

Checking up with BARF:
Evaluating the effectiveness, challenges and shortcomings of the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

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I. Introduction

On April 20, 2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).¹ The law is also referred to by some critics as the “Bankruptcy Abuse Reform Fiasco”, or “BARF.”² Upon signing, the President remarked that the law “will protect those who legitimately need help, stop those who try to commit fraud, and bring greater stability and fairness to [the] financial system.”³ The Act, the first major overhaul of the consumer bankruptcy code since 1978, is a culmination of almost a decade of lobbying⁴ and failed legislative attempts to reform Title 11 of the United States Code.⁵ In fact, unlike prior revisions to the bankruptcy code, the text of the BAPCPA itself was largely drafted by lobbyists with limited knowledge of consumer bankruptcy practice.⁶ The bi-partisan BAPCPA was met with both applause and criticism. Supporters of the BAPCPA include the Credit Union National Association, the Independent Community Bankers of America and the United States Chamber of Commerce.⁷ Critics include the National Association of Consumer

¹ Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

² Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, n.1 (2005).

³ Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 41 WEEKLY COMP. PRES. DOC. 641 (Apr. 20, 2005).

⁴ During the 1994 through 2004 congressional election cycles, the Financing and Credit Industry spent approximately \$39,870,664 on congressional campaign contributions. *See* Center for Responsive Politics, [opensecrets.org](http://www.opensecrets.org/industries/indus.asp?Ind=F06&cycle=2006), <http://www.opensecrets.org/industries/indus.asp?Ind=F06&cycle=2006> (last visited Jan. 24, 2007). Among these companies, MBNA Corp., one of the largest lending institutions in the country, was consistently among the biggest spenders in terms of dollars spent on campaign contributions. *Id.* MBNA Corp. is also widely given credit as the primary sponsor and lobbyist for the BAPCPA. *See* Martin H. Bosworth, *Senate Passes MBNA’s Bankruptcy Bill*, CONSUMERAFFAIRS.COM, Mar. 11, 2005, http://www.consumeraffairs.com/news04/2005/bankruptcy_bill2.html.

⁵ *See* Bankruptcy Abuse Reform Act of 1995, S. 769, 104th Cong. (1995); Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (2d Sess. 1998); Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. (1999); Bankruptcy Reform Act of 2000, S. 3186, 106th Cong. (2000); Bankruptcy Reform Act of 2001, H.R. 333, 107th Cong. (2001); Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. (2003).

⁶ Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 191, 192 (2005).

⁷ *See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the S. Judiciary Comm.*, 109th Cong. 1 (2005) (written testimony of Kenneth E. Beine, President, Shoreline Credit Union on behalf of Credit Union National Association); *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Hearing on S. 256 Before the S. Judiciary Comm.*, 109th Cong. 1 (2005) (testimony of R. Michael Menzies,

Bankruptcy Attorneys, the Consumer Federation of America and the National Consumer Law Center, and the U.S. Public Interest Research Group.⁸ This comment is intended to evaluate the effectiveness of the BAPCPA in the first year since its enactment, explain the present and potential future challenges to the law, and discuss some of the major shortcomings of the new law.

Following this introduction, Part II evaluates the effectiveness of the BAPCPA by measuring bankruptcy filing rates pre- and post-enactment and examines the losses disclosed by some of the largest credit lenders who lobbied for the bill. Part III discusses the legal challenges to BAPCPA that have already appeared in federal court. Part IV explains some of the more heavily-criticized shortcomings of the BAPCPA. This comment concludes with a brief discussion of the root causes of bankruptcy that remain unaffected by the passage of the BAPCPA.

Part II – Effectiveness of the BAPCPA

Before the BAPCPA became effective on October 17, 2005, there was an unprecedented surge in the number of consumer bankruptcy filings nationwide.⁹ The average daily rate of filings for the month of September increased from 6,079 in 2004 to 10,367 in 2005.¹⁰ In the final week before the new law took effect, the number of bankruptcy filings was expected to be

President and CEO, Easton Bank and Trust Company, on behalf of The Independent Community Bankers of America); Letter from R. Bruce Josten, Executive Vice President of Governmental Affairs, U.S. Chamber of Commerce, to Members of the U.S. Senate (Feb. 28, 2005) *available at*: <http://www.uschamber.com/issues/letters/2005/050228s256keyvote.htm>.

⁸ Press Release, National Association of Consumer Bankruptcy Attorneys, Connecticut Bar Association and Consumer Bankruptcy Attorneys Challenge Parts of New Bankruptcy Law (May 11, 2006) (*available at* http://nacba.com/files/main_page/news%20release%20on%20challenge%20to%20new%20law-1.doc); *see also*, *Oversight Hearing on Implementation of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005, Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 109th Cong. 2 (2005) (testimony of Travis B. Plunkett, Consumer Federation of America, National Law Center, U.S. Public Interest Research Group).

⁹ *See infra*, text accompanying notes 10-14.

¹⁰ Caroline E. Mayer, *Bankruptcy Filings Soar in Advance of New Law*, WASH. POST, Oct. 5, 2005, at A1.

around 200,000, which is about 170,000 above the typical number of filings for one week.¹¹ The number of filers exceeded estimates however, with 205,129 bankruptcy filings recorded in the final week before the BAPCPA took effect, with a backlog of around 300,000 petitions filed electronically over the weekend or included in the backlog of paper petitions that had been submitted but not posted by October 17, 2005.¹² That brought the total number of bankruptcy petitions filed in the last ten days before the new laws took effect to more than 500,000, or “nearly a third of all bankruptcies filed in 2004.”¹³ The Executive Office of United States Trustees reported that in the four weeks before implementation of the BAPCPA, “more than 726,500 bankruptcy cases were filed in the 88 districts covered by” the United States Trustees Program.¹⁴ While the electronic case-filing system helped make the increase in the number of filings more manageable, several courthouses reported long lines of paper filers that stretched out into the street, all trying to beat the October 17 deadline.¹⁵ The initial filers benefiting from the BAPCPA appeared to be consumer bankruptcy attorneys, who saw the pre-deadline rush to file as a temporary boom to their business.¹⁶

Following the dramatic spike in the number of bankruptcies filed before the BAPCPA took effect, there was a lull in the number of filings compared to earlier years.¹⁷ In fact, the number of bankruptcies filed in the first three months of 2006 was the lowest in twenty years.¹⁸

This data, however, may be misleading, as some experts predicted such a lull in the number of

¹¹ See Terence O’Hara, *A Rush to Beat Bankruptcy Deadline: Filings Spike on Last Weekday Before Tougher Law Takes Effect*, WASH. POST, Oct. 15, 2005, at D1.

¹² Caroline E. Mayer, *Bankruptcy Filings Deluge Courts*, WASH. POST, Oct. 20, 2005, at D3.

¹³ *Id.*

¹⁴ *Justice Department Oversight: Hearing before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 109th Cong. (2006) (statement of Clifford J. White, III, Acting Director, Executive Office for United States Trustees, United States Department of Justice); see also Clifford J. White, Jr., *USTP’s Top Priority: Making Bankruptcy Reform Work*, AM. BANKR. INST. J. 16 (2006).

¹⁵ O’Hara, *supra* note 11.

¹⁶ *Id.*

¹⁷ See Liz Pulliam Weston, *Bankruptcy Filings Soar Again*, MSNMONEY, May 11, 2006. available at <http://articles.moneycentral.msn.com/Banking/BankruptcyGuide/BankruptcyFilingsSoaringAgain.aspx>.

¹⁸ *Id.*

filings, as lawyers and clients became accustomed to the intricacies of the new laws.¹⁹ As of May 2006, bankruptcy filings were already on the rebound, with the daily average reaching 2,000, or four times the number that were filed in November 2005.²⁰

The bankruptcy statistics available from the United States Courts' website support the above statements.²¹ For the months of April, May, and June 2005, there were a total of 467,333 bankruptcies filed, with 458,406 (or 98%) of those filings constituting consumer Chapter 7 and 13 cases.²² By way of comparison, during the months of July, August and September 2005, a total of 542,002 filings occurred, 532,300 (98.2%) of which were consumer Chapter 7 and 13 cases.²³ For the months of October, November, and December 2005, 667,431 cases were filed, with 654,368 (98%) constituting consumer Chapter 7 and 13 filings.²⁴ As evidence of the dramatic decline in the number of filings, for the months of January, February and March 2006, a total of 116,771 cases were filed, 112,564 (96.4%) of those being consumer Chapter 7 and 13 cases.²⁵ However, a comparison of the total number of filings for the year ended March 2005 (1,590,975) and March 2006 (1,794,795) shows that the total number of cases filed increased by

¹⁹ Eileen Ambrose, *Lull Forecast After Rush of Filings for Bankruptcy*, BALTIMORE SUN, Oct. 9, 2005, at C1.

²⁰ Weston, *supra* note 17, at 1.

²¹ See *infra* notes 22-26; see generally News Release, Karen Redmond, *Bankruptcy Filings Rose in March 2006 12-Month Period Quarterly Filings Lowest Since Mid-80s*, Office of Public Affairs, Administrative Office of the U.S. Courts (May 26, 2006) available at http://www.uscourts.gov/Press_Releases/bankruptcyfilings052606.html

²² Table F-2, United States Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the Three Month Period Ended June 30, 2005, available at http://www.uscourts.gov/Press_Releases/bankrupt_f23mos_jun2005.xls.

²³ Table F-2, United States Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the Three Month Period Ended September 30, 2005, http://www.uscourts.gov/Press_Releases/bankrupt_f23mos_sep2005.xls.

²⁴ Table F-2, United States Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the Three Month Period Ended December 31, 2005, available at http://www.uscourts.gov/bnkrpctystats/bankrupt_f23mos_dec2005.xls.

²⁵ Table F-2, United States Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the Three Month Period Ended March 31, 2006, available at http://www.uscourts.gov/bnkrpctystats/bankruptcy_f23mos_mar2006.xls.

12.8%.²⁶ The statistics for the period that ended June 30, 2006 are available at http://www.uscourts.gov/bankruptcystats/bankrupt_f2table_jun2006.xls, and time will tell whether the BAPCPA is successful in reducing the overall number of cases filed.

It remains to be seen whether the BAPCPA is effective in preventing losses to the credit industry. As far as 2005 is concerned, the implementation had the reverse effect – actually increasing overall bankruptcy-related credit losses.²⁷ Bank of America, N.A. (who purchased MBNA, Inc., the largest campaign contributor in the finance and credit industry during the 2004 congressional election cycle)²⁸ posted \$58.5 billion in outstanding credit card loans for 2005, which is about 13% higher than the amount posted for 2004 (\$51.7 billion).²⁹ Their consumer credit card charge-offs increased \$1.3 billion from 2004 to \$3.7 billion.³⁰ However, Bank of America attributes \$578 million to the spike in bankruptcy filings just prior to the October 17th deadline and estimates that 70% of its total bankruptcy-related charge-offs represents acceleration from 2006.³¹ HSBC, American Express, and Capital One, (the third, fourth, and fifth largest contributors in 2004 from the financing/credit industry, respectively)³² all experienced similar results.³³ HSBC attributes \$5 million to additional credit losses resulting from the surge in bankruptcy filings.³⁴ HSBC states that it does not expect a material increase in net charge-offs in 2006 as a result of the BAPCPA.³⁵ American Express posted a \$123 million

²⁶ Table F, United States Bankruptcy Courts, Bankruptcy Cases Commenced, Terminated and Pending During the Twelve Months Ended March 31, 2005 and 2006, *available at* http://www.uscourts.gov/bnkrpctystats/bankruptcy_ftable_mar2006.xls.

²⁷ *See infra* notes 28-37 and accompanying text.

²⁸ *See* Center for Responsive Politics, [opensecrets.org](http://www.opensecrets.org), Finance/Credit Companies: Top Contributors to Federal Candidates and Parties, <http://www.opensecrets.org/industries/contrib.asp?Ind=F06&Cycle=2004> (last visited Jul. 6, 2006).

²⁹ Bank of America, N.A., Annual Report (Form 10-K), at 50 (Mar. 16, 2006).

³⁰ *Id.* at 19.

³¹ *Id.*

³² *See supra* note 28.

³³ *See infra* notes 34-37 and accompanying text.

³⁴ HSBC USA, Inc., Annual Report (Form 10-K), at 6 (Mar. 6, 2006).

³⁵ *Id.*

increase in the fourth quarter of 2005 for losses attributable to the implementation of the BAPCPA.³⁶ Capital One reported a \$146.8 million increase in reported charge-offs and a \$394.8 million increase in managed charge-offs in 2005 compared to 2004.³⁷ The lending industry serves as an indicator of the true effectiveness of the BACPCA; the industry may be as close as the nationwide banking statistics in regards to measuring BACPCA's effectiveness.

Part III – Legal Challenges to the BAPCPA

Less than a year after the BAPCPA became law, it has been predicted that several challenges to the law will follow.³⁸ One possible challenge to the many provisions of the BAPCPA is the requirement that bankruptcy attorneys identify themselves in advertisements as debt relief agencies by stating, “we help people file for bankruptcy relief under the Bankruptcy Code.”³⁹ While the BAPCPA does not specifically require consumer bankruptcy attorneys to qualify under the statutory definition of a “debt relief agency,” language in the BAPCPA defines a “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110...”⁴⁰ This definition could include attorneys, document preparers and for-profit credit counselors.⁴¹ This provision of the BAPCPA may be in direct conflict with a 1977 Supreme Court ruling, which held that advertising by attorneys is commercial speech protected by the First Amendment.⁴² The Court in *Bates v. State Bar of Arizona* noted that advertisements by attorneys may be regulated, but limited this regulation to

³⁶ American Express Company, Annual Report (Form 10-K), at 32 (Feb. 27, 2006).

³⁷ Capital One Financial Corp., Annual Report (Form 10-K), at 33 (Mar. 2, 2006).

³⁸ See Justin Scheck, *Bankruptcy Rewrite Predicted to Bring a Flood of Appeals*, LAW.COM, Feb. 8, 2006, <http://www.law.com/jsp/article.jsp?id=1139306710471>.

³⁹ 11 U.S.C.S. § 528(a)(4) (2006); *Id.* § 528 (b)(2)(B).

⁴⁰ *Id.* § 101(12A).

⁴¹ Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 602 n.43 (2005).

⁴² *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

advertising that is “false, deceptive, or misleading.”⁴³ More recent cases have held that attorney advertising that is neither false nor deceptive nor concerns illegal activities is protected as commercial speech and can be restricted “only in the service of a substantial governmental interest, and only through means that directly advance that interest.”⁴⁴ Attorneys objecting to the advertising provisions of the BAPCPA are likely to argue that they are not “narrowly drawn” and may actually increase the likelihood of misleading speech.⁴⁵

One of the major changes to the bankruptcy code contained in the BAPCPA is the requirement that a debtor receive credit counseling services prior to filing in order to be eligible to file bankruptcy.⁴⁶ Further provisions allow a debtor to avoid the pre-filing credit counseling requirement for a select few circumstances, such as the unavailability of approved credit counseling agencies in his district or existing exigent circumstances meriting a waiver of the requirement.⁴⁷ This provision of the BAPCPA has already received extensive attention in federal courts across the country.⁴⁸ In the case of *In re Montiero*, the debtor argued that she was entitled to a waiver of the credit counseling requirement because her bankruptcy was too complicated.⁴⁹ The bankruptcy judge denied her request because she had “not described any exigent circumstances that would indicate the necessity for filing the bankruptcy case before obtaining the required credit briefing.”⁵⁰ The bankruptcy judge further reaffirmed the credit counseling requirement by ruling that Congress had not created any exemption from the credit counseling

⁴³ *Id.* at 383.

⁴⁴ *Zauderer v. Office of Interdisciplinary Counsel of Supreme Court*, 471 U.S. 626, 638 (1985) (citing *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

⁴⁵ Chemerinsky, *supra* note 41, at 577.

⁴⁶ 11 U.S.C.S. § 109(h)(1) (Supp. 2006).

⁴⁷ *See id.* §109(h)(2)-(3).

⁴⁸ *See Montiero*, 2005 Bank. LEXIS 2695 (N.D.Ga. 2005); *Warden*, *infra* note 52; *Attys. at Law*, *infra* note 62; *McCartney*, *infra* note 62.

⁴⁹ *Montiero*. at 1.

⁵⁰ *Id.* at 6.

provision for individuals with complicated cases, nor given the courts the authority to waive the credit counseling provision in such circumstances.⁵¹

Another case addressing the credit counseling provision of the BAPCPA was heard in Missouri in late 2005.⁵² In this Chapter 7 case, the debtor had not complied with the pre-filing credit counseling requirement and had not filed a certification of exigent circumstances or a motion for a waiver of the credit counseling requirement when the petition was filed.⁵³ The debtor, who had filed the petition on October 17, 2005, the effective date of the BAPCPA, claimed he was informed by the clerk's office prior to his filing that if he filed on or before that date, the new provisions of the BAPCPA would not apply to his bankruptcy.⁵⁴ The debtor filed a motion to waive the credit counseling requirement arguing the allegedly incorrect information regarding the effective date of the BAPCPA constituted exigent circumstances warranting a waiver under section 109(h)(3).⁵⁵ The motion was denied on the grounds that it failed to describe adequate exigent circumstances and that the debtor had further failed to comply with the statute by not filing a document indicating he had requested credit counseling services but had been unable to complete it within five days.⁵⁶ Due to this failure, the debtor was ruled not eligible to be a debtor under Title 11 and an order was entered dismissing the case.⁵⁷ On November 8, 2005, the debtor submitted a certification indicating that he had completed the necessary credit counseling requirement and filed a motion to vacate the order dismissing the bankruptcy.⁵⁸ In denying the debtor's motion to vacate, the bankruptcy judge noted that the debtor had not complied with the statute by obtaining pre-filing credit counseling or satisfying

⁵¹ *See id.* at 7.

⁵² *See In re Warden*, 2005 Bankr. LEXIS 2355, 1 (W.D. Mo. 2005).

⁵³ *Id.* at 1.

⁵⁴ *See id.* at 2.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2-3.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.* at 6-7.

the requirements of section 109(h)(3) authorizing the court to waive the requirement.⁵⁹ In denying the motion to vacate, the bankruptcy judge noted that the language of the statute indicates that all requirements must be met before a waiver can be received.⁶⁰ The bankruptcy judge also acknowledged that permitting a debtor to obtain post-petition credit counseling would be at odds with congressional intent, stating that:

[t]he apparent congressional hope in enacting the credit counseling requirement is that focusing on a budget analysis with the help of a credit counseling professional might obviate the need for seeking bankruptcy relief for some debtors. That objective is not achieved by obtaining credit counseling after the case is filed.⁶¹

Several other arguments challenging certain provisions of the BAPCPA have been heard in federal court since the law went into effect on October 17, 2005.⁶² In the case of *In re Attorneys at Law*, filed and decided on the same day the BAPCPA went into effect, the court considered whether the provisions of the BAPCPA regulating “debt relief agencies” apply to

⁵⁹ *Id.* at 4-5.

⁶⁰ *Id.* at 4 (“[T]he debtor can be eligible for a waiver under [section 11 U.S.C. § 109(h)(3)], only if each of the following three requirements is met: (1) the certification describes exigent circumstances that merit a waiver; (2) it states that the debtor requested credit counseling services from an approved agency, but was unable to obtain the services during the five-day period beginning on the date on which the debtor made the request; and (3) the certification is satisfactory to the court. The requirements are stated in the conjunctive, meaning that each of the three requirements must be met”).

⁶¹ *Id.* at 6; *see also In re Rios*, 336 B.R. 177, 180 (S.D.N.Y. 2005) (holding that congressional intent under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was that credit counseling be obtained prior to filing a bankruptcy petition so that putative debtors could make informed choices about their financial alternatives. Dismissal of the debtor's petition would achieve a result Congress intended to avoid by limiting the forms of protection available to debtors because access to full bankruptcy relief could be precluded); *In re Miller*, 336 B.R. 232, 238-240 (W.D. Pa. 2006) (holding that the debtor, who had completed a credit counseling course prior to filing but was unable to present the required certification because the credit counseling service was withholding the certification due to the debtor's failure to pay the fee, had not complied with the requirements of section 109(h)); *But see In re Graham*, 336 B.R. 292, 296-297 (W.D. Ky. 2005) (holding that although debtor's motion describing exigent circumstances preventing her from obtaining credit counseling prior to filing did not comply with the requirements of section 109(h)(3), due to the confusion over the interpretation of the statute the court will allow the debtor an additional fifteen days to amend her motion to comply with the statutory requirements).

⁶² *See In re Attys. at Law*, 332 B.R. 66 (S.D. Ga. 2005); *In re McCartney*, 336 B.R. 588 (M.D. Ga. 2006) (the court dismissed attorney for debtor's motion that sought a determination that bankruptcy attorneys were not “debt relief agencies” on jurisdictional grounds); *Geisenberger v. Gonzales*, 2006 U.S. Dist. LEXIS 40887, Civ. Act. No. 05-5460 (E.D. Pa. Jun. 19, 2006) (motion by a Pennsylvania bankruptcy attorney to have sections 526, 527 and 528 of the Bankruptcy Code dismissed due to lack of standing).

attorneys licensed to practice law who are members of the bar of the court.⁶³ The challenged components included the provisions contained in section 526(c), which creates civil liabilities for a violation of the duties regarding debt relief agencies specified in sections 526, 527 and 528.⁶⁴ Concluding that attorneys do not qualify as “debt relief agencies,” Chief United States Bankruptcy Judge Lamar W. Davis, Jr., opined that if a lawyer who provides bankruptcy assistance to an assisted person qualifies as a “debt relief agency” and

a new layer of regulation will be superimposed on the bar of this Court, and evaluation of new risks and liabilities will preoccupy them as they strive to represent their clients, comply with existing state regulation of their practice, learn the new substantive and procedural mandates of this new law, and adhere to the separate professional standards applicable to members of the Bar of this Court. *See* Local Rule 83.5(d). That is a burden which should not be borne by the Bar needlessly or merely out of an abundance of caution. It should and must be borne by the Bar if that is the result Congress mandated.⁶⁵

Judge Davis further opined that “[b]ecause the definition of “debt relief agency” omits express reference to attorneys and includes a term which excludes attorneys, it is difficult to imagine that Congress meant otherwise.”⁶⁶ Judge Davis concluded his opinion by observing that “if Congress meant to ensnare attorneys in the thicket of §§ 526, 527 and 528, it would have used the term ‘attorney’ and not ‘debt relief agency.’”⁶⁷ However, the Department of Justice, including the United States Attorney General and United States Trustee Kelly Beaudin Stapleton has taken the position that ““debt relief agencies’ [is] a category of individuals that includes

⁶³ *Id.* at 67.

⁶⁴ *Id.*; *see also* 11 U.S.C.S. § 526-528. Specifically, debt relief agencies are prohibited from failing to provide the services they contracted to provide, counseling any person to make false statements, or advising the person “to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer...” *Id.* § 526(a)(4).

⁶⁵ *In re Attys. at Law*, *supra* note 62 at 68.

⁶⁶ *Id.* at 69.

⁶⁷ *Id.* at 71.

attorneys.”⁶⁸ This discrepancy in the interpretation of the BAPCPA has not yet been reconciled.⁶⁹ Whether the federal courts adopt some unanimity in their interpretation of these provisions remains yet to be seen.

Recently, a similar challenge has been filed in the Connecticut Federal Court on behalf of the Connecticut Bar Association (hereinafter “CBA”) and National Association of Consumer Bankruptcy Attorneys (hereinafter “NACBA”).⁷⁰ The complaint includes allegations that imposing the requirements of debt relief agencies on consumer bankruptcy attorneys censors attorneys, restricts their abilities to give their clients complete and competent counsel, restricts attorney advertising in a manner inconsistent with the First Amendment, deters attorneys and clients from entering into attorney-client relationships and infringes upon the traditional power of the states to regulate the practice of law.⁷¹ Louis R. Pepe, President of the CBA claims that the debt relief agency provisions of the BAPCPA “would prevent attorneys from carrying out their professional and ethical responsibilities to give their clients complete and truthful advice and impair those clients’ constitutional rights and access to the courts.”⁷² Henry J. Sommer, President of the NACBA, claimed that the provisions regarding debt relief agencies are “a serious obstacle to giving our clients the competent and complete representation to which they are entitled.”⁷³ The complaint alleges that if attorneys are deemed to be subject to the rules regarding debt relief agencies, the practical application of section 526 would prevent attorneys from advising clients when professional judgment and applicable ethical rules would dictate

⁶⁸ Plaintiff’s Memorandum, *infra* note 76 at 5 (quoting Brief for Attorney General Gonzales at 6, Geisenberger, *supra* note 62).

⁶⁹ See Olsen v. Gonzales, 350 B.R. 906, 911-12 (D. Or. 2006) (finding BAPCPA definition includes attorneys in “debt relief agency”).

⁷⁰ See National Association of Consumer Bankruptcy Attorneys, Connecticut Bar Association and Consumer Bankruptcy Attorneys Challenge Parts of New Bankruptcy Law, *supra* note 8; Complaint, Conn. Bar Ass’n v. U.S., (D. Conn. May 11, 2006), available at http://nacba.com/files/main_page/complaint.pdf.

⁷¹ See Complaint, Conn. Bar Ass’n., *supra* note 70, at 2-3.

⁷² See *supra* note 8 at 1-2.

⁷³ *Id.* at 2.

otherwise.⁷⁴ The lawsuit seeks a judgment declaring that sections 526, 527 and 528 do not apply to attorneys, and violate the United States Constitution, as well as a preliminary and permanent injunction preventing the enforcement of those provisions.⁷⁵ In a lengthy memorandum in support of its motion for preliminary injunctive relief, the plaintiffs claim that the provisions of the BAPCPA impose substantial and unjustified restrictions on constitutionally protected attorney speech.⁷⁶ Specifically, the complaint alleges that section 526(a)(4) of the BAPCPA, which prohibits attorneys from “advis[ing] an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor,”⁷⁷ if applied to attorneys, would prevent attorneys from advising their clients to incur any debt, even when doing so may be perfectly lawful and the sound and ethically proper course.⁷⁸ The complaint lists a number of instances in which incurring additional debt prior to filing for bankruptcy protection might be both ethical and lawful advice to give a client. Such examples include refinancing a home, borrowing from a 401(k) plan or incurring other debt to pay domestic support obligations (which, if unpaid, might result in imprisonment while possibly avoiding contempt proceedings and possible imprisonment). In addition, purchasing a reliable automobile to enable a debtor to drive to and from work, or paying tax liabilities or obtaining urgently needed goods or services may also constitute sound and ethical advice from an attorney even when the client is preparing to file for bankruptcy

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 21-22.

⁷⁶ Plaintiff’s Memorandum in Support of their Motion for Preliminary Injunctive Relief, *Conn. Bar Ass’n. v. U.S.* (D. Conn. May 11, 2006), available at http://nacba.com/files/main_page/Memorandum%20in%20Support%2005-11-06%20final.doc.

⁷⁷ 11 U.S.C.S. § 526(4)(a).

⁷⁸ Plaintiff’s Memorandum, *supra* note 76 at 7.

protection.⁷⁹ The plaintiff's memorandum claims that these provisions frustrates the overall goals of the BAPCPA, inasmuch as attorneys would not be permitted to advise their clients to incur new debt, even when doing so may obviate the need for them to file for bankruptcy altogether.⁸⁰ For example, a debtor might be able to take a second mortgage on a home or borrow from a 401(k) plan to pay off their creditors, thus avoiding filing for bankruptcy.⁸¹ Advice to take this course, too, is prohibited if an attorney is a debt relief agency.⁸² These provisions, the plaintiffs complain, force attorneys to limit the advice they give their clients, which can result in their clients making uninformed, bad choices.⁸³ The plaintiffs allege that this limitation on the advice an attorney can give a client considering bankruptcy is also a violation of free speech protected by the Constitution.⁸⁴ The plaintiffs further claim that restricting attorneys in advising their clients "distorts the legal system by altering the role of the attorney" and distorts the system of justice.⁸⁵

In support of the complaint, the Commercial Law League of America (hereinafter "CLLA") recently filed a lengthy amicus curiae brief.⁸⁶ The brief alleges if the contested provisions are deemed to apply to attorneys, it unconstitutionally interferes with attorneys who represent creditors, imposes unconstitutional limitations on protected speech and violates due process rights to creditors' attorneys.⁸⁷ The CLLA's brief also criticizes the potential for liability

⁷⁹ *Id.* at 8-10.

⁸⁰ *See Id.* at 11-12.

⁸¹ *Cf. id.* at 11.

⁸² *Id.* at 11 (citing Decl. of Charles A. Magleri, Ex. A, ¶¶13-15).

⁸³ *Id.* at 15.

⁸⁴ *See generally id.* at 28-34.

⁸⁵ *Id.* at 29 (citing *Legal Services Corp. v. Velaquez*, 531 U.S. 533, 544 (2001)).

⁸⁶ *See* Brief for Commercial Law League of Am. As Amicus Curiae Supporting of Plaintiff's Motion for Preliminary Injunctive Relief, Conn. Bar Ass'n., *supra* note 70, *available at* http://nacba.com/files/main_page/NACBA%20dkt022%20ecf.pdf.

⁸⁷ *See id.* at i.

faced by bankruptcy attorney practitioners, arguing if “debt relief agency” is interpreted to include attorneys, it violates the due process rights of attorneys representing creditors.⁸⁸

Part IV – Controversial Aspects of the BAPCPA

There are several additional provisions of the BAPCPA that have received staunch criticism besides those identified above. The extensive possibility for attorney liability as a result of the BAPCPA has been one of the most highly criticized aspects of the new law.⁸⁹ Under the new provisions, the signature of the debtor’s attorney takes on greater significance.⁹⁰ These provisions create a significant risk of liability for consumer bankruptcy attorneys not faced by attorneys in other practice areas.⁹¹ The BAPCPA also permits the court to assess civil penalties if it finds an attorney has violated Rule 9011 of the Federal Rules of Bankruptcy Procedure, which require that all attorneys make certain assurances by signing any document submitted to the court.⁹² Another potential for attorney liability is contained in section 707(b)(4)(A), which allows the court to order the attorney to require the debtor to reimburse the trustee for all reasonable costs and fees associated with a successful motion for dismissal or motion for conversion if the court finds the attorney violated Rule 9011 of the Federal Rules of

⁸⁸ *See id.* at 25-26.

⁸⁹ *See generally* Vance, *supra* note 2.

⁹⁰ *Id.* at 286. See 11 U.S.C.S. § 707(b)(4)(C) which states that, “the signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and (ii) determined that the petition, pleading, or written motion (I) is well grounded in fact; and (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).” The reference to “paragraph (1)” means that the filing is not an abuse as defined by the means test and good faith requirement in Section 102, Vance, *supra* note 2 at 287. See also 11 U.S.C.S. § 707(b)(4)(D), “The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.”

⁹¹ Vance, *supra* note 2, at 287.

⁹² 11 U.S.C.S. § 707(b)(4)(B); *see* Fed. R. Bankr. P. 9011 (requiring all submissions to the court be signed by an attorney of record).

Bankruptcy Procedure.⁹³ This provision is “little more than a fee shifting statute, but with a remarkable distinction – the fees are shifted not to the debtor, but to the attorney alone.”⁹⁴

Another potential for significant liability concerns the requirement that attorneys certify the debtor’s ability to pay in a reaffirmation agreement.⁹⁵ Under the changes as a result of the BAPCPA, if the reaffirmation agreement triggers the statutory definition of hardship,⁹⁶ the attorney must further certify that the client can perform the promise to pay the reaffirmed debt.⁹⁷ This requires the attorney to certify in the same document that the reaffirmation does not impose an undue hardship on the debtor, and to acknowledge that there is a presumption of undue hardship under the statute.⁹⁸ Thus, if the client wishes to reaffirm a debt (which is the client’s decision), even against the advice of their attorney, the attorney must certify that the debtor is able to pay the debt, even when the debtor has demonstrated that they are unable to pay the reaffirmed debt.⁹⁹ The penalty for being wrong could be severe – liability to the creditor for what the debtor owes.¹⁰⁰ The possibility for attorney liability does not end with the provisions mentioned above, rather, the BAPCPA is rife with potential pitfalls of liability for a bankruptcy practitioner.¹⁰¹ The American Bar Association (hereinafter “ABA”) has also been critical of the attorney liability provisions of the BAPCPA.¹⁰² Specifically, the ABA opposes the certification requirements of sections 102 and 203(a) of the new law, which apply to all bankruptcy attorneys,

⁹³ See also 11 U.S.C.S. § 707(b)(4)(A).

⁹⁴ Vance, *supra* note 2, at 288.

⁹⁵ 11 U.S.C. § 524(k)(5).

⁹⁶ See generally 11 U.S.C. § 524(k)(6)(A) (requiring a debtor to certify the repayment of the debt is possible with his or her finances).

⁹⁷ See Vance, *supra* note 2, at 291.

⁹⁸ *Id.* at 332 n.38.

⁹⁹ See *id.* at 291-92.

¹⁰⁰ *Id.* at 292.

¹⁰¹ See generally Vance, *supra* note 2.

¹⁰² See Letter from Robert D. Evans, Director, American Bar Association Governmental Affairs Office, to members of the Senate (Mar. 1, 2005), available at <http://www.abanet.org/poladv/letters/109th/bankrupt/bankrupt030105.pdf>

regardless of whether or not they charge a fee.¹⁰³ The practical result of these provisions, the ABA claims, “will strongly discourage attorneys and law firms from providing essential pro bono bankruptcy services to the very debtors who need them most.”¹⁰⁴

The BAPCPA’s treatment of dependant support income and obligations is also problematic for debtors and creditors seeking to collect such an obligation.¹⁰⁵ Pre-BAPCPA bankruptcy law offered “no guidance as to whether money from a source other than the debtor’s own personal income could be considered part of her ‘regular income.’”¹⁰⁶ Some courts held the debtor’s income was only the money directly generated from the debtor herself, while others included contributions such as child support as part of the debtor’s income.¹⁰⁷

Under the BAPCPA, the identification of “current monthly income” (hereinafter “CMI”) is necessary to determine whether the debtor is subject to the “means test.”¹⁰⁸ The means test requires the court to presume that an abuse of a Chapter 7 exists if the debtor’s CMI is reduced by the deductions for necessary expenses and for payment of secured and priority debts, and is not less than defined trigger points, based in part on an ability to pay the remaining, non-priority unsecured debt.¹⁰⁹ If the debtor has at least \$166.67 in monthly disposable income, or at least \$100 of monthly disposable income if it will result in non-priority unsecured creditors receiving at least 25 percent of their claims, conversion to a Chapter 13 is required.¹¹⁰ The language in the Internal Revenue Code provides that certain items, including child support payments, do not

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.*

¹⁰⁵ See Peter C. Alexander, “Herstory” Repeats: *The Bankruptcy Code Harms Women and Children*, 13 AM. BANKR. INST. L.R. 571, 577-78 (2005).

¹⁰⁶ Erin K. Healy, Comment, *It Depends: Prioritizing Function Over Form to Evaluate a Debtor’s Dependency Relationships in Consumer Bankruptcy*, 22 EMORY BANKR. DEV. J. 185, 192-193 (2005).

¹⁰⁷ See *Id.* at 193 n.61-62.

¹⁰⁸ 11 U.S.C §707(b)(2)(A)(i).

¹⁰⁹ 11 U.S.C.S. § 707(b)(2)(A)(ii)(I).

¹¹⁰ *Id.* at (i). http://www.clla.org/new_code_docs/clla-bankruptcyreform-manual-april2005.pdf.

constitute income.¹¹¹ Alternatively, the language of the BAPCPA provides that ‘income’ includes “any amount paid by any entity other than the debtor, on a regular basis for the household expenses of the debtor or the debtor’s dependants.”¹¹² This section “has the effect of treating child support and foster care payments as ‘income’ even though they are excluded from ‘gross income’ in the Internal Revenue Code.”¹¹³ The BAPCPA does allow for “reasonably necessary” expenses for dependants to be included in the debtor’s monthly expenses to determine whether the CMI exceeds the debtor’s monthly expenses to qualify for abuse.¹¹⁴ The application of these provisions could result in income received from child support actually used to pay the debtor’s creditors if the bankruptcy court decides that the debtor’s stated dependant expenses are too high.¹¹⁵

The devastation left in the aftermath of Hurricane Katrina highlighted a further shortcoming of the BAPCPA. It was immediately apparent that tens of thousands of people filing for bankruptcy after the devastation of the storm would be unduly burdened by the provisions of the BAPCPA.¹¹⁶ An example of a problem Katrina survivors faced is illustrated by considering that under the BAPCPA, a debtor who was pushed into bankruptcy because of the devastation from Katrina would have to wait at least six months to file for Chapter 7, or else their income for the months prior to the hurricane would be included in the calculation of their CMI.¹¹⁷

¹¹¹ 26 U.S.C. § 71(c) (2006).

¹¹² 11 U.S.C. § 101(10A)(A)(B).

¹¹³ Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 245 (2005).

¹¹⁴ 11 U.S.C. § 707(b)(2)(A).

¹¹⁵ Cf. Healy, *supra* note 106, at 194 (concluding that once a court decides less money is reasonably necessary to support the child, if obligor parent is forced to continue to pay the same amount as before the court’s decision, part of the income will support the child and part would support the debtor’s creditors).

¹¹⁶ Jeanne Sahadi, *Calls for Bankruptcy Relief Post-Katrina*, CNN, Sep. 7, 2005, available at http://money.cnn.com/2005/09/06/pf/debt/katrina_bankruptcy/ (last visited Jun. 28, 2006).

¹¹⁷ See Marianne B. Culhane & Michaela M. White, *Catching Can-Pat Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 700 n.42 (2005).

In response to the potential crisis, the Consumer Federation of America and the National Association of Consumer Bankruptcy Attorneys called on Congress to postpone implementation of the BAPCPA for Katrina victims for a full year and also to permanently exempt them from specific provisions.¹¹⁸ Despite “the calls for relief, Representative F. James Sensenbrenner, chairman of the House Judiciary Committee, indicated that he would not hold a hearing on waiving the law for the purposes of disaster relief.”¹¹⁹ Senator Charles E. Grassley, the chief sponsor of the BAPCPA, stated that delaying or overhauling the new law is not necessary.¹²⁰ Senator Grassley further remarked “[t]he new bankruptcy law already allows bankruptcy courts significant flexibility to look at the special circumstances surrounding an individual’s financial situation.”¹²¹ Additionally, Senator Russ Feingold and other opponents of the BAPCPA, introduced legislation to provide a one-year grace period from the law’s application.¹²² The Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005 was introduced in Congress on September 8, 2005.¹²³ The bill would have, among other provisions, excluded money received on account of being a victim of a natural disaster from a debtor’s CMI,¹²⁴ allowed debtors to skip the credit counseling requirement prior to filing,¹²⁵ included within the calculation of permissible monthly expenses the actual reasonably necessary expenses incurred as a result of being a victim of a natural disaster,¹²⁶ modified the time limit for debtors to complete their required duties,¹²⁷ and retain automatic stay protections for a debtor who is a

¹¹⁸ Sanhandi, *supra* note 115.

¹¹⁹ Martin H. Bosworth, *No Bankruptcy Relief for Katrina Victims*, CONSUMERAFFAIRS.COM, Sep. 15, 2005, available at http://www.consumeraffairs.com/news04/2005/katrina_bankruptcy03.html (last visited Feb. 6, 2007).

¹²⁰ Legislative Highlights, *Congress Considers Katrina Impact*, 24-8 AM. BANKR. INST. J. 3 (2005).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Hurricane Katrina Bankruptcy Relief and Community Protection Act of 2005, H.R. 3697, 109th Cong. (2005).

¹²⁴ *Id.* § 2(a)(2).

¹²⁵ *Id.* § 2(d).

¹²⁶ *Id.* § 5(a).

¹²⁷ *Id.* § 6(b)(4)(B).

victim of a natural disaster.¹²⁸ Another bill, the Financial Safeguards for Hurricane Survivors Act of 2005, would have delayed the implementation of the BAPCPA for two years.¹²⁹ Both bills were referred to a committee, but neither survived committee consideration.¹³⁰ Congress had actually considered an amendment to the BAPCPA earlier in 2005 that would have protected the victims of natural disasters.¹³¹ Unfortunately for the victims of Katrina, the amendment was defeated on a party line vote without any debate.¹³²

Some relief did come to Katrina survivors facing bankruptcy difficulties when the United States Trustee Program announced a series of steps to lessen some of the more difficult requirements of the BAPCPA to victims of recent natural disasters.¹³³ Some of the provisions include relaxed document requirements, flexibility in attending creditors' meetings, and allowing a debtor to demonstrate "special circumstances" to rebut the presumption of abuse for the means - test.¹³⁴ However, Senator Russ Feingold claimed the program was not enough, stating, "the victims of Katrina and Rita should not be the guinea pigs for the great bankruptcy experiment that will start in a matter of weeks."¹³⁵

Conclusion

For all the changes to the bankruptcy code caused by the BAPCPA, it does little to address the major factors that cause people to file for protection. While the popular notion may be that debtors blow all of their budgets and credit limits on designer clothes, meals at expensive

¹²⁸ *Id.* § 3.

¹²⁹ Financial Safeguards for Hurricane Katrina Survivors Act of 2005, H.R. 3662, 109th Cong. § 2 (2005).

¹³⁰ 151 Cong. Rec. H7813 (Sep. 8, 2005); 151 Cong. Rec. H 7672 (Sep. 6, 2005).

¹³¹ *See* 151 Cong. Rec. E1803-1804 (daily ed. Sep. 8, 2005) (statement of Rep. Conyers).

¹³² *Id.*

¹³³ *See* Press Release, Executive Office for United States Trustees, U.S. Trustee Program Announces Enforcement Guidelines for Bankruptcy Debtors Affected by Natural Disasters (Oct. 5, 2005), *available at* http://www.usdoj.gov/ust/eo/public_affairs/press/docs/pr20051005.pdf;

¹³⁴ *See generally* Legislative Highlights, *U.S. Trustee Program Relaxes Enforcement for Hurricane Victims*, 24-Nov. AM. BANKR. INST. J. 3 (2005)(summarizing the steps taken by the U.S. Trustees Program to aid hurricane victims).

¹³⁵ Martin H. Bosworth, *Bankruptcy Trustees Ease Rules for Katrina Victims*, CONSUMERAFFAIRS.COM, Oct. 7, 2005, http://www.consumeraffairs.com/news04/2005/katrina_bankruptcy_doj.html.

restaurants and fancy cars, the average four-person family in 2000 actually spent significantly less on such types of consumption than a similar family in 1973.¹³⁶ The much higher cost of the home, rather, is considered one of the primary contributors to the debt epidemic faced by many families.¹³⁷ The increase of credit issued to lower-income borrowers is also cited as a primary reason why bankruptcy rates have risen over the past several decades.¹³⁸ Although the BAPCPA does contain certain credit disclosure provisions that affect the credit-lending industry, the law does little to address the role the credit card industry has had in the surge of bankruptcy filings.¹³⁹ The escalating cost of medical care is also cited as one of the primary factors forcing Americans to file for bankruptcy protection, yet the BAPCPA does little to address the problems of sudden illness or injury or inadequate health insurance.¹⁴⁰ Without more comprehensive and thorough reform efforts that directly address the primary reasons why more people are experiencing the need to file bankruptcy, it is likely that such trends will continue, despite tougher laws designed to discourage filers.

While the BAPCPA may have been an immediate success in making the bankruptcy process much more difficult, risky and expensive, the long term effectiveness of this controversial legislation remains to be seen. The United States Department of Justice states that a fundamental goal of federal bankruptcy laws is to provide debtors a financial “fresh start” from burdensome debts, giving “honest but unfortunate debtor[s] . . . new opportunit[ies] in life and a

¹³⁶ Jean Bracuher, *Book Review: Middle-Class Knowledge*, 21 EMORY BANKR. DEV. J. 193, 200 (2004) (citing ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO INCOME TRAP: WHY MIDDLE CLASS FAMILIES ARE GOING FOR BROKE* 15-17 (2003)).

¹³⁷ *See id.* at 201 (theorizing that the majority of parents are searching for a better school system and are therefore forced to pay for a more expensive home).

¹³⁸ David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM BANKR. L.J. 311, 349 (1999).

¹³⁹ 151 CONG. REC. H1993, 2071 (daily ed. Apr. 14, 2005) (statement of Rep. Levin); *See also* BAPCPA §201-204.

¹⁴⁰ Elizabeth Warren, *A Symposium on the Code After 25 Years*, 12 AM. BANKR. INST. L. REV. 1, 37 (2004); *See also* Melissa B. Jacoby, et al, *Rethinking the Debate Over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001).

clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”¹⁴¹ While proponents of the BAPCPA claim it will reduce fraud, bring stability to the financial system and protect those really in need, as long as the root causes that push people to the brink of bankruptcy persist, it is likely that people will continue to rely on the “fresh start” that is available through the bankruptcy code.¹⁴² However, because of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the fresh start may prove more difficult to attain. That reality may be hard for even the most honest of debtors to keep down.

¹⁴¹ Administrative Office of the United States Courts, *Bankruptcy Basics* 7 (3d ed. Apr. 2006) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

¹⁴² Remarks on signing, *supra* note 3; *supra* notes 135-140 and accompanying text.