Divorcing Into Debt: How Bankruptcy Abuse Prevention and Consumer Protection Act Created A New Class Member In America's Debtors' Prisons

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DIVORCING INTO DEBT:
HOW BAPCPA CREATED A NEW CLASS MEMBER IN AMERICA’S DEBTORS’ PRISONS

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I. INTRODUCTION

“Mawage. Mawage is wot bwings us togeder tooday. Mawage, that bwessed awangment, that dweam wifin a dweam...”\(^2\) This quote has been echoed by fans and mockers of the film since its debut in the late 1980's. This sentiment, with and without the comedy driven from the film, has been the true sprite of what marriage is and the “dweam wifin a dweam”\(^3\) for every man standing at the alter and every woman walking down the aisle to the music. While they both are wondering, “what in the world am I getting myself into?” Somehow, she makes it to the alter to stand with her man, who then clasps her hand and they live happily ever after. That is the dream anyway. However, with the divorce rate of all marriages in the United States around 40%, it is clear that a large number of the 2,118,000\(^4\) marriages will end in divorce. That means roughly 847,200 divorces, with approximately 1,694,400 people affected by divorce last year alone.

So, it begs the questions, one, why should one get married, and two, what is the point of the above rambling? Before 2005, there would be no telling what the “tie in” would be; however, thanks to the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 the “tie in” is how Congress created something wholly illegal. The act that has more than its fair share of legal scholars in an uproar (still after nearly a decade in affect), has yet another wrinkle that should be cause for panic for all soon-to-be divorcees; and a heads up to the high court that will no doubt have to make a ruling in regards to the constitutionality of the act.

This article is malfunctioning in so much that two states, two geographically, legally, and otherwise different states are explored legally. This is done to show that the concepts in this article are at the federal level and has such the entire country is affected. Florida and Ohio are explored herein, both how BAPCPA works within the state, and how creditors can manipulate the current legal civil

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\(^2\) THE PRINCESS BRIDE (20th Century Fox 1987) (Quote from The Impressive Clergyman during the clergyman at Humperdinck and Buttercup's wedding).

\(^3\) Id.

remedies, namely contempt of court, to potentially jail their debtors. This article then seeks to conduct a policy analysis on BAPCPA and give four possible choice of actions to contemplate in reference to the act.

In England, prior to the establishment of colonies, let alone before the revolutionary war, it was not only legal, but also customary to jail a debtor for his failure to pay his debt. Even after the Revolutionary War, there were “Debtors' Gaol's” in the United States used as a deterrent to having debt, and not paying said debt. These prisons were kept separate from ordinary prisons and the conditions were unbearable. Life in debtors' prisons was more than dismal. With tiny rooms, multiple occupants, little to no hygiene, rapid fever, and the debtors, while being unable to afford their own debts, were also charged for their imprisonment. Starvation was also a huge problem as the state did not provide food for the inmates. Debtors had to rely on their family to feed them.

Debtors' Prisons have been a point of contention in the United States since their conception in England, before the United States was the United States. Debtors' Prisons were completely, equal opportunity housing more than just the layman, but many reputable members of the United States including those who finance the revolutionary war.6

Robert Morris was a principal founding father of the United States. In General George Washington's need of funding during the American Revolutionary War with troops in desperate need of weapons, food, clothing, etc., Robert Morris lent $10,000 to the cause and became a major financier of the War. In 1781, Robert Morris was even appointed by Congress as the first superintendent of finance. Seventeen years later, Morris was arrested and imprisoned for a debt in 1978; resulting from a bad investment.7

After centuries of practicing this arcane and unproductive practice of jailing the poor, the United

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5 Steve Rhode, The History of Credit & Debt, GET OUT OF DEBT (Dec. 2, 2009), http://getoutofdebt.org/14244/the-history-of-credit-debt-debtors-prison (Pronounced as “jail”. Gaol comes from an old, northern French word, gaole, which in turn, comes from caveola, a diminutive form of the Latin term cave, which means cage).

6 Id. (In 1798, he was arrested for debt resulting from his speculation in land and confined to the Prune Street prison, Philadelphia, from February 1798, until liberated by the passage of the national bankruptcy law in 1802).

7 Id.
States started seeing the error of their ways and began working on a new form of law, bankruptcy. In the 1800's, the new form of federal law began to emerge and gave hope to those who had lost it. Bankruptcy was eventually adopted by all the states in the union with an eventual understanding that bankruptcy offers a fresh start to those who partake in the bankruptcy procedure.\(^8\) The system, however, is not perfect and has been many times changed and overhauled (even repealed a couple times at its inception). Most recently, the 2005 bankruptcy law underwent a major overhaul with the passing of the BAPCPA.

BAPCPA has its fair share of critics and has been argued over since day one. The major complaint is that the act does nothing to protect the debtor and only protects the creditor. With avenues, and nuances of words that the court system as a whole is confused by. However, the courts are not in the business of making laws, but rather, must interpret them. The following is an analysis of a portion of BAPCPA that has not fully created a problem, but will indeed make a debtors' prison, if it goes unchecked and the main occupants are parents with children.

**II. 11 U.S.C. § 523**

The United States Code (U.S.C.) codifies bankruptcy under Chapter 11 of the code. The main goal of the bankruptcy is to give debtor “a fresh Start”; however, there are many debts that even after a bankruptcy goes through the court system and is approved, that are not dischargeable. These debts are outlined in section 523 of chapter 11 in the U.S.C. Subsection (a): “a discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 11 USCS §§§§ 727, 1141, 1228(a), 1228(b), or 1328(b) does not discharge an individual debtor from any debt”.\(^9\)

The one debt, that is right, *the one debt* that will be looked at that can cause a debtor to be locked up with inmates convicted of rape, murder, theft, robbery, larson, etc. is codified as 11 U.S.C. § 523 (a)(15) and states:


“to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.”

What is the big deal? Seems reasonable to make sure that a former spouse is taken care of in order to help raise children and to make sure that the former spouse and children are kept in the same comfortable living situation as they were accustomed to. If one was to look closer at the first sentence, “not of the kind described in paragraph 5...” What is paragraph 5 you ask; “for a domestic support obligation”. Well, wait… paragraph 15 is not child support; that is paragraph 5. Then what is the purpose of paragraph 15? Child support is to help with the children and to protect them and nondischargeability for those makes total sense. Then why do we have paragraph 15? The answer is not one that you will ever have answered, at least not truthfully. This article will not tell you the reason for said paragraph, as it is better to “keep your mouth shut and be assumed a fool, than to open your mouth and consume all doubt”. This article’s sole purpose is to explain how this paragraph, the fateful paragraph 15, can create a debtors' prison.

A. Problematic Paragraph

Why is paragraph 15 so problematic? To understand why, one must understand what exactly a Marital Separation Agreement (MSA) is or the purpose of any other document related to party obligations, post-divorce or separation. Anyone who has ever seen these MSAs and any other court documents know just what can be, and normally are in these documents, know just how dangerous paragraph 15 can be. In short, an MSA is basically a contract between both parties to a divorce that equitably distributes all assets and liabilities that may have occurred prior to marital union, during, and

10 Id. § 523(a)(15).
11 Id. § 523 (a)(5) (“for a domestic support obligation”).
12 Mark Twain, HISTORY, http://www.history.com/topics/mark-twain (last visited Dec. 20, 2014) (The name Mark Twain is a pseudonym of Samuel Langhorne Clemens. Clemens was an American humorist, journalist, lecturer, and novelist who acquired international fame for his travel narratives, especially The Innocents Abroad (1869), Roughing It (1872), and Life on the Mississippi (1883), and for his adventure stories of boyhood, especially The Adventures of Tom Sawyer (1876) and Adventures of Huckleberry Finn (1885). A gifted raconteur, distinctive humorist, and irascible moralist, he transcended the apparent limitations of his origins to become a popular public figure and one of America’s best and most beloved writers).
even after the separation.

The problem lies with, as most things in life, the debts. While there are indeed several nondischargeable debts, the majority of individual and marital debts can and will be discharged post-bankruptcy. However, thanks to our pesky friend paragraph 15, these debts that are prior to the date of legal separation or divorce (as expressed in the MSA) now become forever nondischargeable.

Let that sink in for a moment. A debt that is or could be, otherwise dischargeable is no longer dischargeable because two parties decided that they no longer love each other. “I love thee not Romeo; forever pay my debt...” Yeah, no. Not even Shakespeare could have written this kind of tragedy. House of Cards\textsuperscript{13} is a very entertaining and a drama filled television series, but who would have thought that someone in the same congress as Kevin Spacey could create such a tragedy. A simple paragraph, paragraph 15 can create a life time of despair and doom; all done in only 65 words. That is all it takes to make an illegal debtors' prison by way of a loophole.

No one, in their right mind, who completes either their first or last loan, credit card, or store card applications thinks that this debt will forever be mine and I will never be able to get out from under this creditor. Granted, the hope is that one does not fill out these kinds of applications with the sole purpose of receiving money and then immediately filing bankruptcy. One expects to use the credit to the betterment of the person in order to put them in a better place than they currently are; the American Dream. Also, one does indeed plan to always pay the debts as they are owed. While one does not consciously think that “one day, if things do not work out, I can get a fresh start with bankruptcy”; the majority of people, even if they do not fully understand bankruptcy laws, do know that they have a crutch if life gets hard. What else could be more difficult than a divorce or a separation from your significant other? Then boom, you are sinking in debt with no way of obtaining a life preserver.

The good news, the creditors have not figured out just how to use paragraph 15 to jail their

\textsuperscript{13} House of Cards (Media Rights Capital 2013).
pesky debtors; or at least have not used this paragraph to jail their debtors. However, there have been cases that address this paragraph and the rulings have yet to acknowledge the problem and to stop it. Looking at two states, Ohio and Florida for contrast, and their divorce laws, proceedings, and current rulings, it becomes not only clear the problems, but just how scary paragraph 15 really is.

III. FLORIDA VS. OHIO

The good news is nothing about to be discussed and addressed has happened, litigated, or been debated in Florida yet, but the bad news is it could happen. So, you are thinking, “why is the writer freaking out and making a big point over something I do not fully understand?” Within BAPCPA, there is a lot of ambiguity and arguments to be made that no one can fully support by virtue of the language used in the act. However, using current laws and the language in the act, it becomes a little more understandable at least the arguable existence of the debtors' prisons.

Divorce decrees, marital separation agreements, and any other court order from a court of record (and arguably premarital agreements discussed later) are no longer dischargeable in a bankruptcy by way of 11 U.S.C. § 523 (a)(15). The problem then becomes what happens when a debtor declares bankruptcy on all debts and is still forced to pay a debt that the debtor could not pay to begin with. This goes against the fundamental rationale behind bankruptcy law, to give the debtor a fresh start. What happens when the debtor who wished to declare bankruptcy on a debt that was non-dischargeable, who still cannot pay the debt? How does the creditor collect? Normally, the creditor would have the option to foreclose on the property used as collateral (assuming it was a secured creditor), as well as all other remedies afforded to the creditor by law. However, hypothesize for a moment that in one of the aforementioned agreements expressed in 11 U.S.C. § 523 (a)(15) a debtor agreed to or was court ordered to take on the mortgage of the marital home for the benefit of the former spouse and children (for simplicity assume there is only one mortgage secured by the marital home), and cannot pay the debt, even after declaration of bankruptcy. Can a creditor still foreclose on the collateral securing the debt? YES!
The easiest way to understand this is to know that the debt secured by the collateral does not attach to the individual debtor who owes the debt, but attaches to the collateral itself, namely in the hypothetical 1, the marital home. This is the same even on a secured debt of collateral on a debt that is dischargeable giving way to the “pay and stay” phenomenon in Florida due to the poor housing market, however, that is a whole other topic of discussion. This hypothetical 1 needs an additional fact; the creditor does, in fact, begin the foreclosure procedure. It would not be fair to foreclose on a marital home that is occupied by the former spouse (and children) who rightfully and legally transferred their portion of the debt to the other former spouse. It would not be in the interest of justice. However, explained above, the debt is attached to the collateral, not the individual. As far as the creditor is concerned, it is merely business and foreclosure on the collateral is to repay the debt owed. The issue then becomes, how does the occupying former spouse protect himself or herself from losing the collateral they own? Enter in the contempt proceedings.

A. Florida Contempt

Contempt proceedings in Florida are broken up into two types: civil and criminal. Under the Rules of Family Law Rules of Procedure, the party (in family law proceedings) bringing the contempt action brings an action against a defendant in a civil contempt proceeding; however, the judge on their own motion or affidavit can issue an order to show cause resulting in a criminal contempt proceeding.14 However, the judge on their own motion or affidavit can issue an order to show cause resulting in a criminal contempt proceeding.15

It is important to note that in Florida, the definition of contempt of court is not fully and unambiguously defined. However, in family law the contempt proceedings are governed by rule 12.615

14 Fla. R. Fam. Law P. 12.615 (a) “Applicability. –This rule governs civil contempt proceedings in support matters related to family law cases. The use of civil contempt sanctions under this rule shall be limited to those used to compel compliance with a court order or to compensate a movant for losses sustained as a result of a contemnor's willful failure to comply with a court order. Contempt sanctions intended to punish an offender or to vindicate the authority of the court are criminal in nature and are governed by Florida Rules of Criminal Procedure 3.830 and 3.840”.

15 Fla. R. Crim. P. 3.840 (a) “Order to Show Cause.--The judge, on the judge's own motion or on affidavit of any person having knowledge of the facts, may issue and sign an order directed to the defendant, stating the essential facts constituting the criminal contempt charged and requiring the defendant to appear before the court to show cause why the defendant should not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of the defense after service of the order on the defendant”.

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in Family Law Rules of Procedure, which indicates what actually is civil contempt in regards to family law. Florida courts have stated that rule 12.615:

“governs civil contempt proceedings in support matters related to family law cases and limits the use of civil contempt sanctions under the rule to those used to compel compliance with a court order and those used to compensate a movant for losses sustained as a result of a contemnor's willful failure to comply with a court order”.\textsuperscript{16}

Similarly, Florida courts have also stated that “at a hearing on a motion for contempt in support matters, a court is concerned with limited issues: (1) whether a prior order directing payment of support was entered, and (2) whether the alleged contemnor has failed to pay the support”.\textsuperscript{17}

What this means is a possible scary outcome. All the court looks to is whether there is an order, and if there was a failure to comply with said order; then there will be a possibility of civil contempt and a possible jail visit. Any agreement of parties in a separation agreement and/or divorce decree (which become a court order once the divorce is granted by the court) of payments of any debts to be paid by a party are debts that will haunt the debtor until repayment is made in full, less there be jail for the debtor. The question then becomes, if debtors' prisons are illegal, then how does this happen and what does it look like?

\textit{Florida Debtors' Prisons}

Return to the hypothetical 1, in which a former spouse one has agreed to in a separation agreement, divorce decree or any other court order to pay the mortgage on the marital home for the benefit of the other former spouse, and for whatever reason is no longer able to pay on the debt. Former spouse wishes to file bankruptcy and be granted a fresh start, but this debt is now forever non-dischargeable by way of BAPCPA. This leaves the creditor with a decision on how to collect. There is, however, not a reported case of the following actually happening because for whatever reason it has not

\textsuperscript{16} Fla. R. Fam. Law P. 12.615 (a), supra note 13.
\textsuperscript{17} \textit{Porush v. Porush}, 23 So. 3d 1284 (Fla. 4th DCA 2010).
yet come up; although, that does not make it any less real or possible due to the wording of the law.

It is likely that the banks do not know of (or do not see it cost effective as of late) the process that it can be afforded by way of Florida law. All court proceedings are a matter of public record and as such are recorded in volumes that anyone can access at any time for any reason. All divorces are a court proceeding and are public record, if a separation agreement or divorce decree have been made, then that too, becomes a part of the court record and become public record and as such a court order. Go on, Google your name, a friend’s name, an enemy; you could even Bing that stuff, chances are if there is a court record in which that name has been involved in, then it pops right up on the computer and a location of the court record and probably even a link to the record in its entirety. Assuming that the majority of banks that process and maintain loans have at least one employee with at least a kindergarten understanding of computer operations, then they have access to any agreement that has been made by any of their debtors by way of a divorce. The banks know the most minor of details in the agreement that former spouse one made to former spouse two as the entire contract becomes a matter of court order and record. The bank in hypothetical 1 now knows all they need to about former spouse one is to make sure that former spouse one never stops paying on the debt.

Step two that the bank must take is another decision. Take the traditional route and foreclose on the property, or take the debtor to court in a civil contempt proceeding. For hypothetical 1, assume that the bank is new age and wants to try a new approach and take the debtor to court directly. The bank brings a motion for failure to pay a court ordered support obligation to former spouse two (this can be done by way of a third party beneficiary contract theory or a number of other theories). The motion could be brought really any time after a missed payment. Granted, the banks would try to mediate through non-court means first. However, after a bankruptcy is filed or the bank has been put on notice of a possible bankruptcy petition the bank could forgo the 341 hearing in Federal Bankruptcy Court, and keep it local and file a motion in contempt proceedings.

At that moment, the courts will have to make a ruling based on what the Florida courts have
already said regarding these types of motions. Was there a court order to pay or was there a failure to pay? Assuming that a Google search of public records showed the court ordered record would prove the existence of said record, and a filed bankruptcy petition (or multiple missed payments) would be enough to show the failure to pay, the courts are then afforded a multitude of options to compel compliance with the original court order. Most of these options are analogous to debtors' prisons, even if not actual jail time, the means of compelling compliance strips away the debtor's liberties.

Back up just hair, enter hypothetical 2, same facts only in this hypothetical, the court looks at the contempt motion filed by the bank and rules that the bank could not bring a motion on rule 12.615 because the court interpreted that the rule is only for the former spouse (former spouse two in the hypothetical), never mind that this would be the court making laws, the court still could rule this way. Do not feel bad for the bank; there is still another option, foreclosure! However, that ruling would not be the end of debtors' prison that was created by BAPCPA. Hypothetical 3, same facts, but the bank decides to foreclose on the property. Former spouse two, not wanting to lose the home files in contempt proceedings defeating the ruling that only former spouses can bring rule 12.615 actions to the court. The outcome discussed above would remain the same, and the debtors' prisons that are illegal would still be intact by way of BAPCPA.

Even more troubling is that while contempt proceedings are in fact state specific and one could argue that if there are debtors' prisons, it is only in Florida and Florida legislature should change the laws of the contempt proceedings in order to once again irradiate the debtors' prisons. Unfortunately for that argument, BAPCPA is a federal law and the language governs all states, and the poorly written language can lead to a debtors' prison in any state. To illustrate this point, look to the Midwest, a vastly different political and legal climate, and the above mentioned process in Florida can be seen with only minor differences.

**B. Ohio Contempt**

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Unfortunately, yet again the only solace that can be found in the following is the mere fact that the creditors do not know that they can do this, or at the very least do not at the moment see it as profitable, one would assume due to the market interior being that it is cheaper to threaten then to take action. The majority of the time just the threat of losing one’s home is enough to compel at least some payment and for very little effort. Most creditors do know that no matter what the debtor does, if the debtor declares bankruptcy then the creditor will have a chance to be heard at a 341 hearing in a bankruptcy proceeding. However, the creditors do have options and without delving too far into the Florida Unfair and Deceptive Trade Practices Act, it seems that a creditor would have the ability to threaten a contempt proceeding and possible jail time for failing to comply with the separation agreement, divorce decree, (or any other court order) associated with a divorce. “Til Death do us part”¹⁹ would be a sweeter parting than “debt”.

As stated above, no person in any state is free from debts agreed to in the process of divorce with the binding nature that is inherent with BAPCPA. Looking at Ohio’s court system, one can see this paradigm as well.

There are two types of contempt of court in Ohio: direct and indirect. However, the sanctions imposed therein are a function of civil or criminal contempt. "[C]ivil contempts are characterized as violations against the party for whose benefit the order was made, whereas criminal contempts are most often described as offenses against the dignity or process of the court."²⁰ Also, unlike Florida, they are expressed in statutes both what is contempt and the punishment thereof. Actually, making it easier for the creditor to manipulate the system.

Ohio Revised Code Annotated states that the simple “disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer”²¹ is contempt of court. The code

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²¹ OHIO REV. CODE ANN. § 2702.02 A person guilty of any of the following acts may be punished as for a contempt:
also states the punishment for such is a fine, definite jail term, or both. There must be a hearing, however, to hear the charges and the defenses. Luckily, for the contemtors there is a purge option in Ohio that if the contemtor is in contempt for omission and has the ability to obey, the jail term can only be until the contemtor complies with the court order. Ohio also expresses by way of statute what is to be in a separation agreement and holds that it can only be amended prior to the final determination of the court, and can only be amended by the court after the court order if the separation agreement grants the permission of the court to amend, at any time for any reason.

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer;
(B) Misbehavior of an officer of the court in the performance of official duties, or in official transactions;
(C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required;
(D) The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by the officer;
(E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of the person’s recognizance;
(F) A failure to comply with an order issued pursuant to section 3109.19 or 3111.81 of the Revised Code;
(G) A failure to obey a subpoena issued by the department of job and family services or a child support enforcement agency pursuant to section 5101.37 of the Revised Code;
(H) A willful failure to submit to genetic testing, or a willful failure to submit a child to genetic testing, as required by an order for genetic testing issued under section 3111.41 of the Revised Code.

Ohio Rev. Code Ann. § 2705.05 (West 2013). Hearing; penalties; duty of garnishee under support order:
(A) In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge. If the accused is found guilty, the court may impose any of the following penalties:
(1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;
(2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;
(3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.

Ohio Rev. Code Ann. § 2705.06 (West 2013). When the contempt consists of the omission to do an act which the accused yet can perform, he may be imprisoned until he performs it.

(A) (1) A petition for dissolution of marriage shall be signed by both spouses and shall have attached and incorporated a separation agreement agreed to by both spouses. The separation agreement shall provide for a division of all property; spousal support; if there are minor children of the marriage, the allocation of parental rights and responsibilities for the care of the minor children, the designation of a residential parent and legal custodian of the minor children, child support, and parenting time rights; and, if the spouses so desire, an authorization for the court to modify the amount or terms of spousal support, or the division of property, provided in the separation agreement. If there are minor children of the marriage, the spouses may address the allocation of the parental rights and responsibilities for the care of the minor children by including in the separation agreement a plan under which both parents will have shared rights and responsibilities for the care of the minor children. The spouses shall file the plan with the petition for dissolution of marriage and shall include in the plan the provisions described in division (G) of section 3109.04 of the Revised Code.

Id.

Id.

Id.
Ohio also holds that agreements (separation agreements) made and incorporated in a divorce decree are binding and not agreements that a party can repudiate when one no longer wishes to be bound.\textsuperscript{26}

\textit{Ohio Debtors' Prison}

Return, again, to the hypothetical 1, in which a former spouse one has agreed to in a separation agreement, divorce decree or any other court order to pay the mortgage on the marital home for the benefit of the other former spouse, and for whatever reason is no longer able to pay on the debt. Former spouse one wishes to file bankruptcy and be granted a fresh start, but this debt is now forever non-dischargeable by way of BAPCPA. This leaves the creditor with a decision on how to collect.

As examined above, there is nothing stopping creditors from bringing a contempt action against former spouse one (if the creditor knows of the agreement). The outcome is no different than the process explained above through the court system. Note, however, actual Ohio statutes, rules, and laws

\hspace{1cm} (2) The division of property in the separation agreement shall include any participant account, as defined in section 148.01 of the Revised Code, of either of the spouses, to the extent of the following:

\hspace{2cm} (a) The moneys that have been deferred by a continuing member or participating employee, as defined in that section, and that have been transmitted to the Ohio public employees deferred compensation board during the marriage and any income that is derived from the investment of those moneys during the marriage;

\hspace{2cm} (b) The moneys that have been deferred by an officer or employee of a municipal corporation and that have been transmitted to the governing board, administrator, depository, or trustee of the deferred compensation program of the municipal corporation during the marriage and any income that is derived from the investment of those moneys during the marriage;

\hspace{2cm} (c) The moneys that have been deferred by an officer or employee of a government unit, as defined in section 148.06 of the Revised Code, and that have been transmitted to the governing board, as defined in that section, during the marriage and any income that is derived from the investment of those moneys during the marriage.

\hspace{1cm} (3) The separation agreement shall not require or permit the division or disbursement of the moneys and income described in division (A)(2) of this section to occur in a manner that is inconsistent with the law, rules, or plan governing the deferred compensation program involved or prior to the time that the spouse in whose name the participant account is maintained commences receipt of the moneys and income credited to the account in accordance with that law, rules, and plan.

\hspace{1cm} (B) An amended separation agreement may be filed at any time prior to or during the hearing on the petition for dissolution of marriage. Upon receipt of a petition for dissolution of marriage, the court may cause an investigation to be made pursuant to the Rules of Civil Procedure.

\hspace{1cm} (C) (1) If a petition for dissolution of marriage contains an authorization for the court to modify the amount or terms of spousal support provided in the separation agreement, the modification shall be in accordance with section 3105.18 of the Revised Code.

\hspace{1cm} (2) If a petition for dissolution of marriage contains an authorization for the court to modify the division of property provided in the separation agreement, the modification shall be made with the express written consent or agreement of both spouses.

would be used in court rather than Florida’s statutes, rules, and laws.

In fact, there is even Ohio case law that supports this argument. Ohio courts have opined that “with the enactment of BAPCPA, [the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,] a non-debtor spouse no longer has an affirmative duty to file an adversary proceeding when seeking to have a nondischargeability determination made pursuant to 11 U.S.C. §523(a)(15)”.

What this means is that formerly the non-debtor spouse had to bring the action, now it seems that Ohio has stated that this is not the case and any party can bring the action. Furthermore,

“the [party contesting the dischargeability of the debt] bears the burden to establish the existence of three elements: (1) the debt in question is to a spouse, former spouse or child of the debtor; (2) the debt is not a support obligation of the type described in §523(a)(15) and (3) the obligation was incurred in a separation agreement, divorce decree or other order of a court of record”.

It would then come down to the court making a decision that either was in accordance with the above or to vacate current case law and state that the creditor could not a bring a contempt of court action. Again, however, that is not the end of the ballgame.

Enter again, hypothetical 3, same facts, but the bank decides to foreclose on the property. Former spouse two, not wanting to lose the home files in contempt proceedings. This is the creditor defeating, and going around the assumed ruling in hypothetical 2 that only a former spouse can bring a contempt action to the court. What is scarier still, is that in Ohio this has happened and the court ruled affirmatively for the creditor (if only inadvertently). The debtor spouse was brought into a contempt proceeding for failing to comply with the court order surrounding the divorce order. The creditor bank began a foreclosure process and the non-debtor spouse filed suit.

While this case was in the Federal Bankruptcy Court and a contempt of court proceeding, the judgment was in fact in favor of the creditor. (Note, that the non-debtor spouse did also file contempt of court proceedings).

The facts are laid out. This can happen, and this will happen, assuming the country gets out of

28 Id, at ¶ 13.
the current debt crisis it is in, only to be stricken with another debt crisis; a debtors’ prison. The question then becomes what, if anything, can be done to stop this before it becomes commonplace to jail debtors?

IV. POSSIBLE SOLUTIONS

How did this happen? How did congress create an act that is essentially illegal and has the potential to bring the country back to the 15th century under the rule of a monarch? Granted, that might be a bit of an overstatement, but the problems with BAPCPA remain. The reasons why are many, and most are not something that cannot be proven, but merely conjecture; for example, BAPCPA being written by lobbyist for the same creditors that BAPCPA gave immense power and protection to. However, proving that would take more than Frank Underwood30 to prove that one. The attention, in turn, should be moved toward fixing the issues of the act.

This act was best described by a member of the 109th Congress as

“...this is the most special interest-vested bill that I have ever dealt with in my career in Congress. It massively tilts the playing field in favor of banks and credit card companies and against working people and their families. I have never, ever faced such a piece of legislation. That explains to me why it took 8 years to get this thing up here, because they kept fixing it up, making it wrong.”31

Mr. Conyers further pleaded with House of Representatives that this bill is embarrassing and is opposed by nearly every group that it is supposedly designed to help, with the exception of the credit companies who are the major proponents. The question becomes, can it be fixed or should it be scrapped and an overhaul of the Bankruptcy Code be written?

Take a look at the critiques of BAPCPA. There are many, a few seem to be across the board,

30 House of Cards, supra note 13
However, to start, the laws were not written by persons who have any knowledge of expertise in the field. Instead, the laws of BAPCPA were written by lobbyist for the banking industry, whose main concern is lobbying for their client and looking for the best interest of the banks the lobbyist work for.\textsuperscript{32}

What, if anything can be done about this law? The answer has not been looked into. It seems the majority of the scholars who weigh in on BAPCPA either agrees with BAPCPA and that it doesn't need to be changed, or modified; or they totally disagree with BAPCPA and give no indication for what can or should be done. However, consider the four following possibilities.

\textit{A. Complete Overhaul}

BAPCPA was the first overhaul of the Bankruptcy Code that happened without an economic crisis. This makes this choice already an uphill battle. With every overhaul (and the creation of the Bankruptcy Code itself) is expensive. Not only for taxpayers in the terms of money, but also for the time and effort that it takes for the creators and writers of the code. The average salary for members of the House of Representatives and the Senate is hovering around $174,000.00 (and this does not include higher salaries of higher ranking members of the House or Senate).\textsuperscript{33} With 100 Senators and 435 House Representatives making up 535 members of the U.S. Congress and an estimated $93,090,000.00 per annum. Since the 108\textsuperscript{th} Congress the average number of pieces of legislation (not including this session) is 12,751.40.\textsuperscript{34} This makes each piece of legislation costing roughly $7,300.37.

Granted, this number is an estimate and does not accurately depict the cost of a piece of legislation. Furthermore, this only accounts for a bill after it has made it in the House or Senate, not for the hours and committees charged with researching, writing, and lobbying for each piece of legislation.

\begin{itemize}
\item \textsuperscript{32} Craig D. Robins, \textit{The New Bankruptcy Laws Continued to be Mired in Controversy}, LONG ISLAND BANKRUPTCY BLOG (April 7, 2006) \url{http://longislandbankruptcyblog.com/the-new-bankruptcy-laws-continue-to-be-mired-in-controversy/} (“The laws were primarily written by the lobbyists who supported the legislation, rather than by scholarly academics, judges and committees who have written most of the existing bankruptcy law. There have been a number of commentators, including judges, who have suggested that the poorly written laws are often ambiguous and will result in a number of cases needed to interpret them.”).
\item \textsuperscript{33} Ida A. Brudnick, \textit{Congressional Salaries and Allowances}, CONGRESSIONAL RESEARCH SERVICE, (Jan. 7, 2014), \url{http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C%5B%3D%23P%20%20%0A}.
\item \textsuperscript{34} \textit{Bills By Final Status}, GOVTRACK.US, \url{https://www.govtrack.us/congress/bills/statistics} (last visited Dec. 19, 2014).
\end{itemize}
However, it can be assumed that this monetary value for an overhaul of the entire Bankruptcy Code would cost exponentially more.

The cost, is it acceptable or at the very least necessary? Without knowing the actual time, persons, and any number of costly variables that would go into an overhaul for the entire Bankruptcy Code. One of the best indicators of the necessity of an overhaul of the Bankruptcy Code is to look at what was said about the overhaul of the Code that was the BAPCPA.

Perhaps the new laws were not needed in the first place?

“Commentators have suggested that there was a perception that some debtors who filed for Chapter 7 relief were able to discharge their debts even though they had the ability to repay some or all of their debt. In response to this perceived imbalance, the credit card industry pushed for passage of tougher bankruptcy laws. However, the credit card industry has not accepted any share of the responsibility for the problem. The industry gives credit to high-risk people and then is shocked to find that people cannot make their payments. One commentator said we have a classic case of poetic injustice: Congress is bought by the credit card companies in order to pass a bill that hammers those people who can’t afford to pay their bills. Thus, Congress has listened to the banks who have complained for years that they get shortchanged by debt-crazy consumers seeking bankruptcy.”

Taking a look at the cost of the overhaul, perhaps is not the best idea. The time, money, and persons involved are simply too high for the complete overhaul. Furthermore, there is no way to make everyone happy or in agreement with this idea. The lobbyist won when we voted in BAPCPA and until the court rules that BAPCPA is inherently unconstitutional, the arguments from the lobbyist (and even taxpayers who hate having taxes spent on anything) will say that it is constitutional and the cost of overhaul is not warranted on a piece of legislation that is not presently causing problems.

Unfortunately, their arguments are sound. Even if the court system does get a case challenging the constitutionality of BAPCPA it will be unlikely that the entire act will be considered and adjudicated as being unconstitutional. It would more than likely (if at all that is) be piecemeal when it comes to the unconstitutionality of the act. A word here, and a phrase there, that is. Which brings up the next point, what if the legislation just repeals the parts that are unconstitutional, or poorly worded?

35 Robins, supra note 32.
B. Repeal/Reword

The legislation could skip the step of the court system of piecemeal and become proactive in the inevitable decision of multiple repeals and revisions by way of court order and revise the sections of BAPCPA that are presently problematic. The problem then would become...where in the world would we start? That is a very good question. With the way our legislation is set up, even if the committee members (assuming the legislation created a committee to review the act) knew where to begin there is still all the problems that were mentioned above. There would still be the members of the House and Senate looking over the bill, from start to finish, just trying to figure out what is and what is not a good idea in BAPCPA. There is also not a requirement that a House or Senate member have a law degree or any qualification that involve legal services. The commentators who have law degrees and experience in the field would be at a loss. The laws are nearly too much for an expert to take on, let alone a layperson in law to take on.

“The New Laws are Cumbersome. BAPCPA makes filing a case unnecessarily complex. We now have many “obstacles” that are in the way of obtaining bankruptcy relief. These include the means test, the credit and budget counseling requirements, the requirement of producing documents and tax returns, etc. In addition, the increased burden and time on consumer bankruptcy attorneys to personally verify all information in the petition has driven up the cost of bankruptcy legal services. The commentators have been very vocal about their belief that the primary goal of the creditor community in supporting bankruptcy reform legislation was to make bankruptcy for consumers so difficult that it would cause overall bankruptcy filings to go down. The proponents of the harsher laws thought that if there are too many obstacles, then consumers will not file bankruptcy. For now, credit counseling is exactly what the opponents of the bill predicted – a device to delay and to drive up the costs of bankruptcy for the poorest people.”

It would appear that we are back at square one with this option. Assuming that the committee assigned to the task of finding out what is and what is not a good idea and law within BAPCPA, there would still be the same process as discussed above. There would still need to be a bill introduced to address these issues and then a debate, a discussion, revisions, then possibly a vote. A vote that may or

36 Id.
not be passed, or be anything like the bill originally introduced by this hypothetical committee.

With this option there would be lots of money spent, which may be all for nothing. What then, can be done? There is always the option of allowing the system of checks and balances to fix the problem, as our founding fathers so intelligently designed. How? Let the court system take a look at the issues raised by BAPCPA.

C. Let The Courts Figure It Out

One of the most ingenious ideas that came out of our founding fathers was the idea of checks and balances. A way to make sure that the new country would not fall back into the way of the monarch. Rather, create three branches of government and allow them to check each other and balance each other out. A fantastic idea. However, where there is a will there is a way, and each branch, by its own right has become able to go unchecked. That is until one branch raises its hand and says, “Umm... teacher? This does not seem right.” Proverbially of course. The problem here is that no one has questioned, officially. At least not the right way, that is. The Executive Branch could issue an Executive Order solving the problem with BAPCPA and mandating an overhaul of the Bankruptcy Code. Sure as that would happen, the Legislative Branch would appeal to the Judicial Branch and claim the Executive Branch is overstepping their power, which equates to “Daddy, brother is not playing fair.”

In all fairness, that probably is an overstep of the Executive Branch’s power; however, that is a discussion for another day. In the case at present, what can the Judicial Branch do? For one, a case has to come into the jurisdiction of the courts. Assume there is a case that is brought to the courts and all jurisdiction and venue issues are satisfied, what then? Can the courts decipher what the laws means? Meant to mean? Legislative intent?

“The New Laws are Poorly Written. The laws were primarily written by the lobbyists who supported the legislation, rather than by scholarly academics, judges and committees who have written most of the existing bankruptcy law. There have been a number of commentators, including judges, who have suggested that the poorly written laws are often ambiguous and will result in a number of cases needed to interpret
Getting back to brass tacks, the most basic concept involved in all of the above is simply time and money, and time is money. The courts are constantly drained in finances with all the other cases that the courts deal with from day to day. Most of them, having little impact on the world; however, that is the American way, to allow everyone their expected day in court. The system is there to properly adjudicate the wrongs of the individual, both criminally and civilly. However, those individuals who feel as if they have been wronged often abuse it. Again, that is another rant for another day.

The plot thickens, so they say. The facts that we know are there is a major problem with BAPCPA, it will take potentially millions of dollars to correct the problem, the problem while present, prevalent, and waiting to cause major havoc, has yet to cause such havoc. Again, the question becomes, what can be done? As anyone who has ever taken a class in or completed a policy analysis knows that sometimes the best thing to do is to do nothing.

D. Do Nothing

There is a common misconception when looking at a policy (or at least I had the misconception prior to being corrected) that something has to be done. Often, the best solution to a policy is to do nothing. Much like a business looking at a practice that pollutes above the limits, it is often cheaper to continue and pay a fine rather than change the process. If a company producing a product that has a one in a hundred chance of harming someone, the company may take the gamble and produce the product anyway; and settle (out of court) if and when a person is injured.

The option of doing nothing does tend to rest heavy on those morally conscious individuals. However, this is the world, not a morally driven novella written by Ayn Rand. It seems, however, that

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37 Id.
38 Anthem, AYN RAND, https://www.aynrand.org/novels/anthem#synopsis-1 (last visited Dec. 19, 2014) (Anthem is Ayn Rand’s “hymn to man’s ego.” It is the story of one man’s rebellion against a totalitarian, collectivist society. Equality 7-2521 is a young man who yearns to understand “the Science of Things.” But he lives in a bleak, dystopian future where independent thought is a crime and where science and technology have regressed to primitive levels. All expressions of individualism have been suppressed in the world of Anthem; personal possessions are nonexistent, individual preferences are condemned as sinful and romantic love is forbidden. Obedience to the collective is so deeply ingrained that the very
the policy created by BAPCPA is yet to cause much trouble by way of 11 U.S.C. §523(a)(15). As it stands, there are not many cases on point which enhances the argument of those wishing to see BAPCPA unchanged. The option of doing nothing has other merits as well. The idea that yes, BAPCPA is a problem and could create illegal debtors' prisons, there are other devices that could raise and make it a non-issue. In the way of 11 U.S.C. §523(a)(15) there is the civil contempt of court process. If the judges overseeing these cases know of the problems of BAPCPA, then entire contempt of court process can illuminate the illegal debtors' prisons created by 11 U.S.C. §523(a)(15). Granted, that does not fix the problematic nature of BAPCPA, but would fix a problem with BAPCPA. There are other processes as well, in other areas of future BAPCPA litigation that could get around the numerous problems. This would essentially be putting a Band-Aid on a bullet wound, limping away, and hoping for the best. Although by doing so, it would be a solution.

V. CONCLUSION

As in life, anything suggested in this paper is much easier said than done. There are positives and negatives with every idea illuminated herein. There are arguments for and against and could be debated for years, all the while issues and problems arise.

As a recap, this article looked at Florida and Ohio and how BAPCPA works within and affects each state. This was followed by how creditors can use contempt of court as a means to potentially jail their debtors creating the inherently illegal, debtors' prisons. This article then conducted a full policy analysis of BAPCPA and posed four possible choices of action as they relate to BAPCPA.

There have been many questions and issues ranging in various natures raised herein with many more answers, solutions, and fixes all of which have multiple positives and negatives. BAPCPA has created a very perplexing conundrum that even the best scholars and experts cannot solve (without spending millions of dollars and even then, not everyone will be happy). The option of doing nothing

word “I” has been erased from the language. In pursuit of his quest for knowledge, Equality 7-2521 struggles to answer the questions that burn within him — questions that ultimately lead him to uncover the mystery behind his society’s downfall and to find the key to a future of freedom and progress.)
does seem to be the best option. However, there is more that can be done. Awareness of the issues and problems caused by BAPCPA can be distributed to all of the judges in the court system. This would allow them to use the processes of each varying court proceeding to do what the courts have the right and obligation to do, check and balance.

Check the legislation and balance the whole of BAPCPA. As Phil Coulson would say, “trust the system”.\textsuperscript{39} Allow the system to do what it is designed to do. Our founding fathers created the best system of democracy and it is the oldest one in the history of democratic systems. It has seen many problems in its over 200 year history and solved them all. It is likely that the system will ultimately solve the BAPCPA problem. If not, in the waiting there will be issues that will cause havoc. At that time it might be better to choose one of the other options illuminated herein. The costs, at that time, may be offset by the issues and problems that will undoubtedly show up in the future. Unfortunately, at this time, the best option is to do nothing, raise awareness to the system, hope for the best, and prepare for the worst.