

Inside the Beltway Insights

Results of the ABI Consumer Fee Study

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The Consumer Bankruptcy Fee Study Final Report

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December 2011

American Bankruptcy Institute
National Conference of Bankruptcy Judges

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Thank You

This Study has benefitted from the efforts of many. I am indebted to the members of my Advisory Board, who took time out of their busy schedules to provide comments, critiques, and advice throughout the course of the Study, as well as “chain-referrals” for the qualitative data set. I also was fortunate to have an outstanding team of Research Assistants: Bodie B. Colwell, Claire F. DeWitte, Lindsay Laxon, Brianna Dietrich, Jonathan McPhee, Haley B. Hall, and Colin Morrow.

I would also like to thank: Ross S. Donihue, Geo-spatial Analyst and Cartographer, for his beautiful maps; Adam Howard, Ed.D., Associate Professor of Education at Colby College, for sharing his expertise on qualitative data analysis; Ira L. Herman, Rhett Campbell, Demetra Liggins, and the Creditors’ Rights Group at Thompson & Knight LLP for their support; the staff and membership of NACBA, NABT, and NACTT for their help in coordinating focus group participant and survey respondents; the bankruptcy court judges (and clerks) who granted our requests for PACER fee waivers; ABI staff members, John Good, Jennifer Aversano Guirguis, Jennifer Dugas, Shannon Nelligan, Karim Guirguis, and Kathy Sheehan, who, as always, provided good cheer and logistical support; Christine Hepler, Associate Director of the Garbrecht Law Library, and Katherine Gibson, Law Clerk, U.S. Bankruptcy Court, District of Maine for final draft reviews; Clifford J. White III, and the Executive Office of the U.S. Trustee for counsel, advice, and survey review; and, all of the bankruptcy professionals who gave of their time to complete a survey, participate in focus group, sit for interviews, and send me long emails detailing their experiences with the bankruptcy system.

This project would not have been initiated without the vision of: Professor Margaret Howard, Chair of the ABI Research Grants Committee; the Honorable Steven W. Rhodes, U.S. Bankruptcy Court for the Eastern District of Michigan; Claude R. “Chip” Bowles; and ABI Executive Director Samuel J. Gerdano.

I am also indebted to the University of Maine School of Law. A special thanks to: Dean Peter Pitegoff and Vice Dean Christopher Knott for their institutional support and their cheerful endurance of my divided attentions over the past two years; Reference Librarians Julie Welch, Christine

Hepler, and Maureen Quinlan for their excellent research assistance; and Megan Mullaney and Tara Wheeler for outstanding administrative support.

I am also grateful for the support provided by the Honorable Leif M. Clark, U.S. Bankruptcy Court for the Western District of Texas, the Honorable Eileen M. Hollowell, U.S. Bankruptcy Court for the District of Arizona, and the National Conference of Bankruptcy Judges Endowment for Education.

I very much appreciate the good-natured patience of Noah Lupica and Jesse Lupica-Nowlin throughout this project. And Thomas R. Sather's charm and wit.

Finally, I am indebted to Statistical and Economic Consultant, Professor Michael R. Donihue and Project Manager and Lead Research Assistant Bodie B. Colwell for their extraordinary contributions to this project.

While I was the sole Reporter and Principal Investigator, this Study and Report are the collaborative efforts of many. References to "we" throughout this Report refer to the Consumer Bankruptcy Fee Study Team. I could not have had a finer, more dedicated group of professionals to work with. Any mistakes are mine and mine alone.

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Foreword

The Consumer Bankruptcy Fee Study Background

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA” or the “Act”) fundamentally altered the consumer bankruptcy system. During the eight-year run up to the eventual enactment date, October 17, 2005, there was much political, social, and academic commentary and speculation on the impact these amendments would have on the operation of the system and on the system participants: attorneys, trustees, bankruptcy judges, and of course, debtors. A number of thorough and important empirical studies have been conducted which have examined and analyzed the effects of the Act’s changes on debtors and debtors’ behavior. Up until now, however, there has not been a comprehensive national study of the impact of BAPCPA on the bankruptcy system’s operation, on its professionals, and ultimately on the system users. It is in this context that the Consumer Bankruptcy Fee Study was developed. The Consumer Bankruptcy Fee Study (the “Fee Study,” the “National Study” or the “Study”) provides the most comprehensive, independent look at the cost of access, including attorney fees, in Chapter 13 and Chapter 7 consumer cases to date.¹

Study Support

This Study was funded with generous contributions from the American Bankruptcy Institute Anthony H.N. Schnellling Endowment Fund and the National Conference of Bankruptcy Judges Endowment for Education.

¹ In 2004, the American Bankruptcy Institute commissioned a study of professional fees in Chapter 11 cases. As noted by Reporter and Principal Investigator Stephen J. Lubben, “The central objective of the study is to gather data from a sufficient number of chapter 11 cases across the United States so that valid conclusions can be drawn concerning practices and procedures used by bankruptcy courts in awarding fees in bankruptcy cases.” Stephen J. Lubben, *ABI Chapter 11 Professional Fee Study*, Seton Hall Public Law Research Paper No. 1020477 (December 1, 2007).

Disclaimer

In funding this research, neither the American Bankruptcy Institute Anthony H.N. Schnelling Endowment Fund nor the National Conference of Bankruptcy Judges Endowment for Education endorses or expresses any opinion with respect to any conclusions, opinions, or reports of any research funded by these grants.

Replication

The databases developed and used as part of this Study are available with source identifying data redacted for replication purposes or for those wishing to draft a response to this Report. Interested parties should contact the Principal Investigator. In addition, the databases will be made publicly available for all purposes in 36 months (December 2014).

Scope of Final Report

This Report summarizes the central findings of the Consumer Bankruptcy Fee Study. It does not attempt to fully analyze all of the gathered data in order to reach conclusions and to make specific policy recommendations regarding the operation of the consumer bankruptcy system, and in particular, professional fees in consumer bankruptcy cases. While the Principal Investigator expects to draw specific conclusions and recommendations in separate articles based on the Study's findings, this Report is primarily descriptive.

This Report does not provide a review of case law that has developed on the topic of attorney fees and professional compensation. The reader is directed to other sources for this information.

Introduction

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act had as one of its stated goals the reduction of consumer bankruptcy filings, and failing that, a decline in consumer cases filed under Chapter 7 of the Bankruptcy Code.² Another declared purpose of the Act was to stop the perceived abuse of the bankruptcy system by consumer debtors who could pay their debts but instead opted to file for bankruptcy protection.³ A theme that ran through the Congressional debates preceding BAPCPA's enactment was the suspicion that the consumer bankruptcy system was an institution that meted out extravagant benefits to undeserving debtors.⁴ On this view, thousands of opportunistic debtors had to be halted from taking advantage of this generous and accessible system.⁵

The ordnance chosen to eradicate this scourge was leveled at the professionals laboring in the bankruptcy system; swords were sharpened and arrows aimed at debtors' attorneys, trustees and bankruptcy judges. Within this rhetorical framework, the way to keep both debtors and bankruptcy professionals from reaping unmerited and lavish gains from an

² See David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 318-19 (2007); 152 Cong. Rec. S10647-48 (daily ed. Sept. 29, 2006) (statement of Sen. Grassley) ("We have seen bankruptcy rates fall dramatically from about 2 million bankruptcies in 2005 to the point where I doubt there will be over 1 million bankruptcies in 2006, if current trends continue For now, almost one year later, bankruptcy reform seems to have been a success.")

³ "[A significant] factor motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse Some bankruptcy debtors are able to repay a significant portion of their debts, according to several studies. Current law, however, has no clear mandate requiring these debtors to repay their debts." H.R. Rep. No. 109-031, (I), at 92 (2005) (statement of Rep. Gekas).

⁴ See 144 Cong. Rec. S10471 (1998) (remarks of Sen. Hatch) ("Bankruptcy has become a routine financial planning device used to unload inconvenient debts, rather than a last resort for people who truly need it."); 144 Cong. Rec. S10787 (1998) (remarks of Sen. Grassley) ("The fact is that some people use bankruptcy as a convenient financial planning tool to skip out on debts they could repay.")

⁵ When President George W. Bush signed BAPCPA into law on April 20, 2005, he remarked, "Too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts." President George W. Bush, Remarks at the Signing of Bankruptcy Abuse Prevention and Consumer Protection Act (Apr. 20, 2005), available at http://www.whitehouse.gov/news/releases/2005/04/2005_0420-5.html.

accommodating system was to erect barriers to access.⁶ These barriers take the form of procedural hurdles that were designed to affect the ease and cost of navigating the consumer bankruptcy system.

The primary objective of this Study is to identify and monetize these costs of bankruptcy access through the analysis of quantitative and qualitative data gathered from court dockets and from professionals working within the bankruptcy system. We began the quantitative section with the hypothesis that following BAPCPA's enactment, the cost of access to the consumer bankruptcy system increased.⁷ We did not begin the qualitative component of the Study with an explicit hypothesis, however, because we wanted the process of theory development to be iterative and incremental. We set out to determine the degree of increased costs, as well as to identify the specific policies and practices affecting these costs. Additionally, we endeavored to evaluate, with specificity, how diverse local procedures and guidelines impact the system's processes and outcomes. Our focus throughout the Study was on the consumer bankruptcy system and its principal stakeholders.

Until now, empirical study of BAPCPA's impact has focused primarily on the system's demand side, gathering and analyzing financial and sociological data with respect to debtor households.⁸ The effect of

⁶ "Today, many lawyers who specialize in bankruptcy view bankruptcy as an opportunity to make big money for themselves. This profit motive causes bankruptcy lawyers to promote bankruptcy as the only option even when a financially troubled client has an obvious ability to repay his or her debts. In other words, this profit motive creates a real conflict of interest where bankruptcy lawyers push people into bankruptcy who don't belong there simply because they want to make a quick buck." 144 Cong. Rec. S10649 (1998) (remarks of Sen. Grassley); *See* 144 Cong. Rec. S12140 (1998) (remarks of Sen. Grassley) ("[T]he bankruptcy bar is not adequately counseling people as to whether or not they should be in bankruptcy, let alone discouraging them from being in chapter 7 when they should be in chapter 13."); ("I think we need to be very cautious about [the proposed *in forma pauperis* provision] [Bankruptcy] can be a smart financial move. You can just walk away from [your debts], as this [lawyer advertisement] says, 'For \$350 total.' And the truth is, that is why we have increased filings of these kinds of ads in phone books, in newspapers, in magazines, in the yard sale publications that are [passed out] . . . free in this country.") 144 Cong. Rec. S10572 (1998) (Statement of Sen. Feingold).

⁷ Testing this hypothesis was one of the objectives of the Pilot Study. *See infra* notes 66–75 and accompanying text.

⁸ Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A. E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 352 (2008) [hereinafter *Did Bankruptcy Reform Fail?*]; Melissa Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323 (2007); Melissa Jacoby, *Bankruptcy Reform and the Costs of Sickness: Exploring the Intersections*, 71 MO. L. REV. 903, 914–915 (2006); Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289 (2010); Katherine

BAPCPA on debtors, however, cannot be fully assessed without an examination of the architecture that surrounds a consumer's decision to file, coupled with an account of the complexity of factors that inform and influence the consumer's experience in the bankruptcy system. This Study addresses issues related to the institutional framework of consumer bankruptcy by not only measuring and monetizing the cost of access, but by also examining the incentives and constraints imposed by the system.⁹

A unique feature of this Study is its scope. The Study examines a national random sample of 11,221 Chapter 7 and Chapter 13 consumer cases (approximately 0.12% of the consumer bankruptcy cases filed). The data set includes cases filed in 90 judicial districts between 2003 and 2009. Analysis of quantitative data was conducted at the circuit, state and district level. In addition, four separate survey instruments were administered in an effort to examine and appraise the experiences, perspectives, attitudes, and behaviors of frontline bankruptcy providers. Qualitative data was also collected from interviews and focus groups comprised of bankruptcy professionals: consumer debtors' attorneys, Standing Chapter 13 Trustees, Chapter 7 Panel Trustees, U.S. Trustees, and bankruptcy judges. Through the use of multiple quantitative and qualitative data sources, complementary facets of the consumer bankruptcy system emerged. In using method triangulation to develop and analyze the Study data, we are able to examine, from a 360-degree perspective, the operation and cost of the consumer bankruptcy system.¹⁰

Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67 (2006); John A. E. Pottow, *The Rise in Elder Bankruptcy Filings and the Failure of U.S. Bankruptcy Law*, 19 ELDER L.J. 119, 124 n.17 (2011); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 213-214 (2006).

⁹ "It is notoriously difficult to obtain reliable information about how much it costs to file for consumer bankruptcy." Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 395 n.98 (2007). See also Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 545-47 (1993).

¹⁰ When a study utilizes "triangulation" it uses more than one approach to investigate a research question. The term derives from land surveying, where a series of triangles is used to map out an area. MICHAEL QUINN PATTON, *QUALITATIVE RESEARCH & EVALUATION METHODS* 247 (3rd ed. 2002).

Summary of Findings

Descriptive Statistics: Attorney Fees in Chapter 13 Cases

- There was a 24% increase in Total Direct Access Costs for post-BAPCPA dismissed Chapter 13 cases.
- There was a 27% increase in Total Direct Access Costs for post-BAPCPA discharged Chapter 13 cases.
- The national mean attorney fee in pre-BAPCPA Chapter 13 cases was \$2,061. Post-BAPCPA, the mean attorney fee increased 24% to \$2,564.
- At the state level, the highest post-BAPCPA mean attorney fees were in Maine, Nevada, and New Hampshire (\$4,950, \$4,335, and \$4,294, respectively). North Dakota had the lowest mean fee (\$1,560).
- The largest increase in mean attorney fee by state was in Idaho (a 115% increase), followed by Maryland (an 87% increase), Kentucky (an 87% increase), and Nevada (an 85% increase).
- The only jurisdictions that registered decreases in attorney fees were Wyoming and Alaska.
- Of those states that saw an increase in the mean attorney fee, the most modest increases were in Massachusetts (1%), Montana (2%), Rhode Island (2%), Oklahoma (4%), North Dakota (6%), Minnesota (7%), and Kansas (10%).

Descriptive Statistics: Attorney Fees in Chapter 7 Cases

- There was a 37% increase in Total Direct Access Costs for post-BAPCPA discharged Chapter 7 asset cases.
- There was a 51% increase in Total Direct Access Costs for post-BAPCPA discharged Chapter 7 no-asset cases.
- In Chapter 7 asset cases, the national mean attorney fee increased from \$821 to \$1,072—a 30% increase.

- In Chapter 7 no-asset cases, the national mean attorney fee increased 48%, from \$654 to \$968.
- The highest average post-BAPCPA attorney fees by state were found in Arizona (\$1,530), Texas (\$1,314), Alaska (\$1,298), Montana (\$1,282), Minnesota (\$1,268), South Dakota (\$1,238), and Florida (\$1,223). The states with the lowest average fees were Idaho (\$692), Arkansas (\$698), Kentucky (\$749), Washington (\$702), Utah (\$714), and Vermont (\$781).
- The largest post-BAPCPA percentage increases in mean attorney fees were found in Montana (90%), Virginia (87%), Oregon (85%), Mississippi (82%), Tennessee (81%), and Utah (80%).
- The states with the smallest percentage increase were Vermont (10%), Arkansas (11%), and Illinois (16%).

Pro se Cases

- Two percent of post-BAPCPA Chapter 13 cases (discharged, dismissed, and open) were filed *pro se*.
- 100% of Chapter 13 cases filed *pro se* cases were filed with a petition preparer's assistance, none ending in discharge.
- In Chapter 7, 5.8% of post-BAPCPA (asset and no-asset) cases were filed *pro se*.
- 75% of all Chapter 7 *pro se* asset cases, and 97.8% of all Chapter 7 *pro se* no-asset cases filed post-BAPCPA were filed with the assistance of a petition preparer.
- Average petition preparer fee in post-BAPCPA Chapter 13 cases was \$181.
- Average petition preparer fee in post-BAPCPA Chapter 7 cases was \$184.

Distributions to Unsecured Creditors

- There was no statistically significant difference, post-BAPCPA, holding other factors constant, in distributions to unsecured creditors in Chapter 7 and Chapter 13 cases.

Regression Modeling

- Holding all other factors constant, on average, attorney fees in Chapter 7 cases were \$258 higher in real terms, post-BAPCPA.
- Holding all other factors constant, on average, attorney fees in Chapter 13 cases were \$564 higher in real terms, post-BAPCPA.

Qualitative Findings

- The discord between (i) complexity of the consumer bankruptcy system, (ii) the experience and resources needed to represent debtors through an often byzantine maze, and (iii) the dearth of resources available to pay for this representation.
- The irony presented by the ostensible goals of BAPCPA and the unintended consequences of these changes in practice.