filers must promise to pay creditors at least as much as they would have received in a chapter 7 liquidation. As noted elsewhere, many debtors in the 2001 CBP reported having mortgages that were fully secured or undersecured, or had only a bit of equity. *See* Bahchieva et al., *supra* note 8, at 94. In addition, the fact that they promise to commit payment does not mean they pay, especially if they drop out early. In Norberg and Velkey's study, fully half of the filers ended up paying nothing to general unsecured creditors. *See* Norberg & Velkey, *supra* note 7, at 544 tbl.46. Even under BAPCPA, sometimes higher-income chapter 13 filers will have minimal or no obligations to pay their unsecured creditors. *See, e.g.*, *In re* Barr, 341 B.R. 181, 185 (Bankr. M.D.N.C. 2006) (finding that BAPCPA disposable income rules trump one's actual ability to pay unsecured debt).

36. BAPCPA has strengthened the mortgage lender's entitlement to this treatment. *See* BAPCPA, § 306(c)(1), 119 Stat. 23, 80–81 (codified at 11 U.S.C. § 101(13A)) (defining debtor's principal residence to include mobile homes and to clarify that liens on incidental property do not affect treatment of lender's claim).

37. *See, e.g.*, *In re* Perez, 339 B.R. 385, 410 (Bankr. S.D. Tex. 2006) (calculating extra amount of payments for debtors who pay mortgage through trustee over sixty-month plan, but concluding that none of debtors addressed in plan "*deserve* to be allowed to make direct payments to their mortgagees" (emphasis added)). *See generally* Michaela M. White, *Direct Payment Plans*, 29 CREIGHTON L. REV. 583, 602–03 (1996).

38. For a study of how homeowners make decisions pending foreclosure, see Barbara Gross, *Consumer Response to Time Pressure: A Qualitative Study of Homeowners in Foreclosure*, 21 ADV. IN CONSUMER RES. 120 (1994). In general, the decision to initiate a bankruptcy is not well understood. *See* Tashira K. Hira & Kyle L. Kostelecky, *Pilot Study of Consumer Debtors Provides New Insights—What Influences Debtors' Attitudes?*, AM. BANKR. INST. J., Apr. 1995, at 1, 1 ("[N]o studies have been carried out on the decision making process debtors undertake when determining whether to file for bankruptcy.").

39. The earlier empirical studies of chapter 13 plan completion have been reviewed elsewhere and need not be rehashed here. *See, e.g.*, Jacoby, *supra* note 7, at 247–50.

40. *See* Norberg & Velkey, *supra* note 7, at 505–06 tbls.18 & 19. Norberg and Velkey studied 795 chapter 13 cases filed in 1994 in seven judicial districts (N.D. Ga., S.D. Ga., M.D.N.C., M.D. Tenn., W.D. Tenn., D. Md., W.D. Pa). These districts comprised almost 20% of all the chapter 13 filings that year. *See id.* app. A at 549–50. For percentages calculated only from confirmed plans, see *id.* at 507–08 tbls.20 & 21.

through bankruptcy (and often chapter 13) multiple times.[41] In Norberg and Velkey's words, "with each successive filing, the debtor is less likely to complete a plan, and more likely to have sought relief without the intent or ability to consummate a plan."[42] It is possible, but unlikely, that defaulting mortgage borrowers had a higher rate of plan completion than other filers, or that the noncompleters dropped out of chapter 13 only after having cured their mortgage arrearages.[43] Likewise, one would expect defaulting mortgage borrowers to be *more* likely, not less likely, to file multiple chapter 13 cases than those who are not faced with the prospect of losing their homes.[44]

A household-by-household cost-benefit analysis is not the end of the story, of course. Chapter 13 filers neither shoulder all the costs nor receive all the benefits of this system. Unfortunately, it is nearly impossible to characterize the aggregate impact, in part because real estate finance scholars have not conceptualized chapter 13 as a mortgagor protection statute.[45] Some researchers clearly are aware that bankruptcy

41. *See* Norberg & Velkey, *supra* note 7, at 497 fig.3. For a breakdown of previous and subsequent filings, see *id.* at 498 tbl.11.

42. *Id.* at 519–20.

43. Judges, trustees, and lawyers have opined that debtors might be curing secured debt arrearages before dropping out of their plans, in which case it would be possible that they would save their homes without plan completion. *See* Gordon Bermant, *What is "Success" in Chapter 13? Why Should We Care?*, AM. BANKR. INST. J., Sept. 2004, at 20, 65. However, "success-by-dismissal stories are probably rare." Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 474 (1997). Nearly 23% of the chapter 13 cases in the Norberg and Velkey sample were dismissed or converted (but mostly dismissed) *before* plan confirmation. *See* Norberg & Velkey, *supra* note 7, at 506 tbl.18. A single-court study similarly found that most of the chapter 13 filings in the sample that took place on or right before "foreclosure Tuesday"—and thus were likely home-saving-related—were dismissed within the first six months. Michael Catrett, *A Month of Debtors: "Foreclosure Tuesday" and the Rush to Chapter 13 in the Houston Division of the Southern District of Texas*, AM. BANKR. INST. J., May 2005, at 24, 82–83. In a study of participants in a foreclosure prevention program, debtors were in arrears for, on average, five or six months of mortgage payments. *See* Quercia et al., *supra* note 5, at 20 tbl.7. Six months is likely too short a time for many defaulting mortgage borrowers to cure their arrearages, which is why some nonchapter-13 interventions are not viable. *See* DeJarnatt, *supra* note 13, at 496; *see also* Christie, *supra* note 23, at 886–87 (discussing the difficulty of making up arrears and continuing with regular mortgage payments).

44. Housing policy scholars have observed recidivism in mortgage troubles outside of bankruptcy. *See generally* Quercia et al., *supra* note 5, at 8, 27 (reporting that a study of mortgage counseling participants found that "about 40 percent of all borrowers in the program, and about 30 percent who avoided foreclosure, reported being late on payments again 12 months after program intervention" and also reporting from literature review that "[e]vidence shows that many borrowers, even if they can stave off foreclosure once, may face difficulties again several years later"); Christie, *supra* note 23, at 886–87.

45. For analyses of state-supplied mortgagor protection statutes, see, for example, Karen Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, REV. ECON. & STAT. (2006) (estimating that loan sizes are smaller in judicial foreclosure states and concluding that this reflects a reduced supply of credit); Terrence M. Clauretie, *State Foreclosure Laws, Risk Shifting, and the Private Mortgage Insurance Industry*, 56 J. RISK & INS. 544, 552 (1989) (concluding that judicial foreclosure, statutory right of redemption and antideficiency statutes add significantly to mortgage risk); Clauretie & Herzog, *supra* note 10, at 229, 231 (predicting borrowers in more protective states eventually will pay higher private mortgage insurance premiums); Charles M. Kahn & Abdullah Yavas, *The Economic Role of Foreclosures*, 8 J. REAL EST. FIN. & ECON. 35, 46 (1994) (arguing that mortgagor protection laws have substantial effects on the market); Phillips & VanderHoff, *supra* note 26, at 584 (proposing that less protective laws will reduce costs and will lower interest rates). *Cf.* Michael H. Schill, *An Eco-*

plays some role, but tend not to build bankruptcy—and certainly not chapter 13 in particular—into their analyses.[46] Thus, very few real estate studies even acknowledge the existence of chapter 13 and its antiforeclosure provisions, let alone try to study its impact or compare it to state law and other approaches.[47] Perhaps some real estate finance experts cannot fathom that defaulting mortgage borrowers would file chapter 13 to save their homes when they have zero or negative equity,[48] but even many of these experts would acknowledge that the determinants of mortgage default and recovery are not completely understood.[49]

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nomic Analysis of Mortgagor Protection Laws, 77 VA. L. REV. 489, 491 (1991) (finding that state mortgage protection laws impact interest rates less than prior studies indicated).

46. *See, e.g.*, Ambrose & Capone, *supra* note 27, at 407, 422 (discussing a study that included a bankruptcy variable indicating that debtor filed for some sort of bankruptcy protection). Ambrose and Capone report:

> [B]ankruptcy petitions increase the probability of low-LTV borrower reinstatement by 15 percentage points (Table 8). This again indicates the presence of trigger-event defaulters who are working to save their properties. For high-LTV borrowers, the principal effect appears to be in buying time to either sell the property or forestall foreclosure. The probability of their property sale or foreclosure increases by nearly 4%, while reinstatement rates decline by 2% . . . .

Id. at 422; *see also* THE REINVESTMENT FUND FOR THE PA. DEP'T OF BANKING, MORTGAGE FORECLOSURE FILINGS IN PENNSYLVANIA (2005), *available at* http://www.trfund.com/resourse/downloads/policypubs/mortgage.Forclosure.Filings.pdf; Peter J. Elmer & Steven A. Seelig, *Insolvency, Trigger Events, and Consumer Risk Posture in the Theory of Single-Family Mortgage Default*, 10 J. HOUSING RES. 1, 2 (1998).

47. For some studies that do recognize chapter 13, see Quercia et al., *supra* note 5, at 22 tbl.9 (discussing a study of the Mortgage Foreclosure Prevention program in Minneapolis, which reported that, between 1991 and 2003, the proportion of participants ending up in chapter 13 has been stable at around 4%); Cheryl Long, Negative Effects of Personal Bankruptcy for Homeowners: Lost Homes and Reduced Credit Access, at 20 (July 11, 2005) (unpublished manuscript, on file with Colgate University) (using a limited sample of Panel Study of Income Dynamics data, finding that chapter 7 has a "significant and negative effect on homeownership, but the effect of homeownership of Chapter 13 bankruptcy, although still negative, is no longer significant at the conventional level").

48. For the literature on conceptualizing default as a put option, see, for example, Brent W. Ambrose et al., *Optimal Put Exercise: An Empirical Examination of Conditions for Mortgage Foreclosure*, 23 J. REAL EST. FIN. & ECON. 213 (2001) [hereinafter Ambrose et al., *Optimal Put Exercise*]; Brent W. Ambrose et al., *Pricing Mortgage Default and Foreclosure Delay*, 29 J. MONEY, CREDIT & BANKING 314, 315 (1997) [hereinafter Ambrose et al., *Pricing Mortgage Default*]; Cutts & Green, *supra* note 25, at 9–10; Roberto G. Quercia & Michael A. Stegman, *Residential Mortgage Default: A Review of the Literature*, 3 J. HOUSING RES. 341, 350–51 (1994). Models of default now take transaction costs into account. *See, e.g.*, Capozza & Thomson, *supra* note 5, at 115. They also now recognize that foreclosure is only one possible consequence of default. *See* Ambrose et al., *Pricing Mortgage Default*, *supra*, at 315; Ambrose & Capone, *supra* note 25, at 106; Kahn & Yavas, *supra* note 45, at 35 (noting that foreclosures occur in a small proportion of instances of nonperformance and using the difference in rates as a proxy for renegotiation in the analysis); Mickey Lauria et al., *An Investigation of the Time between Mortgage Default and Foreclosure*, 19 HOUSING STUD. 581, 582 (2004); Phillips & VanderHoff, *supra* note 26, at 572 (reporting that 20% of defaults result in actual foreclosure).

49. Real estate finance researchers increasingly recognize that borrowers' continuation of the mortgage may depend on factors such as job loss, medical problems, or divorce. *See* Ambrose & Capone, *supra* note 27, at 427–28 (1998); Clauretie, *supra* note 45, at 548 (including variable for trigger event in spite of mixed evidence for their role); Elmer & Seelig, *supra* note 46, at 2; *cf.* Capozza & Thomson, *supra* note 5, at 126–27, 130 (study of subprime loans finding that trigger events did not play expected role); Quercia & Stegman, *supra* note 48, at 376 (concluding that role of borrower-related factors and transaction costs in default remained less clear as of 1994). Other research explores the broader financial climate. *See, e.g.*, Elmer & Seelig, *supra* note 46, at 14–15 (referring to entire financial picture of each consumer); Easterlow et al., *supra* note 6, at 376 (referring to interest rates and macroeconomic climate). *But see* Quercia & Stegman, *supra* note 48, at 374–75 (reporting, as of 1994,

Beyond case-by-case and aggregate financial evaluation, it is important to consider the psychosocial costs associated with government intervention that prolong unsustainable homeownership. Debts that enable the acquisition of a home can be "a chronic strain on an individual's financial well-being, and ultimately emotional well-being."[50] A growing body of literature, largely from the United Kingdom, focuses specifically on the health impact of mortgage troubles.[51] Scholars have reported a connection between mortgage indebtedness and subjective well-being.[52] They also have described "marginal homeownership" or "unsustainable" homeownership as a public health issue.[53] Thus, it is possible that chapter 13, by prolonging unsustainable homeownership while adding extra financial obligations, serves as a pathway through which home mortgage indebtedness contributes to adverse health outcomes.[54]

that "household income and mortgage payment have been found both to have an effect and no effect on default" and concluding that the mixed results arise from lack of adequate panel data).

50. Patricia Drentea, *Age, Debt and Anxiety*, 41 J. HEALTH & SOC. BEHAV. 437, 438, 447 (2000) (studying credit card debt, but proposing that other types of debt be studied). A number of papers have been written on the relationship between debt, financial strain, and health. *See, e.g.*, P.R. Duberstein et al., *Suicide at 50 Years of Age and Older: Perceived Physical Illness, Family Discord and Financial Strain*, 34 PSYCHOL. MED. 137, 142, 144–45 (2004) (reviewing literature showing "significant associations of depression in older adults with severe physical illness, financial strain and relationship difficulties" and finding mixed results depending on type of regression, but concluding that "[f]inancial adversity and family discord, particularly in the context of a mental disorder, should alert healthcare providers to the possibility of suicide risk"); Angela C. Lyons & Tansel Yilmazer, *Health and Financial Strain: Evidence from the Survey of Consumer Finances*, 71 S. ECON. J. 873, 888 (2005) (finding "[t]here is little evidence that financial strain contributes to poor health suggesting that it is unlikely that large financial burdens accelerate a decline in health status" but "[i]t may be the case that financial strain may significantly increase the probability of poor health for those with serious health conditions"); Barbara O'Neill et al., *Financially Distressed Consumers: Their Financial Practices, Financial Well-being and Health*, 16 FIN. COUNSELING & PLAN. 73, 79–80, 82 (2005) (summarizing a study of debt management plan participants that found a positive association between health status and recommended financial behaviors—"respondents who reported poorer health are more likely to perceive their health is affected by financial problems than those in very good health"—as well as finding the association varies with age, employment status and family size); Richard Reading & Shirley Reynolds, *Debt, Social Disadvantage and Maternal Depression*, 53 SOC. SCI. & MED. 441, 442 (2001) (citing studies finding associations between health and financial problems, money worries and housing tenure).

51. *See, e.g.*, JANET FORD ET AL., HOME OWNERSHIP IN A RISK SOCIETY 153–68 (2001); Christie, *supra* note 23, at 898–901; Easterlow et al., *supra* note 6; Sarah Nettleton & Roger Burrows, *Mortgage Debt, Insecure Home Ownership, and Health: An Exploratory Analysis*, 20 SOC. OF HEALTH & ILLNESS 731 (1998); Nettleton & Burrows, *supra* note 6.

52. *See* Nettleton & Burrows, *supra* note 51, at 738–43; *see also* John Cairney & Michael H. Boyle, *Home Ownership, Mortgages and Psychological Distress*, 19 HOUSING STUD. 161, 162–63 (2004) (discussing Canadian study of differences between homeownership with mortgage debt and homeownership without).

53. *See, e.g.*, Roger Burrows, *Mortgage Indebtedness in England: An 'Epidemiology*,' 13 HOUSING STUD. 5, 6 (1998) ("There is good evidence to suggest that the experience of mortgage arrears is such a stressful life event and is now so common that it could usefully be reconceptualised as a major public health issue."); Nettleton & Burrows, *supra* note 6, at 478.

54. *See* Cairney & Boyle, *supra* note 52, at 172 (referring to the importance of elaborating on the terms of housing tenure to clarify pathways between homeownership and health).

B. The (Sustainable Homeownership) Case for Chapter 13?

Taken together, the assumptions and factors explored in the prior section invite greater scrutiny of chapter 13 as mortgagor protection. But the assumptions themselves deserve greater scrutiny. It is an empirical question whether mortgage servicers offer workout options to all sustainable defaulting mortgage borrowers. There are many reasons why defaulting borrowers may not be able to get workouts outside of bankruptcy. A mortgage servicer may take a narrow view of sustainability, both in terms of the surplus income to be eligible and the length of time over which an arrearage must be paid. Servicers may randomly decline workouts to sustainable borrowers due to moral hazard concerns.[55] Stories have circulated of seemingly arbitrary acts of servicers, negligent servicing, or aggressive pursuit of foreclosure to appropriate debtors' equity.[56] Chapter 13 may provide at least a limited check on servicer activity that is inconsistent with governmental and societal promotion of homeownership.[57] In addition, even if a defaulting borrower could obtain substitute financing to address the foreclosure, the direct costs of doing so could be considerable and, thus, may decrease sustainability. Also, for individuals with mortgage delinquency as well as other debt problems, the costs and risks associated with bankruptcy's collective forum are somewhat more justified.

For defaulting mortgage borrowers who cannot get a private workout, notwithstanding a reasonable prospect of curing the arrearage, the existence of chapter 13 may reduce psychosocial costs with respect to sustainable defaulting mortgage borrowers. Some studies have found that renters tend to have worse health than homeowners with mortgages.[58] The litany of oft-mentioned benefits of homeownership need not be repeated here, but homeownership is thought to offer more than physical shelter; it is positively associated with wellbeing,[59] and provides a source

55. Some research suggests that lenders should randomly reject requests for loan workouts to avoid having to screen for actual borrower distress, but that lenders are more likely to do this if their policies are not observable. *See* Wang et al., *supra* note 25, at 976; *see also* Ambrose & Capone, *supra* note 25, at 117.

56. *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POL'Y DEBATE 753, 756–58 (2004); Duncan Kennedy, *Cost Benefit Analysis of Debtor Protection Rules in Sub-prime Market Default Situations* (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. BABC 04-02, 2004) (comparing "high road" and "low road" creditors' willingness to invest in antiforeclosure devices, depending in part on whether creditors seek to profit from appropriating debtors' equity).

57. *See* 11 U.S.C. § 1322(d) (2000) (setting plan lengths).

58. *See* Cairney & Boyle, *supra* note 52, at 169–70 ("There is a gradient in mental health status by housing tenure; home owners without mortgages report lower levels of distress than home owners with mortgages, who in turn report lower levels of distress than those who live in rental accommodation. This effect holds even after controlling for age, gender, marital status, education, income and stress."). *But see* Belsky et al., *supra* note 6, at 17–18.

59. *See, e.g.*, Cairney & Boyle, *supra* note 52, at 162; Dickerson, *supra* note 5, at 20 ("Research indicates that homeowners feel better about themselves, maintain better and safer neighborhoods, and live in neighborhoods that have better schools.").

of "ontological security."[60] When individuals struggle with the fear, or the actuality, of home loss, they may experience a "biographical disruption," with "profound consequences for a person's sense of self and social identity."[61]

C. Identifying Sustainable Homeowners?

Part III.B suggested that chapter 13 might provide an otherwise unavailable workout option for sustainable homeowners. Yet, for the reasons explored in Part III.A, the costs of chapter 13 may outweigh the benefits as applied to unsustainable homeowners. A judge is supposed to confirm a chapter 13 repayment plan only after finding that "the debtor will be able to make all payments under the plan and to comply with the plan."[62] This can be interpreted as a tool to sort filers with housing problems on the basis of sustainability.

Notwithstanding this feasibility mandate, commentators believe this provision has little bite in practice, even in the face of evidence that filers are often unsuccessful.[63] Prior to BAPCPA, judges spent little time on

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60. Burrows, *supra* note 53, at 6 (noting circumstances challenging ontological security of homeownership); Nettleton & Burrows, *supra* note 6, at 474–77 (noting that uncertainty and train of events out of control "are coming to be regarded as amongst the most crucial determinants of poor health in contemporary societies"). From a study of families in Swinton in the United Kingdom, Christie observed:

> The common experience of mortgage arrears, beyond inadequate income and financial hardship, was enforced spatial mobility and exclusion from a range of social networks and services. But beyond these physical and material problems the household members also spoke about the emotional trauma of being in arrears: the worry that they would not manage, the fear of loosing [sic] their home, the uncertainty about the future, and the sense of failure. As Nettleton, et al., argue, problems arose not just with the practicalities of what happened but with how it made them feel. Although the pressures of managing on limited resources had repercussions for families and households, the burden often fell heavily on individuals, and especially on women. While impoverishment eroded the autonomy of households, and closed down their options, the management and experience of arrears contributed to the creation and perpetuation of gender inequalities *within* the home.

Christie, *supra* note 23, at 898 (citation omitted); *id.* at 901 ("[S]ocial exclusion was a feature of the lives of defaulting households."); *see also* William M. Rohe & Michael A. Stegman, *The Effects of Homeownership on the Self-Esteem, Perceived Control and Life Satisfaction of Low-Income People*, 60 J. AM. PLAN. ASS'N. 173, 174–76 (1994).

61. Nettleton & Burrows, *supra* note 51, at 746; Nettleton & Burrows, *supra* note 6, at 474–75 (referring to social isolation, stigma, changed social status, sense of failure and impact on self-confidence associated with having lost their homes constituting biographical disruption). The conception of biographical disruption comes from Michael Bury, *Chronic Illness as Biographical Disruption*, 4 SOC. HEALTH & ILLNESS 167, 169 (1982) ("[I]llness, and especially chronic illness, is precisely that kind of experience where the structures of everyday life and the forms of knowledge which underpin them are disrupted."). Bury disaggregates biographical disruption into three components: (1) "disruption of taken-for-granted assumptions and behaviors," (2) "more profound disruptions in explanatory systems normally used by people, such that a fundamental re-thinking of the person's biography and self-concept is involved," and (3) a response "involving the mobilization of resources, in facing an altered situation." *Id.* at 169–70.

62. 11 U.S.C. § 1325(a)(6) (2000).

63. *See, e.g.*, Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill*, 44 SANTA CLARA L. REV. 1065, 1088–89 (2004); LoPucki, *supra* note 43, at 474–75; Norberg & Velkey, *supra* note 7, at 508–09 (referring to the "heartbeat test" of feasibility). Even members of the U.S. Supreme Court have hinted at the possibility that the feasibility analysis was inadequately undertaken. *See* Till v. SCS Credit Corp., 541 U.S. 465, 496–97 (2004) (Scalia, J., dissenting). Some

front-end screening of personal bankruptcy filers.[64] Indeed, some judges apparently do not review chapter 13 plans at all. They have delegated this review, in one form or another, to chapter 13 trustees, who do not have financial incentives to heavily scrutinize homeownership sustainability.[65] Furthermore, whether due to financial incentives or beliefs in "last, last chances," it also seems that debtors' lawyers are insufficiently screening their potential clients for ability to complete a multiyear repayment plan.

Leaving the chapter 13 door wide open does offer some catch-all consumer protection.[66] At least in the very short term, chapter 13 tempers the impact of the decision to turn unsecured consumer debt into mortgage debt and then defaulting on it.[67] Chapter 13 buys time for people who have misunderstood the terms of their adjustable rate mortgages

judges and trustees also have made plans less feasible for debtors by requiring that they promise to pay certain percentages of unsecured debt, which makes curing the mortgage even more difficult. Braucher, *supra* note 32, at 196. It is possible, however, that BAPCPA will bring an end to these practices.

64. *See* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 598 (2001) (noting that "[j]udges simply don't spend much time on consumer cases" and explaining why); LoPucki, *supra* note 43, at 472 ("most [bankruptcy judges and chapter 13 trustees] are wedded to the idea that cases must be mass processed and cannot be given individual attention"). Researchers at the Federal Judicial Center found in the 1980s that judges spent an average of six minutes per chapter 7 nonbusiness case and twenty-three minutes per chapter 13 case. *See* Gordon Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988–1989 Bankruptcy Court Time Study*, 65 AM. BANKR. L.J. 491, 504 tbl.3 (1989). If the same survey were conducted today, one would suspect both that the average would be smaller and, even then, would be skewed upward by a very small number of cases that took considerable time. *See* Gordon Bermant, *A Day in Bankruptcy*, AM. BANKR. INST. J., June 2003, at 20 (reporting that 4440 chapter 7 cases and 1823 chapter 13 cases are filed on the average working day).

65. *See generally* Braucher, *supra* note 32, at 195–96.

66. For an earlier iteration of this argument, see generally William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 400 (1994) ("The boom in consumer bankruptcy could be seen as an indictment of other supposed consumer remedies—if consumers had other methods of stopping collection activities they find intolerable, fewer would use bankruptcy."); *id.* at 402 ("If the debtor claims a defense to a secured claim under the contract or consumer protection legislation, however, bankruptcy provides an efficient forum for asserting that claim. The litigation takes place in bankruptcy court, where delays in obtaining a hearing because of case backlog are less common than in general civil courts. Because the consumer debtor has an attorney for the bankruptcy, obtaining legal help in asserting the defense is practical. Often the bankruptcy attorney will assert a defense to a secured claim without charging an additional fee to the basic charge for the bankruptcy.").

67. *See* HARVARD UNIV. JOINT CTR. FOR HOUS. STUDIES, *supra* note 4, at 1, 6, (reporting cash-out of $139 billion in home equity in 2004); Bucks et al., *supra* note 4, at A29 (noting that 31% in the 2004 SCF used funds for debt consolidation); Glenn Canner et al., *Mortgage Refinancing in 2001 and Early 2002*, FED. RES. BULL., Dec. 2002, at 469; Kathleen W. Johnson, *Recent Developments in the Credit Card Market and the Financial Obligations Ratio*, FED. RES. BULL., Autumn 2005, at 473, 482 (hypothesizing that households are substituting mortgage debt for credit card debt); George S. Masnick et al., *Emerging Cohort Trends in Housing Debt and Home Equity* 26 figs.12 & 13 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. W05-1, 2005) (showing "skyrocketing" in cash-out refinances and "sharp increase" in second mortgage borrowing); Richard T. Curtin, National Survey of Home Equity Loans, Survey Research Center, University of Michigan, WP51 14 (Oct. 1998) (between 1988 and 1997, finding that "[t]he largest change has been the growing use of second mortgages for the consolidation of existing credit card debt").

on the verge of a major reset.[68] Chapter 13 also can be seen as a type of short-term housing policy for senior citizens who now are more likely to carry mortgages and thus run the risk of home loss.[69] Homeowners who believe they are victims of predatory lending might resort to chapter 13 while explicit regulation of predatory lending remains mired in controversy.[70] But, as of now, chapter 13 has neither a proven track record with respect to these functions nor the specific tools that might be required to deal with these issues adequately.

This discussion leads me to conclude, at least tentatively, that even if chapter 13 should remain a component of an overall antiforeclosure scheme, some additional sustainability-based sorting would be desirable. This brings us to BAPCPA's revisions of the Bankruptcy Code.[71]

68. For discussion of the growth of ARMs, see Bucks et al., *supra* note 4, at A29–A30 (noting that in 2004 SCF, 15% had ARMs, up from 11.4% in 2001); James R. Hagerty, *The Home-Mortgage Muddle: Some Borrowers Are Confused by Terms of Adjustable-Rate Loans*, WALL ST. J., Mar. 11–12, 2006, at B4 (reporting Mortgage Bankers Association statistics that ARMs accounted for about a third of mortgages originated in 2004 and 2005); HARVARD UNIV. JOINT CTR. FOR HOUS. STUDIES, *supra* note 4, at 16 (indicating that the share of conventional mortgage originations attributed to ARMs was 18% in 2003 and 35% in 2004). For an analysis of default risk based on lack of knowledge of terms or affordability once the rate is reset, see Erick Bergquist et al., *Pipeline*, AM. BANKER, Dec. 2000, at 12 (2005) (reporting that New York ratings agency, Fitch, Inc., anticipated a 10–15% rise in subprime delinquencies due to resets and inability to refinance in light of inadequate home value); Brian Bucks & Karen Pence, *Do Homeowners Know Their House Values and Mortgage Terms?* 18–20 (Federal Reserve Working Paper No. 2006-3, 2006), *available at* http://www.federalreserve.gov/pubs/feds/2006/200603pop.pdf; Christopher L. Cagan, Mortgage Payment Reset: The Rumor and the Reality 30–32 (First American Real Estate Solutions, Feb. 8, 2006) (unpublished manuscript), *available at* http://www.loanperformance.com/infocenter/whilepaper/FARES_resets_whitepaper_021406.pdf. *See generally* Donald F. Cunningham & Charles A. Capone Jr., *The Relative Termination Experience of Adjustable to Fixed-Rate Mortgages*, 45 J. FIN. 1687, 1702 (1990) (concluding that adjustable rate mortgages have a greater default risk and a lower prepayment probability than fixed rate mortgages).

69. *See* William C. Apgar & Zhu Xiao Di, *Housing Wealth and Retirement Savings: Enhancing Financial Security for Older Americans*, *in* OXFORD HANDBOOK OF PENSIONS AND RETIREMENT INCOME (Gordon L. Clark et al. eds., forthcoming 2006) (reporting on growth in mortgage debt among older Americans that is outpacing growth among younger Americans); Craig Copeland, Debt of the Elderly and Near Elderly, 1992–2001, 4 EMP. BENEFIT RES. INST. NOTES 2, Apr. 2004, at 1, 3, *available at* http://ebri.org/pdf/notespdf/0404notes.pdf (reporting on the growth in relative magnitude of housing payments since 1992, the increase in households with debt payments exceeding 40% of income and attributing trends in part to home mortgage refinancing and home equity loans that transform unsecured debt into secured debt); Masnick et al., *supra* note 67, at 2–3, 25 (evaluating mortgage debt trends of households reaching retirement age, and exploring elderly households' use of home equity through cash-out refinances and additional loans).

70. For studies of predatory lending, see, e.g., Apgar & Di, *supra* note 69 (reporting on equity stripping and mortgage abuse among older Americans); Apgar & Fishbein, *supra* note 4, at 1 (noting "noticeable uptick in abusive lending practices" involving low-income and minority households); *id.* at 12 ("In addition to available survey data, there is a growing body of econometric evidence that mortgage brokers do in fact target uninformed borrowers, and that their focus on the subprime marketplace is reinforced by a mortgage delivery system that provides incentives to participants to take advantage of the situation."); Belsky et al., *supra* note 6, at 11.

71. For an overview of the legislation's consumer bankruptcy aspects, see generally Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 11–34 (2001). For a longer history of consumer bankruptcy development, see Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32–37 (1995).

IV. BAPCPA AND SUSTAINABLE HOMEOWNERSHIP SORTING

A. Credit Counseling

BAPCPA requires a briefing from an approved credit counseling service within 180 days prior to filing as a condition for bankruptcy eligibility.[72] A requirement relating to prebankruptcy counseling has the potential to channel financially distressed homeowners into a targeted anti-foreclosure program. In that instance, a counselor with special expertise, and not judges who must handle myriad situations in a court setting, would be able to assess a defaulting mortgage borrower's likelihood of curing the mortgage and help achieve a private workout or suggest a viable exit strategy.[73] As of now, it is likely that many of the approved counseling programs focus on unsecured debt management and will not be well-equipped to address mortgage problems.[74] Yet, this need not be the case.

Also, judges are required to scrutinize the circumstances of individuals who file for bankruptcy without the requisite counseling briefing, which itself presents a narrow opportunity for sorting defaulting homeowners. A debtor who has not received such a briefing must submit a waiver request to the court if she wishes to be eligible for bankruptcy.[75] Debtors with many kinds of financial problems, but no foreclosure looming, should be able to satisfy the credit counseling requirement before filing, assuming that they know the counseling provision exists.[76] Those who have a foreclosure scheduled imminently seem more likely to seek a court waiver of this requirement.[77]

72. BAPCPA, Pub. L. No. 109-8, § 106(a), 119 Stat. 23, 37 (codified at 11 U.S.C. § 109(h)(1)).

73. This is the function of mortgage foreclosure prevention programs. *See* U.S. Dep't of Hous. & Urban Dev., *supra* note 25.

74. *See* Lea Krivinskas, *"Don't File!": Rehabilitating Unauthorized Practice of Law-Based Policies in the Credit Counseling Industry*, 79 AM. BANKR. L. J. 51, 70 (2005); David A. Lander, *A Snapshot of Two Systems that are Trying to Help People in Financial Trouble*, 7 AM. BANKR. INST. L. REV. 161, 186–87 (1999). For an assessment of the counseling requirement and its likely effectiveness overall, see 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, 554 (2005).

75. *See* BAPCPA § 106(a), 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)(3)(A)). The statute also specifies circumstances under which the requirement will not apply at all, but they are limited, and I do not review them in this article.

76. Although not the topic of this article, this assumption of knowledge of the provision should not go unchallenged. In addition to pro se filers, some debtors apparently have underprepared lawyers who have not ensured that their clients have satisfied BAPCPA's requirements. *See, e.g.*, *In re* Collins, 335 B.R. 646, 649 (Bankr. S.D. Tex. 2005) (represented debtor dismissing and refiling fifth case at time of law change without preparing to rebut presumption applicable in repeat filings); *In re* Skarbek, No. 05-9002b, 2005 WL 3348879, at *1 (Bankr. W.D. Pa. Dec. 6, 2005) (lawyer conflating credit counseling requirement with financial management course requirement); *In re* Collins, 334 B.R. 655, 656 (Bankr. D. Minn. 2005) (represented debtor voluntarily dismissed chapter 13 and filed chapter 7 next day, became entangled in new repeat filing provisions, and failed to serve creditors with notice of request for automatic stay extension).

77. For post-BAPCPA credit counseling cases involving looming home loss, see, for example, *In re* Dixon, 338 B.R. 383 (B.A.P. 8th Cir. 2006); *In re* Burrell, 339 B.R. 664 (Bankr. W.D. Mich. 2006); *In*

The statute explicitly delegates to judges the power to decide, within some limits, whether the waiver is warranted.[78] The limits operate as a one-way ratchet; when the statute is clear, this usually means the judge is required to eject the defaulting mortgage borrower from bankruptcy.[79] When more judicial discretion is required, it generally will relate to whether the debtor's certification has described "*exigent* circumstances that *merit* a waiver" that is "satisfactory to the court."[80] An important dimension of the "exigent circumstances" inquiry should be whether bankruptcy will serve some otherwise unavailable insurance function for the debtor if initiated today.[81] A debtor should not have exigent circumstances that merit a waiver simply because a foreclosure is scheduled.[82]

I must be realistic about the scope and impact of this alleged sorting opportunity. First, some (although not all) judges already seem disinclined to interpret "exigent circumstances" in the way I have described.[83] Indeed, some judges believe the provision is foolish and have expressed frustration when its application requires ejecting a defaulting mortgage borrower from bankruptcy.[84] Although this provision is clearer than others in BAPCPA, the language still leaves room for consequential statu-

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re Salazar, 339 B.R. 622 (Bankr. S.D. Tex. 2006); *In re* Tomco, 339 B.R. 145 (Bankr. W.D. Pa. 2006); *In re* Mingueta, 338 B.R. 833 (Bankr. C.D. Cal. 2006); *In re* DiPinto, 336 B.R. 693 (Bankr. E.D. Pa. 2006); *In re* Miller, 336 B.R. 232 (Bankr. W.D. Pa. 2006); *In re* Sosa, 336 B.R. 113 (Bankr. W.D. Tex. 2005); *In re* Talib, 335 B.R. 417 (Bankr. W.D. Mo. 2005); *In re* Wallert, 332 B.R. 884 (Bankr. D. Minn. 2005).

78. BAPCPA § 106(a), 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)(3)(B)).

79. *In re* LaPorta, 332 B.R. 879, 882 (Bankr. D. Minn. 2005); *In re Wallert*, 332 B.R. at 888–89 ("[T]here is literally no other possible outcome, when the very specific, nondiscretionary terms of the Act are applied just as they read. . . . [T]he structuring of this requirement was a matter of policy, committed in the first instance to Congress and not one that the courts may second-guess on its merits.").

80. *See* BAPCPA § 106(a), 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)(3)(A)(i)) (emphasis added).

81. *See, e.g.*, *In re LaPorta*, 332 B.R. at 882–83 (refusing to approve counseling waiver because chapter 7 contains no tools to fix on longer term basis the debtor's problem, and thus filing was not exigent); *see also* 11 U.S.C. § 362(d)(2)(B) (2000).

82. *See In re Dixon*, 338 B.R. at 388 (upholding the bankruptcy court's finding, on an abuse of discretion standard, that debtor did not show exigent circumstances sufficient to merit a waiver when state law provided twenty days notice of foreclosure sale); *In re DiPinto*, 336 B.R. at 700 (holding that imminent foreclosure, while constituting an exigent circumstance, does not merit a waiver). This provision should be seen as analogous to a court considering whether to lift the automatic stay because property is not necessary for an effective reorganization. *See* 11 U.S.C. § 362(d)(2)(B). There, the court evaluates not only whether the property is theoretically necessary, but whether that reorganization is reasonably possible. *See* United Sav. Ass'n of Texas vs. Timbers of Inwood Forest Assoc., 484 U.S. 365, 375–76 (1988).

83. For example, in the District of Maryland and elsewhere, a claim of exigent circumstances requires only the assertion that the debtor is facing a looming event, such as foreclosure, and not an assessment of how the debtor got into the situation or how the bankruptcy case will help. *See In re* Childs, 335 B.R. 623 (Bankr. D. Md. 2005) (per curiam); *In re* Cleaver, 333 B.R. 430 (Bankr. S.D. Ohio 2005) (holding that sheriff's sale is an exigent circumstance whether or not exigency is self-created or created by other factors).

84. *See, e.g.*, *In re* Sosa, 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005); *Judges Openly Criticize New Law; Opinions Interpreting BAPCPA Amendments Offer Harsh Reviews*, CONSUMER BANKR. NEWS, Mar. 16, 2006.

tory interpretation. For example, the debtor requesting a waiver must submit a "certification."[85] Many judges interpret "certification" to require formalities and explicit detail,[86] while others are more flexible regarding both substance and form.[87] Courts can disagree on whether the statute creates a waiting period between requesting counseling services and filing a bankruptcy petition.[88] Judges also affect the sorting impact of this provision by establishing the consequences of ineligibility, with most courts dismissing the case but some courts "striking" the case.[89] The ways in which judges handle such issues alter the capacity of the provision to serve as a screen for sustainable homeownership. Additionally, appellate courts will likely review a bankruptcy court's handling of a waiver under a highly deferential standard and, thus, may not provide a meaningful check on less stringent applications of the meaning of "exigent circumstances that merit a waiver."[90]

Furthermore, the screening opportunities offered by this provision are incomplete. Many filers who do not comply with the counseling re-

85. *See* BAPCPA § 106(a), 119 Stat. at 37 (codified at 11 U.S.C. § 109(h)(3)(A)).

86. *See, e.g.*, *In re* Tomco, 339 B.R. 145, 155 (Bankr. W.D. Pa. 2006) (requiring certification to contain names of agencies contacted, manner in which debtor contacted agencies, and responses of agencies); *In re* Mingueta, 338 B.R. 833, 837 (Bankr. C.D. Cal. 2006) (citing 28 U.S.C. § 1746 and stating that "[a]n unsubstantiated request is not a certification"); *In re* DiPinto, 336 B.R. 693 (agreeing with collected cases measuring sufficiency of certification against 28 U.S.C. § 1746). In *Mingueta*, however, the debtor made no explanation, let alone an unsubstantiated one. *In re Mingueta*, 338 B.R. at 837.

87. *See In re* Childs, 335 B.R. 623, 626 (Bankr. D. Md. 2005) (per curiam) (certification requires simple description and need not be under oath); *see also In re* Graham, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005) (certification need not be under penalty of perjury).

88. For example, does the debtor have to request counseling from more than one service? *Compare In re DiPinto*, 336 B.R. at 649 ("To allow the Debtor under these circumstances to fulfill his obligation by contacting but a single credit counselor would reward token effort."), *with In re* Hubbard, 333 B.R. 377, 387 (Bankr. S.D. Tex. 2005) (a debtor need not scour the field for available credit counselors, but rather need only contact one). Does a lawyer's inquiry suffice? *In re Hubbard*, 333 B.R. at 385 (debtor may not rely on counsel's general conclusion that services are unavailable, but may allow lawyer to make request specifically on her behalf). Can a debtor file earlier than five days after first requesting counseling if she can show counseling would have been unavailable for the next five days in any event? *Compare In re DiPinto*, 336 B.R. at 700 ("[W]hile the Court finds merit to the argument that the requirement probably *should* be five prepetition days, the Court cannot conclude that the plain reading of the statute supports that result."), *and In re Graham*, 336 B.R. at 298 n.6 ("[I]f a debtor reasonably believes that he or she cannot reasonably complete the offered credit counseling within the five-day period, he or she need not wait until the end of the five-day period to file his or her bankruptcy petition."), *with In re* Gee, 332 B.R. 602, 604 (Bankr. W.D. Mo. 2005) (seeming to interpret the five-day waiting period strictly).

89. If the petition is "stricken" for ineligibility rather than "dismissed," a debtor still will lose a filing fee and automatic stay protection, but will not be a "repeat filer" upon returning to bankruptcy a second time within a year. For cases in which the petition is stricken, see, for example, *In re* Salazar, 339 B.R. 622 (Bankr. S.D. Tex. 2006) (upholding validity of postbankruptcy foreclosure sale in stricken case where debtor was ineligible because of the lack of credit counseling); *In re* Rios, 336 B.R. 117, 180 (Bankr. S.D.N.Y. 2005); *In re Hubbard*, 333 B.R. at 388 (deciding to strike filing due to BAPCPA-provided consequences of having prior case dismissed); *cf., e.g.*, *In re Tomco*, 339 B.R. at 161 (deciding that dismissal was necessary); *In re* Ross, 338 B.R. 134, 141 (Bankr. N.D. Ga. 2006) (concluding dismissal, rather than striking, is proper response).

90. *See, e.g.*, *In re* Dixon, 383 B.R. 383, 383 (B.A.P. 8th Cir. 2006) (reviewing grant of waiver under clear error standard due to discretionary nature of waiver request).

quirement will not be identified (if they do not file a waiver request) and will slip into the system unnoticed.[91] In busy districts, this is especially likely to occur. Also, the counseling requirement is becoming so easy to satisfy through short internet briefings that even defaulting mortgage borrowers may be able to satisfy the requirement before filing.[92] Thus, the number of cases screened this way will likely be extremely small.

B. Repeat Filers

BAPCPA also introduced a provision requiring higher scrutiny of repeat filers.[93] This represents a stronger statutory charge to sort filers based on sustainable homeownership than the counseling provision. Prior to BAPCPA, a bankruptcy filer virtually always was protected by an automatic stay (with no affirmative showings) that enjoined all collection activity, including foreclosure.[94] Creditors could seek to lift the automatic stay, but this entailed considerable cost.[95] At least on the books, the new law shifts the burden sharply to the debtor if she fits the statutory definition of a repeat filer (e.g., if she has had a prior case dismissed in the past year). The statute provides that the automatic stay will be terminated after thirty days if the debtor does not make affirmative showings, noted below, to the judge's satisfaction.[96]

This provision clearly implicates defaulting mortgage borrowers, and intentionally so.[97] Defaulting mortgage borrowers facing imminent

91. *See generally In re Tomco*, 339 B.R. at 154–60 (agreeing with the *Ross* court); *In re Ross*, 338 B.R. at 140 ("Especially in a jurisdiction such as this one with a high volume of individual filings, it is quite conceivable that administration of an individual's case might proceed despite § 109(h) ineligibility because the question does not immediately come to the attention of the court."); *id.* at 141 (noting that some commentators believe the § 109(h) requirement is waivable). Section 109 eligibility requirements are generally thought not to be jurisdictional. Thus, they do not prevent the receipt of relief if no one raises the issue. *Cf.* 2 COLLIER ON BANKRUPTCY ¶ 109.06 (15th ed., rev. 2006) (discussing chapter 13 eligibility requirements).

92. For a list of approved counselors, including many internet-based providers, see U.S. Trustee Program, List of Credit Counseling Agencies Approved Pursuant to 11 U.S.C. § 111, http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm (last visited Sept. 5, 2006).

93. BAPCPA, Pub. L. No. 109-8, § 302, 119 Stat. 23, 75–76 (codified at 11 U.S.C. § 362(c)).

94. *See* 11 U.S.C. § 362(a) (2000).

95. *Id.*

96. *See id.* § 362(c)(3) (providing that stay terminates after 30 days for some filers). Another provision, § 362(c)(4), addresses debtors who have had two cases pending and dismissed within the prior year. In such instances, the stay is not to go into effect at all unless a party in interest makes the requisite showing within thirty days. To simplify the discussion, I focus only on § 362(c)(3).

97. The home mortgage industry was a key supporter of this provision. *See, e.g.*, *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the Subcomm. on Commercial and Admin. Law*, 105th Cong. 148, 153–56 (1998) (testimony of Thomas H. Boone, Countrywide Home Loan, Inc.) (proposing additional provisions that would require an automatic stay to be lifted in thirty days for repeat filer); Nat'l Bankr. Rev. Comm'n, Commission Meeting (Dec. 17, 1996) (statement of Garry Seligson, Vice President and General Counsel, Citicorp Consumer Asset Division) (proposing restrictions on repeat filing that require debtor to show significant change in circumstances demonstrating that she will be able to confirm and perform a plan); Memorandum from Eric Friedman, Countrywide Home Loans, to Melissa Jacoby and Elizabeth Warren, Professor of Law, Harvard Law School (April 14, 1997) (on file with author) (offering repeat filing statistics, re-

foreclosure cannot wait to get beyond BAPCPA's one year lookback period, as other debtors might.[98] Consequently, this provision increases the possibility that defaulting mortgage borrowers will have only short-term automatic stay protection unless they can justify extended protection.[99] Although not representative of the universe of cases, many of the publicly available court decisions on repeat filing thus far involve chapter 13 filers with mortgage delinquency.[100]

The repeat filer's "good faith" is a pivotal component of the debtor's request for an extension of the automatic stay beyond thirty days.[101] The statute delineates some factual circumstances to be considered, including whether the debtor has experienced a substantial change in the debtor's "financial or personal affairs" since the dismissal of the prior case and whether there is "any other reason to conclude" that the debtor will complete the instant case successfully.[102] To fill gaps in the statute regarding the meaning of good faith, courts have been resorting to multifactor and fact-driven tests of good faith in the common law that involve likelihood of fixing financial problems, including curing a mortgage.[103]

Screening chapter 13 repeat filers could be consistent with the goal of promoting sustainable homeownership without prolonging unsustainable homeownership. It could help ensure that those who are allowed multiple chances to use chapter 13's mortgagor protection features have a reasonable likelihood of success, and also might encourage mortgage servicers to allow a wider array of workout options with sustainable borrowers. Due to the posture of the required review, it would be difficult for judges to allocate this responsibility to chapter 13 trustees. Ideally,

porting that repeat filers comprised 10% of the bankruptcy filers they were servicing, and advocating for elimination of stay in repeat filings).

98. *See, e.g.*, Catrett, *supra* note 43, at 82 ("During 1999 and 2001, 50% of the sampled chapter 13 filings occurred on the Monday before and the morning of Foreclosure Tuesday, and in 2003, 40% of the filings occurred on those two days. The automatic stay stops the auction on the courthouse steps.").

99. BAPCPA, Pub. L. No. 109-08, § 311, 119 Stat. 23, 84–85 (codified at 11 U.S.C. § 523(a)(2)(C)).

100. For repeat filing cases involving looming home loss, see, for example, *In re* Easthope, No. 06-20366, 2006 Bankr. LEXIS 826 (Bankr. D. Utah Mar. 28, 2006); *In re* Ziolkowski, 338 B.R. 543 (Bankr. D. Conn. 2006); *In re* Baldassaro, 338 B.R. 178 (Bankr. D.N.H. 2006); *In re* Kurtzahn, 337 B.R. 356 (Bankr. D. Minn. 2006); *In re* Parker, 336 B.R. 678 (Bankr. S.D.N.Y. 2006); *In re* Ball, 336 B.R. 268 (Bankr. M.D.N.C. 2006); *In re* Warneck, 336 B.R. 181 (Bankr. S.D.N.Y. 2006); *In re* Johnson, 335 B.R. 805 (Bankr. W.D. Tenn. 2006); *In re* Collins, 335 B.R. 646 (Bankr. S.D. Tex. 2005).

101. BAPCPA § 302, 119 Stat. at 75 (codified at 11 U.S.C. § 362(c)) (providing that party in interest may move for stay continuation and must demonstrate that the filing "is in good faith as to the creditors to be stayed").

102. *Id. See generally* Richardo I. Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 823 (2005) (noting that the provision may require "mini-confirmation hearings").

103. *See, e.g.*, *In re Baldassaro*, 338 B.R. at 187–88 (adjusting the First Circuit good faith test); *In re Ball*, 336 B.R. at 274; *In re* Mark, 336 B.R. 260, 265–67 (Bankr. D. Md. 2006); *In re* Havner, 336 B.R. 98, 103–04 (Bankr. M.D.N.C. 2006); *In re* Galanis, 334 B.R. 685, 692–93 (Bankr. D. Utah 2005); *In re* Montoya, 333 B.R. 449, 458–60 (Bankr. D. Utah 2005).

however, it should lead debtors' lawyers to engage in more due diligence of their potential debtor clients' likelihood of financial recovery, both in a first filing and in a repeat filing.

Notwithstanding the potential of this new repeat filing provision to sort individuals on the basis of homeownership sustainability, statutory amendments to the Bankruptcy Code tend to have a more modest impact than their appearance on paper would suggest.[104] Preferring the role of arbiter of disputes to system gatekeeper, some judges may be reluctant to deny a defaulting mortgage borrower's request for a stay extension unless creditors actively oppose it.[105]

In addition, as suggested in the discussion of the credit counseling provision, BAPCPA's provisions are remarkably susceptible to a wide array of statutory interpretations.[106] The repeat filing provision is drafted particularly poorly, leading to some recent judicial interpretations that may significantly mute the screening function I envision. For example, under one interpretation, terminating the stay frees only those creditors who have taken *formal* action against the debtor (lawsuits, garnishment,

104. *See generally* Jacoby, *supra* note 34, at 176–82.

105. *See In re* Beasley, 339 B.R. 472 (Bankr. E.D. Ark. 2006); *In re* Phillips, 336 B.R. 818, 870 (Bankr. E.D. Okla. 2006) ("Attorneys who practice before this Court are advised that if their Motion to Extend the Automatic Stay is unopposed, the Court may grant the Motion under certain circumstances without the necessity of a hearing."); *In re* Warneck, 336 B.R. 181, 182 (Bankr. S.D.N.Y. 2006) ("Where no presumption of bad faith arises, and where no party objects, a request to extend the automatic stay should be liberally granted."); *In re* Charles, 332 B.R. 538 (Bankr. S.D. Tex. 2005). In an earlier writing, I predicted that the efficacy of this provision would depend on creditor vigilance because some judges believed that debtors may need multiple opportunities to succeed in chapter 13 repayment plans. *See* Jacoby, *supra* note 34, at 179–80.

106. There are multiple theories to explain the drafting choices. Complex and uncertain new gatekeepers, plus the additional uncertainty of judicial discretion, may have furthered the drafters' goal of imposing costs to arbitrarily thin the ranks of bankruptcy filers. *See, e.g.*, Jacoby, *supra* note 7, at 262–66 (identifying discharge reduction function of bankruptcy reform legislation). It is not clear, of course, that deterring bankruptcy filings will automatically increase lenders' profits. *See, e.g.*, Sumit Agarwal et al., *Exemption Laws and Consumer Delinquency and Bankruptcy Behavior: An Empirical Analysis of Credit Card Data*, 43 Q. REV. ECON. & FIN. 273 (2003). The BAPCPA screens may have been attractive to proponents because of the ways in which they might favorably alter their leverage in nonbankruptcy negotiations. However, one cannot rule out the "legislative monster" theory, namely that the bankruptcy system has grown into something sufficiently complex that Congress cannot understand it well enough to predict the effects of amendments. *See* L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050, 1051 (1990) (noting that Congress intended RICO for use against crime syndicates but it has been applied to "legitimate businesses"); Garrett E. Land, *Judicial Assessment or Judicial Notice? An Evaluation of the Admissibility Standards for DNA Evidence and Proposed Solutions to Repress the Current Efforts to Expand Forensic DNA Capabilities*, 9 J. MED. & L. 95, 114 (2005) ("DNA legislation has produced a monster . . . . "). Congress' reliance on interest groups has the potential to ameliorate or exacerbate the legislative monster problem. Professors Nourse and Schacter's study of the Senate Judiciary Committee suggests that Congressional actors were more inclined to delegate authority to lobbyists regarding BAPCPA than on other legislative items. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 587–88 (2002). Institutions engaged in consumer lending activities likely delegated the drafting and lobbying tasks to government affairs lawyers rather than employees who understood the inner workings of bankruptcy. Government affairs lawyers are less well-suited to fine tune the system in more substantive and sophisticated ways.

liens) prior to the bankruptcy filing.[107] Under another, terminating the stay does not free creditors seeking to pursue *property of the estate*, such as a home subject to a defaulted mortgage loan, from the stay.[108] The latter interpretation, if adopted more broadly, will substantially hinder the ability of mortgage servicers to pursue foreclosure even when a filer cannot show that her current circumstances are likely to enable her to cure her arrearage and continue with her payments.

Finally, the provision applies to only a subset of repeat filers who have a relatively short gap between their cases.[109] This will not capture all repeaters who avoid foreclosure through multiple bankruptcy filings.[110] Thus, as with the credit counseling waiver review, this new provision is significantly underinclusive with respect to screening for homeownership sustainability.

V. CONCLUSION

Instruments of housing policy appear in unexpected places.[111] Although scholars of mortgage debt and foreclosure generally are aware that some bankruptcy filers own homes, chapter 13's specific anti-foreclosure function has not received sufficient scholarly attention. Thus, this article aims to encourage more critical analysis of the role of chapter 13 as part of a larger mortgagor protection scheme at a time when both bankruptcy law and the home mortgage market are in flux.

Although firmer conclusions will depend on the result of further study of chapter 13 as mortgagor protection law, this article has sought to examine the assumption that prolonging homeownership in all instances is consistent with promoting sustainable homeownership. Thus, reform efforts that encourage the sorting of defaulting homeowners or encourage cheaper, more targeted, nonbankruptcy workouts ultimately may be beneficial to the overall scheme. These considerations provide an alter-

107. *See In re* Jones, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006); *In re* Paschal, 337 B.R. 277, 278 (Bankr. E.D.N.C. 2006). As an interesting twist, this interpretation serves as an incentive for creditors to engage in formal, rather than informal, collection activity across the board, which is a subject of recent media interest.

108. *See In re* Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006); *In re* Johnson, 335 B.R. 805, 806 (Bankr. W.D. Tenn. 2006). Although the House Committee Report says little other than restating the statutory language, it gives the impression of a complete termination of the automatic stay. *See* H. REP. NO. 109-31, pt. 1, at 69 (2005).

109. *See* BAPCPA, Pub. L. No. 109-8, § 301, 119 Stat. 23, 75 (amending 11 U.S.C. § 362(c)).

110. *See In re* Blinco, No. 3:06-BK-01569-GLP, 2006 WL 2471961 (Bankr. M.D. Fla. Aug. 28, 2006) (repeat filer not falling within new restriction); *In re* Gould, No. 06-12324-WCH, 2006 WL 2403562 (Bankr. D. Mass. Aug. 18, 2006) (husband and wife alternate filings not falling within new restrictions). The amount of time a defaulting mortgage borrower can wait between chapter 13 filings depends in part on the details of state law that set forth foreclosure timetables. *See* Debra Pogrond Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 OKLA. L. REV. 229, 257–67 (1998) (providing fifty-state survey of time-to-completion of foreclosure process); Nelson & Whitman, *supra* note 9, at 1407.

111. *Cf.* Michael A. Stegman et al., *The Earned Income Tax Credit as an Instrument of Housing Policy*, 15 HOUSING POL'Y DEBATE 203 (2004).

native framework in which to evaluate the 2005 amendments to the Bankruptcy Code.