

# Relief for the Poorest of All: How the Proposed Bankruptcy Reform Would Impact Women and Children

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## INTRODUCTION

Since 1980, the United States has witnessed an explosion in filings for personal bankruptcies.<sup>1</sup> Filings have increased over four-fold in less than two decades.<sup>2</sup> The United States witnessed a record 1.42 million filings in 1998 alone,<sup>3</sup> representing one out of every sixty-eight households in the United States,<sup>4</sup> and the trend shows no

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1. The United States Bankruptcy Code provides several different chapters under which to file for bankruptcy relief. Each chapter provides a different type of relief for individuals, businesses, or family farms. Personal bankruptcy is filed under Chapters Seven and Thirteen of the United States Bankruptcy Code. 11 U.S.C. § 701-01 (1978); § 1301-13 (1978). Chapter Seven, Liquidation, provides a discharge of most unsecured debts while allowing the debtor to retain a substantial portion of personal property. The trustee collects all non-exempt property of the debtor and distributes the proceeds from its sale to the creditors. 11 U.S.C. § 704(1), § 726. Creditor claims for the exempt assets are terminated. Chapter Seven is sometimes known as the “fresh start” provision, or a “straight bankruptcy,” and represents 70% of all bankruptcies filed.

Under Chapter Thirteen, Rehabilitation or Reorganization, debtors make regular payments to creditors for a certain number of years according to a court-approved plan. 11 U.S.C. § 1322. The debtor is permitted to remain in possession of the debtor’s assets if the debtor abides by the plan. 11 U.S.C. § 1306(b).

The decision whether to file under Chapter Seven or Chapter Thirteen is primarily voluntary, although Chapter Thirteen contains some restrictions as to who may file. 11 U.S.C. § 1325. Chapter Thirteen requires that debtors have regular income, as defined by 11 U.S.C. § 101(27), and debts under a certain threshold. *Id.*

2. The newest figures on consumer bankruptcy filings show that between 1980 and 1999, filings increased from 287,570 in 1980 to 1,281,581 in 1999. Consumer filings represented 97.12% of all filings in 1999. American Bankruptcy Institute, *US Bankruptcy Filing 1980-1998* (Business, Non-Business, Total), available at <http://www.abiworld.org/stats/1980annual.html> (last visited May 1, 2001).

3. 145 CONG. REC. H2644 (daily ed. May 5, 1999) (statement of Rep. Sessions).

4. Brooks Jackson, *World Today: Many to Blame for Bankruptcy Boom in America* (CNN television broadcast, Nov. 4, 1999), available at <http://cnn.com/TRANSCRIPTS/9911/wt.10.html>.

signs of slowing.<sup>5</sup>

Bankruptcy affects all persons in the United States. Creditors and retailers increase the cost of goods and services for all consumers to compensate for the financial loss caused by bankruptcy discharges.<sup>6</sup> Analysts estimate that the aggregate loss for each American family due to discharge of debts through bankruptcy was \$550 each year in higher cost for credit, goods, and services.<sup>7</sup>

Ironically, the growth in consumer bankruptcies is occurring within the context of a booming economy, low unemployment,<sup>8</sup> and increased household incomes.<sup>9</sup> More telling is the fact that between 1978 and 1997, the amount of consumer debt grew over 650%.<sup>10</sup> The Federal Reserve reported in 1997 that consumers' debt grew at a rate that exceeded disposable income growth.<sup>11</sup>

The question remains: "Why there are so many individuals going broke in the midst of such a healthy economy?" The answer varies depending upon who is asked.<sup>12</sup> Proponents of bankruptcy reform point the finger at the increasingly permissive attitude of society toward bankruptcy, the lack of responsibility of individuals to repay

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5. Non-business filings for the first and second quarters of 2000 totaled 615,315 filings. ABI World, *Personal Bankruptcy Filings By Quarter available at* <http://www.abiworld.org/stats/newstatsfront.html> (last visited Apr. 12, 2001) (data as of Apr. 12, 2001).

6. In 1991, the Accounting Office estimated that Chapter 7 cases involved \$24.4 billion in assets. This included both business and non-business filings, although business filings only represent 6% of Chapter Seven cases. KAREN GROSS, *FAILURE AND FORGIVENESS, REBALANCING THE BANKRUPTCY SYSTEM* (1997).

7. 145 CONG. REC. H2644, *supra* note 3. The Senator, however, did not specify which study this figure came from.

8. In October, 1999, the United States Census Bureau reported the unemployment rate was 4.1%. The United States currently has the lowest unemployment rate than it has seen in the last quarter-century. Robert D. Hershey, Jr., *Creditors Lead Push to Curb Bankruptcy*, N.Y. TIMES, May 10, 1998, Sec. 3, at 10; 145 CONG. REC. H2644, *supra* note 3.

9. In 1980, the median family income was \$31,095 according to the Census Bureau and Bureau of Labor Statistics. In 1999 it was \$42,769. In contrast, the median family income for Chapter Seven filers in 1999 was \$21,450. Torri Still, *Bankruptcy Bar Bashes Reform Bill*, 157 N.J.L.J. 344 (1999).

10. Bankruptcy Reform Act of 1999: Hearing on H.R.833 Before the Subcommittee on Commercial and Administrative Law, Mar. 18, 1999, *available at* <http://www.house.gov/judiciary/106-rouk.htm> (last visited May 1, 2001).

11. *Id.* In fact, Congresswoman Marge Roukema stated that between 1986 and 1996, real annual per capita disposable income grew by over 13% while personal bankruptcies more than doubled. *Id.*

12. For further discussion of this apparent anomaly, see Gordon Bermant, *Consumer Filings in a Complex Economy*, 18 AM. BANKR. INST. J. 22 (1999).

the money they borrow, and the rise in “bankruptcy mill” law firms.<sup>13</sup> These proponents describe the increase in bankruptcy filings as a “moral crisis”<sup>14</sup> in the United States where “bankruptcies of convenience” are granted frequently.<sup>15</sup> Opponents, on the other hand, blame the credit card industry and its loose standards for extending credit,<sup>16</sup> deceptive lending practices, and high interest rates. They criticize creditors for profiting from the same practices that force many individuals into bankruptcy.

Women and children remain one of the most vulnerable groups in the United States economy. Although, on average, the real median income of female-headed households increased in 1997,<sup>17</sup> over 31% still lived below the poverty line. This statistic is staggering when contrasted with that of married couples living below the poverty line—slightly over 5%.<sup>18</sup> On average, when women divorce, their standards of living sharply decline, regardless of what their standards of living may have been while they were married.<sup>19</sup>

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13. The term “bankruptcy mill” is generally used to refer to law firms which earn the bulk of their income by encouraging consumers to file for bankruptcy. The firms charge a flat rate for assisting individuals in completing the forms necessary for filing; a task usually performed by trained legal assistants. Because their income is based on processing as many bankruptcies as they can, they are reputed to discourage debtors from trying to repay their loans, even when they want to.

14. 145 CONG. REC. S14248 (daily ed. Nov. 8, 1999) (statement of Sen. Grassley).

15. Rep. Linder remarked that taking into account the increasing number of bankruptcies despite economic growth and low unemployment, one can realistically only come to only one conclusion: bankruptcies of convenience have provided a loophole for those who are financially able to pay their debts but simply have found a way to avoid personal responsibility and escape their financial responsibilities. 145 CONG. REC. H2648 (daily ed. May 5, 1999) (statement of Rep. Linder).

16. Consumer borrowing has grown seven-fold since the last time that the Bankruptcy Code was reformed in 1978. See ABI World, *U.S. Bankruptcy Filings 1980-1998 (Business, Non-Business, Total)*, at <http://www.abiworld.org/stats/1980annual.html> (last visited May 1, 2001) (reporting 287,570 non-business filings for 1980 and 1,281,581 for 1999).

17. U.S. Bureau of the Census, *Current Population Reports: Consumer Income, Poverty in the United States (1997)*, available at <http://www.census.gov/prod/3/98pubs/p60-01.pdf> (last visited May 1, 2001). In 1997, 31.6% of female households with no husband present lived below the poverty line. The poverty line threshold is \$16,400 in annual income. *Id.*

18. *Id.* In 1997, married couples living below the poverty line totaled 5.2% according to the United States Census Bureau. *Id.*

19. Peter C. Alexander, *Divorce and the Dischargeability of Debts: Focusing on Women as Creditors in Bankruptcy*, 43 CATH. U. L. REV. 351, 364-65 (1994). Alexander cites a 1981 California study where women experienced a 73% decline in their standard of living. *Id.* at 365 n.70 (citing Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181,

Not surprisingly, individual women are the fastest growing segment of the population for bankruptcy.<sup>20</sup> In the second half of 1998 and the first quarter of 1999, single-filing women represented 34.6% of all bankruptcy cases.<sup>21</sup> Estimates indicate that 540,000 women will file bankruptcy in 1999 alone.<sup>22</sup> Divorced women as a group are most likely to file bankruptcy,<sup>23</sup> and unmarried women in bankruptcy are worse off than both married women and unmarried men.<sup>24</sup>

This Note will argue how the current bankruptcy reform, similar to that proposed in the previous two Congresses, is a "mixed bag" for women and children. An act similar in form to what we have seen will surely target the small group of debtors abusing the system, as hoped, but it will also negatively impact the most economically vulnerable members of society, namely women and children. While Congress has taken affirmative steps to make the United States Bankruptcy Code (the Code) more responsive to the needs of women and children that receive support payments from men who have filed for bankruptcy, these provisions sometimes fall short or are ill-conceived.<sup>25</sup> In addition, reformers have failed to adequately address the procedural hurdles that the poorest Americans encounter when they are in particular need of bankruptcy relief. The Bankruptcy Reform Act of 1999 (the Act), therefore, must be altered to further

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1181-1251 (1981)).

20. Since the early 1980s, the number of women filing bankruptcy alone has risen faster than men filing alone or married couples. The proportion of women filers increased from 32.79% in July, 1997 to 33.82% to 34.43% to 36.28% in June, 1999. The fact that the number of women filing bankruptcy is increasing at the same time that the overall number of bankruptcies filed is rising means that the number of women filing is growing even more dramatically. Teresa A. Sullivan & Elizabeth Warren, *More Women in Bankruptcy*, AMERICAN BANKRUPTCY INSTITUTE, available at <http://www.abiworld.org/research/morewomen.html> (July 30, 1999) (last visited May 1, 2001).

21. *Id.*

22. *Id.*

23. Heather Brewer, *Snap Judgments*, BUS. L. TODAY, Jan./Feb. 2000, at 4.

24. TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS, BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 147-59 (1989).

25. Pub. L. No. 95-598, tit. I, §101, 92 Stat. 2549 (1978) (codified primarily as 11 U.S.C.), amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, and by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

address the special needs of women and children.<sup>26</sup>

Part I of this Note will discuss the legislative history of the Act and the specific provisions it proposes. The purpose and public policy behind the Act will be examined. The proposals will then be compared with the provisions currently embodied within the Code. This Note will specifically outline provisions within the Code that relate to women and children who seek to collect alimony and child support from men who have declared bankruptcy, and provisions that will make it harder for female heads of household to attain bankruptcy relief for themselves.

The proposals of the Act will be analyzed in Part II according to the purported fundamental purpose of a bankruptcy system—a fair and equitable system that allows a fresh start for those who really need it—as well as the intent of the Act’s sponsors. This Part will address unforeseen or inadvertent consequences of the Act’s provisions, as well as those consequences that adequately meet the needs of women and children.

Part III of this Note, in conclusion, will outline recommendations for an equitable bankruptcy system that meets the needed reform’s goals.

## I. HISTORY

Bankruptcy began as a way to give “the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”<sup>27</sup> In the last few decades, however, bankruptcy has become a common occurrence.<sup>28</sup> The vast number of filings for bankruptcy led the public to question whether the individuals filing were really the “honest but unfortunate” sort of debtors that bankruptcy was originally intended to assist. Bankruptcy was overhauled in 1994 in response to this public concern.<sup>29</sup> Nevertheless, filings continued to rise<sup>30</sup> and consequently Congress has been receptive to the American

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26. Cite the Bankruptcy Reform Act of 1999.

27. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

28. *See supra* notes 1-4.

29. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

30. *See supra* notes 1-5 and accompanying text.

public's call for another overhaul.<sup>31</sup>

Congress responded to the public call for bankruptcy reform during the 105th Congressional session when the Bankruptcy Reform Act of 1998 was proposed.<sup>32</sup> Its sponsors introduced the bill intending to make bankruptcy a more difficult option for those who could actually afford to pay their debts.<sup>33</sup> Although both chambers passed the bill,<sup>34</sup> it was not adopted at the end of the session because it died in the conference committee.<sup>35</sup> Congress did not reject it on its merits, however.<sup>36</sup> Instead, it died because of numerous "rider" amendments tacked on by the Senate, most notably a minimum wage increase.<sup>37</sup> Due to the unpopularity of these rider amendments, the Conference Committee let bankruptcy reform quietly die.<sup>38</sup>

Bankruptcy reform resurfaced in the 106th Congress. The Bankruptcy Reform Act of 1999<sup>39</sup> is almost identical to the Bankruptcy Reform Act of 1998.<sup>40</sup> While its fate is still uncertain, the Senate passed the minimum-wage provision that seemingly killed the

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31. According to studies and polls, the American public desires bankruptcy reform. However, the sudden push for reform may in part be due to intense lobbying by the credit industry rather than by pressure from legislative constituents. For reports and statistics on the main players in the lobbying campaign for bankruptcy reform, see Jennifer She, *Money in Politics Alert*, THE CENTER FOR RESPONSIVE POLITICS, at <http://www.opensecrets.org/alerts/v4/alrtv4n16.asp> (last visited May 1, 2001); Dan Morgan, *Creditors' Money Talks Louder in Bankruptcy Debate: Consumer Groups Fight New Curbs on Insolvent Debtors*, WASH. POST, June 1, 1999, at A4; Hershey, Jr., *supra* note 8.

32. H.R. 3150, S. 1301. The last major overhaul to the Bankruptcy system was in 1978, in the Bankruptcy Reform Act of 1978. This Act was signed into law on November 6, 1978 and repealed and replaced the National Bankruptcy Act of 1898.

33. See *infra* notes 42, 117-23 and accompanying text.

34. H.R. 3150 passed the House on June 10, 1998 by a vote of 306-118. Roll No. 225. Amended S. 1301 passed September 23, 1998 by 97-1. Record Vote No. 284.

35. A bill is sent to the Conference Committee if it is passed in the second chamber in a form different than the one passed in the originating chamber. The Congressional session ended in May, 1999.

36. This is obvious by the passage of the bill with significant margins in both chambers. The amendments did not fundamentally change the essence of the Bankruptcy Bill itself.

37. See, e.g., Fair Minimum Wage Act of 1998, S. Cong. Rec. S9942 (daily ed. Sept. 3, 1998) (Kennedy Amendment No. 3540).

38. See *House Passes Bill to Toughen Bankruptcy Laws: White House Threatens Veto* (May 6, 1999), available at <http://www.cnn.com/ALLPOLITICS/stories/1999/05/06/bankruptcy> (last visited May 1, 2001).

39. H.R. 833, S. 625.

40. H.R. 3150, S. 1301.

Act during the previous session.<sup>41</sup> However, even if the Act does not pass in this Congressional session, members of Congress, bankruptcy practitioners, and law professors predict that it will reappear in the near future.<sup>42</sup>

The legislative history of the latest version of bankruptcy reform outlines the purpose of the Act. Its sponsors<sup>43</sup> seek to reduce what they perceive as the widespread abuse of the bankruptcy system. They aim to construct systematic safeguards that would turn bankruptcy into a strictly needs-based system<sup>44</sup> where those who really are in need of relief are identified through objective evidence before relief is granted.<sup>45</sup> They want bankruptcy to become both a less attractive and more difficult option for those who can actually afford to repay at least some of their debts.<sup>46</sup> The Act's sponsors hope to restore bankruptcy to its former role—a last resort instead of first response to a financial crisis.<sup>47</sup>

The sponsors' loftier goal is to restore both consumer and creditor responsibility in economic society.<sup>48</sup> They believe that a system<sup>49</sup> that

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41. The Domenici Amendment, No. 2547, passed on November 9, 1999 by a vote of 54-44. This is significant because on September 21, 1999, a vote to invoke closure failed to pass the Senate by seven votes. The vote was intended to prevent the addition of non-germane amendments like the ones that killed the bill in the previous Congress. When the vote did not pass, many predicted that this would make it virtually impossible to pass the legislation again because of the Republican commitment to oppose the minimum wage increase. 145 CONG. REC. S14129 (daily ed. Nov. 5, 1999) (Domenici Amendment No. 2547).

42. Roundtable, *Consumer Bankruptcy Reform Roundtable*, 7 AM. BANKR. INST. L. REV. 3, 3-4 (1999) (remarks of Samuel J. Gerdano).

43. The Act's sponsors in the United States House of Representatives are Rep. George W. Gekas (R-Pa.) and Jim Moran (D-Va). The sponsors in the Senate are Charles E. Grassley (R-Iowa) and Richard J. Durbin (D-Ill.). Robert D. Hershey, N.Y. TIMES, May 10, 1998, sec. 3, at 10.

44. Systematic safeguards to achieve a needs-based system would take the form of a means test. See discussion *infra* notes 117-22 and accompanying text.

45. One of the Act's proponents in the Senate remarked that the current law, where the bankruptcy judge has discretion in granting relief, is a "case-by-case investigation" and "turns on little more than the personal predilections of the judge. This chaotic system mocks the rule of law, and has resulted in unfairness and inequality for debtors and creditors alike." 145 CONG. REC. S11089 (daily ed. Sept. 21, 1999).

46. See *infra* notes 117-22 and accompanying text.

47. Matthew Tully, *House-Passed Bankruptcy Rewrite Demands More From Debtors*, ALL POLITICS CNN, at <http://cnn.com/ALLPOLITICS/1998/06/16/cq/bankruptcy.html> (June 16, 1998) (last visited May 1, 2001).

48. "Personal responsibility has to be returned to our society." Rep. George W. Gekas. Also, although not a sponsor of the bill, Rep. Pryce of Ohio echoed the sentiment of personal

affords filers only the amount of debt relief needed—no more and no less—would restore public confidence.<sup>50</sup>

However, to create an equitable system that would meet these objectives, the unique situation of women and children requires consideration. The current bankruptcy system and the proposed changes attempt to address this issue.

### A. Comparing the Act with the Current Bankruptcy Code

#### 1. Women and Children Collecting Alimony or Child Support from Men Filing Bankruptcy

Women and children become creditors when men fail to meet their financial obligations pursuant to alimony or child support contracts.<sup>51</sup> They attempt to collect overdue payments by assigning debts to another party and garnishing wages, just like ordinary creditors. Unlike other creditors, women and children often look solely to that debtor for their financial survival.<sup>52</sup> These women and children may seek public assistance or file bankruptcy if they do not receive the money owed them. As a result, they deserve special consideration and protection by the bankruptcy system.<sup>53</sup>

The primary purpose of personal bankruptcy is to provide a means for insolvent debtors to wipe the slate clean of debts and start anew.<sup>54</sup>

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responsibility when she remarked that “when intelligent citizens ignore basic common sense by spending outside of their means, we need to establish a reasonable level of accountability and demand some personal responsibility to protect those who have extended credit to them in good faith.” 145 CONG. REC. H2646 (daily ed. May 5, 1999).

49. “The arbitrary nature of the process has also undermined public confidence in the fairness and efficiency of the consumer bankruptcy system.” 145 CONG. REP. S11089 (daily ed. Sept. 21, 1999) (statement of Todd Zewicky and James White).

50. See *infra* notes 117-22 and accompanying text.

51. For a more detailed discussion of women as creditors in bankruptcy see Alexander, *supra* note 19.

52. See *Shine v. Shine*, 802 F.2d 583 (1st Cir. 1986) (stating that there is a strong policy interest in protecting women and children from losing alimony and child support payments owed by an ex-spouse who has filed for bankruptcy).

53. NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT § 1.4.4 (1997).

54. The court in *Blaemire v. Sinton*, 229 B.R. 665, 667 (1999), outlined the purpose of the bankruptcy system, saying:

In individual cases, a central purpose of bankruptcy is to provide a process by which insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a



However, the policy in favor of giving debtors a fresh start does not extend to all debts.<sup>55</sup> The Code carves out exceptions for support payments to one's dependents.<sup>56</sup>

Under the current system, some men are able to escape their support obligations by filing bankruptcy. This becomes particularly likely when past due payments have been assigned to third parties for collection. In bankruptcy, a debt is dischargeable<sup>57</sup> unless a statutory exemption applies.<sup>58</sup> Although support obligations are expressly excepted from discharge,<sup>59</sup> savvy men or bankruptcy attorneys have learned to exploit loopholes to avoid their responsibilities.<sup>60</sup> When

new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt, or put another way, bankruptcy is a means to afford a fresh start to an "honest but unfortunate debtor."

*See Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

55. Congress codified exceptions to the general rule in 11 U.S.C. § 523. Congress believed that some debts either "fail to meet the bankruptcy objective of giving a fresh start only to honest debtors or are considered to be of paramount societal importance (such as tax obligations, and alimony and child support)." H.R. REP. NO. 103-835, at 34 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3342.

56. 11 U.S.C. § 523(a)(15) (1995). *See infra* notes 89-91.

57. A debtor is "discharged" when he is released from the obligation to repay his debt. BLACK'S LAW DICTIONARY 463 (6th ed. 1990).

58. Yvonne M. Lada, Note, *Something Every Divorce Attorney Should Know about Bankruptcy Law*, 23 S. ILL. U. L.J. 735, 735 (1999) (citing *Brown v. Felsen*, 442 U.S. 127, 131 (1979)).

59. The provision excepting such obligations reads as follows:

A discharge under section 727, 1141, . . . 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt . . . to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that:

(A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise (other than debts assigned pursuant to Section 402(a)(26) of the Social Security Act, or any such debt which has been assigned to the Federal Government or to a State or any political subdivision of such State); or . . .

(B) such debt includes a liability designated as alimony, maintenance or support, unless such liability is actually in the nature of alimony, maintenance or support . . . .

11 U.S.C. § 523(a)(5)(A)-(B) (1993).

60. Senator Grassley remarked during the Senate debate:

I want to point out that some bankruptcy lawyers actually advertise that they can help deadbeat dads get out of paying their child support and other marital obligations. One bankruptcy lawyer has even written a book entitled "Discharging Marital Obligations in Bankruptcy."

this happens, the bankruptcy system inadvertently allows the individual to receive debt relief at the expense of his dependents.

a. Definition of “Domestic Support Obligation”

The Act addresses these concerns through several provisions that relate to “domestic support obligations.” First, the Act would add “domestic support obligation” to the general definition provision of the Code.<sup>61</sup> The current provision does not include such a definition.<sup>62</sup> Section 523 requires that debt in the nature of alimony, maintenance, or support owed to a former spouse or child is to be nondischargeable.<sup>63</sup> The debt must be “in connection with a separation agreement, divorce decree . . . or property settlement agreement . . . .”<sup>64</sup> However, the statute does not define what kind of debts constitute those “in the nature of” alimony or maintenance, and support is not defined by the statute.<sup>65</sup> Hence, courts look to case law for its meaning.<sup>66</sup>

Bankruptcy courts look to the intent of the parties in making the divorce decree and use factors to determine the nature of the debt.<sup>67</sup> The number of factors and the weight given to factor varies from

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145 CONG. REP. S14248 (daily ed. Nov. 8, 1999) (statement of Sen. Grassley).

61. H.R. 833 § 138, S. 625 § 211. Congress defines fundamental terms used throughout the Code. 11 U.S.C. § 101.

62. See 11 U.S.C. § 101.

63. “Alimony” is commonly understood to mean the “sustenance or support of the wife by her divorced husband.” BLACK’S LAW DICTIONARY 73. Usually this definition contemplates monetary payments at regular intervals. *Id.*; 11 U.S.C. § 523(a)(5)(B).

In 1903, Congress codified the common law practice of exempting alimony and child support payments from discharge in bankruptcy. This amendment to the 1898 Act read that “[a] discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part, except such as . . . are for alimony due or to become due, or for maintenance or support of wife or child.” Act of Feb. 5, 1903, § 5, 32 Stat. 797, 798 (repealed 1978). This provision was found to violate the Equal Protection Clause of the federal Constitution in 1977, and was reenacted with gender-neutral language in 1978.

64. 11 U.S.C. § 523(a)(5)(B).

65. See *id.*

66. The bankruptcy court makes an independent evaluation regarding the nature of the obligation that arises from the divorce decree. The determination is controlled by federal bankruptcy law, not state law. See *In Re Garrard*, 151 B.R. 598, 601 (Bankr. M.D. Fla. 1993); *In Re Harrell*, 754 F.2d 902 (11th Cir. 1985).

67. Alexander, *supra* note 19, at 351, 361-62.

court to court and among judges.<sup>68</sup> If the party challenging dischargeability fails to carry its burden of proof by a preponderance of the evidence, then the debt is determined to be in the nature of a property settlement and is fully dischargeable in bankruptcy.<sup>69</sup> Thus, it seems, the Legislature allowed the courts to fill the gap it created by leaving the definition of “alimony” and “child support” open to interpretation.

The Act defines “domestic support obligation” broadly and explicitly, and takes back the discretion previously left to the courts. The definition includes alimony, child support, paternity settlements and obligations to reimburse governmental units.<sup>70</sup> The definition moreover includes obligations to governmental units, that reflect the sponsor’ desire to prevent debts assigned to third parties from escaping the judicially-created exception.<sup>71</sup> The impact of this provision, however, is relative to the other provisions of the Act it.<sup>72</sup> The definition explicitly states the claims Congress intends to include

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68. See *In Re Bowsman*, 128 B.R. 485, 487 (Bankr. M.D. Fla. 1991), finding six factors to nondischargeability, namely:

- (1) Whether the obligation under consideration is subject to contingencies such as death or remarriage.
- (2) Whether the payment was fashioned in order to balance disparate incomes of the parties.
- (3) Whether the obligation is payable in installments or a lump sum.
- (4) Whether there are minor children involved in a marriage requiring support.
- (5) The respective physical health of the spouse and the level of education.
- (6) Whether, in fact, there was need for spousal support at the time of the circumstances of the particular case.

*Daulton v. Daulton*, 139 B.R. 708 (Bankr. C.D. Ill. 1992) (citing twenty factors to determining dischargeability, including the age and health of the parties; whether the parties had counsel; whether the parties had made a knowing, voluntary, and intelligent waiver of rights; the length of the marriage; and other special or unique circumstances of the parties).

69. *In Re Burch*, 100 B.R. 585, 589 (Bankr. M.D. Fla. 1989).

70. H.R. 833, 106th Cong. § 138 (2d Sess. 1999); S. 625, 106th Cong. § 211 (2d Sess. 1999).

71. This is not to say that domestic support obligations assigned to third parties always escape nondischargeability. However, they are required to pass the “nature of the debt” test, and these debts are usually more difficult for the challenger to establish their burden of proof.

72. Section 101 would apply to §§ 139-44 of H.R. 833, *supra* note 70. These provisions are, in order: “[p]riorities for claims for domestic support obligations,” “[r]equirements to obtain confirmation and discharge in cases involving domestic support obligations,” “[e]xceptions to automatic stay in domestic support obligation proceedings,” “[n]ondischargeability of certain debts for alimony, maintenance, and support,” “[c]ontinued liability of property,” and “[p]rotection of domestic support claims against preferential transfer motions.” *Id.* Not all of these provisions, however, will be covered in this Note.

in such domestic support provisions and to protect to from dischargeability.<sup>73</sup>

### b. The Automatic Stay

The Act addresses the operation of the automatic stay<sup>74</sup> in domestic support claims.<sup>75</sup> The automatic stay generally operates to prevent creditors from collecting on debts once the individual has filed for bankruptcy.<sup>76</sup> The automatic stay takes effect as soon as the bankruptcy petition is filed with the court and provides a respite for the debtor from his creditors.<sup>77</sup> Creditors are prohibited from filing suits against the debtor to collect money, repossess secured property, or garnish wages.<sup>78</sup>

Under the current version of the Code, section 362 exempts alimony and child support obligations from protection under the automatic stay.<sup>79</sup> However, men who owe domestic support

73. See *supra* note 70.

74. 11 U.S.C. § 362(a) (1993 & Supp. 2000). "Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities . . ." *Id.*

75. H.R. 833, 106th Cong. § 152 (1st. Sess. 1999). No parallel provision exists in S. 625.

76. The Notes of Committee on the Judiciary, Senate Report No. 95-989, described the automatic stay as:

[O]ne of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

Notes of Committee on the Judiciary, S. REP. NO. 95-989, *reprinted in* BANKRUPTCY CODE, RULES, AND OFFICIAL FORMS, 1999 LAW SCHOOL EDITION III (West Group 1999). The court is not required to sign or issue an order; filing a petition with supporting documentation is sufficient to activate the automatic stay. BLACK'S LAW DICTIONARY 134 (citing *In re Artishon*, Bkrcty. Minn., 39 B.R. 890, 893; *Jones v. Wood (In re Wood)*, Bkrcty. Idaho, 33 B.R. 320, 321). The automatic stay applies only to pre-petition creditors. However, some pre-petition creditors may be exempt from the automatic stay under § 362(b) or may be able to lift the automatic stay through the procedures set out in § 362 (d)-(g).

77. The other function of the automatic stay is to preserve the estate. This prevents unfairness for creditors by disallowing one creditor to rush in and collect from the debtor before any other creditors are able to do so. The bankruptcy system aims to equalize creditors in order to provide for a collective solution to the debtor's insolvency. GROSS, *supra* note 6, at 41-43.

78. Gross, *supra* note 6, at 41.

79. 11 U.S.C. § 362(b)(2)(B). The provision reads, in pertinent part:

The filing of a petition under section 301, 302, or 303 of this title . . . does not operate

obligations and file for bankruptcy sometimes avoid collection of past due payments when they are assigned to third parties for collection. These debts, when assigned to a private collection agency, are classified like any other debts assigned to a collection agency. Further, under the Bankruptcy Reform Act of 1994,<sup>80</sup> debts assigned to the government are not protected by the automatic stay.<sup>81</sup>

The Act would change section 362 in two ways.<sup>82</sup> First, Act would amend the provision to read “domestic support obligations,” replacing “alimony, maintenance or support.”<sup>83</sup> This is a broader term than would be adopted in section 101 and would exclude more debts from the protection of the automatic stay than at present—including debts assigned to third parties and governmental entities.<sup>84</sup> Most categories of child support would additionally be excluded from the automatic stay.<sup>85</sup> For example, a wage deduction order imposed to enforce a domestic support obligation would be ineligible for protection. Similarly, restrictions or suspensions of licenses imposed to enforce domestic support obligations would be unaffected by the automatic stay.<sup>86</sup> This includes those restrictions pursuant to federal law on driver’s, professional, and recreational licenses to enforce payments on overdue support obligations.<sup>87</sup> Therefore, a state could impose penalties or garnishments to enforce a debtor’s overdue support payments, even after he has filed for bankruptcy relief.

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as a stay . . . under subsection (a) of this section . . . of the commencement or continuation of an action or proceeding for . . . the establishment of paternity; or . . . the establishment or modification of an order for alimony, maintenance, or support; or . . . of the collection of alimony, maintenance, or support from property that is not property of the estate[.]

11 U.S.C. § 362(b)(1)-(2)(A)(i), (ii), (B). *See also In re Schock*, 37 B.R. 399, 400 (Bankr. D. N.D. 1984); *In re Cunningham*, 9 B.R. 70, 71 (Bankr. D. N.M. 1981).

80. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (Oct. 22, 1994).

81. 11 U.S.C. § 362.

82. H.R. 833, 106th Cong. § 138 (1st Sess. 1999); S. 625, 106th Cong. § 214 (2000), available at <http://thomas.loc.gov/cgi-bin/C?c106:/temp/~c106H1m4zx>.

83. *Id.*

84. *Id.* § 141. *See supra* notes 62-67 and accompanying text.

85. *Supra* note 82.

86. *Supra* note 82.

87. *See, e.g.*, Title IV-D of the Federal Social Security Act, 42 U.S.C. § 651 (1994).

### c. Property Settlement Agreements as a Part of a Divorce

A woman will frequently accept a lower alimony or support payment in a divorce settlement in exchange for an agreement in which her former husband bears more responsibility for the marital debt.<sup>88</sup> This leaves more disposable income free from credit card payments and other bills, so she may support herself and her children. This arrangement, however, only works when her former husband actually pays those debts. If her former husband files for bankruptcy and these debts are discharged for him, this leaves her with the obligation to pay these debts under the current version of the Code.<sup>89</sup> Although support payments are always nondischargeable, payments resulting from a divorce decree or separation agreement that are not supportive are evaluated using a balancing test to determine dischargeability.<sup>90</sup> The test evaluates whether the nonfiling spouse, deprived of the property settlement payment, would be more burdened than would the filing spouse if forced to make the payments.<sup>91</sup> If the nonfiling spouse fails the test and the bankruptcy

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88. These arrangements are also called "hold harmless agreements."

89. 11 U.S.C. § 523(a)(15) (Supp. 2000). The provision reads as follows:

A discharge . . . does not discharge an individual debtor from any debt . . . not of the kind described in paragraph (5) [regarding alimony and child support payments] 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, a determination made in accordance with State or territorial law by a governmental unit . . .

*Id.* Therefore, if a woman is jointly liable for a debt, such as a joint holder on a credit card account, an agreement from a divorce proceeding has no bearing on her legal obligation to pay the debt. The divorce settlement is considered solely between the woman and her husband—not between the parties and the lender. Therefore, the lender could still collect from the woman following her husband's bankruptcy. She could, however, file suit against her former husband to enforce the divorce agreement.

90. 11 U.S.C. § 523(a)(5) (Supp. 2000); *see also* 11 U.S.C. § 523(a)(15)(B) (Supp. 2000). Property settlements pursuant to a divorce decree or separation agreement are subject to a balancing test to determine whether "discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor . . ." *Id.*

91. *Id.* The Congressional Record reflects the purpose behind the inclusion of the balancing test:

In some instances, divorcing spouses have agreed to make payments of marital debts, holding the other spouse harmless from those debts, in exchange for a reduction in alimony payments. In other cases, spouses have agreed to lower alimony payments

court decides to discharge the debt of her former husband,<sup>92</sup> then the woman suffers the worst of both worlds—the burden of the original debt as well as lower support payments.<sup>93</sup>

The Act would exempt from discharge all property settlements that arise out of divorce proceedings.<sup>94</sup> This would remove the balancing test from the Code altogether, and eliminate any risk that the debt would be returned to the woman.<sup>95</sup>

#### d. Prioritization in the Distribution Of Assets

The Act would reprioritize domestic support obligations in the distribution of assets.<sup>96</sup> In section 507, the Code prioritizes section 507 payments for expenses and debts in the distribution of the debtor's assets.<sup>97</sup> First priority is given to the administrative expenses of the estate and to any other related fees and charges.<sup>98</sup> This

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based on a larger property settlement. If such "hold harmless" and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support. This subsection will make such obligations nondischargeable in cases where the debtor has the ability to pay them and the detriment to the nondebtor spouse from their nonpayment outweighs the benefit to the debtor of discharging such debts.

140 Cong. Rec. H10, 752-01 (daily ed. Oct. 4, 1994).

92. Under the current system, the bankruptcy court has exclusive jurisdiction over § 523(a)(15) complaints.

93. "If such 'hold harmless' and property settlement obligations are not found to be in the nature of alimony, maintenance, or support, they are dischargeable under current law. The nondebtor spouse may be saddled with substantial debt and little or no alimony or support." H.R. REP. NO. 103-835, at 54 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3363. *See* David M. Susswein, Note, *Divorce Related Property Division v. Alimony, Maintenance and Support in the Bankruptcy Context: A Distinction Without a Difference?*, 22 HOFSTRA L. REV. 679 (1994). *See also* Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J. ON LEGIS. 43 (1993) (further discussing the differing treatment of support payments and property settlements in bankruptcy).

94. H.R. 833, § 142; S. 625, § 215.

95. *Analysis of the Consumer Bankruptcy Provisions of H.R.*, ABI World homepage at <http://www.abiworld.org/legis/bills>. The need for Bankruptcy Court jurisdiction would be removed as well. *Id.*

96. H.R. 833, § 139; S. 625, § 212.

97. 11 U.S.C. § 507 (Supp. 2000). In a Chapter Seven bankruptcy case, the trustee reduces the debtor's assets to cash for distribution to the creditors after a determination of the debtor's eligibility for Chapter Seven relief. *See also* 11 U.S.C. § 704 (discussing the duties of trustees).

98. 11 U.S.C. § 507(a)(1). "First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28." *Id.*

encompasses payments to the trustee,<sup>99</sup> appraisers, brokers, and auctioneers involved in the assessment and distribution of the debtor's estate.<sup>100</sup> Following the settlement of administrative claims, the other claims that are given priority include wages owed to the debtor's employees, contributions to employees' benefit plans, property loans and taxes.<sup>101</sup> Presently, domestic support obligations are in the seventh priority tier, and are therefore not paid until priorities one through six are satisfied.<sup>102</sup> Moreover, these domestic support claims specifically exclude debts assigned to third parties for collection as unsecured creditor claims.<sup>103</sup> Unsecured creditors' claims, on the other hand, are not considered a priority for repayment and are generally dischargeable.<sup>104</sup>

In contrast, the Act would move domestic support claims to the first priority tier.<sup>105</sup> These claims would thereby outrank administrative claims.<sup>106</sup> Debts assigned to governmental entities

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99. The Bankruptcy trustee is the "[p]erson appointed by the Bankruptcy Court or elected by creditors to take charge of debtors estates, to collect assets, to bring suit on debtor's claims, to defend actions against it, and otherwise administer debtor's estate." BLACK'S LAW DICTIONARY 147 (6th ed. 1990) (citing 11 U.S.C. § 321; 28 U.S.C. § 581).

100. 11 U.S.C. § 507(a)(1).

101. 11 U.S.C. § 507. The claims prioritized in § 507 are as follows: (1) administrative expenses; (2) unsecured "involuntary gap" creditors; (3) compensation to employees; (4) contributions to employee benefit plans; (5) debts owed by owners of grain storage facilities; (6) debts owed by persons owning a fish storage or processing facility; (7) debts owed for property; (8) alimony or child support; and (9) taxes. *Id.*

102. 11 U.S.C. § 507(A)(7). The section reads as follows:

Seventh, allowed claims for debts to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that such debt . . . (A) is assigned to another entity, voluntarily, by operation of law, or otherwise; or (B) includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

*Id.* Domestic support obligations were added to the list of priority claims in 1994. *Id.*

103. 11 U.S.C. § 507(a)(7)(A). *See also* 11 U.S.C. § 523(a)(5)(B).

104. The creditor can challenge the debt's dischargeability pursuant to a provision under § 523. 11 U.S.C. § 523(a) (1993). These debts may become nondischargeable, however, if the debtor signs a reaffirmation agreement—an agreement to repay the debt that is approved by the court. "Unsecured debt" is defined as "[d]ebt obligations that are not backed by pledged collateral or security agreement." BLACK'S LAW DICTIONARY 1539 (6th ed. 1990).

105. H.R. 833 § 139, S. 625, § 212.

106. 11 U.S.C. § 507(a)(1).



would also take on priority status thereby giving effect to the Act's proposed definitional change of "domestic support obligation."<sup>107</sup> However, the amendment specifies that support payments to individuals are given priority over payments to the government.<sup>108</sup> Support payments to individuals would therefore receive the first distribution of the debtor's assets.

## 2. Women Filing for Bankruptcy

### a. Qualifying for Chapter Seven Bankruptcy

A major feature of the Act is the means test, also called the "needs-based" bankruptcy approach.<sup>109</sup> In its present form, the Code allows debtors in personal bankruptcy to elect either Chapter Seven or Chapter Thirteen, subject to a few restrictions.<sup>110</sup> Generally, the Code contains a presumption in favor of granting relief to individuals who file a voluntary petition for Chapter Seven.<sup>111</sup> If the court, however, finds that granting relief under Chapter Seven would result in "substantial abuse" of the provision,<sup>112</sup> then the bankruptcy judge possesses wide discretion in determining whether or not to dismiss debtor's petition. Alternatively, the debtor may elect to convert his case to Chapter Thirteen, if he qualifies.<sup>113</sup> There are not, however, other explicit rules controlling the judge's decision.

The means test aims to channel debtors who can repay a certain portion of their debts into Chapter Thirteen.<sup>114</sup> Chapter Thirteen

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107. H.R. § 139, S. 625, § 212.

108. H.R. § 139, S. 625, § 212.

109. H.R. 833, § 101; S. 625, § 101; H.R. 833, § 102; S. 625, § 102.

110. *Id.*

111. 11 U.S.C. § 707(b) (Supp. 2000). The provision reads: "There shall be a presumption in favor of granting the relief requested by the debtor." *Id.*

112. *Id.* The provision allows the court to dismiss a case for cause, including "a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter." *Id.* The Code does not define "substantial abuse," and thus its application appears to be left to the discretion of the bankruptcy judge.

113. 11 U.S.C. § 109(e) (Supp. 2000). To file for relief under Chapter Thirteen, a debtor is required to have a regular income, unsecured debts that total, in the aggregate, under \$250,000, and secured debts that total less than \$750,000. *Id.*

114. *See supra* note 1.

requires debtors to repay more unsecured creditors than under a traditional Chapter Seven filing.<sup>115</sup> The Act would remove the presumption in favor of Chapter Seven bankruptcy relief from the Code. “Substantial abuse,” presently grounds for dismissal or conversion,<sup>116</sup> would be reduced to mere “abuse,”<sup>117</sup> and a finding of “abuse” in a given case would be determined by the means test.<sup>118</sup>

The means test closes Chapter Seven to filers who are found to be presumptively able to repay a significant portion of their debts. The court would apply the proposed formula to their income and debts.<sup>119</sup> Debtors who earn more than the national median income<sup>120</sup> and possess the ability to repay at least 25% of their unsecured debt over five years would be unable to file under Chapter Seven.<sup>121</sup> To determine whether a debtor is able to pay 25% of their unsecured debt in the prescribed time period, the debtor’s monthly income is reduced by monthly living expenses, monthly secured debt payments, monthly priority debt payments, monthly charitable contributions, and administrative and attorney’s fees.<sup>122</sup> If the amount left over after these deductions is at least \$100, then abuse of Chapter Seven is presumed.<sup>123</sup> Debtors earning less than seventy-five percent of the

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115. See *supra* note 1.

116. 11 U.S.C. § 707 (1993).

117. H.R. 833, 106th Cong. § 102(2)(B)(D)(III) (2000). A judge cannot convert a petition for Chapter Seven to Chapter Thirteen without the debtor’s consent. *Id.* If the debtor refuses the conversion, the bankruptcy petition is dismissed. *Id.*

118. H.R. 833, § 102(2)(c). The means test would establish a presumption of abuse. See *id.* However, there is no exact definition of “abuse” in the Code. See *id.*

119. The formula adopts the Internal Revenue Service collection standards. I.R.M., Handbook No. 515 § 1.3 (2000), available at <http://tax.cch.com/primesrc/bin/highwire.dll>. The amount allowed per category of expenses, for example, food, clothing, transportation, housing and utilities, is determined by county. *Id.*

120. National median income is \$51,000 for a family of four. Michelle Singletary, *Bankruptcy’s Personal Toll: Consumers Get Blamed for Debt Crisis, but Creditors Play Role Too*, WASH. POST, Sept. 27, 1998, at H2.

121. See S. 625, § 102.

122. See H.R. 833, § 102(a)(2)(A)(ii). The monthly expenses allowed by the standards are listed in three categories: (1) national standards; (2) local standards; and (3) other necessary expenses. H.R. 833, § 102(a)(A)(ii). The national standards include food, housekeeping supplies, clothing, services and personal care items. I.R.M., Handbook No. 5.15, § 1.B, *supra* note 119, at § 1.A. Local standards include housing and transportation, and the amounts allowed vary by county. *Id.* at § 1.B. Taxes, health care, court ordered payments and other various expenses related to income production fall under the other necessary expenses. *Id.* at § 1.C.

123. See H.R. 833, § 102(a)(2)(I).

national median income, however, would be unaffected by the means test. This scheme removes the present discretion afforded bankruptcy judges in determining a debtor's eligibility for Chapter Seven relief.

#### b. Administrative Filing Requirements

The Act makes filing for bankruptcy more difficult. Under the current Code, after a debtor files a voluntary petition,<sup>124</sup> he must file a list of creditors, schedules of assets and liabilities, current income and expenditures, and statements of financial affairs.<sup>125</sup> In addition, the debtor must give the bankruptcy trustee the property of the estate and any related documents.<sup>126</sup> The debtor is thereafter required to attend a meeting of creditors and state any intention to retain secured property.<sup>127</sup> The process, therefore, is relatively easy for debtors to understand and complete on their own. Many debtors file *pro se*,<sup>128</sup> or hire a paralegal or other petition preparer to assist them with the forms.<sup>129</sup> Although failure to correctly complete and file the forms

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124. See 11 U.S.C. § 301 (1994). The section reads as follows:

[A] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.

*Id.* An involuntary case can be filed under Chapters Seven or Eleven, the latter of which deals with reorganization. See 11 U.S.C. § 303(a) (1994).

125. See 11 U.S.C. § 521(1) (1994). "The debtor shall—(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs . . ." *Id.*

126. See 11 U.S.C. § 521(4) (1994). "The debtor shall—(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title . . ." *Id.*

127. See 11 U.S.C. § 341(a) (1994). This section, "Meetings of creditors and equity security holders," mandates a meeting of creditors within a reasonable time after the debtor files. 11 U.S.C. § 341(a).

128. Debtors may file with the assistance of counsel when they anticipate actions filed by their creditors. *Id.*

129. Congress addressed the proliferation of services available for preparing bankruptcy petitions by non-attorneys by imposing a "[P]enalty for persons who negligently or fraudulently prepare bankruptcy petitions." See 11 U.S.C. § 110(l)(1) (Supp. 2000). The notes of the House Judiciary Committee illustrate the impetus behind the provision by stating:

[b]ankruptcy petition preparers not employed or supervised by any attorney have proliferated across the country. While it is permissible for a petition preparer to

will result in a dismissal of the bankruptcy petition,<sup>130</sup> the straightforward filing process tends to offset the concern over adverse results.

The Act increases the informational requirements for filing and includes forms that are complicated and lengthy.<sup>131</sup> Petitioners must provide three years of tax returns,<sup>132</sup> as well as detailed financial information concerning expenses and income. These requirements far exceed the information required by in the current system.<sup>133</sup>

## II. ANALYSIS

The Act is a “mixed bag” for women and their dependents. Some provisions would undoubtedly improve their ability to collect support payments from men who file for bankruptcy. Moreover, garnishments and other state-imposed penalties for failure to pay support obligations would survive the automatic stay.<sup>134</sup> These obligations, however, compete with other provisions for payment of debts like unsecured credit cards.<sup>135</sup> When women are on the other side of bankruptcy—as debtors—they confront new filing requirements and the means test.<sup>136</sup> The proposed procedural changes would make it more difficult for women to seek financial relief.

Although Congress generally intended the Act to target bankruptcy system abusers who use bankruptcy to evade their financial obligations,<sup>137</sup> the major changes proposed by the Act are

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provide services solely limited to typing, far too many of them also attempt to provide legal advice and legal services to debtors . . . . These services may take unfair advantage of persons who are ignorant of their rights both inside and outside of the bankruptcy system.

H.R. Rec. No. 103-835, at 56 (1994). Section 110 entitles the debtor to damages if their petition is dismissed because of the incompetence of the preparer, including actual damages, statutory damages of the greater of \$2,000 or twice the amount paid to the preparer, plus the costs of hiring another attorney and their fees. 11 U.S.C. § 110(i)(1) (Supp. 2000).

130. 11 U.S.C. § 1307(c)(9) (1993).

131. See H.R. REP. NO. 106-833.

132. See *id.*

133. See *id.*

134. See *supra* notes 81-87 and accompanying text.

135. See *supra* notes 117-22 and accompanying text.

136. See *supra* notes 117-22, 128-31 and accompanying text.

137. See *supra* notes 44-49 and accompanying text.

aimed at all filers, and not just the abusers.<sup>138</sup> In fact, the large number of bankruptcy filings may have more to do with the growth of the credit-based economy in the United States than individual abuses of the bankruptcy system. Recent studies estimate that only about 3% of bankruptcy filings evidence abuse.<sup>139</sup> Thus, the current bankruptcy reform ultimately forces the responsibility for an efficient bankruptcy system on segments of society that are least able to pay.

*A. Women and Children Collecting Alimony or Child Support from Men Filing Bankruptcy*

1. Definition of “Domestic Support Obligation”

The addition of the proposed definition of “domestic support obligation”<sup>140</sup> gives the claims of women and children an advantage. Property settlements arising from divorce agreements would always be excluded from the protection of the automatic stay<sup>141</sup> and would not be considered a different kind of financial agreement. As a result, the Act would no longer require women to litigate “nature of the debt”<sup>142</sup> issues when divorce decrees contain combinations of alimony, child support payments, and payments for the division of marital debts.<sup>143</sup> The test would be completely removed from bankruptcy proceedings.

2. The Automatic Stay

Provisions restricting the application of the automatic stay further benefit the claims of women and children for support payments.<sup>144</sup> In

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138. For example, the increased filing requirements and the means test make filing more difficult for persons who are not abusing the system and sincerely need relief. *See supra* notes 117-22, 128-31.

139. “[T]he evidence . . . shows that very few people—maybe 3 percent—have abused the law. And because of that, we are passing a draconian, harsh piece of legislation which imposes enormous difficulties on the poorest families, on working-income families.” 123 CONG. REC. S11090 (daily ed. Sept. 21, 1999) (statement of Senator Wellstone).

140. *See supra* notes 61-67 and accompanying text.

141. *See supra* notes 61-67.

142. *See supra* notes 65-67.

143. *See supra* notes 65-67.

144. *See supra* notes 74-87 and accompanying text.

preventing the automatic stay from protecting support payments assigned to third parties for collection, the Act removes uncertainty for women who count on those payments for survival.<sup>145</sup> Also, recognizing state and federal enactments to enforce support provisions<sup>146</sup> fully advances the legislative intent behind these acts. This way, the Code recognizes and correctly applies the law, thereby balancing the individual's interest in a financial fresh start with their obligation to honor family commitments.<sup>147</sup>

### 3. Property Settlement Agreements as a Part of a Divorce

The Act also eliminates some of the bankruptcy judges' discretion.<sup>148</sup> As a result, women will no longer feel vulnerable to the personal predilections of judges and can count on the enforcement of divorce decrees whether or not their former husbands file for bankruptcy. This protects the public interest in ensuring that the law upholds and consistently enforces divorce decree obligations. This provision also treats all parties fairly, and prevents bankruptcy courts from overlooking support obligations because of tricky legal maneuvering.

### 4. Prioritization in the Distribution of Assets

The reprioritization of domestic support claims from seventh to first in the order of asset distribution<sup>149</sup> is misleading. To the public, the Act appears to guarantee that support claims will be paid more frequently and in full. Putting domestic support ahead of administrative expenses,<sup>150</sup> however, can make it impossible for any creditor to collect at all. Administrative expenses were originally prioritized first because if administrative expenses were not paid, qualified lawyers would likely decline offers to administer the estate. In those cases, the debtor's assets would not be liquidated but would

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145. *See supra* note 85.

146. *See supra* note 86.

147. Singer, *supra* note 93, at 43.

148. *See supra* note 71 and accompanying text.

149. *See supra* notes 105-07 and accompanying text.

150. *See supra* note 106.

instead be abandoned and return to the debtor.<sup>151</sup> Under the proposed changes, domestic support claims will similarly not be paid, despite their new found priority status. In order to ensure the proper administration and distribution of the estate, the Code has always earmarked administrative claims as first priority, and should continue to do so in the future.

Also, reprioritization of support claims will not significantly change the frequency with which these claims are paid. The claims in categories two through six—lying between the administrative expenses and support claims—infrequently apply to consumer bankruptcy cases.<sup>152</sup> The sort of claims in those categories include payments to the owners of grain facilities and fish storage and processing facilities.<sup>153</sup> The Consumer Federation of America estimates that reprioritization of domestic support claims will only make a difference in 1% of consumer bankruptcies.<sup>154</sup>

The priority of support claims does not apply to collections following discharge.<sup>155</sup> The assurance the provision provides for priority payments concludes as soon as the legal proceedings end. Thus, the protection for those payments is currently very limited. In sum, the reprioritization of domestic support claims is only a superficial solution to protect domestic bankruptcy claims: Reprioritization does not adequately provide the assurances it appears to grant.

## 5. The Means Test

Under the means test, more men will file under Chapter Thirteen.<sup>156</sup> As a result, women counting on future installments of

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151. See generally *Bankruptcy Reform Act of 1999: Hearing on H.R. 833 Before the Subcommittee on Commercial and Admin. Law*, 106th Cong. (Mar. 18, 1999) (statement of Joan Entmacher), available at: <http://www.house.gov/udiciary/106-entm.html> (last visited May 1, 2001).

152. 11 U.S.C. § 507(a); H.R. 833, § 142; S. 625 § 212. See *supra* note 107 and accompanying text.

153. U.S.C. § 507(a); *supra* note 107.

154. Stephen Brobeck, *Recent Trends in Bank Credit Cord Marketing and Indebtedness*, AM. BANKR. INST., at [http://www.abiworld.org/research/cfa\\_credit\\_study\\_7-98.html](http://www.abiworld.org/research/cfa_credit_study_7-98.html) (July 13, 1998).

155. See *supra* notes 105-07.

156. See *supra* notes 1, 117-22 and accompanying text.

alimony or child support will have more debts.<sup>157</sup> Under Chapter Seven, the slate is essentially wiped clean and few debts are left to be repaid.<sup>158</sup> Domestic support obligations survive bankruptcy to then share in the debtor's post-bankruptcy resources.<sup>159</sup> As a result of Chapter Seven relief being foreclosed to more individuals, domestic support payments will become part of a larger-surviving debt pool. Unsecured creditors, traditionally considered a lower priority,<sup>160</sup> will be elevated to the same level as alimony and child support. This result inverts the objectives of the Code.

### *B. Women Filing for Bankruptcy*

#### 1. Qualifying for Chapter Seven Bankruptcy

The means test<sup>161</sup> will prevent many women from receiving much needed bankruptcy relief. Statistics prove that women are the most financially vulnerable demographic group in the United States,<sup>162</sup> and the high bankruptcy rate within this group<sup>163</sup> is not surprising. The means test will force greater numbers of women into Chapter Thirteen, even though they may not necessarily have the financial resources to continue payments to unsecured creditors. Many of these women are single mothers who may need the extra \$100 per month for medical expenses, school clothes, or any number of the unforeseeable expenses involved in raising children.<sup>164</sup> Often these women are dependent on alimony or child support payments for survival. Thus, when ex-husbands are delinquent or late with payments, many women must decide between sacrificing payments to creditors or foregoing necessary household expenses. The means test

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157. *Id.*

158. *See supra* note 1.

159. *See supra* notes 62-67.

160. In Chapter Seven bankruptcies, unsecured debt is fully dischargeable unless the creditor can prove nondischargeability under U.S.C. § 523. In most cases, all unsecured debt is discharged. The Code prioritizes such unsecured debt beneath secured debt and the explicitly exempted debts enumerated in § 523.

161. *See supra* notes 117-22 and accompanying text.

162. *See supra* notes 18-21.

163. *See supra* notes 22-25.

164. *See supra* note 121 and accompanying text.



closes the door to many women who need the peace of mind afforded by a fresh financial start.

## 2. Administrative Filing Requirements

At a time when they can least afford it, increased administrative requirements will force women to come up with enough front money to hire attorneys in order to avoid involuntary dismissals. These requirements put women seeking to file for bankruptcy in a precarious position, and many women are still likely to file pro se petitions. If these petitions are dismissed for failing to meet the administrative procedures, the women's financial crisis will be prolonged.

### III. PROPOSAL

Domestic support claims should be moved to second in the list of priorities in section 507.<sup>165</sup> This will guarantee that administrative expenses are paid before assets are distributed to other claimants.<sup>166</sup> Domestic support obligations would be more protected than they would be in the current version of the Act because the assets of the estate would not be at risk of returning to the debtor due to the debtor's inability to pay his lawyer.<sup>167</sup> This would also protect future bankruptcy filings, as trustees and other administrators would be more willing to take on bankruptcy cases when have confidence in receiving payment for their services.

The means test<sup>168</sup> should be removed from the Act. Also, bankruptcy judges should retain discretion when determining the merit of bankruptcy petitions. These judges can consider factors that may affect the financial well-being of women who head households and who may not fit neatly into the rigid categories of the means test. If, however, Congress insists on retaining some form of the means test, then the test should be made more flexible in its application. This flexibility could be achieved by replacing the currently proposed

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165. *See supra* note 105.

166. *See supra* notes 105-07 and accompanying text.

167. *See supra* notes 105-07, 149 and accompanying text.

168. *See supra* notes 117-22 and accompanying text.

IRS standards with standards that focus on a debtor's actual expenses. The coupling of the judge's discretion with the objective test would yield a more flexible approach—one that is more responsive to the needs of matriarchal families.

Administrative procedures should be designed with the pro se debtor in mind. Documentation requirements and filing procedures should be easily understood and followed. Women should not be required to retain an attorney for an uncomplicated bankruptcy because of the risk of dismissal. Therefore, the administrative procedures should be re-examined.

#### CONCLUSION

Bankruptcy reform is desperately needed, and Congress can no longer neglect the unique situation of many women and children in the zeal for reform. Congress must examine the realities affecting women and children in the United States in order to enact reform that does not place the burden of change on the backs of those who can least bear it.





