

No. 2:2009-cv-00579-MHT

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IN THE  
UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA

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In re ROBERT L. WASHINGTON, III AND GLORIA JEAN WASHINGTON,  
*Debtors.*

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ROBERT L. WASHINGTON, III AND GLORIA JEAN WASHINGTON,  
*Debtors-Appellants*

— v. —

CURTIS C. REDING,  
*Chapter 13 Trustee-Appellee*

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ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA

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**BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF  
CONSUMER BANKRUPTCY ATTORNEYS**

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1(a), *amicus curiae*, The National Association of Consumer Bankruptcy Attorneys states that it is a nongovernmental corporate entity that has no parent corporations and does not issue stock.

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## STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 800,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *In re Pyatt*, 486 F.3d 423 (8<sup>th</sup> Cir. 2007); *In re Scarborough*, 461 F.3d 406 (3<sup>rd</sup> Cir. 2006).

The NACBA membership has a vital interest in the outcome of this case. Although above-median debtors represent only a small percentage of bankruptcy petitioners, with the current recession and rise in unemployment a growing number of people are finding themselves dependent upon unemployment compensation benefits for their subsistence. Where the societal ills resulting from unemployment was of paramount concern to the drafters of the Social Security Act, it is important that the provision of the BAPCPA that relate to the Social Security Act work in harmony with its principles.

## **SUMMARY OF ARGUMENT**

When applying the means test of section 707(b)(2) and determining a debtor's current monthly income, a court must exclude "benefits received under the Social Security Act." Unemployment compensation is a benefit received under the Social Security Act, and should therefore be excluded from the calculation of current monthly income.

The history of both the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and the Social Security Act ("SSA") supports this finding. First, in presenting the amendment excluding benefits under the Social Security Act from current monthly income, both Senator Kennedy and Representative Conyers included unemployment compensation as such a benefit.

Likewise, unemployment compensation benefits have always been a significant component of the SSA. In addition to providing for the elderly and disabled, the SSA, introduced by President Franklin D. Roosevelt, sought to combat the personal and social ills associated with unemployment. Though administered through state programs, unemployment compensation laws, like many other Titles of the Social Security Act, are a joint federal/state construct with the federal government providing substantial oversight by the Secretary of Labor, as well as funding through federal tax trusts.



The plain language of the statute and the legislative history of both BAPCPA and SSA require a finding that unemployment compensation is a benefit received under the Social Security Act for the purpose of calculating current monthly income.

## INTRODUCTION

This case is on appeal of an order sustaining the trustee's Objection to Confirmation of the Debtor's Chapter 13 Plan and Conditional Order of Dismissal issued by the United States Bankruptcy Court for the Middle District of Alabama. The Bankruptcy Court determined that Debtors had miscalculated their current monthly income as a result of their failure to include unemployment compensation benefits.

A presumption of abuse arises under the 707(b)(2) means test when debtor's current monthly income less statutorily defined expenses exceeds a certain threshold. section 707(b) provides, in pertinent part:

(1) After notice and a hearing, the court . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions . . . to any qualified religious or charitable entity or organization . . . .

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,575, whichever is greater; or

(II) \$10,950.

The starting point for applying the means test formula is "current monthly income" ("CMI"). CMI is statutorily defined and consists of "the average monthly income from all sources that the debtor receives" during the six months prior to filing. 11 U.S.C. § 101(10A)(A). Importantly, however, the statutory definition of CMI excludes "benefits received under the Social Security Act." 11 U.S.C. § 101(10A)(B).

Here, Debtor receives unemployment compensation and excluded it from his calculation of CMI as a “benefit received under the Social Security Act.”

## ARGUMENT

### **I. Under a plain language reading of the statute, unemployment compensation should be excluded from current monthly income because it falls squarely within the term “benefits received under the Social Security Act.”**

The Supreme Court has consistently employed a strict plain meaning rule for the Bankruptcy Code. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). It is well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwriters*, 530 U.S. at 6 (internal quotations omitted). Moreover, if the plain language of a statute appears to contradict its philosophical foundation, it is not the role of the courts to redraft the statute to bring the two into alignment. “If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.” *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring).

Although the BAPCPA has been roundly criticized as an exercise in muddled draftsmanship, *see e.g.* Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 Am. Bankr. L.J. 191(2005) (calling the draftsmanship of the

BAPCPA “atrocious”); *In re Sorrell*, 359 B.R. at 172 (clarity of expression is frequently lacking in the BAPCPA), the provisions relating to CMI are straightforward. Section 101(10A)(A) describes CMI as: “the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income.” Section 101(10A)(B) excludes from current monthly income “benefits received under the Social Security Act.” A plain language interpretation of section 101(10A)(B) leads to the conclusion that unemployment compensation, which is a substantial component of the SSA and is regulated and funded by the Department of Labor and the Federal Unemployment Tax Act, 26 U.S.C. § 3304, is a “benefit received under the Social Security Act.”

Although reported cases are few, at least two courts and several commentators have found that, based upon the plain language of the statute, unemployment compensation benefits should be excluded from current monthly income. *See In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007); 2 COLLIER ON BANKRUPTCY 101.10A (Alan N. Resnick & Henry J. Sommer eds., 16<sup>th</sup> ed. 2007) (noting that unemployment benefits are provided for in several Titles of the Social Security Act), David W. Allard, *Means Testing, Dismissal & Conversion Under the New Law*, 24-6 Am. Bankr. Inst. J., 8, 74 (July 2005) (“[U]nemployment compensation was also excluded from CMI because it appears that it is a benefit received under the Social Security Act.”); David Gray Carlson, *Means Testing: the Failed Bankruptcy Revolution of 2005*, 15 Am. Bankr. Inst. L. Rev., 223, 262-63, (Spring 2007) (referring favorably to *Sorrell’s* reasoning for finding that unemployment compensation is a benefit received under the Social Security Act); Henry J. Sommer, *Trying to Make*

*Sense out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”*, 79 Am. Bankr. L.J. 191, 195 (2005) (unemployment compensation benefits provided for under Titles III, XII, XIII and XV of the Social Security Act).

In finding that unemployment compensation is a “benefit received under the Social Security Act,” the court in *Sorrell* began its analysis with the premise that “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material.” 359 B.R. at 177 (quoting *Exxon Mobil Corp. v. Allapattah Svcs., Inc.*, 545 U.S. 546, 568 (2005)). It proceeded to review the arguments set forth by the Trustee within that framework.

First, the *Sorrell* court rejected the Trustee’s argument that the phrase “benefits under the Social Security Act” was limited to direct payments from the federal government. The court noted that the statute did not limit the broad term “benefits” to direct payments. The *Sorrell* court also examined other sections of the Bankruptcy Code that refer to benefits under the Social Security Act. Specifically, the court compared section 362(b)(2) (exceptions to the automatic stay for child support under section 466 of the SSA), section 704(c)(1)(A)(i) (duties of the Trustee with respect to state child support agencies created under the SSA), and section 1302(d)(1)(A)(i) (same), to the language employed in section 101(10A)(B). Relying on the rule that “congressional enactments which contain particular language in one section of a statute, but omit such particularity in another section, reflect Congress’s intention and purpose in such disparate use,” the court concluded that the broader language of section 101(10A)(B) reflected an intention to provide broader coverage of the Act in its entirety. *Sorrell*, 359 B.R. at 183.

Finally, the court held that:

[I]n consideration of the text of various relevant portions of the Social Security Act, United States Supreme Court language, and a comparison with other statutory text of the 2005 Act, which reference specific provisions of the Social Security Act, the court holds that unemployment compensation is one of the ‘benefits under the Social Security Act.’

*Id.*

The court in *Munger* adopted this reasoning. Based upon “canons of statutory construction and the *Sorrell* decision,” the *Munger* court found that unemployment compensation is excluded from current monthly income pursuant to section 101(10A)(B). 370 B.R. at 26. Like *Sorrell*, the court noted that when Congress intended to draw a distinction between specific social security provisions it did so expressly, as in the case of section 522(d)(10), which provides that a debtor may claim as exempt:

- (A) a social security benefit, unemployment compensation, or a local public assistance benefit;
- (B) a veterans’ benefit;
- (C) a disability, illness, or unemployment benefit
- (D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;
- (E) a payment under a . . . plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor . . .

The court found that the phrase “social security benefit,” as used in section 522(d), was narrower than the phrase “benefits under the Social Security Act,” as used in section 101(10A)(B):

[T]he phrase [benefits received under the Social Security Act] is intentionally broad. sections of the Bankruptcy Code distinguish ‘unemployment compensation’ from ‘a social security benefit.’ . . . The way which Congress chose to phrase the references in the sections

supports the view that ‘a benefit received under the Social Security Act’ in § 101(10A)(B) was *purposefully intended to be broader than ‘a social security benefit.’* ‘Unemployment compensation’ is included in this broader definition.

370 B.R. at 25-26 (emphasis added).

This Court should adopt the holdings of *Sorrell* and *Munger* and should find, based upon the plain language of the statute, that unemployment compensation is a benefit received under the SSA and should be excluded from the calculation of CMI.

**II. The legislative history of both the BAPCPA and the SSA mandates a finding that unemployment compensation is a “benefit received under the Social Security Act” for purposes of calculating CMI.**

In the event that this Court finds that the statutory text is ambiguous, the congressional record fully supports a finding that unemployment compensation is a “benefit received under the Social Security Act” within the meaning of section 101(10A)(B).

When Congress chose to exclude social security benefits from calculation of CMI, it was motivated in part by consideration of the financial distress caused by loss of employment and the need to protect unemployment compensation from creditors. Likewise, a significant impetus for the passage of the SSA in 1935 was to combat the harm that job loss causes to individuals and to society as a whole. Therefore, the legislative history of both Acts militates in favor of a finding that unemployment compensation is a “benefit received under the Social Security Act” within the meaning of 11 U.S.C. § 101(10A)(B).

**A. The legislative history of BAPCPA demonstrates Congress’s intent to include unemployment benefits in the scope of section 101(10A)(B) and, thus, to exclude them from CMI.**

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 485, 490 (Summer 2005) (“When an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.”) (quoting Cong. Rec. H.R. Rep. No. 55-65, at 43 (1897)). With that philosophy in mind, bankruptcy laws included a presumption in favor of granting chapter 7 relief.

Over time, the public perceived a misuse of chapter 7 bankruptcy protection. Congress was persuaded that chapter 7 relief, designed to protect those who found themselves in unexpected financial circumstances caused by illness, job loss, or death of a spouse, had instead become a tool to relieve debts incurred by people who had merely spent recklessly. Jensen, *supra*, at 495. After over a decade of discussion, drafting and redrafting, the Bankruptcy Abuse Prevention and Consumer Protection Act was signed into law in 2005. BAPCPA eliminated the presumption that chapter 7 debtors are entitled to relief and created a new test—the means test—under which a chapter 7 case could be dismissed based upon a presumption of abuse. *See Sorrell*, 359 B.R. at 178.

The Senate and the House of Representatives both considered proposals as early as 1999 to exclude “benefits received under the Social Security Act” from the definition



of CMI. Introducing the amendment to the Senate, Senator Edward Kennedy noted the many financial hardships that disproportionately affect older Americans, such as increased health care costs and loss of health insurance, more pressure from predatory lenders, and loss of employment:

This amendment is particularly important to seniors. Between 1991 and 1999 the number of people over 65 who filed bankruptcy grew by 120 percent. If we look over the figures from 1991 to 1999 by age of petitioner, we see the growth of those that are going through bankruptcy primarily have increased in the older citizen age group. This is primarily a result of the downsizing, dismissing older worker and because of health care costs—primarily they have been dropped from health insurance.

*Bankruptcy Reform Act of 1999*: 106th Cong., 1st Sess., 145 Cong. Rec. S 14678 (Nov. 17, 1999) (statement of Sen. Kennedy). In proposing the amendment, Senator Kennedy emphasized the importance of social security benefits to older citizens unable to maintain employment at the levels they sustained as younger employees: “in too many circumstances in our country today, the elderly are discriminated against in terms of employment.” The amendment generated no debate and passed at that session. *Id.* at 14680.

In the House, Representative John Conyers moved to recommit the Bankruptcy bill as it then stood, with an amendment identical to Senator Kennedy’s. In his opening remarks Rep. Conyers specifically mentioned unemployment compensation as a benefit to be protected by his amendment:

As the law currently stands, any senior is eligible for bankruptcy relief. The bill, however, would force millions of seniors living on fixed incomes into mandatory repayment plans. This is because there is no exclusion from the definition of “income” for payments received for Social Security, retirement, for disability insurance, for supplemental security income, or for *unemployment insurance*.

*Bankruptcy Reform Act of 1999: Hearing on H.R.833 before the Committee of the Whole House*, 106th Cong., 1st Sess., 145 Cong. Rec. H 2655, 2770 (statement of Rep. John Conyers) (emphasis added). Rep. Conyers read a letter from the National Council of Senior Citizens in support of the amendment, in which it was stated that the bill as it stood without the amendment “would force millions of seniors to make mandatory payments based on a definition of income that would include payments for social security, disability, *unemployment compensation*, supplemental security income and other income security and welfare needs.” *Id.* (emphasis added). The motion to recommit passed without debate and became part of the final bill.

Thus, the congressional record demonstrates that when Senator Kennedy and Representative Conyers proposed the amendment to exclude social security benefits from the calculation of CMI, Congress specifically contemplated that “benefits received under the Social Security Act” would include unemployment compensation. It is clear, therefore, that Congress’s intention behind the language of the BAPCPA was to exclude unemployment compensation from calculation of current monthly income as a “benefit received under the Social Security Act.”

**B. State unemployment compensation laws, created under the auspices of the Social Security Act and regulated by the Secretary of Labor, are one of the core purposes of the Social Security Act.**

Not only does the legislative history of the BAPCPA provide unmistakable guidance in this case, but the history and purposes of the SSA are in perfect harmony with the conclusion that unemployment compensation is a “benefit received under the Social Security Act” for purposes of calculating CMI.

President Franklin D. Roosevelt introduced the SSA in 1935 as part of the New Deal. The purpose of the Act was to provide for the general welfare by establishing a system of federal old-age benefits and by enabling the states to make more adequate provisions for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of state unemployment compensation laws. ([http://www.ssa.gov/OP\\_Home/ssact/title00/0000.htm](http://www.ssa.gov/OP_Home/ssact/title00/0000.htm)).

In 1934, President Roosevelt created the Committee on Economic Security in recognition of Congress's interest in "federal grants to states for the needy aged and for some federal legislation in the field of *unemployment compensation*." Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 Minn L.Rev. 379, 383 (1983) (emphasis added); *see also* Joel F. Handler, *Symposium: The Legacy of Goldberg v. Kelly; A Twenty Year Perspective: "Constructing the Political Spectacle": Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 Brooklyn L.Rev. 899, 914 (Summer 1990) (the first major task of the Social Security reformers was to provide unemployment insurance.) In the original 1935 report to President Roosevelt, the Committee on Economic Security recommended a program of unemployment insurance as a first line of defense for workers ordinarily steadily employed. It was believed that unemployment compensation for a limited period would "carry workers over most, if not all periods of unemployment in normal times without resort to any other forms of assistance." *Cal. Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 130-31 (1971) (quoting *Report of the Committee on Economic Security: Hearings on S. 1130 Before the Senate Comm. on Finance, 74th Cong., 1st Sess., 1311, 1321-1322 (1935)*).

The United States Supreme Court explained the importance of addressing the social ills that were the impetus for creating the unemployment compensation system in the SSA:

The evils of the attendant social and economic wastage [caused by unemployment] permeate the entire social structure. Apart from poverty, or a less extreme impairment of the savings which afford the chief protection to the working class against old age and the hazards of illness, a matter of inestimable consequence to society as a whole, and apart from the loss of purchasing power, the legislature could have concluded that unemployment brings in its wake increase in vagrancy and crimes against property, reduction in the number of marriages, deterioration of family life, decline in the birth rate, increase in illegitimate births, impairment of the health of the unemployed and their families and malnutrition of their children.

*Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 516-17 (1937).

From its inception in 1935, therefore, the SSA has had two major social insurance components: the Federal Old Age, Survivors, Disability and Hospital Insurance (“OASDHI”) program, including Title II and Title XVIII (Medicare) of the SSA, and the federal-state unemployment compensation program, Title III and Title IX of the SSA.

As originally contemplated by the Committee on Economic Security, the unemployment compensation provisions of the SSA, like many Titles in that Act, outline a joint federal-state program. Payments to recipients are partially funded by federal grants, which are themselves funded through the FUTA, and the administration of state plans is funded by the SSA. 42 U.S.C. § 501 (2004); *Java*, 402 U.S. at 125. The SSA also provides for training of state employees (§ 1107), research of the unemployment compensation programs (§ 1106), and an advisory counsel (§ 1108). Through this system, the federal government is able “to furnish federal money for the administrative expenses of state unemployment compensation programs as an inducement to the states

to adopt programs that would achieve the larger objects [of humane assistance and macroeconomic benefits].” *Jenkins v. Bowling*, 691 F.2d 1225, 1229 (7th Cir. 1982).

Eligibility for federal funds is contingent upon the Secretary of Labor’s certification of a state program after finding that it conforms to federal requirements spelled out in detail in section 503 of the SSA. *Java*, 402 U.S. at 125; *Sorrell*, 359 B.R. at 181. Pursuant to section 503 a state must, among other things, pay unemployment compensation claims “when due,” provide a fair and impartial hearing, and allow a claimant to deduct health insurance or income tax in accordance with a program approved by the Secretary of Labor. Furthermore, a state must make periodic reports to the Secretary of Labor and make information available to the Secretary of Labor concerning individual claimants. If a state’s unemployment compensation plan does not meet these requirements, federal funding stops unless and until the state plan comes into compliance. 42 U.S.C. § 503(b). Additionally, a state law that conflicts with any of these provisions may be deemed invalid. *Java*, 402 U.S. at 121 (enjoining California’s unemployment compensation regulation because it conflicts with the “when due” provision of the Social Security Act.)

Under this construct, therefore, there is more than merely a financial connection between the SSA and state unemployment compensation laws. The state laws are created and administered according to guidelines set forth by the SSA, the administrative aspects of such laws are paid for by the federal government, and a substantial portion of the benefits are paid through federal tax trusts. Moreover, the provision of unemployment compensation was a substantial concern driving President Roosevelt and the Committee on Economic Security to propose the SSA in the first place. State

unemployment compensation laws are extensively tied to the SSA both in terms of its regulatory provisions and in terms of its original purpose to insure against financial ruin as a result of circumstances beyond the control of the recipient.

For these reasons, Debtor urges this Court to find that unemployment compensation is a benefit received under the SSA, to be excluded from CMI under section 101(10A)(B).

**III. The single case finding that unemployment compensation is not a benefit received under the SSA is incorrectly decided.**

There is only one reported case in which unemployment compensation was found not to be a “benefit received under the Social Security Act” within the meaning of section 101(10A)(B). *See In re Baden*, 396 B.R. 617 (Bankr. M.D. Pa. 2008). That case essentially relied upon four propositions for its conclusion: (1) that the congressional intent behind the BAPCPA and the amendments it made to section 707(b) was to ensure that all income be included in the calculation of current monthly income; (2) that comparison with the language of section 522(d)(10) indicates that Congress deemed unemployment compensation to be a benefit separate from social security; (3) that “benefits received under the Social Security Act” refers to benefits wholly funded, administered and paid by the federal government; and (4) that current monthly income should be calculated according to the Internal Revenue Code’s definition of gross income.

Debtor maintains that, for the following reasons, *Baden* was wrongly decided and should not be followed by this Court.

**A. There is no congressional mandate that debtors be required to include unemployment compensation in the calculation of CMI under the means test.**

As an initial matter, the *Baden* court determined that interpretation of section 101(10A)(B) could not be based solely on the text of the provision, finding that there is an inherent ambiguity in that language. Specifically, the court stated:

It is unclear whether a 'benefit received under the Social Security Act,' was meant to be all encompassing since it did not refer to a specific provision of the act or whether it was an alternative way of referring to social security benefits, which are distinguished from unemployment compensation in other provisions. Since the language of this provision is unclear, it is necessary to look beyond the plain language to correctly interpret the statute.

396 B.R. at 622.<sup>1</sup>

The court then turned to the legislative history of the BAPCPA for guidance and found that Congress had two primary concerns: “(1) Protecting the Bankruptcy system from being abused by ensuring that those who could afford to pay their debts did pay; and (2) protecting education and retirement savings from being drained by creditors.” *Id.* The court concluded that excluding unemployment compensation from the calculation of CMI would be antagonistic to both concerns. Specifically, the court stated that “[a]llowing the unemployed to retain any excess funds they receive while failing to pay their bills runs contrary to Congress’ goal of preventing abuse by those who can afford to pay a portion of their bills.” *Id.*

This position was addressed and rejected by the courts in *Sorrell* and *Munger*. The court in *Sorrell*, warned against placing too much emphasis on the oft-cited phrase,

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<sup>1</sup> As argued above, Debtor disagrees with the *Baden* court’s finding that the language of § 101(10A)(B) is ambiguous.

“Those who can pay, should pay,” noting that Congress itself did not always adhere to this principle, specifically excluding other sources of income, including certain retirement funds, repaid loans, and charitable contributions, from consideration of the debtor’s ability to pay. *Sorrell*, 359 B.R. at 178; *see also In re Barfknecht*, 378 B.R. 154 (Bankr. W.D. Tex. 2007) (no bad faith where chapter 13 debtor retains social security disability benefits even though inclusion of such benefits in the estate would significantly increase repayment to creditors).

Contrary to the conclusion in *Baden*, while the BAPCPA may have had as its impetus the desire to curtail perceived abuse of chapter 7 bankruptcy, it did not eradicate the original intent of the bankruptcy laws to afford a debtor a fresh start by protecting certain assets and income from creditors. *See Jensen, supra*, at 490 (the original intent of Chapter 7 bankruptcy was to serve the public good by distribution of a debtor’s assets and allowing him to enjoy a fresh start). *Baden* invoked congressional concerns that may relate to broad issues addressed by the 2005 legislation, but they do not relate to the specific amendment at issue here. In fact, there is no inherent contradiction between the purposes behind the BAPCPA and the preservation of monies received under the SSA. The exclusion from CMI of *all* benefits received under the SSA promulgated the congressional purpose of protecting Americans from the financial burdens created by loss of employment. This founding principle of the SSA also underlies the BAPCPA. As noted by the *Sorrell* court, Congress’s desire to retain the balance between the two competing interests is evidenced by its protection of a variety of debtor’s assets.

The congressional record is also clear that Congress sought to protect unemployment benefits. Both Rep. Conyers and Sen. Kennedy emphasized loss of



employment income in presenting to Congress the amendment that became section 101(10A)(B). *See* section IIA, *supra*. Moreover, when Representative Conyers presented the amendment to the House he explicitly offered it as a means to protect a debtor's unemployment compensation. These amendments passed without challenge.

Therefore, while the passage of the BAPCPA reinforced and strengthened the abuse prevention aspects of the bankruptcy laws, it did not do away with the consumer protection component. The *Baden* court analyzed congressional intent with no specific discussion of the language at issue and cannot be deemed persuasive in the current debate.

If Congress intended to limit its exclusions from CMI in the manner suggested by the Trustee, it knew how to do so. The fact that it did not is a clear indication that courts should not impose their own judicial limitations in contravention of the clear statutory language and legislative history.

**B. Congress's separation of unemployment compensation from "social security benefits" in section 522(d)(10) is not an indication that Congress intended to treat unemployment compensation as outside the Social Security Act for purposes of section 101(10A)(B).**

The *Baden* court's analysis of the statutory text as compared to other provisions in the Code is likewise erroneous. In comparing the text of section 101(10A)(B) with the other language in the Code, the *Baden* court cited only section 522(d)(10) as an example of a specific provision in which Congress distinguished unemployment benefits from the benefits available under the SSA. Where *Munger* relied on section 522(d)(10) as evidence that Congress knew how to distinguish between specific benefits when it intended to do so, the *Baden* court cites that provision as evidence that Congress

intended to exclude unemployment compensation from the definition of “social security benefits” and, therefore, include unemployment compensation in the calculation of CMI:

[T]his Court views the distinction between unemployment compensation and social security benefits [in section 522(d)(10)] as a manifestation of Congress’ intent that the Bankruptcy Code treat the current and temporary replacement of wages administered by the state differently than future benefits associated with old age, ordinarily administered by the federal government.

*Baden*, 396 B.R. at 621.

This conclusion steadfastly ignores the basic principle of statutory construction that differing language in two provisions of an Act be given different meanings. *Russello v. United States*, 404 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each.”). By equating Congress’s reference to “social security benefits” in section 522(d), and the reference to “benefits received under the Social Security Act” in section 101(10A)(B), the *Baden* court failed to recognize the significance of the different language that Congress employed in the two provisions. That Congress chose different, and broader, language in section 101(10A)(B) supports the view that “benefits received under the Social Security Act,” as used in that section, enjoys the broadest possible construction.

The *Baden* court’s interpretation of the disparate terms also ignores the historical and colloquial meaning of the term “social security benefits.” Since 1935, when the SSA was enacted, the term “social security” has frequently been used to refer to the Federal Old Age, Survivors, Disability and Hospital Insurance program (consisting of federal old age benefits and Medicare). Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 Minn L.Rev. 379, 380, 397 (1983). Congress referred to “social security benefits” in section 522(d)(10) and then went on to

separately list other benefits that find their genesis in the Social Security Act, such as disability, public assistance, and unemployment benefits. It is reasonable to conclude that the reference to “social security benefits”—without reference to the SSA itself—was limited to the colloquial understanding of that term. The separate listing of unemployment compensation in that section merely indicates Congress’s desire to ensure protection for those benefits in addition to the benefits commonly understood as “social security.” It has no interpretive value, though, in connection with a provision, like section 101(10A)(B), that makes specific reference to the SSA.<sup>2</sup>

The individual listing of benefits applicable under section 522(d)(10) suggests exclusivity—those benefits not listed were not intended to be exempt under that provision. The opposite is true with respect to section 101(10A)(B) where Congress elected to refer broadly to the Social Security Act in its entirety. The use of different terms leads inexorably to the conclusion that different meanings are intended. Had Congress meant to exclude certain social security benefits in section 101(10A)(B) it would have been a simple matter to do so.

**C. The distinction between benefits received directly from the federal government and those received from state governments is irrelevant to the interpretation of section 101(10A)(B).**

The *Baden* court was also persuaded that unemployment compensation is not a benefit received under the SSA based on the structural differences between unemployment compensation and certain other social security benefits. The court found

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<sup>2</sup>Indeed, applying the *Baden* court’s argument consistently would lead to a finding that “disability” and “illness” benefits (which, like unemployment compensation, are identified separately in 11 U.S.C. § 522(d)(10)(C)), are included in the calculation of CMI—even though they are benefits available under the SSA.

that “including unemployment compensation as a benefit ‘received under the Social Security Act’ is a strained interpretation . . .[,] as unemployed individuals do not receive ‘benefits under the Social Security Act,’ but rather ‘under programs adopted by their states.’” *Baden*, 396 B.R. at 621 (quoting Eugene R. Wedoff, *Means Testing in the New* § 707(b), 79 Am. Bankr. L.J. 231, 247 (2005)). It held that the BAPCPA uniformly treats “the current and temporary replacement of wages administered by the state differently than future benefits associated with old age, ordinarily administered by the federal government.” *Id.* The *Baden* court thus held that the extent of state involvement in a benefits program determines whether the recipient derives the benefits under the SSA. Benefits paid directly through the Social Security Administration would be deemed “benefits received under the Social Security Act,” while those received through a state program established under the SSA would not.

The *Sorrell* court rejected that argument, reasoning that unemployment compensation has the requisite nexus to the federal government:

A component of this analysis is a brief understanding of unemployment compensation law, which involves both state and federal law, specifically the Social Security Act. States may, but are not required, to enact unemployment compensation laws. If, however, a state does enact an unemployment compensation law, it is required to comply with a series of federal mandates. See 42 U.S.C. section 1321 (Eligibility requirements for transfer of funds; reimbursement by State; application; certification; limitation). These mandates are inextricably entwined with the Social Security Act. For example, the Secretary of Labor must certify each state’s compliance with the Social Security Act. To the extent a state law is not in compliance with the Social Security Act, it would be invalid under the Supremacy Clause of the United States Constitution.

*Sorrell*. 359 B.R. at 181 (citations omitted). Where unemployment benefits have the same underlying purpose as other provisions of the Social Security Act—that of maintaining “the recipient at subsistence levels,” during a time of financial exigency—the

*Sorrell* court found no logical basis for distinguishing between unemployment compensation benefits and other benefits under the Social Security Act. *Id.* at 182 (quoting *Java*, 402 U.S. at 131-32). Moreover, the court found that “the plain meaning of the words in section 101(10A)(B) contain no distinction between federal and state benefits administration. The applicable text does not speak of ‘payment,’ direct, indirect, or otherwise, but instead contains the unambiguously broader term ‘benefits.’” 359 B.R. at 181.

The court in *Munger* agreed, finding that “benefits” as used in section 101(10A)(B) is a more inclusive word than “payments” and that Congress chose to exclude from CMI benefits received by virtue of the Social Security Act rather than the more narrow reading of “payments” made directly from the federal coffers with no state administration. There, the court found that “[t]he word ‘benefit’ does not draw a distinction between unemployment compensation and other benefits,” and that Congress did not intend to exclude unemployment compensation from “benefits received under the Social Security Act.” 370 B.R. at 23.

The overall construct of the SSA fully supports the conclusion reached by the courts in *Sorrell* and *Munger*. The extensive reach of the SSA includes many programs that, like the unemployment compensation program, states administer through grants from the federal government and that operate with substantial oversight by the Secretary of Labor. As the Act currently stands, its federal/state programs include Title I – Grants to States for Old-Age Assistance; Title III – Grants to States for Unemployment

Compensation Administration<sup>3</sup>; Title IV – Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services; Title V – Maternal and Child Health Services Block Grant; Title X – Grants to States for Aid to Blind; Title XIV – Grants to States for Aid to Permanently and Totally Disabled; Title XIX – Grants to States for Medical Assistance Programs; Title XX – Block Grants to States for Social Services; and finally, Title XXI – State Children’s Health Insurance Program. With the exception of the unemployment compensation laws (Titles III, IX and XII), these Titles are generally referred to as the “welfare” programs. Cohen, *supra*, at 381.

On the other hand, the federally administered and funded programs include: Title II – Federal Old-Age, Survivors, and Disability Insurance Benefits (OASDI); Title VIII – Special Benefits for Certain World War II Veterans; Title XVI – Supplemental Security Income for Aged, Blind, and Disabled (SSI); Title XVIII – Health Insurance for Aged and Disabled (Medicare). The OASDI and Medicare are what is typically meant when people refer to “social security.” Dana M. Muir, *From YUPPIES to GUPPIES: Unfunded Mandates and Benefit Plan Regulation*, 34 Ga. L. Rev. 195, 199 n.30 (Fall 1999); Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 Minn L.Rev. 379, 380 (1983).

Even OASDI, Medicare and SSI, though primarily federal programs, have some state involvement in their operations. OASDI provides for state agencies to make the determination as to whether a claimant is disabled. 42 U.S.C. § 421(a)(1). SSI contemplates coordinated federal-state payments to recipients as well as funding to the states for their complementary programs through Title XIX of the Act. The Medicare

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<sup>3</sup>Other Titles involving Unemployment Compensation are Title IX – Employment Security Administrative Financing, and Title XII – Advances to State Unemployment Funds.

program likewise includes a state component with sections 1395z and 1395aa of that Title providing for the Secretary of Labor to consult with State agencies for determination of conditions of participation by providers of services under the Medicare program.

The *Baden* court deemed “benefits received under the Social Security Act,” to be limited to those that are colloquially known as “social security” benefits. By holding that only those programs that are funded and administered without state involvement are “benefits received under the Social Security Act,” the *Baden* court would require Chapter 7 petitioners to include in CMI all benefits except those benefits received under Titles II (OASDI), XVI (SSI) and XVIII (Medicare). Chapter 7 debtors would have to include in CMI calculations all benefits received under the programs involving grants to the states, such as: Titles I (old-age assistance), III (unemployment compensation), IV (child welfare), V (maternal and child health services), X (aid to the blind), XIV (disability), XIX (medical assistance), XX (social services) or XXI (children’s health insurance).

The *Baden* result would ultimately contort the statutory language and purpose of section 101(10A)(B) by confining the congressional reference to “the Social Security Act” to only those benefits received under three of eleven Titles of that Act. This Court should not adopt such an absurd construction.

**D. The Court should not determine “Income” for purposes of section 101(10A) with reference to the Internal Revenue Code.**

Finally, the court in *Baden* also agreed with Judge Wedoff’s reasoning that unemployment compensation should not be deemed a “benefit received under the Social

Security Act” because the language of section 101(10A) suggests that its interpretation should be guided by reference to the Internal Revenue Code. *Baden*, 396 B.R. at 623. section 101(10A) provides that CMI should include: “the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income.” Under the Internal Revenue Code, that which is “not taxable” is “gross” and 26 U.S.C. § 85 provides that gross income includes unemployment compensation. *Id.* (citing *Wedoff*, *supra*, at 247).

This view, based upon Congress’s reference to taxable income, does not withstand scrutiny, and several courts have rejected it. Addressing the argument in the context of the inclusion or exclusion of private disability payments, the Ninth Circuit held that the “plain language of the Bankruptcy Code . . . does not support this interpretation”:

The phrase "without regard to whether such income is taxable income" in 11 U.S.C. § 101(10A)(A) reflects Congress' judgment that the Internal Revenue Code's method of determining taxable income does not apply to the Bankruptcy Code's calculation of CMI. Moreover, where Congress wishes to define a term in the Bankruptcy Code by reference to the Internal Revenue Code, it clearly knows how to do so. For example, Congress imported the Internal Revenue Service's Local and National Standards for expenses into the means test calculation. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I).

*Blausey v. U.S. Trustee*, 552 F.3d 1124, 1132-33 (9th Cir. 2008); *see also In re Weigand*, 386 B.R. 238, 242 (9th Cir. BAP 2008) (finding plain language “reflects a clear congressional intent that Tax Code concepts for determining taxable income are inapplicable to a determination of current monthly income.”); *In re Bembenek*, No. 08-22607, 2008 Bankr. LEXIS 3003 (Bankr. E.D. Wisc. July 2, 2008) (same). It would have been a simple matter for Congress to have defined CMI as “gross income” under the



Internal Revenue Code if that had been the intention.<sup>4</sup> Specifying that income should be determined “without regard” to taxability suggests that Congress did not intend that the Internal Revenue Code guide the definition of “income” in the Bankruptcy Code.

### CONCLUSION

The plain language of the definition of CMI, as well as the history and purposes of the BAPCPA and the SSA, lead to only one conclusion: that unemployment compensation is a “benefit received under the Social Security Act” under section 101(10A)(B). For the foregoing reasons, this Court should reverse the judgment of the Bankruptcy Court.

Respectfully Submitted,

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<sup>4</sup> In his article, Judge Wedoff himself acknowledges a weakness in his argument: The guidance of the Internal Revenue Code as to the meaning of “income” in §101(10A)(A) of the CMI definition is, however, undercut by the statement in §101(10A)(B) that “income” includes “any amount paid by any entity other than the debtor, on a regular basis for the household expenses of the debtor or the debtor’s dependents.”

This provision has the effect of treating child support and foster care payments as “income” even though they are excluded from “gross income” in the Internal Revenue Code.

Wedoff, *supra*, at 245.

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 13<sup>th</sup> date of November I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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