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TAKING THE NEW CONSUMER BANKRUPTCY MODEL FOR A TEST DRIVE: MEANS-TESTING REAL CHAPTER 7 DEBTORS

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INTRODUCTION

The continued climb in personal bankruptcy filings in the late 1990's, a time of general prosperity and low unemployment, has convinced some that debtors are abusing the system, taking an "easy out" when they could, with effort, repay much of their unsecured debt. Access to Chapter 7's fresh start, it is urged, should be restricted. Others argue that most Chapter 7 filers are more burdened by debt than ever, and that major consumer creditors, especially credit card issuers, are hardly blameless victims.⁽²⁾ Some holders of this view would let the market punish irresponsibility in both camps, imposing losses on lenders and reducing credit to debtors.

The debate on bankruptcy abuse has been accompanied by bankruptcy reform bills in both houses of Congress. Several of these bills include means-testing for Chapter 7 debtors,⁽³⁾ a concept long advanced by the consumer credit industry.⁽⁴⁾ Means-testing would first, develop a mathematical model to predict which Chapter 7 debtors have substantial ability to repay unsecured debt; and second, require those "can-pay debtors"⁽⁵⁾ either to repay in Chapter 13 over five to seven years, or to forego a discharge.⁽⁶⁾ Means-testing would deny such debtors the relatively quick Chapter 7 fresh start, which does not require use of post-petition income to repay most debts.⁽⁷⁾ Some models of means-testing would reduce the discretion bankruptcy judges now have under section 707(b) to dismiss consumer Chapter 7 cases for "substantial abuse."⁽⁸⁾

VISA/U.S.A. Inc., a preeminent unsecured creditor and vigorous advocate of means-testing, has commissioned a series of empirical studies of the repayment capacity of Chapter 7 debtors.⁽⁹⁾ The most recent of these, by the accounting firm of Ernst & Young in March, 1998,⁽¹⁰⁾ followed the means-testing formula of H.R. 3150, the bill which appeared to have the greatest prospect for passage in the 105th Congress.⁽¹¹⁾ Ernst & Young initially concluded that 15% of a national proportional sample of 2,200 Chapter 7 filers were "can-pays" under that bill. They further asserted that H.R. 3150's means-testing would have allowed unsecured creditors, on a national basis, to collect \$4 billion more than did the current system.⁽¹²⁾ Ernst & Young later reduced the can-pay estimate to 11%, after H.R. 3150 was amended.⁽¹³⁾ However, to our knowledge, they did not publicly announce any reduction in the projected \$4 billion net gain.

The VISA-funded studies were much criticized by academics⁽¹⁴⁾ as well as by the General Accounting Office (GAO). The GAO's chief criticisms were that these studies ignored Chapter 13 administrative expenses and based their projections on two unrealistic assumptions: first, that for the next five years, each affected debtor's income would rise as quickly as debts and expenses; and second, that 100% of these debtors would complete a 60-month Chapter 13 plan. The GAO noted that current voluntary Chapter 13 plans have only a 30% completion rate.⁽¹⁵⁾

It appeared to us that one more study was needed, one not funded or controlled by creditors with a financial stake in the outcome. In late 1997, we applied for a grant from the non-profit American Bankruptcy Institute's (ABI) Endowment to support an empirical investigation of means-testing; a test drive of this new model of consumer bankruptcy. We had in hand a ready-made database of over 1,000 individual Chapter 7 cases, from seven judicial districts in seven federal circuits across the nation. These had been collected for use in an ongoing study of reaffirmation practices, funded by the National Conference of Bankruptcy Judges.⁽¹⁶⁾

In April, 1998, the ABI agreed to fund the project. In light of pending legislation and the release of Ernst & Young's March, 1998 report, we decided to apply the version of means-testing in H.R. 3150 passed by the House of Representatives in June, 1998.⁽¹⁷⁾ We also decided to follow many of the steps used by Ernst & Young to facilitate comparison of results.

This article records our results, as well as how and why they might differ from Ernst & Young's. It also sets out insights gained from our test drive of means-testing. Part I is a short summary of means-testing and our conclusions. Part II covers the mechanics of means-testing: steps required, assumptions made and results obtained. Part III projects our sample's repayment capacity to the national level and examines the "impossible dreams" on which VISA's five-year estimates have been based. Appendix A contains short profiles of the can-pay debtors whom H.R. 3150 would dismiss from Chapter 7. Appendix B describes our sample design, data collection and coding.

PART I—OUR RESULTS, ERNST & YOUNG'S RESULTS AND WHY THE TWAIN DON'T MEET.

Our test drive has led us to the following conclusions:

First, abuse of Chapter 7, in the form of filings by debtors who could repay under H.R. 3150's formula, appears minimal. Only 3.6% of sample debtors emerged as apparent can-pays. Ninety-six and four-tenths percent of the sample debtors were rightly in Chapter 7.⁽¹⁸⁾

Second, sophisticated debtors could avoid can-pay status by taking on more debt or increasing charitable contributions. The 3.6% could drop once debtors adjusted to the new rules.

Third, even under the overly optimistic assumptions of the VISA studies, H.R. 3150 would allow nonpriority unsecured creditors to collect at most an additional \$930 million from can-pay debtors across the nation. If our sample results held for the nation as a whole, a more realistic estimate would be \$450 million, less than one-eighth of VISA's estimate.

Fourth, in operation, the necessary analysis will be costly and labor-intensive when applied to a million or more Chapter 7 cases a year. In addition to median income testing of all cases, H.R. 3150 required additional individualized scrutiny of 24% of sample Chapter 7 filings (33% in some districts) to find the 3.6% who emerged as apparent can-pays.

We did not attempt to assess the cost to taxpayers of H.R. 3150's means-testing. The Congressional Budget Office (CBO), however, estimated that H.R. 3150's provisions as a whole would have cost \$214 million in the first five years, plus another \$8-16 million for additional judges needed for means-testing. ⁽¹⁹⁾

All the empirical studies to date agree on one point; the vast majority of Chapter 7 debtors belong in that chapter. They have too little income after necessary expenses to repay unsecured debt. It is vital, therefore, that no undue burdens be thrust on that needy majority in order to flush out a small minority of abusers.

Overview of Means-Testing Under H.R. 3150.

H.R. 3150's version of means-testing asks three questions about each individual or joint Chapter 7 case. In greatly simplified form, those three questions are:

- 1) Is debtor's annual gross income at least equal to the national median income for households of like size?
- 2) Would debtor have more than \$50 of remaining income each month after living expenses and payments on secured and priority debt?
- 3) If debtor's remaining monthly income were applied to nonpriority unsecured debt for the next five years, would it repay at least 20% of that debt?⁽²⁰⁾

If the answer to all three questions is yes, that debtor is a can-pay, ineligible for Chapter 7. On the other hand, if the answer to any of the questions is "No," then H.R. 3150 treats the debtor as a can't-pay, rightfully in Chapter 7.

Our results for each question are displayed in the chart below.⁽²¹⁾

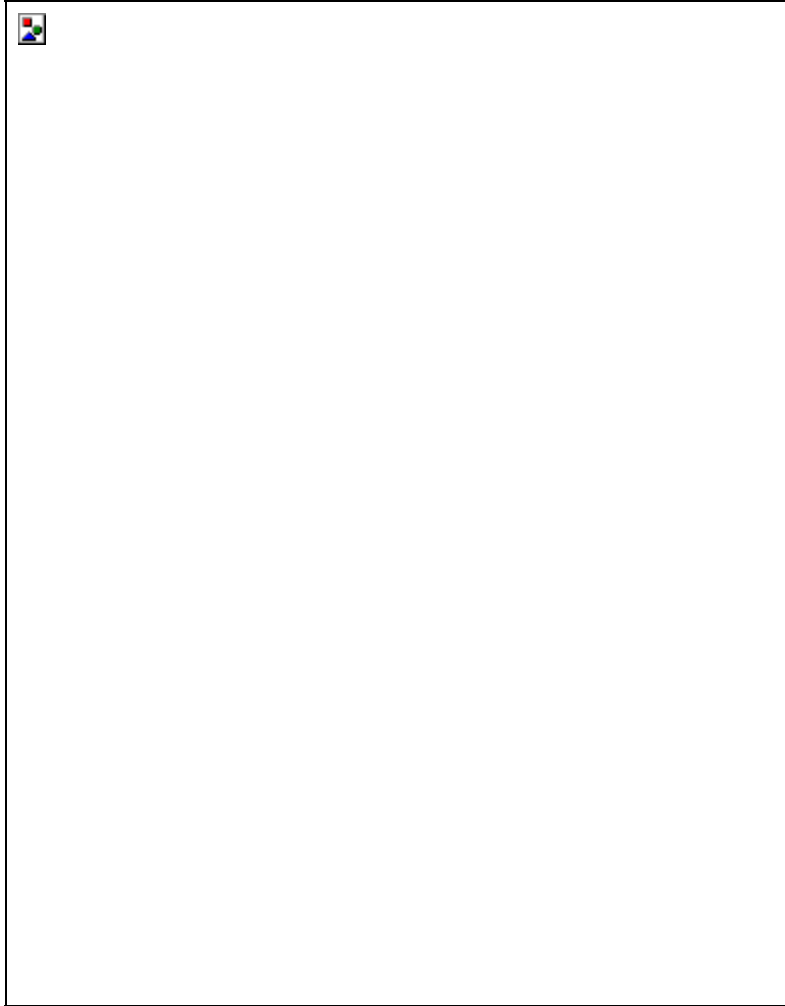


Table 1 sets forth the results of H.R. 3150's three tests for each of the sample districts.

TABLE 1
PERCENTAGE OF DEBTORS PASSING H.R. 3150'S* TESTS

DISTRICT	CASES	% PASSING MEDIAN INCOME TEST	% PASSING PROJECTED MONTHLY NET INCOME TEST	% PASSING 20% TEST
CA	150	33.3	3.33	3.33
CO	149	16.8	6.04	6.04
GA	147	17.0	2.72	1.36
MA	147	27.9	3.40	3.40

NE	149	16.1	5.37	4.03
NC	150	18.0	6.70	3.33
WI	149	15.4	5.37	3.36

*As passed by the House of Representatives on June 10, 1998.

We conclude that only 3.6%(22) of our sample are can-pays under H.R. 3150. Ernst & Young put 11% of their sample into the can-pay category.(23)

Both studies assumed, unrealistically, no avoidance behavior by debtors likely to be impacted. If many debtors chose to increase debt or charitable contributions, these percentages would fall. This dramatic difference is due to a variety of factors. First, we interpreted the bill's car ownership expense allowance more broadly than did Ernst & Young. Ernst & Young allowed debt retirement only, while we added major repairs, replacement and leasing costs. Second, we estimated Chapter 13 administrative expenses and deducted these priority claims from amounts available to creditors. Ernst & Young, like earlier creditor studies, ignored these real world costs.(24) Third, we charged interest on secured claims for five years rather than just two years. Fourth, the reports are based on samples of different designs.(25)

Fifth, our sample was drawn from 1995 filings, while Ernst & Young's sample was drawn from 1997 filings.

PART II--APPLYING H.R. 3150'S MEANS-TESTING FORMULA TO THE SAMPLE

A. The Median Income Test.

H.R. 3150 uses an income test to make its first cut. If required proof of income is not unduly burdensome, an income test might serve reasonably well.(26) Any means-testing system needs a mechanism that quickly, inexpensively and predictably eliminates all but the most likely candidates for can-pay status, freeing the can't-pay majority of debtors to make a fresh start. Such a front-end screen will reduce the cost and increase the efficiency of means-testing. Using a median income test at the front end to free most debtors to continue in Chapter 7 is far better than the approach taken in the Conference version of H.R. 3150, recently resurrected as the Bankruptcy Reform Act of 1999 in the 106th Congress. In these bills, all Chapter 7 cases are put through the complex Projected Monthly Net Income Test, which requires rigorous examination of individual debts and expenses. A median income test is used only at the end of the process, to determine whether creditors, in addition to judges and trustees, can move to dismiss the Chapter 7 case.(27)

Current Annual Gross Income and Household Size. H.R. 3150 compares the debtor's annual gross income to national median incomes. The test is relatively simple; the only data needed from the debtor are annual gross income and household size. The bill calculates annual gross income by first, determining the debtor's average monthly gross income for the six months preceding the petition; and second, multiplying that figure by 12 to come up with the figure to be compared with the relevant median.(28) Since the necessary data for that calculation are not supplied by the current Official Bankruptcy Forms, we, like Ernst & Young, substituted the debtor's current monthly gross income from Schedule I and multiplied it by 12.(29) Both studies determined household size by adding two to the number of dependents in joint cases and one to the number of dependents in individual cases.(30)

National Median Incomes. The bill requires use of the most recent prior year's medians available from the Census Bureau as of January 1st of the year in which the petition was filed.(31)

Because our cases were filed in 1995, we used 1993 medians:

one person(32) \$ 25,560

two persons 31,302

three persons 38,727

four or more persons(33) 45,161

Our Median Income Test Results. As Table 2 shows, 24% of our weighted sample(34)

had incomes at or above the national medians. These results are not directly comparable to Ernst & Young's, for they followed an earlier version of H.R. 3150 which set the cut at 75% rather than 100% of the medians.(35)

Forty-seven percent of their sample had incomes meeting that lower threshold.(36)

TABLE 2
THE MEDIAN INCOME TEST--WEIGHTED BY TOTAL

CHAPTER 7 NON-BUSINESS FILINGS					
DISTRICT	CASES	# PASSED	% PASSED	TOTAL CH. 7 FILINGS IN 95	ESTIMATED # PASSED
CA	150	50	33.3	17,347	5,777
CO	149	25	16.8	10,443	1,754
GA	147	25	17.0	8,480	1,442
MA	147	41	27.9	11,240	3,136
NE	149	24	16.1	2,931	472
NC	150	27	18.0	1,151	207
WI	149	23	15.4	3,210	494
TOTAL	1,041	215	20.7	54,802	13,282

WEIGHTED PASS RATE = 24.2%⁽³⁷⁾

While the majority of cases in our sample and Ernst & Young's had incomes below 75% of the medians, almost one-fourth of our sample had incomes at or above the national medians. This may seem surprising, but one should keep in mind two factors raising the numbers. First, both samples include not just wage-earners and pensioners, but also debtors who are self-employed in whole or part. Gross income for the self-employed means gross revenues from their business, before deduction of ordinary and necessary business expenses. Only after deduction of those expenses is their income comparable to that of wage-earners, because only the adjusted income is available for living expenses and debt repayment. Thus, the higher gross incomes of some self-employed debtors do not necessarily indicate greater capacity to repay.

A second and more pervasive influence is the use of national medians. Debtors from relatively high cost-of-living areas, such as San Francisco and Boston, are much more likely than Nebraskans or Georgians to have incomes at or above national medians, even though their higher expenses may mean San Franciscans and Bostonians are no more likely to emerge as can-pays after all three tests are done. Use of national medians works both ways, cutting out some debtors in low cost-of-living areas with incomes below national medians, who may nevertheless have repayment capacity. But the overall impact of national medians on our sample, when weighted by cases filed per district, is to increase the percentage with incomes at or above the medians. This occurs because many more Chapter 7 cases were filed in 1995 in the Northern District of California, the District of Massachusetts and the District of Colorado, some of the higher cost-of-living parts of our sample, than in the Northern District of Georgia, the District of Nebraska, the Middle District of North Carolina, and the Western District of Wisconsin.⁽³⁸⁾

We find the median income test to be more efficient at 100% rather than 75% of the relevant median. No doubt, there are debtors with incomes below the 100% level who currently have repayment capacity. However, they will be scarcer than at 100%, so more cases would have to be tested (and more deserved fresh starts delayed) to find each additional can-pay. Further, debtors with lower incomes are less likely to complete a 60-month plan returning any substantial amount to unsecured creditors. Setting the cut at 100% of the median will better balance the need for a quick and efficient cutoff of all but the most likely can-pays against the desire to capture the real can-pays.

We also recommend increasing the cutoff level for larger families. As noted above, H.R. 3150 applies the family of four median to all families of four or more persons.⁽³⁹⁾ Our sample included 106 cases filed by debtors with families of five or more persons. Twenty-two of these cases passed the median income test, but only one emerged as a can-pay. Thus, the family of four median required individualized scrutiny of 11 large-family cases to locate one can-pay case. A substantial increase in the minimum income figure for families of five or more would increase efficiency.

In sum, H.R. 3150's median income test is not as efficient a front-end screen as it could be. The test will require considerable streamlining if it is to fulfill its function of identifying only the likely can-pays.

B. The \$50 a Month Test (Projected Monthly Net Income Test).

The second stage of means-testing under H.R. 3150 is the Projected Monthly Net Income Test. This test is much more complex than the first, requiring detailed scrutiny of each debtor's debts and expenses. The test asks whether the debtor would have more than \$50 of remaining income each month after living expenses and payments on secured and priority debt. If so, the debtor is a potential can-pay who must proceed to the third and final test. If not, the debtor is rightfully in Chapter 7. In essence, the bill presumes for purposes of

means-testing that for five years the debtor will enjoy a stable income, keep expenses within an IRS budget, retain all collateral, repay 100% of non-real estate secured and priority debt in 60 equal installments and continue regular payments under the original contract on long-term real estate debt.

The No Cram-Down Rule. Anyone familiar with Chapter 13 may ask, "Why assume 100% payment of non-housing secured debt?" After all, current practice is to bifurcate or "cram down" secured claims to the value of the collateral, and treat the balance of the debt in law as it is in fact, unsecured.⁽⁴⁰⁾

"Cram down" is one of the principal inducements to debtors to file in Chapter 13.⁽⁴¹⁾

However, the no-cram-down assumption for means-testing reflects another of H.R. 3150's proposed changes to consumer bankruptcy. One version of the bill would amend Code section 506 to prohibit cram down on purchase-money claims for "personal property acquired by the debtor within five years of the filing of the petition."⁽⁴²⁾ Instead, the value of the collateral and the allowed secured claim equal "the sum of the unpaid principal balance and interest and charges at the contract rate."⁽⁴³⁾

Is the no-cram-down provision a payoff to car and furniture lenders for not opposing means-testing?

Imagine the glee of the car financiers when [the bill] fixed the value of five year old used cars at the amount due under the contract, including contractual interest, late payment fees and collection fees. Where were Visa and Mastercard? Every dollar of "fake" value added to a car is lost for unsecured creditors in Chapter 13 cases.⁽⁴⁴⁾

Means-testing, of course, aims to increase returns to unsecured creditors by pushing more debtors into Chapter 13. But Chapter 13 for secured creditors has meant cram down, waiting months for payments to begin, and years under the automatic stay. Secured creditors have fared better in Chapter 7, where the debtor may reaffirm car debt in full, and the quick discharge eases the burden of reaffirmation payments. Chapter 7's automatic stay lasts months, not years, so if the debtor fails to pay, the secured creditor can retake the collateral. The no-cram-down rule would make Chapter 13 more acceptable to secured creditors. However, it will do so at the cost of reducing payments to unsecured creditors in Chapter 13, making Chapter 13 less attractive to debtors and increasing plan failure rates.

H.R. 3150 goes even further for initial means-testing analysis. It presumes that debtors will retain all collateral and repay the full unpaid balance without cram-down. Not surprisingly, very few debtors can pay their non-housing secured debt in full in five years, cover the trustee's fees and priority taxes, and pay 20% of unsecured claims as well.

1. Living Expenses and the IRS Collection Financial Standards.

To find Projected Monthly Net Income, the bill starts with average monthly gross income for the six months prior to filing (the same income figure used in the median income test). From that figure, one deducts living expenses as well as payments on secured and priority debt. H.R. 3150 directs that living expenses for this test be based on the Collection Financial Standards (CFS) used by the Internal Revenue Service in tax payment plans.⁽⁴⁵⁾

H.R. 3150 turns to the CFS for guidance on reasonable living expenses, rather than relying exclusively on the debtor's scheduled expenses, which are widely viewed as inaccurate. Some say that debtors often inflate living expenses to avoid dismissal under section 707(b). Others say that when debtors' scheduled expenses are wrong, the errors are often on the low side, because many debtors do not keep track of actual amounts they spend for categories like food, clothing and transportation that require many small expenditures rather than one monthly check.

Many questions will arise with use of the CFS for means-testing. Two general questions will be treated here and others will be addressed in the discussion of the Projected Monthly Net Income Test below. The first is which version of the CFS to use. The IRS issues and updates the CFS on a somewhat irregular schedule. For example, the 1997 CFS were to be effective from and after April 14, 1997, while the 1998 CFS were to be effective from and after October 15, 1998.⁽⁴⁶⁾

H.R. 3150 does not state whether one should follow IRS practice, that is, shift allowances in mid-year, or instead use the same set for the full calendar year. We assumed that, for means-testing purposes, the CFS should be used in the same way as the national income medians from the Census Bureau. That is, one should use the most recent CFS that is available January 1st for all cases filed in that calendar year. Administratively, this would be substantially simpler, especially if the IRS continues to adjust the CFS on an irregular schedule. Trustees, attorneys for debtors and creditors, makers of bankruptcy software, and others could adjust their computer programs at the same time once a year for new national medians and new CFS.

A second problem is that the CFS are not, for the most part, designed as allowances. Instead, under IRS practice at least, several CFS categories are maximums and the taxpayer is allowed only the lesser of actual expenses or the CFS limit.⁽⁴⁷⁾ Again, it is unclear if H.R. 3150's drafters intended to follow that IRS practice or instead, for purposes of means-testing, to use the CFS as straight allowances. Both we and Ernst & Young⁽⁴⁸⁾

assumed that H.R. 3150 intended the CFS to be used in means-testing as allowances, not merely as maximums. We made this assumption for several reasons. First, use as allowances addresses both of the alleged shortcomings in debtors' scheduled expenses. If the debtor's expenses are too high, the CFS will limit them. If they are unrealistically low, use of the CFS as an allowance, rather than reliance on the debtor's actual scheduled expenses, will produce a more realistic budget and, hence, generate a better prediction of ability to repay. Much of the utility of the CFS for means-testing purposes would be lost if debtors and trustees had to collect evidence of and calculate the debtors' actual expenses for categories covered by the CFS. While it is easy to determine a monthly rent or mortgage payment, it is much more difficult to keep track of all monthly transportation or food expenses for a family of five, for example.

What did we do for our sample? We did not resurrect the CFS actually in effect as of January 1, 1995. Instead, we used the CFS version promulgated in 1997 and reduced those allowances to 1994 dollars.⁽⁴⁹⁾

because the 1994 CFS would have been in effect as of January 1, 1995. We chose that route in case there had been any structural changes to the CFS, in addition to increased dollar amounts. Since means-testing, if adopted in a version using CFS, would have to use the post-1997 structure, it seemed best for our test drive to use the version closest to that considered for adoption.

The four CFS categories are: 1) Food and Clothing, 2) Housing and Utilities, 3) Transportation and 4) Other Necessary Expenses. The first three categories set specific monthly dollar amounts.⁽⁵⁰⁾

The Other Necessary Expenses category is apparently left to the discretion of IRS agents (or in bankruptcy, perhaps the U.S. Trustee and the bankruptcy judge). It is helpful to have objective guidance on allowable expenses, but if the CFS understates actual and reasonable expenses, projected repayment capacity will be overstated under H.R. 3150.⁽⁵¹⁾

a. CFS Food and Clothing Allowance. The Food and Clothing Allowance, for "food, clothing and clothing care, housekeeping supplies, personal care products and services, and miscellaneous,"⁽⁵²⁾

presents no particular interpretive problems, because it is a national standard that does not vary by location (except for Alaska and Hawaii). The situation is not nearly so simple, however, with the rest of the CFS under H.R. 3150.

b. CFS Transportation Allowance. The CFS Transportation Allowance is subdivided into a uniform national standard for Ownership expense and local standards (adjusted for cost-of-living) for Operating expense (or Public Transportation expense if the debtor does not own or lease a car). The Operating Allowance covers "insurance, registration fees, normal maintenance, fuel,...parking and tolls,"⁽⁵³⁾ for cars owned or leased. We read the CFS to limit Ownership and Operating Allowances to one car for households of one and no more than two cars for households of two or more. Debtors who did not own or lease a car were allowed one Public Transportation Allowance regardless of family size. For larger families, these limits may understate reasonable transportation expenses.

The Ownership Allowance covers lease or purchase of up to two motor vehicles.⁽⁵⁴⁾ Integrating this particular CFS allowance into means-testing is complex because H.R. 3150 treats payment of secured debt separately from living expenses, while two CFS categories (Transportation and Housing and Utilities) include repayment of secured debt. Without adjustment, payments for homes and cars would be counted twice. To avoid such double-dipping, H.R. 3150 directs that one "exclud[e] payments for debts" from the CFS allowances. ⁽⁵⁵⁾

To follow that mandate, we first calculated a monthly payment that would amortize all secured car debt over 60 months. Next, we subtracted that monthly car payment from the Ownership portion of the Transportation Allowance. If there was a remainder, however, we treated it as an allowable expense. Ernst & Young, on the other hand, disallowed the CFS Ownership component altogether, and merely amortized existing motor vehicle debt over 60 months.

To see the dollar difference this makes over five years, look at the example in Table 3 below. The IRS in 1997 allowed \$335 a month for Ownership costs, separate and apart from Operating costs. H.R. 3150 is more generous than the IRS; the bill assumes for means-testing analysis that debtors will repay all prepetition car debt (even payments for a luxury car that greatly exceed the CFS Ownership Allowance). H.R. 3150 directs one to amortize all car debt, however high, over 60 months.

TABLE 3
MEANS-TESTING AND MOTOR VEHICLES

DEBTOR	AGE OF	AGE AFTER	CAR DEBT	60-MONTH OWNERSHIP		
	CAR AT	60-MONTH	AT FILING	DEBT REPAYMENT AND	OWNERSHIP ALLOWANCE	
	FILING	CH. 13 PLAN				
	<i>E&Y*</i>		<i>IRS CFS</i>		<i>C&W**</i>	
A	1 month	5 years	\$30,000	\$30,000	\$20,100	\$30,000
B	8 years	13 years	\$0	\$0	\$20,100	\$20,100

*E&Y allows debtors to retire pre-petition car debt only - **no allowance for replacing during plan.**

** C&W allow debtors to retire debt and, if that is less than 60-month IRS CFS allowance, use balance to repair/replace vehicle.

Assume Debtor A bought a luxury car just a month before filing. Debtor A's high monthly car payments exceed the IRS allowance, so neither Ernst & Young nor we would give Debtor A any Ownership Allowance. Her car is new, however, and likely to run well for five years, so that may not be unrealistic.

Debtor B, on the other hand, was more frugal; she filed bankruptcy owning an eight-year old car that was paid off. Her eight-year old car is not likely to run another five years (it would then be 13 years old!) without major repairs or replacement. Ernst & Young, however, would deny Debtor B any Ownership Allowance. Our interpretation, on the other hand, affords Debtor B her CFS Ownership Allowance, to cover a transmission transplant or a purchase at some point of a newer model. The difference over 60 months is \$20,100. This is how Ernst & Young found much of the money they claim would be available for unsecured creditors--by assuming all cars, no matter how old, would run five more years. That assumption will prove false, and that money will not be available for unsecured creditors, for if the debtor cannot get to work, she cannot pay anyone.

One cannot understand the full impact of Ernst & Young's approach without a closer look at our debtors' cars, especially the age of those cars. This is old car territory, even very old car territory. Debtors in more than 80% of our 1,041 sample cases owned a car.⁽⁵⁶⁾ Altogether they owned about 1,300 cars. Yet the debtors scheduled only 696 claims secured by motor vehicles. We at first found it hard to believe so many cars were free of debt. Further checking, however, revealed that most cars in the sample were at least five model years old when the debtors filed their Chapter 7 cases. Even older cars were not always debt-free: 267 cars with secured debt were five or more model years old at time of filing; 82 with secured debt were 10 or more years old.⁽⁵⁷⁾ Due to the debtors' financial distress, these cars may not have received regular maintenance. Most of these older cars would need major repairs and many might have to be replaced over the next five years.⁽⁵⁸⁾

The debtors need reliable transportation to earn the income which H.R. 3150 presumes will continue unabated all that time.

Remember that we are forecasting car purchase/lease repair costs for five years into the future under H.R. 3150. To deny the CFS Ownership Allowance altogether, as Ernst & Young do, and amortize preexisting car debt only, seriously understates necessary and foreseeable car-related expenses. First, debtors who lease rather than buy get no allowance under Ernst & Young's method even for current monthly lease payments. Second, the many debtors who come into bankruptcy with older cars get no allowance for major repairs or eventual replacement. This interpretation increases the already substantial incentive to buy a car shortly before filing. After all, it may be the debtor's last chance for five years.⁽⁵⁹⁾

To measure the impact on means-testing outcomes, we tried Ernst & Young's method on the 215 sample cases which passed the median income test. When we held all other variables constant, but denied the Ownership Allowance, the number of can-pays nearly doubled, to 73 cases. When this result is weighted by filings per district, the pass rate is 6.78%. We believe that a substantial part of the difference between Ernst & Young's results and our own results is due to the treatment of motor vehicle expense.

The CFS Ownership Allowance, when used for a five-year forecast, must be read to cover not only current car debt, but also leasing, major repairs, and in some cases, eventual replacement of aging or damaged vehicles. Because Ernst & Young omit these other reasonable expenses, their report seriously overstates repayment capacity.

c. CFS Housing and Utilities Allowance. The CFS Housing and Utilities Allowance covers monthly rent, mortgage payments, utilities, property taxes, homeowner's and renter's insurance, maintenance and repairs, homeowner dues and condominium fees. It is adjusted for cost of living to the county level.⁽⁶⁰⁾

H.R. 3150's mandate to exclude debt repayment from the CFS allowances applies to home mortgage payments. As with cars, H.R. 3150 ignores the CFS cap on total monthly housing expenses to allow full payment of housing debt (to the extent due under the original contract within the 60 months after the petition).

Excluding debt repayment is more complex for Housing than for Transportation, because the IRS does not subdivide the Housing and Utilities Allowance into ownership and operating portions. The IRS gives no direction as to how much of this lump-sum allowance should be preserved for utilities, maintenance, property taxes, insurance and other related expenses. We followed the method used by

Ernst & Young,⁽⁶¹⁾ giving renters the CFS Housing and Utility Allowance, but treating homeowners differently. For homeowners, both we and Ernst & Young substituted the amounts scheduled by the debtor for monthly mortgage payments, maintenance, property taxes and insurance (if not included in the mortgage payment), and utilities (other than cable television which we disallowed). We, like Ernst & Young, allowed these expenses in full,⁽⁶²⁾ even if they exceeded the CFS Housing and Utilities Allowance.

d. CFS Other Necessary Expense Allowance. The Other Necessary Expense category has no fixed dollar amounts, and is intended to cover a wide variety of actual expenses.⁽⁶³⁾

Under this heading we, like Ernst & Young, allowed expenses as scheduled by the debtor for tax and social security withholdings, union dues, work uniforms, alimony and child support, child care, regular business expenses, life, health, and disability insurance, taxes other than those withheld by the employer (unless it appeared that the same taxes were listed as priority claims on Schedule E), charitable contributions and medical/dental expenses. We disallowed, on the other hand, debt payments withheld from the paycheck, transfers into savings plans and pension contributions except in the one case where the debtor stated the contribution was mandatory. We also disallowed all payments for dependents not at home (other than alimony and support) and tuition payments.

As this recitation shows, use of the IRS CFS to budget for means-testing still requires detailed examination of and judgments about each debtor's scheduled expenses. This will be time-consuming, expensive, and, inevitably, the source of much litigation under any means-testing regime.

2. Additional Expenses Required by Extraordinary Circumstances and the Tithing Bill.

In addition to the CFS allowances, H.R. 3150 has a wild card category for "extraordinary circumstances."⁽⁶⁴⁾

To claim additional expenses under this heading, the debtor and her attorney must file a sworn statement describing the expense and the circumstances. If the trustee objects, a hearing will be held and the debtor has the burden of proof. Our finding that 3.6% are can-pays assumes that no sample debtors had expenses of this type.⁽⁶⁵⁾

However, extraordinary circumstance expenses may become very ordinary indeed, under the Religious Liberty and Charitable Donation Protection Act of 1998 or "Tithing Act."⁽⁶⁶⁾

The Tithing Act allows debtors in Chapters 7 and 13 to donate 15% of their annual gross income (and sometimes more) to qualified churches and charities. Such donations, the Act states, are not constructive fraudulent transfers, nor are they disposable income in Chapter 13 or evidence of substantial abuse in Chapter 7.⁽⁶⁷⁾ If, as some commentators urge, no prior history of giving is required, the Tithing Bill gives new meaning to the phrase "eve-of-bankruptcy conversion."

H.R. 3150's section 118(d) would extend the Tithing Bill into means-testing. It directs that qualified donations up to 15% of the debtor's annual gross income "shall be considered ... additional expenses of the debtor required by extraordinary circumstances."⁽⁶⁸⁾

One wonders whether the right hand knew what the left hand was doing here. Means-testing is intended to benefit unsecured creditors by pushing can-pay debtors into Chapter 13. The Tithing Act and section 118 of H.R. 3150, however, seem to offer the same debtors a way out. As one commentator put it, "any attorney worth his salt is going to include within projected expenses 15% of...gross income for...contributions....To do otherwise probably would require notification to the E&O carrier of a potential claim."⁽⁶⁹⁾ For almost all debtors, charitable donations of 15% of gross income, on top of other expenses and debt payments, would reduce projected monthly net income to zero, enabling them to avoid can-pay status.

Our sample, like Ernst & Young's, was collected before the Tithing Act passed, so we cannot directly measure its impact. None of our sample debtors scheduled charitable contributions even close to 15% of gross income. However, we retested our 37 can-pay debtors, this time assuming they made qualified contributions of 15% of gross income in each of the five years after filing. In that scenario, well under one percent (six of 1041) had enough projected monthly net income to repay 20% of nonpriority unsecured debt.

3. Secured Debt Payments.

After deducting allowable monthly expenses from monthly gross income, we moved on to the second component of the Projected Monthly Net Income Test: monthly debt repayment. As noted above, H.R. 3150's means-testing provisions assume full amortization of priority and non-real estate secured debt, plus maintenance of regular monthly payments on real estate debt, before repayment of general unsecured debt. Thus, one must calculate total monthly payments on secured and priority debt (at least to the extent that payments would have been due within the 60 months after the petition).

a. Secured Debt. There are several problems with using current Official Bankruptcy Forms to project secured debt payments under H.R. 3150. First, neither the term nor the interest rate is disclosed for non-housing claims; only the unpaid balance is available. Second, the schedules do not clearly separate homeowners from renters, yet the distinction is important for several purposes under this analysis. One must make that judgment based on comparison of the debtor's address with real property or mobile homes on Schedules A and B and then examine Schedules C (exempt property) and D (secured claims). Third, one cannot tell whether the debtor is behind on house or car payments. In Chapter 13, such a debtor would have to make cure payments in addition to regular car or mortgage payments until the arrearage is paid.⁽⁷⁰⁾ For this study, we assumed "no default, no cure," and therefore only a single level monthly payment on each secured debt. However, this clearly understates required payments for debtors in default.

We followed Ernst & Young's methods for housing debt, allowing deduction of home mortgage payments from Schedule J in the living expense calculations as discussed above, and excluding home mortgage debt from the treatment for other secured debt described below. One complexity in this area is the need to separate home mortgage debt from debt secured by other real property. For home mortgages, we used as the monthly payment whatever amount the debtor entered on Schedule J for "Rent or Home Mortgage Payment."⁽⁷¹⁾

However, some debtors who rent their living quarters (and thus make regular monthly rent payments) also own real estate subject to one or more mortgages. For example, 65 debtors in our sample owned (and had mortgaged) real estate other than their primary residence. They owned apartment buildings, farmland, vacation condos, and unfinished "spec" homes. If one mistakes such a debtor for a homeowner, and treats her rent as a home mortgage payment, one will omit her additional "Other Real Estate" payment, and overstate repayment capacity.

Similar problems occur for homeowners with two or more home mortgages and for owners of mobile homes when the house and lot are separately financed. Schedule J does not reveal whether the "Rent or Home Mortgage" amount is the sum of monthly payments on all the mortgages or not, and without term and interest rate data, it is impossible to distill the truth from the files.

For debts secured by real property or mobile homes other than the debtor's primary residence, only the claim amount was available from the schedules. To follow H.R. 3150's direction to project repayment only of amounts in fact due within 60 months,⁽⁷²⁾

we had to construct an artificial amortization schedule. Claims of \$20,000 or more were amortized over 15 years at 9%; only the resulting level monthly payment was deducted from the debtor's monthly income. Other real estate debts of less than \$20,000 were fully amortized over 60 months at 9% like non-real estate secured debt. Ernst & Young's report does not discuss treatment of non-housing real estate debt.

All non-real estate secured debt (and other real estate claims under \$20,000) were treated as due within five years.⁽⁷³⁾ We generally followed Ernst & Young's methods here, grossing up the claim amount to simulate interest, then dividing by 60 to get an assumed monthly payment.

However, Ernst & Young grossed up such debt by 10%, equivalent to interest at 9% for only two years.⁽⁷⁴⁾ However, we are amortizing these claims over five years, not two. Therefore, we added 24% to principal, to simulate interest at 9% for five years. We suspect automobile lenders and furniture dealers will not settle for two years' interest on five-year loans. By understating required secured debt payments, Ernst & Young have overstated unsecured debt repayment capacity. We suspect that many Chapter 7 debtors have borrowed in the subprime market where interest rates are significantly higher than 9%. To that extent, we have also overstated unsecured debt repayment capacity.

4. Priority Claims.

a. Prepetition Priority Claims. Prepetition priority claims were taken from Schedule E, with care to include only that portion of the claim entitled to priority if the debtor gave that additional information. We also excluded student loans, which debtors frequently scheduled as priority rather than the general unsecured claims they are. We divided the total by 60 to get one month's prepetition priority debt payment.⁽⁷⁵⁾

b. Priority Expenses of Administration in Chapter 13. H.R. 3150 directs that priority claims be "estimated,"⁽⁷⁶⁾

recognizing that post-petition expenses of administration are an important part of total priority debt, entitled to first priority under section 507⁽⁷⁷⁾ of the Code in a Chapter 13. Most creditor-funded studies, however, have omitted these expenses. For example, Ernst & Young assumed that the debtors' attorney fees would be paid in full before filing, although that is almost never true in Chapter 13.⁽⁷⁸⁾

As for Chapter 13 trustee's fees, their report stated only that "administrative expenses would necessarily rise for the petitions that are converted to Chapter 13."⁽⁷⁹⁾ They then proceeded to ignore these expenses in their calculations. We, on the other hand, estimated and deducted these expenses when calculating Projected Monthly Net Income.

Chapter 13 trustees are compensated by a percentage of payments made through Chapter 13 plans.⁽⁸⁰⁾ We used the rate of 5.6% (the 1995 national average Chapter 13 trustee's fee computed as a percentage of disbursements).⁽⁸¹⁾ This is a conservative figure for two reasons. First, the national average Chapter 13 trustee's fee rose after 1995, and this would have impacted these debtors in a five-year plan. Second, under H.R. 3150, Chapter 13 trustees would have additional duties, so the percentage fee might rise to cover their increased expenses. We applied the 5.6% fee to prepetition priority claims and to secured debt (other than home mortgages and other real estate claims of \$20,000 or more, which we assumed would be made by the debtor outside the plan).⁽⁸²⁾

Fee credit is frequently extended by debtors' counsel in Chapter 13 cases. In Chapter 13, unpaid fees are treated as administrative expenses and paid through the plan.⁽⁸³⁾ We assumed that attorney fees paid through the plan and the trustee fee thereon would total \$800 for our sample debtors. This added \$13 a month to monthly expenses in each sample case. This amount is a reasonable estimate of 1995 practice, based on a 1996 study by the National Association of Consumer Bankruptcy Attorneys (NACBA), which found that the average total attorney fee in Chapter 13 was \$1,281, with \$428 paid up front, and the balance of \$853 paid through the plan⁽⁸⁴⁾ subject to the trustee's percentage fee.

Final Calculation of Projected Monthly Net Income.

Once living expenses, extraordinary circumstances expenses and payments on secured and priority debt (including administrative expenses) have all been deducted from monthly gross income,⁽⁸⁵⁾

the remainder, if any, is called Projected Monthly Net Income by H.R. 3150.⁽⁸⁶⁾

If the debtor's Projected Monthly Net Income is \$50 a month or less, the debtor is eligible to remain in Chapter 7. On the other hand, if the debtor has more than \$50 a month remaining, the debtor must proceed to the third and final portion of H.R. 3150's three-part means-test.⁽⁸⁷⁾

Table 4 shows how our sample fared on this test. Only 45 of our sample debtors had Projected Monthly Net Income over \$50, for a weighted pass rate of 4.07%. Ernst & Young, by contrast, found that 17% of their sample had more than \$50 Projected Monthly Net Income.⁽⁸⁸⁾

We believe the differences are due to use of different medians, different treatment of motor vehicle expenses, interest on secured debt for five rather than two years and our inclusion of Chapter 13 administrative expenses.

TABLE 4
THE PROJECTED MONTHLY NET INCOME TEST--

WEIGHTED BY TOTAL CHAPTER 7 NON-BUSINESS FILINGS

DISTRICT	CASES	# PASSED	% PASSED	TOTAL CH. 7 FILINGS IN 95	ESTIMATED # PASSED
CA	150	5	3.33	17,347	578
CO	149	9	6.04	10,443	631
GA	147	4	2.72	8,480	231
MA	147	5	3.40	11,240	382
NE	149	8	5.37	2,931	157
NC	150	6	6.70	1,151	77
WI	149	8	5.37	3,210	172
TOTAL	1,041	45	4.32	54,802	2,228

WEIGHTED PASS RATE = 4.07%⁽⁸⁹⁾

We have serious questions as to the feasibility and cost-effectiveness of applying this complex test to hundreds of thousands of Chapter 7 filers each year. As has been shown, H.R. 3150's Projected Monthly Net Income test is labor intensive, and heavily dependent upon the accuracy of debtor's schedules regarding debts and expenses. Sophisticated debtors can manipulate the outcome by increasing their secured debt and charitable contributions.

C. The 20% of Unsecured Debt Test.

The third, final and mercifully simpler test under H.R. 3150 is whether the debtor's Projected Monthly Net Income is sufficient to repay at least 20% of her nonpriority unsecured debt over five years.⁽⁹⁰⁾ The steps we took to apply this test follow.

First, we multiplied Projected Monthly Net Income by 60 to get the total amount available for general unsecured claims. Second, because Chapter 13 trustees collect fees on payments to nonpriority unsecured creditors, we multiplied that total by .9469 (in effect reducing it to reflect the trustee's 5.6% fee). Finally, we divided this adjusted Projected Five-Year Net Income by total nonpriority unsecured debt⁽⁹¹⁾

to project the percentage the debtor could repay over 60 months.

As Table 5 shows, only 37 of our sample debtors, or 3.55% on a weighted basis, had sufficient income to meet or exceed H.R. 3150's 20% threshold. Ernst & Young reported that 15% of their sample emerged as can-pays when it used 75% of the median. At 100% of the median, 11% of their sample were can-pays.⁽⁹²⁾

**TABLE 5
THE 20% OF UNSECURED DEBT TEST--**

WEIGHTED BY TOTAL CHAPTER 7 NON-BUSINESS FILINGS

DISTRICT CASES	# PASSED	% PASSED	TOTAL CH. 7 FILINGS IN 95	ESTIMATED # PASSED	
CA	150	5	3.33	17,347	578
CO	149	9	6.04	10,443	631
GA	147	2	1.36	8,480	115
MA	147	5	3.40	11,240	382
NE	149	6	4.03	2,931	118
NC	150	5	3.33	1,151	38
WI	149	5	3.36	3,210	108
TOTAL	1,041	37	3.55	54,802	1,945

WEIGHTED PASS RATE = 3.55%⁽⁹³⁾

The Can-Pay Debtors

The 3.55% of our sample identified as can-pays have median annual gross incomes of \$52,080, almost two and one-half times the median income of the can't-pays (\$20,688), and more than twice that of the whole sample (\$21,264). The can-pays' median incomes are also well above the 1995 national median for all families (\$40,611). See Tables 6 and 7 below, which use the term "impacted filers" for can-pays.

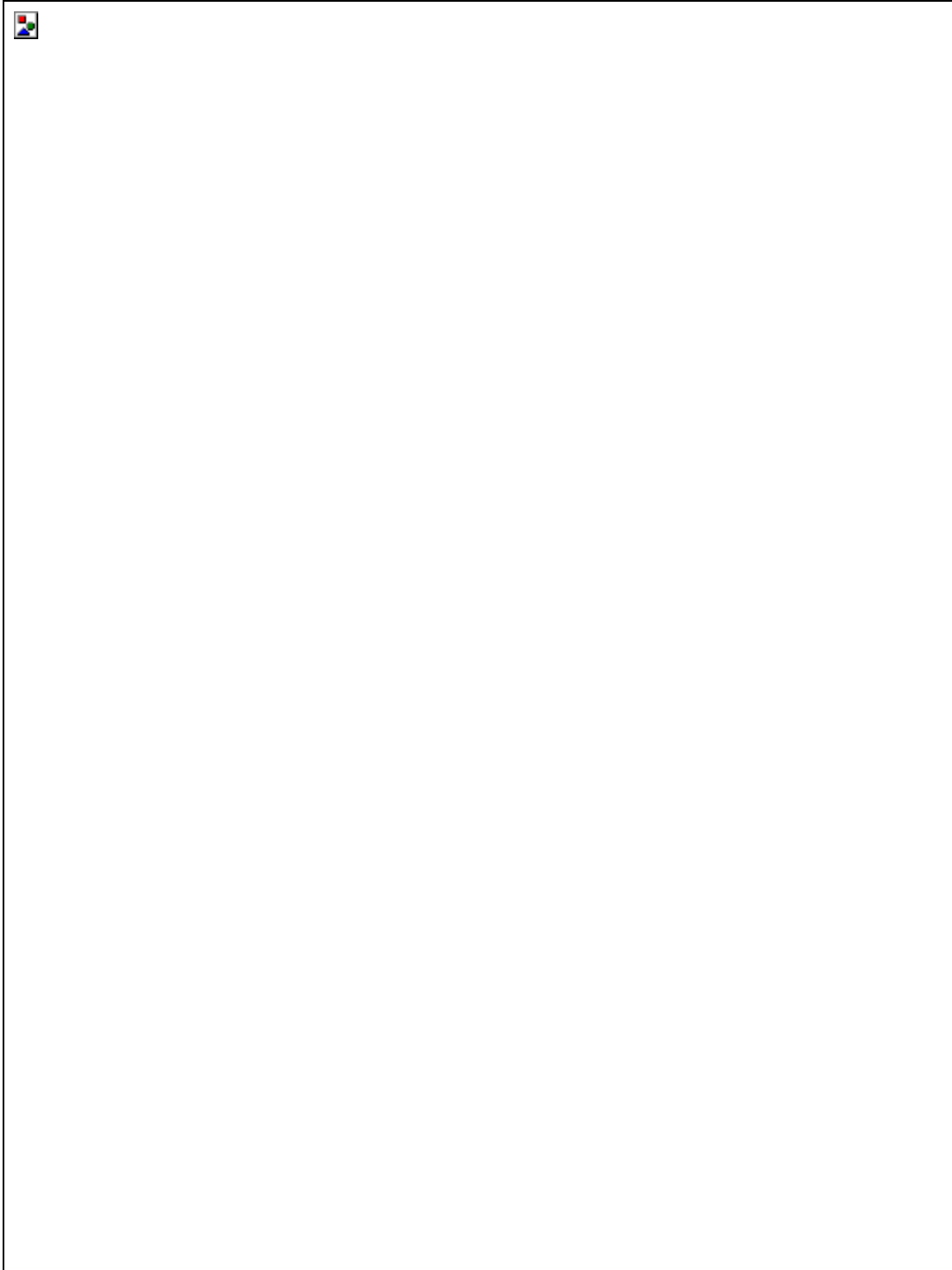


TABLE 7
DISTRIBUTION OF GROSS INCOME AND NON-PRIORITY UNSECURED
DEBT

FILERS NOT ALL IMPACTED

	IMPACTED	FILERS	FILERS
GROSS INCOME			
25 TH QUARTILE	\$13,458	\$13,800	\$41,064
MEDIAN	20,688	21,264	52,080
75 TH QUARTILE	30,036	31,998	60,558
NON-PRIORITY UNSECURED DEBT			
25 TH QUARTILE	\$11,692	\$11,816	\$16,608
MEDIAN	20,303	20,581	33,526
75 TH QUARTILE	35,883	36,380	49,988

Median nonpriority unsecured debt among the can-pay debtors was \$33,526, while for the rest of the sample, the median was \$20,303.

Who are these can-pays? In Appendix A, we profile each can-pay case. These debtors are truck drivers and engineers, mechanics and restaurant managers, a young couple expecting twins, retirees with part-time jobs, one man with a serious gambling problem, a married couple who ended up deeply in debt by caring for and eventually burying their parents. Several got into financial trouble when their small business failed. At least one family matches the stereotypical abuser, with income of \$90,000, homes in California and Hawaii and \$72,000 in credit card debt.

Many of the can-pays had the apparent capacity to repay well over 20%; in fact, average repayment capacity for nonpriority unsecured debt was 74.6%, and 14 of the 37 could repay 100%. However, these repayment percentages are merely forecasts based on the same shaky foundation of the VISA report: that for five years, these debtors' income will rise as quickly as expenses and debts. We critically examine that premise in the next section.

PART III--PROJECTED NET GAIN AND THE IMPOSSIBLE DREAMS.

How much more might unsecured creditors collect under means-testing? VISA estimated that number at "over \$4 billion,"⁽⁹⁴⁾ then qualified that estimate by stating "[t]his assumes that income remained unchanged relative to expenses and liabilities during the 60 month repayment period."⁽⁹⁵⁾

In 1997, some 926,000 nonbusiness Chapter 7 cases were filed. If we assume that our sample holds for the nation as a whole and that 3.55% or 32,873 were can-pays, each with nonpriority unsecured debt of \$35,303,⁽⁹⁶⁾ and that each could repay 75% or \$26,477 of

that unsecured debt. If all 32,873 debtors repaid \$26,477 apiece, it would total about \$870 million, nowhere close to VISA's estimate. However, even that \$870 million is based on at least four unrealistic assumptions:

First, that well-counseled debtors will not evade can-pay status by increasing debt or charitable contributions;

Second, that the debtors' incomes, expenses and debts will remain relatively unchanged for five years;

Third, that 100% of the can-pays will file and complete five-year Chapter 13 plans; and

Fourth, that unsecured creditors will bear no part of the cost to sort all Chapter 7 cases for means-testing and to monitor the 30,000 + can-pays over five years in Chapter 13.

Fifth, that unsecured creditors collect nothing from Chapter 7 debtors at present.

None of these assumptions is well-founded. The first four are impossible dreams and the last is simply untrue. Let's start with the first, the assumption that well-counseled debtors will not choose to avoid can-pay status by increasing debt or charitable contributions prior to filing. As discussed above, the Tithing Bill allows debtors to divert up to 15% of annual gross income into H.R. 3150's extraordinary expense category. We also pointed out the incentives to increase secured debt, especially by buying a car, prior to filing. Many debtors with above-median income could and some would use these routes to escape five years of payments in Chapter 13. If we conservatively assume that only one-quarter of the can-pays would do so, that reduces the can-pay pool to 25,000 debtors and reduces net gain to about \$700 million.

Now let's consider the likelihood that for five years, the incomes, expenses and debts of the can-pay debtors will remain relatively stable. Truly, this is an impossible dream. Over five years, of course, some will die. The rest will get five years older and many will be deeper in debt. Like other human beings, the can-pays will suffer disease, divorce, disability and downsizing that for some will substantially reduce income and increase expenses. Even delightful events like new babies entail years of additional expenses and, eventually, student loans. None of these events is stopped by the automatic stay. As the GAO remarked with reference to VISA's studies, there is "no empirical basis for assuming five years of stable income and expenses."⁽⁹⁷⁾

Another impossible dream is that the can-pays would file and complete a five-year Chapter 13 plan. It is common knowledge that current voluntary Chapter 13 plans have only a 30% completion rate, and many of these were just three-year plans to begin with.⁽⁹⁸⁾ To be sure, the can-pays would be a select group, with above-average ability to repay at the outset, so one could expect a better completion rate, perhaps as high as 50%. But for all the reasons set forth above, plus sheer bad luck and for some, bad habits, many will not finish their plans.⁽⁹⁹⁾

If only half of these 25,000 plans fail, after making payments for an average of two and one-half years, that would reduce net gain to about \$525 million.

The fourth impossible dream is that it will cost unsecured creditors nothing to sort a million Chapter 7 cases a year into can- and can't-pays. Perhaps all these costs can be shifted to taxpayers, but there will be real costs, as the CBO has shown,⁽¹⁰⁰⁾ and unsecured creditors are taxpayers too. But let's be conservative here too. The CBO estimates that H.R. 3150's provisions as a whole would cost \$214 million in the first five years, plus another \$8-16 million a year for additional judges needed for means-testing.⁽¹⁰¹⁾

Assume that only \$25 million of these costs are born by unsecured creditors either directly due to higher Chapter 13 administrative costs, or indirectly through increased taxes. That brings us down to \$500 million.

Finally, the VISA studies also assume that unsecured creditors collect nothing from Chapter 7 debtors at present. This is false. Chapter 7 debtors frequently reaffirm debts scheduled as unsecured.⁽¹⁰²⁾

They must also repay student loans and other nondischargeable unsecured debts. Let's assume that all such payments by 1997 Chapter 7 filers amount to \$50 million. This \$50 million is not new money dependent on means-testing; unsecured creditors already collect that much. So we subtract \$50 million from our \$500 million, giving us a projected net gain of \$450 million.

In seeking that pot of gold from the can-pay minority, however, it is vital that we not bar the many can't-pays from a fresh start. Means-testing would be mean indeed if it hurt the many to capture the few.

CONCLUSION

Our intent in this article is to assess, by means of a test drive of sorts, whether one suggested legislative response to perceived bankruptcy abuse would fulfill its apparent aims. That is, would H.R. 3150's formula find debtors with ability to repay and divert them into Chapter 13 plans that would produce a net gain to unsecured creditors without undue cost to other debtors and taxpayers?

As we have shown, H.R. 3150's formula produces relatively few apparent abusers for diversion into Chapter 13.⁽¹⁰³⁾

Second, because the sample cases were filed in 1995, when the only sanction for abuse was section 707(b) dismissal, debtors and their attorneys had less reason to take evasive maneuvers. At this writing, of course, the Religious Liberty and Charitable Donation Protection Act of 1998 is in force, providing an escape route for all but the wealthiest few. Further, incentives to load up on secured debt, especially by purchasing a new car shortly before filing, are substantially increased. Thus, there is reason to believe that the number of can-pays in our sample is substantially higher than would be found today if means-testing were adopted. Third, the assumed benefits to unsecured creditors from means-testing depend very substantially on whether those can-pay debtors in fact convert to and complete lengthy Chapter 13 plans. Chapter 13's recent history provides little reason to believe that even a bare majority of the debtors would in fact complete their plans. The net gains to unsecured creditors, in sum, appear small relative to the costs likely to be imposed on the great majority of Chapter 7 debtors, as well as trustees, judges and taxpayers. In sum, we conclude that means-testing as enshrined in H.R. 3150 will not go the distance.

APPENDIX A--MEET THE CAN-PAY DEBTORS

Here we briefly describe each of the 37 can-pay cases from our sample, so that readers may make their own assessments on the prospect for repayment from these debtors. The cases are listed by district and then in ascending order by monthly gross income. We include the debtors' gender, marital status, number of dependents, occupation, gross monthly income, total secured, priority and nonpriority unsecured⁽¹⁰⁴⁾

debt and prior bankruptcies, if any. Unfortunately, debtors are not asked to disclose their age on the schedules, though that information would be relevant to a five-year forecast of repayment capacity. We also indicate whether the debtors are homeowners and give the age and make of their cars. If the debtors reaffirmed any debts, we include the amount and type of debt. We also set forth the percentage of non-priority unsecured debt that H.R. 3150's formula predicts the debtors would repay over five years assuming stable income and expenses. Finally, we identify the six can-pay cases in which at least 20% of non-priority unsecured debt could still be repaid even if the debtors contributed 15% of gross income to charity under the Tithing Act.

CALIFORNIA

California Case #1 Husband is an auto mechanic and wife is disabled (apparently injured on the job in 1994). We treated them as a household of two, but there may be more family members for debtors describe part of their social security disability income as "for the kids." Their income was \$4,340 at the time of filing, but the husband may have been out of work part of 1995. They owe \$28,404 secured, \$0 priority and \$51,302 unsecured (much of it credit card debt). They are not homeowners. They lease a 1994 Mustang and own a 1986 Nissan pickup. In the year before they filed, Ford repossessed a 1993 Taurus, and AVCO recovered a judgment. Debtors' projected monthly net income would repay 50.8% of non-priority unsecured debt over five years.

California Case #2 Both husband and wife are truck drivers for a national moving company, and they have no dependents. Their income is \$5,325, but total 1995 income will be only 60% of 1994's. They owe \$6,467 secured (boat), \$0 priority, and \$52,588 unsecured. They own a 1989 Chevy and a 1986 boat, and are not homeowners. No collection activity is noted. Debtors reaffirmed the boat debt (\$5,787) and one unsecured debt (\$786). Debtors' projected monthly net income would repay 74.3% of non-priority unsecured debt over five years.

California Case #3 Debtor, a single male with no dependents, is an engineer with income of \$5,500. He owes \$13,809 secured, \$0 priority, and \$51,478 unsecured. He is not a homeowner. He owns a 1990 Nissan with \$12,769 still owed on it. He may have filed to discharge \$25,772 in dischargeable federal income taxes plus a \$10,400 line of credit from HFC. No collection activity is noted. Debtor reaffirmed his car loan and two unsecured debts (\$2,500). Debtor's projected monthly net income would repay 68.3% of non-priority unsecured debt over five years.

California Case #4 Debtor, a single woman, has custody of a three-year old nephew. She is a realtor, but took a second job at a cell phone firm when a declining real estate market halved her realty income. Her income was back up to \$6,318 at the time of filing. She owes \$93,670 secured, \$3,000 priority taxes, and \$59,367 unsecured (mostly credit card and retail charge card debt). She and her parents co-own a home and live together. Debtor may own other unscheduled real estate because she lists a monthly mortgage payment of \$1,300 in addition to her house payment (or it could be an unscheduled second mortgage on her home). She owns a 1993 Lexus. She lists \$1,040 a month for daycare. No collection activity is noted. Debtor reaffirmed an unsecured debt (\$500). Debtor's projected monthly net income would repay 100% of non-priority unsecured debt over five years. This case is one of the six can-pay cases where debtor would still be able to repay at least 20% of non-priority unsecured debt even if charitable contributions of 15% of gross income were made under the Tithing Act.

California Case #5 Husband, a salesman (4 years) and wife, not employed, have two sons, 13 and 2. Their income is \$7,535, of which \$3,500 is base salary and the rest commissions averaging \$4,035. Their income was 10% lower in 1995 than in 1994. They owe \$208,486 secured, \$1,200 priority taxes, and \$72,741 unsecured (all credit card and retail charge card debt). They own a home in California, a time-share in Hawaii, a 1990 Ford Thunderbird and a 1990 Acura Legend. The husband lists business expenses of \$730 per month for entertainment, cell phone and pager. There are several judgment liens on their home. No other collection activity is noted. Debtors' projected monthly net income would repay 37.9% of non-priority unsecured debt over five years.

COLORADO

Colorado Case #1 The debtor, a divorced male with no dependents, is an Army retiree who works in technical support for a software firm. His income is \$2,816. He owns a mobile home and a 1994 Jeep Wrangler. He owes \$27,152 secured (mobile home and car), \$0 priority and \$33,405 unsecured, including a student loan for \$2,200. No repossessions, foreclosures or garnishments were noted.

Debtor reaffirmed two unsecured debts for a total of \$3,569. Debtor's projected monthly net income would repay 57.6% of non-priority unsecured debt over five years.

Colorado Case #2 Husband installs sprinklers for a fire protection company and wife is a floral designer. They have no dependents. Their income is \$2,997. They do not own a home or a car. They pay \$260 a month for a 1991 Chevy, which debtors apparently lease from the wife's family. Debtors owe \$0 secured, \$0 priority and \$15,530 unsecured. No recent garnishments, attachments or foreclosures were noted, but they owe a deficiency for a car repossessed in 1988, and were evicted from an apartment in 1991/1992. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years.

Colorado Case #3 The debtor, a single female with no dependents, is a social worker whose income is \$3,430. She owes \$87,400 secured (home and car), \$0 priority and \$46,017 unsecured. She owns a home and a 1995 Saturn. She may have been out of work prior to filing; she filed in November but lists year-to-date income at only \$23,000. In 1994, she made \$34,262. Although no current collection suits are noted, she owes a deficiency of \$26,000 from foreclosure on a former home. Debtor's projected monthly net income would repay 39.2% of non-priority unsecured debt over five years.

Colorado Case #4 Husband is a sergeant in the Army National Guard, wife is disabled and unemployed. They have no dependents. Their income is \$3,512, of which \$477 is wife's disability payments. The debtors own a home as well as a 1992 Dodge LeBaron and a 1972 Dodge Coronet. Secured debt is \$93,336 (house, car and furniture), priority debt is \$419 (taxes) and unsecured debt is \$31,057. No garnishments, executions or foreclosures were noted. Debtors reaffirmed \$17,834 on the LeBaron. Debtors' projected monthly net income would repay 86.9% of non-priority unsecured debt over five years.

Colorado Case #5 The debtor, a single male with no dependents, collects retirement pay from a manufacturing company, but continues to work as a contract representative for a supply firm. His income is \$4,222. He owes \$73,950 secured (home and auto), \$8,200 priority (tax) and \$39,380 unsecured (much of it credit card). He owns a home and a 1989 Dodge Dynasty. No garnishments, attachments or collection suits were noted. Debtor's projected monthly net income would repay 100% of non-priority unsecured debt over five years. This case is one of the six can-pay cases where debtor would still be able to repay at least 20% of non-priority unsecured debt even if charitable contributions of 15% of gross income were made under the Tithing Act.

Colorado Case #6 Husband, a metal spinner, and wife, an engineer, have two teenage children. Their income is \$4,427. The husband was out of work at times in 1994 and 1995. They owe \$14,506 secured, \$822 priority (tax) and \$24,196 unsecured. Much of the unsecured debt is medical, nursing home and funeral expenses for debtors' parents. The debtors are not homeowners and indicated they would surrender their 1990 Plymouth van. The debtors filed an earlier bankruptcy in 1984. Their mobile home was repossessed in 1993 and one creditor was garnishing debtors' wages. Debtors went to credit counseling before they filed. Debtors' projected monthly net income would repay 98% of non-priority unsecured debt over five years.

Colorado Case #7 The husband, a dispatcher, and the wife, a bookkeeper, are expecting a child, but currently have no dependents. Their income is \$4,448. They owe \$17,456 secured (car), \$4,026 priority (tax) and \$18,154 unsecured. The debtors are not homeowners. They own a 1991 Ford Ranger and a 1992 Hyundai. One collection suit was pending when the debtors filed. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years.

Colorado Case #8 Husband works at a private school and wife works in social services. They have a 16-year old son. Their income is \$4,458. They owe \$6,182 secured, \$9,075 priority (tax) and \$42,474 unsecured, including \$9,000 in student loans. The debtors are not homeowners. They lease a 1993 Nissan Sentra and own a 1980 Datsun pickup. Their income had declined prior to filing. When they filed 11_ months into 1995, their year-to-date income was only 80% of what they made in 1994. Debtors reaffirmed a furniture debt for \$214. Debtors' projected monthly net income would repay 30.2% of non-priority unsecured debt over five years.

Colorado Case #9 Husband and wife are both truck drivers and have no dependents. Their income is scheduled as \$4,560, but it varies. The debtors' income was much lower in the two years before filing: \$17,860 in 1993 and only \$6,700 in 1994. They owe \$10,352 secured, \$0 priority and \$8,494 unsecured (principally credit card debt and a \$700 phone bill). The debtors own a home valued at \$30,000 with no scheduled mortgage debt. They own a 1987 Ford F-550 pickup, but the stay was lifted in their Chapter 7 to allow repossession of this truck. After the stay was lifted, the debtors twice failed to appear at the first meeting of creditors, so the case was dismissed and they did not receive a discharge. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years.

GEORGIA

Georgia Case #1 Husband, a maintenance man, and wife, a chemical plant worker, have a one-year old child. Their income is \$3,492. They owe \$60,523 secured, \$0 priority, and \$23,430 unsecured. They are not homeowners. They own a 1994 Honda Civic and a 1991 Jeep Wrangler. They are in the process of a divorce. Several collection suits have been filed. They reaffirmed three secured debts (cars and furniture) for a total of \$27,439. Debtors' projected monthly net income would repay 55.2% of non-priority unsecured debt over five years.

George Case #2 Husband, a senior lab scientist, and wife, a utility worker in a manufacturing company, have no dependents. Their income is \$3,701. They owe \$2,482 secured (mostly auto debt), \$229 priority and \$15,563 unsecured, \$8,000 of which relates to an auto loan deficiency. The debtors initially filed a Chapter 13 case in October, 1991. That case was dismissed in December, 1994. They filed this Chapter 7 case in January, 1995. The debtors are homeowners and own a 1990 Nissan Sentra. They reaffirmed two unsecured debts, one for \$28 and one for \$687. Debtors' projected monthly net income would repay 25.5% of non-priority unsecured debt over five years.

MASSACHUSETTS

Massachusetts Case #1 The debtor, a single female with no dependents, is a customer service supervisor. Her income is \$3,025. Her 1995 income was 5-10% less than 1994's. She owes \$35,600 secured, \$0 priority and \$16,728 unsecured (mostly credit card and retail charges). She owns a mobile home and a 1994 Mitsubishi Galant. She reaffirmed a \$23,449 debt secured by her mobile home. Debtor's projected monthly net income would repay 51.9% of non-priority unsecured debt over five years.

Massachusetts Case #2 The debtor, a single male, has no dependents. He has been a construction inspector for 23 years. His income is \$3,786. His debt is entirely unsecured credit card debt, totaling \$44,109. He does not own a home. He owns two automobiles, a 1990 Blazer and a 1988 Jeep. Debtor's projected monthly net income would repay 38.3% of non-priority unsecured debt over five

years.

Massachusetts Case #3 Husband works for a restaurant group and wife is also employed, although her occupation is not disclosed. Their income is \$3,840. They have no dependents, and are not homeowners. Debtors own a 1991 Nissan Sentra. They owe \$5,254 secured (car), \$0 priority and \$18,204 unsecured (mostly credit card debt). However, \$2,200 of the unsecured debt is student loans. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years.

Massachusetts Case #4 The debtor, a single male senior engineer, has no dependents. His income is \$5,103. He owes \$2,185 secured, \$0 priority and \$44,127 unsecured. The unsecured debt is primarily credit card debt, but also includes \$6,300 in student loans and a \$7,200 promissory note to Fannie Mae. The debtor is not a homeowner. He leases a 1993 Honda Accord. Debtor's projected monthly net income would repay 100% of non-priority unsecured debt over five years. This case is one of the six can-pay cases where debtor would still be able to repay at least 20% of non-priority unsecured debt even if charitable contributions of 15% of gross income were made under the Tithing Act.

Massachusetts Case #5 Husband, a computer analyst and wife, a mechanical assembler, have an eight-year old grandson as a dependent. Their income is \$6,131. Their 1995 income will be only 85% of their 1994 income. The debtors are not homeowners. They own a 1983 Toyota and a 1986 Lincoln Town car. They list no secured or priority debt. Their unsecured debt is \$28,225, much of which is dischargeable federal tax debt from 1985-1990. Approximately \$4,700 is student loans. The IRS garnished debtors' wages shortly before they filed their petition. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years.

NEBRASKA

Nebraska Case #1 In this case, a married male debtor filed an individual petition. He is a garbage truck driver and his wife is a civilian employee at a military base. He lists no dependents. His income is \$3,033. He and his wife moved from another state six months before he filed. They owe \$0 secured, \$3,500 priority taxes, and about \$16,500 unsecured. He is not a homeowner and does not schedule a car, but lists a \$556 monthly car payment. A car was repossessed in the past, but no recent collection activity is noted. Debtor's projected monthly net income would repay 75.1% of non-priority unsecured debt over five years.

Nebraska Case #2 Debtor, a single female with no dependents, has worked for a major national credit card processor for eight years. Her income is \$3,196. She owes \$8,642 secured, \$0 priority and \$13,880 unsecured. She is not a homeowner and owns a 1991 Honda Civic. Debtor reaffirmed the car debt (\$4,468). Her major unsecured debt was co-signed by a male, relationship unknown. He sued her and obtained a \$12,000 plus judgment. She was also sued on a medical bill. Debtor's projected monthly net income would repay 85.7% of non-priority unsecured debt over five years.

Nebraska Case #3 Husband, a railroad mechanic, and wife, a cook at a bar/grill, have a 14 year-old son. Their income is \$3,400. Their annual income had declined from \$52,300 in 1993 and \$48,700 in 1994 to a projected \$40,000 in 1995. They owe \$8,000 secured, \$0 priority, and \$9,652 (mostly credit card and utilities from former home state). They are not homeowners. They own a 1993 Dodge Shadow, a 1986 Plymouth Horizon and a 1975 Honda 550. HFC sued the wife a year before the bankruptcy. Debtors

reaffirmed four secured debts (car, tools and furniture) totaling \$18,132. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years.

Nebraska Case #4 Husband, a salesman, and wife, an office clerk, have a 19-year old son. Their income is \$4,400. They owe no secured debt, \$1,908 priority (taxes), and \$57,860 unsecured. Most of the unsecured debt (other than a \$3,600 student loan and \$2135 in medical bills) is business debt from a failed restaurant formerly run by the debtors in another state. They are not homeowners. They own a 1989 Dodge van and 1978 Datsun pickup. They filed after one business creditor obtained a judgment against them. Debtors' projected monthly net income would repay 82.4% of non-priority unsecured debt over five years.

Nebraska Case #5 Husband, clerk for a school district, and wife, manager of a McDonald's restaurant, have four children aged 9 to 15. Their income is \$4,748. They owe \$6,000 secured, \$0 priority and \$46,014 unsecured. Nearly all of the unsecured debt is medical bills; less than \$1,000 is credit card debt. The debtors are not homeowners. They own one car, a 1986 Dodge Caravan, which the debtors indicated they would surrender. They had filed a previous Chapter 7 in April 1990. They filed the current case in Chapter 13. In 1996, they converted to Chapter 7 as soon as they became eligible for a second Chapter 7 discharge. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years. This case is one of the six can-pay cases where debtors would still be able to repay at least 20% of non-priority unsecured debt even if charitable contributions of 15% of gross income were made under the Tithing Act.

Nebraska Case #6 Husband, a retiree and part-time maintenance man, and wife, a debt collector, have a nine-year old granddaughter as part of their household. Their income is \$4,957, \$1,000 of which is husband's retirement pay. They owe \$23,458 secured, \$0 priority and \$48,673 unsecured. The debtors are not homeowners. They own a 1991 Thunderbird, a 1984 Thunderbird and a 1988 Grand Am. The debtors had not previously filed bankruptcy, but their file indicated their daughter was also in bankruptcy when they filed. Debtors' projected monthly net income would repay 64.2% of non-priority unsecured debt over five years.

NORTH CAROLINA

North Carolina Case #1 Husband, a mechanic, and wife, a clerk, had a combined income of \$3,402 and a five-year old daughter. However, they also indicated that the wife was disabled and was expecting twins. It is unclear whether wife's stated income of \$1,459 was historical or current information. We treated it as their current income. They owe \$9,766 secured, \$0 priority and \$33,526 unsecured (all mobile home debt). They own a mobile home, a 1984 Dodge Daytona and a 1989 Hyundai. The debtors reaffirmed one unsecured debt for \$478. Debtors' projected monthly net income would repay 20% of non-priority unsecured debt over five years.

North Carolina Case #2 The debtor, a single female systems analyst, has no dependents. Her income is \$3,450. She owes \$48,595 secured, \$0 priority, and \$3,516 unsecured. She does not own a home in North Carolina, but the stay was lifted to allow foreclosure on real estate in Massachusetts. She owns a 1983 Maxima and a 1984 300 ZX. She may have filed to forestall foreclosure. Debtor's projected monthly net income would repay 100% of non-priority unsecured debt over five years.

North Carolina Case #3 Husband is a truck driver and wife, although formerly employed, was out of work at time of filing. They list no dependents. Their income is \$3,563, but state that income will drop due to an anticipated move. They owe \$3,400 secured, \$0

priority, and \$26,618 unsecured, much of which is medical bills. They are not homeowners. They own a 1986 Chevrolet Spectrum. In August, 1992, a 1987 Hyundai was repossessed. In September, 1993, a 1977 Dodge Ram Charger was repossessed. Six other creditors recovered judgments within the year before they filed. Debtors reaffirmed a \$3,400 car loan and an unsecured debt for \$490. Debtors' projected monthly net income would repay 86.9% of non-priority unsecured debt over five years.

North Carolina Case #4 Husband, an Air Force retiree, is disabled and wife is a textile worker in a towel factory. They have one dependent, a daughter. Debtors are separated and maintain two homes. Their income is \$4,533, much of which is husband's retirement pay, VA and disability benefits. Their bankruptcy is a result of a failed flea market business. They owe \$75,565 secured, \$0 priority and \$70,696 unsecured (\$58,588 from a business premises lease for the flea market). They own a home, a 1992 Ford Mustang, a 1985 Ford truck and a 1988 Cadillac. Debtors reaffirmed two car loans totaling \$17,631 and an unsecured debt for \$549. Debtors' projected monthly net income would repay 68.7% of non-priority unsecured debt over five years.

North Carolina Case #5 Husband, a restaurant manager, and wife, a bank loan processor, have a 19-year old daughter. They are separated and maintain two households in different towns. Their income is \$5,017. They owe \$105,828 secured, \$3,403 priority, and \$39,171 unsecured (all credit card and retail charge card debt). They own a home as well as a 1992 Ford Tempo, 1991 Ford Probe and 1983 Toyota Celica. No collection activity is noted. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years. This case is one of the six can-pay cases where debtors would still be able to repay at least 20% of non-priority unsecured debt even if charitable contributions of 15% of gross income were made under the Tithing Act.

WISCONSIN

Wisconsin Case #1 The debtor, a single male with no dependents, is semi-retired and works as a security guard. His income is \$2,325. He owes \$12,820 secured, \$0 priority and \$8,976 unsecured, of which \$5,200 is owed to VISA and \$3,700 is a deficiency due to repossession of his 1988 Chevy Corsica in August 1995. The debtor filed bankruptcy five weeks after the repossession. He is not a homeowner. He owns a 1993 Buick Regal. The debtor reaffirmed two debts secured by his Buick totaling \$10,857. Debtor's projected monthly net income would repay 100% of non-priority unsecured debt over five years.

Wisconsin Case #2 Debtor, a single male who has been a salesman for 28 years, has no dependents. His income is \$3,414. He owes \$33,101 secured, \$0 priority and \$87,817 unsecured. His unsecured debt consists principally of credit card obligations and a \$33,000 loan from a relative, probably made to help the debtor cover gambling losses. The debtor owns a home and a 1987 Chevy Blazer. The debtor schedules gambling losses of \$27,600 in the two years before bankruptcy. His monthly credit card payments are \$1,166. The debtor reaffirmed five debts totaling \$64,284, including unsecured debts of \$33,258 (to the relative), and debts secured by his home, a boat and an insurance policy. Debtor's projected monthly net income would repay 32.4% of non-priority unsecured debt over five years.

Wisconsin Case #3 Husband, a research analyst for the state, and wife, a computer operator, have two children. Their income is \$5,076. They owe \$95,177 secured, \$454 priority (tax debt) and \$40,179 unsecured, \$10,000 of which is student loans. They own a home, a 1993 Pontiac Trans Sport and a 1985 Pontiac Bonneville. No garnishments, attachments or repossessions are noted. The debtors reaffirmed a car loan for \$11,688. Debtors' projected monthly net income would repay 75.1% of non-priority unsecured debt

over five years.

Wisconsin Case #4 Husband, a teacher for 14 years, and wife, an assembler, pay child support for husband's three-year old. Their income is \$5,424. Their secured debt is \$11,735. They list \$3,578 as a priority claim, but in fact this is a student loan debt. They also scheduled two tax claims, but listed the amounts as \$0. Their unsecured debt is \$9,975 (plus the student loan). The debtors are not homeowners. They have a 1984 Dodge Ram pickup and a 1989 Chevy van. They filed a previous bankruptcy in 1989. The 1995 filing followed soon after a law firm garnished husband's pay for an unsecured debt. He also has older debts for legal fees, probably arising from his divorce from the child's mother. Some medical and dental debts were incurred in 1994; however, \$0 is allotted for monthly medical bills. The debtors reaffirmed three unsecured debts totaling \$2,970 and a car loan for \$8,344. Debtors' projected monthly net income would repay 57.2% of non-priority unsecured debt over five years.

Wisconsin Case #5 In this asset case, husband is a superintendent of schools and wife is a college professor. Their income is \$9,692. They scheduled no dependents, but they have children in college to whom they send \$600 a month. Debtors have unusually high expenses because wife lives and works in another city during the week, while husband lives in the family home. They owe \$146,297 secured, \$7,133 priority and \$104,325 unsecured. They own a home, a 1989 Oldsmobile Toronado and a 1994 Mercury Cougar. Much of their debt arose from a failed travel agency business. Debtors filed bankruptcy after a business creditor sued them. The case was still open and the trustee had not filed her report on distribution of assets when we copied this file. Debtors' projected monthly net income would repay 100% of non-priority unsecured debt over five years. This case is one of the six can-pay cases where debtors would still be able to repay at least 20% of non-priority unsecured debt even if charitable contributions of 15% of gross income were made under the Tithing Act.

APPENDIX B--OUR SAMPLE

Sample Design. Our sample is a stratified random sample of Chapter 7 cases, originally designed and collected, as noted above, for a study of reaffirmation practice underwritten by the National Conference of Bankruptcy Judges, the Bankruptcy Section of the Nebraska Bar Association and Creighton University.⁽¹⁰⁵⁾ We intended in that project to see whether reaffirmation rates varied much among federal judicial districts and, if so, to test the effects of two variables on those rates. The variables were: first, the district's ratio of nonbusiness Chapter 7 to Chapter 13 filings, and second, the law of the district on retention of collateral without reaffirmation or redemption.⁽¹⁰⁶⁾

To evaluate those inter-district differences, we needed a fair number of cases from each sample district. We settled on 150 cases from each of seven districts for a total of 1,050 cases.

The districts sampled (and their circuits) are:

The Northern District of California (Ninth Circuit)

The District of Colorado (Tenth Circuit)

The Northern District of Georgia (Eleventh Circuit)

The District of Massachusetts (First Circuit)

The District of Nebraska (Eighth Circuit)

The Middle District of North Carolina (Fourth Circuit)

The Western District of Wisconsin (Seventh Circuit).

This gave us coast-to-coast coverage and a good mix of urban (Atlanta, Boston, Denver and San Francisco) and less-densely populated areas. Of particular importance for means-testing, these districts also cover the spectrum of high and low cost-of-living areas.

Building the Database. Once we had identified the districts and obtained the consent of the respective Chief Bankruptcy Judges and Bankruptcy Clerks, we asked each district for a list of all docket numbers assigned to bankruptcy cases filed anywhere within the district in calendar year 1995.⁽¹⁰⁷⁾ Our statistician⁽¹⁰⁸⁾ used those docket number lists to generate random number lists of about 400 cases for each district. We next used computerized bankruptcy court docket-access programs (BANCAP and PACER) to identify the first 150 cases on each list which met the sample's three qualifications:

- 1) Filed as or converted to a Chapter 7 case;
- 2) Filed by an individual or a married couple; and
- 3) The file included most schedules in order to assure adequate useful data.

This process gave each qualified case, regardless of when and where filed even within multi-divisional districts, an equal chance to become part of the final sample.

Next, we arranged to photocopy the files and transport the copies to Creighton University School of Law for coding. We benefited greatly from outstanding cooperation from the personnel of the Bankruptcy Court Clerk's office in each district. They helped us track down files from all divisions and retrieve some from deep storage in federal archives as well. In addition, we are indebted to Professor Gary Neustadter of Santa Clara Law School, who handled the Northern District of California files. Only three files ultimately could not be located. For each of these, we substituted the next qualified case from the relevant district's random number list.

At Creighton Law School, data entry was done by Professor Marianne Culhane and five third-year law students under her direction. Our statistician and programmer designed an easy-to-use data entry program using Microsoft Access 2.0, and trained us and the students in its use. Each case was entered by one person, rechecked by another and all differences reconciled. Additional rechecks of student work were done by Marianne Culhane. While we originally aimed at and coded 150 cases from each district, we eventually eliminated seven cases as outliers. These seven cases each had total debt in excess (some well in excess) of \$1 million, and they seemed likely to distort totals in a sample of this size. Two additional cases were eliminated for the Means-Testing Project because the debtors in those cases did not file Schedule I on income. Thus, the final sample is of 1,041 cases from seven districts.

The Reaffirmation Database provides a wealth of data on each case. It was designed to include more information than needed for that project, in hopes we could adapt it for other uses, plus build a longitudinal database by adding cases from later years at regular intervals.

A partial list of data follows. Each asset, creditor and claim is separately coded and classified; collateral is linked to the relevant secured claim; and each intended action from the Statement of Intention is linked to the relevant claim, asset and reaffirmation agreement, if any. Some data from the Statement of Affairs (prior years' income, gambling losses, repossessions and foreclosures) as well as attorney fees from the Rule 2016b form are coded. Income and expense data from Schedules I and J are, of course, included. Since almost all the cases had been closed before we collected them, the files reflected and we took note of events well after the initial

filing. We coded all amendments to the schedules, adversary proceedings and a variety of motions. In the few asset cases, we coded proofs of claims and trustee's reports on distributions of the estate.

Adapting the Database for Means-Testing. Despite this wealth of data, additional coding was necessary for the Means-Testing Project. From Schedule I, for example, we had originally recorded marital status, number and relationship of dependents, job title, employer, length of employment, gross and net income from employment, incoming alimony/support and total monthly income. For means-testing, however, we needed more detail on payroll deductions. For debtors who passed the median income test,⁽¹⁰⁹⁾ we went back to the hard copies of the files to code the amount and type (tax, social security, insurance, retirement account contribution, union dues, debt repayment, alimony/support) of each deduction, so that these could be appropriately allowed or disallowed for H.R. 3150's Projected Monthly Net Income test. We added more detail from Schedule J, Debtor's Monthly Expenses. Here we had originally coded expenses such as mortgage/rent, medical, outgoing alimony/support, regular business expenses, installment payments and total monthly expenses. For means-testing, we added charitable contributions, insurance, taxes, and child care, and for homeowners, utilities, property taxes, homeowner's insurance and home maintenance expenses.

Tables 8, 9 and 10 below give a picture of the mean and median debt levels, in 1995 dollars, of all the debtors in the sample used for the Means-Testing Project.

TABLE 8
MEDIAN SECURED, PRIORITY AND UNSECURED DEBT OF SAMPLE DEBTORS

DEBT	ALL SAMPLE DEBTORS	REAL PROPERTY OWNERS*	RENTERS	SINGLE FILERS	JOINT FILERS
Secured	\$7,000	\$70,000	1,498	\$3,690	\$23,362
Priority	\$0	\$0	\$0	\$0	\$0
Unsecured	\$20,581	\$25,121	\$18,706	\$18,972	\$24,711
Total Debt	\$38,662	\$103,013	\$26,048	\$31,164	\$62,167

*Includes mobile homeowners.

TABLE 9
MEAN SECURED, PRIORITY AND UNSECURED DEBT OF SAMPLE DEBTORS

DEBT	ALL SAMPLE DEBTORS	REAL PROPERTY OWNERS*	RENTERS	SINGLE FILERS	JOINT FILERS	
Secured		\$36,370	\$93,975	\$10,223	\$25,786	\$57,175

Priority	\$2,346	\$3,092	\$2,008	\$2,237	\$2,560
Unsecured	\$35,613	\$42,310	\$32,573	\$33,573	\$39,623
Total Debt	\$74,329	\$139,377	\$44,803	\$61,597	\$99,358

Percent of Total Debt

Secured	48.9%	67.4%	22.8%	41.9%	57.5%
Priority	3.2%	2.2%	4.5%	3.6%	2.6%
Unsecured	47.9%	30.4%	72.7%	54.5%	39.9%

*Includes mobile homeowners.

**TABLE 10
STANDARD DEVIATIONS FROM THE TABLE 8 MEANS**

DEBT	ALL SAMPLE DEBTORS	REAL RENTERS PROPERTY OWNERS*	SINGLE FILERS	JOINT FILERS	
Secured	\$76,255	\$104,916	\$35,736	\$66,615	\$88,814
Priority	\$14,827	\$20,205	\$11,593	\$12,963	\$17,954
Unsecured	\$62,477	\$65,770	\$60,728	\$68,037	\$49,616
Total Debt	\$108,197	\$138,279	\$74,611	\$100,992	\$117,299

*Includes mobile homeowners.

1. The authors are Professors of Law at Creighton University School of Law. This project was funded by a grant from the American Bankruptcy Institute's Endowment Fund. The underlying database was built for a different project funded by the National Conference of Bankruptcy Judges, the Bankruptcy Section of the Nebraska State Bar Association and Creighton University Law School. Computer programming and statistical analysis were done by David Van Dyke of Van Dyke Consulting, Inc. He cheerfully responded "It can be done" to our endless requests for further analyses. In addition, Professor Gary Neustadter's comments on an early draft of this article improved it greatly. We are grateful to them all.

2. Elizabeth Warren, *The Bankruptcy Crisis*, 73 Ind. L.J. 1079, 1079-84 (1998); Richard E. Coulson, *Substantial Abuse of Bankruptcy Code Section 707(b)*, 52 Consumer Fin. Q. Rep. 261, 286 (1998); Diane Ellis, *The Effect of Consumer Interest Rate Deregulation on Credit Card Volumes, Charge-Offs, and the Personal Bankruptcy Rate*, Bank Trends (Federal Deposit Insurance Corp, Washington, D.C. 98-05 March 1998); Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 Am. Bankr. L.J. 249 (1997); William Whitford, *Changing Definitions of Fresh Start in U.S. Bankruptcy Law*, 20 J. Consumer Pol. 179, 192-93 (1997); *The Increase in Personal Bankruptcy and the Crisis in Consumer Credit: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 105th Cong. 39 (1997) (statement of Kim J. Kowalewski, Macroeconomic Analysis Division, Congressional Budget Office).

3. The Bankruptcy Reform Act of 1999, H.R. 833, §102, 106th Cong. (1999); A Bill to Amend Title 11 of the U.S. Code to Modify the Application of Chapter 7 Relating to Liquidation Cases, H.R. 333, 106th Cong. (1999); Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 101 (1998); The Consumer Lenders and Borrowers Accountability Act of 1998, H.R. 3146, 105th Cong. § 8 (1998); Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 102 (1997); Responsible Borrower Act of 1997, H.R. 2500, 105th Cong. § 101 (1997).

4. A recent account of the consumer credit industry's long campaign to restrict access to Chapter 7 appears in Richard E. Coulson, *Substantial Abuse of Bankruptcy Code Section 707(b)*, 52 Consumer Fin. Q. Rep. 261, 264-74 (1998). Section 707(b) allows dismissal of Chapter 7 cases for "substantial abuse," which in many courts involves determining whether the debtor could repay in Chapter 13. Thus, we have had one form of means-testing since 1984.

5. The term "can-pay" comes from Elizabeth Warren, *The Bankruptcy Crisis*, *supra* note 1, at 1090 n.48.

6. Means-testing is critically examined in Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposals as a Starting Point*, 6 Am. Bankr. Inst. L. Rev. 1 (1998); Gary Klein, *Means Tested Bankruptcy: What Would It Mean?* U. Mem. L. Rev. 711 (1998); Elizabeth Warren, *The Bankruptcy Crisis*, *supra* note 1; Hon. Eugene R. Wedoff, *An Analysis of the Consumer Bankruptcy Provisions of H.R. 3150*, <<http://www.abiworld.org.legis/bills/98julhr3150.html>> at 4-5 (July 16, 1998).

For arguments in favor of means-testing, see Hon. Edith H. Jones & Comm'r James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy in Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years*, Final Report Ch. 5, at 10-27 [hereinafter Jones-Shepard Dissent and Commission Report] (discussing means testing bankruptcy). Judge Jones and Professor Todd Zywicki are preparing an article for the January 1999 edition of B.Y.U. L. Rev. as well, tentatively titled "It's Time for Means-Testing."

7. Of course, most liens survive a Chapter 7, so a debtor who wants to keep property subject to a lien must pay secured creditors post-discharge to avoid foreclosure. In addition, many debts are nondischargeable in Chapter 7; tax, support, student loan, tort and various other creditors may pursue debtors despite a Chapter 7 discharge. *See* 11 U.S.C. § 523 (1994) (listing nondischargeable debts).

8. Richard E. Coulson, *Substantial Abuse of Bankruptcy Code Section 707(b)*, *supra* note 3; Wayne R. Wells, *et al.*, *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 Clev. St. L. Rev. 15 (1991); Karen Gross, *The Debtor as Modern Day Peon: A Problem of Unconstitutional Conditions*, 65 Notre Dame L. Rev. 165, 174 n.54 (1990).

9. Ernst & Young, Chapter 7 Bankruptcy Petitioners' Ability to Repay: the National Perspective, 1997 <<http://www.ey.com/tax/eyecon/bankruptcy.asp>> (March, 1998) [hereinafter E & Y]; Ernst & Young, Chapter 7 Bankruptcy Petitioner's [sic] Ability to Repay: Additional Evidence from Bankruptcy Petition Files (February, 1998) (available on the Ernst & Young website above); WEFA, The Financial Costs of Personal Bankruptcy (February, 1998) (unpublished manuscript on file with authors); John M. Barron & Michael E. Staten, Personal Bankruptcy: a Report on Petitioner's Ability-to-Pay (Oct. 6, 1997) (unpublished manuscript on file with authors); VISA, Consumer Bankruptcy: Bankruptcy Debtor Survey (July, 1996) (unpublished manuscript on file with authors); VISA, Bankruptcy Petition Study (June, 1997) (unpublished manuscript on file with authors).

10. E & Y's March report concluded that these results "are consistent" with the firm's February 1998 report, as well as with other VISA-funded studies by WEFA and the Credit Research Center. E & Y, *supra* note 8, at 16.

11. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 101 (1998). E & Y, *supra* note 8. On February 24, 1999, means-testing legislation was again introduced in the House. The Bankruptcy Reform Act of 1999 is identical to the Conference Report of H.R. 3150 which passed the House late in the 105th Congress. <<http://www.abiworld.org/headlines/99feb25.html>> at 1 (February 25, 1999).

12. *Id.* at 12.

13. The authors of E & Y's March report informed us that 11% of their sample were can-pays when they retested at 100% of the medians under the House-passed version of H.R. 3150. Telephone conversation with Dr. Thomas Neubig and Mr. Gautam Jaggi, Jan. 28, 1999. E & Y have not issued a written report on these revisions.

14. *See* Elizabeth Warren, *The Bankruptcy Crisis*, *supra* note 1, at 1091-94 (1998); Gary Klein, *Means Tested Bankruptcy: What Would It Mean?* *supra* note 5, at 713-28; General Accounting Office, Personal Bankruptcy, The Credit Research Center Report on Debtors' Ability to Pay (1998).

15. *See* U.S. Gen. Accounting Office, GAO/T-GGD-98-79, Personal Bankruptcy: The Credit Research Center and E & Y Reports on Debtors' Ability to Repay at 6-7 (1998). The GAO also faulted these studies for reliance on unaudited data from Chapter 7 court files. *Id.* To that, we must also plead guilty. At present, no other data are available at reasonable cost.

16. Marianne B. Culhane & Michaela M. White, Preliminary Results of the Bankruptcy Reaffirmation Project (October, 1998) [hereinafter Reaffirmation Project] (unpublished manuscript on file with authors). Appendix B describes our sample design as well as data collection and coding. Debt and income data from the Reaffirmation Project were shared with Professor Elizabeth Warren and appear in her article, *The Bankruptcy Crisis*, *supra* note 1 at 1103-1110. The income data supplied to Professor Warren were net of all payroll deductions. However, the income figures used for this means-testing study are gross figures.

17. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 101 (1998).

18. The absolute number is 37 can-pay debtors from a sample of 1041 cases, or 3.55%. When weighted to reflect the total number of Chapter 7 cases filed in each sample district in 1995, the weighted percentage is also 3.55%. See Table 5, *infra* at __. The weighting process is outlined in note 33, *infra*.

In an earlier paper on this project, we reported a total of 35 can-pay debtors using a sample of 1,043 Chapter 7 cases. Further analysis has turned up two more. We have also excluded two cases from the sample of 1,043 because the debtors in those two cases did not file Schedule I (Income). Thus, the final sample for the Means-Testing Project is 1,041. See Marianne Culhane & Michaela White, Means-Testing for Chapter 7 Debtors: Repayment Capacity Untapped? <<http://www.abiworld.org/research/creightonstudy.html>>

19. Congressional Budget Office Cost Estimate, H.R. 3150: Bankruptcy Reform Act of 1998 (reported June 5, 1998) <<http://www.cbo.gov/showdoc.cfm?index=>>.

20. H.R. 3150 expresses these tests as follows:

(h)(1) An individual or, in a joint case, an individual and such individual's spouse, have income available to pay creditors if the individual, or, in a joint case, the individual and the individual's spouse combined, as of the date of the order for relief, have--

(A) current monthly total income of not less than the highest national median family income reported for a family of equal or lesser size or, in the case of a household of 1 person, of not less than the national median household income for 1 earner, as of the date of the order for relief;

(B) projected monthly net income greater than \$50; and

(C) projected monthly net income sufficient to repay twenty percent or more of unsecured nonpriority claims during a five-year repayment plan.

H.R. 3150 B101(4).

21. We have weighted the results of H.R. 3150's tests to reflect the total number of Chapter 7 cases filed in 1995 in each of our seven sample districts. See note 33 *infra* for an explanation of the weighting procedure. Other findings, however, are unweighted unless otherwise stated.

22. See *supra*, text accompanying note 17.

23. See *supra*, text accompanying note 12.

24. E & Y, *supra* note 8, at 18, 25-26.

25. E & Y's sample includes 2,200 cases filed in 1997, with cases from all federal judicial districts in the proportion to which each district's total Chapter 7 filings bears to total national Chapter 7 filings in 1997. Our sample is described in detail in Appendix B.

26. In that regard, H.R. 3150's requirement that income be evidenced not only by recent pay stubs but also by copies of tax returns for the three years prior to bankruptcy is problematic. Section 406(c)(1), H.R. 3150, as passed by the House in June, 1998, requires each Chapter 7 debtor to provide "copies of all Federal tax returns...filed by the debtor for the 3 most recent tax years preceding the order for relief." Judge Wedoff, in his critique of H.R. 3150, emphasizes the "significant burdens" that production of tax returns and

pay stubs will impose. "Both the difficulty and cost of assembling the required information and the intrusion on privacy would act as substantial barriers to good faith bankruptcy filings." Wedoff, *supra* note 5, at 30-31.

27. H.R. 833 B 102(b)(2,5), 106th Cong. (1999). H.R. 3150 B 102(b)(2,5) (Conference Report on H.R. 3150, Oct. 30, 1998, 105th Cong.); *see supra* note 10.

28. The bill provides "'current monthly total income' means the average monthly income from all sources derived which the debtor, or in a joint case, the debtor and the debtor's spouse, receive without regard to whether it is taxable income, in the six months preceding the date of determination, and includes any amount paid by anyone other than the debtor, or in a joint case, the debtor and the debtor's spouse, on a regular basis to 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." H.R. 3150 B 101(1)(A).

29. E & Y, *supra* note 8, at 29. The current Official Bankruptcy Forms, however, require disclosure only of monthly gross income at time of filing and annual gross income for the three years prior to filing.

In joint cases, both spouses' gross incomes are aggregated. When a married debtor files an individual rather than a joint petition, H.R. 3150 would sometimes mandate inclusion of the non-filing spouse's income in means-testing. H.R. 3150 B 101(1)(A). However, disclosure of spousal income in such cases is not currently required, so it could not be included here. Thus, gross income in such cases may be understated. In our sample, 9.7% of the cases involved married debtors filing individually. E & Y did not disclose the portion of its sample so filing.

30. E & Y, *supra* note 8, at 29.

31. H.R. 3150 B 101(1)(B). The Census Bureau's website displays the national median income tables at <http://www.census.gov/hies/income/histinc/>. As of January 1 of any year, the Census Bureau has information only for the second year before that date. In times of high inflation, this could substantially increase the number of cases subject to individualized scrutiny under the second and third tests. *See* Wedoff, *supra* note 5, at 4-5.

32. For households of one, the appropriate median is that for "households with one earner" rather than "households of one person." H.R. 3150 B 101(4). *See* Ed Flynn and Gordon Bermant, *Measuring Means-Testing: It's All in the Words*, American Bankruptcy Institute Journal at 1 (September, 1998). The Median Income for Households of One (Table H-11) is substantially lower than that for Households with One Earner (Table H-12). In 1993, the figures were \$16,065 and \$25,560 respectively.

Ernst and Young's March, 1998 written analysis apparently used the lower median income figure for "households of one" as well as 75% rather than 100% of the relevant median incomes. They later applied 100% of the median to their sample and found that 11% were can-pays. *See supra* note 12. We do not know whether they continued applying at 100% the lower median income figure for "households of one" rather than the higher median for "households with one earner."

33. For households of two or more, we used medians from Table F-8, Size of Family. H.R. 3150 allows families of five or more to use the highest median income for a family of the same or lesser size because the actual median incomes for families of five or more are lower than those for families of four. H.R. 3150 B 101(4).

34. For this article, we weighted the results to reflect the number of nonbusiness Chapter 7 cases filed in each district. For that reason, the percentage results differ slightly from the unweighted results in our earlier paper on this project. Culhane & White, *supra* note 17.

We display our results for H.R. 3150's three tests in Tables 2, 4 and 5. Each table shows both the number of sample cases which passed the test, and a pass rate weighted by the actual number of nonbusiness Chapter 7 cases filed in 1995 in each of our seven sample districts. To weight those results, we followed these steps:

1) Computed district pass rates by dividing the number of sample cases from a district which passed the relevant test ("# Passed") by the total number of sample cases from that district ("Sample"). District pass rates are displayed as "% Passed."

2) Estimated the total number of cases from each district which would have passed the relevant test, by multiplying the actual number of non-business Chapter 7 cases filed in each district in 1995 ("Total Ch. 7 Filings in 95") by the district's pass rate ("% Passed"). The result is displayed as "Estimated # Passed."

3) Summed the results of Step 2 for an estimated total number of cases from all seven districts which would have passed the relevant test. That total appears at the base of the "Estimated # Passed" column.

4) Computed the overall weighted pass rate by dividing total "Estimated # Passed" by the total number of cases filed in 1995 in all seven districts (54,802 cases). The result is displayed as "Weighted Pass Rate" at the bottom of the table for each test.

35. The earlier version also used a different and much lower median for households of one, which amounted to 33.2% or 346 cases in our sample. *See supra*, note 31 for more on this point.

36. We retested our sample against 75% of the 1993 equivalents to the medians used by E & Y in the March, 1998 report. Forty-nine percent of our sample met the threshold. E & Y, to our knowledge, has not disclosed the percentage of their sample passing the first or second tests when applying 100% of the national median income figures. They have only indicated that 11% of their sample passed all three tests of H.R. 3150. *See supra* note 12.

³⁷. *See supra* note 33 for discussion of weighting.

38. The total number of nonbusiness Chapter 7 cases filed in 1995 in each sample district is displayed in Table 2 in the column titled "Total Ch. 7 Filings in 95."

39. *See supra* note 32.

40. The bill defines necessary payments as follows:

the average monthly payment on account of secured creditors, which shall be calculated as the total of all amounts scheduled as contractually payable to secured creditors in each month of the 60 months following the date of the petition.

H.R. 3150 § 101(3)(B), 105th Cong. (1998).

41. 11 U.S.C. §§ 506(a), 1325(5) (1994).

42. H.R. 3150 § 124 (Conference Report on Bankruptcy Reform Act of 1998, Oct. 30, 1998, 105th Cong.). The Bankruptcy Reform Act of 1999 has an identical provision. H.R. 833, § 124, 106th Cong. (1999).

43. *Id.* An earlier version more reasonably limited the no-cram-down rule to goods purchased within six months before the case was filed. H.R. 3150 § 128 (as passed by the House on June 10, 1998). Both versions also provide that the property shall be valued at the full unpaid balance in any subsequent bankruptcy case filed by the debtor within two years after the current case was filed. *Id.*

44. H. Gray Burks, IV, *Rethinking the Eradication of Cram Down--Changing "Cram Down" to "Cram Up,"* Norton Bankruptcy Law Adviser 10, 11 (December, 1998).

45. The Collection Financial Standards are displayed on the IRS website. *See* <<http://www.irs.ustreas.gov/prod/ind-info/coll-stds/>>; IRS Manual 5323.433 (rev. 1995).

46. *See supra* note 44.

47. *Id.*

48. E & Y treated the Transportation Ownership Allowance as a maximum, as discussed at text accompanying notes 51-57 *infra*.

49. We converted 1997 to 1994 dollars by multiplying 1997 dollars by the Consumer Price Index (CPI) for 1994 divided by the CPI for 1997. The CPI for 1994 is 148.2 and for 1997 is 160.5. This yields a formula of: $\$100 \times (148.2/160.5) = \92.34 . Council of Economic Advisors, Economic Indicators (May, 1998).

50. The IRS in fact treats only the Food and Clothing category as an allowance without reference to taxpayers' actual expenses. The Housing and Utilities and Transportation categories set a dollar maximum, but the taxpayer is allowed only actual expenses up to the maximum. We, like E & Y, interpreted H.R. 3150 to treat all three of these categories as allowances.

51. The CFS expense allowances for the most part are adjusted for regional, sometimes down to county-level, cost-of-living. In his analysis of H.R. 3150, Judge Eugene Wedoff raised the problem of the CFS allowances being unduly restrictive, in Cook County, Illinois, where the range in residential rent is huge. *See Wedoff, supra* note 5, at 6-7.

52. *See* IRS Manual 5323.433 (rev. 1995).

53. *Id.*

54. *Id.*

55. H.R. 3150 § 101(4).

56. At least 50 more cars were leased. Reaffirmation Project Data, on file with the authors.

57. The debtors may have bought these as used cars or pledged them as collateral for nonpurchase-money loans.

58. Jill Michaux, a member of the Board of Directors of the National Association of Consumer Bankruptcy Attorneys, informed us that, even under current 36-month Chapter 13 plans, car repairs and replacement are a constant problem. She also said Chapter 13 debtors find it particularly difficult to buy a newer vehicle because car dealers are unwilling to follow the procedure under 11 U.S.C. § 1305 to incorporate their claim into an ongoing Chapter 13 plan. Telephone conversation between Marianne Culhane and Jill Michaux, Friday, January 8, 1999.

59. A perverse incentive to load up on secured debt prior to filing is built into H.R. 3150, given that any increase in secured debt makes it less likely the debtor will fall into the can-pay category and be dismissed from Chapter 7. Remember that under the bill, nonhousing secured debt is assumed to be repaid 100% in 60 months. H.R. 3150 § 101(4).

60. *See* IRS Manual at 5323.433 (rev. 1995).

61. *E & Y*, *supra* note 8, at 30-32.

62. Where comparison with the claim amount showed the mortgage would be paid off in less than 60 months, we first multiplied the monthly payment by .85 to remove tax and insurance, then grossed up the claim amount by 10% to account for additional interest, divided the sum by 60 to come up with a level monthly payment, and allowed that rather than the scheduled monthly payment. *See id.* at 31.

63. IRS Manual at 5323.433 (rev. 1995).

64. The bill requires:

(i) a written statement that [the extraordinary circumstances part of the bill] applies in determining the debtor's eligibility for relief under chapter 7 of this title;...

(iii)...a list itemizing each additional expense which exceeds [the CFS];

(iv) a detailed description of the extraordinary circumstances that explain why...each additional expense itemized under clause (iii) requires allowance; and

a sworn statement signed by the debtor and, if the debtor is represented by counsel, by the debtor's attorney, that the information ...is true and correct.

H.R. 3150 § 101(4).

65. One difficulty in adapting the CFS for use in H.R. 3150 means-testing is possible duplication between the CFS Other Necessary Expense Category and H.R. 3150's extraordinary expense deduction described above.

66. Pub. L. No. 105-183 (1998).

67. *Id.*

68. H.R. 3150 § 118(d) (emphasis added) (as passed by the House on June 10, 1998). This section did not become part of the Conference Report of H.R. 3150 which passed the House late in the 105th Congress. Nor is it part of H.R. 833, 106th Cong. (1999). However, the interplay of the Tithing Act and the CFS arguably yields the same result.

69. Thomas J. Yerbich, H.R. 3150 After the Impact of the Tithing Law-Alice in Wonderland? <<http://www.abiworld.org/abidata/online/newslet/98yerbich2.html>>. Debtors and their counsel should remember, however, that the Tithing Act does not prevent a claim that the donation was a transfer made "with actual intent to hinder, delay or defraud..." under 11 U.S.C. §§ 544(b), 548(a)(1) and 727(a). Steven J. McCardell, *The Religious Liberty and Charitable Donation Protection Act of 1998*, Norton Bankruptcy Law Adviser 8, 9 (Sept. 1998). Legislative history suggests that prior patterns of conduct may be relevant, and that large eve-of-bankruptcy donations from first-time givers could raise an inference of intent to defraud. House Report 105-556 (1998). *See also* In re Buxton, 228 B.R. 606 (Bankr. E.D. La. 1999) (qualified contributions subject to "reasonably necessary" expense limits even after Tithing Act).

70. This point is forcefully made by the Chief Bankruptcy Judge of the Central District of California. *See* Geraldine Mund, Sample Debtor Summary (1998) (unpublished manuscript on file with authors).

71. Home mortgage payments frequently include tax and insurance escrow amounts in addition to principal and interest portions. We, like Ernst and Young, compensated for this by multiplying home mortgage payments by 85%, and treating the result as principal and interest. E & Y, *supra* note 8, at 31.

72. H.R. 3150 § 101(4).

73. Of course, the recent trend to seven-year and even ten-year car loans casts doubt on this assumption.

74. E & Y, *supra* note 8, at 31-32.

75. Neither we nor E & Y allowed interest on Priority Claims, although in fact such claims are entitled to be paid present value as of the date of confirmation of the plan. 11 U.S.C. § 1325(a) (1994). Stretching these claims out for 60 months will give this provision real impact. Omitting this calculation of course leads to overstatement of repayment capacity.

76. H.R. 3150 B 101(4).

77. 11 U.S.C. B 507(a)(1) (1994).

78. Chapter 13 attorney fees and extension of credit practice is described in Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Amer. Bankr. L.J. 501, 545-49 (1993).

79. E & Y, *supra* note 8, at 18, 26.

80. The Chapter 13 trustee is required to "collect [a] percentage fee from all payments received by such individual under plans...under chapter...13...." 28 U.S.C. B 586(e)(2) (1994).

81. This figure was obtained from the Executive Office of the United States Trustee.

82. Debtors are commonly allowed to make certain large payments directly to creditors and thus escape the trustee's percentage fee on those payments. When a debtor is curing arrearages on a home mortgage or other secured debt, cure payments must be made through the plan and thus are subject to the trustee's fee. *See* Michaela M. White, *Direct Payment Plans*, 29 Creighton L. Rev. 583 (1996).

83. *See* 11 U.S.C. B 330(a)(4)(B) (1994) (allowance of fees to Chapter 13 debtor's counsel); 11 U.S.C. B 503(b)(2) (1994) (administrative expense priority for fees to debtor's counsel).

84. National Association of Consumer Bankruptcy Attorneys Survey on Compensation 4 (1996). *See also* American Bankruptcy Institute, National Report on Professional Compensation in Bankruptcy Cases 172 (1991) (the average Chapter 13 fee in 1991 was \$820). Jean Braucher, *supra* note 5, at 547-48 (1991-92 Chapter 13 fees ranged from \$650 to \$1,500).

85. H.R. 3150 would use the average monthly gross income for the six months prior to the petition. H.R. 3150 B101(1). As explained in text accompanying notes 24-28 above, both we and E & Y substituted current monthly gross income from Schedule J.

86. *Id.* at B 101(4).

87. *Id.*

88. E & Y, *supra* note 8, at 10. The 17% is the outcome when E & Y used 75% of the national median. To our knowledge, E & Y has not disclosed the percentage of their sample that passed the Projected Monthly Net Income test when they applied 100% of the relevant national median income to their sample debtors. *See supra* note 34.

89. *See supra* note 32 for discussion of weighting.

90. H.R. 3150 § 101(4). As others have noted, this test in some ways rewards those with large unsecured debt relative to income and pushes into Chapter 13 those prudent or fortunate enough to have less unsecured debt relative to income. *See* Wedoff, *supra* note 5, at 7-8. The House-Senate Conference Report on H.R. 3150 § 102 (October, 1998) and H.R. 833 § 102 avoid this paradox by setting the third test in the alternative. Both would treat a debtor as a can-pay if Projected Monthly Net Income was sufficient to pay the lesser of \$5,000 (\$83.33 a month if one ignores the trustee's fee) or 25% of general unsecured debt.

91. We calculated total nonpriority debt by adding Schedule F claims to the parts, if any, of Schedule E claims not entitled to priority.

When we held all other variables constant, but did not deduct trustee's and attorney fees, the number of can-pays rose from 37 to 40. When weighted by filings per district, the pass rate rose from 3.55% to 3.88%. *See supra* note 33 for discussion of weighting.

We also calculated the combined impact of disallowing the motor vehicle ownership allowance and not deducting trustee's and attorney fees. That led to 75 can-pays, for a pass rate of 6.94% when weighted by filings per district.

92. Dr. Thomas Neubig and Mr. Gautam Jaggi, two of the authors of E & Y's March, 1998 report, confirmed that 11% of their sample were can-pays at 100% of the median. *See supra* note 12.

93. *See supra* note 33 for discussion of weighting.

94. E & Y, *supra* note 8, at i.

95. *Id.*

96. \$35,303 is the equivalent in 1997 dollars of the median unsecured debt of can-pay debtors in our sample. We converted 1995 to 1997 dollars by multiplying the 1995 dollars by the CPI for 1997 divided by the CPI for 1995. The 1997 CPI was 160.5 and the CPI for 1995 was 152.4. This yields a formula of: $\$100 \times (160.5/152.4) = \1.053 . Council of Economic Advisors, Economic Indicators (May, 1998).

97. GAO Report, *supra* note 14, at 6.

98. *Id.* at 7.

99. Of course, some will never convert to Chapter 13 in the first place, but dismissal from Chapter 7 does not guarantee that their creditors will be able to force them to repay.

100. Congressional Budget Office Cost Estimate H.R. 3150: Bankruptcy Reform Act of 1998 (reported June 5, 1998) <<http://www.cbo.gov/showdoc.cfm?index=>>.

101. *Id.*

102. Some 40% (163 of 446) of the filed reaffirmations in our Reaffirmation Project's sample of 1,043 Chapter 7 cases were of debts scheduled as unsecured or not scheduled at all. Culhane & White, *supra* note 15, at 3. It is quite likely that there were a great many more unfiled reaffirmations in 1995. In late 1996 and 1997, the systematic practice of Sears, Federated Department Stores, GE Capital and other retailers of not filing reaffirmation agreements with the court came to light. Sears alone is estimated to have failed to file 187,000 reaffirmations from 1992-1997. Numerous class actions against these and other retailers based on this practice were filed and settled for upwards of \$200 million. On February 9, 1999, a Sears spokesperson stated that it would plead guilty to bankruptcy fraud and pay a \$60 million fine for unlawfully collecting debts that were not reaffirmed in accordance with 11 U.S.C. § 524. Cliff Edwards, *Sears Agrees to Plead Guilty to Bankruptcy Fraud Pay \$60 Million Fine*, Associated Press, Chicago, February 9, 1999, at 1, available in Westlaw, West Group; Joseph B. Cahill, *Sears Agrees to Plead Guilty to Charges of Criminal Fraud in Credit-Card Case*, Wall Street Journal at page B-11 (2/10/99).

103. It is true that the number might have been slightly higher had all the required information been available. That is, the six-month average gross income plus the income of spouses where married debtors file individual, rather than joint, petitions.

104. Here we characterize as "nonpriority unsecured" any debt appearing on Schedule F without regard to whether the claim was properly so scheduled. However, where debts clearly not entitled to priority (such as student loans) appeared on Schedule E as priority claims, we treat those debts as nonpriority unsecured claims.

105. *See* Marianne Culhane and Michaela White, *supra* note 15.

106. Circuits allowing debtor to retain without reaffirmation or redemption: *In re Parker*, 139 F.3d 668, 672-73 (9th Cir. 1998); *In re Boodrow*, 126 F.3d 43, 53 (2d Cir. 1997), *cert. denied* ___ U.S. ___ (1998); *In re Belanger*, 962 F.2d 345, 347-48 (4th Cir. 1992); and *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1546-47 (10th Cir. 1989).

Circuits requiring reaffirmation or redemption: *In re Burr*, 160 F.3d 843 (1st Cir. 1998); *In re Johnson*, 89 F.3d 249, 250-52 (5th Cir. 1996); *In re Taylor*, 3 F.3d 1512, 1516-17 (11th Cir. 1993); and *In re Edwards*, 901 F.2d 1383, 1385-87 (7th Cir. 1990).

107. Bankruptcy courts assign sequential docket numbers to cases in the order filed, without regard to the chapter in which the case is filed. The docket numbers take the format xx-xxxxx. The first two digits indicate the year of filing, the first digit to the right of the dash indicates the division within the district and the remaining four digits the sequence of filing within that division.

108. David Van Dyke, formerly a Creighton University faculty member and now president of Van Dyke Consulting, Inc., of Omaha, Nebraska.

109. *See* description *supra* in Part II.