

No. 12-2017

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re Robert Mort Ranta,
Debtor.

ROBERT MORT RANTA
Debtor-Appellant

— v. —

THOMAS P. GORMAN,
Trustee-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA – NO. 1:12-cv-505

**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF
CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLANT
AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION**

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CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Robert Mort Ranta v. Thomas P. Gorman – No. 12-2017

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___/s/ Tara Twomey_____
Tara Twomey, Esq.

Dated: October 9, 2012

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,000 consumer bankruptcy attorneys nationwide. 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.

The NACBA membership has a vital interest in the outcome of this case. Many consumer debtors who file for bankruptcy protection are dependent upon Social Security Benefits to answer their basic needs such as housing, food, transportation, and clothing. Because of this reliance, Congress has legislated to protect Social Security Income through the Social Security Act as well as the Bankruptcy Code. In fact, Congress's protection of retirement benefits in bankruptcy has increased with the passage of the 2005 amendments to the Code, necessarily at the expense of unsecured creditors. Congress has balanced the rights of creditors and debtors as it deems appropriate. By contrast, the Bankruptcy Court and District Court decisions effectively strip Social Security benefits of all protections in Chapter 13 bankruptcy cases.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

SUMMARY OF ARGUMENT

Congress has long shielded social security benefits from the reach of a beneficiary's creditors. In addition to the exclusion of Social Security benefits from "the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a), Congress also specifically excluded benefits under the Social Security Act from the amounts debtors must pay to their unsecured creditors. 11 U.S.C. §§ 101(10A); 1325(b)(1),(2). The Bankruptcy Court and District Court decisions effectively strip Social Security benefits of all protections in Chapter 13 bankruptcy cases. Such rulings run counter to unambiguous, long-standing congressional directives. Over time Congress has consistently increased protection of retirement benefits in bankruptcy at the expense of unsecured creditors. Congress has balanced the rights of creditors and debtors as it deems appropriate. It is essential that the plain language of these statutes, as well as clear legislative intent, be respected and adhered to.

STATUTORY FRAMEWORK

I. Chapter 13

Individuals seeking bankruptcy relief generally seek liquidation under chapter 7 of the Bankruptcy Code or propose a plan for repayment of a portion of their debt under chapter 13. Chapter 13 permits an individual debtor with a source of regular income to receive a discharge of certain debts after completing a bankruptcy plan that meets the Code's requirements. Section 1321 directs debtors to file a debt adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321. Chapter 13 plans that meet the requirements set forth in the Code are confirmed by the bankruptcy court. 11 U.S.C. §§ 1322, 1325. Debtors make payments under confirmed plans for the benefit of the debtors' secured and/or unsecured creditors. Upon completion of payments under the plan debtors receive a discharge of all debts provided for by the plan, with limited exceptions. 11 U.S.C. § 1328(a).

II. The Chapter 13 Plan

Subchapter II of chapter 13 contains the statutory provision applicable to chapter 13 plans. Two critical sections of this subchapter are sections 1322 and 1325. Section 1322(a) delineates the mandatory provisions for chapter 13 plans. Section 1322(b) describes the permissive provisions that a debtor may incorporate into his or her chapter 13 plan. Section 1325(a) lists additional standards for confirmation of a chapter 13 plan.

There are generally four tests that the plan must satisfy in order to be confirmed: the best interest of the creditors test, the feasibility test, the disposable income test, and the good faith test. Of these tests, the Trustee objected to confirmation of the Debtor's chapter 13 plan based only on the disposable income test of 1325(b)(1)(B). [R.56; Trustee's Objection to Confirmation].¹

A. Best Interest of the Creditors Test: The Bankruptcy Code provides that the court "shall confirm a plan...if the value, as of the effective date of the plan, of property to be paid under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on the claim [in a chapter 7 case]." 11 U.S.C. § 1325(a)(4). This test ensures that general unsecured creditors would not be harmed by a debtor's choice of chapter 13 over chapter 7. That is, unsecured creditors must receive as much in a chapter 13 as they would have under a chapter 7 liquidation. The Trustee did not object to the debtor's plan based on the best interest of the creditors test. [R.56; Trustee's Objection to Confirmation].

B. Feasibility Test: Section 1325(a)(6) requires that the "debtor will be able to make all payments under the plan and to comply with the plan." If the plan does not meet this standard, often called the feasibility test, confirmation may be denied.

Under this test, the budget figures must show sufficient income or other financial

¹ Record cites are to the Joint Appendix. The Trustee also raised an objection based on section 521(3), which is unrelated to the Debtor's chapter 13 plan and appears to have been resolved.

resources to enable the debtor to make the payment proposed. A plan is considered feasible if the debtor's net monthly income, as reflected on Schedule J, is equal to or greater than the debtor's proposed plan payment. The Trustee did not object to the debtor's plan based on the feasibility test.² [R.56; Trustee's Objection to Confirmation]

C. Disposable Income Test: Section 1325(b) permits the trustee or holder of an allowed unsecured claim to object to confirmation if the debtor does not propose to pay into the plan all of his or her projected disposable income to be received during the applicable commitment period. The test was originally enacted as part of the 1984 amendments to the Code, and it provided express instructions regarding how to take into account the debtor's income and what portion of the that income should be devoted to plan payments. The 2005 amendments to the Code significantly altered the disposable income test.

Pre-BAPCPA Statutory Provisions and Application. Before enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 ("BAPCPA"), section 1325(b)(1) of the Bankruptcy Code

² The District Court appears to have been confused as to the various tests applied to chapter 13 plans. The District Court held that the Debtor's plan was not feasible, however, the Trustee raised no objection based on feasibility in the bankruptcy court. In this case, net monthly income on Schedule J (rounded to the nearest dollar) is equal to the Debtor's proposed plan payment. There is no feasibility issue in this case.

precluded a court from confirming a proposed Chapter 13 plan over the objection of the trustee or a creditor,

unless, as of the effective date of the plan . . . (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325(b)(1)(B) (2000). Section 1325(b)(2) defined “disposable income” to mean “income which is received by the debtor and which is not reasonably necessary to be expended...” 11 U.S.C. § 1325(b)(2)(B) (2000). Although the Code did not further define “reasonably necessary” expenses, a bankruptcy debtor was required to list monthly income and expenses on Schedules I (“Current Income of Individual Debtor(s)”) and J (“Current Expenditures of Individual Debtor(s)”). Fed. R. Bankr. P. Official Form 6, Schedules I-J (2004). Upon objection to the plan, bankruptcy courts determined on a case-by-case basis which items listed in Schedule I could properly be counted as income and the extent to which Schedule J expenses were reasonably necessary. *See In re Hagel*, 171 B.R. 686 (Bankr. D. Mont. 1994) (pre-BAPCPA, including social security income is projected disposable income; *see also In re Taylor*, 243 F.3d 124, 129 (2d Cir. 2001) (whether pension funds constitute income); *Watters v. McRoberts*, 167 B.R. 146, 147–48 (S.D. Ill. 1994) (personal injury recovery is income). Additionally, bankruptcy courts adjusted the debtor's disposable income based on known or virtually certain changes in the debtor's income and expenses. *See Lanning*, 120 S. Ct. at 2472 (citations omitted). Courts then calculated projected

disposable income by multiplying the debtor's monthly disposable income by the number of months in the plan. *Id.* at 2472-73; *see also, e.g., In re Gonzales*, 157 B.R. 604, 613 (Bankr. E.D. Mich. 1993) (describing judicial discretion over "disposable income," followed thereafter by multiplication); *In re Campbell*, 198 B.R. 467, 474 (Bankr. D. S.C. 1996) (stating that "court should determine projected disposable income by calculating a debtor's present monthly income and expenditures and extending those amounts over the life of the plan." (citations omitted)). That figure represented the amount the debtor was obliged to pay all creditors over the life of the plan.

BAPCPA Statutory Revisions. "[S]ection 1325(b) was substantially amended by the 2005 amendments to the Bankruptcy Code." 8 Collier on Bankruptcy ¶ 1325.08[1], pp. 1325-53 (16th ed. 2010). Section 1325(b) now provides that a court may not confirm a plan over the objection of the trustee or unsecured creditor,

unless, as of the effective date of the plan... (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

11 U.S.C. § 1325(b)(1)(B). BAPCPA fundamentally redefined a chapter 13 debtor's "disposable income." Section 1325(b)(2) now provides, in relevant part, "[f]or purposes of this subsection, the term 'disposable income' means *current monthly income* received by the debtor . . . less amounts reasonably necessary to be expended." 11

U.S.C. § 1325(b)(2) (emphasis added). In turn, “current monthly income” is defined as “the average monthly income from all sources that the debtor receives . . . derived during the 6-month period” prior to filing the bankruptcy petition. 11 U.S.C. § 101(10A)(A)(i). This figure explicitly excludes social security benefits. 11 U.S.C. § 101(10A)(B).

On the expense-side, for above-median income debtors amounts reasonably necessary to be expended “*shall* be determined in accordance with subparagraphs (A) and (B) of [S]ection 707(b)(2).” 11 U.S.C. § 1325(b)(3) (emphasis added). Section 707(b)(2), in turn, provides deductions for standardized “expense amounts specified under the National and Local Standards . . . issued by the Internal Revenue Service for the area in which the debtor resides,” secured debts, and other specifically permitted expenses. 11 U.S.C. § 707(b)(2)(A). Form 22C provides entry lines for the specified deductions and directs the above-median debtor to calculate “disposable income” by subtracting those deductions from “current monthly income.” *See* Fed. R. Bankr. P. Official Form 22C.

The Trustee objected to the Debtor’s plan for failure to comply with the disposable income test of section 1325(b)(1)(B). [R.56; Trustee’s Objection to Confirmation].

D. Good Faith Test: Section 1325(a)(3) requires that “the plan [be] proposed in good faith and not by any means forbidden by law.” The good faith standard

provides a check on actions that abuse the bankruptcy system. Prior to enactment of the disposable income test in 1984, the degree to which § 1325(a)(3) could set a standard for how much a debtor must pay under a chapter 13 plan was a subject of dispute. However, the financially based factors of the good faith test were subsumed by the enactment of section 1325(b), the disposable income test, in 1984, such that the good faith inquiry no longer turns on the amount of payments to unsecured creditors. *See Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987) (section 1325(b)'s disposable income test subsumes most of the financially related factors set forth in *United States v. Estus*, 695 F.2d 311 (8th Cir. 1982)); *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983) (remanding because in denying confirmation based on 1325(a)(3) bankruptcy court placed emphasis on payments to unsecured creditors); *In re Hopper*, 474 B.R. 872, 883 n.24 (Bankr. E.D. Ark. 2012) (and cases cited). Several Code sections specifically regulate the level of plan payments, and many courts have held that these provisions establish the adequacy of payments. Lundin, *Chapter 13 Bankruptcy* at § 193.1. The 2005 BAPCPA amendments reinforced the irrelevance of a subjective review of the adequacy of plan payments under § 1325(a)(3) when debtors comply with the new statutory guidelines that determine the level of their plan payments. *See 8 Collier on Bankruptcy, supra* ¶ 1325.04 [1].

The Trustee did not object to the debtor's plan based on the good faith test. [R.56; Trustee's Objection to Confirmation].

ARGUMENT

III. The Plain Language of the Bankruptcy Code That Excludes Social Security Benefits from Disposable Income and the Provisions of the Social Security Act Excluding Benefits from the Operation of Any Bankruptcy or Insolvency Law Mandate Reversal of the District Court Opinion.

“The starting point in discerning congressional intent is the existing statutory text.” *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted). “It is well established that ‘when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

Here, the Bankruptcy Code plainly directs that disposable income to be committed by the debtor to chapter 13 plan payments shall not include benefits under the Social Security Act. 11 U.S.C. § 101(10A). Similarly, the Social Security Act, plainly states that Social Security benefits are not subject to any legal process “or to the operation of any bankruptcy or insolvency law.” 42 U.S.C. § 407(a). As the Debtor has ably argued the plain language of these statutes alone mandate reversal of the District Court’s decision. However, even looking beyond the plain language, Congress has long protected, and continues to increase protections, for retirement benefits in bankruptcy. These protections necessarily come at a cost to unsecured creditors, but that is a choice for Congress, not the courts to make.

IV. Congress Intended Strong Protections for all Forms of Retirement Income in Bankruptcy, and These Protections Come at a Cost to Creditors.

The district court suggests that Social Security benefits must be paid to creditors in chapter 13 cases because to hold otherwise would be inconsistent with the means test's purpose of ensuring that debtors repay creditors the maximum they can afford. (D.Ct. at 2). Focusing solely on the dollar amount payable to creditors, the District Court and the Trustee ignore the other equally important goal of federal bankruptcy legislation – the debtor's fresh start. The Code excludes certain income and assets from the bankruptcy estate and allows for exemptions to ensure that debtors achieve this fresh start. *Schwab v. Reilly*, 130 S. Ct. 2652, 2667 (2010) (“We agree that ‘exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a ‘fresh start.’”) While the Congress left to the states an important role in determining the nature and extent of bankruptcy exemptions, it nevertheless emphasized “that there is a federal interest in seeing that a debtor [who] goes through bankruptcy comes out with adequate possessions to begin his fresh start.” H. Rep. No. 95-595, 95th Cong.; 1st Sess. 126-127 (1977), U.S.C.C.A.N 1978 p. 6087. Over time, the Code's provisions for exemptions and exclusions from estate property designed to protect retirement income and assets have grown stronger and more pervasive.

A. The Pre-BAPCPA Bankruptcy Code's Significant Protections for Retirement Savings.

In excluding common forms of retirement savings from the bankruptcy estate and otherwise allowing for their exemption from the estate, Congress gave special protections to the long-term income needs of bankruptcy debtors. In *Patterson v. Shumate*, 504 U.S. 753 (1992), the Supreme Court broadly construed 11 U.S.C. § 541(c)(2), which allows the exclusion of ERISA-qualified retirement accounts from the bankruptcy estate. In a unanimous decision the Court affirmed the exclusion of the \$250,000 retirement savings of a debtor who had been president and chairman of the board of directors of a corporation. According to the court, the exclusion gave effect to the statutory goal of protecting pension benefits – if the individual had been promised the retirement income and met the conditions for receiving it, he or she should receive the income. 504 U.S. at 765. The Supreme Court noted that in excluding assets of this magnitude from the reach of creditors, there could be “strong equitable considerations to the contrary.” *Id.* Nevertheless, the Supreme Court recognized that the exclusion represented a clear congressional policy choice to safeguard the stream of income for pensioners to the detriment of creditors.

In another unanimous decision, *Rousey v. Jacoway*, 544 U.S. 320 (2005), the Supreme Court held that IRA accounts were protected under the Bankruptcy Code's exemption for pensions and similar plans that condition disbursements upon “illness, disability, death, age, or length of service.” 11 U.S.C. § 522(d)(10)(E). As in *Shumate*,

the Court focused on the nature and purpose of these protected funds. In the Court's view, the funds that were shielded under the federal bankruptcy exemption scheme of § 522(d) provided income that "substitutes for wages lost upon retirement". 544 U.S. at 332. Social Security benefits similarly substitute for wages the beneficiary earned at an earlier time, with eligibility to receive the benefits tied to age or disability. As is true for pension and similar retirement accounts, workers pay Social Security taxes out of current income with an expectation of receiving the funds back over time at a future date.

B. The 2005 BAPCPA Amendments Strengthened the Protections for Retirement Income and Assets.

The 2005 amendments added three new provisions to the Bankruptcy Code that directly affect debtors' retirement income. These are found in sections 522(d)(12), 522(b)(3)(C), and 541(b)(7). When a chapter 13 debtor participates in some form of retirement savings plan, these amendments substantially reduce the dividend available to unsecured creditors.

1. The new § 522(d)(12) exemption for retirement savings. New § 522(d)(12) allows debtors to exempt from the bankruptcy estate "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401[qualified plans], 403[annuities], 408[IRAs], 408A[Roth IRAs], 414[hybrid plans], 457[deferred compensation plans for government and tax-exempt organizations], or 501[plans funded with employee contributions only] of the Internal

Revenue Code of 1986.” 11 U.S.C. § 522(d)(12). This provision shelters additional types of accounts not already excluded from the bankruptcy estate. H.R. Rep. No. 109-31 at 63-64 (2005). Several aspects of § 522(d)(12) are noteworthy. Unlike the pre-BAPCPA exemption under § 522(d)(10)(E), § 522(d)(12) does not limit exempted funds to amounts “reasonably necessary for the support of the debtor and any dependents of the debtor.” There is no monetary limit for most types of pension accounts. For one type of account, Congress did set a cap. Debtors may exempt up to \$1,171,650 in an IRA account. 11 U.S.C. § 522(n). However, courts may increase the cap “if the interests of justice so require.” *Id.* Courts have no discretion to decrease the cap.

2. New § 522(b)(3)(C) and the extension of the federal retirement savings exemption to all bankruptcy debtors. Debtors may claim the new § 522(d)(12) exemption in states that have opted out of the federal exemption scheme. 11 U.S.C. § 522(b)(3)(C). The extension of this federal bankruptcy exemption to all bankruptcy cases, regardless of the debtor’s residence in an “opt-out” state, is unique in the Code. All bankruptcy debtors in all states now have the right to shield from the reach of creditors at least \$1,171,650 in common types of retirement savings.

3. New § 541(b)(7)’s exclusion from the estate of contributions to retirement accounts. Section 541(b)(7) provides that the debtor’s contributions to a 401k retirement account “shall not constitute disposable income as defined in section 1325(b)(2).” 11 U.S.C. § 541(b)(7). Under a related provision, the debtor’s payments

to repay a loan from a 401k plan do not constitute disposable income under § 1325. 11 U.S.C. § 1322(f). Sections 541(b)(7) and 1322(f) address the debtor's ongoing *expenditures* during a chapter 13 payment plan, namely, expenditures designed to build up retirement savings.

Here again, the detriment to creditors is obvious. In the chapter 13 context, these expenditures to accumulate retirement savings reduce dollar-for-dollar the amount available to pay creditors during the pendency of the chapter 13 plan. In re *Glisson*, 430 B.R. 920, 922 (Bankr. S.D. Ga. 2009); In re *Leahy*, 370 B.R. 620, 623 (Bankr. D. Vt. 2007); In re *Njuguna*, 357 B.R. 689, 690 (Bankr. D. N.H. 2006) (“for purposes of the bankruptcy plan, it is as if the 401k contribution does not exist.”); In re *Johnson*, 346 B.R. 256 (Bankr. S.D. Ga. 2006). A 401k plan's terms limiting maximum contributions sets the only limit on the size of monthly contributions subject to this exclusion. In re *Mati*, 390 B.R. 11, 17 (Bankr. D. Mass. 2008); In re *Glisson*, 430 B.R. at 922.

C. Accumulation of Retirement Savings Does Not Show Bad Faith Under 11 U.S.C. § 1325(a)(3).

Because Congress expressly provided for the exclusion from disposable income of contributions to most retirement accounts, any challenge to these contributions as contrary to the good faith requirement of § 1325(a)(3) must fail. In re *Egan*, 458 B.R. 836, 849 (E.D. Pa. 2011) (“In BAPCPA's legislative history, Congress specifically recognized that amendments relating to ‘some retirement, education, and

other savings generally would make less money available [to creditors]” quoting H.R. Rep. 109-31(I), 2005 WL 832198 at * 35 (Apr. 8, 2005)); *In re Johnson*, 346 B.R. at 262-63; *In re Mati*, 390 B.R. 11, 17 (Bankr. D. Mass. 2008); *In re Devilliers*, 358 B.R. at 864-65.³

D. As the Foundation of Retirement Income, Social Security Benefits Must Receive the Highest Degree of Protection

The Bankruptcy Code has always given even stronger and more consistent protections to Social Security benefits than to the various forms of private retirement savings. For example, in the pre-BAPCPA federal bankruptcy exemptions listed under 11 U.S.C. § 522(d), the debtor’s right to receive payments under pensions, annuities and other retirement accounts was exempted only “to the extent reasonably necessary for the support of the debtor and any dependents of the debtor.” 11 U.S.C. § 522(d)(10)(E). By contrast, the debtor’s right to receive Social Security benefits has always been exempted without any limitation. 11 U.S.C. § 522(d)(10)(A).

Under the 2005 BAPCPA amendments Congress developed the term “current monthly income” as the key standard for the means test and Chapter 13 disposable

³ An exception to these rulings appeared in the Sixth Circuit’s decision in *In re Seafort*, 669 F.3d 662 (6th Cir. 2012), holding that § 541(b)(7) excluded from income only *pre-petition* payments to retirement accounts. The decision ignored the clear language of § 541(b)(7) that the plan contributions do not constitute “disposable *income*.” (emphasis added). Instead, the court treated the section as protecting only an exempt asset. The Sixth Circuit has already ruled on the specific issue to be addressed in the instant appeal, holding that Social Security income must be excluded from the projected disposable income calculation in chapter 13. *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011).

income test. 11 U.S.C. § 101(10A). Congress defined Current Monthly Income broadly to include the debtor's income from all sources. The CMI calculation did not expressly exclude private retirement benefits. The only form of regular income Congress expressly excluded from the CMI definition was "benefits received under the Social Security Act." 11 U.S.C. § 101(10A)(B).⁴

Outside of bankruptcy, courts have held that funds in ERISA-qualified private retirement accounts were protected from attachment by creditors only up to the time they were paid out to the beneficiary. Yet, these same courts recognized that § 407 of the Social Security Act protected both the right to receive Social Security benefits in the future and benefits that had been paid out and received by the beneficiary. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1083 (10th Cir. 1994); *Hoult v. Hoult*, 373 F3d 47, 56 (1st Cir. 2004). See generally *Philpott v. Essex County Welfare Board*, 409 U.S. at 416.

As a recent GAO study noted, "While income in retirement varies widely by source, Social Security benefits are the foundation of income for nearly all retiree households."⁵ Private retirement savings supplement Social Security benefits. While

⁴ The CMI definition in § 101(10A)(B) also excludes certain payments to victims of war crimes and terrorism. It is not clear to what extent these payments are sources of regular income rather than lump-sum disbursements.

⁵ U.S. Government Accountability Office, *Retirement Income: Ensuring Income Throughout Retirement Requires Difficult Choices*, GAO Report 11-400 (June 2011) p. 3.

nearly all individuals age 65 or older receive Social Security benefits, most do not receive income from employment-related pensions or annuities.⁶

The Bankruptcy Code generously protects private retirement savings in amounts that greatly exceed the income that a debtor will ever receive from Social Security. The average Social Security benefit paid to a retiree in the United States is \$1,176 monthly.⁷ This is essentially the poverty level of income for an individual.⁸ Social Security benefits, like other retirement income, represent a substitute for lost wages. However, Social Security benefits cover only a small portion of the wages the typical earner has lost, making the need to shield these benefits critical.⁹

Retired workers cannot expect to receive anything close to their former wages again. As they go through their seventies, eighties, and nineties, retirees' income drops further.¹⁰ As time passes, individuals over age 65 earn increasingly less from

⁶ Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin, 2011* SSA Publication No. 13-11700 p. 168 (released February 2012, presenting data as of December 2010).

⁷ Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin, 2011, supra*, p. 1. The average monthly Social Security benefit paid to disabled workers is less than the retiree benefit, at \$1,068 monthly. *Id.* The average federal SSI payment for all ages is \$501 monthly. Social Security Admin. *Facts and Figures about Social Security* 2011 p. 23.

⁸ The 2012 HHS Poverty Guideline threshold for a household of one is \$11,170. <http://aspe.hhs.gov/poverty/12poverty.shtml>

⁹ On average, Social Security replaces only 41 percent of a median earner's former wages. Selena Caldera, AARP Public Policy Institute, *Social Security: Who's Counting on It?* AARP Policy Institute, p. 4. (2011).

¹⁰ Social Security Administration, *Income of the Population 55 or Older, 2008* Section 9 (April 2008) http://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/index.html . For

employment while depleting private retirement savings and other assets. They rely more on Social Security as their primary source of income. Because income that once supplemented Social Security tends to disappear, older individuals need to preserve and protect Social Security benefits above all else. This is particularly true as traditional fixed-benefit pensions become less common and are replaced by more volatile and limited-benefit retirement saving options.¹¹

V. Adopting the Trustee's Position Will Discourage Chapter 13 Filings and Encourage Chapter 7 Filings.

The Trustee's position frustrates, rather than promotes, the goal of means testing under BAPCPA. The purpose of means testing is to encourage debt repayment, and particularly to promote chapter 13 rather than chapter 7 filings. Despite the means test, the overwhelming majority of consumer debtors today still have a choice between filing under chapter 7 or 13. The trustee's rule would encourage all debtors with Social Security income to file under chapter 7. They would avoid chapter 13, where their Social Security benefits would lose all protections. Instead of paying off some portion of the debts they owed to unsecured creditors in chapter 13, they would file under chapter 7 and pay nothing to unsecured creditors. In addition, many debtors file for chapter 13 relief in order to cure defaults on home

50.6% of beneficiaries aged 65-70, Social Security benefits provided more than half of their household income. The proportion grew steadily with age, with 76.5% of the beneficiaries over age 80 dependent on Social Security for more than half of their household income.

¹¹ Employee Benefit Research Institute, *Retirement Trends in the United States Over the Past Quarter-Century* June 2007, available at <http://www.ebri.org/publications/facts/> .

mortgages. The trustee's rule exposes these homeowners to loss of Social Security benefits if they seek chapter 13 relief. Thus, another result of adopting the trustee's rule would be fewer chapter 13 filings by retirees seeking to save their homes.

CONCLUSION

For these reasons, Amicus, the National Association of Consumer Bankruptcy Attorneys, requests that this Court reverse the decision below.

Respectfully Submitted,

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**CERTIFICATION OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

I hereby certify that the foregoing Brief contains 4,768 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 9, 2012.

/s/ Tara Twomey
Tara Twomey

CERTIFICATE OF SERVICE

Tara Twomey, attorney for appellant, certifies that on this 9th day of October, 2012, she caused the foregoing Brief to be electronically filed. Copies of same have been served upon the following this same date by the CM/ECF system:

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