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A New Paint Job on an '85 Yugo: BAPCPA Improves Chapter 12 But Will It Really Make a Difference?

by

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A NEW PAINT JOB ON AN '85 YUGO: BAPCPA IMPROVES CHAPTER 12 BUT WILL IT REALLY MAKE A DIFFERENCE?

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I. INTRODUCTION

The plight of insolvent debtors has evolved substantially from ancient times[1] and the early English and American practice of debtor prisons.[2] Beginning with the initial federal bankruptcy act in 1800,[3] through the first permanent federal bankruptcy act in 1898,[4] and the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005,[5] the federal government has attempted to delineate the rights of debtors and creditors in a way that promotes the nation's entrepreneurial spirit while addressing the omnipresent risk of financial failures.[6]

The rights of farmers began to be defined separately from other creditors with the Act of 1898 when they were exempted from involuntary bankruptcy proceedings.[7] Congress gave farmers further specialized protections during the Great Depression when it enacted an entire subsection devoted to farm bankruptcies.[8] Additional protections came during the farm crisis of the 1980s when a new chapter, Chapter 12, was temporarily added to the Bankruptcy Code.[9] Most recently, BAPCPA made several changes to Chapter 12 that will impact farm bankruptcies, such as making its provisions a permanent part of the Bankruptcy Code.[10] Although BAPCPA itself has been widely criticized,[11] the revisions to Chapter 12 were generally supported in Congress.[12]

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1. *See* J. Wesley Oler, *The Farmer and the Bankruptcy Laws*, 40 Dick. L. Rev. 122, 123 (1935-1936) (giving examples of how insolvent debtors in Babylonia had been sold into slavery and, under Roman law, debtors could be killed and their bodies dismembered to be distributed proportionally amongst the creditors).

2. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 7-12 (1995).

3. *See* Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

4. *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

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

6. *See generally* Robert J. Landry, III., *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 Rutgers Bus. L.J. 2, 3 (2006) (noting how bankruptcy laws encourage risk taking by offering protection should those risks fail).

7. Bankruptcy Act of 1898, ch. 541, § 4(b).

8. *See* Frazier-Lemke Farm-Mortgage Act, ch. 869, 48 Stat. 1289 (1934).

9. *See* 11 U.S.C. §§ 1201-31(2005); *see also* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3124 (codified at 11 U.S.C. §§ 1201-31).

10. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 1001, 119 Stat. 23, 185.

Yet while these revisions faced little opposition and appear to expand eligibility for Chapter 12, it will remain to be seen if they will yield higher usage. When originally enacted in 1986, some predicted 30,000 farmers would file under Chapter 12.[13] However, even as Chapter 12 was being enacted, the Seventh Circuit noted farm bankruptcies were rare.[14] Even two years after enactment only 8,527 petitions had been filed,[15] and the number of filings since has continued to decline.[16] In fact, through 2003 the 30,000 filings mark had still not been attained.[17] Given these facts, the comments of Bankruptcy Judge Richard Stageman in a November 6, 1985 meeting of the Senate Judiciary Committee have proven prophetic: "What I'm questioning is whether the immediate problem of the family farmer . . . should be placed in the context of the bankruptcy courts. His problem is much bigger than the bankruptcy courts. The bankruptcy courts have no solution."[18] It has also been argued that by the time a farmer files under Chapter 12, it may be too late to save the farm,[19] thereby explaining the low overall number of filings. While BAPCPA and this note do not address the root causes of farm bankruptcy, BAPCPA does make progress towards the goal of helping to keep farmers farming.

This note focuses primarily on what impact BAPCPA may have upon Chapter 12 usage. It does so by first examining the history of farm bankruptcy leading up to the enactment of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. It then discusses faults of the 1986 act as drafted and applied, ending with an analysis of the changes brought by the passage of BAPCPA.

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11. *See, e.g.*, Keith M. Lundin, *Ten Principles of BAPCPA: Not What was Advertised*, Am. Bankr. Inst. J. 1, Sept. 2005; Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 Am. Bankr. L.J. 191 (2005); Katherine M. Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code*, 79 Am. Bankr. L.J. 729 (2005) [hereinafter *Phantom*].

12. *See* Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 Am. Bankr. L.J. 221, 226-27 (2004) [hereinafter *Bankruptcy*].

13. U.S. Gen. Accounting Office, Farm Finance: Participants' Views on Issues Surrounding Chapter 12 Bankruptcy 11 (1989), http://archive.gao.gov/d25t7/138655.pdf.

14. *In re* Wagner, 808 F.2d 542, 548 (7th Cir. 1986).

15. U.S. Gen. Accounting Office, *SUPRA* NOTE 13, AT 11.

16. *See* Bruce L. Dixon et al., *Factors Affecting State-Level Chapter 12 Filing Rates: A Panel Data Model*, 20 Emory Bankr. Dev. J. 401, 405 (2004).

17. *See generally* Landry, *supra* note 6, at 7 (from 1986-2003 there were 23,394 Chapter 12 filings).

18. NEIL E. HARL, THE FARM DEBT CRISIS OF THE 1980s 135 (Richard S. Kirkendall ed., Iowa State University Press, 1990).

19. *See* Steven Shapiro, Note, *An Analysis of the Family Farmer Bankruptcy Act of 1986*, 15 Hofstra L. Rev. 353, 375 (1987).

II. A BRIEF HISTORY OF AMERICAN BANKRUPTCY LAW AND THE ROLE OF AGRARIAN INTERESTS IN ITS CREATION

The Framers included a provision in the Constitution authorizing federal bankruptcies based upon the disparate impact bankruptcy laws could have upon interstate commerce.[20] Despite this belief, the bankruptcy clause was invoked only three times during the first 111 years of its existence.[21] Each invocation occurred in times of economic distress which, once ended, eliminated the perceived need for the act and led shortly thereafter to its revocation.[22] Yet, even during these times of need, the bankruptcy acts were resisted by those who feared its impact on farmers.[23]

A. *Act of 1800*

The first federal bankruptcy law was passed in 1800[24] and was based upon British laws inherited by the colonies.[25] During the debates leading to enactment, representatives of agrarian interests objected to the bill's involuntary bankruptcy provisions.[26] The argument focused on the fact that farmers paid their creditors when the crops were harvested and as a result payments were generally late.[27] As a result, urban creditors could easily ruin farmers whose financial lives were dependent upon forces they could not control.[28] It would not be until 1898 that farmers were exempted from involuntary bankruptcy.[29]

The Bankruptcy Act of 1800 treated fraudulent bankruptcy as a criminal offense, heavily favored creditors over debtors,[30] provided exclusively for invol-

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20. U.S. Const. art. I, § 8, cl. 4; *see also* Charles Warren, Bankruptcy in United States History 7 (William S. Hein & Co., Inc. 1994) (1935).

21. *See* Landry, *supra* note 6, at 3.

22. *Id. But see* Bradley Hansen, *Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law*, 72 Bus. Hist. Rev. 86, 87 (1998) (arguing that the 1898 Act was the result of an organized, long-term corporate lobbying effort rather than simply a response to economic conditions).

23. David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 Bankr. Dev. J. 321, 324 (1999) [hereinafter *Genius*].

24. Act of Apr. 4, 1800 § 1, 2 Stat. 19 (repealed by Act of Dec. 19, 1803, ch. 6).

25. Tabb, *supra* note 2, at 14.

26. *See* Warren, *SUPRA* NOTE 20, AT 15.

27. *ID.*

28. *See ID.*

29. Bankruptcy Act of 1898 § 4(b), 30 Stat 544, 547 (repealed 1978).

30. *See generally* Tabb, *supra* note 2, at 14 (stating that bankruptcy, at the time, was merely a creditor's remedy).

untary bankruptcy, and was restricted to business interests.[31] However, opposition to the 1800 law grew, led by the agricultural sympathizers who originally opposed it.[32] As they noted, it was entirely possible for a merchant indebted to a farmer to have his debts discharged, but a farmer indebted to a merchant had no mechanism by which the farmer's debts could be discharged, thereby creating an imbalance of power.[33] The perceived discrimination against agricultural interests in favor of the merchant class was also at the focal point of subsequent legislation.[34]

Dissatisfaction with the 1800 act also grew due to abuse attributed to some debtors and the distance required in order to travel to access federal courts. [35] Given these problems, the law was repealed in 1803, two years before its scheduled sunset.[36]

B. *Act of 1841*

The next federal bankruptcy law was passed in 1841[37] and was the first to allow for voluntary bankruptcy.[38] The law also contained other progressive provisions that further evidenced a movement away from treating debtors as criminals.[39] However, agricultural interests again voiced their opposition, claiming the bill's "provisions are incompatible with the interests of the corn, tobacco and cotton planters . . . ."[40] They claimed that the bill exacerbated the conflict between agricultural and commercial interests.[41] Also contributing to the Act's brief eighteen month lifespan and subsequent repeal[42] were complaints from both creditors, unhappy with the small dividends received, and from debtors, who resented the loss of favorable state provisions.[43]

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31. David S. Kennedy & R. Spencer Clift, III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power, and Jurisdiction of Today's United States Bankruptcy Court and Its Judicial Officers*, 9 J. Bankr. L. & Prac. 165, 171 (2000).
32. Warren, *SUPRA* NOTE 20, AT 21.
33. *See ID.*
34. *See ID.* AT 40.
35. *See ID.* AT 19-20.
36. Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.
37. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).
38. *See* Tabb, *supra* note 2, at 17.
39. *See generally* Kennedy & Clift III, *supra* note 31, at 171-72 (listing seven provisions of the 1841 act, including the abolishment of debtor's prisons).
40. Warren, *SUPRA* NOTE 20, AT 73 (quoting Congressman Henry A. Wise of Virginia).
41. *ID.* AT 81.
42. Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.
43. Warren, *SUPRA* NOTE 20, AT 82.

The 1841 act also provides a unique glimpse into the controversy surrounding early federal bankruptcy acts. Its passage was a central plank to the Whig party platform in the 1840 election; however, before the bill took effect, the House passed a vote to repeal, and it came within one vote of passing in the Senate.[44]

C. *Act of 1867*

The next federal bankruptcy act came in 1867[45] as a response to the states' inability to deal with the financial catastrophe resulting from the Civil War.[46] The economic crisis was exacerbated by the restraints the Supreme Court had previously imposed upon the states' ability to handle debts.[47] The greatest support for the creation of a new federal bankruptcy act came from Northern creditors who saw federal courts as the only method by which they could enforce debts incurred by Southerners.[48]

The 1867 act had several notable liberalizations compared to the 1800 and 1841 federal bankruptcy acts. After the 1872 amendment, debtors were allowed to use generous state exemptions in federal bankruptcy cases.[49] In 1874, another amendment to the act created compositions, which were the historical antecedent to the reorganization chapters of the modern code.[50] However, the bill's involuntary bankruptcy provisions were not restricted to merchants and could be applied to farmers, which led to a prediction during debate that "[t]he farmers and mechanics of the West will rise against it."[51]

Ultimately, Northern creditors were disappointed with the opportunities the law provided them to recoup debts owed by Southern borrowers.[52] Allegations of widespread corruption and fraud combined with high administrative costs to produce minimal, if any, dividends for creditors.[53] Opposition was also raised, as predicted, by agrarian interests in the South and West who resisted

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44. David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America 31-32 (2001) [hereinafter *DOMINION*].

45. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

46. Kennedy & Clift III, *supra* note 31, at 172.

47. *See generally* Tabb, *supra* note 2, at 19 nn.112-13 (detailing the restraints placed upon the ability of states to discharge debts in Sturges v. Crowninshield, 17 U.S. 122 (1819), and the inability of state law to discharge the debts of nonresident creditors in Ogden v. Saunders, 25 U.S. 213 (1827)).

48. Warren, *SUPRA* NOTE 20, AT 106.

49. *See id.* AT 110.

50. *ID.* AT 118.

51. *ID.* AT 104 (quoting Congressman Dalbert E. Paine of Wisconsin).

52. Tabb, *supra* note 2, at 19.

53. *See* Warren, *SUPRA* NOTE 20, AT 112-13.

involuntary bankruptcy for farmers as they had with the previous bankruptcy acts.[54] By the time the Act was repealed in 1878,[55] public opinion had turned decidedly against the act, as evidenced by resolutions passed by several state legislatures calling for the Act's demise.[56]

D. *Act of 1898*

What would become the first permanent federal bankruptcy act was signed into law on July 1, 1898.[57] This law represented a transition from anti-debtor statutes to moderately pro-debtor thinking after two economic crises in 1888 and 1893.[58] Some of its pro-debtor provisions limited the number of grounds upon which a denial of discharge could be based and also restricted the types of debts which could not be discharged.[59] The statute also provided the first special rule for farmers, which exempted farmers from involuntary bankruptcy.[60]

Despite these provisions, agrarian interests still resisted the bill and even offered their own short-lived bill which provided exclusively for voluntary bankruptcy.[61] However, the addition of the involuntary bankruptcy exception may have exploited a fissure in the agrarian coalition, as demonstrated by a regional breakdown of an 1896 vote in the House on what would become the final bill two years later.[62] Another theory explaining the passage of the 1898 Act holds that the country had advanced economically to the point that commercial interests, which had consistently been in favor of bankruptcy legislation, were able to form a permanent majority despite agrarian resistance.[63]

The 1898 Act was not without its problems. The phrase "engaged chiefly in farming or the tillage of the soil" created seemingly arbitrary standards in the courts, which only agreed that, when attempting to determine if the section

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54. *See generally id.* at 114 (stating the West and South were dissatisfied with the increasing powers of the Federal Courts).

55. Act of June 7, 1878, ch. 160, 20 Stat. 99.

56. Warren, *supra* note 20, at 122 (New York, Kentucky, New Hampshire, Illinois, Indiana and Mississippi were among the states passing resolutions calling for the Act's repeal).

57. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

58. *See* Tabb, *supra* note 2, at 23-24.

59. *Id.* at 24.

60. Bankruptcy Act of 1898, ch. 541 § 4(b).

61. Warren, *SUPRA* NOTE 20, AT 136-38.

62. *See generally* Warren, *SUPRA* NOTE 20, AT 140 (while the Middle and Eastern states succeeded in voting as a block, the vote of the Southern and Western states, which had previously formed a solid oppositional block, was badly split).

63. *See Genius, supra* note 23, at 325.

applied, the court's decision was to be factually based.[64] The word "chiefly" was also given widely varying interpretations,[65] creating uncertainty that may have created a disincentive for farmers to rely upon the exception.

E. *Frazier-Lemke*

The Great Depression and the collapse of commodity prices were the catalysts for the next round of specialized bankruptcy protections for farmers.[66] Congress added section 75 to the Bankruptcy Code in 1933 to help farmers avoid foreclosure and liquidation but it initially proved unworkable.[67] However, under this framework, creditors still could deny approval to debtor's plans.[68] The result was the addition of subsection (s) to section 75, which undermined the rights afforded to secured creditors.[69] However, the Supreme Court struck down subsection (s) in 1935 on Fifth Amendment grounds.[70] Within weeks, Congress responded with a modified version which survived judicial scrutiny.[71] As upheld by the Court, the Act allowed the farmer-debtor an opportunity to keep his farm and force the value of the deflation onto the creditor.[72] This section was only a temporary part of the Bankruptcy Code and expired in 1949.[73]

Although decidedly pro-farmer, subsection (s) was also not without problems. In attempting to formulate a definition of "farming" courts again came to fundamentally opposed conclusions.[74] In two prime examples, courts concluded that a person who primarily raised chickens was a farmer, but a person who primarily raised sheep was not.[75] Furthermore, although the Supreme Court suggested that the statute's language also provided relief to absentee landlords who merely rented their land but were not personally farming, the lower courts ignored this argument and applied a more stringent standard.[76]

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64. Oler, *supra* note 1, at 123.
65. *See generally id.* at 124-26 (even in factually similar cases, courts came to diametrically opposed conclusions).
66. *See* John C. Anderson & Rex D. Rainach, *Farmer Reorganizations Under the New Bankruptcy Code*, 28 Loy. L. Rev. 439, 448 (1982).
67. *Id.* at 447-48.
68. Alfred Letzler, *Bankruptcy Reorganizations for Farmers*, 40 Colum. L. Rev. 1133, 1137 (1940).
69. Shapiro, *supra* note 19, at 354.
70. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935).
71. Wright v. Vinton Branch of Mountain Trust Bank, 300 U.S. 440, 470 (1937).
72. *See* Anderson & Rainach, *supra* note 66, at 460-61.
73. Shapiro, *supra* note 19, at 355.
74. Oler, *supra* note 1, at 128.
75. *Id.*
76. *See* Letzler, *supra* note 68, at 1139.

III. BANKRUPTCY JUDGES, UNITED STATES TRUSTEES, AND THE FAMILY FARMER BANKRUPTCY ACT OF 1986

During the early part of the 1980s, agriculture faced conditions reminiscent of the Great Depression.[77] By 1985, it was estimated that over one-third of all farms faced "extreme financial difficulties."[78] As commentators and members of Congress noted, the bankruptcy provisions then available to farmers, namely Chapters 7, 11, and 13, were inadequate for a variety of reasons.[79] The economic conditions and the perceived failures of the Bankruptcy Code led to the creation of a new code section specifically for family farmers.[80] Senator Charles Grassley, the primary sponsor of The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act, stated the Act addressed the fact that "hearings in the House and Senate led to the unmistakable conclusion that the Bankruptcy Code doesn't work for farmers."[81] Chapter 12 became the latest incarnation of specialized bankruptcy provisions for farmers based in part upon the relief provided during the Depression.

A. *Problems with Maximum Allowable Debt*

Chapter 12, as implemented in 1986, presented several problems, one of which arose as a consequence of strict judicial enforcement of the $1.5 million debt ceiling.[82] As the expenses of operating a farm continued to grow, it was

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77. *See* Shapiro, *supra* note 19, 361-62 (discussing the overwhelming debt load incurred by farmers in the 1970s and the rapid depreciation of land value and commodity prices that made debt service impossible); *see also* James J. White, *Taking from Farm Lenders and Farm Debtors: Chapter 12 of the Bankruptcy Code*, 13 J. Corp. L. 1, 2-4 (1987) (noting the public outcry to the farm crisis was similar to that of the Great Depression); Harl, *supra* note 18, at 189 (discussing a resolution passed by the Iowa Senate declaring the farm economy in a state of depression).

78. Shapiro, *supra* note 19, at 361-62.

79. *See* Shapiro, *supra* note 19, 362-66 (discussing the inadequacies of then existing Chapter 11 and 13 bankruptcies); L. Leon Geyer, *Risk Sharing Down on the Farm: A Comparison of Farmer Bankruptcy and Insolvency Statutes or Selling the Farm*, 45 Drake L. Rev. 331, 333-34 (1997) (noting that farmers felt the avenues available under Chapters 7, 11, and 13 were inadequate to prevent farm foreclosures); Anderson & Rainach, *supra* note 66, at 441 (discussing how farmers were "over-leveraged, top-heavy with debt"); Janet A. Flaccus, *A Comparison of Farm Bankruptcies in Chapter 11 and the New Chapter* 12, 11 U. Ark. Little Rock L.J. 49, 50 (1988-1989) ("[G]etting a plan confirmed in Chapter 11 and meeting the requirements of being a debtor in Chapter 13 have been difficult, if not impossible, for many farmers.").

80. William W. Horlock Jr., *Chapter 12: Relief for the Family Farmer*, 5 Bankr. Dev. J. 229, 229 (1987).

81. 132 Cong. Rec. S15074-05 (daily ed. Oct. 3, 1986) (statement of Sen. Grassley).

82. *See In re* Cross Timbers Ranch, Inc., 151 B.R. 923, 925 (Bankr. W.D. Mo. 1993) (finding that the farmer's debts exceeded $1,500,000.00 and therefore precluded Chapter 12 eligi-

noted that the ceiling was potentially too low, and therefore excluded operations of the type Congress intended to protect.[83] Some respondents in a 1989 study of Chapter 12 by the General Accounting Office (GAO) stated that the $1.5 million ceiling failed to account for two important variables: the different costs associated with different types of farms and regional variances in the price of land.[84] One respondent stated different types of farming operations require different debt levels and that a flat $1.5 million ceiling could exclude otherwise eligible farmers from Chapter 12's protections.[85] Another participant noted farmers in California were disadvantaged due to the high real estate prices they encountered, consequently disqualifying farmers purely due to their geographic location.[86]

B. *Composition of Debt*

Another area of concern focused on the requirement that eighty percent of the farmer's debt had to arise from the farming operation for Chapter 12 eligibility.[87] One debt that did not count towards the eighty percent requirement was debt on the farmer's principle residence, unless it related to the farming operation.[88] Participants in the 1989 GAO study suggested excluding other debts from the calculation including forgivable debts which may not require the payment of money and loans for which the farmer is only a co-signer.[89] Yet, shortly after Chapter 12 was created, one commentator noted that even in 1980, prior to the farm crisis, approximately sixty-three percent of farmers could not meet the eighty percent debt requirement.[90] Regardless, the statute left it to the courts to determine which debt was of the type to "arise from a farming operation."[91]

The test set forth by the court in *In re Douglass* stated "the reason or purpose for which the debt was incurred coupled with the use to which the borrowed funds were put . . . should be the criteria to determine whether the debt 'arises out of a farming operation.'"[92] Applying this test, the court held that a mortgage on a service station could be considered debt arising out of a farming

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bility); *see also* Horlock, *supra* note 80 at 239-40 (discussing cases in which debtors had attempted and failed to circumvent the $1.5 million debt limitation).

83. Jonathan K. Van Patten, *Chapter 12 in the Courts*, 38 S.D. L. Rev. 52, 65 (1993).
84. *See* U.S. Gen. Accounting Office, *SUPRA* NOTE 13, at 34.
85. *See id.*
86. *See id.*
87. *See* 11 U.S.C. § 101(18)(A) (2006); 11 U.S.C. § 101(18)(B) (2006).
88. 11 U.S.C. § 101(18)(A) (2006).
89. U.S. Gen. Accounting Office, *SUPRA* NOTE 13, at 34.
90. Shapiro, *supra* note 19, at 358.
91. *Id.*; *See generally* 11 U.S.C. § 101 (2006).
92. *In re* Douglass, 77 B.R. 714, 715 (Bankr. W.D. Mo. 1987).

operation if the funds "were actually procured for and used in the farming operation."[93] As applied in *In re Kan Corp.*, the debtor failed to reach the eighty percent threshold when the court found that although farm land had been used as security, the money had not been used for a farming operation.[94]

C. *Measure of Income*

More vexation with the 1986 act lay in the requirement that fifty percent of the farmer's income in the taxable year preceding the year in which bankruptcy was filed arise from the farming operation.[95] This led to a multitude of problems and solutions.

The judiciary developed two separate tests for determining whether the farmer satisfied the fifty percent test. The Seventh Circuit's test from *In re Wagner* simply applied the definition of gross income supplied by the Internal Revenue Code.[96] The court reasoned "that Congress wanted a mechanical, which is to say an easily applicable, test for 'farmer'. . . ."[97] The court also noted that "[t]he decision to bring a bankruptcy action must often be . . . made in a hurry,"[98] and by applying this definition it was hoped that the determination regarding the level of income would be made simple, and "everyone will know where he stands."[99] Thus since the tax code included Wagner's income from his IRA as gross income, it was also included in his gross income for purposes of the bankruptcy code.[100]

The *Wagner* approach was criticized by *In re Rott,* where the court considered the circumstances of the debtor's situation and reasoned that "'gross income' is not an accounting term capable of precise definition."[101] It stated that while the *Wagner* test had its own merits, "this court does not believe that judicial economy, procedural convenience, and predictability should be placed above the flexible nature of the Bankruptcy Code, and the objective of reaching just and equitable results. . . ."[102] In applying this totality of the circumstances approach, the court refused to count $60,000 in loan forgiveness as gross income despite

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93. *Id.*
94. *In re* Kan Corp., 101 B.R. 726, 727 (Bankr. W.D. Okla. 1988).
95. 11 U.S.C. § 101(18)(A)(i) (2006).
96. *In re* Wagner, 808 F.2d 542, 547 (7th Cir. 1986).
97. *Id.*
98. *Id.*
99. *Id.* at 549.
100. *Id.* at 548.
101. *In re* Rott, 73 B.R. 366, 372 (Bankr. D.N.D. 1987) (citing *In re* Wagner, 808 F.2d 542, 548 (7th Cir. 1986)).
102. *Id.* at 371-72.

sections of the Internal Revenue Code that would have included it, stating that to do so would be to penalize the debtors.[103]

There was also controversy, resulting in yet more split authority and complaints from farmers, on whether rent received could be included as farm income.[104] The Seventh Circuit in *In re Armstrong* agreed that mere ownership of farm land does not independently establish the owner as a farmer eligible for Chapter 12 relief.[105] Echoing the reasoning of the majority, the dissent stated that "Congress did not intend to shield from involuntary bankruptcy a non-resident landowner whose rents happened to derive to some degree from farming operations taking place on his land. Rather, Congress established protection for those whose incomes are inherently cyclical and somewhat unpredictable. . . ."[106] However, the opinions diverged on when to include rental income as farm income. The majority held that cash rent received did not count as income from a farm operation.[107] They reasoned that by renting out the land "Armstrong was insulated from the traditional risks of farming", and therefore could not count the income as farm income.[108]

The opposing line of cases, based upon the dissent from *In re Armstrong*, attempted to make an individualized determination for each debtor using a totality of the circumstances test.[109] This principle was further enunciated by *In re Rott* where the court stated that "[w]hile an empirical formula for determining Chapter 12 eligibility would be convenient and desirable," distinguishing rent between farm and non-farm income cannot be determined as a simple matter of law.[110] In applying its test, the court included or excluded rents received based upon whether the rent was subject to the inherent risks of farming.[111]

This totality-of-the-circumstances test was later set forth in four parts:

> 1) is rental of the land an integral part of the debtor's farming operation?; 2) was the debtor forced to temporarily rent the land?; 3) what are the prior and proposed uses of the rented land?; and, 4) does the debtor show a firm purpose to farm the land again in the near future?[112]

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103. *Id.* at 372.

104. *See* U.S. Gen. Accounting Office, *SUPRA* NOTE 13, AT 39.

105. *See In re* Armstrong, 812 F.2d 1024, 1030 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part).

106. *Id.*

107. *Id.* at 1028.

108. *Id.*

109. *Id.* at 1031 (Cudahy, J., concurring in part and dissenting in part).

110. *In re* Rott, 73 B.R. 366, 373 (Bankr. D.N.D. 1987).

111. *Id.*

112. *In re* Maynard, 295 B.R. 437, 440 (Bankr. S.D.N.Y. 2003) (citing *In re* Armstrong, 812 F.2d 1024, 1031 (7th Cir. 1987) (Cudahy, J., concurring in part and dissenting in part)).

The goal of the test is to avoid punishing farmers who made the necessary business decisions to keep their farm operational.[113]

Another problem was the requirement that greater than fifty percent of the debtor's income in the tax year preceding the year of filing arise from the farming operation.[114] In the GAO study, respondents argued this provision punished farmers for attempting to look to other sources for income.[115] This argument was furthered by commentators who noted that, leading up to the bankruptcy filing, it was common for debtors to attempt to solve their financial woes by taking off-farm jobs.[116] Ironically, if the debtor wished to continue farming, this logical and prudent action could actually bar filing under the very chapter which would afford the best opportunity to continue farming.[117]

Similarly, the GAO respondents argued the requirement that the fifty percent test be satisfied in the taxable year immediately prior to filing was too brief to truly gauge farm income.[118] They argued that this short time span punished both farmers who either took off-farm jobs to save their farming operations, and those who had suffered a natural disaster which had affected their income for that year.[119]

D. *The Sunset Clause*

The seven year sunset clause of the 1986 act[120] created further misery for farmers. This sunset clause was triggered and then extended on multiple occasions,[121] but not without criticism for the intervening lapses.[122] This left courts in the precarious position of deciding when and to whom Chapter 12 was available.[123]

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113. *See In re* Rott, 73 B.R. at 373.

114. 11 U.S.C. § 101(18)(A)(i).

115. U.S. Gen. Accounting Office, *SUPRA* NOTE 13, AT 39.

116. Van Patten, *SUPRA* NOTE 83, AT 68; Robert J. Haupt, *When is a Farmer a "Family Farmer"?: An Analysis of Chapter 12 Income Qualification*, 29 Okla. City U. L. Rev. 725, 727 (2004).

117. Van Patten, *SUPRA* NOTE 83, AT 68.

118. U.S. Gen. Accounting Office, *SUPRA* NOTE 13, AT 39.

119. *ID.*

120. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(f), 100 Stat. 3088, 3124 (1986).

121. U.S. Dept. of Ag., Ag. Info. Bull. No. 788, Farmer Bankruptcies and Farm Exits in the United States, 1899-2002 31-32 (2004), *available at* http://www.ers.usda.gov/publications/aib788/ (detailing, as of March 2004, ten separate instances where the Act had been extended) [hereinafter FARMER BANKRUPTCIES].

122. *See Bankruptcy*, *supra* note 12 at 222.

123. *See, e.g., In re* Campbell, 313 B.R. 871, 873 (B.A.P. 10th Cir. 2004).

These problems were recognized by the National Bankruptcy Review Commission's 1997 report that proposed to eliminate Chapter 12's sunset clause and expand the chapter's eligibility requirements.[124] In response to this recommendation, Senator Grassley, the original sponsor of Chapter 12 in 1986, filed a bill to make Chapter 12 permanent.[125] However, the road to Chapter 12 permanence was considerably lengthened by the same report that called for its permanent enactment.[126] The dissenters from the Commission's report argued for means testing and stricter requirements for bankruptcy, among other proposals.[127] These recommendations, along with many others, were incorporated into various legislative proposals which would eventually become BAPCPA.[128] From the public record, it appears that the permanent renewal of Chapter 12 was supported by many.[129] However, permanence was tied directly to the passage of BAPCPA,[130] resulting in a myriad of short-term extensions after the October 1, 1998 amended sunset.[131]

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124. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 485, 487 (2005).

125. Family Farmer Protection Act of 1997, S. 1024, 105th Cong. (1997); 143 Cong. Rec. S7603-05 (1997) (statement of Sen. Grassley).

126. *See generally* Jensen, *SUPRA* NOTE 123, at 487 (describing the delays faced by the commission in meeting).

127. *Id.* at 488-89.

128. *See* Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. (1997); Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. (1997).

129. *Bankruptcy*, *SUPRA* NOTE 12, at 226-27 & n.35.

130. *See* Press Release, Senator Charles Grassley, Grassley: Chapter 12 Bankruptcy for Farmers Extended for Now (May 8, 2002), *available at* http://grassley.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=3736&Month=5&Year=2002; 149 Cong. Rec. H5673 (daily ed. June 23, 2003) (statement of Rep. Baldwin) (stating "There is a great consensus that chapter 12 bankruptcy protections work well. It is for that reason that we have included a permanent authorization in the comprehensive bankruptcy reform bill for the past three sessions of Congress. In fact, it is considered so popular that it has been held hostage to the larger bill. Every time we come to the floor to extend chapter 12, we are told that permanent extension cannot be passed separately from the big bill because taking out a popular item might slow that bill's momentum. We were told we had to strip the permanent extension of chapter 12 from last year's farm bill because it would slow down the bankruptcy bill.").

131. *See* FARMER BANKRUPTCIES, *SUPRA* NOTE 120, AT 31-32.

IV. BAPCPA: WHAT IT DOES AND WHAT IT MEANS[132]

A. *Section 1001: Permanent Reenactment*

The first change BAPCPA made to Chapter 12 was permanent reenactment of the chapter.[133] This change was widely supported and seemingly uncontroversial.[134] Additionally, it alleviated the jurisdictional questions that arose every time the chapter was allowed to expire.[135] Permanent enactment was accomplished despite reports documenting declining usage of Chapter 12 since its inception.[136] Chapter 12 usage peaked in the first year of its existence,[137] but still constituted only 0.009 percent of all bankruptcy cases filed.[138] Even the latest statistics published by the Administrative Office of the United States Courts show that the number of Chapter 12 filings remains infinitesimally small compared to the total number of filings.[139] Yet despite the plethora of evidence suggesting Chapter 12 has extremely limited use for financially distressed farmers, Congress chose to focus on political spin rather than reality.

Chapter 12 has been wildly successful. So many times in Washington we develop programs and laws with the best of intentions. But when these programs get to the real world, they don't work well. Chapter 12, on the other hand, has worked exactly as intended. According to a recent University of Iowa study, 74 percent of family farmers who filed chapter 12 bankruptcy are still farming and 61 percent of farmers who went through chapter 12 believe that chapter 12 was helpful in getting farmers back on their feet.

In conclusion, chapter 12 works and it works well. Let's make sure that we keep this safety net for family farmers in place. I urge my colleagues to think

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132. This section is necessarily limited to the changes set forth by BAPCPA §§ 1001-1009. *See* Susan Schneider, *Bankruptcy Reform: Changes to Chapter 12 - Adjustment of Debts of a Family Farmer*, 2005 Ark. L. Notes 113 (2005) (discussing other sections of BAPCRA that may also affect Chapter 12 debtors).

133. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1001, 119 Stat. 23, 185.

134. *See Bankruptcy*, *supra* note 12, at 226-27.

135. *See In re* Campbell, 313 B.R. 871 (10th Cir. 2004).

136. *See* Bruce L. Dixon et al., *supra* note 16, at 401.

137. *Id.* at 405.

138. *Phantom*, *supra* note 11, at 740.

139. Administrative Office of the United States Courts, U.S. BANKRUPTCY COURTS: BUSINESS AND NON-BUSINESS BANKRUPTCY CASES COMMENCED, BY CHAPTER OF THE BANKRUPTCY CODE, DURING THE THREE MONTH PERIOD ENDED SEPT. 30, 2006, *available at* http://www.uscourts.gov/bnkrpctystats/bankrupt_f23mos_sep2006.xls (showing that of the 155,833 total bankruptcy filings between July 1 and Sept. 30, 2006, only 97 were under Chapter 12, constituting 0.00056% of all bankruptcy filings).

of this bill as a low-cost insurance policy for an important part of America's economy and America's heritage.[140]

The decline in Chapter 12 usage may be attributed to a variety of factors, one of which may be caused in part by the small number of filings itself. Bankruptcy lawyers may be reluctant to specialize in Chapter 12 work due to the small number of debtors eligible for its provisions, which raises the cost of filing under Chapter 12 and presents yet another barrier to the farmer/debtor.[141] Furthermore, prior to its permanent enactment, the incentive for practitioners to specialize was decreased by the uncertainty as to Chapter 12's future.[142] Although the changes discussed in this section expand eligibility, it is an open question as to whether this will increase the attractiveness of Chapter 12 to debtors.

B. *Section 1003: Certain Debts Owed to Federal Government*

Another change to Chapter 12 under BAPCPA will allow farmers to downsize their operations under a reduced tax burden. Under tax law, a farmer may elect to depreciate certain property, which qualifies as a reduction in their tax burden.[143] However, when the farmer seeks to sell equipment that has been depreciated, the proceeds of that sale are subject to recapture[144] or, if they have not been depreciated, the proceeds from the sale still qualify as taxable income.[145] Prior to BAPCPA, governmental claims against the debtor took priority under section 507 and were required to be paid in full.[146] The result was that if the farmer attempted to downsize by selling off equipment and raise capital to pay debts, the tax owed on these sales would take precedence over the debts owed to creditors.[147] This formed yet another illogical roadblock to fiscally responsible debtors who were attempting to complete their bankruptcy.

Under BAPCPA, "if the tax claim is owed to a governmental unit and arose 'as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation,' then the claim 'shall be treated as an unsecured claim that is not entitled to priority under section 507.'"[148] The effect is that the tax is an unsecured claim and the government may only collect

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140. 143 CONG. REC. S7607 (daily ed. July 16, 1997) (statement of Sen. Grassley).
141. *See Phantom, supra* note 11, at 742-43.
142. *See generally id.* at 731 (stating the temporary nature of previous Chapter 12 legislation).
143. *See* I.R.C. § 167 (2006).
144. *See* I.R.C. § 1245 (2006).
145. I.R.C. §§ 1245, 1250 (2006).
146. *Phantom, supra* note 11, at 737.
147. *Id.* at 737-38.
148. *Id.* at 737 (*citing* 11 U.S.C. § 1222(a)(2)(A) (2006)).

its pro rata share of the debt in either the reorganization plan or liquidation.[149] Interestingly, the section is silent as to when the assets must be disposed of to qualify for the tax reduction.[150] Sales after bankruptcy will undoubtedly qualify, but it is unclear if sales made in an attempt to avoid filing bankruptcy will receive protected status.[151]

C. *Section 1004: Redefining the Family Farmer*

a. *Maximum Allowable Debt*

BAPCPA also made several changes to Chapter 12 debt requirements for family farmers. One change increased the maximum allowable debt from $1.5 million to $3.237 million.[152] This was the first adjustment of the debt ceiling since the creation of Chapter 12.[153] The provision also provided for an adjustment to the debt ceiling every three years based on inflation,[154] ensuring that future farmers would not again be stuck with an outdated debt ceiling.

Raising the ceiling was a long overdue correction to a well-noted problem.[155] In a statement on the floor, Senator Russ Feingold noted that "[i]nflation has severely limited the usefulness of Chapter 12 to family farmers."[156] The General Accounting Office study noted that, even in 1989, the ceiling may have been too low.[157] This study and the cost of operating a farm were cited as reasons to consider raising the limit only six years after enactment.[158] The surge in fuel prices following the damage wrought by Hurricane Katrina further emphasized the uncertainty farmers confront when projecting their expenses.[159] By including an automatic adjustment mechanism in the statute itself, Congress ensured that not only would the debt ceiling reflect reality, but that farmers would not have to wait for the prevailing political winds to receive an adjustment.

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149. *Phantom*, *supra* note 11, at 738.
150. *Id.*
151. *Id.*
152. 11 U.S.C. § 101(18)(A) (2006).
153. *See* 151 Cong. Rec. S2318 (daily ed. March 9, 2005) (statement of Sen. Feingold).
154. *Id.*; 11 U.S.C. § 104(b) (2006).
155. *See* Van Patten, *SUPRA* NOTE 83, AT 65.
156. 151 Cong. Rec. S2318 (daily ed. March 9, 2005) (statement of Sen. Feingold).
157. U.S. Gen. Accounting Office, *SUPRA* NOTE 13, AT 31.
158. *See* Van Patten, *SUPRA* NOTE 83, AT 65.
159. *SEE* U.S. Dept. OF Ag., Economic Research Service, Amber Waves, *U.S. FARM SECTOR WEATHERING HIGHER ENERGY COSTS*, Nov. 2005, *available at* http://www.ers.usda.gov/AmberWaves/November05/UpFront/ (noting that shocks in commodity market pricing affect farm production costs and ultimately farm income).

b. *Debt Arising from a Farming Operation*

BAPCPA also reduced the amount of debt required to arise from a farming operation from eighty percent to fifty percent.[160] Although the eighty percent requirement excludes the value of a principal residence unless the debt on the residence arose out of a farming operation, [161] meeting the eighty percent minimum was still an obstacle to farmers considering Chapter 12.[162] For instance, over the last 30 years the average level of credit card debt has risen. In the early 1980s a study found that the average bankrupt debtor carried approximately $3,700 in credit card debt.[163] However, during the debate over BAPCPA, the average American, not just bankrupt debtors, carried approximately $10,000 to $12,000 in credit card debt.[164] The cost of healthcare also contributed significantly to debt loads, as shown in a 2001 empirical study which revealed that medical bills played a substantial role in approximately half of the bankruptcy cases filed in 1999.[165]

In short, there are a multitude of factors contributing to the debt load of the family farmer. By the time health care costs, credit card debt, and other consumer debts are factored into the farmer's debt load, they may be enough to constitute more than twenty percent of the debt and therefore disqualify the farmer from Chapter 12's protections.[166] A lowered minimum percentage will help to alleviate this risk.

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160. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1004, 119 Stat. 23, 186.

161. 11 U.S.C. § 101(18)(B) (2006).

162. *See* U.S. Gen. Accounting Office, *SUPRA* NOTE 13, AT 34.

163. Teresa A. Sullivan et al., As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 183 (Oxford University Press) (1989).

164. 151 Cong. Rec. S2471 (daily ed. March 10, 2005) (statement of Sen. Kerry) (citing a study by the Consumer Federation of America).

165. *See* Melissa Jacoby et al, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts,* 76 N.Y.U. L. Rev. 375, 375 (2001) [hereinafter *Rethinking*]; *see also* Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 Wis. L. Rev. 969, 1015 [hereinafter *Broke*] (noting that medical problems are the second biggest cause of bankruptcies).

166. *See* Schneider, *supra* note 131, at 114.

D. *Section 1005: When the Determination of Gross Income is Made*

Chapter 12 is a reorganization chapter;[167] in order to qualify for its protections, farmers must be "engaged in a farming operation."[168] Under Chapter 12, as originally passed in 1986, a farmer had to earn fifty percent of gross income from the farm in the taxable year prior to the year the bankruptcy filing was made to be considered "engaged in a farming operation."[169]

The revisions of BAPCPA expanded the time frame in which the farmer could derive fifty percent or more of his income from his farm.[170] As previously noted, the fifty percent requirement actually may have discouraged farmers from seeking off-farm employment to help deal with their financial difficulties.[171] Instead of considering only the taxable year immediately preceding the year in which the bankruptcy was filed, BAPCPA allows the farmer to go back up to three years preceding the bankruptcy to meet the fifty percent requirement.[172] However, data indicates that in some farm households, almost ninety percent of income originates off-farm,[173] thus perhaps mooting this provision's attempt to expand eligibility.

E. *Section 1006: Disposable Income Test*

Another change to Chapter 12 seeks to end a discrepancy as the chapter is applied by the courts.[174] 11 U.S.C. § 1225 has much of the exact same wording as section 1325, yet courts have taken differing approaches to interpreting them.[175] The line of Chapter 12 cases based on *Rowley v. Yarnall* holds the projected disposable income confirmed in the plan is merely a frame of reference and that the payments the debtor is required to make may be adjusted to reflect

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167. 143 Cong. Rec. S7607 (daily ed. July 16, 1997) (statement of Sen. Grassley) (noting that Chapter 12 is modeled upon Chapter 13, which allows debtors to reorganize and repay a portion of their debts); *see also* Flaccus, *supra* note 79, at 50-51.

168. 11 U.S.C. § 101(18)(A) (2006).

169. *Id.*

170. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1005, 119 Stat. 23, 186.

171. *See* Van Patten, *SUPRA* NOTE 83, AT 68; U.S. Gen. Accounting Office, *SUPRA* NOTE 13, AT 39.

172. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1005, 119 Stat. 23, 187.

173. *Broke*, *supra* note 164, at 978.

174. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1006, 119 Stat. 23, 187.

175. *See* Joshua T. Crain, *Resolution of an Apparent Conflict: Rowley Versus Anderson*, 10 Drake J. Agric. L. 483, 493 (2006).

the actual disposable income of the debtor.[176] The court reasoned that to hold otherwise would lead to "an absurd result" in which farmers could effectively nullify the requirement that debtors use all their disposable income to fund their reorganization plan.[177] As noted, this is in conflict with Chapter 13 cases dealing with the nearly identical sections.[178]

This approach has been criticized as forcing farmers to account for and justify each and every expense made under the plan prior to obtaining discharge.[179] Criticism was leveled against exceedingly strict accountings[180] and large payments required for discharge,[181] while concern was expressed that farmers were being left with insufficient funds to operate their newly reorganized farms.[182]

The alternative set of Chapter 13 cases, based upon *In re* Anderson, hold that the debtor is only required to meet the payments as confirmed in the plan and that the figure is not open to later adjustment.[183] Although an argument has been made that the apparent conflict did not exist,[184] Congress felt otherwise and made a modification to the disposable income requirement.[185]
Congress' modifications added the following to section 1229:

> (d) A plan may not be modified under this section—
>
> (1) to increase the amount of any payment due before the plan as modified becomes the plan;
>
> (2) by anyone except the debtor, based on an increase in the debtor's disposable income, to increase the amount of payments to unsecured creditors required for a particular month so that the aggregate of such payments exceeds the debtor's disposable income for such month; or

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176. Rowley v. Yarnall, 22 F.3d 190, 193 (8th Cir. 1994).

177. *Id.* at 192 (farmers could simply list their projected disposable income as zero and still receive confirmation).

178. *See* Crain, *supra* note 174, at 494.

179. Schneider, *supra* note 131, at 117.

180. *In re* Wood, 122 B.R. 107, 116 n.11 (Bankr. D. Idaho 1990) (court found trustee's "microscopic examination" of farmer's financial records "extreme").

181. *In re* Hammrich, 98 F.3d 388, 389-90 (8th Cir. 1996) (debtors owed $95,885.86 prior to discharge); *In re* Broken Bow Ranch, Inc., 33 F.3d 1005, 1007 (8th Cir. 1994) (debtor owed $81,862.00 prior to discharge).

182. Schneider, *supra* note 131, at 118.

183. *See In re* Anderson, 21 F.3d 355 (9th Cir. 1994).

184. *See* Crain, *supra* note 174, 497-98 (arguing that the *Rowley* line focused on payment of actual disposable income at discharge while the *Anderson* line focused on the pledge of payment as a prerequisite to confirmation, thus eliminating the perceived conflict).

185. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1006(b), 119 Stat. 23, 187.

> (3) in the last year of the plan by anyone except the debtor, to require payments that would leave the debtor with insufficient funds to carry on the farming operation after the plan is completed.[186]

Each modification carries with it a benefit to debtors at the expense of creditors. 11 U.S.C. § 1229(d)(1), as amended, simply states that the payments due may not be increased until the modified plan is confirmed.[187] In short, not only does this provide the farmer an opportunity to demonstrate that the increase was only temporary, it ensures that any increased payments are prospective only and not applied retroactively to payments already made.[188] Section 1229(d)(2), as amended, further limits the rights of unsecured creditors to propose an increase in payments based upon an increase in actual disposable income by stating that only the debtor may propose payments that exceeds that month's disposable income as confirmed in the plan.[189] The final amended section, 11 U.S.C. 1229(d)(3), effectuates the goal of Chapter 12, to keep farmers farming, by attempting to ensure that farmers will emerge from bankruptcy with sufficient funds to continue farming.[190]

F. *Section 1007: Family Fishermen*

One of the most dramatic expansions of eligibility was the addition of family fisherman as an eligible class.[191] Originally proposed by Senator Susan Collins in 1999,[192] this change was necessitated by unfavorable case law regarding the eligibility of fishermen.[193] The historical predecessor to Chapter 12, the Frazier-Lemke Act, was also interpreted by the courts to deny eligibility to fisherman.[194] The definition included in Chapter 12 states: "The term 'farming op-

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186. *Id.*

187. *Id.*

188. Schneider, *supra* note 131, at 119.

189. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1006(b), 119 Stat. 23, 187.

190. *Id.*; *Phantom*, *supra* note 11, at 739; for further discussion of the changes discussed in this section *see* Karen R. Krub and Susan A. Schneider, Farmers' Legal Action Group, Inc., *Chapter 12 Bankruptcy Reform: Correcting the Disposable Income Problem* (June 2006) *available at* http://www.flaginc.org/topics/pubs/flar/200506FR.pdf.

191. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1007, 119 Stat. 23, 187.

192. Fishermen's Bankruptcy Protection Act, S. 684, 106th Cong. (1999); *see* 145 Cong. Rec. S3134 (daily ed. March 23, 1999) (statement of Sen. Collins).

193. *See In re* Watford, 898 F.2d 1525, 1527 (11th Cir. 1990) (holding that a stone crab business was not a "farming operation" for the purposes of Chapter 12 eligibility).

194. *See In re* Dunkly, 64 F.Supp 10, 11 (N.D. Cal. 1946) (defining the word "livestock" to not include fish and therefore fishermen are not "farmers").

eration' includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state."[195]

The courts have consistently held that the statutory list is not comprehensive,[196] and when interpreting what constitutes a "farming operation" under Chapter 12, "courts have generally applied a broad or liberal construction."[197] In applying this construction, six factors were recognized to assist in the determination:

> 1. Whether the location of the operation would be considered a traditional farm
>
> 2. The nature of the enterprise at the location
>
> 3. The type of product and its eventual market, although the "... court should not be limited to products and produce which are traditionally associated with farming in the state of the court's location ..." Debtors "... should not be denied the protection of the Bankruptcy Code merely because their endeavors are not found in the laundry list of Old McDonald's Farm." (edits in original)
>
> 4. The physical presence or absence of family members on the farm
>
> 5. Ownership of traditional farm assets
>
> 6. Whether the debtor is involved in the process of growing or developing crops or livestock.[198]

However even a broad construction did not extend Chapter 12 to fishermen. *In re Watford* presented the question of if and when a fish pond or stone-crab operation would be considered within a "farming operation."[199] The Eleventh Circuit held that "[t]he stone crabbing is not carried out on the Watfords' property and is too remote from Congress' statutory purpose to constitute a 'farming operation,'"[200] thereby implicitly denying Chapter 12 to fishermen. Regarding the fish ponds, the court concluded that it may be possible to qualify them as a "farming operation" and remanded the case on this point.[201]

There is one flaw in section 1007: although family fishermen are now eligible for Chapter 12 protection under BAPCPA, they are subject to the chap-

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195. 11 U.S.C. § 101(21) (2006).
196. *See In re* Watford, 898 F.2d at 1527 (citations omitted).
197. *In re* Sugar Pine Ranch, 100 B.R. 28, 31 (Bankr. D. Or. 1989) (citations omitted).
198. *Id.*
199. *In re* Watford, 898 F.2d at 1527.
200. *Id.*
201. *Id.* at 1529.

ter's *original* eligibility requirements. BAPCPA created 11 U.S.C. § 101(19A) which states,

> (19A) The term "family fisherman" means--
>
> (A) an individual or individual and spouse engaged in a commercial fishing operation--
>
> (i) whose aggregate debts do not exceed $1,500,000 and not less than 80 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse, unless such debt arises out of a commercial fishing operation), on the date the case is filed, arise out of a commercial fishing operation owned or operated by such individual or such individual and spouse; and
>
> (ii) who receive from such commercial fishing operation more than 50 percent of such individual's or such individual's and spouse's gross income for the taxable year preceding the taxable year in which the case concerning such individual or such individual and spouse was filed.[202]

Thus, although the monetary limits will be indexed to inflation, fishermen are still hampered by the same restrictions that led to many of the Chapter 12 revisions contained in BAPCPA. As has been noted, this drafting error was likely caused by the complete incorporation, without modification, of Senator Collins' bill which reflected Chapter 12's then current eligibility requirements.[203]

Interestingly, Congress took no testimony on the inclusion of family fishermen.[204] Given the utter lack of Congressional fact-finding in regards to the financial status of family fishermen, it is impossible to predict Chapter 12's impact upon them. The amendment that opened Chapter 12 to family fishermen was co-sponsored by Senator Collins and Senator John Kerry, but even in his floor statement announcing he would vote against the bill, Senator Kerry did not provide concrete reasons for the necessity of this expansion.[205] He stated,

> The small, family-owned fishing businesses are in serious trouble . . . The Collins-Kerry amendment will help ensure that fishermen have the flexibility under chapter 12 of the Bankruptcy Code to wait out the rebuilding of our commercial fish stocks without back tracking on our conservation gains to date. It will help preserve the rich New England fishing heritage in Massachusetts.[206]

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202. 11 U.S.C. § 101(19A) (2006).
203. *Phantom, supra* note 11, at 735.
204. *See id.* at 736 (stating that Congress failed to document or publicly consider the issue).
205. *See* 151 Cong. Rec. S2472 (daily ed. March 10, 2005) (statement of Sen. Kerry).
206. *Id.*

V. CONCLUSION

Chapter 12 offers financially distressed farmers a means by which to restructure their operations without losing their farm. Although a variety of factors lead to its infrequent use, it does provide farmers with leverage in their attempts to remain farming. The modifications embodied in BAPCPA will prove to be a benefit to those who resort to this chapter, despite the perception that the remainder of the bill is a boon to creditors at the expense of their debtors.