2007

Eliminating the Judicial Function in Consumer Bankruptcy

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by

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This Essay focuses on means testing in consumer bankruptcy and seeks to place it in its proper context. As the centerpiece of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, otherwise known as BAPCPA, the means test has been on everyone's mind, as evidenced by the flurry of opinions and academic writings on the subject that have followed in the wake of BAPCPA's enactment. Its topicality alone makes it worthy of commentary. More important, however, the means test encapsulates some of the core themes underlying the consumer bankruptcy system, arguably the more relevant of the two bankruptcy systems. While the spectacular business failures of companies like Enron, WorldCom, Adelphia, K-Mart, and U.S. Airways grab headlines, bankruptcy is first and foremost a story about the financial failure of individuals. From 1996, when total bankruptcy filings surpassed the one million mark for the first time in our nation's history, through 2005, there were at least one million bankruptcy filings per year,[1] and more than 90% of those filings were consumer bankruptcy cases.[2] Lest the significance of these statistics be lost, consider the following description of consumer bankruptcy as an everyday occurrence:

> Bankruptcy has become deeply entrenched in American life. This year, more people will end up bankrupt than will suffer a heart attack. More adults will file for bankruptcy than will be diagnosed with cancer. More people will file for bankruptcy than will graduate from college. And, in an era when traditionalists decry the demise of the institution of

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[1] *See* Press Release, Admin. Office of the U.S. Courts, Calendar Year Shows Bankruptcy Filings Up 27 Percent Over 1995 (Mar. 18, 1997), *available at* http://www.uscourts.gov/pressrel/bk1296.htm.

[2] *See* U.S. Courts, Bankruptcy Statistics, http://www.uscourts.gov/bnkrpctystats/bankruptcystats.htm (last visited Sept. 23, 2007) (providing statistics for bankruptcy filings by calendar year and fiscal year, among others).

> marriage, Americans will file more petitions for bankruptcy than divorce. Heart attacks. Cancer. College graduations. Divorce. These are markers in the lives of nearly every American family. And yet, we will soon have more friends and coworkers who have gone through bankruptcy than any one of these other life events.[3]

These are sobering words, to say the least. They remind us that bankruptcy law predominantly affects the individual debtor, which brings us back to the means test.

On April 20, 2005, President Bush signed BAPCPA into law. In so doing, he declared the following:

> In recent years, too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them. . . . The bill I sign today helps address this problem. Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts.[4]

The panacea for the purported systemic abuse of the bankruptcy laws by individual debtors would be the means test, a formulaic statutory directive pursuant to which courts are to presume abuse of the bankruptcy system by Chapter 7 debtors who appear to have an ability to repay past debts with future income. Such debtors would be subject to having their cases dismissed. In theory, this approach will prevent can-pay debtors from obtaining an immediate discharge in Chapter 7 and instead will direct them to seek bankruptcy relief under Chapter 13 where discharge is granted after completion of a repayment plan.

The conventional story about the means test has been that it is inherently anti-debtor because of its overly broad reach. Because the debate over the means test has been framed in this way, this Essay suggests that a crucial point has been overlooked. More than anything else, the means test is a story about institutional design—that is, the manner in which Congress would like courts to function within the bankruptcy system. The means test evinces a deep mistrust of the pre-BAPCPA discretion that had been exercised by the bankruptcy judiciary in its gatekeeper role under the substantial abuse dis-

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[3]ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003).

[4]Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html.

missal regime,[5] the precursor to BAPCPA's abuse dismissal regime of which means testing is a central component. While Congress has attempted to rein in bankruptcy judges' discretion, a nuanced look at the abuse dismissal reveals that Congress was largely ineffective in doing so. Judicial discretion remains alive and well in the new abuse dismissal regime. Does this mean that Congress failed in its attack on the bankruptcy judiciary? It does not, and this is the insight that the Essay provides.

This Essay argues that one of the greatest causes of concern with BAPCPA, as evidenced by the means test, is that the judicial and administrative functions in the bankruptcy court have become increasingly blurred. Part I begins by giving a brief overview of the transition from the substantial abuse dismissal regime to the abuse dismissal regime, and Part II explains how that transition sought to divest bankruptcy judges of their gatekeeping discretion yet failed to accomplish the divestiture. Part III describes the various ways in which the abuse dismissal regime has exacerbated the blurring of administrative and judicial functions and suggests why this should be cause for concern. Finally, the Essay concludes with some thoughts on how the abuse dismissal regime may shape bankruptcy law in the years to come.

I. THE TRANSITION FROM SUBSTANTIAL ABUSE TO ABUSE

With every iteration of a bankruptcy law this nation has witnessed, from the Bankruptcy Act of 1800 to BAPCPA, two broad issues have pervaded regarding the substantive relief afforded to individual debtors: eligibility for relief and scope of relief. Eligibility rules define whether an individual may seek respite from financial failure under the protective cover of bankruptcy law. Scope rules, on the other hand, determine the extent of relief that will be conferred upon those who have already been deemed eligible for relief.

Over time, eligibility rules have become more generous. For example, under the Bankruptcy Act of 1800, only certain individuals engaged in commerce (merchants, bankers, brokers, factors, underwriters, and marine insurers) could be debtors,[6] and only if a creditor initiated bankruptcy proceedings against the individual.[7] Today, few limits exist on the ability of any individual to seek relief by *voluntarily* filing a petition.[8]

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[5]*See* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 561 & n.7 (2001).

[6]Bankruptcy Act of 1800, ch. 19, § 1, 2 Stat. 19, 20 (repealed 1803).

[7]*Id.* § 2.

[8]*See, e.g.*, 11 U.S.C. § 109(g) (2000) (providing special rules to deter abusive serial filings); 11 U.S.C.S. § 109(h)(1) (2007) (requiring that, with certain exceptions, an individual must obtain credit counseling within 180 days prior to the petition date to be eligible to be a debtor). The Bankruptcy Code's provision regarding dismissal of a debtor's Chapter 7 case on the basis of abuse further augments the Code's bankruptcy eligibility rules by deeming certain cases to be improperly administered and adjudicated under that chapter. *See id.* § 707(b)(1).

On the other hand, scope rules have remained in a constant state of flux. To be sure, bankruptcy law offers debtors relief in many forms.[9] However, the ultimate form of relief is the discharge, which generally releases the individual from personal liability on prebankruptcy debts.[10] Thus it seems reasonable to evaluate the state of scope rules by reference to the discharge in bankruptcy.

Historically, the grounds for denial of discharge and the exceptions to discharge have waxed and waned.[11] But perhaps the most striking change in scope rules occurred in 1938 with the Chandler Act,[12] which codified as part of U.S. bankruptcy law the concept of conditional discharge,[13] a concept embodied today in Chapter 13 of the Bankruptcy Code.[14] In contrast to the immediate Chapter 7 discharge granted in exchange for the debtor's nonexempt assets,[15] the Chapter 13 discharge is granted after the debtor completes a repayment plan pursuant to which a portion of his or her future income has been devoted to repaying the claims of creditors.[16] Where the present value of the debtor's stream of future income that would be committed to a repay-

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[9]For example, a bankruptcy filing immediately effectuates relief for the debtor by staying, among other things, creditor collection efforts. *See* 11 U.S.C.S. § 362(a). The breathing room provided to the debtor by the automatic stay represents the first step in relieving the debtor from the financial pressures that prompted the seeking of bankruptcy relief. *See* H.R. Rep. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97; *cf.* Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 504 (2006) ("Some Chapter 13 debtors are able to regain their financial footing simply as a result of the breathing spell afforded by the automatic stay. This breathing spell—perhaps no longer than a few months or a year between filing and dismissal of a case—is enough to allow the debtor to cure defaults or pay off debts without further court supervision or debt relief.").

[10]*See, e.g.,* 11 U.S.C. § 727(b); 11 U.S.C.S. § 1328(a). Such relief, however, is not limitless as certain debts are excepted from discharge. *See, e.g., id.* §§ 523(a), 1328(a)(1)-(4).

[11]*See generally* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325 (1991).

[12]Act of June 22, 1938, Pub. L. No. 75-696, 52 Stat. 840 (repealed 1978).

[13]*See* §§ 660-661, 52 Stat. at 935-36 (permitting discharge upon satisfaction of certain conditions by debtor). For a general discussion of conditional discharge rules, see Douglass G. Boshkoff, *Limited, Conditional and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 73-74 (1982).

[14]*See* 11 U.S.C.S. § 1328(a), (b) (permitting discharge upon satisfaction of certain conditions by debtor). For a history on the origins of Chapter 13, see Timothy W. Dixon & David G. Epstein, *Where Did Chapter 13 Come from and Where Should It Go?*, 10 AM. BANKR. INST. L. REV. 741 (2002).

[15]A Chapter 7 debtor relinquishes all property in which he or she had a legal or equitable interest prior to filing for bankruptcy except for property that can be claimed as exempt. *See* 11 U.S.C. § 541(a)(1) (providing that commencement of a case creates an estate consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case"); 11 U.S.C.S. § 704(a)(1) (requiring trustee to "collect and reduce to money the property of the estate"); *id.* § 726(a) (providing for distribution of property of the estate to unsecured creditors); *id.* § 522(b) (allowing debtor to exempt certain property from property of the estate).

[16]*See* 11 U.S.C. § 1306(b) (stating that, "[e]xcept as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate"); *id.* § 1327(b) (providing that confirmation of debtor's repayment plan "vests all property of the estate in the debtor"); *id.* § 1322(a)(1)

ment plan exceeds the value of the debtor's nonexempt assets, and where Chapter 13's broader discharge provision does not benefit the debtor because of the nature of his or her debts, the Chapter 13 discharge will forgive less debt than the Chapter 7 discharge and will thus represent a narrower scope of relief. This scenario will likely arise frequently given that: (1) the overwhelming majority of consumer bankruptcy cases historically have been no-asset cases,[17] and (2) the types of nondischargeable debts likely to be owed by individual debtors (e.g., taxes, domestic support obligations, certain consumer debts incurred three months prior to filing for bankruptcy) are nondischargeable in both Chapter 7 and Chapter 13.[18]

That said, if an individual debtor has an ability to repay a portion of his or her prebankruptcy debts from future income, it seems eminently reasonable and unobjectionable that such an individual should do so. For such an individual, a narrower scope of relief makes sense. The difficulty, however, arises in attempting to identify such an individual, and bankruptcy law has preoccupied itself with this task over the past two decades by seeking to deny debtors with an ability to repay access to Chapter 7—initially, through the substantial abuse dismissal, which was introduced by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA);[19] and, most recently, through the abuse dismissal, a product of BAPCPA.[20]

In order to understand the evolution of these two distinct dismissal regimes, it is important to keep in mind that every bankruptcy law in the nation's history has been a product of a series of compromises between three major interest groups: creditors, prodebtor movements, and bankruptcy professionals.[21] These compromises transformed the bankruptcy forum from a

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(requiring debtor's repayment plan to "provide for the submission of all or such portion of future earnings as other future income of the debtor . . . as is necessary for the execution of the plan").

[17]U.S. TR. PROGRAM, U.S. DEP'T OF JUSTICE, PRELIMINARY REPORT ON CHAPTER 7 ASSET CASES 1994 TO 2000, at 7 (2001) (noting that, "[h]istorically, the vast majority (about 95 to 97 percent) of chapter 7 cases yield no assets"), *available at* http://www.usdoj.gov/ust/eo/private_trustee/library/chapter07/docs/assetcases/Publicat.pdf.

[18]*Compare* 11 U.S.C.S. § 523(a)(1) (2007) (excepting certain tax debts from scope of Chapter 7 discharge), *id.* § 523(a)(2)(C)(i)(I) (excepting certain consumer debts incurred three months prior to filing for bankruptcy from scope of Chapter 7 discharge), *and id.* § 523(a)(5) (excepting domestic support obligations from scope of Chapter 7 discharge), *with id.* § 1328(a)(2) (excepting from scope of Chapter 13 discharge debts specified under section 523(a)(1)(B), (a)(1)(C), (a)(2), and (a)(5)). Although the Chapter 13 discharge does not except debts specified under section 523(a)(1)(A), which covers tax debts entitled to priority under section 507(a)(8), a Chapter 13 debtor must repay all priority debts in full. *See id.* § 1322(a)(2).

[19]Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 355.

[20]Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a)(2), 119 Stat. 23, 27.

[21]DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 16 (2001).

creditor collection device in the 19th century to a forum for effectuating substantive relief for debtors in the 20th century. Bankruptcy law reached its zenith as a robust prodebtor law with enactment of the Bankruptcy Code in 1978.[22] Immediately thereafter, the consumer credit lobby sought to gain back the concessions it had made.[23]

Six years later, the consumer credit lobby scored its first major victory, albeit one that fell short of its ultimate goal of a true means test.[24] With BAFJA, Congress authorized a court to dismiss a debtor's Chapter 7 case under a certain set of circumstances: If the debtor was an individual and his or her debts were primarily consumer debts, and if the court found that granting the debtor relief would constitute a *substantial abuse* of Chapter 7, then the court could *sua sponte* dismiss the case.[25] The consumer credit lobby hoped that courts would use the abuse dismissal to police use of Chapter 7 by debtors with an ability to repay a portion of their debts from future income. The thinking went that, if such debtors were denied access to Chapter 7, their other alternative, if they wanted bankruptcy relief, would be to use Chapter 13.

It should be emphasized that the substantial abuse dismissal directly contravened the spirit in which Congress had enacted the Bankruptcy Code in 1978. The Code's legislative history unequivocally rejected the notion of repayment ability as a basis for dismissing a debtor's Chapter 7 case, which, prior to BAFJA, could be dismissed only for cause. On this subject, both the House and Senate Reports that accompanied the Bankruptcy Reform Act of 1978 stated as follows: "The [Code] does not contemplate, however, that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal. To permit dismissal on that ground would be to enact a non-uniform mandatory chapter 13, in lieu of the remedy of bankruptcy."[26] Thus, enactment of the substantial abuse dismissal regime marked a pointed shift in the orientation of bankruptcy law in relation to the substantive relief that would be extended to individual debtors.

Nonetheless, the hopes of the consumer credit lobby encountered difficulty in becoming reality for two reasons. First, Congress failed to define the term "substantial abuse," thus leaving it to courts to fashion its meaning

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[22]*See* Lawrence Ponoroff, *Exemption Impairing Liens Under Bankruptcy Code Section 522(f): One Step Forward and One Step Back*, 70 U. COLO. L. REV. 1, 6-7 (1999) ("[T]here is no doubt that adoption of the Bankruptcy Code in 1978 marked a significant shift in favor of consumer debtor relief in the precarious and elusive balance that American bankruptcy law has long sought to achieve between the fresh start for individual debtors and protection of the legitimate collection rights of creditors.").

[23]SKEEL, *supra* note 21, at 157.

[24]*See id.* at 197.

[25]*See* 11 U.S.C § 707(b) (2000) (amended 2005).

[26]S. REP. NO. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880; H.R. REP. NO. 95-595, at 380 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6336.

through decisional law. While some courts focused on the presence of surplus future income as a basis for a substantial abuse dismissal, not all did.[27] Moreover, a great deal of variance characterized courts' assessment of the level of surplus future income that would trigger a finding of substantial abuse. What constituted substantial abuse for some did not for others. From the perspective of the consumer credit lobby, the indeterminacy of the substantial abuse standard contributed to the provision's failure in living up to its intended purpose.[28]

The second factor which contributed to the statute's shortcomings was that the statute solely gave standing to the court, on its own motion, to initiate a substantial abuse dismissal. The perception existed that courts raised the issue infrequently and, because no other party could initiate such a motion, the provision was essentially a dead letter.[29] Congress responded in 1986 by giving the U.S. Trustee standing to bring substantial abuse dismissal motions,[30] but, yet again, the perception persisted that underenforcement of

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[27]*See* Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, *in* 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 1123, 1165-67 & 1167 n.136 (1997); *see also* H.R. REP. NO. 109-31, pt. 1, at 12 (2005) ("The standard for dismissal—substantial abuse—is inherently vague, which has lead [sic] to its disparate interpretation and application by the bankruptcy bench. Some courts, for example, hold that a debtor's ability to repay a significant portion of his or her debts out of future income constitutes substantial abuse and therefore is cause for dismissal; others do not." (footnotes omitted)), *reprinted in* 2005 U.S.C.C.A.N. 88, 98.

[28]Given that the substantial abuse dismissal represented a political compromise, this outcome may not have been that surprising to the provision's architects. *See* SKEEL, *supra* note 21, at 196 ("[T]he compromise fits a pattern we have seen again and again: when interest groups clash directly on an issue of real importance, lawmakers often resolve the conflict by devising a mushy, fact-driven compromise. 'Substantial abuse' is malleable enough to permit courts to reach either result—to dismiss the debtor's petition or permit it—in almost any given case.").

[29]Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 128 (1999). Courts perhaps did not do so, in part, because of the awkward position in which they would be placed were an appeal to occur. Consider, for example, Judge A. Jay Cristol's poetic disposition (in the tradition of Edgar Allan Poe's *The Raven*) of the abuse dismissal motion he raised sua sponte:

> Could I? Should I? Sua sponte, grant my motion to dismiss?
> While it seemed the thing to do, suddenly I thought of this.
> Looking, looking towards the future and to what there was to see
> If my motion, it was granted and an appeal came to be,
> Who would be the appellee?
> Surely it would not be me.
> Who would file, but pray tell me,
> a learned brief for the appellee
> The District Judge would not do so
> At least this much I do know.
> Tell me raven, how to go.

In re Love, 61 B.R. 558, 559 (Bankr. S.D. Fla. 1986).

[30]Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219, 100 Stat. 3088, 3101.

the substantial abuse dismissal was the norm.[31]

Against this backdrop, in 1994, Congress authorized the National Bankruptcy Review Commission (the NBRC) to evaluate and recommend revisions to the Bankruptcy Code.[32] In a preemptive strike, prior to publication of the NBRC's final report in 1997, the consumer credit lobby proposed legislation to Congress in 1996.[33] At the heart of its proposal was a means-testing provision. This stood in contrast to the NBRC's final report, which indirectly appeared to reject the concept.[34] The report, however, was not unanimous: Four of the nine commissioners, who included Judge Edith Jones from the U.S. Court of Appeals for the Fifth Circuit, filed dissenting views on the NBRC's recommendations for the consumer bankruptcy system.[35] Lambasting the NBRC majority for its inaction on means-testing, Judge Jones vociferously advocated for it.[36] While the NBRC's recommendations essentially went ignored by Congress, the creditors' bill wended its way through nearly a decade's worth of legislative cycles and was ultimately signed into law on April 20, 2005 as BAPCPA.[37]

BAPCPA made various amendments in order to transfigure the substantial abuse dismissal into the abuse dismissal. With respect to the original structure of the provision, four revisions were made. First and foremost, BAPCPA broadened the standard for dismissal from *substantial abuse* to *abuse*. Second, it broadened the class of individual who has standing to bring an abuse dismissal motion to include the private trustee as well as any party in interest. Third, it added the option of converting the debtor's case to Chapter 11 or Chapter 13 with the debtor's consent. Finally, reflecting BAPCPA's anti-debtor tenor, it eliminated the presumption in favor of granting relief to the debtor.[38]

BAPCPA further changed the provision's structure by adding six new paragraphs.[39] Among them is the formulaic means test under which a pre-

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[31]Williams, *supra* note 29, at 113.

[32]Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 108 Stat. 4106, 4147.

[33]*See* SKEEL, *supra* note 21, at 202.

[34]*See* 1 NAT'L BANKR. REV. COMM'N, *supra* note 27, at 272 ("The Commission's Consumer Bankruptcy Working Group discussed section 707(b), but did not make a recommendation on the appropriate interpretation or changes to that provision. The Commission's endorsement of guidelines to replace the problematic disposable income requirement was not intended to be applied to Chapter 7 debtors to be a proxy for substantial abuse, for this would stretch the term 'substantial abuse' beyond recognition.").

[35]*See* Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, *in* 1 NAT'L BANKR. REV. COMM'N, *supra* note 27, at 1043.

[36]*See* Jones & Shepard, *supra* note 27, at 1131, 1132-49.

[37]*See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

[38]Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a)(2)(B), 119 Stat. 23, 27.

[39]§ 102(a)(2)(C), 119 Stat. at 27-32.

sumption of abuse arises if a debtor's disposable monthly income exceeds certain amounts.[40] The presumption may be rebutted only under a narrow set of circumstances and only pursuant to highly-specific, statutorily-defined procedures.[41] For those cases where the presumption of abuse does not arise or is rebutted, Congress has mandated that a court consider whether the debtor filed for bankruptcy in bad faith or whether the totality of the circumstances of the debtor's financial situation demonstrates abuse (the bad-faith/totality inquiry).[42] Finally, certain restrictions are placed on standing to bring an abuse dismissal motion with respect to a debtor whose annual income is less than or equal to the state median income for a family size comparable to that of the debtor's household.[43] A closer look at how these provisions function reveals that Congress sought to strip bankruptcy judges of their discretion in evaluating abuse dismissal motions, yet failed to do so.

II. THE PERSISTENCE OF JUDICIAL DISCRETION UNDER THE ABUSE DISMISSAL REGIME

Here, the Essay details the individual facets of the abuse dismissal framework in order to focus on the judicial discretion Congress has left in place, and in some instances created, thereby undercutting its own reform efforts. It bears mentioning that this Essay does not seek to comment on the underlying merits of the abuse dismissal regime—for example, whether the formulaic means test is the best approach for identifying can-pay debtors, or whether the standing to bring such dismissal motions should be so liberal. Rather, the principal objective at this point is to describe the manner in which the abuse dismissal regime fails in its attempts to cabin pre-BAPCPA judicial discretion.[44]

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[40]*See* 11 U.S.C.S. § 707(b)(2)(A)(i) (2007).

[41]*See id.* § 707(b)(2)(B).

[42]*See id.* § 707(b)(3).

[43]*See id.* § 707(b)(6), (b)(7).

[44]As a general matter, bankruptcy courts are not autonomous decision-making bodies and can adjudicate only those disputes brought before them. It thus bears mentioning that the selection of cases for litigation, which is driven by litigant choices, will necessarily constrain judicial discretion insofar as judges will have the opportunity to exercise discretion only in a select group of cases. *See* Janger, *supra* note 5, at 598 (describing manner in which litigant-choice dynamics in consumer bankruptcy cases limits judicial involvement). As a theoretical matter, litigant effects on judicial involvement may be diminished in the abuse dismissal framework for two reasons. First, the Bankruptcy Code imposes a duty upon the U.S. Trustee or Bankruptcy Administrator to file an abuse dismissal motion (or a statement explaining why such a motion would be inappropriate) in any case (1) involving a debtor whose annual income equals or exceeds the state median income of a family size comparable to that of the debtor's household and (2) where the U.S. Trustee or Bankruptcy Administrator deems that the case should be presumed an abuse under Code § 707(b). *See* 11 U.S.C.S. § 704(b)(2). (This provision exemplifies Congress's inattention to the manner in which BAPCPA was drafted, *see infra* note 52, given that the U.S. Trustee and Bankruptcy Administrator lack standing to bring an abuse dismissal motion based on the presumption of abuse under the means test with respect to a debtor whose annual income equals the state median income

The starting point is the overarching framework for the abuse dismissal. Notwithstanding the complexity of BAPCPA's amendments, this framework conceptually remains straightforward. First, there exists a class of individual that is potentially subject to an abuse dismissal; and, second, there is a standard that must be established as a prerequisite to giving the court authority to dismiss the case.

Consider the first part of the overarching framework. In establishing the abuse dismissal regime, BAPCPA did not alter the class of individual targeted by the provision. The only type of debtor potentially subject to an abuse dismissal is an individual debtor whose debts are primarily consumer debts. This was true prior to BAPCPA, and it remains true today. Accordingly, courts retain the discretion they exercised prior to BAPCPA's enactment in determining whether an individual may fall subject to the abuse dismissal's reach. Such discretion will primarily center on the issue of ascertaining the nature of the debtor's debts—that is, identifying those debts that are consumer debts, which the Bankruptcy Code defines as debts "incurred by an individual primarily for a personal, family, or household purpose."[45] Once the court has identified the nature of the debtor's debts, a second related issue will invite the exercise of yet additional discretion. The court will have to determine whether the debtor's consumer debts, when considered in relation to the debtor's total debts, constitute a large enough percentage for the debtor to be deemed as having primarily consumer debts. After more than two decades' worth of decisional law, many of the points within this first part of the framework that are open to interpretation may, in fact, be settled law.[46] That said, courts nonetheless continue to wield front-end discretion that enables them to declare that an individual debtor falls outside of the potential reach of the abuse dismissal.

The second part of the overarching framework for an abuse dismissal is the standard that must be established as a prerequisite to giving the court authority to dismiss the case—namely, that the granting of relief would be an abuse of the provisions of Chapter 7. As was the case under the substantial abuse regime, the Code leaves the term "abuse" undefined. Accordingly, courts retain discretion to define abuse. That discretion, however, is not

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of a family size comparable to that of the debtor's household, *see* 11 U.S.C.S. § 707(b)(7).) Second, a court has standing to dismiss a case for abuse. *See id.* § 707(b)(1). Past experience, however, suggested that courts did not actively bring such motions under the substantial abuse dismissal framework. *See supra* notes 29-31 and accompanying text. Perhaps this will also be the case under the abuse dismissal framework.

[45]11 U.S.C.S. § 101(8).

[46]*Cf.* Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., Sept. 2005, at 1, 69 ("But it is surely true that hundreds of appellate decisions in consumer bankruptcy cases over 25 years of the Code have substantially narrowed the exercise of discretion by bankruptcy judges in many of the areas that BAPCPA attacks with formulas and automation.").

limitless. Congress sought to constrain the manner in which courts structure their abuse inquiry through a pair of mechanisms: the means test formula and the bad-faith/totality inquiry. The former represents the stronger attempt at discretion-stripping, one that implements a heavy-handed, rules-based approach.[47] The latter represents the weaker attempt at discretion-stripping, one that implements a vague and indeterminate standards-based approach. It will quickly become clear that, in all likelihood, by virtue of poor statutory design, both mechanisms will prove to be largely unsuccessful in accomplishing what Congress sought to achieve.

The focus begins with the strong mechanism for curbing the decision-making authority of judges. Pursuant to the means test formula, a presumption of abuse arises if the debtor's disposable monthly income exceeds certain amounts. In oversimplified terms, a court calculates a debtor's disposable monthly income by subtracting from a debtor's current monthly income, a term defined by the Bankruptcy Code,[48] three categories of deductions: (1) a debtor's monthly expenses specified either by certain IRS guidelines or by the Bankruptcy Code, (2) the debtor's average monthly secured debt payments, and (3) the debtor's monthly expenses for the payment of priority unsecured claims.[49] As described by one commentator, the "rules approach to means-testing removes authority from the bankruptcy judge, replacing that authority with rude approximations created by Congress of who is or is not eligible for relief without ever having to look the participants in the face."[50]

At first blush this would appear to be true. Consider the language of the means test itself. It reads as follows:

> (2)(A)(i) In considering under [Code § 707(b)(1)] whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

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[47]*See* Janger, *supra* note 5, at 602-03 ("Judicial competence would seem at first to be crucial to any system that relies on judges to make decisions. The obvious response to judicial incompetence would be to shift responsibility to the legislature, using crystalline rules to prohibit certain well defined behaviors, while tolerating a significant amount of over- and underinclusiveness.").

[48]11 U.S.C.S. § 101(10A).

[49]*Id.* § 707(b)(2)(A)(i).

[50]Williams, *supra* note 29, at 130; *see also In re* Hartwick, 352 B.R. 867, 870 (Bankr. D. Minn. 2006) ("The means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt. Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process."), *aff'd in part and rev'd in part*, No. 06-4433 (MJD), 2007 WL 2350560 (D. Minn. Aug. 20, 2007).

> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, whichever is greater; or
> (II) $10,950.[51]

This language leaves much to be desired as a matter of statutory design. Much like the rest of BAPCPA, it is not a piece of artful drafting.[52] That said, if one carefully parses through that language, one concludes that Congress has sought to preordain the presumption of abuse in one of three scenarios:

- first, in the case of a debtor whose nonpriority unsecured debt is less than $26,300.02, if the debtor's disposable monthly income is greater than or equal to $109.59;
- second, in the case of a debtor whose nonpriority unsecured debt is greater than or equal to $26,300.02 and less than or equal to $43,799.97, if the debtor's disposable monthly income is greater than or equal to the debtor's nonpriority unsecured debt divided by 240; and
- third, in the case of a debtor whose nonpriority unsecured debt is greater than $43,799.97, if the debtor's disposable monthly income is greater than or equal to $182.50.[53]

On this basis, one might conclude that courts will be required to do nothing more than act as automatons, making computations that: (1) identify the amount of the debtor's nonpriority unsecured debt, (2) calculate the debtor's monthly disposable income, and (3) ascertain whether monthly disposable income equals or exceeds the applicable, predetermined amount. And to ensure that courts do not deviate from this desired course of conduct, Congress engrafted an imperative onto the means test through the mandatory "shall" rather than the permissive "may": If a debtor fails the means test, the Bankruptcy Code commands that the court *shall* presume that abuse exists.

Will this strong mechanism achieve its intended purpose? A look at some

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[51] 11 U.S.C.S. § 707(b)(2)(A)(i).

[52] In discussing BAPCPA's "list of drafting errors and incomprehensible provisions," U.S. Bankruptcy Judge Keith Lundin observed the following: "Whether by design or default, bankruptcy practitioners and judges will spend decades unraveling cross-references that lead nowhere and interpreting new terms of art that fail to communicate. If the drafters intended to make bankruptcy law less coherent and more difficult of application, they succeeded." Lundin, *supra* note 46, at 70; *see also* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 268-91 (2007) ("BAPCPA adds a great amount of detail and is rife with bad draftsmanship, dumbfounding contradictions, and curious, even comical, special interest exceptions. It is hard to choke out any words of admiration for the quality of BAPCPA's draftsmanship. Judges and scholars have not hesitated to pour scorn on Congress for the details of BAPCPA."). As will be discussed, the interpretive difficulties stemming from BAPCPA's inartful drafting provide added opportunities for courts to exercise their discretion in conducting the means test.

[53] *See infra* Appendix.

of the issues that can arise on the income side of the means test equation suggests otherwise. The Bankruptcy Code defines "current monthly income" as the average monthly income that the debtor receives from all sources during one of two possible historical six-month periods.[54] The definition includes amounts regularly paid by nondebtor individuals toward the debtor's household expenses, yet excludes benefits received under the Social Security Act.[55] This definition gives rise to more questions than it answers. For a debtor who received wages from an employer, should the calculation of the debtor's current monthly income be based upon the gross amount of pretax wages or the net amount of post-tax wages? For a married debtor who files singly for bankruptcy, how should the spouse's contribution to the household be calculated? Are *indirect* benefits that flow from the Social Security Act, such as state unemployment benefits funded by federal grants authorized under the Act, excluded in calculating the debtor's current monthly income? The Code does not provide express guidance on any of these issues.[56]

Courts will have to fill the statutory interstices in the current-monthly-income calculus with judicially created rules. The question arises whether the same will occur on the expense side of the means test equation. Other commentators have already identified the uncertainty and ambiguity in this context, and the issue need not be further explored in detail.[57] Simply put, equal opportunity will arise for the monthly-expense calculus to become permeated with judicial gloss.[58] Accordingly, it is not clear that the presumption of abuse will arise with the frequency anticipated by Congress.[59]

More important, even if the presumption of abuse does arise, that does

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[54]*See* 11 U.S.C.S. § 101(10A)(A). For a discussion of how postpetition fluctuations in the debtor's income should be taken into account pursuant to the abuse dismissal framework, see Rafael I. Pardo, *Analyzing Chapter 7 Abuse Dismissal Motions Post-BAPCPA: A Reply on* Cortez, AM. BANKR. INST. J., Dec./Jan. 2007, at 16.

[55]*See* 11 U.S.C.S. § 101(10A)(B).

[56]For academic commentary on the first issue, see ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 160 (5th ed. 2006). For academic commentary on the latter two issues, see Carlson, *supra* note 52, at 260-63.

[57]*See, e.g.,* Carlson, *supra* note 52, at 268-91; Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 251-77 (2005).

[58]*See* Lundin, *supra* note 46, at 69 ("Substituting IRS guidelines for '(substantial) abuse' will not be an effective gatekeeper for access to chapter 7."); Wedoff, *supra* note 57, at 279 ("Although the use of IRS expense standards limits to some degree the discretion that courts have employed in making determinations of a debtor's ability to pay debt under the pre-BAPCPA versions of §§ 707(b) and 1325(b), the disputes that will arise under the BAPCPA version of these provisions will nearly all be resolved by discretionary judicial determinations.").

[59]Prior to BAPCPA's enactment, Professor Janger predicted that means-testing, with its overreliance on a rule rather than a standard, would fail to accomplish its intended purpose. *See* Janger, *supra* note 5, at 619 ("What is striking about the reforms contained in both bills is not that they propose means testing, but instead that they go to great lengths to define precisely the concept of ability to pay. The approach of S. 625 is remarkable in its bizarre use of crystals to quantify a distinctly muddy form of abuse. The result is to create a rule that is likely to accomplish virtually none of the stated goals of its drafters.").

not signify the end of the court's opportunity to exercise discretion under the abuse dismissal regime. Further opportunities abound. First, a debtor may rebut the presumption by demonstrating special circumstances that justify either an increase in expenses or a reduction in income.[60] The presumption will be rebutted if the adjustments generated by the special circumstances reduce the debtor's monthly disposable income below the thresholds triggering the presumption.[61] Because Congress chose to use the concept of "special circumstance" to allow recalculation of the means test, and because Congress did not define this term, courts will have wide latitude to circumscribe the reach of the means test.

Granted, that discretion could theoretically be limited by the principle of statutory construction that, when specific terms follow general terms in a statutory enumeration, the permissible inference to be drawn is that the specific terms restrict application of the general term to things similar to those specifically enumerated.[62] Accordingly, because the Code refers to "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces,"[63] one might conclude that a special circumstance must involve similar dynamics to a serious medical condition or a call to active military duty. While some courts have endorsed this view,[64] others have rejected it.[65] Regardless, the point remains that judicial discretion inheres in the abuse dismissal framework even after the presumption of abuse arises.[66]

The abuse inquiry does not end in the absence or rebuttal of the presumption of abuse. Rather, Congress again has sought to dictate the manner in which courts will structure the inquiry by commanding the court (again, by using the mandatory "shall") to consider whether the debtor filed the petition in bad faith, or, in the alternative, whether the totality of the circumstances of the debtor's financial situation demonstrates abuse.[67] This represents another component of Congress's discretion-stripping approach insofar as it sets forth additional bases for dismissal that the court must consider. Nonetheless, the bad-faith/totality inquiry implements a standards-

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[60]11 U.S.C.S. § 707(b)(2)(B)(i).

[61]*See id.* § 707(b)(2)(B)(iv).

[62]2A STATUTES AND STATUTORY CONSTRUCTION § 47.17, at 274-81 (Norman J. Singer ed., 6th ed. 2000).

[63]11 U.S.C. § 707(b)(2)(B)(i).

[64]*See, e.g.*, *In re* Delunas, No. 06-43133-705, 2007 WL 737763, at *2 (Bankr. E.D. Mo. Mar. 6, 2007); *In re* Johns, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006).

[65]*See, e.g.*, *In re* Delbecq, 368 B.R. 754, 758-59 (Bankr. S.D. Ind. 2007); *In re Haman*, 366 B.R. 307, 314 (Bankr. D. Del. 2007).

[66]*See* Wedoff, *supra* note 57, at 279 (noting that, where abuse presumption arises, "it is likely that the debtor will assert special circumstances to rebut the presumption, and the courts will be required to make discretionary determinations as to whether the claimed circumstances justify additional expenses or a reduction in income").

[67]*See* 11 U.S.C.S. § 707(b)(3).

based approach in contrast to the rules-based approach of the means test. Accordingly, it is a weaker mechanism for divesting judicial discretion. To be sure, the provision does strip some discretion. Whereas a court under the substantial abuse dismissal regime was free to structure its inquiry without reference to bad faith or totality of the circumstances, unless required to do so by virtue of binding precedent,[68] a court no longer has that freedom. On the other hand, because the bad-faith/totality inquiry will involve a highly factual determination centered on the individualized circumstances of the debtor's case, it seems likely that decisionmaking in this vein will remain largely unconstrained.[69]

The focus on the second part of the overarching framework of the abuse dismissal, the abuse standard itself, has revealed that Congress underestimated the deficiencies in its strong and weak mechanisms for minimizing judicial discretion. But there remains one component of decision-making authority that has not yet been discussed. Recall that abuse first must be established, whether via the means test or the bad-faith/totality inquiry, for the court to have the authority to dismiss the debtor's case. That the court has the authority to dismiss the case, however, does not mean that the court must exercise that authority and dismiss the case. The Bankruptcy Code unequivocally states that the court *may* dismiss the debtor's case if it finds that the granting of relief would be an abuse. Put another way, if the court does not find abuse, then the court *never* has authority to dismiss the case. On the other hand, if the court does find abuse, then the court has discretion to dismiss *but it need not do so*. Congress has clearly demonstrated throughout the entire abuse dismissal framework that it knows how to engraft an imperative through use of the mandatory "shall." If Congress had intended for courts to dismiss a case in every instance where there was an unrebutted presumption of abuse or where abuse existed by virtue of the debtor's bad

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[68]For example, prior to BAPCPA, the U.S. Court of Appeals for the Fourth Circuit had adopted a totality-of-the-circumstances framework for evaluating substantial abuse dismissal motions, *see* Green v. Staples (*In re* Green), 934 F.2d 568, 572 (4th Cir. 1991), and courts within the Fourth Circuit implemented that framework, *see, e.g., In re* Shaw, 311 B.R. 180, 183 (Bankr. M.D.N.C. 2003) (noting that "[t]he Fourth Circuit has adopted a test for substantial abuse that requires that the court look at the 'totality of the circumstances'" and citing *In re Green* for that proposition).

[69]Extant academic debate over the proper reach of the bad-faith/totality inquiry may be a harbinger of diverging judicial interpretations of the provision that loom on the horizon. *See, e.g.,* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665 (2005) (arguing that a debtor's income-based repayment ability is an improper consideration under the totality inquiry); Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035 (arguing that a debtor's income-based repayment ability is a proper consideration under the totality inquiry); *see also* John A. E. Pottow, *The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World: Trying to Bridge the Wedoff/Culhane & White Divide*, 71 MO. L. REV. 1053 (arguing that the totality inquiry ought to focus on a debtor's asset-based repayment ability).

faith or the totality of the circumstances, it would have amended the Bankruptcy Code to read "the court shall dismiss a case." Instead, Congress left untouched the largest weapon of judicial discretion that courts have in their arsenal under the abuse dismissal framework.

Sadly, courts and commentators have read the permissive "may" out of the statute by assuming that an unrebutted presumption of abuse or abuse under the bad-faith/totality inquiry is the kiss of death for the debtor.[70] This is an incorrect reading of the statute, and courts need to consider whether, notwithstanding a finding of abuse, other factors weigh in favor of nondismissal—for example, the debtor's need for a fresh start. The permissive "may" represents the decisive element of judicial discretion within the abuse dismissal framework and thus further weakens congressional efforts at removing decision-making authority from the courts.

In light of these observations, how might one assess the likelihood that the abuse dismissal framework will achieve the results Congress originally envisioned? In answering that question, recall that BAPCPA implemented standing limitations within the abuse dismissal framework that preclude a motion based on the means test from being brought against any debtor whose current monthly income is less than or equal to the state median income for a family size comparable to that of the debtor's household. Pre-BAPCPA empirical studies of the means test estimated that, at a minimum, three-quarters of all debtors would be immune from means testing.[71] If these numbers hold true in a post-BAPCPA world, then, at best, only 25% of all debtors would face scrutiny under the abuse dismissal framework that has just been described. A recent report by the Executive Office for United States Trustees suggests this estimate may prove to be too high: Based on a sample of bankruptcy filings in eight judicial districts between April and November 2006,

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[70] *See, e.g., In re Haman*, 366 B.R. at 311 ("If, after performing the calculations under the means test, the presumption of abuse arises, the Court has no discretion and must dismiss the chapter 7 case unless a debtor is able to rebut the presumption by demonstrating special circumstances . . . ."); *In re* Sorrell, 359 B.R. 167, 180 (Bankr. S.D. Ohio 2007) ("If a case is determined to be an abuse, the case will be dismissed unless the debtor consents to a conversion to chapter 11 or 13."); *In re* Skaggs, 349 B.R. 594, 600 (Bankr. E.D. Mo. 2006); Wedoff, *supra* note 57, at 242 ("If a debtor's disposable income is sufficiently large to raise a presumption of abuse, *the only way* for the debtor to avoid dismissal or conversion under § 707(b)(2)(A) is to rebut the presumption in the manner required by § 707(b)(2)(B)." (emphasis added)); *cf.* Carlson, *supra* note 52, at 267-68 ("Means testing boils down to this: if net current monthly income exceeds $167.77 [sic], the debtor's chapter 7 case *will always be dismissed*." (emphasis added)).

[71] *See* Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 37-38 (1999) (finding that 76% of debtors had income less than the national median); Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Pre-Bankruptcy Planning Limits Means-Testing Impact*, AM. BANKR. INST. J., Feb. 2000, at 22 (finding that 84% of debtors had income less than the applicable state median); *see also* WARREN & WESTBROOK, *supra* note 56, at 161 (observing that, according to data from 2001 Consumer Bankruptcy Project, 92% of debtors had income less than the applicable state median).

the report found that approximately 8% of Chapter 7 debtors were subject to means testing and that only 10% of debtors within that group had sufficient disposable monthly income to trigger the presumption of abuse.[72]

Given the degree to which judicial discretion has survived within the framework, despite Congress's efforts to the contrary, it seems reasonable to conclude that the law, when applied, will effectuate minimal substantive change. Taken a step further, upon examining the myriad opportunities to circumvent the means test due to poor statutory design, Professor David Gray Carlson has concluded that "the means test either encourages bankruptcy abuse or has no effect. . . . But insofar as the fresh start is concerned, the end result is a consumer bankruptcy law that is not much changed (in substance) compared to the days before 2005."[73]

One might ask why the consumer credit lobby expended so much effort, to the tune of at least $80 million in lobbying costs,[74] to pass a law that has more bark than bite. Some commentators have surmised that, because the abuse dismissal framework increases the cost of filing for bankruptcy, primarily by increasing the number of disclosures required by debtors and the cost of representation, the real effect of the abuse dismissal framework will be to deter filings by otherwise eligible Chapter 7 debtors.[75] Professor Carlson, however, has pointed out that such deterrence will be short-lived: More and more debtors will make their way through the system, and the reality that the doors to Chapter 7 remain open will debunk the popular myth that Chapter 7 bankruptcy is no longer an option.[76]

Recent bankruptcy filing statistics suggest that, with time, Professor Carlson's prediction may materialize. The surge in filings that occurred prior

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[72]EXECUTIVE OFFICE FOR U.S. TRS., U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS: IMPACT OF THE UTILIZATION OF INTERNAL REVENUE SERVICE STANDARDS FOR DETERMINING EXPENSES ON DEBTORS AND THE COURT 3-4 (2007), *available at* http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/Rpt_to_Congress_on_IRS_Standards.pdf.

[73]Carlson, *supra* note 52, at 227; *cf.* Wedoff, *supra* note 57, at 279 ("For those debtors whose income is above the median, pre-bankruptcy planning will frequently allow sufficient deductions from income to avoid a presumption of abuse."). Professor Carlson's conclusion may prove too much. Because the means test operates within the broader abuse dismissal framework, debtors who escape the means test (whether by virtue of strategic or nonstrategic behavior) will still have to contend with the possibility of dismissal under the bad-faith/totality inquiry. *See supra* note 67 and accompanying text. In fact, Professor Carlson acknowledges this point. *See* Carlson, *supra* note 52, at 297 ("A broad interpretation of section 707(b)(3) permits courts to punish strategic manipulation of the means test.").

[74]*See* SKEEL, *supra* note 21, at 203.

[75]*See id.* at 205; Carlson, *supra* note 52, at 318-19; Lundin, *supra* note 46, at 69-70; Wedoff, *supra* note 57, at 277-78. Some commentators have dismissed the argument that the potential for increased repayment in Chapter 13 motivated the consumer credit lobby to push for BAPCPA's enactment. *See, e.g.*, Carlson, *supra* note 52, at 318. *But see* SKEEL, *supra* note 21, at 205 (noting that consumer credit lobby perhaps supported means-testing on the basis "that a means test that catches only a few debtors is better than no means-testing provision at all").

[76]*See* Carlson, *supra* note 52, at 319.

to October 17, 2005, BAPCPA's effective date, have made it difficult to interpret bankruptcy filing statistics in the wake of BAPCPA.[77] It has been assumed that the filing surge can be explained as strategic behavior by individuals who had been contemplating filing for bankruptcy and sought to avail themselves of the pre-BAPCPA Bankruptcy Code. If that is so, it remains unclear how many fewer filings in 2005 and how many more filings in 2006 there would have been absent the filing surge from 2005. With this caveat in mind, if one compares total consumer filings in the first quarter of 2006 to those in the first quarter of 2007, such filings have risen dramatically from 112,685 to 187,361.[78] This represents approximately a 66.3% increase in consumer filings. If consumer filings hold constant for the rest of 2007, there would be nearly three quarters of a million consumer bankruptcy filings, a number closely approaching the 1 million mark consistently seen in pre-BAPCPA filing statistics.

If the future ends up proving that the abuse dismissal framework has little impact on deterring consumer bankruptcy filings and constraining the exercise of judicial discretion, what, if anything, will be the lasting impact of the abuse dismissal framework? This is the question the Essay now seeks to answer.

III. THE BLURRING OF ADMINISTRATIVE AND JUDICIAL FUNCTIONS UNDER THE ABUSE DISMISSAL REGIME

Ultimately, the means test represents the manner in which BAPCPA has undermined congressional reform efforts from the late 1970s to redefine the role of courts in the bankruptcy system. With the means test, Congress has exacerbated the degree to which bankruptcy courts must handle an intensely administrative function, which has had the concomitant effect of impairing the ability of such courts to exercise their judicial function.[79] Many disputes that have arisen under the means test have not involved facts to be determined that are unique to the litigants before the bankruptcy court. Rather, such disputes have called upon the bankruptcy court to make a direct statement of positive law largely removed from the individual circumstances of the case at hand.[80] Such disputes would be better resolved through the rule-

[77]A massive drop off in filings occurred after BAPCPA's enactment, from a record high of 2,078,415 in 2005 to 617,660 in 2006. *See* U.S. Courts, *supra* note 2.

[78]*See id.*

[79]Professor Skeel observes that, in the hearings leading up to BAFJA's enactment, bankruptcy judges expressed serious concerns about the administrative burden of mean testing. *See* SKEEL, *supra* note 21, at 194; *cf.* Janger, *supra* note 5, at 620 (predicting that means-testing "will require a substantial reallocation of judicial time to determining eligibility for Chapter 7").

[80]For example, courts have had to determine whether debtors who own their vehicles and thus do not owe monthly payments on them may nonetheless deduct from their current monthly income the standard IRS deductions permitting a motor vehicle ownership expense. *See* Carlson, *supra* note 52, at 275-76.

making decision structure of an administrative agency rather than the highly formal decision-making structure of adjudication by a court. Moreover, the decisional law that results from such adjudications will have limited effect in binding future litigants in a decentralized judicial system. Thus, improper and inefficient use of judicial resources will likely lead to inconsistent application of the law. Such an outcome merits great concern and calls for policy-makers to reconsider reform efforts that would ensure a more appropriate role for the bankruptcy judiciary.

In order to understand how the abuse dismissal regime restructures the institutional design of bankruptcy courts, one must consider the role Congress envisioned for them when it enacted the Bankruptcy Code. Over three decades ago, Congress established the Commission on the Bankruptcy Laws of the United States (the Bankruptcy Act Commission) to evaluate the then-existing bankruptcy system.[81] In its report, the Commission identified the need for substantial revision of the system of bankruptcy administration as one of the principal problems that led to the creation of the Commission.[82] Ultimately, the Commission deemed the severance of judicial functions and administrative functions within the bankruptcy system to be imperative.[83] This would be accomplished in a two-step fashion: first, by relieving bankruptcy courts of "significant administrative functions in the absence of a litigable controversy;"[84] and second, by creating an administrative agency empowered to handle almost all matters in proceedings that did not involve litigation.[85] Implicit in this solution lies a single-axis model for separating administrative and judicial functions. Disputed matters implicate the judicial function and fall on one side of the axis, whereas undisputed matters implicate the administrative function and fall on the other side of the axis. Figure 1 depicts this relationship.

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[81]Pub. L. No. 91-354, 84 Stat. 468 (1970). Prior to the Bankruptcy Code's enactment, what has been commonly referred to as the Bankruptcy Act of 1898 set forth the legal rules for the federal bankruptcy system. *See* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

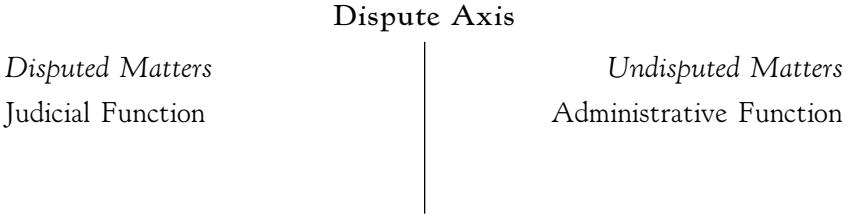
[82]*See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt.1, at 4-5 (1973).

[83]*See id.* at 6.

[84]*Id.*; *see also id.* at 94 ("The Commission accordingly recommends that the bankruptcy judges be removed from the administration of bankrupt estates and be restricted to the performance of essentially judicial functions, that is, primarily to the resolution of disputes or issues involving adversary parties and matters appropriate for judicial determination.").

[85]*Id.* at 7; *see also id.*, pt. 2, at 67 ("Save where the Act specifically requires an issue to be raised by complaint filed with the bankruptcy court, this section contemplates that all necessary actions in a case will be taken by the administrator and that, after an interval to permit any aggrieved person to seek a judicial determination by filing a complaint with the court, shall become final if not contested.").

FIGURE 1
SINGLE-AXIS ADMINISTRATIVE MODEL



Congress seemed to endorse this single-axis model in its enactment of the Bankruptcy Code.[86] The Code's section governing rules of construction specifies that the phrase "after notice and a hearing" authorizes action without a court hearing where a party fails to request one in a timely fashion.[87] The Bankruptcy Code's legislative history further reveals that Congress intentionally incorporated this mechanism as part of its institutional design of the bankruptcy courts. Both the House and Senate Reports that accompanied the Bankruptcy Reform Act of 1978 state as follows:

> The concept [of "after notice and a hearing"] is central to the bill and to the separation of the administrative and judicial functions of bankruptcy judges. . . . If there is no objection to the proposed action, the action may go ahead without court action. The change will permit the bankruptcy judge to stay removed from the administration of the bankruptcy or reorganization case, and to become involved only where there is a dispute about a proposed action, that is, only when there is an objection.[88]

In light of these observations, how does the claim that the abuse dismissal framework blurs the administrative and judicial functions of the bankruptcy court fare?

Under the Code's single-axis model, the claim is a nonstarter. The operative language of the abuse dismissal framework begins with the phrase "after notice and a hearing."[89] Accordingly, only where a dispute arises over an abuse dismissal motion will the court have to intervene. For undisputed abuse dismissal motions, the court need not become involved in the administrative sphere. While that may be true, once one recognizes the deficiencies

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[86]*See* Richard B. Levin, *Towards a Model of Bankruptcy Administration*, 44 S.C. L. REV. 963, 967 (1993).

[87]11 U.S.C. § 102(1)(B)(i) (2000).

[88]S. REP. NO. 95-989, at 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5813; H.R. REP. NO. 95-595, at 315 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6272.

[89]*See* 11 U.S.C.S. § 707(b)(1) (2007).

inherent in the simplicity of the single-axis model, it becomes clear that requiring bankruptcy courts to adjudicate disputed abuse dismissal motions implicates the administrative function.

Richard Levin has argued that the single-axis model is inadequate because it fails to classify the nature of the decision to be made, a classification necessary for determining whether the court is the suitable decisionmaker.[90] To remedy this, Levin proposes improving the single-axis model by adding an axis that would define the nature of the decision to be made.[91] This additional axis would differentiate between forensic and nonforensic decisions.

Levin defines a forensic decision as one based on past events. Because such decisions typically arise from past disputes, such decisions require proof of existing facts and application of the relevant law to them.[92] Levin characterizes forensic decisions as "suitable for resolution by judicial forms and procedures, such as the introduction of disputed evidence to permit the court to find facts."[93] On the other hand, Levin defines a nonforensic decision as one involving prediction about the future course of events in administration of the case and thus requiring the decisionmaker to evaluate risks and balance competing risk-reward preferences among case participants.[94] In contradistinction to forensic decisions, nonforensic decisions are inappropriate for judicial resolution for several reasons: (1) Courts do not have an independent investigatory arm to conduct research about future risk; (2) the adversary system does not encourage collaborative exchange between the parties to a solution to a forward-looking problem; and (3) the indeterminacy of the future makes it difficult to establish effective legal standards.[95]

Pursuant to the double-axis model, there exist four broad categories of matters in a bankruptcy case: (1) disputed forensic matters, (2) undisputed forensic matters; (3) disputed nonforensic matters; and (4) undisputed nonforensic matters. In the absence of a dispute, court involvement will not be necessary even under the double-axis model. Accordingly, the possible matters to be heard by a court would be disputed forensic matters and dis-

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[90]*See* Levin, *supra* note 86, at 970, 975-76. Levin was one of the congressional staff attorneys who helped draft the Bankruptcy Code. *See* Robert M. Zinman, *Precision in Statutory Drafting: The Qualitech Quagmire and the Sad History of § 365(h) of the Bankruptcy Code*, 38 J. MARSHALL L. REV. 97, 108 n.38 (2004); *see also* Geraldine Mund, *Appointed or Anointed: Judges, Congress and the Passage of the Bankruptcy Act of 1978* (pt. 1), 81 AM. BANKR. L.J. 1, 23 & n.71 (2007) (noting that the House Subcommittee on Civil and Constitutional Rights began hearings on bankruptcy reform legislation in May 1975 and that Richard Levin began work for the Subcommittee in summer 1975). Mr. Levin recently joined Cravath, Swaine & Moore to create a bankruptcy restructuring department within the firm. *See* Karen Donovan, *Breaking Tradition While Embracing Bankruptcy Law*, N.Y. TIMES, Aug. 3, 2007, at C5.

[91]*See* Levin, *supra* note 86, at 970-71.

[92]*See id.* at 971.

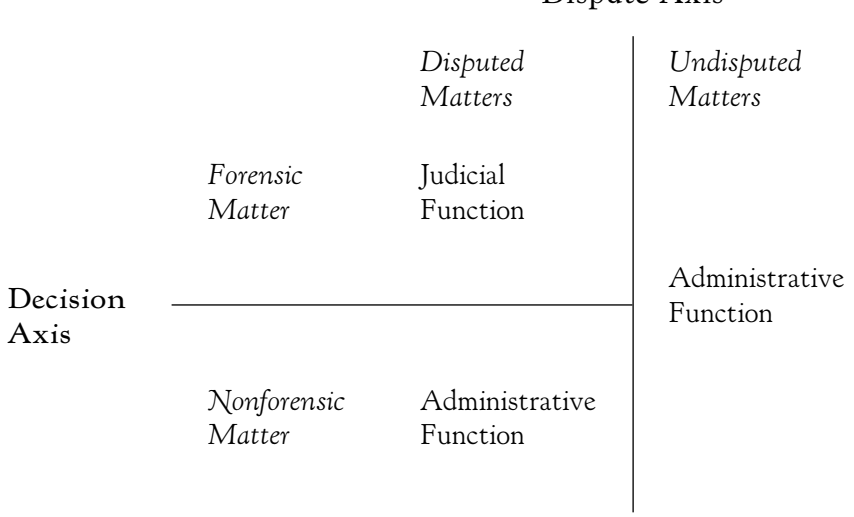
[93]*See id.*

[94]*See id.* at 972.

[95]*See id.* at 981-83.

puted nonforensic matters. However, because courts should not resolve nonforensic matters, the double-axis model leaves only disputed forensic matters for court resolution. Thus, the double-axis model eliminates a category of matters from the judicial function that would otherwise have been assigned thereto by the single-axis model—namely, disputed nonforensic matters. Figure 2 illustrates the double-axis model.

FIGURE 2
DOUBLE-AXIS ADMINISTRATIVE MODEL



Under the double-axis model, the claim that the abuse dismissal framework blurs the administrative and judicial functions of the bankruptcy court fares much better. A disputed abuse dismissal motion ultimately requires the court to make a decision about the course of action that should be taken regarding administration of a debtor's Chapter 7 case (i.e., whether it ought to be dismissed), and this necessarily entails a prediction about the debtor's future ability to repay creditor claims. To be sure, the underlying determination regarding abuse will necessarily entail forensic inquiry into past events: What amounts has the debtor historically earned? Has the debtor suffered from special circumstances justifying an adjustment to his or her historical earnings? Did the debtor file the petition in bad faith? Once those forensic determinations have been made, however, the court must answer a nonforensic question: Notwithstanding the finding of abuse, should the debtor's Chapter 7 case be dismissed? This will entail risk-reward analysis about the consequences of dismissal for the debtor and the debtor's creditors—in other words, crystal-ball gazing into the debtor's ability to repay nonpriority un-

secured debts over time.[96]

Considering the abuse dismissal framework within the context of the double-axis model reveals that Congress has exacerbated the blurring of administrative and judicial functions. According to the model, presiding over a disputed abuse dismissal motion, a nonforensic matter, constitutes an exercise of an administrative function. If the reported cases are any indication, it would appear that there has been a sizable number of such adjudications. In the year and a half following BAPCPA's effective date, bankruptcy courts issued to Westlaw 1,039 opinions citing to Title 11 of the United States Code and containing the term BAPCPA or "Bankruptcy Abuse Prevention and Consumer Protection Act."[97] Approximately 14% of those opinions mentioned the term "means test" or "707(b)(2)." Of course, such dispositions may be the tip of the iceberg: Bankruptcy courts surely do not resolve all of their dispositions by written opinion, and Westlaw surely does not document all written opinions issued by bankruptcy courts.

When one considers the deluge of paperwork in consumer cases that has inundated courts as a result of BAPCPA's disclosure requirements,[98] as well as the fact that more than three-quarters of bankruptcy judges considered themselves case managers prior to BAPCPA due to excessive caseloads,[99] the increased burden of resolving abuse dismissal motions does not further the separation of administrative and judicial functions that Congress sought to achieve in its design of the bankruptcy courts. Worse yet, it interferes with courts' ability to devote their resources to resolving disputed forensic matters which lie at the heart of the judicial function. Ultimately, the further entrenchment of the administrative function within bankruptcy courts ought to be considered as one of BAPCPA's most significant effects upon the bankruptcy system.

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[96]If required to adjudicate such an issue, the court will likely get an incomplete picture through the adversarial presentation of select information that favors each side—an undesirable approach for resolving a nonforensic matter. Furthermore, it seems unlikely that the parties would collaborate to craft a sensible conclusion to the elusive question of how much the debtor will be able to repay.

[97]The search query was formulated in Westlaws's FBKR-BCT database and read as follows: "11 U.S.C." & (BAPCPA "Bankruptcy Abuse Prevention and Consumer Protection Act") & CO(BANKR) & DA(AFT 10/16/2005 & BEF 4/17/2007)."

[98]*See* Carlson, *supra* note 52, at 228 (opining that BAPCPA's substantive effect on consumer bankruptcy has been to increase the paperwork burden). Regardless of the presence of a dispute, papers involving bankruptcy matters must be filed with the court. *See* FED. R. BANKR. P. 5005(a)(1). This state of affairs stands in stark contrast to what the Bankruptcy Act Commission, *see supra* note 81 and accompanying text, recommended in its final report. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt.1, at 5 (1973) ("[T]here is no reason to involve judges in the handling of papers and procedures for many thousands of cases in which no contest arises.").

[99]*See* Stacy Kleiner Humphries & Robert L. R. Munden, *Painting a Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 73-74; *see also* Levin, *supra* note 86, at 968 (noting that "many bankruptcy judges continue to view themselves as responsible for the overall management and supervision of the cases on their dockets").

CONCLUSION

Where, then, does this development lead the world of bankruptcy in the years to come? If bankruptcy filing rates return to pre-BAPCPA levels, bankruptcy courts will likely find a corresponding increase in their exercise of administrative functions, and this will have the effect of changing the nature of the institution. Professor David Skeel has suggested that yet another reason the consumer credit lobby may have pressed so hard for enactment of the abuse dismissal regime was to bring our bankruptcy system closer to the English bankruptcy system,[100] which has a pervasively administrative character.[101] Other BAPCPA provisions would support this suggestion. For example, if a consumer debtor fails to file with the court certain required disclosures, the debtor's case will be automatically dismissed,[102] and the court will be required to enter an order dismissing the case upon the request of a party in interest.[103] This represents yet another example of Congress's desire for courts to engage in administrative tasks. Or consider that Congress has sought to discourage attorneys from representing consumer debtors by placing restrictions on what they can tell their clients and by requiring such attorneys to certify through their signatures on a petition, pleading, or written motion that the debtor's Chapter 7 filing does not constitute an abuse.[104] The lack of consumer debtor representation is one of the hallmarks of the English system.[105] The history of bankruptcy law in this nation has repeatedly seen failed efforts to transform our consumer bankruptcy system into an administrative one resembling the English system. BAPCPA perhaps marks an emerging and evolving reorientation away from the judicial character of bankruptcy law.[106]

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[100]SKEEL, *supra* note 21, at 205.

[101]*Id.* at 2.

[102]11 U.S.C.S. § 521(i)(1) (2007).

[103]*Id.* § 521(i)(2).

[104]*Id.* §§ 526(a), 707(b)(4)(C)(ii)(II).

[105]*See* SKEEL, *supra* note 21, at 2.

[106]All of this leaves unanswered the question of who should carry out the administrative function in bankruptcy. While this issue is beyond the scope of the Essay, it is worth noting that the Bankruptcy Act Commission recommended that administrative responsibilities would be assigned to a new administrative agency in the executive branch that would be referred to as the United States Bankruptcy Administration. *See* REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt.1, at 103-55 (1973). The Commission envisioned that the arrangement between the agency and the bankruptcy courts would be akin to that existing between the IRS and the U.S. Tax Courts. *See id.*, pt. 1, at 6. Bankruptcy judges adamantly lobbied Congress against creation of such an agency for fear of losing their jobs. *See* SKEEL, *supra* note 21, at 143-44.

APPENDIX

This Appendix provides the analysis supporting the propositions discussed in the text regarding the thresholds under which the presumption of abuse arises under the means test. The means test requires the comparison of two amounts: (1) a debtor's disposable monthly income multiplied by 60,[107] and (2) one of three possible thresholds. The three possible thresholds are (1) $6,575, (2) $10,950, or (3) 25% of the debtor's nonpriority unsecured debts (denoted as $u/4$).[108] The applicable threshold will be the *minimum* of one of two values: (1) the *maximum* of $u/4$ or $6,575; or (2) $10,950. Accordingly, the applicable threshold t can be expressed as

$$t = \min((\max(u/4, \$6{,}575)), \$10{,}950). \quad (1)$$

Simplifying means test outcomes into a set of immutable rules can be accomplished by understanding the $u/4$ threshold in relation to its fixed counterparts (i.e., $6,575 and $10,950). For this purpose, there are three relevant categories of cases to consider: (1) where 25% of the debtor's nonpriority unsecured debts are less than $6,575 (denoted C_1); (2) where 25% of the debtor's nonpriority unsecured debts are greater than $6,575 and less than $10,950 (denoted C_2); and (3) where 25% of the debtor's nonpriority unsecured debts are greater than $10,950 (denoted C_3). Thus, for C_1, $u/4 < \$6{,}575$; for C_2, $\$6{,}575 < u/4 < \$10{,}950$; and for C_3, $u/4 > \$10{,}950$. Knowing the relationship of $u/4$ to the fixed amounts in equation 1 allows one to establish the applicable threshold for each case category. For C_1, $t = \$6{,}575$. For C_2, $t = u/4$. For C_3, $t = \$10{,}950$.

The presumption of abuse arises under the means test where the debtor's disposable monthly income (denoted *DMI*) multiplied by 60 is *greater than or equal to* the applicable threshold.[109] Accordingly, the presumption of abuse

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[107]Although the Bankruptcy Code does not use the term disposable monthly income, the term is used here as short hand for the amount represented by "the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) [of § 707(b)(2)(A)]." 11 U.S.C.S. § 707(b)(2)(A)(i).

[108]The Bankruptcy Code defines the applicable threshold as "the *lesser* of (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, *whichever is greater*; or (II) $10,950." *Id.* (emphasis added). In defining the applicable threshold, one witnesses yet again the inartful drafting characteristic of BAPCPA. The Code sets forth one possible threshold as "25 percent of the debtor's nonpriority unsecured *claims*." *Id.* § 707(b)(2)(A)(i)(I). Since the Code defines a "claim" as "a right to payment," *id.* § 101(5)(A), the means test instructs that the court ascertain the amount of money owed to the debtor on an unsecured basis by individuals or entities. As the $u/4$ threshold applies only if it exceeds $6,575, on a literal reading of the statute, the threshold would possibly have relevance only with respect to a debtor who was owed more than $26,300. However, given that the means test attempts to screen debtors for their ability to repay unsecured debts, and given that the Code defines "debt" as "liability on a claim," *id.* § 101(12), Congress most likely meant to use the word "debts" rather than "claims" for the $u/4$ threshold.

[109]While the Bankruptcy Code states that the presumption of abuse arises where the debtor's disposable monthly income multiplied by 60 "is not less than" the applicable threshold, *see id.* § 707(b)(2)(A)(i), avoiding use of the negative seems more straightforward.

arises in the following instances:

- for C_1, where $DMI(60) \geq \$6{,}575$;
- for C_2, where $DMI(60) \geq u/4$; and
- for C_3, where $DMI(60) \geq \$10{,}950$.

Dividing by 60 and rounding to the nearest hundredth, these expressions can be rewritten as follows:

- for C_1, where $DMI \geq \$109.59$;
- for C_2, where $DMI \geq u/240$; and
- for C_3, where $DMI \geq \$182.50$.[110]

Recall that, for C_2, $\$6{,}575 < u/4 < \$10{,}950$. When rounding to the nearest hundredth, if $u = \$26{,}300.02$, then $u/4 = \$6{,}575.01$ (satisfying the lower bound of the inequality). If $u = \$43{,}799.97$, then $u/4 = \$10{,}949.99$ (satisfying the upper bound of the inequality). Accordingly, C_1 applies where $u < \$26{,}300.02$; C_2 applies where $\$26{,}300.02 \leq u \leq \$43{,}799.97$; and C_3 applies where $u > \$43{,}799.97$.

Table 1 charts the three case categories and sets forth the characteristics under which the presumption of abuse arises.

TABLE 1
PREORDAINING THE PRESUMPTION OF ABUSE

	Case Category		
Case Characteristics	*Case 1* (C_1)	*Case 2* (C_2)	*Case 3* (C_3)
Nonpriority Unsecured Debt	$u < \$26{,}300.02$	$u \geq \$26{,}300.02$ & $u \leq \$43{,}799.97$	$u > \$43{,}799.97$
Applicable Threshold	$t = \$6{,}575$	$t = u/4$	$t = \$10{,}950$
Disposable Monthly Income	$DMI \geq \$109.59$	$DMI \geq u/240$	$DMI \geq \$182.50$

[110]Accordingly, where $DMI < \$109.59$, the presumption of abuse never arises. Conversely, where *DMI ≥ $182.50, the presumption of abuse always arises.*