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Bankruptcy Reform and the Elderly: The Effect of Means-Testing on Older Debtors

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BANKRUPTCY REFORM AND THE ELDERLY: THE EFFECT OF MEANS-TESTING ON OLDER DEBTORS

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I. INTRODUCTION

Much has been written about the need for bankruptcy reform, both by proponents¹ and opponents.² In 1999, the United States House of Representatives passed a bankruptcy reform bill.³ On February 3,

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1. See, e.g., Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177 (1999); Colloquium, *Consumer Bankruptcy*, 67 FORDHAM L. REV. 1315 (1999) [hereinafter *Consumer Bankruptcy*]; *Resolved: The Time Has Come for Means-Testing Consumer Bankruptcy: A Debate*, AM. BANKR. INST. J., Apr. 1998, at 6. There are also a number of suggestions for reform other than the current proposals. See generally A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69 (1998) (suggesting economic dependence as a measure for benefits of joint filings under the Bankruptcy Code); Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 AM. BANKR. L.J. 461 (1997) (suggesting that bankruptcy reform be based on some measure of debtor culpability); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685, 710-16 (1998) (proposing a merger of Chapter 7 and Chapter 13 of the Bankruptcy Code to have debtors use both wealth and earnings to repay some debt).

2. See, e.g., Gary Klein, *Means Tested Bankruptcy: What Would It Mean?*, 28 U. MEM. L. REV. 711 (1998) [hereinafter Klein, *Means Tested Bankruptcy*]; Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors*, 5 AM. BANKR. INST. L. REV. 293 (1997) [hereinafter Klein, *Consumer Bankruptcy*]; Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079 (1998).

3. The Bankruptcy Reform Act of 1999 was passed in the U.S. House of Representatives by the veto-proof margin of 313-108. See Bankruptcy Reform Act of 1999,

2000, the United States Senate approved a similar bill.⁴ The bill then went to conference to work out the differences between the House and Senate versions of bankruptcy reform.⁵ While even opponents to the proposed bankruptcy reforms agree that there are some flaws in the current system,⁶ the debate concerns what the problems are, who abuses the system, and how these problems can be resolved.

This article focuses on one controversial portion of the above debate – means-based testing – which attempts to shift more debtors from Chapter 7 liquidation to Chapter 13 repayment plans, as well as its potential effect on older Americans. Because both the House and Senate versions of the Bankruptcy Reform Act of 1999 contained means-testing provisions, the final version of the Act will undoubtedly contain such a provision.⁷ In particular, this article addresses what impact means-testing could have on elderly debtors in light of their primarily fixed incomes and uncertain future expenses. This article suggests that, despite any benefits such a reform may have overall,⁸ means-testing will inevitably cause undue hardship for elderly debtors.

II. BANKRUPTCY AND THE ELDERLY

Much of the forgoing debate has been prompted by a dramatic rise in the number of bankruptcy filings during the 1980s and 1990s, despite a generally strong economy. In 1996, for the first time in United States history, the number of filed bankruptcies passed the

H.R. 833, 106th Cong. (1999); 145 CONG. REC. H2771 (daily ed. May 5, 1999); AM. BANKR. INST. J., June 1999, at 1 (noting that “the bipartisan vote, with 96 Democrats joining all House Republicans, is enough to override a threatened Presidential veto”).

4. The Senate’s version of the Bankruptcy Reform Act of 1999, S. 625, passed by a margin of 83-14. See 146 CONG. REC. S255 (daily ed. Feb. 2, 2000).

5. See *id.* The Senate requested conference with the House on proposed amendments to the House bill. The result of the conference and final vote had not yet occurred when this article was published.

6. See generally Warren, *supra* note 2 (arguing although legal loopholes in current bankruptcy system exist and should be fixed, there is little evidence of widespread abuse to justify sweeping changes to consumer bankruptcy provisions).

7. See Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. § 102 (1999); Bankruptcy Reform Act of 1999, S. 625, 106th Cong. § 102 (1999).

8. There is much debate as to whether, even with respect to the general debtor population as a whole, this would have any significant benefit which outweighs the cost of administering the program. Fifth Circuit Judge Edith Jones and Professor Todd Zywicki argue that an acceptable explanation of the relevant provisions in recent bankruptcy reform measures demonstrates that “means-test[ing] is not only moderate and fair but also practical and administratively reasonable.” Jones & Zywicki, *supra* note 1, at 180. But see Klein, *Means Tested Bankruptcy*, *supra* note 2, at 734 (“Without question, these complicated additional barriers to Chapter 7 relief would elevate the total administrative costs of the bankruptcy system.”).

one million mark.⁹ Surprisingly, more people filed for bankruptcy in a six-month period in 1997 than during the entire Great Depression,¹⁰ and although the number of filings declined slightly during 1999,¹¹ more than 1.4 million bankruptcies were filed in 1998.¹² This is a figure equal to 1% of the total number of American households and represents a 300% increase since 1980.¹³ All told, the number of bankruptcies in the United States has quadrupled between the 1970s and 1990s.¹⁴

This growth in the number of bankruptcies coincides with the aging of the American population. The elderly are the fastest growing population segment in the United States.¹⁵ In 1990, 12.5% of the U.S. population was over sixty-five years of age.¹⁶ This percentage is projected to increase to 17.7% in 2020 and to 25% by 2050.¹⁷

Most people consider bankruptcy as an issue for the younger, wage-earning family. After all, the elderly are the most financially secure group of Americans, often owning a substantial number of assets and controlling a significant proportion of the nation's privately held wealth.¹⁸ However, not all older Americans are well-off. Over 10% of Americans over the age of sixty-five lived below the poverty line in 1995.¹⁹ Thus, while older Americans are collectively a financially sta-

9. See BUREAU OF CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 555 (1998) (table 881); see also Warren, *supra* note 2, at 1079 (noting the spotlight on the bankruptcy system in 1996 when it passed the magic number of one million filings). For comprehensive statistics on bankruptcy filings in the United States, including current quarterly filing statistics which are updated daily, visit the American Bankruptcy Institute's website at <<http://www.abiworld.org>>.

10. See Jones & Zywicki, *supra* note 1, at 177.

11. See Mary Gordon, *Personal Bankruptcy Rate Falls*, CHICAGO SUN-TIMES, Jan. 18, 2000, available in 2000 WL 6664891 (noting that 112,000 fewer people filed for and received bankruptcy protection in 1999 than in 1998).

12. See *id.*

13. See *id.*

14. See LoPucki, *supra* note 1, at 462 (citing statistics showing an increase from 214,399 cases in 1977 to 1,042,110 cases in 1996).

15. See Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect - The Legal Framework*, 31 CONN. L. REV. 77, 78 (1998).

16. See *id.* See also BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 16, 37 (110th ed. 1990) (table no. 18, Projections of the Total Population by Age, Sex, and Race: 1989 to 2010) [hereinafter STATISTICAL ABSTRACT].

17. See Moskowitz, *supra* note 15, at 78; STATISTICAL ABSTRACT, *supra* note 16, at 16, 37.

18. See Teresa Sullivan et al., *From Golden Years to Bankrupt Years*, 7 NORTON BANKR. L. ADVISER 1 (July 1998) (stating that "Americans aged 55-64 have the highest net worth from all sources of any age group, followed closely by Americans aged 65-74").

19. See *id.* Although this number remains high, the proportion of Americans

ble and prosperous group, that financial soundness does not extend to all older Americans. Some of the less financially stable will be forced to seek bankruptcy protection, and as the size of this population segment grows, so will the number of their bankruptcies.

As one would expect, older Americans do file for bankruptcy protection at a lower rate than the population as a whole.²⁰ One study of bankruptcy and older Americans, however, found that 18.5% of the sampled bankruptcy cases involved at least one debtor over the age of fifty²¹ and that a majority of these filings involved debtors between the ages of fifty and sixty-four.²² Extrapolating to the number of filings nationwide, the study's authors estimated that 280,000 older Americans filed for bankruptcy in 1997, and as many as one-million filed over the five years preceding the study.²³ Thus, bankruptcy is, or at least should be, a significant issue for those concerned with the legal rights of the elderly.²⁴

Older Americans typically file for bankruptcy for the same reasons as the general population. While some bankruptcies filed by the elderly may be due to financial fraud,²⁵ most are caused by financial calamities similar to those experienced by other groups. Job losses or changes, difficulty paying creditors, and family problems lead the list of contributing causes identified by older Americans who have filed for bankruptcy.²⁶ As one would expect, health problems, both those re-

65 and older below the poverty line has been reduced by nearly 15% since 1970. *See id.*

20. *See id.* at 2 (noting that Americans aged 50 and older comprise about 35.8% of the total population but constitute only 14.4% of those Americans who filed bankruptcy in 1997).

21. *See id.*

22. *See id.*

23. *See id.*

24. For an earlier article discussing the effects of bankruptcy on the elderly, see Daniel L. Skoler, *The Elderly and Bankruptcy Relief: Problems, Protections, and Realities*, 6 BANKR. DEV. J. 121 (1989).

25. For a discussion of the effect that financial abuse can have on the elderly, see Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203 (2000). *See also* Sullivan et al., *supra* note 18, at 6 (noting that in their study some debtors "identified specifically that they were cheated, scammed or otherwise defrauded, and that bankruptcy was their only recourse to deal with these debts").

26. *See* Sullivan et al., *supra* note 18, at 4-7. Although the authors noted that specific responses varied, their study found that most employment related problems concerned lost or altered jobs resulting in interrupted or postponed income. *See id.* Family reasons included such problems as having to support a son or daughter in financial trouble or marital dissolution. *See id.* Additionally, more than one in ten older Americans who filed for bankruptcy in the authors' study cited actions taken by their creditors as the primary reason. *See id.* Many older Americans stated that their creditors would not work with them or that their creditors collection practices were such that they chose bankruptcy over dealing with the creditor. *See id.* These reasons are consistent with other studies that considered debtor identified causes of bankruptcy for the population as a whole. *See* Tahira K. Hira & Kyle Kostecky, *Pilot Study of*

sulting in unpaid medical bills and those directly affecting the ability to work are cited more often by older debtors as a major factor in their decision to file.²⁷ Although the social safety net is strongest for older Americans, particularly those age 65 and over, it is not perfect, and many elderly debtors will continue to need bankruptcy protection from the unanticipated calamities of life.²⁸

III. BANKRUPTCY REFORM AND MEANS-TESTING

A. Background

Prior to discussing particular aspects of bankruptcy reform, it is helpful to consider the basics of consumer bankruptcy. Bankruptcy and debt forgiveness are deeply rooted in our society.²⁹ The two primary avenues for debt forgiveness available to individual debtors in bankruptcy are liquidation under Chapter 7³⁰ and repayment of debts under Chapter 13.³¹ Each is generally designed to provide financially distressed debtors with protection from creditors.³² Both seek to supply the debtor with a means to achieve a financial fresh start while providing a means for repayment of creditors.³³

Consumer Debtors Provides New Insights — What Influences Debtors' Attitudes? AM. BANKR. INST. J., Apr. 1995, at 31 (finding that marital problems, employment issues, and overspending were identified by debtors as major factors in decision to file for bankruptcy).

27. See Sullivan et al., *supra* note 18, at 4.

28. See *id.* at 1 (noting that preliminary evidence in their study suggested that "older Americans will use bankruptcy at an increasing rate").

29. See Klein, *Means Tested Bankruptcy*, *supra* note 2, at 711 (noting that debt forgiveness is rooted in the Old Testament of the Bible).

30. See 11 U.S.C. §§ 701-766 (1994) (commonly referred to as Chapter 7).

31. See *id.* §§ 1301-1330 (commonly referred to as Chapter 13).

32. 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, 632 (1997). But see Karen Gross & Shari Rosenberg, *In Forma Pauperis in Bankruptcy: Reflecting on and Beyond United States v. Kras*, 2 AM. BANKR. INST. L. REV. 57 (1994) (noting that problems in a system designed to help debtors in financial distress has led to academic criticism).

33. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (stating that the fresh start policy of bankruptcy law gives a debtor who surrenders property for distribution to creditors freedom from pre-existing debt); Dickerson, *supra* note 32, at 632 (stating that bankruptcy is concerned with two different policy considerations: a debtor's fresh start and repayment of creditors); Dickerson, *supra* note 1, at 70 (noting that the purpose of bankruptcy is to provide the debtor with a financial fresh start and to ensure that creditors receive maximum payment possible); Steve H. Nickles, *Consider Process Before Substance, Commercial Law Consequences of the Bankruptcy System: Urging Merger of the Article 9 Drafting Committee and the Bankruptcy Commission*, 69 AM. BANKR. L.J. 589, 590 (1995) (noting that bankruptcy aims at distributive fairness to creditors); Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not The Scrip-*

Under Chapter 7 liquidations, current non-exempt assets are used to repay all or a portion of the debtor's indebtedness.³⁴ The debtor generally retains all future income, free and clear from most debts.³⁵ Chapter 13 repayment plans, on the other hand, require the debtor to use some portion³⁶ of future income over a three to five year period³⁷ to repay all or a portion of the outstanding debt. In exchange, the debtor is generally allowed to retain currently owned assets.³⁸

Thus, the choice between the two chapters appears to come down to whether the debtor prefers to use current assets or future income to repay creditors. However, this is not actually the case. First, there are a number of exemptions available to debtors, even those choosing to liquidate their assets, which protect the debtor's property from the reach of creditors.³⁹ Additionally, secured debt and priority claims are paid before any distribution is made to general unsecured creditors.⁴⁰ As a result, most Chapter 7 liquidations involve no repayment to gen-

tures: Protecting A Bankruptcy Debtor's Right to Tithe, 1998 WIS. L. REV. 1223, 1227 (1998) (explaining that bankruptcy involves trade-offs between interests of competing constituencies).

34. See generally 11 U.S.C. § 522 (exemptions); § 704 (identifying the duties of the trustee in Chapter 7); §§ 725-726 (discussing the disposition and distribution of property of debtor's estate). See also White, *supra* note 1, at 687-88 (explaining how a debtor's non-exempt property is surrendered and used to satisfy the claims of creditors).

35. See F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 189 (1998) (explaining that in Chapter 7, debtors surrender non-exempt assets but shelter future earnings from creditors' claims); White, *supra* note 1, at 687-88 (noting that Chapter 7 debtors are not obligated to use any future income to repay discharged debts, no matter what the level of that income).

36. Chapter 13 generally requires a debtor to use the income which exceeds the amount reasonably necessary for the maintenance or support of the debtor and dependents (disposable income) to repay unsecured creditors for a three year period. See 11 U.S.C. § 1325. See also *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985) (demonstrating a calculation of disposable income used to pay unsecured creditors under Chapter 13).

37. See 11 U.S.C. § 1322(d) (providing for repayment plans of no longer than three years unless the bankruptcy judge approves, for cause, a longer repayment period). The maximum period the court can allow is five years. See *id.*

38. See Buckley & Brinig, *supra* note 35, at 189 (explaining that in Chapter 13, debtors preserve current assets by sacrificing some portion of future earnings); White, *supra* note 1, at 691 (explaining how Chapter 13 debtors keep assets in exchange for repayment of all or portion of debt through future income).

39. Exemptions will generally be available under the federal exemptions provided in the bankruptcy code or state exemptions. See 11 U.S.C. § 522. Federal bankruptcy law allows individual states to set their own exemption levels and many states have separate exemptions for equity in principal residences ("homesteads"), equity in automobiles, personal property, and retirement accounts. See White, *supra* note 1, at 688.

40. See generally 11 U.S.C. § 726 (providing the order for distribution of property of the debtor's estate). See also *Festner*, 54 B.R. at 533 (calculating disposable income available for payment to creditors after payment of secured and priority claims).

eral unsecured creditors at all.⁴¹ Moreover, in those cases where some repayment is made, it generally amounts to pennies on the dollar.⁴²

Despite incentives in the Bankruptcy Code to induce debtors to choose Chapter 13 repayment plans,⁴³ most debtors choose the liquidation alternative under Chapter 7, thus opting to retain their future income free and clear of most debt in exchange for the loss of non-exempt assets.⁴⁴ Because a majority of the Chapter 7 cases result in little or no repayment to creditors,⁴⁵ some commentators have suggested that debtors who could successfully use Chapter 13 to repay a significant portion of their debt are foregoing that option to pursue

41. See Zywicki, *supra* note 33, at 1230 (citing Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. RICH. L. REV. 303, 310-11 & n.30 (1988)) (noting that approximately 96% of Chapter 7 debtors make no distribution to creditors).

42. See *id.* (noting an average repayment rate in Chapter 7 cases of one to two percent). See also Herbert & Pacitti, *supra* note 41, at 315-16 (1988) ("Even in asset Chapter 7 proceedings, only a small fraction of general unsecured debt is paid."); Michelle J. White, *Personal Bankruptcy under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 39 (1987) ("The average payment to all creditors in Chapter 7 cases, including those that received nothing, amounted to .5% of priority claims and .11% of unsecured claims.") (citation omitted).

43. The predominant benefit attributable to a Chapter 13 bankruptcy, as compared with a Chapter 7 bankruptcy, is the broadened ambit of debts dischargeable upon a successful completion of a Chapter 13 plan. Compare 11 U.S.C. § 523, with 11 U.S.C. § 1328. Debts dischargeable pursuant to Chapter 13 which are nondischargeable under Chapter 7 include, *inter alia*, debts for money, property, or services procured by fraud, debts resulting from embezzlement or larceny, and debts for willful and malicious injury by the debtor to another entity or to the property of another entity. See 11 U.S.C. § 1328. See also H.R. REP. NO. 95-595, at 118 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6078 (suggesting that debtors should attempt repayment under Chapter 13 when possible); Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990) (stating that the broader discharge available to a debtor in Chapter 13 reflects policy judgment that it is preferable for debtors to repay their debts); Karen Declerq, Note, *Johnson v. Home State Bank: Use or Abuse of Chapter 13?*, 23 U. TOL. L. REV. 823, 826-27 (1992) (discussing the policies and as well as the various benefits of choosing Chapter 13); 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, 119 (1986) (noting Congress' intent to encourage voluntary repayment by debtors through Chapter 13); Teresa A. Sullivan et al., *Folklore and Facts: A Preliminary Report from the Consumer Bankruptcy Project*, 60 AM. BANKR. L.J. 293, 311, 321 (1986) (noting Congress' intent to encourage debtors to choose Chapter 13 for the purpose of paying what they "can").

44. See American Bankruptcy Institute, *Non Business Bankruptcy Filings By Chapter 1990-1998* (visited Feb. 12, 2000) <<http://www.abiworld.org/stats/1990nonbuschapter.html>>; Jones & Zywicki, *supra* note 1, at 185 (noting that approximately 70% of consumer debtors file under Chapter 7).

45. See *supra* note 42 and accompanying text.

Chapter 7 liquidation and non-payment.⁴⁶ This is the genesis of means-testing.

B. Means-testing

A major aspect of the current bankruptcy reform movement is means-testing. The purpose of means-testing is to attempt to distinguish between those debtors who can repay a portion of their debt from future income from those who cannot.⁴⁷ The idea behind means-testing is surprisingly simple: those who can afford to pay their creditors should do so.⁴⁸ Means-testing would thus provide a threshold requirement for debtors seeking discharge under Chapter 7. Under means-testing generally, if a debtor is found to be capable of paying a set portion of outstanding debts from his current disposable monthly income, the debtor would be ineligible to file for liquidation and discharge under Chapter 7.⁴⁹ As a result, the debtor would be compelled to either file a repayment plan under Chapter 13 or forego bankruptcy.⁵⁰

46. See Jones & Zywicki, *supra* note 1, at 183 (noting that high-profile celebrity and political bankruptcies have attracted sufficient attention to call into question the system's ability to regulate itself); *Consumer Bankruptcy*, *supra* note 1, at 1322 (panel discussion statement of Fifth Circuit Judge Edith Jones citing bankruptcies of individuals such as actress Kim Basinger and former Baseball Commissioner Bowie Kuhn as evidence of manipulation and abuse of the system).

47. See Jones & Zywicki, *supra* note 1, at 183 (stating that means-testing minimizes the inequity of a "calculating, incentive-driven remedy that can openly be taken advantage of by the opportunistic").

48. See *id.* This premise is also embodied in the broad discharge attainable only by debtors selecting to repay some or all of their debts under Chapter 13. See also *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (stating that broader discharge available to debtor in Chapter 13 than Chapter 7 reflects policy judgment that it is preferable for debtors to repay their debts); Sullivan et al., *supra* note 44, at 311, 321 (noting Congress' attempts to encourage debtors to use Chapter 13 for repayment of debt).

49. See Jones & Zywicki, *supra* note 1, at 183-185 (discussing the "three-part test" under the 1998 Bankruptcy Reform Act designed to steer debtors away from Chapter 7).

50. No debtor would be forced into Chapter 13 repayment plans, as involuntary Chapter 13 petitions are not permitted under current bankruptcy law. See 11 U.S.C. § 303(a) (1994) (permitting involuntary petitions only under Chapter 7 and Chapter 11); Klein, *Consumer Bankruptcy*, *supra* note 2, at 322 (noting that Congress has consistently rejected forced participation in Chapter 13 repayment plans). *But see* Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 36 (1995) (concluding that Congress has indirectly attempted to compel some debtors into Chapter 13 by allowing courts to dismiss Chapter 7 cases where there is "substantial abuse" under section 11 U.S.C. § 707). See also Jones & Zywicki, *supra* note 1, at 178-85. Jones and Zywicki devote a significant portion of their article to discussing the means-testing proposals present in the Bankruptcy Reform Act of 1998 as passed by the House of Representatives. See *id.* The Act, although

Different types of means-testing have been proposed and debated.⁵¹ The goal of every version, however, is to encourage more repayment of debt through Chapter 13 by prohibiting certain debtors from opting for liquidation under Chapter 7.⁵² While a general discussion of the pros and cons of means-testing is beyond the scope of this Article and has been extensively undertaken by others,⁵³ it is important to note the premises and assumptions that underlie means-testing.

IV. MEANS-TESTING AND THE ELDERLY

At first glance, means-testing seems eminently reasonable. By conditioning access to bankruptcy on a debtor's ability to repay his creditors, the general policy of encouraging repayment of debt would be furthered.⁵⁴ However, a closer inspection of the assumptions and policies underlying means-testing demonstrates that, whatever benefit it may have when applied to other segments of the bankruptcy population,⁵⁵ means-testing has the potential to create undue hardship for older debtors.

welting in the face of a threatened White House veto, would have directed consumer debtors away from Chapter 7 and into Chapter 13 based on monthly income levels. *See id.*

51. Examining the different versions of means-testing that have been considered by the U.S. House of Representatives and U.S. Senate over the previous two years provides a good starting point. *See* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 102 (1998) (means-testing considered in measure passed by the U.S. House of Representatives); Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 102 (1998) (means-testing considered in measure passed by the U.S. Senate). A Conference Committee also worked out revisions to H.R. 3150, which the House approved on Oct. 8, 1998. *See* H.R. Res. 586, 105th Cong. (1998); 141 CONG. REC. H10224 (daily ed. Oct. 8, 1998) (outlining compromises on means-testing between U.S. House and Senate). *See also* Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. § 102 (1999) (means-testing contained in Bankruptcy Reform Act of 1998 as passed by the U.S. House of Representatives). Bankruptcy Act of 1999, S. 625, 106th Cong. § 102 (1999) (means-testing contained in Bankruptcy Reform Act of 1999 as considered by U.S. Senate).

52. For example, the House and Senate versions of the Bankruptcy Reform Act of 1999 provide for dismissal of Chapter 7 liquidation petitions or voluntary conversions of these petitions to Chapter 13 repayment plans if the court finds that the debtor is capable of paying a set amount towards general unsecured debt. *See* H.R. 833, § 102; S. 625, § 102.

53. *See supra* notes 1-2 and accompanying text.

54. *See supra* note 33 and accompanying text.

55. *See* Jones & Zywicki, *supra* note 1, at 183 (stating that means-testing implements the commonly shared notion that well-off debtors should be held accountable to their creditors by providing a rule that distinguishes between those who can pay creditors out of future income and those who cannot). For arguments that there is insufficient evidence of consumer bankruptcy abuse to justify means-testing, *see* Klein, *Means Tested Bankruptcy*, *supra* note 2 at 714-28; Warren, *supra* note 2, at 1100.

Means-testing is justified by proponents as a method of insuring that those with future earning capacity sufficient to repay a portion of their accumulated debt actually do so.⁵⁶ This may be a legitimate aim. However, means-testing, as proposed in every version of the bankruptcy reform measures thus far, is determined by reference to current rather than anticipated future income.⁵⁷ Additionally, current expenditures or some fixed formula for determining acceptable current expenditures is used.⁵⁸ Thus, means-testing assumes that the debtor's income and expenses will continue uninterrupted and unchanged throughout the payment period.⁵⁹

However, using current income to justify means-testing while forcing debtors to use future income to repay debt is problematic. It requires current income to be an accurate predictor of future income. This premise is questionable with respect to debtors in general,⁶⁰ and poses special concerns for elderly debtors. It also runs counter to at

56. See *Consumer Bankruptcy*, *supra* note 1, at 1322 (Fifth Circuit Judge Edith Jones stating that the time has come to stop individuals from "taking full advantage of the bankruptcy laws when we all know they have huge earning capacity in the future").

57. See Klein, *Means Tested Bankruptcy*, *supra* note 2, at 713. See H.R. 833 § 102(b)(3) (1999). The House of Representatives version states:

In considering . . . whether the granting of relief would be an abuse of the provisions of this chapter, the court shall conclusively presume abuse does not exist if the debtor's *current monthly income*, when multiplied by 12, is less than or equal to 100 percent of the highest national or applicable State or Statistical Area median family income reported for a family of equal size, whichever is greater. . . .

Id. (emphasis added); S. 625 § 102(a)(2)(C). The Senate version states:

[W]hether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's *current monthly income* reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lessor of-

(I) 25 percent of the debtor's nonpriority unsecured claims in the case; or

(II) \$15,000.

Id. (emphasis added).

58. See H.R. 833, § 102(b)(3)-(8) (discussing determination of debtor's monthly expenses); S. 625 § 102(a)(2)(C) (determining the same).

59. See Klein, *Means Tested Bankruptcy*, *supra* note 2, at 719 (citing a creditor-funded study which used an assumption that debtor's income and expenses would "continue, uninterrupted and unchanged for duration of the payment period") (quoting John M. Barron & Michael E. Staten, *Personal Bankruptcy: A Report on Petitioners' Ability to Pay*, in NAT'L BANKR. REVIEW COMM'N, *BANKRUPTCY: THE NEXT TWENTY YEARS* (1997)).

60. See *id.* at 719; see also Warren, *supra* note 2, at 1089 (noting that 68% of debtors in a creditor funded bankruptcy study experienced income decline within five years after bankruptcy).

least one justification for the existence of bankruptcy: to protect persons against unexpected reductions in income and wealth.⁶¹ This protection is most important for individuals such as older Americans who have an unpredictable economic future.

For instance, elderly debtors are much less likely to have predictable future income and expenses than the population as a whole.⁶² Older debtors are much more apt than younger debtors to suffer medical problems that result in increased expenses in the form of unreimbursed medical bills or decreased earnings because of job reduction or loss.⁶³ Elderly debtors are also more likely to live on fixed pension incomes that do not increase at a pace which keeps up with inflation.⁶⁴ As a result, the elderly debtor is more likely to have reductions in future income and increases in future expenditures, both of which will affect the success of any repayment plan.

Additionally, there may be inadequate protection within the means-test to permit the debtor to demonstrate that current income is not an accurate predictor of future income.⁶⁵ Thus, the assumption of constant income and expenses that underlies means-testing is fallacious for these debtors. An elderly debtor who at the outset of the bankruptcy case appears to meet the means-test, is in fact more likely to have insufficiently certain future income to make a repayment plan viable.

Moreover, repayment plans are still premised on giving debtors a fresh start to once again become contributing financial citizens.⁶⁶ Elderly Americans have less ability to recover from financial setbacks because of shorter remaining life spans, and more importantly, fewer working years.⁶⁷ In Chapter 13, after three to five years of repayment, the debtor can start anew.⁶⁸ Unfortunately for older Americans, this

61. See White, *supra* note 1, at 692 (explaining that the basic economic argument for bankruptcy is to provide insurance against the possibility that income or wealth may fall before pre-bankruptcy debt is repaid).

62. See *supra* notes 26-28 and accompanying text.

63. See Skoler, *supra* note 24, at 121 n.3 (noting that older Americans have out-of-pocket health care costs more than three times that of other individuals). See also Sullivan et al., *supra* note 18, at 5 (indicating that medical problems are one of the most common causes cited by older Americans who file for bankruptcy).

64. See Moskowitz, *supra* note 15, at 101 (noting that elder individuals "have less ability to recover from financial exploitation because of fixed incomes").

65. See Klein, *Means Tested Bankruptcy*, *supra* note 2, at 729 n.72 (discussing a similar provision in a previous attempt by Congress to incorporate means-testing into the Bankruptcy Code).

66. See Dickerson, *supra* note 32, at 632-33 (noting that the policy of fresh start includes leaving the debtor with sufficient assets to re-establish himself as productive, responsible member of society).

67. See Moskowitz, *supra* note 15, at 101; Skoler, *supra* note 32, at 126 (both noting that elderly have limitations on income enhancement).

68. See 11 U.S.C. § 1329(c) (1994).

fresh start may come too late to be worthwhile.⁶⁹ With limited earning years left, older Americans will be called upon to give up a higher percentage of income from their remaining productive years in exchange for a fresh start.

By way of example, consider the remaining working lives of debtors aged 40, 50, 60, and 65. Assuming each worked until the age of 70 and used a repayment plan of five years, as currently proposed for use with means-testing in the reform legislation,⁷⁰ the 40-year old would pay on the plan for one-sixth of his remaining working years (5/30), the 50-year old for one-quarter (5/20), the 60-year old one-half (5/10) and the 65-year old for his entire (5/5) remaining working years. Thus, the promise of a fresh start is virtually useless to an older debtor who must give up a large percentage of his remaining economically productive years and earnings in exchange. As such, there would be little reason for these debtors to attempt repayment plans. If means-testing forecloses liquidation as an option, these debtors will be left with no meaningful bankruptcy protection available.

Another erroneous premise underlying means-testing is that any debtor who is "able-bodied and earns an income that will allow him to live comfortably but still make payments to his creditors" should be required to do so.⁷¹ This is a faulty justification since Chapter 13 and means-testing are not limited to wage earners. Rather, anyone with a regular income and total debts within the prescribed limits is eligible for Chapter 13.⁷² Additionally, there is nothing within the proposed means-testing legislation that would change this standard.⁷³ As such, the elderly, who may not be able-bodied or may be relying on pension, Social Security, or other fixed income and assets,⁷⁴ may be swept into the reformers' reach, even if unintentionally.

Once an elderly debtor who is living on a fixed income is pushed into repayment by the means-test, the decline in fixed income in real dollar terms may result in the debtor having more difficulty making the necessary payments to satisfactorily complete the plan. Accordingly, the uncompleted repayment plan will not result in a discharge,

69. See Skoler, *supra* note 24, at 126 (noting California's legislative policy determination that the elderly have inherent limitations on "fresh start" capacity).

70. See Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. § 606 (1999) (entitled "Chapter 13 Plans to Have a 5-Year Duration in Certain Cases"); Bankruptcy Reform Act of 1999, S. 625, 106th Cong. § 318 (1999) (entitled the same).

71. Jones & Zywicki, *supra* note 1, at 182.

72. See 11 U.S.C. § 109(e) (providing that only an individual with regular income may be a debtor under Chapter 13 of the Bankruptcy Code).

73. See *supra* notes 57-58 and accompanying text.

74. See Moskowitz, *supra* note 15, at 101 ("Older persons may have less ability to recover from financial exploitation because of fixed incomes or short remaining life spans.").

and the liquidation option will not be available – once again leaving no meaningful bankruptcy protection for these debtors.

In addition, these same factors – unpredictable income and expenses for older debtors – are likely to result in fewer successful repayment plans. Currently, studies show that about two-thirds of all Chapter 13 repayment plans fail.⁷⁵ This high level of failure reflects debtors who are voluntarily choosing to repay. If repayment is forced upon a debtor because of the elimination of liquidation as an option, the failure rate is likely to be even higher.⁷⁶

The success of any repayment plan is based on predictable income.⁷⁷ Yet, as noted earlier, for the older debtor, such predictability is less likely to be present. Thus, both of these factors, involuntariness and unpredictability of future income and expenses, are likely to significantly decrease the success rate of repayment plans for elderly debtors subject to the means-test. One has to question the usefulness of a provision as applied to a segment of the population when that provision is likely to have a failure rate of over 70%.⁷⁸ If reform is designed to enhance bankruptcy efficiency, increase payments to creditors, and minimize costs,⁷⁹ a provision that is almost certain to fail should be avoided. Yet, the application of means-testing to the elderly debtor constitutes such a provision.

Furthermore, in addition to providing economic benefits to creditors, repayment plans are also supposed to provide intangible benefits to debtors. By repaying debt through Chapter 13, some commentators argue debtors are meeting their moral obligations to live up to their promises to repay.⁸⁰ An honest effort at debt repayment should give

75. See Henry E. Hildebrand, III, *Administering Chapter 13-At What Price?*, AM. BANKR. INST. J., Aug. 1994, at 1 (reporting an independent study which found a completion rate of Chapter 13 repayment plans of 32.89%); Klein, *Means Tested Bankruptcy*, *supra* note 2, at 720 n.39; LoPucki, *supra* note 1, at 474.

76. See Klein, *Means Tested Bankruptcy*, *supra* note 2, at 720 n.39; Klein, *Consumer Bankruptcy*, *supra* note 2, at 322 (explaining that Chapter 13 plans require substantial commitment to repayment for three to five years and are unlikely to succeed if not voluntarily entered into).

77. See Skoler, *supra* note 24, at 139 (“Success in a chapter 13 bankruptcy is necessarily based upon an income stream that will support both current expenses and proposed debt management.”) (quoting Elizabeth Warren, *Reducing Bankruptcy Protection: A Response*, 72 GEO. L.J. 1333, 1354-55 (1984)).

78. See Hildebrand, *supra* note 75, at 1.

79. See Jones & Zywicki, *supra* note 1, at 182 (arguing that means-testing is designed to assure some repayment to creditors and minimize costs imposed by bankruptcy).

80. See *id.* at 191 (stating that by forcing debtors into Chapter 13, “means-testing would send an important moral signal to bankruptcy debtors that if they have the ability to repay a substantial portion of their debt, they should be required to do so”).

debtors a sense of self-worth and thus preserve their dignity.⁸¹ However, it is unlikely that unwilling debtors who are forced into doomed repayment plans will experience these "benefits." Instead, with no help from the bankruptcy system forthcoming, elderly debtors are likely to experience an increased sense of failure and a concomitant decline in self-worth as they remain unable to meet their financial obligations.

VI. CONCLUSION

Bankruptcy policy has long recognized that different situations require different approaches.⁸² Some laws already reflect an acknowledgment of the differences in the financial circumstances involving the elderly.⁸³ Means-testing, however, in its current form, does not differentiate between debtors' situations, at least to the extent that it does not consider age and future earning capacity. To adequately protect the interests of older Americans and potential debtors, reform measures should take into account the unpredictability of future income for elderly debtors by incorporating future earning capacity into the means-test, or by excluding older Americans from its application altogether.

Adjustments to means-testing reform which consider future income potential would be consistent with the reformers' goals. One goal of means-testing is to adjust available bankruptcy relief to a debtor's ability to pay and his need for relief.⁸⁴ An increased recognition of the unique circumstances of older debtors who must avail themselves of the protections of bankruptcy would more accurately adjust the relief granted to the debtor's needs and ability to pay. Without these provisions, the potential hardships caused by the hur-

81. See Gross & Rosenberg, *supra* note 32, at 68 (noting that individuals could benefit from bankruptcy relief both economically and in terms of "those things that are usually undervalued or not valued at all in our economic system").

82. See *Toibb v. Radloff*, 501 U.S. 157, 164 (1991) (stating that "differences in the requirements and protections of each chapter reflect Congress' appreciation that various approaches are necessary to address effectively the disparate situations of debtors seeking protection under the Code.").

83. See White, *supra* note 1, at 701 n.63 (noting that some states protect the elderly through increased homestead exemptions). See, e.g., CAL. CIV. PROC. CODE § 704.730 (West 1999) (providing homestead exemption of \$60,000 for elderly or disabled); ME. REV. STAT. ANN. tit. 14 § 4422 (1) (West 1997) (increasing homestead exemption from \$12,500 to \$60,000 if debtor is elderly); see also 11 U.S.C. § 522 (1994) (protecting Social Security benefits from claims of creditors in bankruptcy); Skoler, *supra* note 25, at 122-24 (describing protections for elderly in bankruptcy).

84. See Jones & Zywicki, *supra* note 1, at 182; see also White, *supra* note 1, at 710-716 (arguing for change in the bankruptcy laws to use aspects of both Chapter 7 and Chapter 13 to provide repayment of debt according to debtor's wealth and future income).

dle means-testing erected to bankruptcy access may disproportionately fall on the elderly debtors – a group less likely to be able to overcome financial difficulties.⁸⁵ Any meaningful bankruptcy reform should instead protect the unique interests of older Americans.

Unfortunately, this need has been overlooked or ignored by both houses of Congress in passing of the Bankruptcy Reform Act of 1999, which adopts a means-test with a focus on current, as opposed to future income. This law will likely cause unwarranted suffering by elderly Americans who experience the potentially devastating setbacks for which bankruptcy was intended.

85. See Moskowitz, *supra* note 15, at 101 (suggesting that older persons are less likely to recover from financial difficulties because of fixed incomes and short remaining life spans).