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Brent Wilson

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# THE “CURRENT MONTHLY INCOME” DEBATE: UNEMPLOYMENT COMPENSATION AS A “BENEFIT RECEIVED UNDER THE SOCIAL SECURITY ACT”?

BRENT WILSON\*

## I. INTRODUCTION

In an exchange between Senator Russ Feingold of Wisconsin and Professor Todd Zywicki during a hearing in front of the Senate Judiciary Committee debating the 2005 amendments to the Bankruptcy Code (the “Code”) known as the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Professor Zywicki stated, after being pressed by the Senator about the quality of the reform, that “[t]here is no word that I would change in this particular piece of legislation.”<sup>1</sup> Professor Zywicki was a proponent of BAPCPA and perhaps being put on the spot by Senator Feingold caused him to overextend the quality of the

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\* Juris Doctor, *cum laude*, The John Marshall Law School, Jan. 2011. I would like to thank Professor Mary Jean Dolan for exposing me to her brilliant example of legal writing that I will always strive to match. Also, I would like to thank Professor Paul Lewis and Professor Jason Kilborn for early inspiration on this topic, and Professor Allen Kamp for his Social Security Act knowledge and assistance. Finally, I would like to thank Colleen DeRosa for her mentorship, editing, and notes during the writing of this Comment.

1. *Bankruptcy Reform: Hearing on S. 109-1014 Before the Committee on the Judiciary, United States Senate*, 109th Cong., 42 (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:42675.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:42675.pdf). Professor Zywicki, a Visiting Professor of Law at Georgetown University Law Center, testified about the need for bankruptcy reform and was asked questions from Senator Feingold regarding what changes needed to be made to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) before it was enacted into law. *Id.* In this exchange, Senator Feingold asked Professor Zywicki whether the proposed amendments in BAPCPA required any amendments or were perfect the way they were. *Id.* Professor Zywicki responded as stated above: that there was nothing that he would change in BAPCPA. *Id.* Senator Feingold then replied that he did not think that the professor was credible based on his statement that not a word needed to be changed. *Id.* The Senator went on to state that after all the economic changes over the past eight years, he was surprised and concerned about how fast the BAPCPA bill was moving through Congress. *Id.*

BAPCPA reform. Professor Zywicki's support may have wavered slightly since BAPCPA's inception in October 2005, but he is not willing to give up on the amendments just yet.<sup>2</sup>

However, if clarity was a goal, BAPCPA went astray almost immediately in the definitions section. Specifically, the definition of "current monthly income," as described in 11 U.S.C. § 101(10A), creates uncertain consequences in the courts and leaves the need for at least a few words to be changed.

Pursuant to 11 U.S.C. § 101(10A) the Code broadly defines "current monthly income" drawing in every source of income the debtor has available, "[t]he term 'current monthly income'—(A) means the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period [before filing the bankruptcy petition] . . . ."<sup>3</sup> However, after a broad definition of "current monthly income" that taketh away, the Code starts to giveth—in both compensation and confusion. In 11 U.S.C. § 101(10A)(B), "[current monthly income] includes any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents . . . but excludes benefits received under the Social Security Act . . . ."<sup>4</sup>

2. See, e.g., *Circuit City Unplugged: Why Did Chapter 11 Fail to Save 34,000 Jobs?: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (Mar. 11, 2009) (statement of Todd J. Zywicki, Professor, George Mason Univ. Sch. of Law), available at <http://judiciary.house.gov/hearings/pdf/Zywicki090311.pdf> (discussing and refuting concerns about the BAPCPA reform as it applies to Chapter 11, and if those changes caused more businesses to liquidate instead of successfully traversing the strictures of a Chapter 11 plan). The professor contends that it is "tempting to blame BAPCPA" for these problems, but he claims that other factors, like restricted access to debtor-in-possession financing, are more likely the cause for more liquidations of companies who first try Chapter 11 restructuring. *Id.* at 19. The Professor's loyalty to BAPCPA, however, shined through as he concluded by stating "it is not so easy to point to BAPCPA as the scapegoat." *Id.*

3. The full text of this section states:

The term "current monthly income"—means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on— (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and . . . .

11 U.S.C. § 101(10A)(A) (2006).

4. The full text of this section states:

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but

This section begs the question: what exactly does "benefits received under the Social Security Act" mean? Does this phrase mean that any funds received from the Social Security Act are excluded? Or must a court determine what funds are "benefits" under the Act and what funds are just indirectly related to the Act and thus excluded from "current monthly income"? While bankruptcy courts in many districts have not yet faced this issue, the trend seems to be to include unemployment compensation in the calculation.<sup>5</sup>

Unemployment compensation has a connection with the Social Security Act.<sup>6</sup> This connection is pertinent to any discussion of BAPCPA's current effect on debtors due to the fact that the unemployment rate is higher today than it has been for twenty-six years, and it appears it will stay that way for the foreseeable

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excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

11 U.S.C. § 101(10A)(B) (2006) (emphasis added).

5. See, e.g., *In re Overby*, No. 10-20602, 2010 WL 3834647, at \*5 (Bankr. W.D. Mo. Sept. 24, 2010) (holding that unemployment compensation should be included in "current monthly income" calculations); *In re Winkles*, No. 10-30137, 2010 WL 2680895, at \*5 (Bankr. S.D. Ill. July 6, 2010) (holding that unemployment compensation is not a benefit received under the federal Social Security Act but rather paid by the State of Illinois); *In re Nance*, No. 09-05604, 2010 WL 2079653, at \*2-3 (Bankr. S.D. Ind. May 21, 2010) (incorporating by reference *In re Kucharz* and adopting the line of reasoning that unemployment compensation is included in "current monthly income" calculations); *In re Rose*, No. 09-70088, 2010 WL 2600591, \*3 (Bankr. N.D. Ga. May 12, 2010) (gleaning Congress's "intent" from the Bankruptcy Code in finding that "current monthly income" should include unemployment compensation); *In re Kucharz*, 418 B.R. 635, 643 (Bankr. C.D. Ill. 2009) (holding that unemployment compensation should be included in calculating a debtor's "current monthly income"); *DeHart v. Baden (In re Baden)*, 396 B.R. 617, 623 (Bankr. M.D. Pa. 2008) (holding that unemployment compensation should be included in the "current monthly income" calculation of debtors); *In re Munger*, 370 B.R. 21, 26 (Bankr. D. Mass. 2007) (holding unemployment compensation is a "benefit received under the Social Security Act" and thus excluded from the "current monthly income" calculation of debtors); *In re Sorrell*, 359 B.R. 167, 183 (Bankr. S.D. Ohio 2007) (holding that unemployment compensation is excluded from the "current monthly income" calculation of debtors due to it being a "benefit received under the Social Security Act").

6. See generally 42 U.S.C. § 501 (2006) (laying out what is required of the states under the Social Security Act, so that they may receive federal funds for unemployment compensation assistance). Specifically, Section 501 states: "The amounts made available pursuant to section 1101(c)(1)(A) of this title for the purpose of assisting the States in the administration of their unemployment compensation laws shall be used as hereinafter provided." 42 U.S.C. § 501 (2006).

future.<sup>7</sup> Nonetheless, the question of whether unemployment compensation should be considered a “benefit received under the Social Security Act” per Section 101(10A)(B) remains unanswered. Therefore, what is included in “current monthly income” of debtors is undefined for most.

With unemployment higher than it has been in decades, and as more and more unemployed debtors file for bankruptcy, the issue of whether unemployment compensation should be considered in calculating a debtor’s “current monthly income” is and will continue to be intensely contested.

Part II of this Comment will address the background of the BAPCPA reforms and the consequences it has produced since being enacted in 2005. Next, Part III will address the first five cases to decide whether unemployment compensation is a “benefit received under the Social Security Act,” and the courts’ reasoning, as well as some commentators’ positions on this issue. Finally, Part IV and Part V will propose a plain meaning approach to analyzing the Code and conclude that an attempt to go beyond this approach to find Congress’s “intent” in drafting Section 101(10A)(B) is futile and produces inconsistent judgments.

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7. See Chris Isidore, *Job Losses Ebb, but Unemployment Up*, CNNMONEY.COM, Sept. 4, 2009, [http://money.cnn.com/2009/09/04/news/economy/jobs\\_august/index.htm?postversion=2009090408](http://money.cnn.com/2009/09/04/news/economy/jobs_august/index.htm?postversion=2009090408) (discussing the rising unemployment rates throughout the country and signs of improvement in the economy based on fewer job losses reported). The forecast by economists for early 2010 was hopeful for a recovery to begin. *Id.* However, in reality the unemployment numbers have not nosed over just yet. See e.g., Andy Soltis, *Unemployment Hits Highest Level Since '83*, N.Y. POST, Mar. 7, 2009, [http://www.nypost.com/p/news/politics/unemployment\\_hits\\_highest\\_level\\_8DM79syj2pq4y8Eic4IgDN](http://www.nypost.com/p/news/politics/unemployment_hits_highest_level_8DM79syj2pq4y8Eic4IgDN) (stating that “[t]he number of Americans without a job has hit 12.5 million—larger than the population of Pennsylvania, and the highest since the government began tracking the totals in 1940”); Jeannine Aversa and Christopher S. Rugaber, *Unemployment Rate Holds Steady at 10%, 85,000 Jobs Lost in December*, THE HUFFINGTON POST, Jan. 8, 2010, [http://www.huffingtonpost.com/2010/01/08/unemployment-rate-decembe\\_n\\_416008.html](http://www.huffingtonpost.com/2010/01/08/unemployment-rate-decembe_n_416008.html) (noting “[t]he number of unemployed has hit 15.3 million, up from 7.7 million when the recession started in at the end of 2007 . . . [a]nd the number of people jobless for at least six months hit a record of 6.1 million”). Economists think that the unemployment rate will rise in the early months of 2010 and could reach eleven percent, which would be the highest rate of unemployment since World War II. *Id.* And into the years to come, “[m]ost economists think unemployment will rise this year and stay high into 2012.” *Id.*

## II. BACKGROUND

*A. Congress's Determination that the Bankruptcy Code Was Being Abused by Can-pay Debtors Leads to a New Approach: "I Don't Mind Stealing Bread from the Mouths of Decadence"*<sup>8</sup>

In 2005, Congress passed BAPCPA.<sup>9</sup> This reform of the Bankruptcy Code had the goal of finding the debtors that have the ability to pay their creditors and making them pay, instead of allowing these debtors to get the complete liquidation of their assets and the fresh start that comes with the discharge of all debts.<sup>10</sup> Before BAPCPA, a bankruptcy court would have discretion to dismiss a Chapter 7 filing based on the individualized financial position of the debtor.<sup>11</sup> The Code, at that time, required a showing of "substantial abuse" for a judge to dismiss, but "there was a presumption in favor of granting the relief sought by the debtor."<sup>12</sup>

Now, BAPCPA calls for the debtor's "current monthly income" to be calculated, and if it is above the median income for the debtor's family size in the debtor's state, the debtor is subject to further inquiries into his or her income and expenses.<sup>13</sup> This process is now referred to as the "means test."<sup>14</sup>

The questions now are: why did Congress believe that this type of abuse was occurring, and who did Congress believe was the primary offender? Many in Congress believed that bankruptcy filings increased because debtors realized that they could avoid their debts and obtain a quick discharge. However, the increase was more likely caused by other factors (for example, lack of health insurance with significant injury or illness, job loss, the endless amount of credit card solicitations, etc.).<sup>15</sup> BAPCPA and

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8. TEMPLE OF THE DOG, *Hunger Strike*, on TEMPLE OF THE DOG (A&M Records 1991).

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

10. See ELIZABETH WARREN AND JAY WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 150 (6th ed. 2009) [hereinafter *THE LAW OF DEBTORS AND CREDITORS*] (discussing the presumption of abuse that Congress created in BAPCPA to ensure that all debtors who have what Congress believes to be enough money to pay their creditors are not allowed Chapter 7 relief but are forced into Chapter 13).

11. *Id.* at 151.

12. *In re King*, No. 08-41975, 2009 WL 62252, at \*3 (Bankr. E.D. Tex. Jan. 6, 2009).

13. 11 U.S.C. § 707(b)(1) (2006).

14. See, e.g., *In re Rudler*, 576 F.3d 37, 40 (1st Cir. 2009) (noting BAPCPA was created to reduce Chapter 7 filings by several measures, one of which was the means test, which relaxed the standard of dismissing a case for "abuse" as opposed to the previous requirement of a finding of "substantial abuse").

15. See *Bankruptcy Reform: Hearing on S. 109-1014 Before the S. Comm. on the Judiciary*, 109th Cong. 10-12 (2005), available at

the means test clearly target the high earning, consumer debtor who seeks the discharge of Chapter 7 in order to skirt the obligations to repay his or her creditors.<sup>16</sup> Having identified the target, Congress further determined that the only type of debtor that would engage in this sort of abuse is the debtor with “primarily consumer debts.”<sup>17</sup> “Consumer debt” is defined by the Code as “debt incurred by an individual primarily for a personal, family, or household purpose.”<sup>18</sup> It is therefore clear that Congress

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[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:42675.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:42675.pdf) (remarks of Professor Elizabeth Warren) (pointing out that the means test treats all debtors alike in that the test assumes that the debtors are in bankruptcy solely because the debtor overspent). Professor Warren points out that the means test fails to take into account that, generally, empirical data suggest that the people who are in bankruptcy are forced there due to an unexpected life event or tragedy not the indulgent lifestyle assumed by some individuals of Congress. *Id.* See also Robert M. Lawless, et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debts*, 82 AM. BANKR. L.J. 349, 350 (2008) (discussing empirical research conducted that found that many people are still struggling with ever increasing debt—likely even more individuals than before the BAPCPA amendments—but the amount of bankruptcy filings after BAPCPA have dramatically dropped).

16. “[BAPCPA] requires the bankruptcy trustee to examine the income and expenses of high-income debtors and determine whether they have the ability to pay something toward their debts.” 151 CONG. REC. S1779 (daily ed. Feb. 28, 2005) (remarks of Sen. Specter).

17. Section 707(b)(1) states:

After notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter *whose debts are primarily consumer debts*, or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

11 U.S.C. § 707(b)(1) (2006) (emphasis added).

18. 11 U.S.C. § 101(8) (2006). See also David W. Allard et al., *Means Test—Can it Work?*, 061506 AM. BANKRUPTCY INST. 11 (June 15 – 18, 2006) (stating that pre-BAPCPA determination of whether the debtor’s debts were primarily consumer was for the purposes of determining “substantial abuse” under the old section 707(b), but now, BAPCPA makes this determination a “threshold issue” in order to determine whether the debtor has to be subject to the means test). This now creates the issue of how one determines what is “primarily” consumer debt. *Id.* The Bankruptcy Code does not define the term “primarily” thus this is open to interpretation by the courts. *Id.* The possibility of a debtor with many consumer creditors but with just one judgment creditor against his business operations in an amount that dwarfs the consumer debts yields a gray area. See THE LAW OF DEBTORS AND CREDITORS, *supra* note 10, at 166-67 (proposing a similar hypothetical set of facts that is meant to draw the

singled out the consumer debtor and did not create the means test to prevent corporate abuse of the bankruptcy process.<sup>19</sup>

The results of BAPCPA in accomplishing what Congress intended, as laid out above, have been less than perfect.<sup>20</sup> The high-living, high-income debtor who incurs debt only to get it discharged by abusing Chapter 7 seems to be a convenient justification created or dreamed up by Congress to push forward reform of the allegedly overloaded bankruptcy system.<sup>21</sup> If, however, the goal was simply to reduce what Congress saw as too many bankruptcy filings, then it worked marvelously.<sup>22</sup> As a result of BAPCPA, more low-income debtors struggle longer and incur more debt than before the 2005 amendments to the Bankruptcy Code.<sup>23</sup> Thus, the bread stolen is not from the decadent but from

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reader's attention to the issue of what exactly "primarily consumer debts" means).

19. See generally 11 U.S.C. § 707(b)(1) (2006) (making no reference to corporate or business debtors and thus excluding these type of debtors from the rigors of the means test).

20. See generally Lawless, *supra* note 15, at 353 (reviewing empirical research that indicates that the individuals who filed in 2007 have basically the same income as those who filed in 2001, before BAPCPA, but noting that the amount of filings in 2007 was reduced by 800,000). BAPCPA was designed to make high-income debtors pay more of their debts, thus there should have been a shift up in the incomes of the individuals who were filing after BAPCPA. *Id.* "These income data suggest that instead of functioning like a sieve, carefully sorting the high-income abusers from those in true need, the amendment's means test functioned more like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual income circumstances." *Id.*

21. THE LAW OF DEBTORS AND CREDITORS, *supra* note 10, at 144. "From early 1980s to the early 2000s the number of bankruptcy filings had quadrupled. By 2004, about one in every 75 households across the country filed for bankruptcy. With more than 1.5 million cases filed (and more than 2 million people filing, counting husbands and wives who file jointly), bankruptcy had become far more common than our forebears could have imagined." *Id.*

22. See Lawless, *supra* note 15, at 350 (stating that after BAPCPA there were 800,000 less families filing for bankruptcy). The authors refer to the missing 800,000 as "squeezed from the system after BAPCPA." *Id.* at 378.

23. *Id.* at 349-50 (stating that throughout this decade families have been under increasing amounts of financial stress because median family incomes have declined, basic expenses for the family have increased, default on credit cards and care loans is extremely high, foreclosures are up, and, generally, Americans are "shouldering" unprecedented amounts of debt). Families that filed for bankruptcy in 2007 compared to the families who filed in 2001 had significantly more debt loads, but this trend began before BAPCPA and is in line with that upward trend of debt. *Id.* at 375. BAPCPA foreclosed the options of many of these families that were incurring more debt to seek bankruptcy protection, and required them to tough it out without the safety net that bankruptcy provides. *Id.* BAPCPA caused the bankruptcy filings to drop dramatically but it did not lessen the amount of debt loads that the families are now living with instead of filing for bankruptcy. *Id.*



the dispossessed.

### B. *The Guarded Gates of the Chapter 7 Promised Land*

The “heart of BAPCPA” is the means test of section 707(b).<sup>24</sup> One court explained the intent behind this test by stating, “Congress intended that there be a uniform and readily-applied formula for determining when the bankruptcy court should presume that a debtor’s [C]hapter 7 petition is an abuse and for determining an above-median debtor’s disposable income in [C]hapter 13.”<sup>25</sup>

Since the 2005 enactment of the means test in BAPCPA, it has had many detractors.<sup>26</sup> Even so, BAPCPA institutes the means test as a hoop that consumer debtors must jump through in order

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24. “The heart of [BAPCPA] is the means test.” 151 CONG. REC. S1779 (daily ed. Feb. 28, 2005) (remarks of Sen. Specter). *See also* Sandra Manocchio, *Means Testing: The Heart of BAPCPA*, 40 MD. B.J. 26, 30 (2007) (discussing the “means test” and the issues that it has presented to bankruptcy courts since 2005). The “current monthly income” position taken by the United States Trustee is that unemployment compensation is *included* in the calculation. *Id.* at 28 (emphasis added).

25. *In re Kimbro*, 389 B.R. 518, 527 (6th Cir. BAP 2008) (labeling the means test as a “bright-line” test that eliminates judicial discretion). *See also* THE LAW OF DEBTORS AND CREDITORS, *supra* note 10, at 151 (referring to the means test, Congress gave a clear instruction to the courts to presume abuse exists according to the means test formula of income less expenses if the amount is more than the test allows). “The starting point is unambiguous: No more judicial weighing and measuring what constitutes abuse under the highly individualized circumstances of each person who files for bankruptcy relief. Instead . . . the judges have their marching orders from Congress: Apply the formula to all Chapter 7 filers, then dismiss or convert the cases that the formula identifies as abusive.” *Id.*

26. *See Kimbro*, 389 B.R. at 528 (stating “[t]he clear policies behind the means test were the uniform application of a bright-line test that eliminates judicial discretion. Plainly, Congress determined that these policies were more important than accuracy”); A. Jay Cristol and Cheryl Kaplan, *11 U.S.C. § 707(b)(2)(A)(III): Does it Mean What it Says and Say What it Means?*, 19 U. FLA. J.L. PUB. POL’Y 1, 2 (2008) (discussing Chief Judge Emeritus of the Bankruptcy Court for the Southern District of Florida Jay Cristol’s view of BAPCPA’s means test, referring to it as, “Congress’s ill-conceived attempt to curb abuse in bankruptcy . . .”); Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 281 (2005) (stating that the means test is likely to generate a lot of litigation and a lot of confusion; also referring to the test as “complicated and arbitrary”); THE LAW OF DEBTORS AND CREDITORS, *supra* note 10, at 142-52 (discussing the means test and the problems in its application). “The test for eligibility in Chapter 7 is complex. In the 2005 legislation, it filled two printed, single-spaced pages. Like a big meal that can’t be digested all at once, the new formula is best understood when broken into smaller parts.” *Id.* at 150. *See also* Marianne B. Culhane and Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 668 (Winter 2005) (stating, “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.”).

to obtain relief in Chapter 7 through its desired, typically quick discharge.<sup>27</sup> If a debtor fails the means test, he or she is not allowed to enter Chapter 7, and instead, the debtor must propose a repayment plan to his or her creditors and go the route of Chapter 13.<sup>28</sup>

The means test incorporates "current monthly income" of Section 101(10A) into its formula; based on the initial calculations, one may find themselves with entry into Chapter 7 or with more calculations to do.<sup>29</sup> If the debtor "passes" the means test, the debtor is not necessarily off the hook and into the open arms of Chapter 7.<sup>30</sup> The debtor may still be bound by a finding of "abuse"—a lesser standard than "substantial abuse" of the pre-BAPCPA Bankruptcy Code—which will allow the bankruptcy judge to use his or her discretion in converting the Chapter 7 into a Chapter 13 or Chapter 11 or even dismissing the case outright.<sup>31</sup> Although these other steps are beyond the scope of this Comment, some highly recognized bankruptcy scholars have recognized the

27. 11 U.S.C. § 707(b) (2006). *See also* Culhane & White, *supra* note 26, at 665 (beginning the article by stating "[t]he much heralded means test now guards the gates of chapter 7").

28. *See generally* 11 U.S.C. § 707(b) (2006) (describing at great length the means test and its requirements). In the pre-BAPCPA Bankruptcy Code, section 707(b) used to be the section that called for the bankruptcy judge to dismiss or convert a Chapter 7 filing for "substantial abuse" in three sentences, but now, the revised version of Section 707(b) created by BAPCPA covers five single-spaced pages with seven subsections. Culhane & White, *supra* note 26, at 668.

29. Section 707(b)(2)(A)(i) states:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's *current monthly income* reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$7,025, whichever is greater; or (II) \$11,725.

11 U.S.C. § 707(b)(2)(A)(i) (2006) (emphasis added).

30. *See generally* 11 U.S.C. § 707(b)(3) (2006) (noting that even if the debtor passes the means test laid out in Section 707(b)(2), the court could nonetheless declare that the debtor's Chapter 7 filing is an "abuse"). This section relies on "bad faith" and "totality of the circumstances" analysis that can lead to dismissal or conversion by the court. *Id.*

31. Section 707(b)(3) states:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b)(3) (2006).

“abuse” sections as “catch-all categories with no clear guidelines.”<sup>32</sup>

*C. Debtor Asks, “Is Unemployment Compensation a ‘Benefit Received Under the Social Security Act?’: Means Test Form Responds, “You Tell Me”*

The official means test form, 22A, is of no help to a debtor trying to determine whether his or her unemployment compensation should be included in the “current monthly income” calculation: “if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below.”<sup>33</sup> Without guidance, the debtor is left to determine if his or her income is a “benefit received under the Social Security Act”.

Few courts have decided the issue of whether debtors must include their unemployment compensation in their “current monthly income” calculation, and the courts that have disagree about whether it should be included or excluded.<sup>34</sup> Additionally, bankruptcy judges have written articles that discuss the means test and their different perspectives on the “current monthly income” debate.<sup>35</sup> As of the date of this writing, no district court or higher court has taken the invitation to resolve this ambiguity and disagreement.

*D. The Social Security Act as It Pertains to Unemployment Compensation*

The Social Security Act (the “Act”) as it pertains to unemployment compensation has a stabilizing effect on industry because it aims to provide prompt, partial replacement wages to individuals who have lost their job to allow workers to “tide

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32. THE LAW OF DEBTORS AND CREDITORS, *supra* note 10, at 151 (noting that Congress left some discretion to the bankruptcy judges to find that there were “special circumstances” like a serious medical condition or service in the military that may justify calculation adjustments).

33. Statement of Current Monthly Income, (Official Form 22A) (January 2008).

34. *See* sources cited *supra* note 5 (showing that different courts come to different conclusions regarding whether or not unemployment compensation should be included in a debtor’s “current monthly income” calculation).

35. *See, e.g.*, Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 247 (2005) (opining that excluding unemployment compensation from the “current monthly income” calculations of the debtors “would be a strained interpretation . . . since unemployed individuals received no benefits ‘under the Social Security Act’ but only under the programs adopted by the states, which may provide benefits beyond those that are federally funded.”). Judge Wedoff’s opinion is in accord with the holdings of the courts in the cases of *In re Baden* and *In re Kucharz*. *See generally Kucharz*, 418 B.R. at 643; *Baden*, 396 B.R. at 623.

themselves over.”<sup>36</sup> The Act is a federal law that provides the states funding to distribute unemployment compensation to their citizens in a way the state determines, but subject to federal approval.<sup>37</sup> In this way, the Code and the Act collide. The following illustrates the collision between the Bankruptcy Code and the Social Security Act: “unemployment compensation will present a difficult problem since it is partially funded by the federal government under the Social Security Act, and social security benefits are not included in ‘current monthly income.’”<sup>38</sup>

The next section of this Comment will examine the cases and commentators that have taken positions on the “current monthly income” debate. Part IV will propose a resolution to the conflict.

### III. ANALYSIS

This section will examine how courts and commentators view the issue of whether unemployment compensation should be considered in the “current monthly income” calculation. The first section will review the approach of courts that faced this issue before the changes that came with BAPCPA. Section B will examine the statutory connection between unemployment compensation and the Social Security Act. Next, section C will discuss the cases and commentators who have decided that unemployment compensation is included in a debtor’s “current monthly income.” Finally, section D will address the courts holding that unemployment compensation is excluded from a debtor’s “current monthly income.”

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36. See generally *California Dept. of Human Res. Dev. v. Java*, 402 U.S. 121, 132 (1971) (quoting H.R. Rep. No.615, 74th Cong., 1st Sess., 7 (1935)) (examining the beginning of the Social Security Act as established by executive order of President Roosevelt in 1935).

37. See, e.g., *Java*, 402 U.S. at 135 (overturning California’s applicable unemployment compensation statute due to it being inconsistent with the Social Security Act); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 n.3 (1981) (stating that all states have unemployment compensation as provided by the Social Security Act, but these states can, if they so choose, expand the amount of protection provided to their citizens and in that way go beyond what is required of them by the Social Security Act).

38. Ronald R. Peterson, *A Means Test by No Means* 11 U.S.C. § 707 and BAPCPA, AM. CONFERENCE INST., p. 6 (Jan. 23, 2006). See also Allard et al., *supra* note 18 (reiterating the point that unemployment compensation is a gray area as a “benefit received under the Social Security Act,” and laying out the arguments for and against including unemployment compensation in the “current monthly income” calculation of debtors).

### A. Unemployment Compensation as "Income" before BAPCPA

Congress created a new phrase, "current monthly income," in the BAPCPA reform and defined it in Section 101(10A).<sup>39</sup> Prior to the adoption of BAPCPA, unemployment compensation and other forms of state aid were included in the calculation of disposable income of the debtor.<sup>40</sup> The courts pre-BAPCPA would allow for things like unemployment compensation to be used to fund a Chapter 13 plan.<sup>41</sup>

Recently, Judge Leif M. Clark of the Western District of Texas noted this fact but pointed out, "[o]f course, those pre-BAPCPA decisions did not have to struggle with a definition of 'disposable income' that incorporated a new defined term, 'current monthly income,' as is now the case under BAPCPA."<sup>42</sup>

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39. See Culhane & White, *supra* note 26, at 674 (noting the new definition of "current monthly income" and how it is calculated).

40. See, e.g., *In re Hickman*, 104 B.R. 374, 377 (Bankr. Dist. Colo. 1989) (holding that "public assistance income" does allow a debtor to qualify for Chapter 13); *In re Compton*, 88 B.R. 166, 167 (Bankr. S.D. Ohio 1988) (holding that even though the Chapter 13 debtor was about to lose her unemployment compensation and possibly get a higher paying job, the unemployment compensation noted in the Chapter 13 plan would be used to create the budget of the debtor); *In re Overstreet*, 23 B.R. 712, 713-14 (Bankr. W.D. La. 1982) (holding that a debtor in Chapter 13 can use unemployment compensation to make his or her Chapter 13 plan feasible even though the length of the compensation would not last the entire time of the debtor's plan). The thrust of these cases, therefore, is that if an individual debtor decides that he or she would like to repay debts with public aid, or any other type of income that is sufficiently stable and regular, then the courts would not deny this debtor his or her right to do so.

41. See, e.g., *In re Overstreet*, 23 B.R. at 714 (allowing a debtor to use unemployment compensation to make the Chapter 13 plan feasible). See also *supra* note 40 (describing noteworthy Chapter 13 cases where the court allowed the debtor to do what he or she initially wanted to do, which is propose a Chapter 13 repayment plan to be paid with their public assistance cash). The cases did not limit an individual's access to a Chapter of the Bankruptcy Code that they deemed necessary, but rather the courts allowed the debtors to propose to repay their debts with these funds as they saw fit. *Id.* If the outcome were the same after BAPCPA, it could be argued that the court allowed the debtors in these cases to take the carrot provided by Congress in Chapter 13 repayment plans as opposed to prodding these debtors into a Chapter 13 with the stick of calculating "current monthly income" and the means test.

42. *In re Barfknecht*, 378 B.R. 154, 160 (Bankr. W.D. Tex. 2007) (holding Social Security benefits received under the Social Security Act are excluded from the calculation of "current monthly income" and thus by reference from "projected disposable income," as described by 11 U.S.C. § 1325(b)(2), which incorporates the definition of "current monthly income" into its formula). Section 1325(b)(2) states:

For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the

In short, BAPCPA has changed the rules and what is past, at least in the context of determining a debtor's income, is past. A new path of determining "current monthly income" must be blazed.

*B. Statutory Steps: The Connection Between Unemployment Compensation and the Social Security Act*

The link between unemployment compensation and the Social Security Act is found in 42 U.S.C. § 501.<sup>43</sup> The statute expressly provides that the federal government will provide funds to the states "for the purpose of assisting the States in the administration of their unemployment compensation . . . ."<sup>44</sup> A state may elect to have unemployment compensation benefits, but if the state does so it must comply with federal law.<sup>45</sup> As noted by the Bankruptcy Court for the Southern District of Ohio in the case of *In re Sorrell*, "[t]hese mandates are inextricably entwined with the Social Security Act" because if the states are not in compliance with these requirements it will not receive federal funding.<sup>46</sup>

Thus, the Social Security Act created unemployment compensation by giving tax incentives to the states.<sup>47</sup> When the Social Security Act was initially enacted in 1935, states were reluctant to create any funding for unemployment compensation due to the states' concern that this program would cause business to leave for states without this program and higher taxes.<sup>48</sup> The creation of the Social Security Act then rectified this problem by providing a national program that called on the states to create

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extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended . . .

11 U.S.C. 1325(b)(2) (2006).

43. 42 U.S.C. § 501 (2006) states:

The amounts made available to section 1101(c)(1)(A) of this title for the purpose of assisting the States in the administration of their unemployment compensation laws shall be used as hereinafter provided.

44. *Id.*

45. See 42 U.S.C. § 1321 (2006) (laying out what is required of the states to meet the eligibility requirements of the Social Security Act).

46. *In re Sorrell*, 359 B.R. 167, 181 (S.D. Ohio 2010) (noting that pursuant to 42 U.S.C. §§ 503 and 504, the Secretary of Labor must certify each state's compliance with the Social Security Act and noting that if the state law is in contravention of the Social Security Act then the state law will be deemed invalid). See also *Pennington v. Didrickson*, 22 F.3d 1376, 1378 (7th Cir. 1994) (discussing 42 U.S.C. §§ 501-04 and noting that unemployment compensation is administered at the state level and is largely funded by federal funds, but the Secretary of Labor must certify that the states receiving these funds are meeting the federal requirements of the Social Security Act).

47. See *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 587-88 (1937) (pointing out that many states were reluctant to create an unemployment compensation program because the states worried that this would drive away business due to the increase of taxes that this program would require).

48. *Id.*

this program subject to the federal approval of the states' system.<sup>49</sup>

The Supreme Court described the genesis of the unemployment provisions of the Social Security Act as a "response to the widespread unemployment that accompanied the Great Depression. [The Social Security Act] called for a cooperative federal-state program of benefits to unemployed workers."<sup>50</sup> Notably, an alternative proposal to run the unemployment compensation system as a national system failed.<sup>51</sup> With the cooperative setting in place, the states were free to create their own laws governing how the unemployment benefits would be administered, but those states were subject to federal review to ensure compliance with the Social Security Act.<sup>52</sup>

Interestingly, the Social Security Act was originally known as "A Bill to Alleviate the Hazards of Old Age, Unemployment, Illness and Dependency."<sup>53</sup> Edwin E. White, the Executive Director of the Committee on Economic Security who was involved in the drafting of the Social Security Act, notes, "[u]nemployment compensation was regarded by the Committee on Economic Security and its staff as the most important part of the entire legislation."<sup>54</sup> This was likely the case due to the fact that the

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49. *Id.*

50. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 (1981).

51. See EDWIN E. WHITE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 112-14 (Univ. of Wis. Press 1963) (discussing the debates that occurred during the enactment of the Social Security Act where one proposal was to create a federally run unemployment compensation program but noting that President Roosevelt's initial instructions were to create a system of unemployment compensation that had a cooperative approach between the states and the federal government).

52. See, e.g., *Baker v. General Motors Corp.*, 478 U.S. 621, 632-33 (1986) (noting that when Congress enacted the Social Security Act, this "motivat[ed] the enactment of state programs throughout the Nation"). The Court continued by reviewing *Steward Machine Company*, where the Court stated that unemployment compensation was basically a "project" of the states before Congress created the Social Security Act. *Id.* at 633 n.25. After the creation of this Act, the states were then free to create their own scheme of unemployment compensation programs, though they were required to provide a federal minimum of unemployment compensation as provided by the Act. *Id.* at 633.

53. See Social Security Online, Reports and Studies: Senate Hearings on 1935 Bill, <http://www.ssa.gov/history/reports/35senate.html> (last visited, Apr. 11, 2011) (noting the history of the Social Security Act and the title of the original bill). This site allows for access to the 74th Congress Debates about the bill in 1935 shortly after President Franklin D. Roosevelt sent it to Congress for approval. *Id.*

54. EDWIN E. WHITE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 111 (Univ. of Wis. Press 1963). See also W. ANDREW ACHENBAUM, *SOCIAL SECURITY: VISIONS AND REVISIONS* 19-20 (Cambridge Univ. Press 1986) (discussing the beginnings of the Social Security Act). The Committee on Economic Security conducted debates among experts during the time of the

nation was in the midst of the Great Depression.

Perhaps the "hazard" of unemployment in the Great Depression of the 1930s is rearing its head again in the recession the United States faces today. Certainly those who have lost their jobs in the recent recession, which has caused forty-three states to recently report further job losses,<sup>55</sup> would acknowledge the hazard.

C. *In re Baden, In re Kucharz, and Judge Wedoff's Approach:  
Unemployment Compensation Included in the Debtor's  
"Current Monthly Income"*

1. *The In re Baden Approach*

The Bankruptcy Court for the Middle District of Pennsylvania recently held that a Chapter 13 debtor's unemployment compensation received within six months of filing a petition for bankruptcy relief was not a "benefit received under the Social Security Act;" thus this income must be included in the debtor's "current monthly income" calculation.<sup>56</sup> The court determined that the definitions in Section 101(10A)(A) and (B) were ambiguous.<sup>57</sup>

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Great Depression. *Id.* at 19. Unemployment compensation programs constituted the Committee's top priority, taking into account this time in history. *Id.* Specifically, the Director of the Committee, Edwin E. White, was fixed on designing a system of unemployment compensation. *Id.* at 20. Mr. White's efforts in focusing on the unemployment compensation issue instead of others like old age benefits drew quite a bit of criticism. *Id.* A letter from Mr. White to the President stated, "I do not know whether this is the time for any federal legislation on old age security." *Id.* Thus, unemployment compensation was integral to the creation of the Social Security Act. Although the Social Security Act is now known for the benefits associated with old age and retirement, at its genesis the Act was contemplated to alleviate the hazards of unemployment that came with the Great Depression, and the old age benefits were secondary. *Id.*

55. See Christopher Rugaber, *23 States Report Higher Unemployment in September*, ASSOCIATED PRESS, Oct. 21, 2009, [http://news.yahoo.com/s/ap/20091021/ap\\_on\\_bi\\_go\\_e\\_c\\_fi/us\\_state\\_unemployment](http://news.yahoo.com/s/ap/20091021/ap_on_bi_go_e_c_fi/us_state_unemployment) (pointing out that companies are still reluctant to hire additional workers due to the state of the economy). The United States jobless rate hit 9.8% in September 2009, which is a twenty-six year high. *Id.*

56. *Baden*, 396 B.R. at 623.

57. *Id.* at 621-22 (noting that several courts determined the provisions of BAPCPA to be ambiguous, so they moved beyond the "plain language" of the statute to determine the "intent of Congress"). In determining that the provisions of BAPCPA are ambiguous, the court determined that all of the BAPCPA amendments are ambiguous allowing them to interpret the "intent of Congress" in enacting this statute. *Id.* The court stated, "[s]everal courts have acknowledged the lack of clarity in the provisions of the BAPCPA." *Id.* (citing *Sorrell*, 359 B.R. at 173); see also *In re Paschal*, 337 B.R. 274, 277 (Bankr. E.D. N.C. 2006) (finding ambiguity in BAPCPA generally); *In re Collins*, 334 B.R. 655, 658 (Bankr. D. Minn. 2005) (stating the same). In the cases cited by the court in *Baden*, only *In re Sorrell* addressed the "ambiguous" section, 11 U.S.C. § 101(10A)(B), which, in contravention of *Baden*, held unemployment



The court highlighted the problems other courts have had in interpreting the ambiguous language of BAPCPA, and looked beyond the plain language of BAPCPA to “determine the intent of Congress.”<sup>58</sup> In order to accomplish this goal, the court reviewed the legislative history of BAPCPA and found little assistance.<sup>59</sup>

The court, however, determined that the “two primary concerns” of Congress in enacting BAPCPA were: “(1) Protecting the Bankruptcy System from being abused by ensuring that those who could afford to pay their debts did pay; and (2) protecting education and retirement savings from being drained by creditors.”<sup>60</sup> The court concluded that these goals are “incongruous” with both of the goals that they identified from the Congressional debates.<sup>61</sup> The court stated that “[a]llowing the unemployed to retain any excess funds they receive while failing to pay their bills runs contrary to Congress’ [sic] goal of preventing abuse by those who can afford to pay a portion of their bills” and the goal of protecting retirement savings.<sup>62</sup>

Another determinative factor for the court in *Baden* was that the pre-BAPCPA approach, as discussed above, included income from all sources.<sup>63</sup> The court found that since Congress knew that unemployment compensation was previously incorporated in the debtor’s “income” before their BAPCPA amendments, Congress would have specifically called for unemployment compensation to be excluded from debtors’ “current monthly income” if Congress intended that result.<sup>64</sup>

## 2. *The In re Kucharz Approach*

On October 28, 2009, the Chief Judge of the Bankruptcy Court for the Central District of Illinois entered the debate on whether unemployment compensation is a “benefit received under the Social Security Act,” and determined that unemployment compensation should be included in the debtor’s “current monthly

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compensation to be excluded from the “current monthly income” calculations of debtors.

58. *Id.* at 621-22.

59. *Id.* at 622.

60. *Id.* (citing generally to Senate and House discussions of BAPCPA during the 105th Congress). The court stated that after a “thorough analysis” of the discussions of Congress on BAPCPA, it found that there were two “primary concerns” Congress had in enacting BAPCPA: (1) to protect retirement saving plans; and (2) to ensure that individuals who can pay their debts do pay their debts. *Id.* The court concluded that those goals would not be furthered by allowing unemployment compensation to be excluded from the “current monthly income” calculation of debtors. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 623.

64. *Id.*

income" calculation.<sup>65</sup> The court began the analysis by noting that this issue presents a "surprisingly difficult question."<sup>66</sup> The court then discussed whether the Act creates a federal program of unemployment compensation or one that is mainly state run.<sup>67</sup> The court noted that the Social Security Act created incentives for the states to enact unemployment programs, but importantly, the court found that the benefits paid to the unemployed citizens of the state are received under state law as opposed to the Social Security Act.<sup>68</sup>

The court reached this conclusion by focusing on the word "under" in the phrase, "benefit received under the Social Security Act" of Section 101(10A)(B).<sup>69</sup> It started, "[t]he preposition 'under' is both the cause of and the key to unlock the mystery."<sup>70</sup> The court found the plain meaning of the word "under," in the dictionary, to be "required by" or "in accordance with."<sup>71</sup> The court reasoned that because the Social Security Act did not compel the states to enact unemployment compensation programs, the unemployment benefits that the citizens of these states receive are from the states themselves, not the federal government as provided by the Social Security Act.<sup>72</sup> Thus, the court concluded that the benefits are not received "under" the Social Security Act but rather "under" the states' unemployment programs.<sup>73</sup>

After determining the meaning of the language of Section 101(10A)(B), the court proceeded to examine the "contextual analysis" of the Section 101(10A)(B).<sup>74</sup> The court found that BAPCPA and the means test were put in place to identify those debtors who have the ability to pay their creditors so that they do pay their creditors.<sup>75</sup> The court noted that "current monthly income" is a backward-looking test that then is projected forward to determine the debtor's income in the future.<sup>76</sup> The court found that to leave unemployment compensation out of this calculation would render an inaccurate determination of what the debtor will earn in the future because it would omit the unemployment

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65. *Kucharz*, 418 B.R. at 643.

66. *Id.* at 637.

67. *Id.* at 637-38.

68. *Id.* at 639. The court noted that if the Social Security Act was repealed the Illinois, the unemployment compensation program would still be able to continue *Id.*

69. *Id.* at 641.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 641.

75. *Id.* at 641-42.

76. *Id.* at 642.

compensation received in the place of wages.<sup>77</sup>

### 3. Judge Eugene R. Wedoff's Approach

Although there is no published opinion as of the writing of this Comment regarding whether unemployment compensation should be considered in the "current monthly income" calculation of debtors in the Northern District of Illinois, Judge Wedoff, a bankruptcy judge in this jurisdiction, has discussed his thoughts on the issue in an article he authored soon after BAPCPA took effect.<sup>78</sup> Judge Wedoff acknowledged that the argument could be made that unemployment compensation was a "benefit received under the Social Security Act" but opined, "[t]his would be a strained interpretation, however, since unemployed individuals receive no benefits 'under the Social Security Act,' but only under the programs adopted by their states, which may provide benefits beyond those that are federally funded."<sup>79</sup>

The United States Trustee's Office also finds unemployment compensation to be a "benefit received under the Social Security Act."<sup>80</sup> The United States Trustee's website draws the line in the sand to advise all debtors that they will challenge any attempt to claim unemployment compensation as a "benefit received under the Social Security Act," but as pointed out above, this position is contrasted by the means test form that invites that debtor argument.<sup>81</sup>

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77. *Id.*

78. Wedoff, *supra* note 35, at 281.

79. *Id.* at 247.

80. See Allard et al., *supra* note 18 (stating that the position of the United States Trustee is that unemployment compensation is included in "current monthly income" calculations of debtors, and that the United States Trustee will challenge any attempt to exclude this compensation); see also STATEMENT OF THE U.S. TRUSTEE PROGRAM'S POSITION ON THE LEGAL ISSUES ARISING UNDER THE CHAPTER 13 DISPOSABLE INCOME TEST 2 (2009), [http://www.justice.gov/ust/eo/bapcpa/docs/chapter13\\_analysis.pdf](http://www.justice.gov/ust/eo/bapcpa/docs/chapter13_analysis.pdf) (stating "Line 8, Unemployment compensation. Unemployment compensation is not a 'benefit under [the Social Security Act]' and should be included; [the United States Trustee] opposes any entry in the boxes to the left of Columns A and B"). The United States Trustee website clearly states that unemployment compensation should be included in the debtor's "current monthly income" on the means test form. *Id.* But, the means test form still allows for this argument to be made. Statement of Current Monthly Income, (Official Form 22A) (Jan. 2008) (inviting debtors to determine on their own whether they find unemployment compensation to be a "benefit received under the Social Security Act").

81. See Allard et al., *supra* note 18 (pointing out the conflict between the United States Trustee's view of unemployment compensation and that of the means test form inviting the debtor to determine whether this income is part of the debtor's "current monthly income").

*D. In re Sorrell and In re Munger Approach: Unemployment Compensation Excluded in the Debtor's "Current Monthly Income"*

*1. The In re Sorrell Approach*

The Bankruptcy Court for the Southern District of Ohio in the case of *In re Sorrell* crafted a different approach to the unemployment compensation analysis to conclude that this compensation is a "benefit under the Social Security Act."<sup>82</sup> This court was the first to address this issue and publish an opinion after the enactment of the BAPCPA reforms.<sup>83</sup> The court began its analysis of this issue with a comment on the ambiguity presented by the BAPCPA reforms.<sup>84</sup> The court determined that despite the ambiguity that the BAPCPA reform created, it would apply the ordinary meaning of the language Congress used.<sup>85</sup>

Upon review of the language of Section 101(10A), the court found that certainly unemployment compensation is a "benefit," but noted that a determination must be made whether this is a "benefit under the Social Security Act."<sup>86</sup> In order to accomplish this goal, the court looked at the law of unemployment compensation as applied through state and federal law.<sup>87</sup> The federal law that applies is the Social Security Act, which funds the states' unemployment programs and regulates them.<sup>88</sup> The court then refused the United States Trustee's invitation to view the payments the debtors received in unemployment compensation to be an indirect benefit from the Social Security Act as opposed to a direct benefit.<sup>89</sup> The court found that Section 101(10A)(B) does not mention "payments" but only "benefits," which the court found to be a much broader word.<sup>90</sup>

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82. See generally *Sorrell*, 359 B.R. at 183.

83. *Id.* at 180 (stating, "[t]he court is not aware of any reported decisions on the question, [of whether unemployment compensation is a "benefit received under the Social Security Act"], although the issue has been addressed by bankruptcy commentators"). This court, therefore, broke new ground in interpreting this section of the BAPCPA amendments.

84. *Id.* at 172-73 (quoting another court that found Section 362(c)(3) as "neither consistent nor coherent." The court continued by referencing another commentator and judge, Thomas Small, who stated that "in an Act in which head-scratching opportunities abound for both attorneys and judges alike § 362(c)(3)(A) stands out"). The court stated that the reason for noting these issues with BAPCPA was not to criticize the provisions but to make note that the amendments are not all together straightforward or clear. *Id.* at 173. "The attempt (necessity) of bankruptcy courts to determine (create) the results intended in the 2005 Act is complicated in such instances." *Id.*

85. *Id.* at 176.

86. *Id.* at 181.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

Next the court noted that there are other references to the Act in the Code that specifically state selected sections of the Act that apply.<sup>91</sup> The court concludes that if Congress intended unemployment compensation to be left out of Section 101(10A)(B) it knew how to do so as shown in these other sections.<sup>92</sup> Therefore, the court held that unemployment compensation is excluded from the debtors' "current monthly income."<sup>93</sup>

## 2. *The In re Munger Approach*

A bankruptcy court in Massachusetts also weighed in on this debate and sided with the *Sorrell* court, finding that unemployment compensation is a "benefit received under the Social Security Act" as provided by Section 101(10A)(B).<sup>94</sup> This court relied much on the analysis of the *Sorrell* decision, but it added an analysis of the commentators who have addressed this issue.<sup>95</sup>

In sum, each court that has addressed this issue has found ambiguity in BAPCPA generally and in Section 101(10A)(B) particularly. The courts agree that the plain meaning of the

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91. *Id.* The court here took the statutory steps as laid out in Section II.B. of this Comment by first discussing 42 U.S.C. § 1321, which describes the eligibility requirements of the states in receiving federal funds under the Social Security Act. *Id.* at 181. The court then noted that the Social Security Act requires that the Secretary of Labor certify each states' compliance with 42 U.S.C. § 504, which allows for judicial review of the Secretary of Labor's decision not to allow the states payment based on the states' noncompliance with the Social Security Act. *Id.* The court continued with cites to Section 503 of the Social Security Act that states the Secretary of Labor will not certify payments to states for their unemployment compensation funds unless those states' laws are in compliance with the Social Security Act as laid out in 42 U.S.C. § 503. *Id.* Finally, the court concluded that if any state laws were in conflict with the Social Security Act, they would be trumped by the Supremacy Clause of the United States Constitution. *Id.*

92. *Id.*

93. *Id.* at 183.

94. *See generally Munger*, 370 B.R. at 26.

95. *Id.* at 23-25. The court based its determination that unemployment compensation should be excluded from "current monthly income" calculations as a "benefit received under the Social Security Act" based on its statutory interpretation and the *Sorrell* opinion. *Id.* The court found that Section 101(10A)(B) clearly states that Social Security Act benefits should be excluded from "current monthly income," and the court refused to look further at the intent of Congress. *Id.* The *In re Baden* court reviewed both the *In re Sorrell* and *In re Munger* analysis and determined that they were both flawed. *See Baden*, 396 B.R. at 619 (determining that both of the cases were wrongly decided because Congress knew that unemployment compensation was previously included in the income calculations of debtors). Thus, Congress could have expressly excluded that income if it had so chose, and the goals of Congress in enacting BAPCPA would not be furthered by allowing a debtor to exclude unemployment compensation in their "current monthly income" calculation. *Id.*

statute should apply; however, they differ on whether it is possible to apply such a meaning. While both positions have support, the exclusion of unemployment benefits in a debtor's "current monthly income" calculation is the position with the most legal and logical support.

#### IV. PROPOSAL

Exclusion of the debtor's unemployment compensation as a "benefit received under the Social Security Act" has the most support and is a logical result. This conclusion is supported by the plain language of Section 101(10A)(B) of the Bankruptcy Code, the purpose and effect of the Social Security Act, the problems that arise in delving into the "intent" of Congress in enacting legislation, and the special difficulty presented by attempting to find the "intent" of Congress in enacting BAPCPA.

This is an active controversy ripe for review by the district (and possibly, appellate) courts. Bankruptcy Judge Stephen S. Mitchell from the Eastern District of Virginia recently sidestepped this "thorny" issue because the "current monthly income" of the debtor in the particular case, inclusive of the debtor's unemployment compensation, would not violate the means test.<sup>96</sup>

##### *A. The Plain Meaning of Section 101(10A)(B) Compels Exclusion of Unemployment Compensation in the "Current Monthly Income" Calculation of Debtors*

A "plain meaning" approach is always subjective, depending mostly on the individual reading the statute.<sup>97</sup> However, it must

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96. *In re Avellaneda*, No. 09-18106-SSM, 2009 WL 5066667 \*1 (Bankr. E.D. Va. Dec. 16, 2009).

97. *Compare In re Ransom*, 577 F.3d 1026, 1030-32 (9th Cir. 2009) (holding that pursuant to the "statutory language, plainly read" Section 707(b)(2)(A)(ii)(I) does not allow an above average income earner who has been forced into Chapter 13 by the means test to deduct from his Chapter 13 plan "ownership costs" that the debtor does not actually incur on his vehicle and concluded that an "ownership cost" is not an expense as it pertains to this section), *with Kimbro*, 389 B.R. at 527 (holding that the "plain meaning" of Section 707(b)(2)(A)(ii)(I) allows the debtor who was forced by the means test into Chapter 13 to continue to deduct his expense of owning a vehicle even though the debtor owned the vehicle outright and had no set expense for the vehicle), *In re Tate*, 571 F.3d 423, 428 (5th Cir. 2009) (holding that the "plain meaning" approach in interpreting the means test Section 707(b)(2)(A)(ii)(I) as it pertains to vehicle ownership deduction of a vehicle that is owned outright is an expense that can be deducted from a Chapter 13 debtor's plan), *and In re Ross-Tousey*, 549 F.3d 1148, 1157-58 (7th Cir. 2008) (adopting what is now referred to as the "plain meaning approach" and holding that a vehicle not encumbered by a debt or lease nevertheless qualified for a deduction in a Chapter 13 debtor's plan pursuant to Section 707(b)(2)(A)(ii)(I) and the plain reading of the statute). So much has this issue divided the circuits that in the final conclusory paragraph of the case of *In re Ransom*, the Ninth Circuit

be assumed that Congress said what it meant to say, or a venture into the quagmire of finding the “intent” of Congress would be required even in addressing the most straightforward statute. On the principles of statutory construction, the United States Supreme Court stated “[a]s we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent that they shed light on the enacting Legislature’s understanding of *otherwise ambiguous terms*.”<sup>98</sup> Section 101(10A)(B) states that “current monthly income”, “excludes benefits received under the Social Security Act, payments to victims of war crimes or . . . victims of . . . terrorism.” As pointed out in the case of *In re Sorrell*, unemployment compensation is quite clearly a “benefit.”<sup>99</sup> And, as discussed above, and further discussed in the next section, unemployment compensation is available due to the fact that the Social Security Act allowed it.<sup>100</sup>

Additionally, Congress used the word “benefit” in describing compensation that should be excluded in a debtor’s “current monthly income” calculation under the Social Security Act, as referenced in *Sorrell*.<sup>101</sup> In that same section Congress used the word “payments” to describe the compensation received by the potential debtor due to crimes against humanity or due to terrorism.<sup>102</sup> The use of the word “benefits” in Section 101(10A)(B) when referring to the Social Security Act is notably broader than the word “payments” in referring to the victims of terrorism.<sup>103</sup>

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made an impassioned plea to Congress to provide some sort of guidance on the issue. *Ransom*, 577 F.3d at 1031-32. The court found that the “correct” answer to the question of whether a debtor in a Chapter 13 repayment plan may deduct an expense for a vehicle that the debtor owes outright has caused courts to struggle for years. *Id.* The court complained that this “correct” answer is “ultimately not upon our interpretation of the statute, but upon what Congress wants the answer to be. We would hope, in this regard, that we the judiciary would be relieved of this Sisyphean adventure by legislation clearly answering [this] straightforward policy question . . .” *Id.* at 1032. The Ninth Circuit then took an “unusual step” and sent a copy of its opinion to the Senate and House Judiciary Committees for a response. *Id.* The Ninth Circuit now, with bated breath, awaits an answer to this divisive issue.

98. *Exxon Mobile Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 568-69 (2005) (emphasis added).

99. *Sorrell*, 359 B.R. at 181 (stating, “[t]here is no dispute that unemployment compensation constitutes a benefit, the analysis focuses on whether this is one of the ‘benefits received under the Social Security Act.’”)

100. See *supra* Section III.B. (discussing the statutory connections between unemployment compensation and the Social Security Act).

101. 11 U.S.C. § 101(10A)(B) (2006).

102. *Id.*

103. *Sorrell*, 359 B.R. at 181 (noting that “[t]he applicable text [of Section 101(10A)(B)] does not speak of ‘payments’, direct, indirect, or otherwise, but instead contains the unambiguously broader term of ‘benefits.’”).

Thus, this broad term used by Congress in Section 101(10A)(B) should be read to include all benefits that the Social Security Act provides without a foray into a direct or indirect analysis uncalled for pursuant to that section.

*B. The Indirect/Direct Analysis Courts Have Used to Determine That Unemployment Compensation Is Included in a Debtor's "Current Monthly Income" Calculation Is Unnecessary and Flawed*

The logic of the case of *In re Kucharz* is easily assailable. In that case, the court held that the states are the entities that provide unemployment compensation because the Social Security Act did not mandate that the states create the unemployment compensation programs. That court acknowledged that the states were wary of enacting unemployment programs before the Social Security Act.<sup>104</sup> After the federal government promulgated the Social Security Act in 1935, which created incentives for the states to create an unemployment compensation program, the states were then free to do so, and by 1937, forty-two states had enacted this legislation.<sup>105</sup> The unemployment benefits received are clearly a "benefit received under the Social Security Act" as required by Section 101(10A)(B) of the Bankruptcy Code because if the Social Security Act was not passed with its incentives to the states, the states would not have enacted their own unemployment compensation programs.

The argument that unemployment compensation is not directly "under" the Social Security Act, and therefore not a "benefit" under the Act, fails to recognize the fact that the Social Security Act was the reason why the states were able to create unemployment compensation programs in the first place.<sup>106</sup>

President Roosevelt's message to the drafters of the Social Security Act underlines the fact that the states were asked by the federal government to create unemployment compensation programs.<sup>107</sup> The President stated, "[t]he purpose of [the federal

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104. See *Kucharz*, 418 B.R. at 641 n.5 (noting that before the Social Security Act the states were wary of enacting unemployment compensation programs due to the increase in taxes that would result and the possibility that such a program would drive businesses from the state to other states without such a program).

105. *Id.* (citing *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 575, 577-78 (1937)).

106. See *Kucharz*, 418 B.R. at 641 n.5 (discussing that states were free to enact unemployment compensation due to the creation of the Social Security Act).

107. See EDWIN E. WHITE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 128 (Univ. of Wis. Press 1963) (reproducing the entire January 17, 1935, statement of the President to Congress regarding the bill that would eventually become the Social Security Act).



payroll tax to support unemployment compensation] is to afford a requirement of a reasonably uniform character for all States cooperating with the Federal Government and to promote and encourage the passage of unemployment compensation laws in the States.”<sup>108</sup> Because the Social Security Act created the incentive and the means for states to have unemployment compensation programs, the compensation should be considered as a “benefit received under the Social Security Act” pursuant to Section 101(10A)(B).

*C. Courts That Look to the “Intent” of Congress in Enacting Legislation, Where There Is No Clear Statement Provided of Such Intent, Are Drafting Their Own Legislation*

The courts in the cases of *In re Baden* and *In re Kucharz* found that even though Section 101(10A)(B) says what it says, it was still necessary to look to the “intent of Congress.”<sup>109</sup> First, it is clear that there is likely no one intent of Congress in enacting any one piece of legislation.<sup>110</sup> The draw to this type of mental exercise is, as one commentator pointed out, looking through the legislative history of a certain bill and picking out one’s friends.<sup>111</sup>

The likely root of the problem that courts and commentators have faced with Section 101(10A)(B) is what George Orwell

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108. *Id.*

109. *Kucharz*, 418 B.R. at 641 (stating, “[b]ecause the language of the provision is ambiguous, it is appropriate to also consider a contextual analysis.”). The Court further stated, “[a] statutory provision’s context consists not only of other sentences and related provisions, but also of the real-world situation to which the language pertains.” *Id.* (citations omitted); *Baden*, 396 B.R. at 622 (noting, “[s]ince the language of this provision [Section 101(10A)(B)] is unclear, it is necessary to look beyond the plain language to correctly interpret the statute.”).

110. *See, e.g.*, *In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005) (stating that legislative history is “virtually useless as an aid in understanding the language and intent of BAPCPA”); ALLEN KAMP, *THE CRIT, JURISPRUDENCE: BEGINNER’S SIMPLE AND PRACTICAL GUIDE TO ADVANCED AND COMPLEX LEGAL THEORY* 93-94 (2009), <http://www.thecritui.com/articles/Kamp4.pdf> (discussing both Justice Scalia’s disdain for the use of legislative intent to find the meaning of a statute as well as Seventh Circuit Justice Easterbrook’s notion that legislative intent is a “useless fiction”). Professor Kamp goes on to state that “[f]ocusing on legislative policies equates meaning with election returns.” *Id.* *See also* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 216 (1983) (discussing the problems with reviewing legislative history in order to come up with a solution to ambiguous statutes and further states that “[t]he legislative materials at [a court’s] disposal of course do not, and probably never will, accurately and comprehensively record what actually took place during the convoluted process of enactment.”).

111. *See* Wald, *supra* note 110, at 214 (quoting a conversation with a federal judge colleague, Judge Harold Leventhal).

described in his essay on *Politics and the English Language* as a "pretentious, Latinized style."<sup>112</sup> Orwell explained this style "gum[s] together long strips of words which have already been set in order by someone else, and mak[es] the result presentable by sheer humbug. The attraction of this way of writing is that it is easy . . . [i]f you use readymade phrases, you . . . don't have to hunt about for words . . ."<sup>113</sup>

The problem with hunting for the "intent" of Congress, as it pertains to Section 101(10A)(B), is that there is no one intent of Congress in enacting this portion of BAPCPA.<sup>114</sup> To the credit of the courts in both *In re Baden* and *In re Kucharz*, the plain meaning of the statute was discussed yet the courts found ambiguity and then went searching for the "intent" of Congress.<sup>115</sup> Section 101(10A)(B) clearly and expressly excludes "benefits received under the Social Security Act" from the "current monthly income" calculation.<sup>116</sup> As discussed above, unemployment compensation falls into that broad category.

## V. CONCLUSION

It is not the province of the courts to determine what Congress meant to say and read between the lines if the statute is clear and unambiguous.<sup>117</sup> The reason courts have seen Section

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112. GEORGE ORWELL, *Politics and the English Language*, in COLLECTION OF ESSAYS, 156, 164 (1946).

113. *Id.*

114. *See, e.g., Sorrell*, 359 B.R. at 176 (citations omitted) (noting that there was no "conference report" for BAPCPA, thus there is no legislative history that can be used to resolve the ambiguities that are apparent in BAPCPA).

115. *See Kucharz*, 418 B.R. at 640 (noting that the first step is the "textual analysis," and the text of the statute suggests that the benefits received by unemployed individuals are not "under" the Social Security Act, but rather those benefits are "under" state programs of unemployment compensation); *Baden*, 396 B.R. at 621-22 (noting that several courts have found BAPCPA provisions unclear for the proposition that the court should look beyond the plain meaning of Section 101(10A)(B); also citing the difference of opinion of Judge Wedoff in interpreting this section and the opinions of *In re Sorrell* and *In re Munger*).

116. 11 U.S.C. § 101(10A)(B).

117. *See United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) (stating "[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result."). The rule of applying what Congress has written if clear and unambiguous has been addressed many times by the Supreme Court and has produced many quotable adages. *See, e.g., Smith v. United States*, 508 U.S. 223, 247 n.4 (1993) (Scalia, J., dissenting) (noting, "[s]tretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in."); *Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989) (stating, "[o]ur task is to apply the text, not to improve upon it."); *United States v. Locke*, 471 U.S. 84, 95 (1985) (noting, "the fact that Congress might have acted

101(10A)(B) as ambiguous is based on the myth of Congressional “intent” in BAPCPA. BAPCPA has changed the bankruptcy rules significantly, and courts should apply it as written. If this is contrary to Congress’s intent, whatever that may have been, the Code may once again be amended; perhaps it could be called “BAPCPA Reconsidered.”

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with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do.”); *In re Chapman*, 166 U.S. 661, 667 (1897) (stating, “nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.”).