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TEN YEARS AFTER CONSUMER BANKRUPTCY REFORM IN THE UNITED STATES: A DECADE OF DIMINISHING HOPE AND FAIRNESS

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"Virtues are acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing."[1] Virtues only have meaning in the context of human behavior.[2] In the context of a legal system, there are a host of virtues that must be balanced and weighed amongst each other.[3] However, "the primary virtue of law is its ability to achieve the purposes for which it is intended: to protect people, provide services, and achieve

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1. Eduardo M. Penalver, *Land Virtues*, 94 CORNELL L. REV. 821, 864 (2009) (citations omitted).

2. Matthew Bruckner, *The Virtue of Bankruptcy*, 45 LOY. U. CHI. L.J. 233, 253 (2013).

3. *See, e.g.*, Brian Wessel, *The Rule of Law in Outer Space: The Effects of Treaties and Nonbinding Agreements on International Space Law*, 35 HASTINGS INT'L & COMP. L. REV. 289, 304, 314 (2012) (recognizing that there are competing virtues and values in a legal system).

justice."[4] If a legal system fails at achieving its primary purposes, the legal system is failing society.

In the context of the U.S. consumer bankruptcy legal system, the primary purposes of the Bankruptcy Code[5] are to provide a "fresh start" to individuals[6] and to provide an equitable distribution to creditors.[7] These primary purposes are a reflection of core virtues in society—hope and fairness. The fresh start provides hope to individuals, and the equitable distribution provides fairness to creditors.[8] This paper argues that the current consumer bankruptcy system, particularly with the passage of the Bankruptcy Abuse Prevention and Protection Act of 2005 ("Reform Act"),[9] is not promoting these core virtues. Thus, this paper also argues that the system is not promoting the primary virtue of any legal system, that is achieving "the purposes for which it is intended: to protect people, provide services, and achieve justice."[10]

This Article provides an overview of the historical development of consumer bankruptcy in the United States by exploring the core virtues of Chapter 7 of the U.S. Bankruptcy Code. In light of the Reform Act, this Article then examines its impact on the core virtues of Chapter 7. Based on this analysis, conclusions, and areas of future research are considered.

I. Overview of the Historical Development of Consumer Bankruptcy Law in the United States

Prior to analyzing the current purposes and virtues of consumer bankruptcy law in the United States, it is necessary to provide a brief historical perspective on the development of consumer bankruptcy law. Some scholars have analyzed the historical development in three periods: 1898 through the 1930s, the 1930s through 1978, and 1978 through the present.[11] That framework was adequate

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4. Edward Rubin, *The Real Formalists, the Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863, 881 (2011).

5. 11 U.S.C. §§ 101–1527 (2012). Unless otherwise noted, all references to the Bankruptcy Code, Code, or Section are to Title 11 of the United States Code.

6. *In re* Federal-Mogul Global, Inc., 684 F.3d 355, 378 (3d Cir. 2012) (recognizing the "fresh start" purpose of bankruptcy); Patel v. Shamrock Floor Covering Serv., Inc., 565 F.3d 963, 967 (6th Cir. 2009) (noting a central purpose of bankruptcy is to provide a "fresh start" to debtors); *see also* Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 354 (2014) ("[T]he most notable consequence of the consumer bankruptcy system remains the availability of the fresh start for a financially beleaguered individual . . . .").

7. *In re* Kestell, 99 F.3d 146, 149–50 (4th Cir. 1996) ("A major purpose of the bankruptcy process is the equitable distribution of a bankrupt's assets among creditors.").

8. One court has recognized the dual purposes of bankruptcy in this way: "Bankruptcy is both a creditor's remedy and a debtor's right." *Patel*, 565 F.3d at 967.

9. *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified in various sections of 11 U.S.C.).

10. Rubin, *supra* note 4, at 881.

11. DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 3–5 (2001) (recounting the history of bankruptcy laws beginning with the gold standard,

until the enactment of the Reform Act in 2005.[12] In light of the Reform Act, a fourth era has emerged: The Post-Reform Act Era.[13] This article provides an overview of the first three eras and builds upon the prior historical treatment by adding the Post-Reform Act Era.

A. Period One: 1898 – 1930s

Although there were intermittent periods in the United States with bankruptcy laws prior to 1898,[14] it was not until 1898 that bankruptcy law became a permanent fixture.[15] The Bankruptcy Act of 1898 ("1898 Act")[16] stayed in effect for eighty years, with many amendments over time.[17] The 1898 Act had provisions for voluntary bankruptcy for any person owing debts.[18] Trustees were empowered to avoid fraudulent and preferential transfers for the benefit of the estate.[19] Importantly, too, beyond liquidation provisions, compositions with the approval of a majority of creditors were included so that upon court

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to the Great Depression, and through the New Deal reforms); *see also* Kara J. Bruce, *Rehabilitating Bankruptcy Reform*, 13 NEV. L.J. 174, 181–84 (2012) (highlighting and summarizing the major periods of bankruptcy law in the United States); Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 5–44 (1995) (providing a very comprehensive treatment of bankruptcy history in the United States).

12. *See generally* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

13. *See* Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 136–37 (2007) (addressing the reforms imposed by the Reform Act of 2005, including stricter means regarding consumer debtors and curtailing abuse).

14. Bankruptcy law during the early nineteenth century took a pattern of bust and boom, with legislation arising in economic downturns and legislation being repealed during boom periods. *See* SKEEL, *supra* note 11, at 23; Bruce, *supra* note 11, at 183 (discussing the pattern of bankruptcy legislation after economic downturns and the repeal of legislation during better economic periods); *see also* Bethany A. Corbin, *Losing at Dodge Ball: Understanding the Supreme Court's Implied Authorization of Consent in* Executive Benefits Insurance Agency v. Arkison *and Why Revision of 28 U.S.C. 157(b) is Critical for Clarity*, 63 DRAKE L. REV. 109, 116–17 (2015) (discussing early bankruptcy legislation in the nineteenth century and how it was responsive to economic downturns immediately following the Civil War); Albert Togut & Samantha J. Rothman, *Chapter 11: Out of Balance*, AM. BANKR. INST. J., Dec. 2014, at 87 (noting the bust and boom pattern of bankruptcy legislation).

15. SKEEL, *supra* note 11, at 4–5; Bruce, *supra* note 11, at 182–83 (noting that the 1898 Act was the beginning of a period in which the United States had permanent bankruptcy legislation); Ponoroff, *supra* note 6, at 355 (noting that the 1898 legislation was the "first long-standing federal bankruptcy law").

16. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 548, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

17. *See* Tabb, *supra* note 11, at 23, 26–27 (discussing several amendments to the Bankruptcy Act of 1898 including the amendment of 1926 and the Chandler Act in 1938).

18. *Id.* at 26.

19. *Id.*

confirmation of the composition, there would be a distribution of the assets and the case would be dismissed.[20]

B. Period Two: 1930s – 1978

The Great Depression ushered in a new era of bankruptcy law,[21] which brought about reforms to bankruptcy that were debtor-oriented.[22] After several years of bankruptcy legislation, the Chandler Act[23] was passed in 1938.[24] The Chandler Act made significant changes to many different aspects of bankruptcy law in the areas of liquidation and reorganization.[25] But perhaps the most notable change was to Chapter 13 of the U.S. Bankruptcy Code, addressing wage earners' plans.[26] The Chandler Act, although modified with some legislation periodically,[27] was the foundation for bankruptcy law in the United States for forty years.[28]

C. Period Three: 1979 – 2005

The passage of the Bankruptcy Reform Act of 1978 ("1978 Act")[29] brought about the modern era of bankruptcy law under the Code, some calling it a "revitalization of bankruptcy practice" in the United States.[30] The 1978 Act was not a response to an economic downturn,[31] but rather the result of Congress' concern over the rising number of consumer bankruptcy filings, making substantial changes to the process of individual bankruptcies.[32] The 1978 Act was "a fairly even balance" between debtor and creditor interests.[33] It sought to encourage greater use of Chapter 13 by providing greater discharge relief than a filing under Chapter 7.[34] As such, much of the 1978 Act was designed to enhance administration of bankruptcy filings.[35]

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20. *Id.*
21. SKEEL, *supra* note 11, at 5.
22. Bruce, *supra* note 11, at 183; *see also* Tabb, *supra* note 11, at 28–29.
23. Chandler Act, ch. 575, 52 Stat. 840 (1938), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.
24. Bruce, *supra* note 11, at 183.
25. Tabb, *supra* note 11, at 29–30.
26. Bruce, *supra* note 11, at 183.
27. *Id*. at 183–84.
28. Tabb, *supra* note 11, at 30–31.
29. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified in various sections of 11 U.S.C.).
30. SKEEL, *supra* note 11, at 5.
31. Tabb, *supra* note 11, at 32.
32. Bruce, *supra* note 11, at 184.
33. Tabb, *supra* note 11, at 36.
34. *Id*. at 35–36.
35. *Id*. at 35 (explaining that the Commission established the "United States Trustees Program" to relieve bankruptcy judges from overburdening administrative duties, among other reforms).

Several amendments were made to the 1978 Act until Congress passed the Reform Act in 2005.[36] The most important change from a consumer Chapter 7 perspective was the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("1984 Act").[37] The 1984 Act added subsection (b) to section 707 of the Code.[38] Section 707(b) provided for dismissal of a consumer case for "substantial abuse," but it expressly provided a presumption in favor of debtors.[39] Section 707(b) remained intact without any major changes until the Reform Act.[40]

Substantial abuse was added to the Code out of the perceived increase in situations where consumers who could repay some debtors avoided making these payments by obtaining a discharge under Chapter 7.[41] Therefore, substantial abuse was a tool to address the perceived problem of increasing consumer filings.[42] However, it was unclear how effective of a tool it was, as a body of case law with various standards developed in an attempt to apply the substantial abuse standard.[43]

In effect, this period saw a dramatic increase in consumer filings.[44] This increase in filings is important because it fueled the legislative effort that began

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36. *See infra* note 51 and accompanying text.

37. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 355 (codified at 11 U.S.C. § 707(b)(1) (2012)). The section originally provided:

> After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss 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. There shall be a presumption in favor of granting the relief requested by the debtor.

Id.; *see also* Wayne R. Wells, Janell M. Kurtz & Robert J. Calhoun, *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 CLEV. ST. L. REV. 15, 15 (1991) ("This section allows the bankruptcy court to act either sua sponte or on the motion of the United States Trustee to dismiss a Chapter 7 petition for substantial abuse when the case is filed by an individual debtor whose debts are primarily consumer debts.").

38. Wells, Kurtz & Calhoun, *supra* note 37, at 17.

39. 11 U.S.C. § 707(b) (Supp. II 1982).

40. A couple of changes are worth noting, but neither of them fundamentally modified the substantial abuse analysis. First, the United States Trustee was given standing to bring such motions in 1986. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219, 100 Stat. 3088, 3101. Prior to 1986 only courts could prosecute such motions. David G. Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 238 (2007). Second, in 1997 post-petition tithing was expressly protected in the context of a substantial abuse analysis. *See* Religious Liberty and Charitable Donation Protection Act of 1997, Pub. L. 105-183, 112 Stat. 517, 518.

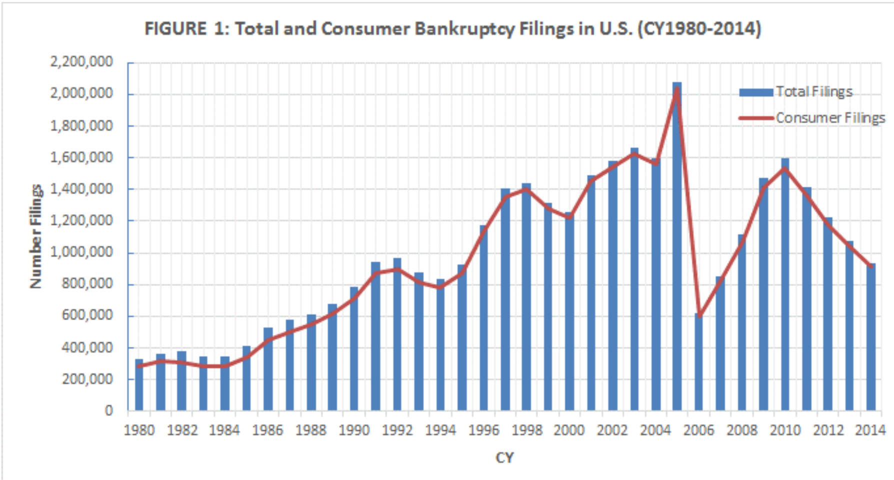
41. *See* Lauren E. Tribble, Note, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 795–96 (2007) (explaining that before 1984, debtors were allowed to eliminate their debts under Chapter 7 as long as they were honest with the Court).

42. Wells, Kurtz & Calhoun, *supra* note 37, at 17 (noting that consumer filings doubled from 1978 to 1982, which fueled the lobbying effort by the credit industry).

43. Tribble, *supra* note 41, at 796.

44. *See* Tabb, *supra* note 11, at 37 n.266 (citing over forty bankruptcy laws that have been enacted since the 1978 Act in the hopes of curtailing the increased consumer filings).

the Post-Reform Act Era, which is discussed later in this Article.[45] Figure 1 sets forth the total bankruptcy filings from 1980 to 2014 and reflects the great portion of filings that are consumer-oriented.



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Most of the consumer filings since the enactment of the Code were filed under Chapter 7.[47] On average, nearly 70% of all consumer cases are filed under Chapter 7.[48] It is important to note that in most Chapter 7 cases there is no return to creditors, as they are no-asset cases.[49] The characterization of Chapter 7 as a liquidation chapter is essentially a misnomer.

D. The Post-Reform Act Era: 2005 – Present

The Code remained largely unchanged from 1978[50] until the passage of the Reform Act in April 2005,[51] which is considered the beginning of the Post-

45. *See infra* notes 50–55 and accompanying text.

46. This table is derived from a data set compiled by the author based on data published by the Administrative Office of the U.S. Courts. *See Caseload Statistics Data Tables*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=&pn=32&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= (last visited July 20, 2016). The author's data set compilation is on file and available upon request.

47. Price & Dalton, *supra* note 13, at 142–43.

48. *Id.*

49. Ed Flynn, *Chapter 7 Asset Cases and Trustee Compensation*, AM. BANKR. INST. J., June 2014, at 48–49 (noting that in most states the amount of cases that are asset cases is below 5%).

50. There were several amendments to the Code impacting consumer bankruptcy, but none of the post-1978 legislation modified the basic policy underpinnings of the Code. For an overview of this legislation, *see* Tabb, *supra* note 11, at 40–43.

51. Bruce, *supra* note 11, at 189. Although the passage of the Reform Act was April 20, 2005, the effective date was October 17, 2005. Price & Dalton, *supra* note 13, at 136.

Reform Act Era. The Reform Act was the most significant reform to the Code since 1978.[52] The Reform Act was designed to curb the perceived abuse of individuals seeking relief under Chapter 7[53] by contracting "the circumstances under which relief may be sought, and by whom."[54] The purpose was to shift individuals from Chapter 7 to Chapter 13 relief.[55]

The primary mechanism to achieve this purpose is the implementation of a statutory means test[56] that is applicable to individual consumer debtors,[57] unless they're specifically excluded from the application of the means test.[58] The means test calculates a debtor's income and expenses under a complex formula.[59] Under the means test, if a debtor's income is above the applicable state median income,[60] and after accounting for expenses (both actual expenses[61] and those based on IRS standards)[62] the debtor has disposable income[63] above certain mathematical thresholds,[64] granting relief is presumed to be an abuse of Chapter 7.[65] The presumption of abuse can be rebutted in very limited circumstances.[66] If the presumption is not rebutted, the case is due to be dismissed, unless the debtor voluntary converts to Chapter 13.[67]

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52. Bruce, *supra* note 11, at 189; Price & Dalton, *supra* note 13, at 136.

53. *See, e.g.*, Bruce, *supra* note 11, at 189 (noting the Congressional intent was to deter abuse of the bankruptcy process); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 27 (2012) ("Another declared purpose of the Act was to stop the perceived abuse of the bankruptcy system by consumer debtors who could pay their debts but instead opted to file for bankruptcy protection.").

54. Ponoroff, *supra* note 6, at 354.

55. Price & Dalton, *supra* note 13, at 137–38.

56. 11 U.S.C. § 707(b) (2012). For a concise overview of the means test, *see* Linda E. Coco, *Swords, Shields, and Shackles: Human and Corporate "Persons" Under the Bankruptcy Abuse Preventions and Consumer Protection Act of 2005*, 83 MISS. L.J. 293, 308–12 (2014).

57. 11 U.S.C. § 707(b)(1).

58. *Id.* at § 707(b)(2)(D) (noting an example of an exempt group such as disabled veterans).

59. Lupica, *supra* note 53, at 33.

60. 11 U.S.C. § 707(b)(7)(A) (setting forth the requirement that if the debtor's income exceeds the applicable median income, the means test calculation is required).

61. *Id.* at § 707(b)(2)(A) (permitting deductions for actual expenses for certain items if documented).

62. Certain expenses in § 707(b)(2)(A)(ii) are derived from national and local IRS standards. *See* Schultz v. United States, 529 F.3d 343, 347 (6th Cir. 2008) (explaining the process of deductions based on national IRS standards).

63. 11 U.S.C. § 707(b)(2) (detailing calculations used to arrive at what is effectively disposable income to fund a repayment plan).

64. *See Schultz*, 529 F.3d at 347.

65. *See* 11 U.S.C. §§ 707(b)(1), 707(b)(2)(A)(ii), 707(b)(7) (providing the statutory framework for finding a presumption of abuse); *see also Schultz*, 529 F.3d at 347 (noting that passage of the Reform Act's means test is required to avoid the presumption of abuse).

66. 11 U.S.C. § 707(b)(2)(B)(i).

67. *Id.* at § 707(b)(2); *see also* Price & Dalton, *supra* note 13, at 136–37 ("From a consumer perspective, the most dramatic change is that debtors who have incomes above their state's median

The Reform Act also mandates other specific hurdles for consumer debtors.[68] For example, credit counseling is mandated as a prerequisite to qualify for relief.[69] These courses typically cost about fifty dollars.[70] The credit counseling is a misnomer, as in most cases there is no direct credit counseling with prospective debtors, but rather it is conducted via the internet or via telephone.[71] This requirement simply adds costs and is an artificial hurdle to obtaining relief without any clear benefit.[72] Without completing credit counseling prior to filing, most cases will be dismissed.[73]

Another procedural hurdle to obtaining a discharge is the completion of a personal financial management course by debtors prior to entry of a discharge.[74] Upon completion of the course, a debtor must file a certificate showing completion of the course.[75] A debtor will typically be denied a discharge if he or she does not complete the course and the case will be administratively closed.[76] The exceptions in which a debtor can obtain a discharge despite not completing the course are limited.[77] One broad exception applies to situations where the U.S. Trustee has determined that the waiver of the course is necessary.[78] The other exception applies if a debtor can show that he or she was unable to complete the course because of incapacity, disability, or active military duty in a combat zone.[79] These grounds for an exception are exclusive.[80] In practice, therefore, obtaining a waiver is quite difficult and case-specific.[81]

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and who fail a 'means test' are presumed to be abusing the system. If they wish to file a Chapter 7 liquidation, they instead are channeled into filing Chapter 13 plans.").

68. Lupica, *supra* note 53, at 33–34 (noting several new requirements for consumer debtors, such as counseling and educational courses, and specific income and expense standards).

69. 11 U.S.C. § 521(b)(1).

70. Wendy Tien, *New Rules for Credit Counseling and Debtor Education*, AM. BANKR. INST. J., June 2013, at 34 (2013).

71. *Id.* at 80 (describing the internet as the dominant form of counseling).

72. *Id.* at 81 (noting that the USTP has questioned the quality and duration of the credit counseling).

73. Eric Pitter, *The Law of Unintended Consequences: The Credit Scoring Implications of the Amended Bankruptcy Code—and How Bankruptcy Lawyers can Help*, 61 CONSUMER FIN. L.Q. REP. 61, 63 (2007) (recognizing the increased number of dismissals based on the failure to obtain credit counseling).

74. 11 U.S.C. § 727(a)(11).

75. FED. R. BANKR. P. 1007(b)(7).

76. FED. R. BANKR. P. 4001(c)(1)(H).

77. *See* 11 U.S.C. § 727(a)(11).

78. *Id.*

79. *Id.* at § 109(h)(4).

80. *See In re* Denger, 417 B.R. 485, 487 (Bankr. N.D. Ohio 2009).

81. For example, incarceration has not always been found to meet the exemption requirements. *See, e.g.*, *In re* Vollmer, 361 B.R. 811, 814–15 (Bankr. E.D. Va. 2007) (describing a case where an incarcerated debtor was unable to prove his situation qualified as exempt until it was eventually granted upon review).

Beyond the statutory means test and other substantive provisions added by the Reform Act that are applicable to consumer debtors, the Reform Act's most significant change is the shift in consumer bankruptcy policy from a presumption in favor of granting relief[82] to the application of the means test to determine if there is a presumption of abuse.[83] This is a shift in fundamental bankruptcy policy in the United States.[84]

II. COMPETING PURPOSES OF CHAPTER 7 CONSUMER BANKRUPTCY

There are two, well entrenched, primary competing purposes of Chapter 7 consumer bankruptcy in the United States:[85] (1) a fresh start for individuals[86] and (2) an equitable distribution of assets among creditors.[87] The fresh start for

82. Under the previous language of section 707(b), the standard warranting dismissal was a finding of "substantial abuse", and there was a presumption in favor of granting relief. *See* 11 U.S.C. § 707(b) (2000). Under section 707(b), as amended by the Reform Act, the standard was lowered to just "abuse" rather than "substantial abuse", and the presumption in favor of the debtor was removed. *See* 11 U.S.C. § 707(b) (2012); *see also* Coco, *supra* note 56, at 307 n.71.

83. *See* Coco, *supra* note 56, at 307–08 (recognizing the significance of the shift in the underlying presumption).

84. *See e.g.*, Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 375–76 (2007) ("Congress enacted amendments to the Bankruptcy Code that—if effective—would fundamentally change the core polices underlying the consumer bankruptcy system in this country."). These changes to U.S. bankruptcy policy "radically altered the policies underlying consumer bankruptcy in this country, marking a significant shift in favor of creditors." *Id.*; *see also* Henry E. Hildebrand, III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 373 n.3 (2005) (noting that BAPCPA represented a shift in public policy from making "bankruptcy a more effective remedy for the unfortunate consumer debtor," to "restoring personal responsibility and integrity to the bankruptcy system").

85. *See* Michelle Arnopol Cecil, *Abandonments in Bankruptcy: Unifying Competing Tax and Bankruptcy Policies*, 88 MINN. L. REV. 723, 753 (2004) ("The twin policies underlying the bankruptcy system are to ensure fair and equitable distribution to all creditors . . . and to preserve the debtor's fresh start after bankruptcy."); *see also* Elijah M. Alper, Note, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1913 (2007) (recognizing the competing interests of bankruptcy law to provide a "fresh start" and to acknowledge the obligation to pay debts).

86. *See* Ashley Koenen, Comment, Schwab v. Reilly*: No Objection Required*, 23 LOY. CONSUMER L. REV. 358, 369 (2011) ("In accordance with the Bankruptcy Code's purpose, Chapter 7 bankruptcies are rooted in the interest of giving debtors a 'fresh start'."); *see also* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (recognizing that the principal purpose of the Code is to provide honest debtors a "fresh start").

87. *See* Williams v. U.S. Fid. & Guar. Co., 236 U.S. 549, 554–55 (1915) ("It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start a fresh . . . . "); *see also* Michelle Arnopol Cecil, *Bankruptcy Reform: What's Tax Got to do With it?* 71 MO. L. REV. 879, 882 (2006) ("[T]he dual policy justifications upon which the system is built: providing a fresh start to deserving debtors while furnishing a fair and equitable distribution to creditors.").

individuals is provided by the discharge[88] of debt.[89] The discharge is often viewed "as being synonymous with the fresh start."[90] The discharge of most pre-petition debt[91] relieves the burden of debt to allow individuals to emerge from bankruptcy as productive members of society.[92] Although some debts may be excluded from discharge,[93] courts construe the exception to dischargeability strictly so as to preserve bankruptcy law's "purpose of giving debtors a fresh start."[94]

Two other statutory provisions in the Code also promote the fresh start. Prior to entry of a discharge in a case, the automatic stay[95] of all collection efforts helps facilitate the fresh start principle by providing the debtor a breathing spell.[96] Beyond giving a fresh start to debtors, it also protects assets of the estate and permits the bankruptcy court to resolve disputes regarding property of the estate, thus potentially making distributions to creditors equitable.[97] The automatic stay is so important that its violators are subject to contempt proceedings or incur damages.[98]

The fresh start is also promoted by the ability of an individual debtor to retain exempt assets[99] after bankruptcy.[100] Under either state or federal law, exempt

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88. 11 U.S.C. § 727(a) (2012) (providing the parameters for granting a discharge).

89. The Supreme Court has recognized that the discharge works toward the end of a fresh start for Chapter 7 debtors. *See Marrama*, 549 U.S. at 367.

90. Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 74 (2006); *see also* Koenen, *supra* note 86, at 370 ("The discharge, in effect, serves as the debtor's 'fresh start'."); Michael D. Sousa, *A Circuits Split: Does the Bankruptcy Code Implicitly Repeal the FDCPA?*, AM. BANKR. INST. J., Oct. 2006, at 59 (noting that the discharge of personal liability for pre-petition debt is known as "the proverbial 'fresh start'"); W. Brian Memory, Comment, *Vicarious Nondischargeability for Fraudulent Debts: Understanding the Dual Purposes of § 523(a)(2)(A)*, 20 EMORY BANKR. DEV. J. 633, 633 (2004) (recognizing that the discharge effectuates a fresh start which is "entrenched in our bankruptcy laws").

91. Most unsecured debts are discharged under the Code. *See* 11 U.S.C. § 727(a).

92. Rafael Efrat, *The Moral Appeal of Personal Bankruptcy*, 20 WHITTIER L. REV. 141, 141 (1998).

93. Some debts, such as student loans, certain taxes, and domestic/support obligations, are exempted from discharge. *See* Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367, 370 (2009).

94. *In re* Kasler, 611 F.2d 308, 310 (9th Cir. 1979) (citations omitted).

95. *See generally* 11 U.S.C. § 362.

96. Lefgren & McIntyre, *supra* note 93, at 371.

97. *In re* Zarnel, 619 F.3d 156, 171 (2d Cir. 2010) (explaining that the automatic stay, once bankruptcy proceedings commence, enables the fair distribution of the debtor's assets to creditors).

98. Richard L. Stehl, Note, *Eligibility for Damage Awards under 11 U.S.C. § 362(h): The Second Circuit Answers the Riddle—When Does Congress Actually Mean What It Says?*, 65 ST. JOHNS L. REV. 1119, 1119–22 (1991).

99. 11 U.S.C. § 522(d) (providing exemptions for certain assets). For a concise overview of the role of exemption in Chapter 7 consumer bankruptcy, *see* Alper, *supra* note 85, at 1916.

100. Congress recognized that exemptions and the discharge provide debtors a fresh start. *See* H.R. REP. NO. 95-595, at 125 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6086 ("The two most important aspects of the fresh start available under the bankruptcy laws are the provision of

assets are not subject to being included in the bankruptcy estate.[101] The ability to retain basic assets provides some measure of protection so that individuals can provide for themselves and their families as they move on past bankruptcy.[102]

While promoting a fresh start, Chapter 7 is also designed to provide a "fair and equitable distribution to creditors."[103] A debtor must surrender non-exempt assets[104] to a trustee so that the assets can be liquidated,[105] with the proceeds

adequate property for a return to a normal [life] and the discharge, with the release from creditor collection attempts."). Likewise, the Supreme Court has recognized the role of exemptions in providing a fresh start. *See* Burlingham v. Crouse, 228 U.S. 459, 473 (1913) ("It is the twofold purpose of the bankruptcy act...and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched.").

101. *See* Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 363 (2014).

102. David G. Baker, *First Circuit BAP Set to Interpret Schwab*, AM. BANKR. INST. J., Mar. 2012, at 63 ("Historically, the purpose of exemption law has been to allow debtors to keep property deemed essential to daily life. In the bankruptcy context, exemptions serve the overriding purpose of helping the debtor obtain a fresh start by maintaining essential property necessary to build a new life."); Mark S. Zuckerberg & Amanda K. Quick, *Exemptions – What Every Attorney Needs to Know*, RES GESTAE, July/August 2014, at 30 ("The purpose behind exemptions is two-fold. Exemptions help individuals to protect at least part of their property while also preventing those in financial trouble from becoming wards of the state."); James Winston Kim, Comment, *Saving Our Future: Why Voluntary Contributions to Retirement Accounts are Reasonable Expenses*, 26 EMORY BANKR. DEV. J. 341, 362–63 (2010) ("The purpose of the exemptions is to provide the debtor with the means to support themselves post-bankruptcy.").

103. Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 505 (2009) ("Bankruptcy serves the interests of creditors by providing them with an equitable distribution of the debtor's nonexempt assets."); Michael D. Martinez, Note, *Where There's a "Will," There Should be a Way: Why* In re *Salvino Unjustifiably Restricts the Application of 532(a)(6) to Exclude Willful and Malicious Breaches of Contract*, 29 N. ILL. U. L. REV. 441, 447 (2009) (recognizing both the equitable distribution purpose and the fresh start purpose of consumer bankruptcy); Carrie B. Williamson, Note, *Missouri's Section 287.865.5 Proof of Claim Filing Requirement: Are Injured Employees Getting a Fair Shake?* 75 MO. L. REV. 271, 304 (2010); *see also* Gandy v. Gandy (*In re* Gandy), 299 F.3d 489, 498 (5th Cir. 2002) ("This dispute intimately implicates a central purpose of the Bankruptcy Code: the expeditious and equitable distribution of the assets of Debtor's estate."); Sakowitz, Inc., v. Chase Bank Int'l, 110 B.R. 268, 271 (Bankr. S.D. Tex. 1989) (noting the primary purpose of the Code is to provide an equitable distribution of assets among creditors).

104. *See* Tedra Hobson, Note, *The Bankruptcy Abuse Creation Act?: Curing Unintended Consequences of Bankruptcy Reform*, 40 GA. L. REV. 1245, 1247 (2006).

105. *See* 11 U.S.C. § 704(a)(1) (2012) (establishing the duty of the trustee to collect and reduce the property of the debtor's estate to money).

distributed to creditors pro rata[106] under a priority scheme in the Code.[107] Although a fundamental purpose of Chapter 7 is to provide a distribution of non-exempt assets to creditors, in most cases there are no significant non-exempt assets to distribute.[108] In fact, most consumer Chapter 7 cases are no-asset cases in which there are no funds available to distribute to creditors.[109]

III. CORE VIRTUES OF CHAPTER 7 CONSUMER BANKRUPTCY

The two competing purposes of Chapter 7 are much more than abstract goals or desired outcomes of Chapter 7. Together they are designed to serve the interests of both debtors and creditors.[110] The two purposes are a manifestation of two core virtues that serve as the philosophical underpinning of Chapter 7 consumer bankruptcy—hope and fairness.[111] Hope for debtors that they can become productive members of society who are not burdened with debt, and fairness for creditors in an equitable treatment in the bankruptcy case.[112]

A. Hope for Debtors

To understand the hope that Chapter 7 provides for debtors, we must first define what is meant by hope in this context. Professors Kathryn Abrams and Hila Keren provide a thoughtful definition and framework of hope in the context of law that can be used in the consumer bankruptcy domain.[113] Professors Abrams and Keren define hope in this way: "[H]ope takes as its object 'a future good that is arduous and difficult but nevertheless possible to obtain.'"[114] This

106. *See* Alper, *supra* note 85, at 1915; *see also* Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Law"*, 42 SETON HALL L. REV. 1081, 1092 (2012) ("The primary duty of the trustee is to secure and sell the debtor's non-exempt assets and to use the proceeds to pay claims of unsecured creditors on a *pro rata* basis."); Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 209 (1998) ("The trustee sells the assets and uses the proceeds to pay creditors on a pro rata basis.").

107. 11 U.S.C. § 726(a) (providing the statutory scheme for distribution of assets among creditors); *see also* Judy Gedge, *Should Deficiency Judgments be Banned? Teaching Materials Designed to Promote an Informed Student Debate*, 19 J.L. BUS. & ETH. 65, 75 (2013) ("In a Chapter 7 bankruptcy, the debtor's assets are sold by the bankruptcy trustee with the liquidation proceeds distributed to the creditors in accordance with the Bankruptcy Code.").

108. Hobson, *supra* note 104, at 1247.

109. Flynn, *supra* note 49, at 48; *see also* Dalie Jimenez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009) ("This Article finds that 93% of Chapter 7 individual debtors did not have any unencumbered non-exempt assets that could be distributed to unsecured creditors.").

110. Jimenez, *supra* note 109, at 795.

111. *Id.* at 795–96 (explaining that the system provides hope for the debtor by creating a fresh start, and fairness to the creditor by promoting a more efficient manner in collecting debts).

112. Bankruptcy promotes other virtues as well, including the virtues of equity and justice. Bruckner, *supra* note 2, at 256.

113. *See generally* Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319 (2007).

114. *Id.* at 324.

definition of hope is not an abstract feeling or concept, but it is aimed at a goal.[115] That future goal is "arduous and difficult," but still attainable.[116]

Hope for the consumer debtor burdened with debt is the future good of living unburdened by debt and being a productive member of society.[117] This goal is not easy for most. Middle and lower income individuals face a host of financial challenges and difficulties.[118] To overcome these challenges and difficulties is not impossible, but can be quite difficult.

Chapter 7 bankruptcy, through discharge and exemptions, provides a debtor legal tools and a framework to have hope in the future.[119] The legal relief can make the future goal of living unburdened by consumer debt and being a productive member of society reachable.[120]

B. Fairness to Creditors

To understand the fairness for creditors, we must first attempt to define what is meant by fairness in the bankruptcy context. It is important to recognize at the outset that "fairness" is an elusive concept in the law.[121] Even so, at its core, the basic definition of fairness is to "treat people in a way that does not favor some over others."[122] This basic notion of fairness has its roots in Deontology, where "[m]embers of society in the same position should be treated equally."[123]

In the context of bankruptcy law, bankruptcy courts should treat similar situations in the same way.[124] From a creditor perspective, this would entail similar creditors being treated the same in a bankruptcy case. Fairness is achieved—i.e., similar treatment for creditors—in bankruptcy by providing creditors the opportunity to share in a distribution of assets on a pro rata basis as set forth in the Code.[125] The Code provides that "similarly situated creditors

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115. *Id.* at 325.

116. *Id.*

117. *See* Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 515–16 (1991).

118. *See* MILES RAPOPORT & JENNIFER WHEARY, DĒMOS, RUNNING IN PLACE: WHERE THE MIDDLE CLASS AND THE POOR MEET 1 (2013), http://www.demos.org/sites/default/files/publications/RunningInPlace_0.pdf (addressing the economic and environmental factors affecting both the poor and middle classes, including lack of social mobility, the rise of low-wage jobs, and unexpected medical costs).

119. *See supra* Part II.

120. *See* Efrat, *supra* note 92, at 141.

121. Austin, *supra* note 106, at 1138.

122. *Fairness*, MERRIAM-WEBSTER.COM, http:// www.merriam-webster.com/dictionary/fairness (last visited Feb. 24, 2016).

123. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 653 (2001).

124. *See*, *e.g.*, Austin, *supra* note 106, at 1138–39 (noting concerns of unfairness when the geographic location causes different outcomes for similar situations).

125. 11 U.S.C. § 726(a)–(b) (2012) (detailing the order that claims are to be paid and requiring that payments be made on a pro rata basis).

receive equal distributions from the estate."[126] It is fundamental bankruptcy policy to ensure that there is an equitable distribution among creditors.[127]

IV. HOPE AND FAIRNESS IN THE POST-REFORM ACT ERA

When Chapter 7 consumer bankruptcy functions in a way that promotes outcomes reflecting both the virtues of hope and fairness, the consumer bankruptcy legal system is achieving its purposes of "protect[ing] people, provid[ing] services, and achiev[ing] justice."[128] Achieving these purposes is the primary virtue of any legal system. However, Chapter 7 consumer bankruptcy cannot achieve this primary virtue without promoting hope and fairness.

A. Diminishing Hope

During the decade since the Reform Act, hope has diminished for individual debtors, primarily due to a decline in access to Chapter 7 consumer bankruptcy relief.[129] Two primary issues have impacted access to relief: (1) it costs more to file for Chapter 7 relief,[130] and (2) there are artificial statutory hurdles to qualifying for relief.[131] Both of these issues are related and greatly impact access.

1. Increased Costs to File

Scholars and attorneys agree that the costs to file Chapter 7 have greatly increased since the Reform Act.[132] Attorney fees in Chapter 7 asset cases have increased 30% since the Reform Act.[133] Attorney fees in Chapter 7 no-asset cases have increased 48% since the Reform Act.[134]

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126. Bruckner, *supra* note 2, at 256.

127. Koch Ref. v. Farmers Union Cent. Exch., Inc., 831 F.2d 1339, 1344 (7th Cir. 1987).

128. Rubin, *supra* note 4, at 881.

129. *See generally* Robert J. Landry, III & David Read, *Erosion of Access to Consumer Bankruptcy's "Fresh Start" Policy in the United States: Statutory Reforms Needed to Enhance Access to Justice*, 7 WM. & MARY POL'Y REV. 51, 52 (2015) (providing a comprehensive treatment of the access to Chapter 7 relief in light of the Reform Act).

130. *See generally* Carlson, *supra* note 40, at 227–28. Professor Carlson argues that the means test has led to higher costs for consumer debtors with no clear benefit in two respects: 1) decreasing abuse of the bankruptcy system, or 2) increasing the return to creditors. *Id.*

131. *See infra* notes 142–49 and accompanying text.

132. Lupica, *supra* note 53, at 30–32 (summarizing the findings of a sample study of Chapter 7 and Chapter 13 case filings, which reveal increased administrative and attorney costs regarding Chapter 7 filings).

133. *Id.* at 69 (showing that attorney fees have increased from $821 to $1,072).

134. *Id.*

Filing fees that are payable to the bankruptcy court[135] have also increased since the Reform Act.[136] Immediately prior to the Reform Act the filing fee was $209, and with enactment of the Reform Act it increased to $274.[137] The current filing fee is now $335.[138] When the attorney fee and filing fee increase, along with other required direct access costs,[139] the direct access cost to filing Chapter 7 no-asset cases has risen 51% since the Reform Act.[140] The direct access cost to filing Chapter 7 asset cases has risen 37%.[141]

2. *Artificial Hurdles*

The statutory means test is complex and riddled with procedural problems.[142] To date, there has not been any showing that the means test has actually improved the consumer bankruptcy system or achieved its purposes of reducing abuse and shifting debtors from Chapter 7 to Chapter 13.[143] Also, the requirement of credit counseling prior to filing has been widely discredited.[144] It is effectively an empty requirement with no clear benefit.[145] It adds not only a procedural hurdle, but also an additional cost to already cash-strapped individuals.[146]

Likewise, debtor education requirements do not seem clearly beneficial.[147] Although the idea of debtor education to help individuals going forward seems positive, and if implemented in a serious fashion would enhance debtors in the

135. 28 U.S.C. § 1930 (2012) (providing the statutory framework for the filing schedule when filing in bankruptcy).

136. Lupica, *supra* note 53, at 68.

137. *Id.*

138. *Schedule of Fees*, U.S. BANKR. CT. N.D. OF ALA., http://www.alnb.uscourts.gov/schedule-fees (effective Dec. 1, 2014).

139. *See supra* text accompanying notes 143–47 (discussing credit counseling and debtor education requirements and associated fees).

140. Lupica, *supra* note 53, at 68 (the total direct access costs have increased from $868 to $1,309).

141. *Id.* at 68–69 (noting further that the mean for attorneys fees, which are included in the total direct access costs, has increased from $821 to $1,072).

142. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 281 (2005) (noting that aspects of the means test are "complicated and arbitrary" and likely to generate litigation).

143. *See, e.g.*, Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 668 (2005) ("The means test is far from perfect. It adds complexity and costs to all cases, and may deter or dismiss relatively few would-be chapter 7 debtors.").

144. Katherine A. Jeter-Boldt, *Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA's Credit Counseling Requirement*, 71 MO. L. REV. 1101, 1110–12 (2006) (highlighting judicial criticism of the credit counseling requirement).

145. *See* Michael D. Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Financial Education*, 97 MARQ. L. REV. 391, 416 (2013) (noting that credit counseling "serves no useful function" and providing empirical support for this vantage point).

146. *Id.* at 411.

147. *Id.* at 429.

future,[148] education requirements as currently implemented are largely a perfunctory procedure to obtain the discharge.[149]

B. Diminished Fairness

Fairness in terms of equitable treatment among creditors does not appear to be diminished. The Code has maintained its distribution scheme requiring pro rata distribution of assets among creditors.[150] However, fairness can be viewed and considered in several ways beyond equitable treatment of similarly situated creditors.

1. Have Chapter 13 Filings Increased and Chapter 7 Filings Decreased?

The Reform Act was designed to increase fairness by shifting debtors from Chapter 7 to Chapter 13.[151] The premise is that creditors would receive more in a Chapter 13 filing through a repayment plan.[152] If this occurred, it would enhance the fairness of the consumer bankruptcy system.[153] However, data does not suggest that this has occurred. One of the few empirical models testing the impact of the Reform Act on filing rates clearly shows that Chapter 13 filings are stable and have stayed close to what they would have been without the Reform Act.[154] Therefore, any increase in overall filings is not based on increases in Chapter 13 filings, but an increase in Chapter 7 filings.[155]

Figure 2 sets forth the yearly filings for consumer Chapter 7 and consumer Chapter 13. Despite the one-time large drop in Chapter 7 filings in 2006, they trended up from 2007 to 2010, reaching over 1.1 million filings. Since 2010 they have trended down each year, reaching 600,885 in 2014.

Chapter 13 filings have followed the same general trend as consumer Chapter 7 filings. After the Reform Act, there was a drop to 248,430 filings. From 2007 to 2010 the filings trended up each year reaching 434,739 in 2010. Since 2010 they have dropped each year, down to 307,783 in 2014.

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148. *Id.* at 416 (noting that the debtor education requirement is good in theory).

149. *Id.* at 429 ("This bounded study serves to re-emphasize most commentators' thoughts and empirical conclusions with respect to the BAPCPA debtor education courses, namely, that as currently constituted they fail to provide any meaningful benefit to the overwhelming number of debtors that file for bankruptcy protection each and every year.").

150. *See* Lupica, *supra* note 53, at 69 (explaining that fees have increased from $654 to $968).

151. Christian E. Weller, et al., *Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Bankruptcy Rate*, 84 AM. BANKR. L.J. 327, 347 (2010).

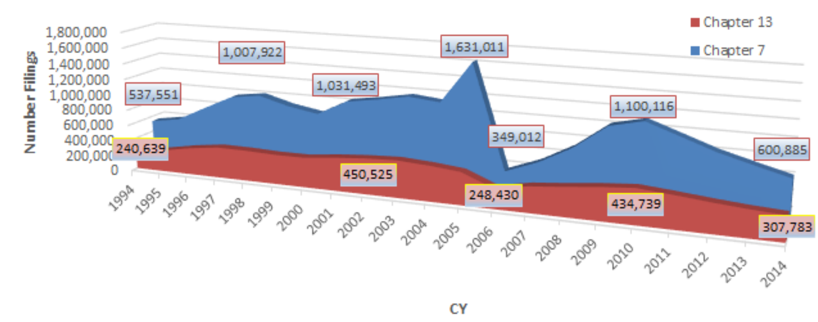
152. *Id.* at 330 (explaining that in Chapter 13 filings, debtors must commit to a repayment plan that typically spans five years).

153. *Id.* at 330 (noting that the repayment plan benefits creditors by ensuring debts are repaid and lowering the incidence of "bankruptcies of convenience").

154. *Id.* at 347.

155. *Id.* at 347–48.

FIGURE 2: Chapter 7 and Chapter 13 Filings in U.S. (CY1994-2014)



[156]

Beyond examining the raw filing numbers and trends of Chapter 7 and Chapter 13, the composition of filings can shed light on the impact of the Reform Act in terms of fairness from a creditor vantage point. Table 1 shows that since enactment of the Code, Chapter 7 accounts for 69.76% of all consumer filings. Prior to the enactment of the Reform Act, from 1980 to 2004, Chapter 7 accounted for 71.3% of all consumer filings. Since the enactment of the Reform Act, from 2006 to 2014, Chapter 7 accounts for 66.99% of all consumer flings. We tested for significance by conducting an analysis of variance using Statistical Package for the Social Sciences ("SPSS") version 22. We found the difference to be statistically significant at the .001 level based on an F value of 12.992. Therefore, we observed a significantly lower percentage of Chapter 7 filings after the legislation took effect.[157]

156. This table is derived from a data set compiled by the author based on data published by the Administrative Office of the U.S. Courts. *See Caseload Statistics Data Tables*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=&pn=32&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= (last visited July 20, 2016).

157. *See supra* Section IV.B.1. (including Fig. 2). Further empirical analysis should be conducted, as the significantly lower percentage of Chapter 7 filings may be overstated due to the onset of Chapter 7 in 2005.

TABLE 1: Percentage of Consumer Filings under Chapter 7 (CY 1980-2014)							
Year	**%**	**Year**	**%**	**Year**	**%**	**Year**	**%**
1980	74.53	*1989*	71.49	*1998*	72.13	*2007*	60.90
1981	72.00	*1990*	70.84	*1999*	70.62	*2008*	66.56
1982	68.88	*1991*	71.02	*2000*	68.91	*2009*	71.48
1983	69.23	*1992*	71.69	*2001*	71.08	*2010*	71.68
1984	69.39	*1993*	70.19	*2002*	70.71	*2011*	70.43
1985	70.26	*1994*	69.08	*2003*	71.19	*2012*	69.20
1986	72.69	*1995*	68.37	*2004*	71.55	*2013*	68.10
1987	73.59	*1996*	69.38	*2005*	80.02	*2014*	66.13
1988	72.90	*1997*	70.95	*2006*	58.42	***Avg***	***69.76***
Source: Administrative Office of U.S. Courts							

2. Actual Return to Creditors in Chapter 7

Beyond no dramatic shift from Chapter 7 to Chapter 13 filings, if we consider the actual return of distributions to creditors over time under Chapter 7, we see a reduced return of assets to unsecured creditors in recent years. From 1996 to 2000, unsecured creditors received 32.3% of assets distributed in Chapter 7; from 2006 to 2011, unsecured creditors received 31.2% of assets distributed in Chapter 7.[158] Interestingly, during these two periods the distributions increased for secured creditors, trustees' fees, and attorneys' fees.[159]

Distributions as a percentage of claims in Chapter 7 cases have also decreased since the Reform Act. Prior to the Reform Act, distributions to unsecured claimholders accounted for 10.4%.[160] After the Reform Act, distributions decreased to 5.1%.[161]

3. Actual Return to Creditors in Chapter 13

Interestingly, although the Chapter 13 filing rate has been relatively steady, the actual return to unsecured creditors in Chapter 13 cases has declined since the Reform Act.[162] Prior to the Reform Act, the return to unsecured creditors in Chapter 13 was 29.5%, whereas in the Post-Reform Act Era it decreased to 26.4%.[163]

4. Continued Lack of Fairness Based on Geography

Lack of fairness in terms of equitable treatment based on geography continues under the Reform Act. The inconsistency of exemptions offered from state to state leads to variation in terms of the percentage of asset cases.[164] Some states,

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158. Flynn, *supra* note 49, at 49 tbls. 3 & 4.
159. *Id.* (showing that the distributions from assets for secured creditors increased from 29.1% to 32.4%, for trustees' fees from 4.4% to 6.3%, and for attorneys' fees from 11.7% to 13.1%).
160. Lupica, *supra* note 53, at 85.
161. *Id.*
162. *Id.* at 84.
163. *Id.*
164. Flynn, *supra* note 49, at 49.

such as Georgia and Rhode Island, have asset cases under 2%, whereas other states, such as Montana and Kansas, have asset cases in excess of 30%.[165] Furthermore, varying state level exemptions have led to disparate results for creditors solely because of the debtor's state of residence.[166] This inequity, or lack of fairness, has no justification in bankruptcy policy.[167] Thus, the Reform Act exacerbates the lack of fairness in treatment of creditors based solely on geographical boundaries.[168]

V. CONCLUSION

Despite the constant claims of abuse of Chapter 7 filings by consumers, there has not been an empirical showing that this perceived abuse occurred prior to the Reform Act or thereafter. In fact, there has been little indication that the bankruptcy system has been improved or enhanced by the Reform Act. Rather, anecdotal evidence indicates that the core virtues that form the philosophical foundation of consumer Chapter 7 are not promoted, and are perhaps actually diminished, by the Reform Act. Policymakers should return to the drawing board and refocus consumer bankruptcy reform in a way that actually promotes the key virtues of hope for debtors and fairness for creditors: By finding a solution that balances the natural tension between these two important virtues.

165. *Id.*

166. *See generally* Ponoroff, *supra* note 6, at 409 (discussing the interplay of federal bankruptcy law and state-level exemptions).

167. *See, e.g.*, Ponoroff, *supra* note 6, at 361, 409 (noting the lack of equity and equality with the disparate treatment of creditors based on the particular applicable state law exemption).

168. Professor Ponoroff summarized the Reform Act's treatment of exemptions as follows:

> [The Reform Act] characteristically ignored the issue of minimally sufficient exemptions for debtors residing in opt-out states with miserly exemptions, and, in its uniquely inelegant style, established an elaborate, confusing, and dreadfully convoluted scheme for attempting to control the practice of abusing high dollar or unlimited state exemptions through forum-shopping and the excessive conversion of nonexempt assets to exempt form on the eve of bankruptcy.

Ponoroff, *supra* note 6, at 359 (internal citations omitted).