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Collecting Debts From the Ill and Injured: The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay

Melissa B. Jacoby

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Collecting Debts From the Ill and Injured: The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay

Keywords

collecting debts, ability to pay, bankruptcy, Chapter 13, The Bankruptcy Reform Act of 2001, unsecured debt repayment

COLLECTING DEBTS FROM THE ILL AND INJURED: THE RHETORICAL SIGNIFICANCE, BUT PRACTICAL IRRELEVANCE, OF CULPABILITY AND ABILITY TO PAY

MELISSA B. JACOBY*

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INTRODUCTION

Consider this fable of two indebted Americans. Mr. Plastic is a young and able-bodied man with a well-paying job. Yet, he is insolvent due to substantial credit card debt. After several years of spending sprees to enjoy gourmet meals, vacations, and other luxuries, during which he made only the recommended minimum monthly payment toward the balance, Mr. Plastic has come to recognize the magnitude of his credit card balance. Factoring in the interest rate, compounded regularly, each of those meals and luxuries now costs a great deal more than he expected. Mr. Plastic would prefer not to engage in the “good old fashioned belt-tightening”¹ that would be necessary to pay his credit card balance while maintaining his lifestyle. After reading an article in his local newspaper on bankruptcy filings, Mr. Plastic determines that personal bankruptcy may provide him with a relatively painless answer to his debt problems.

Mr. Plastic’s neighbor, Mr. Hurt, is filing for bankruptcy too, but under quite different circumstances. Mr. Hurt’s financial stability began to crumble when he developed a chronic health problem. After receiving necessary and expensive treatments, Mr. Hurt discovered that his health insurance provider was willing to pay only a small portion of the cost. On his doctor’s instructions, Mr. Hurt resigned from his high-stress, long-hour, extensive-travel job and accepted a position with shorter hours and less travel at half the salary. Mr. Hurt increasingly turned to credit cards to finance his income shortfall, believing that he could make ends meet. Then, his health worsened while his medical bills continued to mount. Although the doctor’s office agreed to give Mr. Hurt some time to pay, the hospital sold Mr. Hurt’s account for his hospital bills to a

1. This phrase is used frequently in U.S. bankruptcy court opinions as a reference to reduction of expenses to a more modest level. *See generally In re Attanasio*, 218 B.R. 180, 199 n.25 (Bankr. N.D. Ala. 1998) (collecting cases that refer to providence of “belt-tightening”).

collection agency that now calls Mr. Hurt on the telephone incessantly. Throughout this period, Mr. Hurt has missed several mortgage payments and his mortgage lender has now instituted a foreclosure action. At this point, Mr. Hurt realizes that he needs help and files for bankruptcy.

In the aftermath of record numbers of bankruptcy filings,² entitlement to personal bankruptcy for debtors such as Mr. Plastic and Mr. Hurt has become the subject of legislative hearings, on television talk shows, and dinner table conversations. Many members of the U.S. Congress have been supporting bankruptcy reform legislation that is supposed to systematically evaluate the circumstances of those who seek relief.³

Bankruptcy reform proponents have acknowledged the importance of providing unconditional debt relief to individuals who legitimately use bankruptcy as insurance of last resort in the aftermath of serious calamities.⁴ Unconditional debt relief for non-culpable bankruptcy filers was a hallmark of the U.S. bankruptcy system in the Twentieth Century.⁵ Such relief is largely associated with chapter 7 of the Bankruptcy Code, which provides debt relief in relatively short order without the debtor having to commit future income to debt payment.⁶

2. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, 150 tbl.879 (120th ed. 2000), available at <http://www.census.gov/statab/freq/00s0879.txt> (last visited Oct. 21, 2001) [hereinafter *U.S. Census Bureau Statistical Abstract 2000*] (reporting annual bankruptcy filings through 1999).

3. See H.R. 333, 107th Cong. (2001). At the time of this writing, the House of Representatives and the Senate have passed similar, but not identical, bankruptcy reform bills, and the conference committee. President Bush has expressed a preference for the House version. Further movement of the bill was stalled first over certain substantive issues and then due to the need for Congress to focus on other urgent matters. Former-President Clinton pocket-vetoed a similar bill at the end of his presidency.

4. See, e.g., News Release, *Gekas Bankruptcy Bill Passes House*, at <http://www.house.gov/gekas/press/march/2001/1-BankruptcyPasses.htm> (last visited Mar. 1, 2001) [hereinafter *Gekas Bill News Release*] (asserting that this bill “will not hold anyone back who truly needs a fresh start”).

5. See, e.g., *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)) (explaining that central purpose of the Bankruptcy Code is to provide a fresh start free of pressure of preexisting debt but that bankruptcy laws limit opportunity for completely unencumbered fresh start to honest and unfortunate debtor).

6. A chapter 7 filer is entitled to keep all assets that are “exempt” under state and federal law. See 11 U.S.C. § 522 (1994). Thus, only those assets that are not exempt must be forfeited and sold for the benefit of creditors. See 11 U.S.C. §§ 704, 726 (describing duties of trustees and distributions of estates). Most debtors claim to have no non-exempt assets. See generally NATIONAL BANKRUPTCY REVIEW COMMISSION, *BANKRUPTCY: THE NEXT TWENTY YEARS* 86 (1997) [hereinafter *NBRC*] (compiling government data on distributions to creditors in chapter 7). Thus, they receive a discharge without forfeiting any assets. Absent some sort of complication, chapter 7 debtors receive that discharge in a matter of months. See ADMINISTRATIVE OFFICE OF

Yet, the reform proponents have played to our intuition that not everyone deserves unconditional debt relief, of course.⁷ With respect to individuals experiencing only modest financial setbacks of their own making, reform proponents have asserted that the bankruptcy system should promote personal fiscal responsibility and encourage repayment.⁸ If such people receive relief at all, reform proponents explain, they should file under chapter 13, which is the type of personal bankruptcy that conditions the receipt of debt relief upon the completion of a repayment plan,⁹ while unconditional debt relief remains available for legitimate users in chapter 7.¹⁰

These themes resonate in the fable of Mr. Plastic and Mr. Hurt. Mr. Plastic's financial problems are of his own making, and perhaps he should be required to unmake them before receiving any debt

THE UNITED STATES COURTS, *BANKRUPTCY BASICS* 3 (2d ed. 2000), available at <http://www.uscourts.gov/bankbasic.pdf> (last visited Oct. 18, 2001).

7. "The granting of a discharge is justified by a wise public policy. The granting or withholding of it is dependent upon the honesty of the man, not upon the value of his estate." H.R. REP. NO. 55-65, at 43 (2d Sess. 1897). See also *Grogan*, 498 U.S. at 286-87 (describing original policy behind bankruptcy laws). See generally Margaret Howard, *A Theory of Discharge in Bankruptcy*, 48 OHIO ST. L.J. 1047, 1049 (1987) ("A second goal of bankruptcy is to reward only the honest debtor with a fresh start. Policymakers have long been concerned that bankruptcy not be a haven for the dishonest.").

8. See, e.g., *Gekas Bill News Release*, *supra* note 4 (noting that "abuse is rampant in the bankruptcy system. Those of wealth are gaming the system as a financial planning tool"); News Release, *Gekas Denounces Clinton Pocket Veto of Bankruptcy Reform; Gekas Encouraged by Bush Administration*, at <http://www.house.gov/gekas/press/December/2000/21-GekasDenouncesVeto.htm> (last visited Dec. 21, 2000) (explaining that proposed legislation would restore "personal responsibility"); Press Release, *Grassley Continues Effort to Overhaul Bankruptcy System*, at <http://www.senate.gov/~grassley/releases/2001/p01r1-31.htm> (last visited Jan. 31, 2001) ("Every bankruptcy puts upward pressure on interest rates, so decreasing the number is good for people trying to buy a new house or pay for a car. Reforming the bankruptcy system will help usher in a new era of greater personal responsibility.").

9. See 11 U.S.C. §§ 1301-1330 (1994) (dealing with adjustment of debts of individuals with regular income). Debtors who file chapter 13 are permitted to retain all of their assets, but ordinarily are expected to commit all of their disposable income to payment of existing debts. See 11 U.S.C. § 1325 (defining disposable income and outlining requirements for confirmation of repayment plan). A repayment plan is supposed to be three years or less, but can last up to five years. See 11 U.S.C. § 1322(d) (explaining that a court may not approve any repayment plan longer than five years in duration). Ordinarily, a debtor must complete the plan to receive a discharge of debt. See 11 U.S.C. § 1328 (providing that debt may be discharged "as soon as practicable after completion by the debtor of all payments under the plan"). Chapter 13 also contains provisions that help debtors save their homes and cars from foreclosure and repossession. See 11 U.S.C. §§ 1322(b), 1325(a)(4) (describing permissible methods of defaults or modifying secured debt in repayment plans).

10. See, e.g., *The Bankruptcy Reform Act of 1998: Hearings on H.R. 3150 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 105th Cong. 12 (1998) (statement of Rep. James Moran) ("A legislative fix is vital to distinguish between those who truly need a fresh start, and deserve one, and those capable of assuming greater responsibility and making good on at least some of what they owe.").

relief. He is able to pay—he simply prefers not to do so. Mr. Plastic looks like a prime candidate for conditional debt relief under chapter 13.

By contrast, Mr. Hurt's different path to bankruptcy suggests he is an honest and unfortunate debtor who needs debt relief rather than discipline. In addition, his prior expenses and income interruption make it likely that he will continue to face financial difficulties. Based on his lower culpability and his higher likelihood of continued financial problems, chapter 13 seems inappropriate, particularly if it is supposed to be a more exacting form of bankruptcy for profligate spenders.

This Article demonstrates that the principles of repayment and culpability which instinctively seem like relevant factors to distinguish Mr. Plastic's entitlement to debt relief from Mr. Hurt's, actually play very little systematic role in the U.S. bankruptcy system, and will have no greater prominence if pending bankruptcy reform becomes law. Part I presents evidence that a large proportion of chapter 13 filers—whose debt relief is conditioned upon completion of a repayment plan—are ill or injured and have job problems, like Mr. Hurt. These data are derived from an eight-judicial-district study of individual debtors who filed for bankruptcy in 1999 ("1999 Study").¹¹ Part II examines these findings in the context of traditional bankruptcy principles, which suggest that the ill and injured may be the wrong types of debtors to be using chapter 13 in such full force. Part III considers the perspectives of two groups—contemporary bankruptcy reform proponents and debtors' advocates—and concludes that neither would find the high rate of medical-related chapter 13 filings inconsistent with their visions of the bankruptcy system. Instead, chapter 13 fulfills functions for these groups—discharge reduction and home saving, respectively—that deviate from traditional justifications of the bankruptcy system.

I. BANKRUPTCY FILINGS OF THE ILL AND INJURED

A. *Medical-Related Bankruptcy Generally*

Far removed from the bankruptcy discussions, lawmakers and citizens are engaged in an ongoing debate over how to ensure that Americans receive quality health care, and, perhaps more

11. For a full description of the study, see Melissa B. Jacoby, Teresa A. Sullivan and Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 389 (2001).

controversially, how to finance it.¹² In the meantime, most would agree that U.S. health care is expensive, both in terms of health insurance premiums and for specific medical needs that insurance does not cover.¹³ Prominent government programs, such as Medicare, have substantial gaps in coverage.¹⁴ At the same time, other federal and state health benefit programs for low income families or the elderly actually seem to be undersubscribed, perhaps due to lack of information on eligibility and availability.¹⁵ Congress has been wrangling over the extent to which individuals should be able to sue health maintenance organizations when those organizations fail to cover certain doctors' visits and procedures.¹⁶

In this environment, even families with some health insurance coverage pay many significant health care costs themselves. Examples include nursing home care, long-term care, prescription drugs, and

12. See generally BARRY R. FURROW ET AL., *HEALTH LAW* 462-66 (2000) (acknowledging development of national debate over health care financing and delivery of healthcare services in the United States).

13. See *id.* (discussing the development of private health insurance in the United States and the costs of healthcare to individuals, businesses, and the national economy).

14. See Aaron S. Yelowitz, *Public Policy and Health Insurance Choices of the Elderly: Evidence from the Medicare Buy-In Program*, 78 J. PUB. ECON. 301, 304 (2000) (discussing generally the need for Medicare recipients to purchase additional insurance to avoid gaps in coverage); Robert Pear, *Rival Medicare Drug Plans are Both Ruled Affordable*, N.Y. TIMES, June 9, 2001, at A11 (noting that about one-third of the forty million elderly and disabled people on Medicare have no insurance for drug expenses); Medicare: The Official U.S. Government Site for Medicare Information, at <http://www.medicare.gov/faqs/pdap.asp> (last visited Oct. 19, 2001) (explaining that Medicare generally does not cover prescription drugs, although in some cases it covers certain drugs for transplant patients and oral anti-cancer drugs, and certain Medicare plans might cover drugs, but that prescription drugs generally require a supplemental health policy). Notwithstanding these exclusions, Medicare comprised ten percent of the federal budget in 2000 and is expected to increase to over twenty-three percent if spending remains the same. See generally U.S. General Accounting Office, *Medicare: Higher Expected Spending and Call For New Benefit Underscore Need for Meaningful Reform*, GAO-01-539T (Mar. 22, 2001) (discussing fiscal implications of increased Medicare spending and possible effects of increasing coverage to include benefits such as prescription drug coverage).

15. See Dahlia K. Remler et al., *What Can the Take-Up of Other Programs Teach Us About How to Improve Take-Up of Health Insurance Programs?*, 3-12 (Nat'l Bureau of Econ. Research Working Paper No. 8185, Mar. 2001) (discussing possible reasons for under-enrollment in benefit programs by eligible families); Ceci Connolly, *Health Coverage for Kids Low-Cost But Little Used*, WASH. POST, June 1, 2001, at A3 (describing the Children's Health Insurance Program (CHIP)); National Council on the Aging, *New Online Service Helps Seniors, Caregivers Access Hundreds of Public Benefit Programs*, at <http://www.ncoa.org/press/bcu/index.html> (last visited Oct. 15, 2001) (stating that more than five million seniors are currently missing out on hundreds of state and federal benefit programs, and introducing a website to help seniors evaluate their eligibility for programs).

16. See, e.g., Amy Goldstein, *The Patients' Rights Fight, Round 2 Bills Have Passed House and Senate. Now It Gets Rough*, WASH. POST, Aug. 5, 2001, at A1 (discussing difficulties in resolving differences between patients' rights bills passed in both houses of Congress).

even some attributes of the most basic care.¹⁷ Many millions of other families have no health insurance coverage at all.¹⁸

Bankruptcy may not seem like an obvious part of the health care finance system, yet millions of individuals like Mr. Hurt have used bankruptcy as insurance of last resort.¹⁹ Most of those individuals had some health insurance, but experienced medical-related financial difficulties nonetheless.²⁰

17. See Walter L. Stiehm, *Poverty Law: Access to Healthcare and Barriers to the Poor*, 4 QUINNIPAC HEALTH L.J. 279, 283-85 (2001) (collecting statistics on cost of health care in the United States relative to Canada and European nations). By some estimates, out of pocket health spending by an average middle income non-elderly household is about 3.5 percent of the household's total earnings. See Lawrence H. Thompson, *The Retirement Project: Sharing the Pain of Social Security and Medicare Reform*, 2 (Urban Inst. Brief Series No. 11 Aug. 2000). See generally Kenneth R. Wing, *Health Care Reform in the Year 2000: The View From the Front of the Classroom*, 26 AM. J. L. MED. 277, 286-87 (2000) (discussing the types of services generally covered by most health insurance policies); Milt Freudenheim, *Consumers Facing Sharp Rise in Health Costs*, N.Y. TIMES, Dec. 10, 2000, at 54 (reporting on the largest surge in medical inflation since the early 1990s which may lead some lower income and self-employed workers to drop insurance coverage altogether); Robert Pear, *Spending on Prescription Drugs Increases by Almost 19 Percent*, N.Y. TIMES, May 8, 2001, at A1 (reporting on National Institute for Health Care study and stating that spending on prescription drugs increased 18.8% last year).

18. See Robert J. Mills, *Health Insurance Coverage 1* (U.S. Census Bureau, Current Population Reports No. P60-215 2000) (stating that fourteen percent of Americans have no health insurance coverage); see also Pamela Ostuw, *Health Insurance and the Near Elderly*, 1998, Emp. Benefit Research Inst. 4, 5-6 (2000) (explaining that the near elderly are less likely to have employment based coverage than two younger cohorts, with a substantial gender based difference). Among near elderly individuals with income of less than \$30,000 only 41.8% had employment based insurance, compared with 78.7% of those with income above \$30,000. *Id.* at 6. Different forms of measurement and sample sizes have yielded somewhat variable estimates of the uninsured. See Paul Fronstin, *Counting the Uninsured: A Comparison of National Surveys*, Sept. 2000, at http://papers.ssrn.com/so13/papers/cfm?abstract_id=258302 (last visited Oct. 22, 2001) (discussing reasons for different estimates of uninsured population).

19. Jacoby et al., *supra* note 11, at 378-82 (discussing various accounts of medically related bankruptcies since the 1960s); *id.* at 377 (extrapolating from 1999 data to estimate that more than half a million families had medically related bankruptcies in 1999 alone).

20. About one in five filers in the sample had no insurance at all. See Jacoby et al., *supra* note 11, at 399. Insufficient health insurance is often mentioned anecdotally as a "cause" of bankruptcy. See Robert A. Hillman, *Contract Excuse and Bankruptcy*, 43 STAN. L. REV. 99, 122 n.212 (1990) ("Many individuals' need to resort to bankruptcy might disappear if they had publicly funded catastrophic health care insurance and satisfactory unemployment benefits and restraining programs."); Philip Shuchman, *Theory and Reality in Bankruptcy: The Spherical Chicken*, 41 L. & CONTEMP. PROBS. 66, 74 (1977) (noting his belief in the early 1970s that a substantial number of personal bankruptcies could be prevented by comprehensive medical insurance); Robert M. Singer, *Zero Down and Zero Later—The Problem of Collection: A Comparison of Procedures under State Collection Law, the Bankruptcy Code, and the Internal Revenue Code*, 105 COM. L.J. 159, 180 (2001) (noting that "[w]ith millions of Americans having no or minimum insurance protection, medical bills can drive someone into bankruptcy, and medical bills can doom a chapter 13 plan").

The 1999 Study, which is the source of these data, consisted of a survey of debtors in eight judicial districts who filed for bankruptcy that year.²¹ The survey covered a variety of topics, but the medical findings were particularly striking; 46.2% of the 1999 sample, or an estimated 594,491 families in 1999, were identified as medical-related bankruptcies.²² The universe of medical-related bankruptcies included everyone who identified illness or injury as a cause of filing for bankruptcy,²³ plus other filers who indicated a substantial medical debt.²⁴

21. For a full description of the study, see Jacoby et al., *supra* note 11, at 389.

22. *See id.* at 389-90 (finding that 42.6% that had filed for bankruptcy filed for a medical reason or had incurred at least \$1,000 in medical bills within a prescribed time frame). If bankruptcy filers who identified the addition or death of a family member (which are circumstances that may have a medical component to them) as a reason for filing are added, the proportion grows to half (50%) of all the consumer bankruptcy filings in the United States, or an estimated national estimate of 643,389. *See id.* at 390. About 32.2% of all the bankrupt debtors gave one of the four listed reasons, while another 15.6% gave two listed reasons. Another 2.1% listed three, and 0.1% listed all four. *See id.* About 6.6% of the debtors listed "addition of a family member" as a reason for filing, and approximately 4.4% listed "death of a family member." *See id.* If similar fractions of bankruptcies involved medical problems throughout the 1990s, there would have been approximately five million medical-related bankruptcies in the past decade. *See id.* (estimating the number based on 50% of 10.7 million filings).

23. The 1999 Study included several targeted questions designed to explore medical-related bankruptcies in more detail, and yielded a more complete picture of debtors with medical problems as compared to relying only on scheduled debt owed to health care providers. *See Jacoby et al., supra* note 11, at 386-91 (describing methodology of study). One measure of medical-related filings was based on debtors' identification of causes of bankruptcy. *Id.* at 386-87. The survey asked a representative of each family to identify the family's reasons for filing bankruptcy, giving the bankruptcy filer a choice of possible (and unranked) reasons, including the all-encompassing "something else" with room to explain. *Id.* One of the sixteen specific options was "illness or injury of self or family member." *Id.* One in every four families in the sample (25.2%), or an estimated 324,268 bankrupt families in 1999, identified an illness or injury as a reason for filing bankruptcy. *Id.*

24. The petitioners were asked whether they had medical bills not covered by insurance in excess of \$1,000 during the past two years. *See Jacoby et al., supra* note 11, at 389. The debtors in the sample had a median gross income of about \$28,000, and thus the \$1,000 threshold amounted to over 3.5% of that median income. *Id.* Because this question was not limited to debt owed directly to health providers and instead was focused on the origin of the obligation, it should encompass any obligation incurred for medical treatment, such as debt paid prior to bankruptcy, credit card debt, or even a second mortgage on the family home, and thus is a broader category than what would show up on the bankruptcy schedules. *See id.* at 389-90; cf. Ed Flynn & Gordon Bermant, *Charging Their Way Into Bankruptcy*, 19 AM. BANKR. INST. J. 22 (Oct. 2000) (studying debtors with high credit card debts and determining that most of them owed no money directly to medical providers, and the average amount of those who did was \$180). One-third (33.8%) of the debtors, or an estimated 434,931 families in 1999, reported that they had such a debt. *See Jacoby et al., supra* note 11, at 389.

In addition to the effects of direct health care costs not covered by insurance,²⁵ Mr. Hurt's experience is a good reminder of the indirect financial consequences of medical problems. As the hypothetical Mr. Hurt discovered, medical problems can lead to secondary problems, such as income disruption. The data reveal that more than eight out of ten (81.5%) of the medical-related filers in the 1999 Study also identified a job problem.²⁶ Income disruption can, in turn, lead to defaults on mortgages, car loans, and other financial difficulties.²⁷

B. Medical-Related Chapter 13 Filings; The New Data

Medical problems and associated costs have long been mentioned in association with personal bankruptcy,²⁸ and the data presented above support conjecture of that association. Yet, discussions of medical-related bankruptcy have not previously intersected with debates over who should be filing chapter 13. For a debtor with ongoing problems any form of bankruptcy is of only limited assistance because bankruptcy does not insulate debtors from liability for future financial obligations. A debtor with serious medical problems may still be better off with debt relief than without it,²⁹ but

25. See, e.g., *In re Bagley*, 4 B.R. 248, 249 (Bankr. D. Ariz. 1980) (explaining that insurance covered only seventy percent of debtors' expenses related to child's severe respiratory problems).

26. Jacoby et al., *supra* note 11, at 408. Cf. TERESA A. SULLIVAN, ELIZABETH WARREN, AND JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* 161 (2000) (studying correlation between those with medical reasons for bankruptcy and job problems). "Job problem" includes debtors who experienced at least two weeks of income interruption within two years prior to filling out the survey, anyone not currently holding a job and actually seeking work within the four weeks prior to filling out the survey, and anyone who identified job problem as a reason for filing. See Jacoby et al., *supra* note 11, at 416. Although it is possible that the loss of a job led to the loss of health coverage and thus a medical-related bankruptcy, one can assume here that for at least some debtors who identify both types of problems, things happened in the opposite order, namely a health problem led to a job problem.

27. See discussion *infra* Part II.

28. See, e.g., NBRC, *supra* note 6, at 86 (listing various factors identified by researchers, including loss of health insurance); Peter T. Kilborn, *Illness is Turning Into Financial Catastrophe for More of the Uninsured*, N.Y. TIMES, Aug. 1, 1997, at A10 (reporting on uninsured families for whom illness led to bankruptcy). But see *The Bankruptcy Reform Act of 1999: Hearings on H.R. 3150 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 105th Cong. (1998) (statement of attorney Vern McKinley) ("Since a large portion of medical bills is paid by third party providers, health care consumers have little incentive to contain health care costs, leading to enormous debts for the uninsured or underinsured. Fixing the system is important, but is independent from the analysis of bankruptcy.").

29. See generally 11 U.S.C. §§ 524, 727 (describing discharge and effect of discharge of debts incurred prior to bankruptcy filing). The case law reveals unhealthy debtors in both chapters. See, e.g., *In re Hurley*, 258 B.R. 15, 17-20 (Bankr. D. Mont. 2001) (describing in a student loan dischargability case the uninsured

chapter 7 would provide him with a more swift and certain discharge than that available in chapter 13. With that in mind, one might expect to find only a small proportion of medical-related chapter 13 filings in the 1999 sample.

The data do not support this expectation. A second look reveals a rather high percentage (48.3%) of medical-related chapter 13 filings.³⁰ In addition, nearly four-fifths (79.5%) of the medical-related chapter 13 filers identified a job problem. If the proportion of medical and job related filers holds relatively constant year after year, then chapter 13 has been used by several hundred thousand families with medical and job problems over the past few years alone.³¹

Thus, contrary to expectations, many individuals and families who file chapter 13, and commit to a multi-year repayment plan as a condition to discharge, do so carrying the personal and financial burdens associated with medical problems.

debtor's asthma, diabetes, heart problems, hypertension, vascular disease, and other ailments that made the debtor physically unable to continue working as cleaning person and noting that special dietary restrictions amplified the debtor's negative cash flow); *In re Dickerson*, 193 B.R. 67 (Bankr. M.D. Fla. 1996) (explaining in a chapter 7 case where the trustee sought dismissal or conversion to chapter 13 for "substantial abuse" that the debtor suffered complications from her pregnancies, followed by multiple surgeries including an operation for appendicitis, and that she was directed to change her employment to a job that paid her approximately sixty percent lower salary); *In re Hampton*, 147 B.R. 130 (Bankr. E.D. Ky. 1992) (describing debtor's heart condition, which doubled monthly expenses and impaired debtor's ability to work the number of hours he previously worked); *In re Wommack*, 80 B.R. 578 (Bankr. M.D. Ga. 1987) (explaining that debtor suffered from health problems impairing his ability to obtain full-time employment, and proposed to pay his general unsecured creditors six percent of their claims); *In re Chmura*, 63 B.R. 12 (Bankr. D.N.J. 1986) (describing both spouses' serious health problems which caused hospitalizations and financial and emotional hardships); *In re Purdy*, 10 B.R. 902 (Bankr. N.D. Ga. 1981) (describing debtors' baby's health problems pre-petition and mother's need for surgery post-petition). See also, e.g., *In re Green*, 934 F.2d 568 (4th Cir. 1991) (noting in a chapter 7 case that debtor claims that leg injury will preclude debtor from working overtime in future and thus will reduce income by nearly half); *In re Cooke*, 169 B.R. 662 (Bankr. W.D. Miss. 1994) (explaining that the debtor was hospitalized and disabled midway through a chapter 13 plan, at which point her family lost thirty-three percent of its income, fell two payments behind on its chapter 13 plan, and the chapter 13 trustee moved to convert the case).

30. This proportion was larger than the percentage of medical-related cases in chapter 7 (44.1%), although the difference was not statistically significant.

31. See, e.g., Administrative Office of the U.S. Courts, News Release, *Bankruptcy Filings Down in Calendar Year 2000*, at http://www.uscourts.gov/Press_Releases/press_02232001.pdf (last visited Feb. 23, 2001) (reporting calendar year 2000 bankruptcy filing statistics, breaking down non-business bankruptcies by chapter).

II. A TRADITIONAL ANALYSIS OF THE MEDICAL-RELATED CHAPTER 13 FINDINGS

A. *The Centrality of the Discharge for the “Honest and Unfortunate”*

The U.S. bankruptcy system generally does not condition the availability of debt relief on the commitment of future income,³² and offers chapter 13 as an “option.” Providing a discharge to honest and unfortunate debtors has long been understood to be an important function of our bankruptcy system,³³ which in turn serves as a primary form of social welfare in a system of limited safety nets.³⁴

Although the unconditional discharge has some humanitarian justification,³⁵ altruism is not the only basis. The standard justification for unconditional debt relief (unless the debtor chooses chapter 13) is that debt relief brings significant social and economic benefits to the larger community. By freeing an individual of his debts,³⁶ a debtor “by the assistance of his allowance and his own industry, may become a useful member of the commonwealth.”³⁷ Conditioning the discharge, some have argued, could lead insolvent

32. Douglas G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 108-09 (1982) (discussing the history of American bankruptcy statutes).

33. See generally Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 60 (1986) (stating that “[t]he opportunity for an individual debtor to obtain relief from indebtedness and begin anew as a productive member of society—commonly termed the ‘fresh start policy’—has been an essential principle of our bankruptcy laws for more than seventy-five years” and arguing that amendments designed to channel more debtors into chapter 13 and to increase unsecured creditor payment in chapter 13 should be narrowly construed so as not to be inconsistent with American bankruptcy policy and philosophy).

34. See generally Iain Ramsay, *Models of Consumer Bankruptcy: Implications for Research and Policy*, 20 J. CONSUMER POL’Y 269, 275-76, 278-79 (1997) (identifying and evaluating models); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 401 (1994). Nick Huls has observed that the “[d]ischarge of debts is a typical American response to a social problem. It is a mild way of intervening.” Nick Huls, *American Influences on European Consumer Bankruptcy Law*, 15 J. CONSUMER POL’Y 125, 130 (1992).

35. See generally WILLIAM BLACKSTONE, COMMENTARIES 472 (“[A]t present the laws of bankruptcy are considered as laws . . . founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself”); Charles Seligson, *Major Problems for Consideration by the Commission on the Bankruptcy Laws of the United States*, 45 AM. BANKR. L.J. 73, 78 (1971) (“The Bankruptcy Act treats the delinquent debtor with compassionate regard”); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 338 (1991) (noting that during the development of bankruptcy law, legislators were concerned for honest debtors).

36. Of course not all debts are eligible for discharge and many chapter 7 debtors remain liable for some obligations after bankruptcy. See *infra* note 138.

37. WILLIAM BLACKSTONE, COMMENTARIES 471-72.

families to limit their occupational efforts,³⁸ or to stop working altogether.³⁹ The traditional view tells us that, for a family with insurmountable debts, debt forgiveness is financial rehabilitation that enables the family to become an income-producing and consumer-spending economic unit.⁴⁰ Assuming the continued commitment to the traditional view,⁴¹ it is inconsistent with such a view to withhold the discharge from someone who legitimately needs it.⁴²

Only when the debtor is honest and unfortunate, however, is providing debt relief “a matter of public concern.”⁴³ A House of Representatives Report preceding enactment of the Bankruptcy Act of 1898 described the intended recipients of bankruptcy relief as “an army of men crippled financially—most of them active, aggressive, *honest men who have met with misfortune in the struggle of life*, and who, if relieved from the burden of debt, would reenter the struggle with fresh hope and vigor and become active and useful members of society.”⁴⁴ The flip side of our generous bankruptcy system, therefore, is that the social welfare function of debt relief is not, or at least should not be, triggered when someone uses bankruptcy as a

38. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) [hereinafter Jackson].

39. Professor Frank R. Kennedy stated before Congress that:

It may seem unlikely that a debtor would give up his job in order to get relief under the bankruptcy laws, but the pressure of oppressive debt and the formidable requirements for meeting the standards of confirmation of a Chapter 13 plan may make this price for obtaining relief under Chapter 7 entirely acceptable. This option may be particularly attractive when the debtor is contemplating a change of employment.

Personal Bankruptcy: Oversight Hearing Before the Subcomm. on Monopolies & Commercial L. of the House Comm. on the Judiciary, 97th Cong. 549 (1984) (statement of Professor Frank R. Kennedy). See also Jackson, *supra* note 38, at 1433 (“If discharge did not protect human capital, many individuals would counter attempts at garnishment by substituting leisure, which creditors cannot reach, for wages By largely exempting human capital from the bankruptcy estate, society avoids this undesirable externality.”); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1085 (1987) (“Mandating [conditional debt relief] comes down to a diminution of the goal of economic productivity The debtor is, rather, held in economic limbo while tied to past obligations.”).

40. See Howard, *supra* note 7, at 1069.

41. Cf. Douglas Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 576 (1998) (describing competing schools of thought on corporate reorganization, using “traditionalist” label for one group).

42. See *id.* at 1069 (“Discharge in the context of non-tort claims should have only one goal—to restore the debtor to economic productivity and viable participation in the open credit economy. This standard calls for making discharge broadly available since viable economic participation is restored by lifting the burden of impossible debt.”).

43. See, e.g., *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902) (describing the benefits afforded to debtors under bankruptcy law as only being afforded to those debtors that have not committed punishable offenses and have not sought the benefits with fraudulent intent); see also *supra* notes 7-8 and accompanying text.

44. H.R. REP. NO. 55-65, 30 (2d Sess. 1897) (emphasis added).

convenient financial tool rather than as a last resort.⁴⁵

B. Why Chapter 13 is a Risky Form of Bankruptcy, According to the Traditional View, for Debtors With Low Culpability and Weak Repayment Prospects

Chapter 13 can provide debt relief, just like chapter 7, while offering the additional “benefit” of delivering repayment to unsecured creditors.⁴⁶ Indeed, in exchange for conditioning debt relief on repayment, chapter 13 was intended to provide even more debt relief than chapter 7 by discharging a wider range of obligations than chapter 7.⁴⁷ Yet, rather than receiving the discharge in a matter of weeks or months, as is the case for most chapter 7 cases, the debtor must wait several years, and must adhere to a repayment plan in the meantime. Thus, as a practical matter, a debtor with continued financial frailty may not receive the debt relief benefits traditionally associated with bankruptcy.

A debtor with reduced repayment capacity can, in theory, attain plan completion and discharge in chapter 13. Courts may confirm chapter 13 plans if the debtor is paying at least what the creditors would have received in a chapter 7 liquidation,⁴⁸ and if the debtor is committing all of her disposable income.⁴⁹ Even if unsecured creditors gain no benefit directly from these plans, some courts have confirmed such plans in the belief that the debtors are making their “best efforts.”⁵⁰ Likewise, some courts will permit debtors to reduce the amount they pay to creditors to maintain a contingency fund.⁵¹ Courts might be particularly willing to allow debtors to save in the

45. Whether the bankruptcy system has any systematic and formal screening process to determine the culpability of bankruptcy filers is, however, a different story. See *infra* Part III.A.2.

46. See CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 80 (1997) (explaining the function of chapter 13 bankruptcy).

47. See 11 U.S.C. § 1329 (providing fewer exceptions to discharge than section 523).

48. See 11 U.S.C. § 1325(a)(4).

49. See 11 U.S.C. § 1325(b).

50. *In re Harmon*, 72 B.R. 458, 460 (Bankr. E.D. Pa. 1987). In *Harmon*, the debtor was a single parent with three children who proposed to make no payments to unsecured creditors. The debtor filed for chapter 13 when she fell behind in her mortgage payments “due to circumstances beyond her control—medical bills for [her] infant twins, support payments not being made by the children’s father. . . .” *Id.* Even though the debtor had obtained a second job to meet her obligations under the plan, her plan not only proposed zero repayment to unsecured creditors, but it also required 52 months to repay her secured creditors. The judge affirmed the plan stating “[t]he debtor here has demonstrated that she is willing and able to pay the secured creditors in full.” *Id.* at 462.

51. See, e.g., *In re Greer*, 60 B.R. 547, 553 (Bankr. C.D. Cal. 1986). The court in *Greer* reasoned that allowing \$117 a month to be budgeted for a contingency fund was necessary if the plan was to have any feasible possibility of completion. See *id.*

event of an emergency if the debtor's budget is modest.⁵²

Although these approaches might make plan completion slightly more feasible, the fact that the discharge is essentially suspended pending plan confirmation for up to five years puts the ultimate receipt of the discharge at risk. In addition, courts' approaches to reviewing and approving budgets are far from uniform, with some approaches being less accommodating of particular circumstances.⁵³ Perhaps in an effort to be fair or to reduce the labor-intensiveness of individualized rulings, some courts require all chapter 13 debtors to pay a minimum percentage of unsecured debt.⁵⁴ Thus, debtors whose cases are assigned to such judges may be required to propose to pay that amount to their unsecured creditors, whether or not this is realistic.

One also cannot be comforted by the provisions intended to help debtors complete plans and receive a discharge when their financial circumstances change while the plan is underway. For example, a court could modify a repayment plan to increase or decrease payment to account for a change in circumstances.⁵⁵ In addition, a case can be converted to one under chapter 7 (with an extra fee)⁵⁶ or a court can grant a debtor a "hardship discharge" in chapter 13 prior to plan completion if certain requirements are met.⁵⁷ The efficacy of these options depends on a debtor knowing to ask for them and

52. For example, in *Greer* the plan had not budgeted any funds for medical or dental expenses, or for insurance (except for the automobiles), and food and clothing allowances were tight. *See id.* at 553. By contrast, in *In re Kitson*, the court reviewed what it considered to be an "inflated" budget, and stated that "a \$376 monthly cushion is excessive, especially since the debtor's claim of \$433 monthly 'miscellaneous' expenses should be more than adequate to take care of reasonably necessary expenses which arise unexpectedly." 655 B.R. 615, 624 (Bankr. E.D. N.C. 1986).

53. *See* A. Mechele Dickerson, *Lifestyles of the Not-So-Rich or Famous: The Role of Choice and Sacrifice in Bankruptcy*, 45 BUFF. L. REV. 629, 630 (1997) ("Neither Congress, courts, nor scholarly commentators have developed a normative standard that specifies the types of lifestyle choices courts categorically should deny when a person chooses to file for protection under federal bankruptcy laws.").

54. *See NBRC, supra* note 6, at 235 (discussing that court discretion creates variability in determining the structure and likelihood of success of repayment plans).

55. *See* 11 U.S.C. § 1329 (providing that a confirmed plan may be modified before completion of payments under the plan at the request of the debtor, trustee, or holder of an unsecured claim).

56. *Id.* (authorizing conversion). *See generally* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 186 (1997) (discussing attorneys' fees for conversion to chapter 7).

57. *See* 11 U.S.C. § 1328(b), (c). A hardship discharge is available if "the debtor's failure to complete such payments is due to circumstances of which the debtor should not justly be held accountable," if creditors receive at least as much as they would in chapter 7 liquidation, and if plan modification is not practicable. 11 U.S.C. § 1328(b)(1), (b)(2).

understanding their consequences. Many do not have sufficient information to evaluate and exercise these options, which are only infrequently sought and/or granted.⁵⁸ Whatever the reason—lack of information, court-imposed limitations on the granting of these remedies, or some other explanation—there is reason to believe that the failure to successfully request modification, conversion or a hardship discharge is not an entirely informed choice.⁵⁹

As a result of the way the law works in action, filing chapter 13 rather than chapter 7 not only forestalls the discharge, but often prevents it altogether. Available statistics consistently suggest that about two-thirds of the debtors who file under chapter 13 do not complete repayment plans.⁶⁰ Once a debtor defaults on chapter 13

58. See Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13: Dispositions* 4 (Admin. Off. of the U.S. Courts Working Paper No. 2, Oct. 1994) [hereinafter *Bankruptcy Statistical Trends Working Paper*] (finding that dismissal was the most common disposition of chapter 13 cases (49%), with only 14% converting to chapter 7); TERESA A. SULLIVAN, ELIZABETH WARREN, AND JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 215-17 (1989) (discussing data collected on the outcomes for chapter 13 cases and estimating that roughly one-third of the chapter 13 cases would complete their plans). Even in Girth's study that found a higher rate of plan completion (albeit only among cases in which plans were confirmed), 22.9% were dismissed, 11% were converted, and 2% received a hardship discharge. See Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L.J. 17, 40-41 (1989).

59. See, e.g., Braucher, *supra* note 56, at 168 (advising bankruptcy lawyers to help educate clients so that they will be capable of making informed decisions); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 556 (1993) (discussing lawyers' motivations for how they handle bankruptcy cases); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177, 178-79 (1986) (describing the impact of social pressure on lawyers and client susceptibility as contributing to lawyer controlled decision-making by clients); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 863-64 (1994) (observing that debtors remain the nominal decision-makers but that they actually have very little actual autonomy and mostly do what the local system tells them to do); William C. Whitford, *Has the Time Come to Repeal Chapter 13*, 65 IND. L.J. 85 (1989).

60. See *Bankruptcy Statistical Trends Working Paper*, *supra* note 58, at 5; SULLIVAN ET AL., *supra* note 58, at 215-17 (noting about one-third of the chapter 13 cases made it through the payment process to the end); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440 n.85 (1999) (reporting on Mississippi sample and finding that approximately 32% of debtors successfully completed plans and received discharge, but sample does not include cases that were converted to chapter 7); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: An Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L.J. 121, 145 (1994) (reporting 30-35% completion rate in Northern District of Texas); Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, AM. BANKR. INST. J., July-Aug. 2000, at 22 (noting that "[c]ompletion rates hover nationally at about one third of confirmed plans," but that rates vary significantly among different judges, divisions, and districts); Henry E. Hildebrand III, *Administering Chapter 13—At What Price?*, AM. BANKR. INST. J., Aug. 1994, at 16 (estimating, based on annual chapter 13 trustee survey, that "the

plan payments, the case is usually dismissed without the debtor receiving a discharge.⁶¹ When a debtor does not receive a discharge, she remains liable to her creditors for all her unpaid debts, plus any interest that has accrued in the meantime.⁶² The government does not issue a refund check for filing fees in ill-fated cases, and attorneys do not disgorge their own fees (which generally are higher in chapter 13 cases than in chapter 7 cases).⁶³ Some debtors who have not completed their chapter 13 plans pay additional filing fees and attorneys' fees to file a subsequent bankruptcy petition soon thereafter, and sometimes more than once.⁶⁴ Moreover, although chapter 13 is sometimes touted as the psychologically beneficial approach to resolving debt problems,⁶⁵ the psychological effects of repeated failure at debt repayment are likely negative.⁶⁶ With enough repeat filings, chapter 13 can become a "way of life" for an individual in financial distress.⁶⁷

completion rate of chapter 13 cases averaged 32.89 percent. This is consistent with conventional wisdom that approximately two-thirds of chapter 13 cases fail to reach discharge." Although Girth found a higher completion rate in her study of Buffalo cases, she looked only at confirmed plans to derive that statistic. See Girth, *supra* note 58, at 40-42 (looking only at confirmed plans in Western District of New York, Buffalo Region 1980-1982, and finding that over 60% of confirmed plans were successfully completed, albeit with lower repayment promises); cf. Donald Boren, *An Analysis of Changes in the Use of Chapter 13 Since the Enactment of the Bankruptcy Reform Act of 1978*, 23 AM. BUS. L.J. 451, 462 tbl. 4 (1985) (reporting higher levels of unsecured debt repayment plans, but focusing on only completed plans). Low payment plans were considered a problem prior to the Bankruptcy Reform Act of 1978 as well. See DAVID T. STANLEY & MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM 100-01* (The Brookings Inst. 1971).

61. See 11 U.S.C. §§ 349, 1307.

62. See NBRC, *supra* note 6, at 234.

63. See Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 AM. BANKR. INST. L. REV. 1, 21 (1998) (discussing higher fees charged by lawyers for chapter 13).

64. See Susan L. DeJarnatt, *Once is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L.J. 455, 501-02 (1999) (studying repeat filing rate through chapter 13 trustee interviews); NBRC, *supra* note 6, at 234.

65. For some description of such arguments, see Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy"*, 21 UCLA L. REV. 403, 416 (1973), and Lisa J. McIntyre, *A Sociological Perspective on Bankruptcy*, 65 IND. L.J. 123, 129-31 (1989).

66. See, e.g., Braucher, *supra* note 56, at 509 (noting new blow to self esteem); Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461, 473-75 (1997) (citing "the vicious cycle of low self-esteem leading to failure that reinforces low self-esteem," and describing "the original depiction of chapter 13 filers as "good" because they chose debt repayment); Shuchman, *supra* 65, at 442 (discussing not only the personal shame, but the stigma society places on those who fail to repay).

67. See NICK HULS, *OVERINDEBTEDNESS OF CONSUMERS IN THE EC MEMBER STATES: FACTS AND SEARCH FOR SOLUTIONS* 174, 181 (European Communities 1994) (observing that in the United States most judges let debtors file for chapter 13 no more than three times, and that in Birmingham, Alabama, chapter 13 has become a way of life for some African-American debtors); Shuchman, *supra* note 65, at 417 ("The limited empirical evidence suggests that Chapter XIII proceedings—much recommended as a rehabilitative device—become a way of life, perhaps with an

As implemented, therefore, chapter 13 has not merely been a longer and more exacting route to discharge. Rather, it frequently does not deliver the debt relief that traditionally has been perceived to be the purpose of the bankruptcy system for legitimate users. This is particularly troubling to the extent that debtors are intended recipients of this debt relief but likely do not have the financial stamina to complete their repayment plans or the information to take steps to obtain debt relief in a more expedited fashion. The next section considers the extent to which debtors with medical problems and job problems fit this category and thus are the “wrong” type of chapter 13 filer on the whole, according to traditional expectations about the purposes of bankruptcy.

C. Medical-Related Filers Tend to be Risky Chapter 13 Filers

The high rate of medical-related chapter 13 filing suggests that a large number of chapter 13 filers would be better served by chapter 7 because they are the type of debtors for whom debt relief is appropriate and their inability to adhere to a payment plan will preclude them from getting it.⁶⁸

One might challenge the assumption that medical-related filers are less culpable and thus risky chapter 13 filers. After all, people with health problems are not necessarily innocent victims of bad luck and insufficient safety nets. Putting aside sensitive questions of whether these individuals engaged in activities or behavior that increased their risk of illness or injury,⁶⁹ American families tend to spend a lot and save little.⁷⁰ They generally fail to plan for the possibility of disability and income interruption as well as they might, considering the

ethical component but not one, I think, of which many would approve.”).

68. See William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 YALE L.J. 591, 632 (1933) (studying debtors and observing that “the health of the debtor coupled with his low income makes successful amortization unlikely and the wisdom of beginning it dubious”).

69. See, e.g., United States Commission on Civil Rights, *The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination, and Ensuring Equality* (Sept. 1999), at <http://www.udayton.edu/~health/07civilrights/01-02-07Environmental.htm> (last visited Oct. 17, 2001) (pointing out that “several lifestyle behaviors can affect one’s health, including cigarette smoking, heavy alcohol use, being overweight, and being sedentary”).

70. See Dean M. Maki & Michael G. Palumbo, *Disentangling the Wealth Effect: A Cohort Analysis of Household Saving in the 1990s* (Apr. 2001), at <http://www.federalreserve.gov/pubs/feds/2001/200121/200121pap.pdf> (last visited Oct. 17, 2001) (analyzing concurrent increases in consumption and decreases in personal savings documented during the latter half of the 1990s); John P. Watkins, *Corporate Power and the Evolution of Consumer Credit*, 4 J. ECON. ISSUES 909, 924-25 (2000) (citing Economic Report of the President, tbl. 30 (Council of Econ. Advisors 2000)) (comparing U.S. savings rate with European nations and noting significant decline of personal savings as a percentage of disposable income to just above two percent).

probability of experiencing these setbacks.⁷¹ Indeed, some might assert that the availability of generous bankruptcy relief encourages consumers to under-insure.⁷² One could argue, therefore, that the vulnerability of these families to medical-related financial distress is partly self-inflicted and is simply a consequence of other spending and saving decisions similar to those that debtors like Mr. Plastic made.⁷³

Although the data are not sufficiently detailed to say with certainty that all the medical-related filers were honest and unfortunate, there are several reasons to believe that they are on the lower end of the culpability spectrum. First, as previously noted, most of the medical-related filers in both chapter 13 and chapter 7 in the 1999 Study had at least some health insurance,⁷⁴ suggesting that these debtors took precautions to insulate themselves against the financial shocks of illness or injury, rather than counting exclusively on an after-the-fact

71. According to the U.S. Census Bureau, in 1997 more than fifty-two million Americans had some sort of disability, and thirty-three million had a severe disability. See Jack McNeil, *Americans With Disabilities*, U.S. Census Bureau, Household Economic Studies, Current Population Reports (2001), available at www.census.gov/hhes/www/disable/sipp/disabl97/asc97.htm (last visited Oct. 17, 2001). In 1996, there were 3.825 million days of disability in the United States among the civilian non-institutional population of persons eighteen years old or older in the currently-employed population. See *U.S. Census Bureau Statistical Abstract 2000*, *supra* note 2, at 135 tbl. 211. A day of disability is defined as a day when a person cuts down on his activities for more than half a day because of illness or injury. See *id.* at 135 tbl. 211 n.1. Disabled workers, however, receive a relatively small percentage of social security benefits. See *Fast Facts & Figures About Social Security 1999*, at www.ssa.gov/statistics/fast-facts/1999ff32.pdf (last visited Oct. 18, 2001). Also, the majority of Americans do not have long-term disability insurance. See, e.g., David Fischer & Robert H. Jerry, II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 871 n.70 (2001) (collecting government statistics on disability insurance coverage). See generally THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 239 (1986) (noting that individuals tend to underestimate the risks that current consumption imposes on future well-being).

72. Cf. Jean Braucher, *Options in Consumer Bankruptcy: An American Perspective*, 37 OSGOODE HALL L.J. 155, 160 (1999) (describing the views of representatives of the credit card industry and politicians on the relationship between risk and bankruptcy laws).

73. Lest one allow consumers to shoulder all responsibility for their spending, one might suspect the existence of larger institutional forces in place to encourage such behavior by American families. See Braucher, *supra* note 72, at 160 ("A candid definition of the problem requires recognition that, in the absence of more of a social safety net, the only way to reduce over-indebtedness is for individuals to save more and borrow less, which would mean reduced volume for the consumer credit industry and reduced consumption, with attendant ripple effects into the economy."); A. Mechele Dickerson, *America's Uneasy Relationship with the Working Poor*, 51 HASTINGS L.J. 17, 51 n.144 (1999) (noting that "many people who do not live frivolous lives, but want to achieve the 1950's version of the American Dream, may find it increasingly difficult to do so given the changes in the wage labor market" and turn to consumer credit to fill in the gaps); Watkins, *supra* note 70, at 909-10 (explaining forces that led U.S. consumers to increase consumer spending and decrease savings).

74. See *supra* note 11, at 386-97.

government bailout via the bankruptcy system. Second, the cost of medical care in the United States is notably high,⁷⁵ limiting the extent to which private savings can prevent medical-related bankruptcy. The savings account of even the most prudent middle class families probably is too modest to pay for an unexpected multiple-week hospital stay, high-tech medical procedures, or hospice or in-home care.⁷⁶ Put another way, the fact that their savings are insufficient to cover such unexpected and large expenses does not mean they are any less responsible than the rest of us, who likely would be equally unable to cushion our own fall if faced with large, medical-related costs beyond the amount covered by insurance providers.

One might instead challenge the assumption that medical-related filers are risky filers due to their reduced repayment and plan completion prospects. If that is the case, then perhaps even honest and unfortunate debtors with medical problems may be able to repay some debts, and perhaps should be required to pay what they can along with their culpable counterparts. Indeed, it is possible for a person to have a medical-related bankruptcy filing without having a long-term crisis that continues post-bankruptcy. A debtor might have had a broken bone or appendicitis that produced lost income, medical bills, and related costs such as increased child-care expense during hospitalization. The debtor's inability to deal with the resulting bills may have prompted bankruptcy, but the health crisis itself has passed. If that is the situation, the debtor's status as both a medical-related and job-related bankruptcy filer will not necessarily speak to whether the debtor has repayment ability.

Yet, there are good reasons to be dubious that the ill and injured make good chapter 13 debtors, at least from a traditional perspective. It is important to recognize that the fact that a debtor files chapter 13 rather than chapter 7 does not, by itself, indicate the existence of some repayment capacity. One cannot assume the existence of

75. See, e.g., LAWRENCE H. THOMPSON, THE RETIREMENT PROJECT: SHARING THE PAIN OF SOCIAL SECURITY AND MEDICARE REFORM 2 (Urban Inst. Brief Series No. 11, Aug. 2000) (estimating out of pocket health spending by an average middle income non-elderly household as about 3.5% of household's total earnings); Freudenheim, *supra* note 17, at 54 (reporting on largest surge in medical inflation since the early 1990s that may lead some lower income and self-employed workers to drop insurance coverage altogether); Stiehm, *supra* note 17, at 280 n.2 (comparing cost of health care in the United States to Canada and European nations); Scientific American, *By the Numbers: Health Care Costs* (Apr. 1999), at <http://www.sciam.com/1999/0499issue/0499numbers.html> (last visited Oct. 19, 2001) [hereinafter *By the Numbers: Health Care Costs*] (noting that "[r]ising medical costs are a worldwide problem, but nowhere are they higher than in the U.S., and reporting projected increase of health care costs to 16.6% of GDP in 2007").

76. See *By the Numbers: Health Care Costs*, *supra* note 75 (noting that "America leads the world in expensive diagnostic and therapeutic procedures . . .").

repayment ability, or lack thereof, by virtue of debtors' filing decisions. Although the current bankruptcy system offers most debtors a choice between chapters,⁷⁷ the existing literature suggests that debtors rarely sort themselves neatly into chapters on any basis,⁷⁸ let alone into "can-pay" and "can't-pay" categories. Debtors may be steered, or at least gently nudged, into one chapter or another by their attorneys.⁷⁹ Also, debtors may choose chapter 13 over chapter 7 when they need to retain property that could not be retained as easily in chapter 7. As a primary example, a debtor may have defaulted on her home mortgage and wants to cure the default over the objection of the mortgage lender. Chapter 13 permits this,⁸⁰ but chapter 7 does not.⁸¹ Thus, a debtor may file chapter 13 to save a home, regardless of her ability or desire to pay unsecured debts, and it is legally possible for that debtor to be in chapter 13 plans without paying much or anything to unsecured creditors.⁸² The financial profiles of debtors who file chapter 13 and debtors who file chapter 7 have been relatively similar, with chapter 13 debtors only marginally better suited to handle repayment plans than their chapter 7 counterparts.⁸³

The low rate of chapter 13 plan completion provides another reason to believe that at least some of these debtors will default on their payment plan obligations. Although some debtors might choose chapter 13 because they want to try to repay, this does not mean they are better able to pay than other debtors. As previously noted, an estimated two-thirds of chapter 13 filers do not complete their payment plans, whether due to inability or unwillingness to continue to pay.⁸⁴ Given the prevalence of medical-related (and job-related) chapter 13 filings in the 1999 Study,⁸⁵ it seems likely that there is at least some overlap between the medical-related filers and the plan defaulters.

77. See 11 U.S.C. § 109 (imposing relatively few criteria for eligibility for various chapters).

78. See, e.g., Braucher, *supra* note 56, at 581 (suggesting the current state of consumer bankruptcy is not uniform because of local variations in practices and attitudes); SULLIVAN ET AL., *supra* note 58, at 858. Cf. Shuchman, *supra* note 20, at 84-85 (noting the disparate chapter splits among districts under Bankruptcy Act of 1898).

79. See, e.g., Braucher, *supra* note 56, at 581 (evaluating role of attorneys in debtors' decision making).

80. See 11 U.S.C. § 1322.

81. See 11 U.S.C. § 1325.

82. See, e.g., *In re Harmon*, 72 B.R. 458, 460-62 (Bankr. E.D. Pa. 1987) (discussing a debtor's ability to file a petition for relief under chapter 13 but not explicitly provide for payment of unsecured creditors if acting in good faith).

83. See, e.g., Neustadter, *supra* note 59, at 177.

84. See *supra* note 58 for sources addressing the failure of chapter 13 filers to complete payment plans.

85. See *infra* notes 86-89, and accompanying text.

Finally, the descriptions provided by the 1999 Study participants and in the case law reveal that continued medical and financial problems are likely to produce continued or sporadic hardship. Written comments from participants in the 1999 Study describe lingering health problems or medical-related financial burdens of a magnitude that make substantial payment out of future income seem impracticable. For example, one chapter 13 filer indicated that her husband had been in a coma for five years and that she continued to face \$20,000 a year in medical bills not covered by insurance.⁸⁶ Another chapter 13 filer reported a “double-whammie” of serious back problems and HIV.⁸⁷ Another reported several hundred thousand dollars worth of medical bills uncovered by insurance.⁸⁸ These descriptions comport with accounts of chapter 13 filers’ continuing medical problems in the published case law. In one case, both a mother and her young baby had medical problems, and the mother had surgery after filing chapter 13.⁸⁹ In another, both husband and wife suffered numerous hospitalizations.⁹⁰ Others report large expenses over which the debtors have no control.⁹¹ Post-filing problems may lead to further income reductions and financial hardship.⁹² This continued hardship does not comport with the ideal of strong and consistent repayment ability.⁹³

For all of these reasons, it is within the bounds of reason to assume

86. Memorandum from Elizabeth Warren to Melissa Jacoby, July 9, 2001 (on file with author).

87. *Id.*

88. *Id.*

89. *See, e.g., In re Purdy*, 10 B.R. 902, 906 (Bankr. N.D. Ga. 1981) (explaining that “the debtors have a baby to support. Due to health problems suffered by the child, the debtors incurred a considerable amount of medical expenses. Since the filing of their chapter 13 petition, further medical expenses have been incurred as Mrs. Purdy was required to undergo surgery.”).

90. *See In re Chmura*, 63 B.R. 12, 14 (Bankr. D.N.J. 1986) (allowing petition for chapter 13 plan to continue after failed payments because debtor and husband were suffering serious medical problems and numerous hospitalizations which were “events striking at the very heart of the debtor’s ability to comply with the appropriate court orders”).

91. *See, e.g., In re Goodavage*, 41 B.R. 742, 746 (Bankr. E.D. Va. 1984) (stating that medical expenses representing almost one quarter of unsecured debt are a “substantial expense over which the debtors obviously have no control”).

92. *See In re Cooke*, 169 B.R. 662, 669 (Bankr. W.D. Miss. 1994) (noting that debtors were in chapter 13 for almost two years but “health problems incurred by one of the co-debtors resulted in her unemployment and a 33% reduction to household income,” which is justification to convert remaining unsecured debts of chapter 13 plan to a chapter 7 discharge).

93. *See, e.g., In re Chmura*, 63 B.R. at 14 (“The debtor did everything she could do to avoid the situation, but no one can guard against the problems this debtor suffered.”); *In re Goodavage*, 41 B.R. 742, 746 (Bankr. E.D. Va. 1984) (noting that ten out of 21 of debtors’ scheduled unsecured debts were for medical expenses); LoPucki, *supra* note 66, at 465-66 (noting that job loss or unexpected medical expense is by definition not sufficiently predictable).

that a significant number of chapter 13 filers with medical-related bankruptcies will have repayment and plan completion difficulties on account of their conditions, particularly if they have a history of related income interruption as well. To the extent that a bankruptcy discharge remains one of the few safety valves for ill and injured debtors in the U.S., debtors with serious medical problems and related job problems could be characterized as inappropriate candidates for chapter 13.

Notwithstanding the fact that chapter 13 seems to hinder the traditional goals of bankruptcy, at least for some types of debtors, chapter 13 garners significant enthusiasm among bankruptcy reform proponents and bankruptcy professionals. In the next section, I consider other ends that chapter 13 might be achieving that could explain the general zeal for this form of bankruptcy that seems to fall short of traditional expectations.

III. A FUNCTIONAL ANALYSIS OF CHAPTER 13 (OR, WHY SOME PERCEIVE AN ILL OR INJURED DEBTOR AS AN APPROPRIATE CHAPTER 13 FILER AFTER ALL)

A. *The Discharge Reduction Function of Chapter 13*

Contemporary bankruptcy reform proponents have advocated restrictions on bankruptcy relief for the less needy through increased use of chapter 13 while they have echoed traditional themes of preserving bankruptcy relief for those in need. Such rhetoric suggests that reform proponents would find medical-related filers and chapter 13 to be mismatched. A closer look, however, suggests that medical-related filers are appropriate chapter 13 candidates in the eyes of the reform proponents due to a vision of bankruptcy that deviates from the traditional view. This becomes apparent upon exploring the rhetoric, and then the reality, in turn.

1. *Bankruptcy reform rhetoric*

The current bankruptcy reform efforts are premised in part on fears that many debtors are using bankruptcy illegitimately, rather than as a financial “life raft” in the presence of calamity. As such, bankruptcy reform proponents have promised to “help usher in a new area of greater personal responsibility.”⁹⁴ Requiring culpable

94. See Press Release, *Grassley Continues Effort to Overhaul Bankruptcy System* (Jan. 31, 2001), at <http://www.senate.gov/~grassley/releases/2001/p01r1-31.htm> (last visited Oct. 17, 2001) (quoting Iowa Senator, Chuck Grassley, and discussing his

debtors to commit to a repayment plan as a condition of discharge imposes a harder and longer road to discharge. Yet, reform proponents have asserted the intent to preserve unconditional debt relief for legitimate users.⁹⁵ One therefore might conclude from the reform rhetoric that medical related filers, with their more legitimate uses of bankruptcy and lower levels of culpability, are inappropriate candidates for protracted chapter 13 repayment plans and appropriate candidates for chapter 7.

Apart from their concerns about personal responsibility, bankruptcy reform proponents have argued that higher default rates on consumer debt resulting from bankruptcy discharges lead to higher prices for, and reduced access to, goods, services, and credit.⁹⁶

proposed legislation aimed at reducing the number of bankruptcies filed each year).

95. See, e.g., *The Bankruptcy Reform Act of 1999: Hearings on H.R. 3150 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 105th Cong. 12 (1998) (statement of Rep. James Moran) (“A legislative fix is vital to distinguish between those who truly need a fresh start, and deserve one, and those capable of assuming greater responsibility and making good on at least some of what they owe.”).

96. Many members of Congress readily adopted the assertion that the current bankruptcy system costs every American family either \$400 or \$550 per year. See, e.g., *The Bankruptcy Reform Act of 1999: Hearings on H.R. 833 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. (1999) (statement of Rep. Lamar Smith) (“It is estimated that this disregard for their obligation costs other hardworking families an additional \$550 a year in higher prices for goods and services”); *id.* at 2 (statement of Rep. Rick Boucher) (“The typical American family pays a hidden tax of about \$550 per year arising from the increased costs of credit and the increases in the prices of goods and services occasioned by the discharge of \$50 billion each year in consumer debt arising from bankruptcy proceedings.”); *The Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998 Part II Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. 3 (1998) (statement of Rep. George W. Gekas) (“We will hear testimony today that the losses attributable to these filings exceeded \$44 billion. Not surprisingly, you and I as well as and every American family will have to somehow bear the cost of these tremendous losses, now estimated to be about \$400 for the average household.”); News Release, *Bankruptcy Reform Bill Passes* (Oct. 12, 2000), at <http://wwwa.house.gov/gekas/press/October/2000/12-BankruptcyBillPasses.htm> (stating that estimated cost of current bankruptcy system is “one month of groceries—84 meals”). The consumer credit industry provided such figures. See, e.g., *The Bankruptcy Reform Act of 1998 Part I Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. 140 (1998) (statement of Bruce L. Hammonds, Senior Vice Chairman and Chief Operating Officer, MBNA Corp.) (“[M]ore than \$40 billion in consumer debt—about \$400 for each American family—was erased as a result of bankruptcy in 1997”). The consumer credit industry also ran advertisements in the print media claiming that the current bankruptcy system cost \$400 or \$550 a year in diapers, groceries, and gasoline, suggesting that bankruptcy reform would reduce that amount. *But see The Bankruptcy Reform Act of 1999: Hearings on H.R. 833 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm., Select Subcomm. on Admin. Oversight and the Courts*, 106th Cong. (1999) (statement of the National Consumer Law Center) (describing criticisms of consumer credit industry’s methods of calculating losses); *The Bankruptcy Reform Act of 1999, Part II: Hearings on H.R. 833 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. 48 (1999) (statement of Kenneth Klee, on behalf of the National Bankruptcy Conference)

Continuing with this argument, proponents conclude that bankruptcy filers who do not pay their debts raise costs for their neighbors.⁹⁷ This might weigh in favor of having medical-related filers try to repay in chapter 13; to the extent that debtors with medical bills do not try to repay, they may be increasing the costs of, and reducing access to, needed medical services for other consumers who do pay their debts, or so the argument goes. Medical debt generally can be discharged, as it gets no priority or non-dischargeable treatment in the U.S. bankruptcy system.⁹⁸ Slightly under a third (29.9%) of all the chapter 13 debtors in the 1999 study reported that they owed money directly to a provider of health care, services, or supplies.⁹⁹ Although the amount of these debts is unknown, in aggregate it could be significant. This message suggests that Mr. Hurt, in fact, could be a target of the legislation.

Yet, bankruptcy reform proponents have indicated that the reform legislation's primary interest is collecting debts from those who actually can pay.¹⁰⁰ It may simply not be worth the effort to try to collect debts from debtors with ongoing health and job problems.¹⁰¹

("[A]lthough this bill may increase short term profits for the small fraction of the population that holds stock in credit card companies, *it will not save every American family \$550 a year or even \$50 a year.* This bill may not save American families even 50 cents a year. Most independent and government economists and academics who have considered this issue agree that this bill may increase credit card company profits but will not reduce consumer debtors' borrowing costs.").

97. See sources cited *supra* note 96.

98. See Shuchman, *supra* note 65, at 446 (noting that it might be sensible to give better treatment to physician who renders needed care than to creditor in business of financing expensive cars); cf. Volkmar Gessner et al., *Three Functions of Bankruptcy Law: The West German Case*, 12 L. & SOC'Y REV. 499, 507, 513 (1978) (discussing priority treatment under German law of obligations to medical providers, which was higher than debts to debtors' children). Gessner et al. explain, however, that this priority has been based not on access and cost for others, but on concern for the debtors' own access to health care: "preferential right given to doctors was originally intended to ensure that the needy debtor would not be refused help in an emergency because the doctor or chemist could not count on being paid. The social insurance system has also made this sort of claim anachronistic." *Id.* at 513.

99. Of the entire sample, about a third (or an estimated 401,475 families in 1999) owed a debt directly to a health care provider. See Jacoby et al., *supra* note 11, at 387.

100. See, e.g., 147 CONG. REC. E399 (daily ed. Mar. 20, 2001) (statement of Rep. Dennis Moore) (arguing that sufficient safeguards exist to protect those debtors who are truly unable to pay their debts because bill takes into account "those who have special circumstances such as a decline in income or unexpected medical expenses . . . [which] preclude[s] moving the filer into Chapter 13").

101. For additional arguments on why this is so from a different perspective, see William O. Douglas, *supra* note 68, at 632. It is difficult to calculate exactly how much money the U.S. government spends on chapter 13. Government expenditures on bankruptcy are not reported in the same manner as other social welfare expenditures. Cf. *U.S. Census Bureau Statistical Abstract 2000*, *supra* note 2, at 375 (providing data on social welfare expenditures, social security, public aid, federal food programs, etc.). However, the data that are available indicate high

Thus, as a practical matter, the ill and injured do not seem to fit the profile of the appropriate chapter 13 filer described by bankruptcy reform proponents.

2. *Reality*

The bankruptcy reform legislation itself significantly downplays the relevance of culpability to determine whether a debtor should be required to repay debts as a condition of receiving debt relief. In addition, the details of the legislation tend to undermine the stated commitment to enhancing unsecured debt repayment in chapter 13 plans.

a. The Bankruptcy Reform Act of 2001 means test

The Bankruptcy Reform Act of 2001 will implement a means test to determine whether debtors who file in chapter 7 should be in chapter 13 instead.¹⁰² The legislation establishes a procedure requiring the United States trustee (part of the Department of Justice),¹⁰³ largely at taxpayer expense, to review all chapter 7 filings for presumed abuse on this basis.¹⁰⁴ The details of this means test, although complex, are necessary to understand how culpability and actual repayment ability play a reduced role in the debtor sorting

administrative overhead. For example, a substantial portion of repayment plan disbursements are paid to the chapter 13 trustee who administratively oversees the case. See Henry E. Hildebrand III, *Administering Chapter 13—At What Price?*, AM. BANKR. INST. J., Aug. 1994, at 16 (noting average commission charged by trustee was 7.54%, and that trustees' fees alone, in fiscal year 1993, were on average \$255 per active case for the year, with regional averages ranging from a high of \$271 per case to a low of \$123 per case). The debtor's attorney also gets paid out of the plan. See, e.g., Norberg, *supra* note 60, at 433 (using U.S. trustee data, finding that chapter 13 debtors repay between \$1,200 to \$1,800 to their attorneys, an amount that is roughly equal to amount paid to general unsecured creditors). Attorneys fees awarded on chapter 13 "non-business" cases in fiscal year 1993 were an average of \$1,010. See Norberg, *supra* note 60, at 433; see also Henry E. Hildebrand, III, *Use of Bankruptcy as a Collection Device*, 12 AM. BANKR. INST. J. 26, 33 (1993) (noting that average trustee costs were 6.7 cents per dollar disbursed).

102. See H.R. 333, 107th Cong. § 102 (2001). The means test is not an eligibility requirement *per se*, but rather is established as a ground for dismissal on the basis of abuse under section 707 of the Bankruptcy Code. Presumably, it will become a *de facto* eligibility requirement, as debtors (or their attorneys) are required to calculate ability to pay in accordance with the means test and submit that to the court as part of preparing to file for bankruptcy.

103. See The Department of Justice, United States Trustee Program, at <http://www.usdoj.gov/ust> (last visited Aug. 2, 2001) (explaining that the "United States Trustee Program is a component of the Department of Justice responsible for overseeing the administration of bankruptcy cases and private trustees under 28 U.S.C. § 586 and 11 U.S.C. § 101 et. seq.").

104. Creditors also will be authorized to challenge chapter 7 filings for ability to pay, subject to some restrictions for lower income debtors. See H.R. 333, 107th Cong. § 102 (2001).

process.

The first step of the means test is to calculate the debtor's "current monthly income."¹⁰⁵ Current monthly income is not what the debtor actually earns at the time she files; rather, it is defined as the debtor's average monthly income based on the previous six months.¹⁰⁶ The fact that the debtor's actual income at the time of filing bankruptcy is not as high as the average "current monthly income" calculation (or is zero on account of job loss) cannot be factored into the means test, at least not right away.¹⁰⁷ Thinking back to Mr. Hurt's circumstances, assuming that he files for bankruptcy within six months of his job change, he will be presumed to have a higher salary than the paycheck he actually receives.

From this hypothetical income, one deducts expenses (*e.g.*, food, housekeeping supplies, automobile operating costs) in hypothetical amounts established by the Internal Revenue Service guidelines for its internal debt collection efforts.¹⁰⁸ Actual secured debts (*e.g.*, mortgages, car loans), actual priority debts (*e.g.*, child support, taxes), and a litany of miscellaneous expenses are also deducted.¹⁰⁹

105. See H.R. 333, 107th Cong. § 102 (2001) (setting forth the "means test").

106. See *id.* (defining current monthly income as an average of all taxable and non-taxable income derived during the relevant six-month period).

107. See *id.* (limiting discretion in adjusting means test calculation to debtor's assertion of special circumstances which are narrowly defined); see also *infra* note 115.

108. Use of the IRS standards has not been as controversial as one might have expected. First, many supporters of the bill put aside their generally hostile attitudes toward the IRS and its practices to support this approach. This point did not go unnoticed by then Judiciary Committee Chairman Henry Hyde, who unsuccessfully attempted to remove use of the IRS expenses in the bill. See 145 CONG. REC. 2723 (daily ed. May 5, 1999) (statement of Rep. Henry Hyde) ("It is the first time, and I dare say the last time, so much kind approbation will be showered on the IRS by this side of the aisle. I certainly do not join in that showering."). Second, the standards themselves were clearly not designed for this type of use and are somewhat discriminatory toward lower income families. For example, if Mr. Plastic was a high-income, single individual who had no dependents, and Mr. Hurt was a low-income, married individual with two children, the guidelines give Mr. Plastic a higher food allowance than for Mr. Hurt's entire family. See Internal Revenue Service, *Collection Financial Standards*, (Sept. 27, 1999), available at http://www.irs.ustreas.gov/prod/ind_info/coll_stds/cfs-other.html (last accessed Oct. 16, 2001) (providing \$456 monthly food allowance for individual with monthly income of \$5,830 or more, and providing \$374 monthly food allowance for family of four with monthly income of less than \$830). Although the legislation provides for a small amount of flexibility in the food allowance if the debtor can prove that the adjustment is reasonable and necessary, this difference is emblematic of the approach of the means test. See H.R. 333, 107th Cong. § 102 (2001) (allowing for rebuttal of the assumption of abuse by demonstration of "special circumstances").

109. See H.R. 333, 107th Cong. § 102 (2001) (noting that the debtor's average monthly payment of secured debts and priority claims are exempted from calculation of the debtor's monthly expenses, and noting calculation of such secured debts).

The resulting net income is deemed the amount the debtor has available to pay unsecured creditors over a five-year period.¹¹⁰ That amount is evaluated both as an absolute number and as a percentage of the debtor's unsecured debt.¹¹¹ A chapter 7 filing is subject to conversion to chapter 13 or dismissal under the means test as a "presumed abusive" case if the debtor's remaining monthly income, multiplied by sixty,¹¹² is at least \$10,000.¹¹³ Even if the debtor's remaining monthly income is less than \$10,000 over five years, the debtor's case may be presumed abusive if she can pay twenty-five percent of her allowed secured claims, or \$6,000, whichever is greater.¹¹⁴

Although these calculations create only a presumption of abuse, the legislation provides highly circumscribed ways to rebut that presumption, and they are exclusively mathematical in nature. The only way for a debtor to rebut the presumption of abuse is to itemize, document, and attest under oath to expenses or income and why there is "no reasonable alternative" to that income reduction or expense increase.¹¹⁵ This changes the outcome of the means test only if it actually reduces the debtor's remaining monthly income to below the statutory thresholds described above.¹¹⁶ If the debtor cannot rebut the presumption on such grounds, his chapter case must be dismissed altogether, without discharge, or converted to chapter 13.¹¹⁷

b. The irrelevance of culpability under the means test

One implication of this approach is that someone like Mr. Hurt cannot rebut a presumption of abuse with an explanation of his

110. *See id.* (describing the available amount as being the debtor's current monthly income, reduced by acceptable existing debts and expenses, and then multiplied by sixty).

111. *See id.* (noting that the court shall presume abuse exists if the resulting net income is not less than the lesser of twenty-five percent of the debtor's non-priority unsecured claims or \$6,000, whichever is greater, or \$10,000).

112. *See id.* The sixty multiplier indicates sixty months, e.g., a debtor's ability to pay is judged on a five-year time frame.

113. *See id.* (noting that the available amount, multiplied by sixty, is not less than \$10,000).

114. *See id.* (stating that the debtor's current monthly income, reduced by acceptable existing expenses and debts, over a five-year period must not be less than twenty-five percent of the debtor's non-priority unsecured claims or \$6,000, whichever is greater).

115. *See id.* (noting that presumptions of abuse may be rebutted only by demonstrating "special circumstances" justifying additional expenses or modification of current monthly income "for which there is no reasonable alternative").

116. *See id.*

117. *See id.* (describing circumstances warranting dismissal of a case or conversion to chapter 11 or 13).

honest and unfortunate path to bankruptcy. In other words, culpability is not relevant.¹¹⁸ Unless a debtor can prove that her health problems have a direct and quantifiable effect on her balance sheet, her health problems appear to be forbidden considerations regarding whether the presumption of abuse should be rebutted.¹¹⁹ A debtor's culpability for debt problems has limited relevance if a debtor is not presumed abusive under the means test but is later challenged as a bad faith chapter 7 filer,¹²⁰ but a debtor's lack of culpability cannot defeat the means test itself. Whether or not the means test will catch very many chapter 7 debtors,¹²¹ the message is

118. See Edith H. Jones & Todd J. Zywicki, *It's Time For Means-Testing*, 1999 BYU L. REV. 177, 184 (1999) (arguing that "the reason for filing bankruptcy is irrelevant. . . . What matters is an individual's ability to pay."); cf. *The Bankruptcy Reform Act of 2001: Hearings on H.R. 333 Before the House Judiciary Comm.*, 107th Cong. (statement of the National Bankruptcy Conference) (2001).

But Section 102 of the bill submits all consumers to means testing irrespective of the circumstances which led to financial distress. We believe that a bankruptcy judge should have the discretion to exempt from means testing, for instance, an elderly debtor burdened with job loss or medical bills, or the abandoned mother and children (who are four times more likely to have to file bankruptcy than the general population). They ought not be treated the same as the MBA or the lawyer who overspent on vacations and fancy restaurants. In a similar vein, we believe the bankruptcy judge should have discretion, as the Internal Revenue Service itself has discretion, to bend the IRS's expense standards to the circumstances of an honestly disadvantaged debtor. . . . The Court should have discretion to release from the means test honest but unfortunate debtors whose financial circumstances were not of their making and debtors for whom the IRS expense standard is unfair."

The Bankruptcy Reform Act of 2001: Hearings on H.R. 333 Before the House Judiciary Comm., 107th Cong. (2001) (statement of the National Bankruptcy Conference) (citations omitted).

119. It is unclear whether the U.S. trustee has the discretion to decline to pursue a case for presumed abuse on grounds of culpability. Even if that were the case, the U.S. trustee is only one of several parties authorized to move to dismiss or convert for presumed abuse. See H.R. 333, 107th Cong. § 102 (2001) (noting when judges, U.S. trustees, bankruptcy administrators, or other parties may be able to bring motions relating to presumptions of abuse).

120. The revision to section 707 of the Bankruptcy Code will permit dismissal or conversion for abuse based on the "totality of the circumstances," which may provide an avenue for courts to consider culpability, but that analysis will only come into play if the debtor "passes" the means test and is not sent out of chapter 7 on that basis alone. See H.R. 333, 107th Cong. § 102 (2001).

121. 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, 31 (1999) (testing earlier version of means test and concluding that 3.6% of sample debtors had presumptively abusive cases, and describing this estimate as optimistic, and noting the costs of applying the means test to catch this small proportion of debtors); cf. Ernst & Young Study, available at <http://www.abiworld.org/consumer/ernst/ernst.html>; Barron and Staten Credit Research Center Study, available at <http://www.gsb.georgetown.edu/prog/crc/order/monograph33.pdf> (yielding higher proportion of debtors who would be deemed able to repay debts if they were means tested). See generally *Personal Bankruptcy: Methodological Similarities and Differences in Three Reports on Debtors' Ability to Pay: Hearing before the Subcommittee on Commercial and Administrative Law, House Committee on the*

clear: as far as the means test is concerned, Mr. Hurt and Mr. Plastic are on essentially equal footing. Indeed, the means test itself might encourage irresponsible spending and borrowing; debtors who spend more irresponsibly have a somewhat lesser chance of being presumed abusive under the means test.¹²²

Forbidding the consideration of a debtor's lack of culpability will mark a departure for at least some courts. Under current law, chapter 7 cases can be dismissed if granting debt relief in chapter 7 is found to be a "substantial abuse" of the bankruptcy system.¹²³ The Bankruptcy Code does not define "substantial abuse."¹²⁴ Although some courts evaluate substantial abuse primarily based on debtors' ability to pay,¹²⁵ many consider a variety of factors, including the types of problems that contributed to the debtor's financial downfall.¹²⁶ Thus, notwithstanding the rhetoric, the bankruptcy legislation will do nothing to heighten the distinction between Mr. Hurt and Mr. Plastic.

Judiciary, 106th Cong. (statement of Richard M. Stana, Associate Director, Admin. of Justice Issues, General Gov't Division)(explaining methodological differences between studies).

122. For example, secured debts for cars are deducted in their entirety from current monthly income. See H.R. 333, 107th Cong. § 102 (2001). One therefore can shelter income by buying a more expensive car on credit. See, e.g., Culhane & White, *supra* note 121, at 31 (noting that sophisticated debtors can avoid can-pay status by taking on more debt or increasing charitable contributions).

123. Section 707(b) sets out two requirements for a dismissal of a chapter 7 petition. First, the debtor must have "primarily consumer debts," which is defined in 11 U.S.C. § 101(8) as a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 707(b). The second requirement is that "the granting of relief [must] be a substantial abuse" of the bankruptcy code. See *id.* See 11 U.S.C. § 707(a) (noting that courts also may dismiss cases only for cause, including unreasonable delay by the debtor that is prejudicial to creditors, nonpayment of required fees or charges, and failure of the debtor in a voluntary case to file required information). See, e.g., *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000) (upholding court's "for cause" dismissal on lack of good faith basis).

124. See 11 U.S.C. § 101 (noting definitions of terms contained in Title 11 of the Bankruptcy Code, with no reference to "substantial abuse").

125. See, e.g., *In re Kelly*, 841 F.2d 908, 913-15 (9th Cir. 1988) (noting that the debtor's ability to pay when payments are due is a primary factor for consideration when deciding whether granting relief would be substantial abuse).

126. See, e.g., *In re Martinez*, 171 B.R. 264, 267 (Bankr. N.D. Ohio 1994) (holding that substantial abuse can be predicated upon either lack of honesty or want of need, and that evaluating lack of honesty entails considering whether debtor has suffered any unforeseen calamity or is merely using chapter 7 to garner relief from past excesses (referencing *In re Krohn*, 886 F.2d 123 (6th Cir. 1989))); *In re Hampton*, 147 B.R. 130 (Bankr. E.D. Ky. 1992) (explaining that financial problems were precipitated by severe health problems and that debtors tried to work out debt problems in consumer credit counseling before resorting to bankruptcy); *In re Farrell*, 150 B.R. 116, 120 (Bankr. D. N.J. 1992) (explaining that expenses generated by debtor's substance abuse problem and treatment precipitated necessity to file bankruptcy).

c. *The irrelevance of unsecured debt repayment*

One might respond to the discussion above by arguing that the real value of the means test is to distinguish debtors based on repayment ability rather than culpability. Yet, the details of the means test may be too crude to accurately measure a debtor's repayment ability and likelihood of plan completion, particularly for someone like Mr. Hurt. In addition to relying on an income calculation that may overstate (or understate) the debtor's actual income, the limited opportunity to rebut the presumption of abuse with evidence that changes the outcome of the means test may be too narrow to evaluate the realistic repayment ability over a five-year time frame for someone like Mr. Hurt. Mr. Hurt cannot attest under oath to speculative future events, such as whether his income is likely to be interrupted again, or whether his insurance company will or will not pay the next time he gets sick.

In addition, the legislation seems to hamper a reasonable expectation of increased unsecured creditor returns in chapter 13 by virtue of some of the amendments made to chapter 13 itself. For example, the legislation requires that a greater proportion of plan payments go to secured creditors rather than unsecured creditors,¹²⁷ leading to predictions that unsecured creditor distributions in chapter 13 will be "radically decreased" if the bankruptcy legislation passes.¹²⁸ Indeed, a study by chapter 13 trustees of a predecessor version of the bill found that 44.78% of existing chapter 13 cases would be confirmed with a substantial reduction in distributions to general unsecured creditors.¹²⁹

Presumably, someone promoting the use of chapter 13 based primarily on that chapter's unsecured creditor payment virtues would want to be able to show that chapter 13 debtors actually will pay their unsecured creditors at a level sufficient to warrant the government

127. One example is section 306 of H.R. 333, which limits the ability of a debtor to divide a partially secured debt into secured and unsecured portions and to treat those debts accordingly, with the unsecured portion getting a pro rata share along with all other unsecured creditors. Instead, the entire debt would be treated as secured and thus would have to be paid in full, leaving less income available for unsecured debt payment.

128. See, e.g., Norberg, *supra* note 60, at 439 (explaining that bankruptcy reform would "radically decrease" amounts collected by unsecured creditors in chapter 13).

129. See Hank Hildebrand, *Survey Shows Big Impact of Anti-Lienstripping Provision in S. 625* (May 27, 1999), at <http://www.abiworld.org/legis/bills/99mayhildebrandsurvey.html> (last visited Oct. 17, 2001) (reporting on chapter 13 survey, and concluding that average reduction to unsecured creditors in each case in which debtors would still be eligible for chapter 13 was \$3,210.22, or in the aggregate approximately \$100,447,600 per year). In addition, the trustees found that 20.79% of existing chapter 13 cases could not be confirmed due to this change. *Id.*

acting as debt collector for private parties.¹³⁰ Under current law, averages on unsecured creditor payments in chapter 13 are strikingly modest.¹³¹ As previously noted, chapter 13 does not require a set amount of unsecured creditor repayment as long as the plan satisfies the statutory requirements.¹³² Whether due to high secured and priority debt obligations, creative budget drafting, or bona fide negative cash flow, some debtors in chapter 13 have little or no additional disposable income to pay their unsecured creditors, and thus propose plans promising to pay nominal unsecured debt.¹³³ Such a debtor makes plan payments that are largely devoted to lawyers and trustees for the costs of running the chapter 13 case, and

130. See generally Douglas, *supra* note 68, at 632 (studying debtors and observing that “the health of the debtor coupled with his low income makes successful amortization unlikely and the wisdom of beginning it dubious . . .”); Huls, *supra* note 67, at 145 (“The costs of individual debt collection are a waste of public money if it finally turns out that the debtor is not able to pay. The vast array of debt collection procedures contributes considerably to the overburdening of the court system.”).

131. See, e.g., Ed Flynn & Gordon Bermant, *Estimating Means-Tested Chapter 13 Case Yields from Current Chapter 13 Performance*, AM. BANKR. INST. J., June 2000, at 4 (estimating average payment to unsecured creditors over life of chapter 13 case to be \$1,618 based on 1998 data); Norberg, *supra* note 60, at 433 (using U.S. trustee data, finding that chapter 13 debtors repay on average approximately \$1,511 of general unsecured debt).

132. Chapter 13 contains some safeguards to ensure payment to unsecured creditors, but there is no statutory minimum in terms of dollar amount or percentage of debt. A debtor must pay her unsecured creditors at least as much as the creditors would receive in a chapter 7 liquidation of her non-exempt assets. See 11 U.S.C. § 1325(a)(4). This provision offers a relatively limited amount of assurance for creditors when the debtor has few non-exempt assets. Upon creditor or trustee objection, the debtor also must commit all “disposable income” to the plan. *Id.* § 1325(b)(1)(B). That section defines disposable income generally as “income received by the debtor and not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor. . . .” *Id.* 1325(b)(2)(A). If one’s expenses and secured debt consume most or all of that disposable income, leaving little or none left over for unsecured debt payment, the disposable income requirement is nonetheless satisfied.

133. See Braucher, *supra* note 56, at 531 (noting the view among some debtors’ lawyers that chapter 13 plans can be zero-percent payment plans if the creditors would have received nothing had the debtors filed under chapter 7); Lynn M. LoPucki, “Encouraging” Repayment under Chapter 13 of the Bankruptcy Code, 18 HARV. J. ON LEGIS. 347, 348-49 (1981) (commenting on the pre-disposable-income requirement of chapter 13 and noting concerns about possibility of minimum or zero payment plans); see also Gordon Bermant & Ed Flynn, *Planning for Change: Credit Counseling at the Threshold of Bankruptcy*, AM. BANKR. INST. J., Feb. 2001, at 20 (reporting that seven percent of chapter 13 debtors in region in southeast California had no disposable income for repayment of creditors); Girth, *supra* note 58, at 42 (finding, in Buffalo study, that the median repayment proposal was in the range of twenty-five percent and twenty-nine percent). LoPucki has referred to zero or nominal payment plans as “golden handcuffs.” LoPucki, *supra* note 66, at 465. Although some low payment plans can be attributed to low-income, some high-income debtors may propose low payment plans because they have high expenses, leaving little disposable income. See Michelle J. White, *Personal Bankruptcy under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 23 (1987/1988) (noting that due to ambiguous definition of disposable income, even debtors with high incomes might pay little, not yielding substantial repayment).

to priority (e.g., taxes, child support) creditors or secured creditors whom the debtor would have had to pay anyway.¹³⁴

Other debtors promise to pay larger amounts of their unsecured debts but do not complete their plans. Repayment plans commonly dedicate early installments for priority and secured debts,¹³⁵ with payments for unsecured debts coming later.¹³⁶ As a consequence, the low plan completion rate results in reduced unsecured creditor payments.¹³⁷ It is a mistake to automatically equate chapter 13 and unsecured creditor repayment, just as it is not quite accurate to associate chapter 7 with the lack of such repayment.¹³⁸

134. When considering whether chapter 13 delivers repayment, one must remember to focus on the general unsecured debts, as opposed to priority debts and secured debts. The priority debts most frequently arising in consumer cases (e.g., child support) are nondischargeable in chapter 7, and secured debts must be paid in chapter 7 if the debtor wishes to retain the collateral. Thus, chapter 13 should not be justified on payment of these types of creditors. Yet, the payments to those creditors, along with administrative costs, comprise a substantial portion of plan payments. See, e.g., Gordon Bermant & Ed Flynn, *Stability and Change in Chapter 13 Activity (1990-1999)*, AM. BANKR. INST. J., Nov. 2000, at 20 (using information reported annually to EOUST, determining that unsecured creditors have received somewhere between eighteen percent and twenty-two percent of annual disbursements during the 1990s); Norberg, *supra* note 60, at 436-37 (analyzing Southern District of Mississippi data and broader government sample, and finding that administrative costs and secured debt payments comprise a substantial percentage of plan payments). There are, however, significant geographical disparities in these percentage allocations. See Gordon Bermant & Ed Flynn, *Distributions and Expenses in Chapter 13*, AM. BANKR. INST. J., May 2000, at 22 (noting large geographical differences in what percentage of chapter 13 disbursements are paid to general unsecured creditors, with the low being eight percent in Connecticut and the high being forty-nine percent in South Dakota).

135. See generally NBRC, *supra* note 6, at 262 (noting existence of this approach and that it results in delayed payment to unsecured creditors for several years).

136. See *id.* (explaining that sometimes debtors never pay unsecured creditors because a debtor can cure an arrearage on a secured loan and dismiss the case).

137. See, e.g., Bermant & Flynn, *supra* note 60, at 35 (estimating that returns to unsecured creditors are higher when chapter 13 plans are completed).

138. See Culhane & White, *supra* note 121, at 60-61 (noting that it is simply untrue that unsecured creditors collect nothing from chapter 7 debtors); Whitford, *supra* note 34, at 94 ("It is a common misassumption that only chapter 13 debtors repay unsecured debts."). This is so even though most chapter 7 debtors claim to have no non-exempt assets to liquidate for the benefit of their creditors. See, e.g., U.S. GENERAL ACCOUNTING OFFICE, BANKRUPTCY ADMINISTRATION; CASE RECEIPTS PAID TO CREDITORS AND PROFESSIONALS 1-2 (1994) (providing information on the "total amount and distribution of Bankruptcy estate receipts in cases terminated under chapter 7 of the Bankruptcy Code in statistical years 1991 and 1992"). Chapter 7 debtors generally must pay their secured debts post-bankruptcy to retain the secured creditors' collateral. Thus, a debtor has a substantial incentive to continue payment, even if in some cases the debtor is discharged of the underlying personal liability. Debtors sometimes sign "reaffirmation" agreements with selected creditors to remain personally liable on those otherwise-dischargeable unsecured debts. See 11 U.S.C. § 524(c). Although Culhane and White's study of reaffirmation agreements indicates that a minority of debtors legally reaffirm their debts, the debts reaffirmed were of a significant amount. Marianne B. Culhane & Michaela M. White, *Debt After Discharge, An Empirical Study of Reaffirmation*, 73 AM. BANKR. L. J. 709, 713 (1999) (summarizing findings on frequency of reaffirmation). See also Douglas G. Boshkoff, *Fresh Start, False*

The low repayment and plan completion rates are not immutable problems. It is entirely possible that a means test could steer more solvent debtors into chapter 13 and potentially increase unsecured debt repayment and plan completion.¹³⁹ Yet, to improve the overall repayment and plan completion rate statistics, one would focus not only on putting more debtors *into* chapter 13; one would have to make a commitment to screen many debtors *out* of chapter 13.¹⁴⁰ Courts vary in their willingness to try to predict a debtor's future success, with the result being repayment plans that are likely doomed to failure.¹⁴¹ Without screening a fair amount of debtors out of

Start, or Head Start, 70 IND. L.J. 549, 557 (1995) (noting that otherwise dischargeable obligations have been "all too easily revived"). Debtors also may be paying debts post-discharge even if they have not officially reaffirmed them. See Karen Gross, *As We Fleece Our Debtors*, 102 DICK. L. REV. 747, 751 (1998) (discussing purchase and sale of discharged debt claims, which has led to increased unlawful efforts to convince debtors to sign post-discharge agreements to pay discharged debts); Whitford, *supra* note 34, at 94-95 (claiming that chapter 7 debtors often repay discharged creditors, even in the absence of a reaffirmation agreement); see also 11 U.S.C. § 524(f) ("Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt."). In addition, certain debts cannot be discharged either because of the debtor's wrongdoing or because of the creditor's special need of payment. Examples include debts incurred by fraud (often a hook used by some credit card companies to make their debts nondischargeable) or breach of fiduciary duty, debts incurred to compensate willful and malicious injury, and debts owed for child support or alimony or taxes. See generally 11 U.S.C. § 523(a).

139. See, e.g., *The Bankruptcy Reform Act of 1999: Hearings on H.R. 833 Before the Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. 41 (1999) (statement of Todd J. Zywicki) (noting that high plan non-completion rate under current law is not necessarily accurate predictor of repayment prospects of more solvent debtors who might be means tested into chapter 13).

140. See *id.* ("Many debtors simply should not be in Chapter 13 in the first place, in that they lack sufficiently regular income-earning patterns to make it feasible for them to complete a Chapter 13 plan. These debtors file Chapter 13 for a variety of reasons, including a desire to gain its superdischarge, overoptimism about the ability to complete a plan, or mistake.").

141. See LoPucki, *supra* note 66, at 474-75 (noting that judges have not changed their standards for confirmation of chapter 13 plans). Some judges already evaluate feasibility carefully. See Neustadter, *supra* note 59, at 204 n.81 (describing local bankruptcy judge's view that most chapter 13 cases are marginal and many fail within six months, thus judge treats most chapter 13s with skepticism and carefully probes the feasibility of proposed plans at chapter 13 confirmation hearings). Courts are to confirm repayment plans upon finding that "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). This requirement is similar to the requirement in chapter 11 that a plan should be confirmed only if "confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." *Id.* § 1129(a)(11). Feasibility analysis is not the only opportunity to tighten chapter 13 to promote a higher repayment and discharge rate. For example, a debtor must have "regular income" to file under chapter 13. *Id.* § 109(e). This requirement is one of the few eligibility thresholds that exists under current law. A more detailed and realistic analysis of regular income may provide another place to tighten the system. Allowing debtors to budget for expenses that are irregular and impossible to forecast may be a more realistic approach when evaluating the probability that a debtor will be able to live within the limits of a

chapter 13, expecting improvement as a result of the means test may be only wishful thinking.

3. *Rationalizing the disconnect: discharge reduction*

Why would bankruptcy reform proponents support legislation and promote chapter 13 when it has fallen short on debt relief and unsecured debt payment and when the legislation does little that is likely to improve chapter 13 on either front? It is possible that Congress' interest in chapter 13 is solely symbolic or expressive.¹⁴² The filing of a chapter 13 case is symbolically equated with repayment. Merely by promoting chapter 13, Congress has made a moral statement in favor of honoring one's commitments.¹⁴³ Or, the legislation may simply be a "gift" to the consumer credit industry that proposed it,¹⁴⁴ with little interest in whether the legislation actually

proposed plan. See *In re Greer*, 60 B.R. 547, 553 (Bankr. C.D. Cal. 1986) (noting that "if a contingency reserve is 'reasonably necessary . . . for the maintenance or support of the debtor or a dependent of the debtor,' it is excepted from the section 1325(b)(2) definition of disposable income"). Indeed, feasibility may depend on providing this leeway in the plan. See *id.* at 553 (commenting that "such a cushion may be required for compliance with section 1325(a)(6), which requires confirmation of a plan if, *inter alia*, 'the debtor will be able to make all payments under the plan'"). Other courts have similarly reasoned that a chapter 13 plan does not have to propose an unreasonably strict budget to comply with the Bankruptcy Code. See, e.g., *In re Belt*, 106 B.R. 553, 562 (Bankr. N.D. Ind. 1989) (noting that it is neither realistic nor necessary to have "the debtor devote every penny of the disposable income to the plan in order to comply with § 1325(b)(1)(B)," and that to do so would increase the overall costs of bankruptcy since any change of circumstance will necessitate a total revamping of a confirmed plan to account for the change in circumstances). See also *In re Fries*, 68 B.R. 676, 683 n.7 (Bankr. E.D. Pa. 1986) (clarifying that allowing a debtor to have money set aside for reasonable expenses does not violate § 1325(b)(1)(B)); *In re Otero*, 48 B.R. 704, 708 (Bankr. E.D. Va. 1985) (asserting that bankruptcy plans must leave the debtor with a financial cushion in order to provide for "life's unexpectancies"); *In re Goodavage*, 41 B.R. 742, 745-46 (Bankr. E.D. Va. 1984) (citing several examples in which courts found bankruptcy plans to be infeasible because those plans would have left the debtor with little or no money for personal expenses). See generally *In re Attanasio*, 218 B.R. 190, 195 (Bankr. N.D. Ala. 1998) (commenting that "in light of the frequent, and almost predictable failure of many Chapter 13 cases, placing emphasis on a theoretical ability to pay that stretches a debtor so thin that it leaves no extra money to meet the unplanned expenses that will inevitably and frequently arise during the course of a repayment effort, only assures the inevitable . . .").

142. See, e.g., Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 (1995) (noting that policy choices reflect value commitments in addition to bringing about actual consequences).

143. See, e.g., 147 CONG. REC. H518 (daily ed. Mar. 1, 2001) (statement of Rep. Dick Armey) ("[T]his bill is about the character of our nation. . . ."); Todd J. Zywicki, *Bankruptcy As Social Legislation*, 5 TEX. REV. L. & SOC. POL. 393, 320 (2001) (arguing that when filing for bankruptcy, "the debtor rejects his promises and repudiates the moral bonds of reciprocity created when creditors extend goods, services, and credit to her").

144. See, e.g., *A Gift for the Credit Card Industry*, N.Y. TIMES, May 30, 2001, at A22 ("But the kernel of good purpose has now mushroomed into House and Senate bills stuffed with gifts to the credit card industry . . ."); Jeff Brown, *Bankruptcy Bill Needs*

works. If Congress does not perceive bankruptcy to be a salient political issue or a system with widespread impact, it may see little harm in changing the system in the ways requested by the consumer credit industry.

What chapter 13 does offer, however, is the appearance of bankruptcy relief without actual debt relief. As previously explained, when chapter 13 plans fail, most debtors do not get a discharge.¹⁴⁵ If a debtor does not receive a discharge, creditors are free to start collecting from the debtor again.¹⁴⁶ To the extent that some repayment can be squeezed out of a large number of debtors, perhaps failed chapter 13s are preferable to successful chapter 7s from a creditor's perspective. Hence, chapter 13 serves a discharge reduction function that may be desirable to bankruptcy reform proponents.

The discharge reduction function of chapter 13 fits sensibly with the predicted effect of the legislation, namely to make the bankruptcy system more formidable and expensive for all users.¹⁴⁷ In addition to making the Bankruptcy Code several times longer and more confusing, the legislation contains a variety of new restrictions on debtors' attorneys.¹⁴⁸ This development may make lawyers who currently focus on consumer bankruptcy more reluctant to represent debtors, or may compel them at least to charge a higher price.

All of these provisions, taken together, reduce the likelihood that debtors will seek and receive relief and this development would increase creditors' opportunities to collect debts.¹⁴⁹ Whether those consumers can or are willing to pay what they promised, or whether they will be "informally bankrupt"¹⁵⁰ remains to be seen. Nonetheless,

Some Tinkering, Hous. Chron., June 29, 1998, at B3 (finding that legislation is "nothing more than a multibillion-dollar gift to the credit card industry . . .").

145. See 11 U.S.C. § 1328.

146. See NBRC, *supra* note 6, at 274; see generally 11 U.S.C. §§ 362(c)(2)(C), 524 (imposing permanent injunction on collection upon receipt of discharge).

147. See National Bankruptcy Conference, *Additional Paperwork Expenses and Burdens on Consumer Debtors in S.420*, at <http://www.nationalbankruptcyconference.org/Paperwork%20&20s.220.pdf> (last visited Oct. 13, 2001) ("Those familiar with consumer bankruptcy estimate that the increased paperwork requirements in S.220 alone will increase the cost of filing a bankruptcy case by several hundred dollars. . .").

148. See generally H.R. 333, 107th Cong. (2001).

149. See generally DAVID A. SKEEL JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 205, 208 (2001) (describing ways in which legislation increases costs of, and consequently discourages consumers from, filing for bankruptcy).

150. See generally Amanda E. Dawsey & Lawrence M. Ausubel, *Informal Bankruptcy*, (Dept. of Econ. Univ. of Maryland Working Paper, Jan. 2001), at <http://www.bsos.umd.edu/econ/bankruptcy> (last visited Oct. 13, 2001) (defining informal bankruptcy as a situation in which a borrower does not make a payment on her balances for 6 months, yet does not file a bankruptcy petition).

the federal bankruptcy system will not have formally prevented the creditors from trying to collect what they can, and whether creditors can collect what they are owed will depend on other factors.¹⁵¹

Discharge reduction is also consistent with the rallying cry for bankruptcy reform. When the one millionth family filed for bankruptcy in a single year in the mid 1990s, the media took notice and widely reported on the event, and the bankruptcy filing statistics became a matter of public concern.¹⁵² As a result, personal bankruptcy has become a discrete "problem" to be "solved" rather than a reflection of other socio-economic problems.¹⁵³ Although reform proponents have paid lip service to the notion of preserving debt relief for the honest and unfortunate, reducing filing rates (or discharge rates) may have become a goal irrespective of how many people legitimately need debt relief.¹⁵⁴ The reduced commitment to the traditional goals of bankruptcy may explain why the consumer credit industry has experienced unprecedented receptiveness to proposals that Congress has rejected repeatedly in the past.¹⁵⁵

151. See *id.* (stating that the debtor can simply stop making payments and place the burden on her creditors to collect).

152. See, e.g., Albert B. Crenshaw, *Hill Panel Seeks Answers to the Bankruptcy Boom*, WASH. POST, Dec. 8, 1996, at H1. See generally Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079 (1998) (commenting on Americans' fascination with statistics, and news frenzy when bankruptcy filings hit the one million mark).

153. It is possible that this has long been the case. See Douglas, *supra* note 68, at 642 ("Not until bankruptcy is thought of as a congeries of problems, such as housing, home buying, small loans, collection methods, unemployment, medical costs, retail credit practices, instalment [sic.] buying, automobile accidents, etc., rather than as an institution, will more effective control over these problems and their various agencies eventuate.").

154. See generally Dickerson, *supra* note 73, at 18 (noting recent efforts to revise welfare and bankruptcy laws result from perception of bankruptcy users and belief that repayment will increase self-sufficiency); McIntyre, *supra* note 65, at 131 (noting moral aversion to and stigmatization of bankruptcy filers); William C. Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. CONSUMER POL'Y 179, 191 (1997) (noting the "lessened public commitment to the core values that have historically justified a fresh start . . ."). See also Jacob S. Ziegel, *The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison*, 37 OSGOODE HALL L.J. 205, 207 (1999) (explaining that concerns about bankruptcy discharge prompted further restrictions on Canadian consumer bankruptcy law); Jacob S. Ziegel, *Canadian Perspectives on the Challenges of Consumer Bankruptcies*, 20 J. CONSUMER POL'Y 199, 199-200 (1997) (stating that people criticized proposed amendments to Canadian consumer bankruptcy laws "on the grounds that they ignore the source of the problems, the desperate financial condition of many consumer bankrupts, and the credit industry's own role in the precipitating the current crisis."). North American lawmakers appear to be moving in the opposite direction of their European counterparts. See Huls, *supra* note 67, at 125 (discussing "perceptible Americanization of the legal 'culture' in the European commercial world" and the growing interest in U.S. bankruptcy code); Johanna Niemi-Kiesiläinen, *Changing Directions in Consumer Bankruptcy Law and Practice in Europe and USA*, 20 J. CONSUMER POL'Y 133, 137 (1997) (observing that European law is becoming more progressive while U.S. law is becoming less so).

155. See generally *The Bankruptcy Reform Act of 1999: Hearings on H.R. 833 Before the*

One might argue that discharge reduction is in the public interest to the extent that it helps preserve access to the real insurance of last resort: consumer credit.¹⁵⁶ As previously noted, the consumer credit industry has claimed that granting discharges in millions of cases over the past few years has imposed costs on lenders, who pass that cost along to other consumers in a variety of forms, such as higher interest rates and reduced access to credit.¹⁵⁷ Congress has rather uncritically adopted the industry calculations of the costs that creditors have passed along to the average American family.¹⁵⁸ Taking this assertion seriously, perhaps discharge-prevention preserves credit access to the millions of non-bankrupt American families, including those with medical-related financial problems. This will be successful, however,

House Subcomm. on Commercial & Admin. L. of the Judiciary Comm., 106th Cong. 101 (1999) (statement of Lawrence P. King) (describing repeated efforts of consumer credit industry to convince Congress to adopt means testing throughout twentieth century). The 1973 Commission on the Bankruptcy Laws of the United States gave the following explanation:

[P]roposals have been made to Congress from time to time that a debtor able to obtain relief under Chapter XIII should be denied relief in straight bankruptcy. . . . The [1973] Commission has considered the arguments made for conditioning the availability of bankruptcy relief, including discharge, on a showing by the debtor that he cannot obtain adequate relief from his condition of financial distress by proposing a plan for payment of his debts out of his future earnings. The [1973] Commission has concluded that forced participation by a debtor in a plan requiring contributions out of future income has so little prospect for success that it should not be adopted as a feature of the bankruptcy system.

REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES (PART I), H.R. DOC. NO. 93-137, at 158-59 (1st Sess. 1973), *reprinted in* COLLIER ON BANKRUPTCY, Appendix B, Pt. 4(c), App. Pt. 4-327 (Lawrence P. King et al., eds., 1996).

156. *Hearing on Consumer Bankruptcy Before the S. Judiciary Comm.*, 107th Cong. (Feb. 2001) (statement of Robert D. Manning, Ph.D.) ("Consumers have become increasingly dependent on unsecured . . . credit . . . to compensate for stagnant real wages, increasing employment disruptions, and higher costs for big ticket items such as automobiles, college tuition, housing, and health/medical costs.").

157. See, e.g., *The Bankruptcy Reform Act of 1998 Part I, Hearing Before the House Subcomm. on Commercial & Admin. Law of the Judiciary Comm.*, 106th Cong. 140 (1998) (statement of Bruce L. Hammonds, Senior Vice Chairman and Chief Operating Officer, MBNA Corp.) ("[M]ore than \$40 billion in consumer debt—about \$400 for each American family—was erased as a result of bankruptcy in 1997"). But see *The Bankruptcy Reform Act of 1999: Hearings on H.R. 833 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm., Select Subcomm. on Admin. Oversight and the Courts*, 106th Cong. 75 (1999) (statement of the National Consumer Law Center) (describing criticisms of consumer credit industry's methods of calculating losses); *The Bankruptcy Reform Act of 1999: Hearings on H.R. 833 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. 49 (1999) (statement of the National Bankruptcy Conference) (challenging calculation of benefit that consumers will enjoy if bankruptcy reform becomes law).

158. See, e.g., *The Bankruptcy Reform Act of 1999: Hearings on H.R. 833 Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. 2 (1999) (statement of Rep. Rick Boucher) ("The typical American family pays a hidden tax of about \$550 per year arising from the increased costs of credit and the increases in the prices of goods and services occasioned by the discharge of \$50 billion each year in consumer debt arising from bankruptcy proceedings.").

only if those who otherwise would have received a discharge actually end up repaying part or all of their debts. For this to be true, one either must believe that most bankruptcy filers actually would be willing and able to pay their debts in the absence of bankruptcy or that consumers would change their spending and saving patterns if access to bankruptcy was more restricted.¹⁵⁹

Whatever the motivation, under a discharge reduction analysis, any type of debtor who considered filing chapter 7—including one who is ill or injured—is a desirable chapter 13 debtor. The legislation will be considered a success, at least temporarily, if it reduces the number of chapter 7 filings. From this perspective, it is perfectly acceptable—or at least an inevitable consequence—for debtors with ongoing medical problems like Mr. Hurt to file chapter 13, regardless of low culpability and weak repayment prospects.

B. *The Home Saving Function of Chapter 13*

Although chapter 13 may not result in a discharge for many filers, it does have some functions from the debtor advocate's perspective irrespective of the debtor's culpability or ability to pay unsecured debts. From the point of view of some debtors' advocates, "[c]hapter 13's greatest significance for debtors is its use as a weapon to avoid foreclosure on their homes . . . Chapter 13 remains the only viable way for most mortgage debtors to cure defaults and save their homes."¹⁶⁰

In this fashion, chapter 13 provides something to a debtor that chapter 7 does not.¹⁶¹ In addition, the ability to cure a home

159. *But see* Jackson, *supra* note 38, at 1405 (justifying non-waivable right to discharge, and arguing that consumers "systematically misjudge (or ignore) their own interests and . . . this bias leads them to consume too much and save too little.").

160. DeJarnatt, *supra* note 64, at 495-96. *See* Gary Klein, *Consumer Bankruptcy In the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors*, 5 AM. BANKR. INST. L. REV. 293, 323 (1997) ("Perhaps the primary incentive for debtors to choose chapter 13 is the availability of provisions which allow them to manage their secured debt in order to retain residences and automobiles which would otherwise be lost to foreclosure or repossession."); *see also* KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM* 30 (1997) (citing unique benefit of curing arrearages and sometimes reducing secured claim); Norberg, *supra* note 60, at 424 (noting that chapter 13 has provisions that allow debtors to cure defaults and reinstate home mortgages). Sullivan, Warren, and Westbrook report that judges and lawyers argued that debtors do get benefits from incomplete cases, including the opportunity to negotiate with their lenders. *See* SULLIVAN ET AL., *supra* note 58, at 143. *But see* Braucher, *supra* note 56, at 186-87 (noting limits of chapter 13 as effective device to save collateral and also noting possibility of accomplishing similar result in chapter 7 with more active debtors' lawyer negotiation).

161. Chapter 13 gives debtors even more leeway with car loans, although pending bankruptcy legislation would reduce these benefits. Under current law, the amount of the secured debt can be reduced to the value of the collateral, payable over time

mortgage default over the lender's objection gives the debtor extra leverage, and thus chapter 13 becomes a desirable forum for debtors' advocates for the litigation of predatory lending claims, with reduction of the outstanding debt as the goal.¹⁶²

Like discharge reduction, home-saving was hardly an intended stand-alone original purpose of chapter 13. The standard explanation is that Congress enacted the home-saving "incentive" to encourage debtors to choose chapter 13 instead of chapter 7 (and thereby repay some of their unsecured creditors on rate to the receipt of a discharge).¹⁶³ Yet, as previously discussed, repaying unsecured debt is not technically a statutory requirement of chapter 13. A debtor might claim to have no disposable income for unsecured creditors, or might simply stop making payments under the plan once she has de-accelerated and cured her mortgage default. Although she probably will not get a discharge, she has fixed her primary financial problem.¹⁶⁴ Recent research indicating that a substantial proportion of plan payments are dedicated to secured debt payments is consistent with the view that chapter 13 is predominantly a tool to resolve home mortgage or car loan problems, not a vehicle for substantial unsecured debt payment.¹⁶⁵

The fragile financial circumstances of a medical-related filer that

with interest, and the loan schedule can be modified in other ways as well. See 11 U.S.C. § 1325. See generally William C. Whitford, *Secured Creditors and Consumer Bankruptcy in the United States*, 37 OSGOOD HALL L.J. 339, 348-55 (1999) (describing treatment of secured claims under U.S. law).

162. See, e.g., David A. Scholl, *Bankruptcy Court—The Ultimate Consumer Law Forum?*, 44 BUS. LAW. 935, 937 (1989) (describing how predatory lending and other consumer law claims arise in chapter 13 cases as debtors' advocates would seek to reduce amount of creditors' claims). See generally Cathy Lesser Mansfield, *The Road to Subprime "Hell" Was Paved With Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473 (2000) (describing subprime mortgage lending industry and resulting predatory lending practices, as well as recent regulatory efforts to address predatory lending).

163. See generally Boshkoff, *supra* note 138, at 554 (noting incentives Congress provided for debtors to choose chapter 13, but that they did not necessarily lead to repayment). In addition to saving homes, debtors can make significant modifications to car loans and other secured debts, reducing the amount of the principal to the value of the collateral. See 11 U.S.C. § 1325. Debtors who complete repayment plans can obtain a broader discharge of debt than that available in chapter 7. *Id.* § 1328. A co-debtor stay is available in chapter 13 but not in chapter 7. *Id.* § 1301.

164. See Klein, *supra* note 160, at 328-29 ("If the plan should fail after the default is addressed, at least the family will not be at risk of losing their home or car when the case is dismissed."); The Bankruptcy Reform Act of 2001 will somewhat limit the ability to do this, however, if it is enacted. See Bankruptcy Reform Act of 2001, H.R. 333 § 306.

165. Norberg found that secured debt payments accounted for about ninety percent of all chapter 13 payments, excluding attorneys' fees. See, e.g., Norberg, *supra* note 60, at 418 (noting that "in sharp contrast to unsecured creditors, secured creditors fared handsomely").

make unsecured debt payment unlikely also may hamper home-saving efforts, calling into question whether chapter 13 performs the home-saving function well.¹⁶⁶ The home-savers may not define success only in terms of the homes saved forever, but would likely include the benefits of short-term continued ownership that gave debtors further time to make other housing arrangements. In addition, they would likely emphasize the importance of preserving the opportunity to try. Just as it is not always clear in advance which businesses will succeed or fail in reorganization under chapter 11, the home-savers might argue that it is worth letting more debtors try to save their homes instead of presuming failure.

From the home-saving perspective, the finding on medical-related bankruptcies do not suggest system failure, and culpability and ability to pay unsecured creditors are not primary considerations. It probably comes as no surprise to debtors' advocates to hear that many chapter 13 filers are honest and unfortunate.¹⁶⁷ Presumably, however, ill and injured debtors with homes in default need chapter 13 just as much as any other type of debtor, regardless of their low level of culpability.¹⁶⁸ Chapter 13 might cost a bit more in attorneys' fees, but the home-savers might argue that the potential rewards are worth it, particularly given the perceived lack of alternatives to

166. See, e.g., Braucher, *supra* note 56, at 186-87 (noting limits of chapter 13 as effective device to save collateral and also noting possibility of accomplishing similar result in chapter 7 with more active debtors' lawyer negotiation).

167. See, e.g., *The Bankruptcy Reform Act of 1998 Part I Before the House Subcomm. on Commercial & Admin. L. of the Judiciary Comm.*, 106th Cong. 241 (1998) (statement of Henry J. Sommer, on behalf of the Consumer Bankruptcy Assistance Project) ("Remember, the families who are in bankruptcy are often families with unstable incomes, usually stretched to the limit.").

Many hard working and deserving American families are placed in unfortunate, financial positions. Layoffs, loss of overtime, divorce and disability can quickly introduce financial instability into a workers' [sic] life. These families struggle to avoid the use of the bankruptcy system. . . . Over time those efforts fail, often due to the unwillingness of creditors to work with debtors and give them the second chance.

Id. at 274 (statement of Matthew J. Mason, on behalf of the United Auto Workers).

Many [clients] I see are single mothers, who have struggled for years to stay afloat on one income alone, often with no support, and who just cannot make it. Some are older workers who used to have decent incomes, but who have been downsized or let go from their jobs due to age. Most of these people would be fairly described as members of the working or middle class.

Id. at 192 (statement of James Ike Shulman, on behalf of the National Association of Consumer Bankruptcy Attorneys).

168. See, e.g., *In re Sarkese*, 189 B.R. 531 (Bankr. M.D. Fla. 1995) (explaining that severe medical problems resulted in financial hardship and mortgage arrearage of over \$7,000); *In re Chavez*, 117 B.R. 730, 733 (Bankr. S.D. Fla. 1990) ("Prior to this default, debtors had been making payments for a substantial period. The arrearage accrued because the debtor/husband suffered a serious medical problem and was unemployed.").

accomplish this result.

In essence, the home-savers might perceive chapter 13 as offering a different form of insurance of last resort for the ill and injured. As previously noted, the financial fallout from medical problems can take many forms other than the direct costs of medical care, as income problems of all kinds may lead to mortgage default.¹⁶⁹

In their departure from traditional principles regarding the purpose of bankruptcy and, more specifically, the goals of chapter 13, the home-savers inadvertently are in agreement with bankruptcy reform proponents, with whom they are largely at odds in the public debates. As much as they might staunchly oppose the pending means test,¹⁷⁰ home-savers perceive chapter 13 to be appropriate and desirable for Mr. Hurt and others like him who are not culpable and cannot pay much unsecured debt. The way in which they advise their debtor clients demonstrates these beliefs. One cannot, therefore, expect debtors' advocates or others who share the home-saving perspective to take steps to deter chapter 13 filing by the ill and injured because, in their view, there is nothing wrong or inconsistent about them being there even if they never get a discharge or pay a dime of unsecured debt.

CONCLUSION

This Article presents previously unpublished evidence of the high level of medical-related and job-related chapter 13 filings as revealed by the 1999 Study. Debtors with health and job problems have been foregoing the opportunity for a swift discharge in chapter 7 in favor of repayment plans in chapter 13. As a practical matter, however, their chapter 13 repayment plans probably will not distribute much to unsecured creditors and probably will not result in a discharge.

This finding may be troubling, or at least curious, from a traditional viewpoint of the function of bankruptcy, which is to provide debt relief for an honest and unfortunate debtor. The virtues of unsecured creditor repayment cannot justify this finding if they are not paying much or anything to those creditors. Lamenting the presence of so many ill and injured debtors in chapter 13 assumes, however, that the traditional view of bankruptcy remains, or ever was, uniformly accepted.

The large number of low culpability/weak repayment prospect chapter 13 filers in the current system, and the changes

169. See cases cited *supra* note 168.

170. See H.R. REP. NO. 106-123, at 381 (1999) (reporting opposition by consumer and debtor advocates).

contemplated in the legislation, should shake our faith in the proposition that a debtor's path to bankruptcy matters in determining one's entitlement to unconditional debt relief. If pending bankruptcy reform becomes law, it will restrain courts from assessing chapter 7 filers' culpability when they consider whether their cases are presumed abusive under the means test. Courts will not do any more systematic channeling of non-culpable debtors out of chapter 13 than they do under current law (which is not much if the high incidence of medical-related chapter 13 filings is any indication). Mr. Hurt and Mr. Plastic are interchangeable and courts will evaluate them principally on their balance sheets, not on the details of their financial demise.

The home-savers are likely responsible, at least in part, for channeling some of the medical-related filers into chapter 13, notwithstanding those debtors' levels of culpability. They seem to believe that sorting debtors into chapter 13 or chapter 7 is a function of taking advantage of debtor-friendly provisions to perform consumer protection functions. This belief is particularly true with respect to the home-saving function, but also is true to a lesser extent with respect to other incentives in chapter 13 that were intended to encourage debtors to repay their unsecured creditors.

Even the long-exalted goal of unsecured creditor repayment in chapter 13 takes a back seat under a modern functional analysis of chapter 13. The home-savers have found a way to de-link the home-saving benefit of chapter 13 from that chapter's original goals of unsecured creditor repayment, and have advised debtor clients accordingly. The bankruptcy reform proponents have proposed changes to make chapter 13 a less viable unsecured debt repayment device while making the system more complicated overall. This effort suggests that any attempt to reduce the risk of chapter 13 failure to a medical-related filer would be met with resistance. For example, Congress could amend the Bankruptcy Code so that a discharge would be provided automatically to debtors like Mr. Hurt once they default in their repayment plans due to sickness or income interruption.¹⁷¹ Automating the discharge benefit upon plan failure for debtors with deteriorating circumstances would allow debtors to try to pay their debts as much as they can. It would also ensure receipt of a discharge for debtors in default on their payment plans who do not know to ask for one but for whom it is in society's best

171. See *NRBC*, *supra* note 6, Proposal 1.5.5 at 273 (taking the position that the Bankruptcy Code should permit a chapter 13 case that qualifies for dismissal to be converted to chapter 7 by default).

interest to provide one.¹⁷² If reform proponents believe the optimal bankruptcy result is dismissal without discharge (in addition to lowering the filing rate altogether), we should not expect to see such a proposal succeed. Under a discharge reduction analysis, Mr. Hurt's problems make him an even more desirable chapter 13 filer.

Instinctively, Mr. Hurt and Mr. Plastic seem to have different entitlements to debt relief. Traditional bankruptcy principles and current bankruptcy reform rhetoric have relied on such distinctions, perhaps to instill us with confidence that the system is just and fair. To the extent that the system falls short of its goals of providing social welfare to the ill and injured and disciplining the profligate, the distinctions between Mr. Hurt and Mr. Plastic are now chimerical. Perhaps they always were.

172. See, e.g., Remler et al., *supra* note 15, at 15 (concluding that moving from voluntary to automatic coverage in some benefit programs is effective).