

THE COSTS OF BAPCPA: REPORT OF THE PILOT STUDY OF CONSUMER BANKRUPTCY CASES

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INTRODUCTION

Substantial changes were made to the consumer bankruptcy system with the enactment of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").¹ According to the Act's legislative history, the amendments to the Bankruptcy Code were designed "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensur[ing] that the system is fair for both debtors and creditors."² The purported improvements incorporated into the Bankruptcy Code include an "income/expense screening mechanism,"³ a myriad of new eligibility standards for consumer bankruptcy relief,⁴ and new responsibilities on "those charged with administering consumer bankruptcy cases as well as [on] those who counsel debtors with respect to obtaining such relief."⁵ However, the sweeping changes to the consumer bankruptcy system were enacted without data support for, or recognition of how

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¹ See 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, 230 (2005) ("There is no question that the provisions of the Bankruptcy Code have been changed in many significant respects. There is also no question that many debtors, especially those priced out of bankruptcy relief due to increased costs, will be negatively impacted by those changes.").

² BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, H.R. REP. NO. 109-31, at 2 (1st Sess. 2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

³ *Id.* (discussing mechanism designed to ensure maximum payment to creditors).

⁴ See 11 U.S.C. §§ 342, 521, 546, 1308, 1328(a) (2006) (providing examples of statutorily-created eligibility standards).

⁵ See H.R. REP. NO. 109-31, *supra* note 2, at 2.

such changes would affect the cost of accessing the bankruptcy system.⁶

The costs of BAPCPA were considered by Congress during its deliberative process and addressed in a Congressional Budget Office report ("CBO Report").⁷ The focus of the CBO Report, however, was narrow: the costs of BAPCPA to the U.S. Government.⁸ The CBO Report predicted that the additional responsibilities mandated by BAPCPA would increase the costs incurred by the U.S. Trustee's office.⁹ The CBO Report did briefly review the costs of the legislative mandates imposed on state, local, and tribal governments, as well as on certain members of the private sector, including bankruptcy attorneys, creditors, bankruptcy petition preparers, debt relief agencies, consumer reporting agencies, and credit and charge-card companies.¹⁰ It mentioned in passing, that a number of the increased costs that were predicted to be incurred by bankruptcy attorneys and others *may be* passed on to the consumer.¹¹

The "Costs of BAPCPA Pilot Study" undertook a review of the costs of the consumer bankruptcy system following BAPCPA's enactment, to determine whether these costs *were* passed on to the consumer. The issue of "costs" distills to the question of what attorneys are charging consumers to represent them under this new regime. Thus, a study of the costs of the consumer provisions of BAPCPA is, in essence, the study of consumer bankruptcy attorney fees. As has been observed, "[f]ew areas of bankruptcy practice are more publicly controversial or less consistently administered than the determination of reasonable compensation for the . . . professionals who are essential to an efficient and well-managed bankruptcy process."¹²

A consumer bankruptcy fee study is long overdue. The last national study of professional fees in consumer fees was sponsored by the American Bankruptcy Institute in 1991.¹³ The 1991 study, however, primarily examined professional fees

⁶ The Congressional Budget Office ("CBO") prepared a cost estimate of some of the direct costs of BAPCPA and presented it to the House Committee on the Judiciary on April 4, 2005. *Id.* at 33 (presenting BAPCPA's cost estimate).

⁷ The CBO report noted that the primary cost increase would be for additional responsibilities of the U.S. Trustees imposed by BAPCPA. Additionally, new bankruptcy judgeships would impose additional costs—\$26 million over the next five years and \$45 million over the 2006 to 2015 period. The report's summary stated, "[o]n balance and assuming appropriation of the necessary amounts to implement the act, CBO estimates that its enactment would increase budget deficits by about \$280 million over the 2006-2010 period." *Id.* at 34.

⁸ The CBO Report did not estimate the costs of BAPCPA on consumer debtors. *Id.* (analyzing cost to government).

⁹ *Id.* (predicting increased responsibilities of U.S. Trustees). This Pilot Study does not address the issue of costs incurred by U.S. Trustees as a result of additional responsibilities mandated by BAPCPA.

¹⁰ *Id.* at 42–46 (illustrating costs on state, local, and tribal governments, as well as private sector).

¹¹ The increase in filing fees (paid by debtors) was reflected in the CBO Report as an increase in revenue, not costs. The CBO Report concluded that "[a]s long as the likelihood of repayment by debtors and the pool of funds increases by an amount greater than the cost to creditors of administering the new bankruptcy code, creditors would be made better off under the act." *Id.* at 46.

¹² G. RAY WARNER, AMERICAN BANKRUPTCY INSTITUTE NATIONAL REPORT ON PROFESSIONAL COMPENSATION IN BANKRUPTCY CASES 1 (LRP Publications 1991) (1991) [hereinafter *ABI Fee Study*].

¹³ *Id.*

in business bankruptcy cases, devoting a mere eight pages of a 255-page report to discuss attorney fee issues in consumer cases.¹⁴ In these eight pages, however, a wealth of important information about consumer bankruptcy practice was revealed.

For example, in response to a series of survey questions about fees and fee guidelines, judges and consumer bankruptcy lawyers reported the median fees charged in chapter 7 and chapter 13 cases.¹⁵ The study further compared the fees actually charged to local "fee guidelines" (also known as no-look fees).¹⁶ The study found that the assumption of the existence of a "routine" consumer case was reflected in the regular adherence to the no-look fee.¹⁷ Finally, the report questioned both the process by which these no-look fees guidelines were set, as well as the propriety of the assumption that there is such a thing as a "routine" case.¹⁸

If there was a question about whether there was such a thing as a routine consumer bankruptcy case in 1991, thus, justifying default to a standardized fee, the question is even more compelling in today's post-BAPCPA environment. Simply stated, consumer bankruptcy is a far more complicated process than it was before the 2005 amendments.¹⁹ More substantive and procedural obligations are imposed

¹⁴ *Id.* at 169–76 (discussing maximum fees in consumer cases). The report states "[a]lthough most of the compensation issues discussed in this report arise primarily in the business bankruptcy setting, several survey questions addressed the practice of establishing maximum attorneys' fee caps for routine consumer Chapter 7 and Chapter 13 cases." *Id.* at 169.

¹⁵ *Id.* at 171–73. Lawyers reported a median fee maximum of \$750 for chapter 13 cases; \$600 for chapter 7 cases (with assets to administer); \$700 for chapter 7 no-asset cases. *Id.* (explaining fee increase).

¹⁶ *Id.* at 169–71 (comparing actual fees to local "fee guidelines").

¹⁷ *Id.* at 169 (explaining why "many courts have established maximum attorneys' fee guidelines for routine consumer cases").

¹⁸ *Id.* at 169–70 (questioning fees in consumer bankruptcy cases). The study expressed some skepticism that the interests of judicial economy and efficiency has resulted in the conclusion that the "no look fee" is equivalent to a reasonable fee, as mandated by section 330(a)(1). *Id.* at 169 (indicating fees should be evaluated based on reasonableness).

¹⁹ Chapter 13s are longer than they were pre BAPCPA and there is much more opportunity for defaults simply because of the passage of time and the limited resources in a case to begin with. What I have seen is that a typical consumer chapter 13 case ends up being 2 or even 3 cases with the amendments and revisions and cures that go on over the term of the case . . . I can think of a number of other causes for the additional time required and additional costs but in short, the basics of post-BAPCPA cases simply take a lot more time and the extra work just adds to the costs, not to mention the work required where there is a contest or dispute. I can say that I have reduced my fees by thousands of dollars in several consumer chapter 13 cases that might have been routine otherwise just to make the plan work. I think bankruptcy practice is more complicated and time consuming than it used to be and BAPCPA only added to cost and time required. We have tried to be more efficient by employing online data input from clients and credit report downloading to the bankruptcy software. This has helped somewhat but reviewing and performing due diligence remains time consuming.

Comments on consumer debtor's attorney (Jan. 4, 2010) (on file with author); see Sommer, *supra* note 1, at 191 (observing, by virtue of 2005 amendments to Bankruptcy Code, "[t]here is no doubt that bankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law").

on debtors, attorneys, and trustees.²⁰ Moreover, a myriad of conditions must be satisfied before a consumer may access (and exit) the bankruptcy system. It has been observed that the "principal target" of these conditions is the debtor.²¹ An evaluation of the cost of these conditions can be made by a measure of attorney fees.²²

Over three million consumers have met the aforementioned conditions and filed for bankruptcy since BAPCPA's effective date.²³ Many of these consumers have received the relief they were seeking, even in the new "unwelcoming" consumer bankruptcy system.²⁴ But, what did this relief cost them? And, how did it impact the way bankruptcy law is practiced? In essence, this study seeks to answer the question of how the consumer bankruptcy system has changed after the enactment of BAPCPA.

The Pilot Study has taken the first step toward identifying, quantifying, and analyzing the costs of BAPCPA, and offers preliminary insight into how the Bankruptcy Code's new procedural requirements have been monetized. It has also sought to view the changes that BAPCPA brought through a broader lens by developing models to reveal the extent to which distributions to unsecured creditors were affected by the changes made to the Code.

In summary, the costs of bankruptcy have increased following BAPCPA. These costs include an increase in administrative expenses, such as filing fees, debtor counseling, education fees, trustee fees, expenses, and attorney fees. Moreover, data from the Pilot Study reveals that distributions to unsecured creditors have decreased following BAPCPA's enactment in chapter 13 and chapter 7 consumer cases.

There are many questions on the agenda for the Costs of BAPCPA: The National Consumer Bankruptcy Study ("National Study"), which will launch in

²⁰ See Comments of consumer debtor's attorney, *supra* note 19 (indicating change in bankruptcy law have made practice more costly and time consuming); see also 11 U.S.C. §§ 727(a)(8) (2006) (inhibiting debtors from repeat bankruptcy filings), 1308 (2006) (stating in chapter 13, debtor must file four years of tax returns, hold annual meetings, and comply with disclosures).

²¹ See James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 866 (2006) ("The principal target of the Act was the debtor.").

²² [T]he work attorneys are forced to do on behalf of the clerks and the UST far exceeds the \$299 in filing fees the debtor is already paying. It has the effect of hiding the true costs of case management and lets the court believe that somehow moving to electronic filing has saved them money. It has - but not by making the process more efficient, but by shifting the costs onto attorneys and debtors.

Comments of a bankruptcy professional (Nov. 2, 2009) (on file with author); see Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 392-97 (2007) (explaining BAPCPA has caused increasing costs for debtors).

²³ See Bankruptcy Data Project at Harvard, <http://bdp.law.harvard.edu/filingsdb.cfm> (last visited Mar. 31, 2010) (demonstrating consumer filings post-BAPCPA).

²⁴ From January 2006 to October 2009, 3,509,409 bankruptcy petitions have been filed by consumers. See *id.* (illustrating number of bankruptcy filings by consumers after BAPCPA); see also White, *supra* note 21, at 864 n.9 (remarking on increase in filings by consumers).

early 2010.²⁵ While the Pilot Study collected data about system costs and creditor distributions exclusively from public bankruptcy records, the National Study will also examine a more robust sample of filed consumer bankruptcy petitions from the pre-BAPCPA period, and compare them to a sample of cases filed following BAPCPA's effective date. In addition, data will be gathered directly from consumer bankruptcy attorneys, trustees, and judges.²⁶ Survey instruments will be distributed and focus groups will be conducted in an effort to glean answers to questions that cannot be found in bankruptcy petitions and schedules.

Bankruptcy professionals will be asked about the changes in bankruptcy practice following BAPCPA. Specifically, professionals will be asked about the fees charged in consumer bankruptcy cases, the nature and impact of the new administrative requirements, the time it takes to represent a consumer debtor, the impact of the new requirements on consumer behavior and decision-making, and the changes that have proven to be the most and least significant. The National Study will provide more evidence with which to answer the question of whether the 2005 amendments to the Bankruptcy Code improved bankruptcy law and practice or whether the amendments just made the system more cumbersome and costly to use.

I. BAPCPA'S NEW CONSUMER CASE REQUIREMENTS

There are a number of new hurdles (or barricades) to be scaled by consumers seeking the benefits of the bankruptcy system.²⁷ The most oft-discussed addition to the roster of new requirements is the mandate that all debtors calculate their income and expenses under the "means test," whether or not the debtor is seeking relief under chapter 7.²⁸ The means test necessitates a myriad of complex calculations and

²⁵ The National Consumer Bankruptcy Costs Study will be funded by the Anthony H.N. Snelling Endowment Fund and the National Conference of Bankruptcy Judges Endowment for Education. In funding this research, the Anthony H.N. Snelling Endowment Fund, the American Bankruptcy Institute, and the National Conference of Bankruptcy Judges Endowment for Education, do not endorse, nor express any opinion with respect to any conclusions, opinions, or report of any research funded by their respective grant.

²⁶ As was observed, all of the "debtor's duties become the duties of his[/her] lawyer."

²⁷ The data indicate that those who filed in 2007 largely have the same income profile as those who filed in 2001; there has been no shift in the income levels of filers that would have occurred if 800,000 high-income abusers had been pushed from the system. These income data suggest that instead of functioning like a sieve, carefully sorting the high-income abusers from those in true need, the amendments' means test functioned more like a barricade, blocking out hundreds of thousands of struggling families indiscriminately, regardless of their individual circumstances.

Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 353 (2008); see Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. J., 1, 70 (2005) ("BAPCPA requires a lot more work for debtors' attorneys. Debtors will pay for that work, and some debtors will simply be priced out of bankruptcy.").

²⁸ See 11 U.S.C. § 707(b) (2006) (requiring, *inter alia*, debtor income limit for filing chapter 7); see also *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269, 1272 n.2 (10th Cir. 2008) (stating BAPCPA requires chapter 7 and 13 debtors to use means test); Marianne B. Culhane & Michaela M. White, *Catching Can-Pay*

requires the application of various local and IRS expense standards adjusted by location and household size.²⁹ In addition, debtors must be able to prove their income by producing both "payment advices" and income tax returns.³⁰ Debtors must also attend a credit counseling course in order to be eligible to file for bankruptcy.³¹ To receive a discharge, a debtor must attend a debtor education course.³²

Most debtors have complied and will continue to comply with these requirements by subcontracting them to their attorney. It is the lawyer who directs a debtor to the credit counseling course, as well as to the pre-discharge debt management course.³³ The lawyer (or the lawyer's staff) prepares and calculates the means test, and reminds (and reminds again) debtors to produce their tax returns and pay advices.³⁴ Lawyers also commonly provide clients with a section 342(b) notice, describe the forms of bankruptcy, and warn of the consequences of asset concealment or fraud.³⁵ Lawyers must also certify, after "reasonable investigation,"

Debtors: Is the Means Test the Only Way?, 13 AM. BANKR. INST. L. REV. 665, 667 (2005) (noting means test is used for chapter 7 and chapter 13).

²⁹ Anecdotal evidence suggests that most consumer bankruptcy attorneys use "means test" software, such as Best Case Solutions, which simplifies the calculations and application of formulas. A license for three people to use the program for chapter 7 and chapter 13 cases costs \$1,600. Some jurisdictions may require an additional program for an additional fee. See Best Case Solutions Order Form, <http://www.bestcase.com/grafix/pdf/orderfrm.pdf> (last visited Mar. 31, 2010). No doubt, the use of such software programs saves time once the user becomes familiar with the system. Not being a regular user of the software, except for demonstrating its utility before my bankruptcy class once a year, I can attest that there are considerable start-up costs. I can see, however, a time-saving value in repetitive use of the program.

³⁰ See 11 U.S.C. §§ 521(a)(1)(B)(iv) (requiring debtor to disclose payment received from employer within 60 days before petition was filed), 521(e)(2) (2006) (mandating trustee be given Federal income tax return); see also *Segarra-Miranda v. Acosta-Rivera* (*In re Acosta-Rivera*), 557 F.3d 8, 9 (1st Cir. 2009) (requiring debtor to disclose financial information); *Edwards v. U.S. Trustee*, No. 5:09-CV-163 (HL), 2010 WL 381842, at *2 (M.D. Ga. Jan. 27, 2010) (determining debtor must produce tax returns).

³¹ See 11 U.S.C. § 521(b)(1) (2005) (requiring debtor to file certificate from credit counseling agency); see also *In re Lilliefors*, 379 B.R. 608, 610 (Bankr. E.D. Va. 2007) (noting counseling requirement under BAPCPA); *In re Rendler*, 368 B.R. 1, 2 (Bankr. D. Minn. 2007) (discussing counseling requirement and its exceptions).

³² See 11 U.S.C. §§ 727(a)(11) (requiring debtor education under chapter 7), 1328(g)(1) (2006) (requiring debtor education under chapter 13); see also *In re Ring*, 341 B.R. 387, 388 (Bankr. D. Me. 2006) (noting debtor education required for discharge).

³³ See William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 AM. BANKR. L.J. 551, 564 (2008) (discussing debtor's post-petition responsibilities under Code). A number of consumer bankruptcy attorneys have told me that they have computer stations, and telephone centers set up in their offices. This is done so that clients can complete these required courses on-line, or by telephone, while they are in the lawyer's office for consultation.

³⁴ See Jean Braucher, *Getting Realistic: In Defense of Formulaic Means Testing*, 83 AM. BANKR. L.J. 395, 400 (2009) (noting need for attorney assistance to comply with section 707). Consumer bankruptcy attorneys have noted that collecting pay advices from clients for the requisite period of time has been among the most challenging and time consuming of the new requirements. See A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919, 942-43 (2006) (describing time and costs of compliance). Some attorneys have stated that they have hired a new employee whose exclusive job it is to collect the needed documentation from consumer debtors.

³⁵ See 11 U.S.C. § 342(b) (2006) (describing notice to be given to consumer debtor); see also David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 229

that the information provided by debtor in his or her petition is "well grounded in fact."³⁶ To avoid sanctions and potential civil liability, attorneys are required to verify the information given to them by their clients with respect to the list of creditors, assets and liabilities, and income and expenditures.³⁷ All of this takes time, and for lawyers, as well as for other professionals, time is money.

The cost of the new consumer bankruptcy requirements was detailed in the first post-BAPCPA study of the financial impact of the bankruptcy amendments.³⁸ This study, conducted by the Government Accounting Office ("GAO"), examined the costs of BAPCPA on the U.S. Trustee Program, the federal judiciary, consumers, and private trustees.³⁹ The U.S. Trustee Program was found to have incurred significant costs in connection with its role in the implementation of the means test, debtor audits, data collection and reporting, as well as counseling and education requirements.⁴⁰

(2007) (describing notice process); Gary Neustadter, 2005: *A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225, 332 (2006) (discussing notice requirement). A debtor may receive a section 342(b) notice from the court clerk. *See* § 342(b) (stating "clerk shall give [debtor] written notice").

³⁶ *See* § 707(b)(4)(C) (2006) (stating certifications are made by lawyer's signature on petition). Section 707 makes bankruptcy attorneys liable for misleading statements and inaccuracies in schedules and documents submitted to the court or to the trustee. *See* § 707(b)(4)(D) (declaring attorney's signature certifies he or she has no knowledge of incorrect information). To avoid sanctions and potential civil penalties, attorneys need to verify the information given to them by their clients regarding the list of creditors, assets and liabilities, and income and expenditures. *See* H.R. REP. NO. 109-31, *supra* note 2, at 116 (discussing estimated impact of requirements). Completing a reasonable investigation of debtors' financial affairs and, for chapter 7 cases, computing debtor eligibility, requires attorneys to expend additional effort. *See id.* (noting additional effort by attorneys will cause increase in fees). Prior to BAPCPA's enactment, the American Bar Association said that this requirement would increase attorney costs by \$150 to \$500 per case. *See id.* (explaining additional costs will fall on clients).

Based on the 1.6 million projected filings under chapter 7 (liquidation) and chapter 13 (rehabilitation), CBO estimates that the direct cost of complying with this mandate would be between \$240 million and \$800 million in fiscal year 2007, the first full year of implementation, and would remain in that range through fiscal year 2010.

See id. at 116–17. The Congressional Budget Office stated that they expected that some of the additional costs incurred by attorneys would most likely be passed on to their clients. *See id.* at 117.

³⁷ *See* H.R. REP. NO. 109-31, *supra* note 2, at 116 (discussing estimated impact of requirements). An attorney representing a consumer bankruptcy debtor is required to file a written statement of the compensation paid to the attorney, or the compensation agreed to be paid to the attorney for services rendered in contemplation of or in connection with the bankruptcy case. This must be done within one year before the filing of the bankruptcy petition and done whether or not the attorney makes a specific application for compensation. *See* 11 U.S.C. § 329(a) (2006) (requiring statement of compensation); *see also* FED. R. BANKR. PROC. 2016(b) (requiring disclosure of compensation).

³⁸ *See* U.S. GEN. ACCOUNTABILITY OFFICE, GAO 08-697, REPORT TO CONGRESSIONAL REQUESTERS, BANKRUPTCY REFORM, DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 3–6 (2008) [hereinafter *GAO Report*] (summarizing results of study).

³⁹ *Id.* at 41 (describing objectives of report, including "(1) new costs incurred as a result of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 . . . by the Department of Justice and the federal judiciary, (2) new costs incurred as a result of the act by consumers filing for bankruptcy, and (3) the impact of the act on private trustees").

⁴⁰ *Id.* at 11 (discussing cost estimates for U.S. Trustee Program).

Consumer bankruptcy attorney fees incurred in chapter 7 cases were also examined in the GAO study: a nationwide random sample of 176 chapter 7 cases filed pre-BAPCPA were compared to 292 randomly selected chapter 7 cases filed post-BAPCPA.⁴¹ The study found that the average attorney fee for a chapter 7 case increased by \$366.⁴²

With respect to attorney's fees in chapter 13 cases, the GAO study confined its examination to a review of 48 judicial districts' "no-look" fees and found an increase in nearly every district studies, with more than half of the districts showing an increase of 55 percent or more.⁴³ The GAO study concluded that filing for consumer bankruptcy was more costly for debtors, private trustees, and the U.S. Trustee following BAPCPA's enactment.⁴⁴

The result of a series of interviews with half a dozen consumer debtor attorneys concerning the costs of consumer bankruptcy was recently published in Professor James J. White's article, *Abuse Prevention*.⁴⁵ The interview subjects unanimously concluded that the cost of consumer chapter 7 cases rose significantly following BAPCPA's enactment.⁴⁶ The reasons cited for the increase in costs were related to the necessity of multiple meetings with prospective debtors prior to filing:

The first visit would be to explain the Section 342 disclosures and to begin collecting information. The second might be to get additional information and to arrange the counseling briefing, commonly done by telephone in the lawyer's office. Last, the lawyer himself will have to verify the information given by the debtor and hector the debtor for his tax return and pay stub. The lawyer will also have to do the mandated factual investigation . . . [including] getting credit reports, . . . lien searches, and checking

⁴¹ *Id.* at 22 (indicating 176 cases chosen were pre-BAPCPA and 276 chosen were post-BAPCPA).

⁴² *Id.* at 22–23 (noting average attorney fee increased by 51%).

⁴³ *Id.* at 25 ("In more than half of those districts and divisions, the increase was 55 percent or more.").

⁴⁴ *Id.* at 21 (stating evidence from stakeholders demonstrates legal fees increased since effective date of BAPCPA). A single-district study, entitled *An Empirical Examination of the Direct Access Costs to Chapter 7 Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, was published in 2008 addressing the issue of BAPCPA's total direct costs. Robert J. Landry III & Amy K. Yarbrough, *An Empirical Examination of the Direct Access Costs to Chapter 7 Consumer Bankruptcy: A Pilot Study in the Northern District of Alabama*, 82 AM. BANKR. L.J. 331, 332 (2008). As part of this study, data was gathered in pre- and post-BAPCPA chapter 7 cases in the Northern District of Alabama. *Id.* at 333 (indicating time range of state and location of cases). This study examined approximately one hundred chapter 7 cases, from each of the two time periods, concluding that costs were higher following the bankruptcy amendments. *Id.* at 345 (suggesting studies show "attorneys' fees and total direct access costs" increased following reform act). The study's conclusion called out for a national empirical study of the costs of BAPCPA. *Id.* at 347 (explaining when solid empirical analysis and reform in consumer bankruptcy policy occur, "meaningful reform [will] be attained").

⁴⁵ White, *supra* note 21, at 875 (noting assessment of direct costs was created by interviewing dozen of lawyers representing chapter 7 debtors).

⁴⁶ *Id.* ("My respondents were unanimous in concluding that the cost of consumer Chapter 7's will rise significantly.").

other public records to determine if the client is listed as the owner of real property.⁴⁷

In recent years, however, numerous consumers in financial distress chose not to file for bankruptcy: the number of consumers filing for bankruptcy protection declined following BAPCPA's enactment.⁴⁸ In the first large-scale national sample of households that filed for bankruptcy after BAPCPA, the Consumer Bankruptcy Project investigated whether the ostensible "evil" BAPCPA was enacted to address – high income abusers of the bankruptcy system – was effectively eradicated by the reform legislation.⁴⁹ Since BAPCPA's enactment, median family incomes have declined, basic expenses have risen, debt loads have multiplied, and the number of foreclosures and loan defaults has increased. Yet, fewer families have taken advantage of the bankruptcy debt relief system.⁵⁰ Because there was no difference in income level between families filing for bankruptcy before BAPCPA and after BAPCPA's enactment, the study concluded that the families that were shut out of the bankruptcy system were not the system's "gamers," but those consumers the bankruptcy system is designed to offer relief to: households with high debt loads and incomes comparable to pre-BAPCPA filers.⁵¹

The Consumer Bankruptcy Project's study examined the question of *who* left the bankruptcy system post-BAPCPA.⁵² The question of *why* these consumers left remains unanswered, although a number of plausible theories have been raised.⁵³ For example, some have theorized that families in need may not be filing for bankruptcy because they are "discouraged by the negative publicity surrounding the 2005 amendments, concerned about the stigma associated with bankruptcy, or

⁴⁷ *Id.* at 875–76.

⁴⁸ See Lawless et al., *supra* note 27, at 351 (highlighting sharp reduction of 800,000 bankruptcy filings after amendments); see also, Laura B. Bartell, *From Debtors' Prisons to Prisoner Debtors: Credit Counseling For the Incarcerated*, 24 EMORY BANKR. DEV. J. 15, 27 n.86 (2008) (noting non-business bankruptcy filings dropped during first quarter of 2006); Carlson, *supra* note 35, at 318 (2007) (indicating bankruptcy filings dropped from September 2005 to September 2006).

⁴⁹ See Lawless et al., *supra* note 27, at 352 (proclaiming Consumer Bankruptcy Project's purpose of examining whether BAPCPA has resulted in its promised effect).

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If bankruptcy filings had continued at the same level as they had been immediately before enactment of BAPCPA, about 1.6 million petitions would have been filed in 2007 – about twice as many as the 827,000 bankruptcy filings that actually occurred. The sharp reduction in filings after the amendments represents about 800,000 families that would have filed but did not. In the face of deteriorating economic circumstances, the absence of these families from the bankruptcy system is strong evidence that BAPCPA has had a powerful effect on families in financial trouble.

Id. at 351.

⁵¹ See *id.* at 353 (indicating study's data revealed no shift in incomes of pre- and post-BAPCPA filings).

⁵² See *id.* at 352 (explaining study's focus on who, rather than how many, filed for bankruptcy after 2005).

⁵³ See Sommer, *supra* note 1, at 192. ("There is no doubt that bankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law.").

dissuaded by aggressive debt collectors and debt consolidation firms,"⁵⁴ who bully them into believing they can no longer file for bankruptcy.⁵⁵ Others have observed that procedural obstacles require greater up-front access costs⁵⁶ and increased emotional fortitude, which are hindering some consumers in financial distress from filing.⁵⁷

The Pilot Study has examined the extent to which these procedural requirements have been monetized. By identifying the costs of access of the bankruptcy system prior to BAPCPA's enactment and comparing it to cases filed following the amendments, a clear picture of the changes has come into focus. The National Study will seek to confirm the results of the study of what costs have changed and the impact of BAPCPA on attorneys' practice, debtors' experiences, and the bankruptcy system of debt collection as a whole.

II. THE PILOT STUDY: SAMPLE SELECTION

The data for the Pilot Study were collected from consumer bankruptcy cases filed in six judicial districts. Three judicial districts from each of the eleven judicial circuits were initially selected: one from each of the high, low, and medium population states in the circuit, as determined by the July 1, 2008 Population Estimate published by the U.S. Census, leaving a pool of thirty-three judicial districts.⁵⁸ Six judicial districts were randomly selected from the pool of thirty-three judicial districts for Pilot Study sampling. Data was collected in the Pilot Study from (i) the Middle District of Florida, (ii) the Northern District of Illinois, (iii) the Northern District of Georgia, (iv) Maine, (v) Utah, and (vi) the Southern District of West Virginia. A stratified sampling method was used to ensure that cases from low, medium, and high population states were represented in the Pilot Study sample.

Fifty chapter 7 cases from each of the six Pilot Study districts were then randomly selected from the consumer cases filed in 2003 and 2004 (pre-

⁵⁴ In answer to the question of what deterred consumers who did not file for bankruptcy from filing, consumer bankruptcy attorneys consistently cited aggressive and misleading tactics of debt consolidation companies as a significant factor.

⁵⁵ See Lawless et al., *supra* note 27, at 386 (positing aggressive debt collection tactics may cause families to believe bankruptcy is not available to them).

⁵⁶ See Mann, *supra* note 22, at 378–79 (suggesting BAPCPA causes delays in filing, which generates more credit card interest revenue); White, *supra* note 21, at 874 (arguing any increased procedural burden creates additional costs).

⁵⁷ See White, *supra* note 21, at 874–76 (discussing how imposition of additional procedural burdens would raise costs of bankruptcy and reduce number of consumer filings). Professor James J. White observed, "[b]y raising the cost in hundreds of little ways, you might make bankruptcy unpalatable to many who currently take bankruptcy." *Id.* at 874.

⁵⁸ See U.S. Census Bureau Population Estimates, http://www.census.gov/popest/archives/2000s/vintage_2008/ (last visited Mar. 31, 2010). In states with more than one judicial district, the district with the highest population city was selected. Where there was an even number of states in a circuit, I calculated the average population for the circuit and selected the state with a population that was closest to that number; that state was identified as the "median population" state from that circuit.

BAPCPA),⁵⁹ and fifty chapter 7 cases from each of the same districts were randomly selected from consumer cases filed in 2007 and 2008 (post-BAPCPA).⁶⁰ For each period of time, the same number of chapter 13 cases from each Pilot Study district was sampled.

The core sample studied in the Pilot Study contains 293 chapter 7 cases filed in 2003 and 2004, and 299 chapter 7 cases filed in 2007 and 2008. The core sample of chapter 13 cases studied in the Pilot Study was 414, 295 chapter 13 cases filed in 2003 and 2004, and 119 chapter 13 cases filed in 2007 and 2008. These numbers reflect the dismissal of some cases for lack of petition information and an insufficient number of chapter 13 cases.

Using the definitions developed in connection with the Bankruptcy Data Project, non-commercial cases filed by actual people, not entities, were examined.⁶¹ All cases studied in the sample were closed, but not dismissed.⁶² Joint petitions were considered to be one bankruptcy case. We made no distinction between individual and joint petitions. AACER created a random list of bankruptcy case files that fit the criteria for the study.⁶³

III. DATA COLLECTION PROCESS

The Principal Investigator, together with the research assistants, examined case file samples in order to develop the data collection procedure. Over a series of meetings, a data entry Excel spreadsheet and a Coding Manual were developed. The Excel spreadsheet template included forty-nine data points. It was developed with an eye toward collecting data concerning a multitude of potential predictors of costs of access to the consumer bankruptcy system. For each column on the spreadsheet, the Coding Manual describes the data point and directs the research

⁵⁹ Half were selected from the first six month of 2003 and 2004, and half were selected from the second six months of 2003 and 2004.

⁶⁰ Half were selected from the first six month of 2007 and 2008, and half were selected from the second six months of 2007 and 2008.

⁶¹ See Bankruptcy Data Project at Harvard, *supra* note 23. The Bankruptcy Data Projects describes the classification of cases as follows:

Noncommercial: cases not classified as commercial cases.

Commercial: cases filed by legal entities, plus those with other indicia that the filing is related to a business. That is, the debtor may be an individual who indicates on the petition that she is "doing business as" another entity or the debtor may list a Tax ID number instead of a Social Security Number.

Individual: cases filed by actual, natural people (teachers, doctors, and the like).

Entity: cases filed by legal entities (corporations, partnerships, and the like).

See id. (explaining classification of petitions can be searched for in Bankruptcy Filings Database).

⁶² Following a presentation of the Pilot Study, a member of the study's advisory committee observed the utility of discovering what fees attorneys received in cases that were dismissed and converted, in addition to fees received in cases that were confirmed. The National Study will not exclude cases from the sample study based on their outcome.

⁶³ I am indebted to Mike Bickford at AACER for his patience and generous support of this project.

assistant to the place or document in the docket where the information is likely to be found. It also instructs the research assistant on how the data is to be entered (the relevant "Code"), and sets forth any data validation measures applied to that column. As each filed case was examined, data was entered on the spreadsheet in accordance with the instructions in the Coding Manual.

IV. QUALITY CONTROL MEASURES

Throughout the data collection process, the research team met frequently to evaluate the integrity of the data collection procedure. Quality control was approached two different ways: (i) data validation was built into the data entry spreadsheet, and (ii) ten percent (10%) of cases were double coded.

Data validation is a function built into Excel spreadsheets that allows only approved entry of values into the cells. For example, in the Pilot Study, the column "Single or Joint Petition" allows either "S" or "J," but not other values or letters. If a non-approved value is entered into the cell, a pop-up screen alerts the user that they cannot continue until an approved value is entered. Data validation acts as a check on typographical errors and other mistakes.

The second approach to quality control consisted of a research assistant blindly coding 10% of all cases that had been coded by other research assistants. After the coding was finished, the research assistants compared both data sets, reconciled any differences, and further refined data collection procedures.

V. DESCRIPTIVE STATISTICS

A. Total Direct Access Costs

The initial question studied was whether Total Direct Access Costs were higher after the Bankruptcy Reform Act of 2005 was enacted than they were before. Total Direct Access Costs were defined to include (i) debtor's attorney fees and expenses, (ii) trustee fees and expenses, (iii) filing fees, (iv) credit counseling and debtor education fees, and (v) any other professional fees.

Debtor's attorney fees and expenses, trustee fees and expenses, filing fees and other professional fees were extracted from chapter 7 and chapter 13 bankruptcy cases filed in 2003 and 2004, and compared to those fees incurred in chapter 7 and chapter 13 cases filed in 2007 and 2008. In addition, most debtors who filed for bankruptcy protection following BAPCPA's enactment are required to receive "credit counseling" from a government-approved organization within 180 days prior to filing.⁶⁴ We added \$50 for pre-filing "credit counseling" and \$50 for pre-

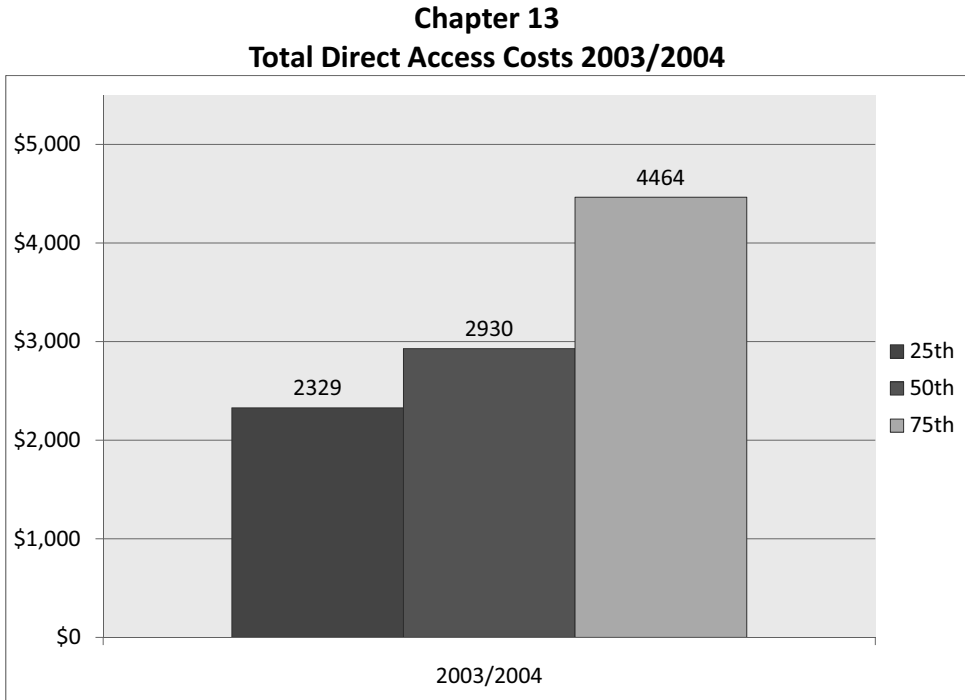
⁶⁴ See 11 U.S.C. § 109(h)(1) (2006) (requiring individual debtors to obtain credit counseling from approved agency during 180-day period preceding filing of bankruptcy petition).

discharge "debtor education" for each bankruptcy case that was filed in 2007 and 2008.⁶⁵

1. Chapter 13

For our sample of chapter 13 cases filed in 2003 and 2004, the median Total Direct Access Costs was \$2,930. The 25th percentile of Total Direct Access Costs was \$2,329 and the 75th percentile was \$4,464.

⁶⁵ This was the median fee charged by the credit counseling and debtor education providers who were surveyed. The "Total Direct Access Costs" post-BAPCPA does not reflect the rare cases in which debtors received a waiver of the requirement to receive counseling. Under section 109(h)(3), a debtor may be exempt from the credit counseling requirement with written certification that describes exigent circumstances that merit waiver. *See* §109(h)(3)(A) (2006) ("[R]equirements of paragraph (1) [credit counseling] shall not apply with respect to a debtor who submits to the court a certification that - - (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1) . . ."). Additionally, the debtor must have requested credit counseling services, but been unable to obtain them, within five days from the debtor's request of the waiver. *See* §109(h)(3)(A)(ii) (describing "7-day period beginning on the date on which the debtor made that request" for credit counseling services). Courts have strictly construed the requirement for credit counseling and few judges have granted waivers. For example, in *In re Booth*, No. 05-045002-LMK, 2005 WL 3434776 (Bankr. N.D. Fla. Oct. 24, 2005), the debtors alleged the "exigent circumstances" of impending foreclosure of their home and repossession of their vehicle, but failed to certify that they had requested, but had been unable to obtain, the required credit counseling within five days from their request. *Id.* at *1. Judge Killian dismissed the case as having been filed by an ineligible person. *Id.* at *2. In *In re Monteiro*, No. 05-85018, 2005 Bankr. LEXIS 2695, at *1-*2 (Bankr. N.D. Ga. Oct. 31, 2005), a *pro se* debtor requested a waiver of the requirement, arguing she had been to credit counseling in the past and it had not been productive, and that her present situation was too complex for credit counseling. The court gave the debtor an opportunity to supplement her request with specific grounds complying with section 109(h)(3) and obtaining a credit briefing within the 30 days of the commencement of her bankruptcy case. *Id.* at *7-*8. In another chapter 13 case, filed to stop a foreclosure, the debtor was held ineligible under section 109(h) and the case was dismissed. *See In re Sosa*, 336 B.R. 113, 114-15 (Bankr. W.D. Tex. 2005). The court noted that dismissal might adversely affect the automatic stay in the next case, to stop the next foreclosure, but stated: "[t]he Court's hands are tied. The statute is clear and unambiguous. The debtors violated the provision . . . and are ineligible to be Debtors in this case. It must, therefore, be dismissed." *Id.* at 115. A Minnesota bankruptcy court also found that failure to meet the requirements of section 109(h) made the putative debtor ineligible to be a debtor; held this lack of eligibility to constitute cause for dismissal under section 707(a); and stated that dismissal was "the only possible outcome" *In re LaPorta*, 332 B.R. 879, 884 (Bankr. D. Minn. 2005).

Figure 1.1

The median Total Direct Access Costs for chapter 13 cases filed in 2007 and 2008 was \$4,077. The 25th percentile of Total Direct Access Costs was \$3,374 and the 75th percentile was \$4,661 (see Figure 1.2 below).⁶⁶

⁶⁶ Unless otherwise indicated, all dollars are adjusted for inflation using the Consumer Price Index. See United States Department of Labor, <http://www.bls.gov/cpi> (last visited Mar. 31, 2010).

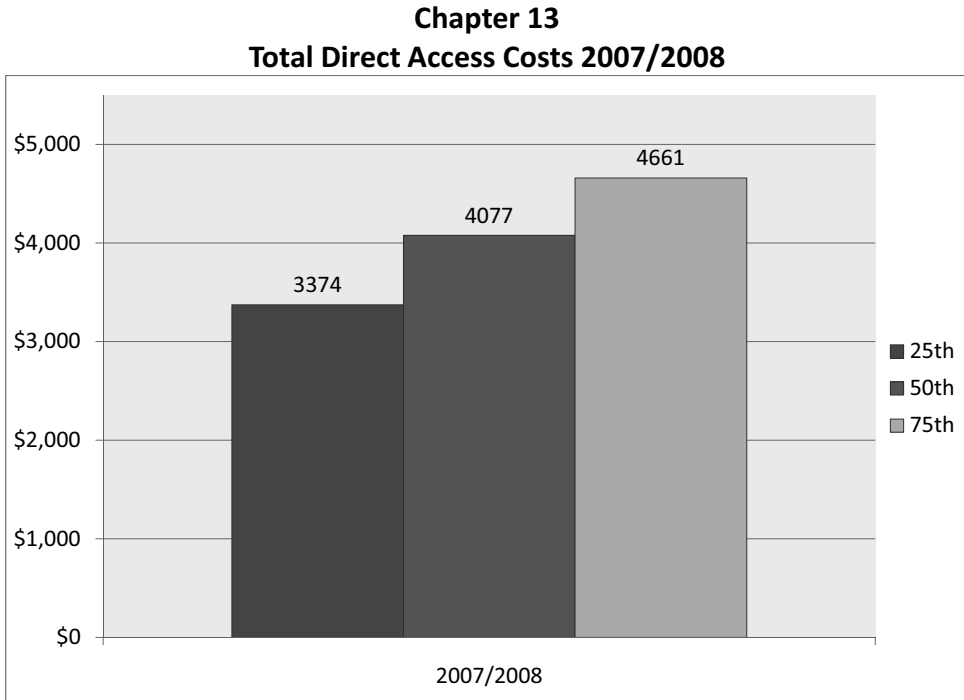
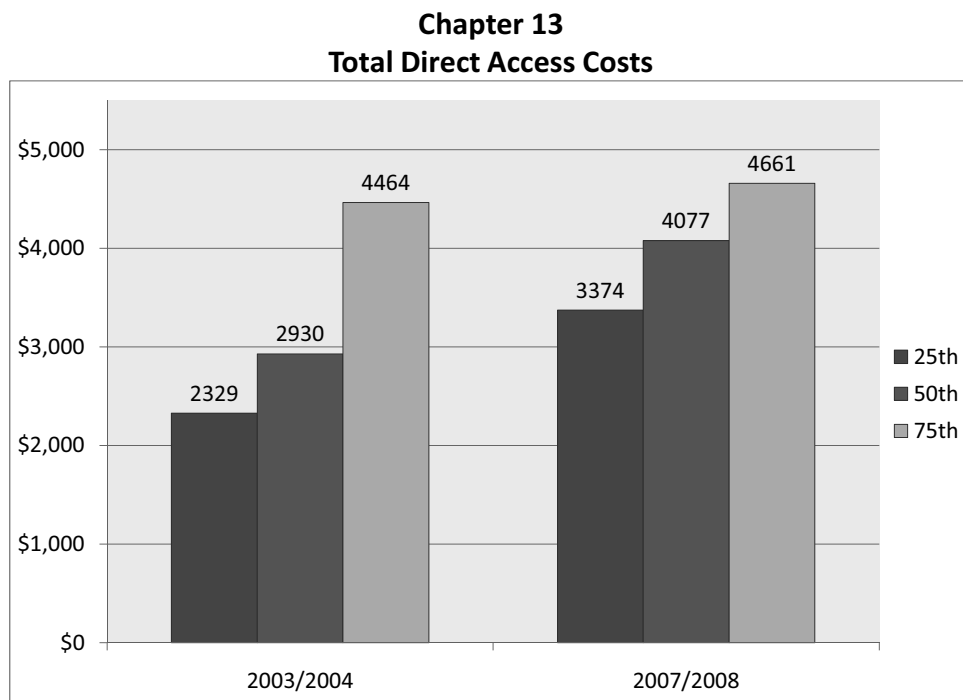
Figure 1.2

Figure 1.3 below compares the Total Direct Access Costs pre-BAPCPA to the Total Direct Access Costs post-BAPCPA. There was a significant increase from 2003-2004 to 2007-2008 in each of the 25th, 50th, and 75th percentiles: a 39% increase at the median, a 45% increase at the 25th percentile, and a 4% increase at the 75th percentile.

A number of fixed costs increased as a result of the amendments to the Bankruptcy Code. For example, filing fees increased from \$185 (in 2003) to \$274 (in 2008)—an increase of \$89 (48%).⁶⁷ Median debtor's attorney fees and expenses in chapter 13 cases increased from \$2,000 to \$3,000 (a 50% increase). In addition, the costs of credit counseling and debtor education added approximately \$100 to each chapter 13 case filed in 2007 and 2008.⁶⁸

⁶⁷ The fees required to be paid by debtors filing for bankruptcy under chapter 13 include a \$235 statutory fee and a \$39 miscellaneous administrative fee (total \$259). See 28 U.S.C. § 1930(a)(1)(A) (2008) (imposing filing fees).

⁶⁸ See A. Mechele Dickerson, *Can Shame, Guilt or Stigma Be Taught? Why Credit-Focused Debtor Education May Not Work*, 32 LOY. L.A. L. REV. 945, 946–47 (1999) (noting debtors are required to enroll in educational programs); Nathalie Martin & Ocean Tama y Sweet, *Mind Games: Rethinking BAPCPA's Debtor Education Provisions*, 31 S. ILL. U. L.J. 517, 540 (2007) (highlighting controversy surrounding whether or not debtor education is effective).

Figure 1.3

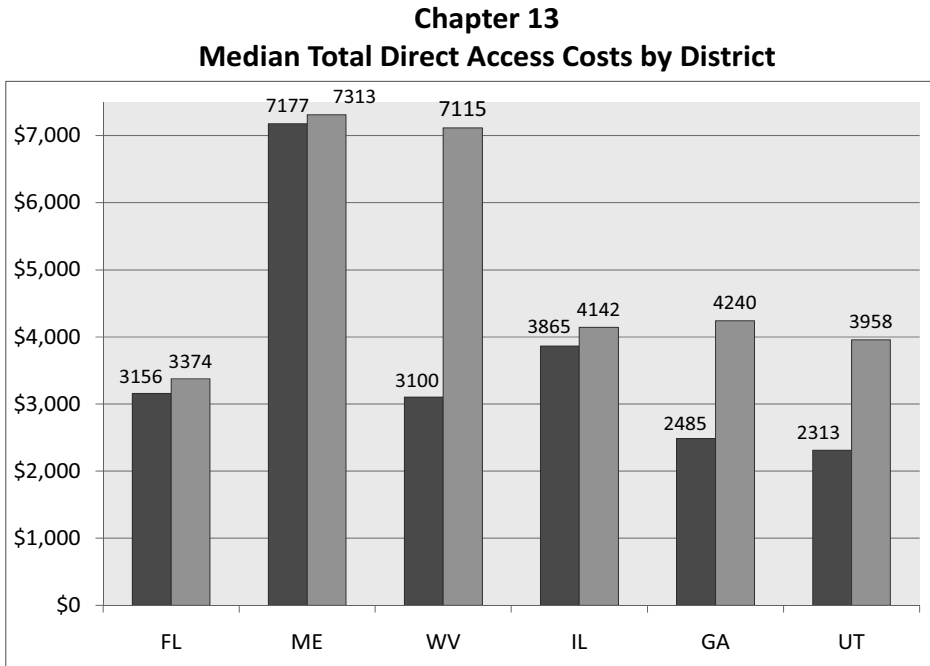
The data gathered in each of the Pilot Study districts may be of interest to courts, debtor's attorneys, and trustees in these individual districts. Although there was a lot of variation in Total Direct Access Costs among Pilot Study Districts for chapter 13 cases, Figure 1.4 below reveals that costs to access the bankruptcy system increased post-BAPCPA, in every district studied. Because there are some costs that are fixed by statute and thus, apply in all cases across the country, the costs that varied between districts were attorney fees (and expenses) and trustee fees.

Sharp increases in Total Direct Access Costs, pre- and post-BAPCPA (as was found in the Southern District of West Virginia (129% increase), the Northern District of Georgia (70% increase) and Utah (71% increase) suggest that attorney fees and/or trustee fees increased significantly in chapter 13 cases. If the increase can be attributed to trustee fees, that may mean more assets are being administered by the trustee or the practice of administering assets changed (such as mortgages being paid inside the plan, rather than outside the plan). If the cost increases are attributable to increased attorney fees, then that may be a reflection of the attorney responsibilities added by BAPCPA.

It is interesting to observe that at least among the districts selected for the Pilot Study, the highest Total Direct Access Costs were in low population jurisdictions.

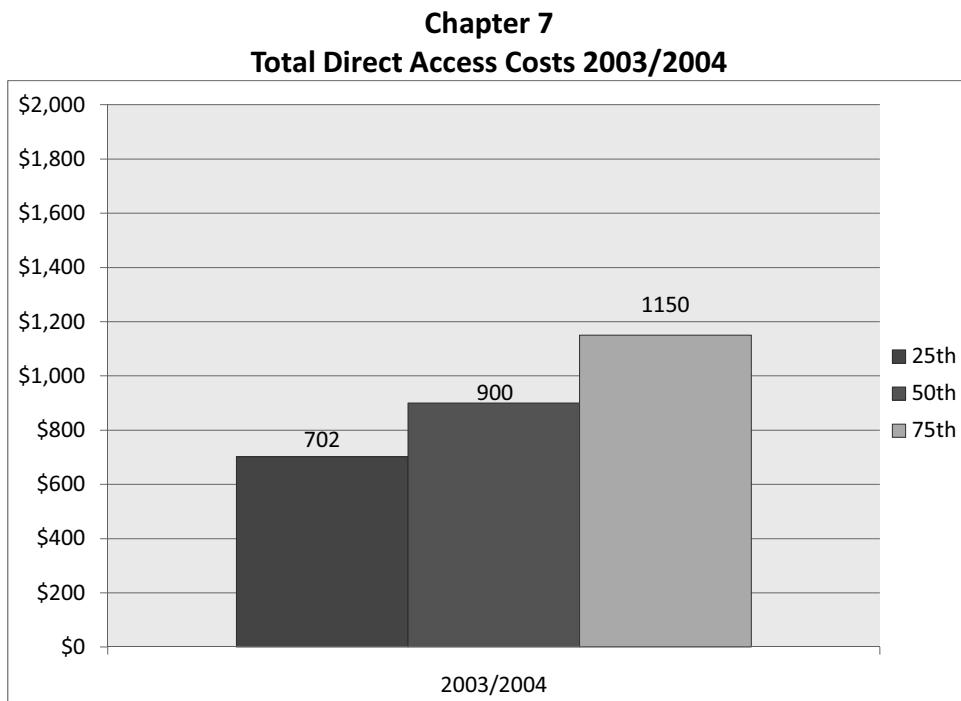
This seems to counter the common belief that costs are higher in larger cities than they are in smaller cities or rural areas.

Figure 1.4



2. Chapter 7

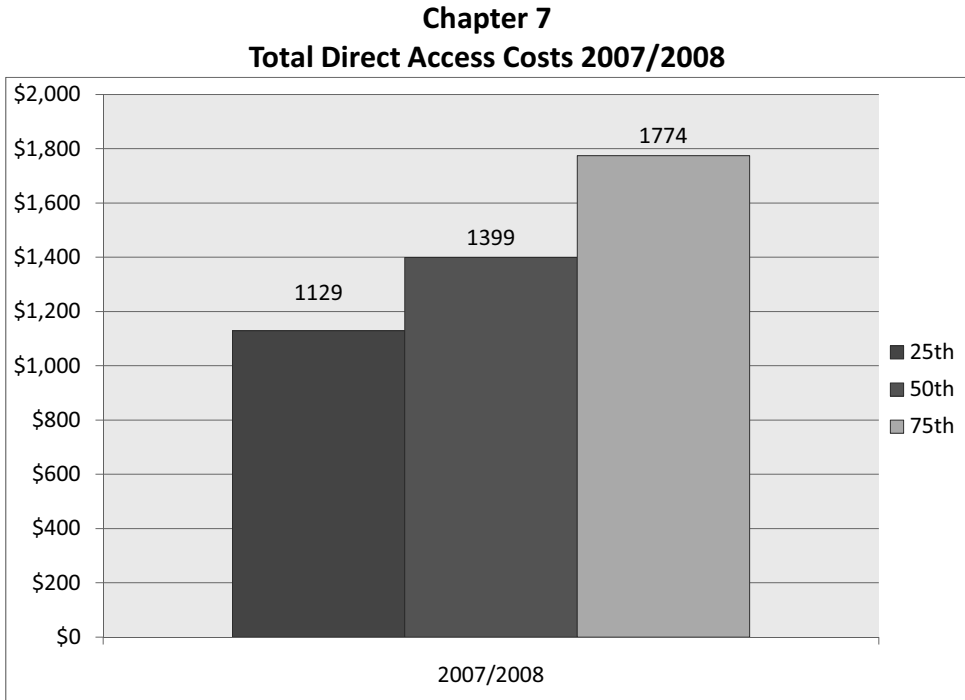
The median Total Direct Access Costs for chapter 7 consumer cases filed in 2003 and 2004 was \$900. For cases filed during this period, the 25th percentile of Total Direct Access Costs was \$702 and the 75th percentile was \$1,150 (see Figure 2.1 below).

Figure 2.1

Following the enactment of the Bankruptcy Reform Act, the median Total Direct Access Costs for chapter 7 consumer cases increased from \$900 to \$1,399 (representing a 55% increase). Costs in the 25th percentile were \$1,129 and \$1,774 in the 75th percentile. As was the case with chapter 13, the filing fees for chapter 7 increased following BAPCPA. In 2003-2004, the filing fee was \$209 for chapter 7 cases; for cases filed in 2007-2008, the fee is \$299—an increase of 43%.⁶⁹ In addition, the costs of credit counseling and debtor education added approximately \$100 to each chapter 7 post-BAPCPA consumer bankruptcy case.⁷⁰

⁶⁹ The chapter 7 "filing fees" can be broken down as follows: \$245 statutory fee, \$39 miscellaneous administrative fee, and \$15 miscellaneous for chapter 7 trustees (total: \$299). *See* § 1930(a)(1)(A).

⁷⁰ *See* GAO Report, *supra* note 38, at 5 ("Most consumers pay about \$100 to fulfill these requirements since credit counseling and debtor education providers typically charge about \$50 per session . . .").

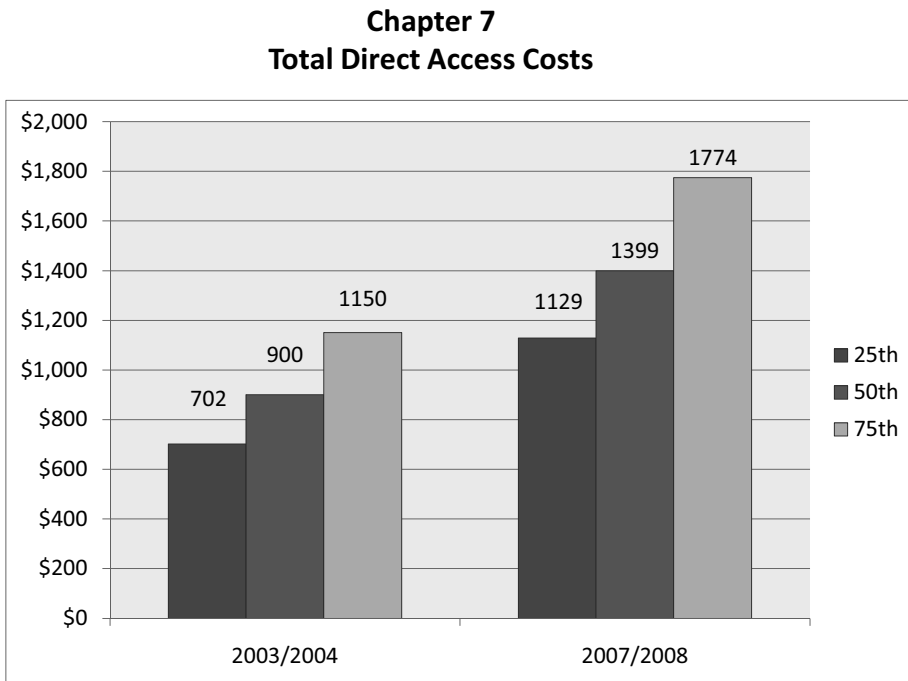
Figure 2.2

This data confirms the findings in the GAO study,⁷¹ the single district study of chapter 7 fees in the Northern District of Alabama,⁷² as well as Professor White's informal survey of bankruptcy attorneys.⁷³ Total Direct Access Costs for chapter 7 consumer cases significantly increased following BAPCPA's enactment.

⁷¹ See generally GAO Report, *supra* note 38.

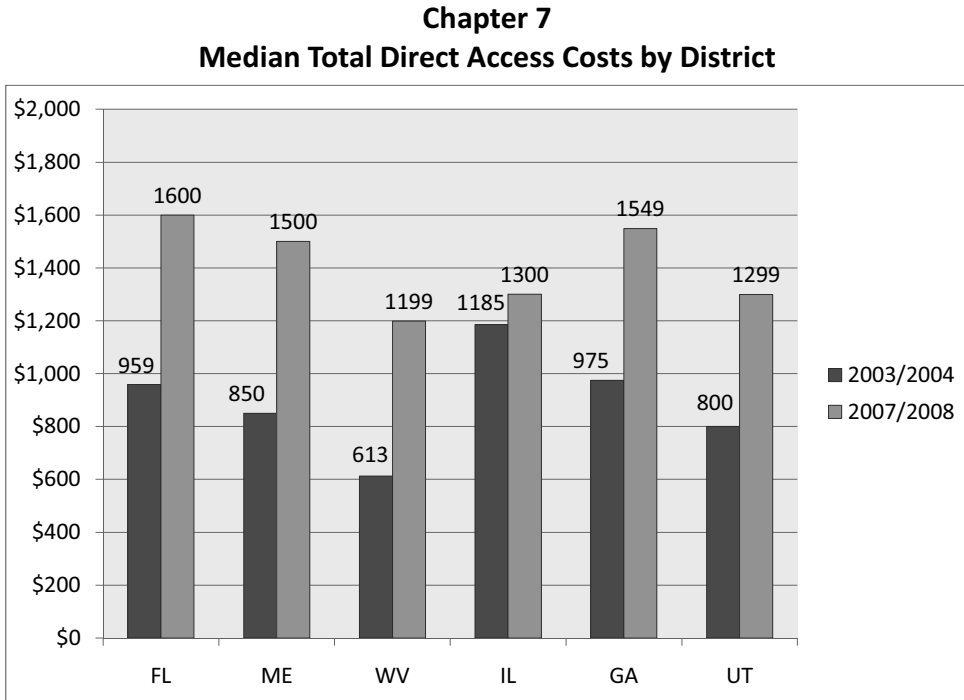
⁷² See generally Landry and Yarbrough, *supra* note 44.

⁷³ See generally *ABI Fee Study*, *supra* note 12.

Figure 2.3

Similar to the Total Direct Access Cost data gleaned from chapter 13 cases, the data gathered in each of the Pilot Study districts with respect to Total Direct Access Costs in chapter 7 cases may be of interest to courts, debtor's attorneys, and trustees in the Access Costs for chapter 7 among Pilot Study Districts. Figure 2.4 below reveals that costs to access the bankruptcy system increased post-BAPCPA in every district studied. Filing fees, credit counseling, and debtor education fees are essentially fixed; given that most of the cases were no-asset cases (89%), the costs that varied between districts were primarily attorney fees.

It is interesting to observe that at least among the districts selected for the Pilot Study, the highest Total Direct Access Costs were in both high population (Middle District of Florida and Northern District of Georgia) and low population jurisdictions (District of Maine and Southern District West Virginia).

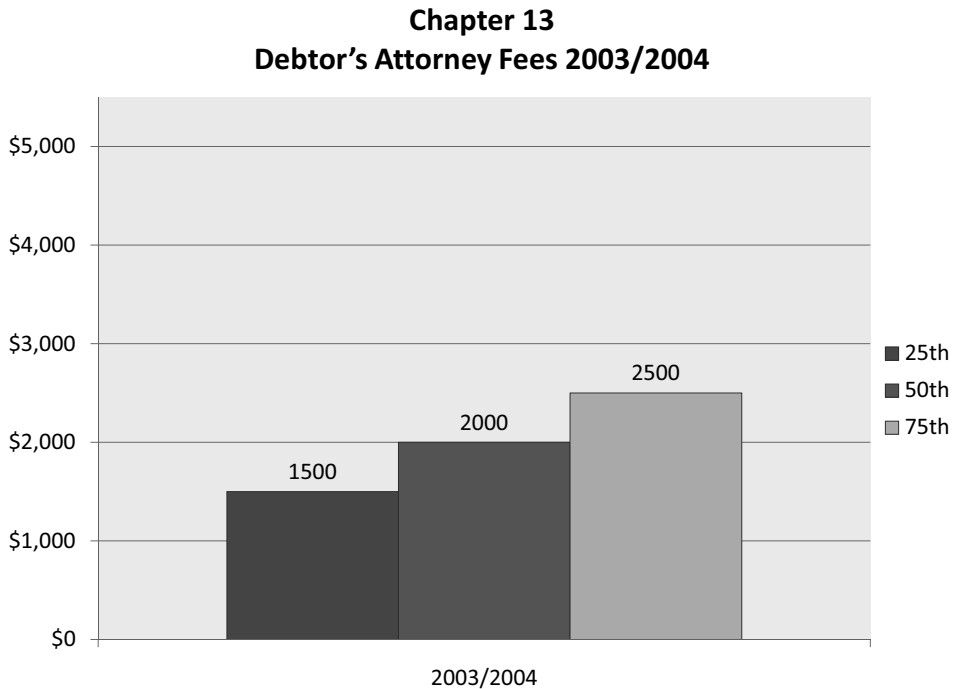
Figure 2.4

B. Debtor Attorneys' Fees

1. Chapter 13

Representing a debtor in chapter 13 has always been a complex undertaking. Chapter 13, even prior to BAPCPA's enactment, was an onerous process for debtors and required them to adhere to a court-supervised repayment plan for three to five years. Counsel is charged with the task of explaining the complex process of the treatment of debtor's secured and unsecured debt, often necessitating the development of a strategy to "save" a home and/or vehicle. Once a chapter 13 plan is filed, there is the potential for plan challenges and other proceedings requiring on-going attorney time.

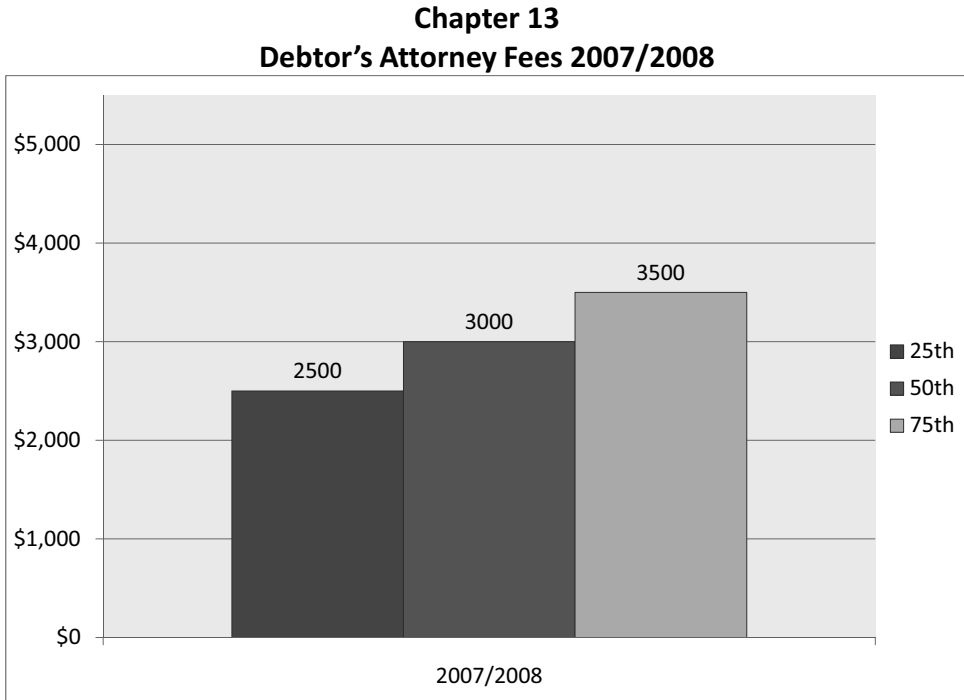
Representation of a chapter 13 debtor in 2003-2004 yielded attorneys a median fee of \$2,000. The 25th percentile fee is \$1,500 and the 75th percentile fee is \$2,500.

Figure 3.1

As noted above, many of the 2005 amendments to the Bankruptcy Code impose added responsibilities on prospective debtors. Accordingly, it was predicted that these added responsibilities would increase chapter 13 debtor's legal fees. A means test calculation must be performed in all cases filed after BAPCPA's enactment, new documentation must be produced, notices must be served, certificates must be obtained, and attorneys must conduct more rigorous investigations of debtor's allegations.⁷⁴

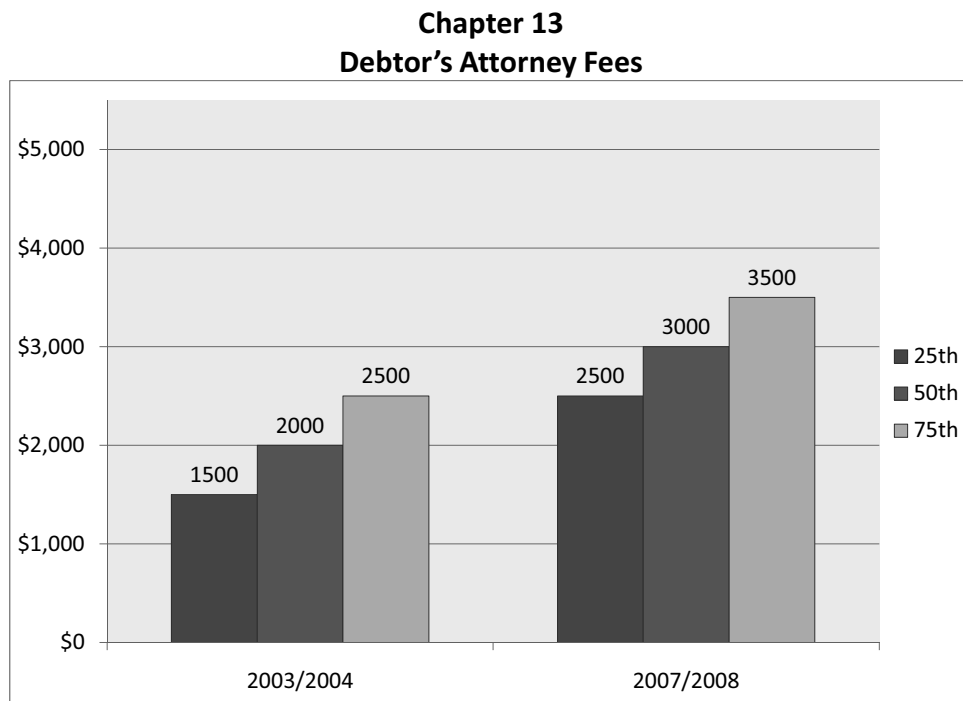
The data supports these predictions. The median fee charged by attorneys representing chapter 13 debtors in our sample is \$3,000. The fee charged in the 25th percentile is \$2,500 and the fee charged in the 75th percentile is \$3,500.

⁷⁴ See *supra* notes 28–37 and accompanying text (discussing means test).

Figure 3.2

There was a 66% increase between the median chapter 13 attorney fees in 2003-2004 and 2007-2008. The fees in the 25th percentile represent a 66% increase and the fees in the 75th percentile increased by 40%. The increased responsibilities and obligations imposed upon debtor (and thus debtor's attorney) may account for the bulk of this increase. It may also be the case that chapter 13 cases, post-BAPCPA, are more complex post-filing, and involved more challenges, contested actions and proceedings, and thus, court and attorney time.⁷⁵ This issue will be more fully explored in the National Study.

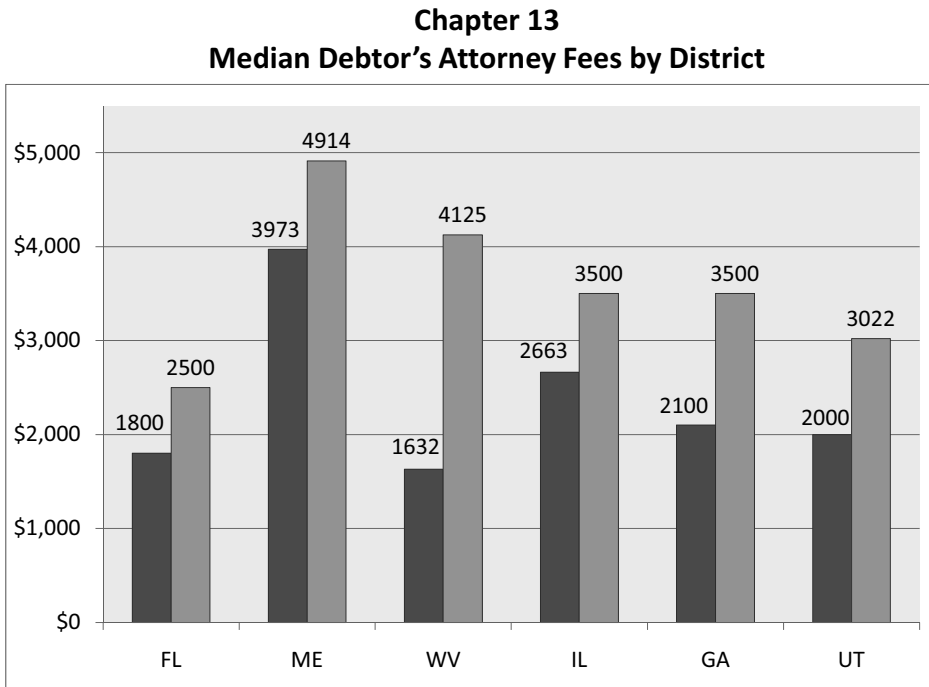
⁷⁵ See *supra* Section II (discussing how additional BAPCPA requirements protract litigation in chapter 13 cases).

Figure 3.3

As noted in the discussion of the findings revealed in Figure 1.4, the costs to access the bankruptcy system increased post-BAPCPA in every district studied. Because there are some costs that are fixed by statute, and thus, apply in all cases across the country, the costs that varied between districts were attorney fees and trustee fees.

The sharpest increase in attorney fees was found in West Virginia (a \$2,493 increase, in the 50th percentile). Fees for chapter 13 attorneys in Georgia, Utah, Maine, and Illinois increased by 66%, 51%, 24%, and 31%, respectively. At least, in these jurisdictions, it does not appear as if more assets are being administered—the bulk of the increase in Total Direct Access Costs can be attributed to a rise in attorney fees.

If the increase *can* be attributed to trustee fees, that may mean more assets are being administered by the trustee or the practice of administering assets has changed (such as mortgages being paid "inside the plan," rather than "outside the plan"). If the cost increases are attributable to increased attorney fees, then that may be a reflection of the attorney responsibilities added by BAPCPA.

Figure 3.4

As noted above, many jurisdictions have enacted local rules or standing orders regarding attorney fees for debtors' counsel in chapter 13 cases.⁷⁶ Pursuant to these orders or rules, an itemized fee application is not required when an attorney seeks a fee that is at or below a specified threshold (known as a "no-look fee"). As observed in the 1991 ABI Fee Study, no-look fees are used in the name of judicial economy as a proxy for the conclusion that a consumer case is a "routine" one.⁷⁷

There is a great deal of variation among districts with respect to both the amount of the no-look fee, as well as the tasks that must be performed for an attorney to have fees approved in excess of the no-look fee. Figure 3.5 below demonstrates that some districts' median attorney fees reflect an adherence to the

⁷⁶ In other jurisdictions, no-look fees are set by local rules, memorandum decisions, general orders or "local practice." See David S. Kennedy et al., *Attorney Compensation in Chapter 13 Cases and Related Matters*, 13 J. BANKR. L. & PRAC. 6 ART. 1, 12 (2004) (noting courts set no-look fees based on various locality considerations); Dennis Montali et al., *Recent Developments in Business Bankruptcy*, 29 CAL. BANKR. J. 551, 562 (2008) (describing no-look fee approval process for Northern District of California Bankruptcy Court); Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 463 (2007) (indicating standing chapter 13 trustee "recommends to the court the standard 'no-look' fee for debtors' attorneys").

⁷⁷ See *ABI Fee Study*, *supra* note 12, at 169.

district's no-look fee, such as the District of Utah and the Northern District of Illinois.⁷⁸ Other districts, such as Maine, notwithstanding its relatively high no-look fee, reveal a sharp divide between actual attorney fees received and the district's no-look fee.⁷⁹

The GAO Study collected information on the no-look fees in place in 48 districts before and after BAPCPA.⁸⁰ The study found that the chapter 13 no-look fee increased in almost all of the districts (or divisions)⁸¹ studied. In more than half of those cases, the increase was 55% or more. The National Study will focus attention on the issue of no-look fees: how they are set; how frequently are they reviewed; how they compare to other jurisdictions; and how frequently fee applications for additional fees are filed and approved.

⁷⁸ See generally *In re Debtor's Attorney Fees in Chapter 13 Cases*, No. 07-mp-00002-MGW (M.D. Fla. Aug. 26, 2007) (on file with author).

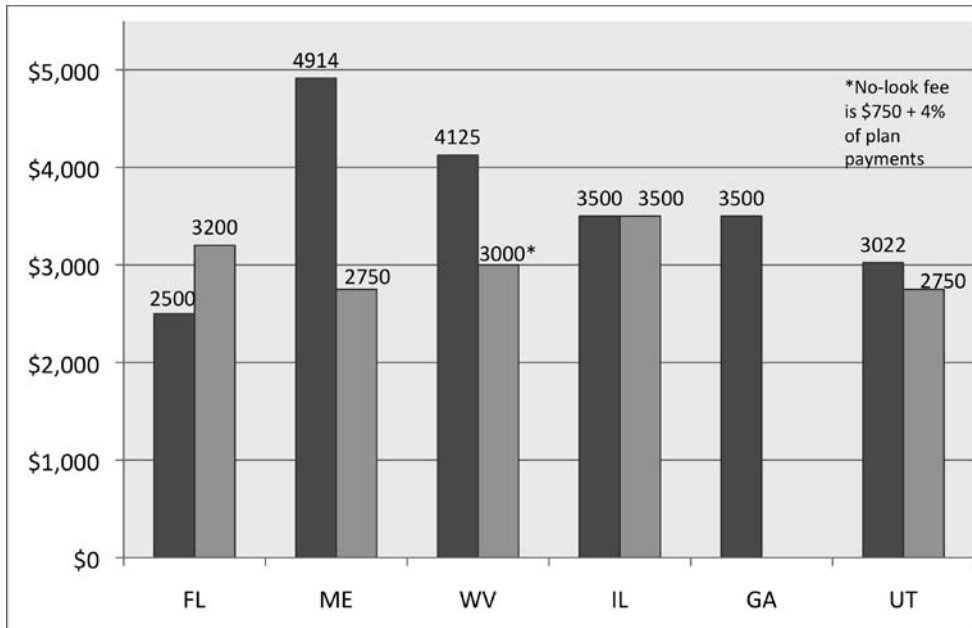
⁷⁹ See Conversation with Peter Fessenden, Standing Chapter 13 Trustee (Oct. 15, 2009) (on file with author).

⁸⁰ GAO Report, *supra* note 38, at 25 (explaining study was conducted by "collect[ing] information on the standard fees in place before and after the Bankruptcy Reform Act in 48 districts or divisions that collectively accounted for 65 percent of Chapter 13 filings in fiscal year 2007").

⁸¹ *Id.* (indicating increase was 55% or higher in over half of districts). As noted in the GAO Study, "[a] division is a sublevel below that of a federal judicial district." *Id.* at 25 n.38.

Figure 3.5

Chapter 13
Median Debtor's Attorney Fees 2007/2008
Compared to No-Look Fee by District



2. Chapter 7

As is the case with chapter 13 debtor representation, representing debtors filing for bankruptcy under chapter 7 has become considerably more complicated since BAPCPA's enactment. As discussed above, the administration of the means test and the collection of supporting proof and documentation have added to the tasks required of chapter 7 attorneys.⁸² We found that the median attorney fee charged by lawyers in chapter 7 consumer cases was \$650 in 2003/2004. In 2007/2008, it had jumped to \$1,000—representing a 53% increase. Attorney fees charged at the 25th percentile and the 75th percentile each increased by 40%. These findings are consistent with the findings in the GAO Study.

⁸² See *supra* notes 28–37 and accompanying text.

Figure 4.1

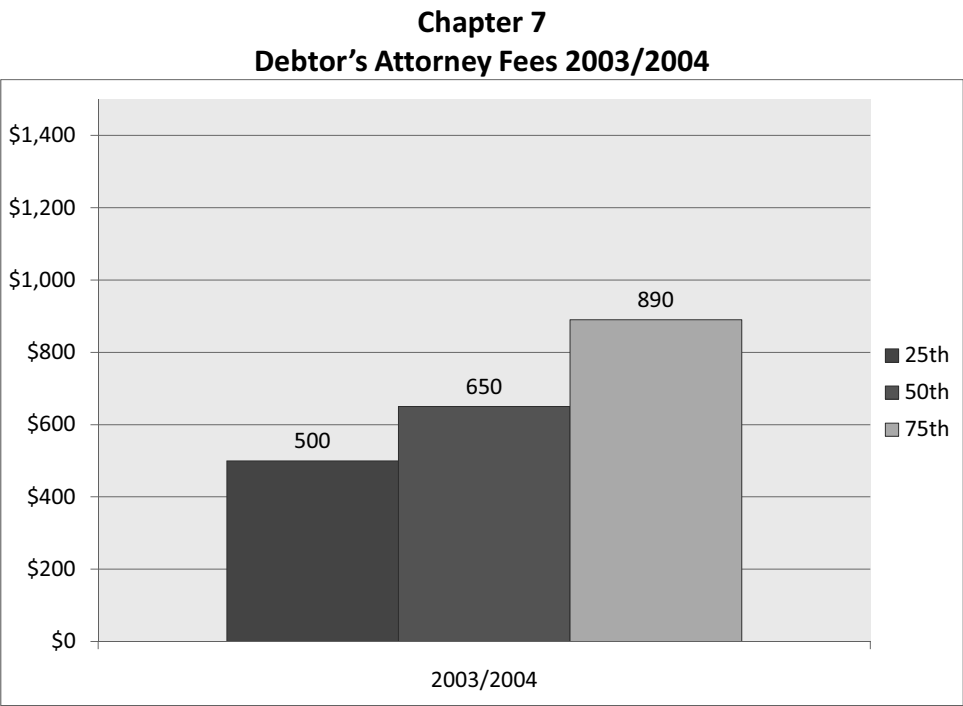


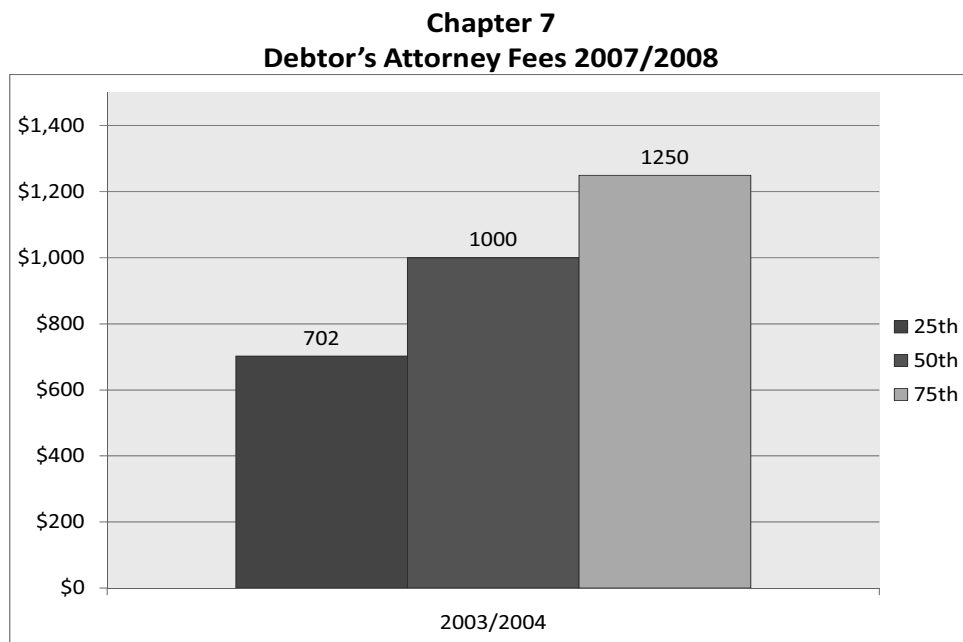
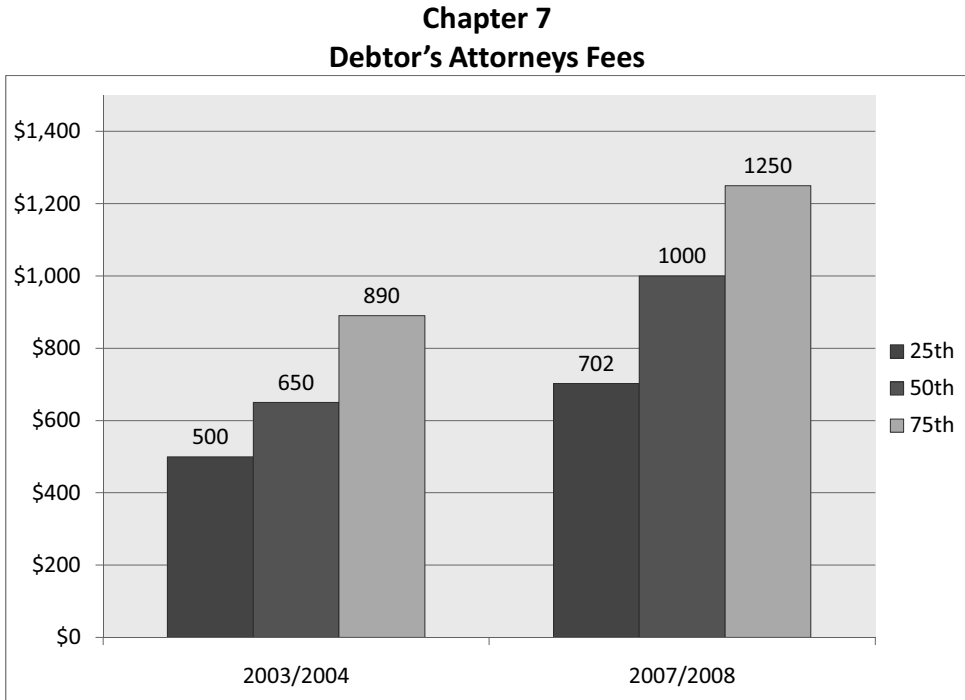
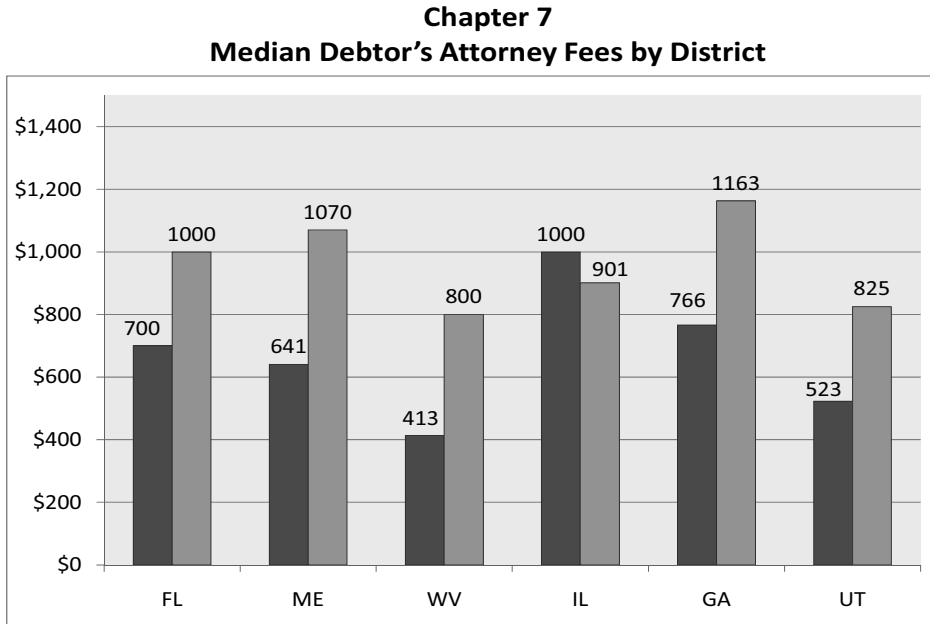
Figure 4.2

Figure 4.3

When we looked at fees charged, district by district, we saw similarly sharp increases post-BAPCPA. In the Southern District of West Virginia, for example, fees in chapter 7 consumer cases increased by 93%. In the Northern District of Georgia, they increased by 51%.

Figure 4.4

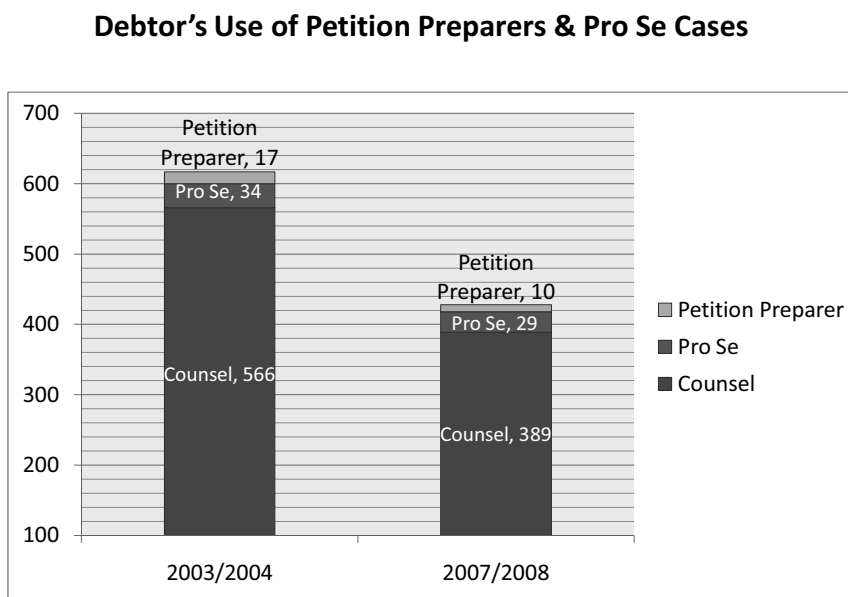
We examined whether higher legal fees led more chapter 7 consumers to seek the aid of less expensive petition preparers, to seek *pro bono* counsel, or to file *pro se*. Figure 4.5 reflects debtors' use of petition-preparers and *pro se* debtors. In our sample, 6% of debtors filed *pro se* pre-BAPCPA. Seven percent of debtors filed *pro se* post-BAPCPA. Of those pre-BAPCPA debtors, 50% had the assistance of a petition preparer; post-BAPCPA, 34% of the *pro se* debtors used petition preparers.⁸³ Seven percent of our sample of pre-BAPCPA had the assistance of a *pro bono* attorney.⁸⁴ One percent post-BAPCPA debtors had the assistance of a *pro bono* attorney.⁸⁵ While some debtors file *pro se*, and other debtors found *pro bono* counsel, the vast majority of debtors, both pre- and post-BAPCPA, paid a lawyer to help them navigate the bankruptcy system.⁸⁶

⁸³ In 2003/2004, there were 34 *pro se* cases in our sample, 17 of which used petition preparers. In 2007/2008, there were 29 *pro se* cases in our sample, 10 of which used petition preparers.

⁸⁴ Four out of 588 chapter 7 debtors had a *pro bono* attorney.

⁸⁵ Six out of 418 chapter 7 debtors had a *pro bono* attorney.

⁸⁶ Feedback received during a presentation of the Pilot Study suggested that this may not be the case in every jurisdiction.

Figure 4.5

VI. MODELING THE COSTS OF ACCESS

Describing the difference in costs, before and after the amendment of the Bankruptcy Code, has the advantage of simplicity, but, in order to account for the many variables that may influence the costs, other than the statutory amendments, a regression model is required. For example, debtors could be presenting more complex financial profiles in 2007/2008, and such complexity could account for the increase in costs. Variables, such as the value of personal property assets or the number of documents on the docket, may be proxies for case complexity. Linear regression models were developed to identify the strongest predictors of Total Direct Access Costs and Debtor's Attorneys Fees.

Linear regression is an approach to modeling the relationship between a response variable, (y), and one or more predictor variable, (x). Given " y " (i.e., Total Direct Access Costs), and a number of predictor variables (x_1 = pre/post BAPCPA, x_2 = number of documents in docket, x_3 = amount of secured claims,) linear regression analysis can be applied to quantify the strength of the relationship between " y " and x_1 , x_2 or x_3 . Total Direct Access Costs (in one model) and Debtor's Attorney's Fees (in another model) were identified as the response variables based

on the presumption that the value of each of these response variables is caused by or directly influenced by the predictor variables.

We began with a list of potential candidate predictors from the total list of coded variables, in an effort to identify the predictors that most influenced Total Direct Access Costs and Debtor's Attorney Fees. Certain candidate predictors were then omitted from the models for the reasons set forth below.

Omitted predictors	Reason
Estimated Value of Real Estate Assets	high correlation with Estimated Assets
Distribution to Unsecured Creditors	large number of zeroes (chapter 7)
	high correlation with Secured Claims (chapter 13)
Distribution to Secured Creditors	high correlation with Estimated Assets.
Estimated Secured Liabilities	high correlation with Secured Claims
Estimated Unsecured Liabilities	high correlation with Unsecured. Claims
Estimated Priority Liabilities	large number of zeroes

We narrowed the potential pool of predictors to the following: (i) Pre- or Post-BAPCPA, (ii) District, (iii) Single or Joint Petition, (iv) Number of Documents on Docket, (v) Number of Creditors, (vi) Estimated Assets, (vii) Estimated Debts, (viii) Current Monthly Income, (ix) Estimated Value of Personal Property, and (x) Unsecured Claims, and (xi) Secured Claims.

A. Chapter 13 – Total Direct Access Costs

Figure 5.1 below is a model analyzing Total Direct Access Costs in chapter 13, testing the six most highly correlated variables. The response variable is modeled as a linear function of p predictors. In this case, the response variable is Total Direct Access Costs and p , the number of predictors, is six. The departure of the model from the observed value of y is the error, e , or the residual. The model can be written as $y_i = \beta_0 + \beta_1 x_{1i} + \beta_2 x_{2i} + \dots + \beta_p x_{pi} + e_i$. β_0 is the intercept term or the predicted value of y , when all the predictors are equal to 0. The other β s are the regression coefficients for the predictors in the model. In Figure 5.1 below, the most egregious outliers were omitted from analysis under this model.

Figure 5.1

Model for Chapter 13 adjusted log Total Direct Access Costs (with certain outliers omitted)

Coefficients:

	Estimate	Std. Error	t value	Pr(> t)
(Intercept)	6.516058	0.214253	30.413	< 2e-16 ***
Pre- or Post-BAPCPA	0.255436	0.055859	4.573	6.47e-06 ***
Number of Documents	0.110236	0.029087	3.790	0.000175 ***
Secured Claims	0.019585	0.005699	3.437	0.000652 ***
Unsecured Claims	0.027549	0.009171	3.004	0.002837 **
Single or Joint Petition	0.093783	0.044309	2.117	0.034929 *
Est.Val.Pers.Prpty.Assets	0.033487	0.015904	2.106	0.035882 *

Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Residual standard error: 0.404 on 390 degrees of freedom
Multiple R-squared: 0.4096, Adjusted R-squared: 0.393
F-statistic: 24.6 on 11 and 390 D, p-value: < 2.2e-16

Analysis of Variance Table

	Df	Sum Sq	Mean Sq	F value	Pr(>F)
District	5	29.793	5.959	36.5074	< 2.2e-16 ***
Pre- or Post-BAPCPA	1	3.413	3.413	20.9113	6.47e-06 ***
Number of Documents	1	2.344	2.344	14.3627	0.0001746 ***
Secured C.Claims	1	1.928	1.928	11.8104	0.0006524 ***
Unsecured C.Claims	1	1.473	1.473	9.0233	0.0028375 **
Single or Joint Petition	1	0.731	0.731	4.4799	0.0349289 *
Est.Val.Pers.Prpty.Assets	1	0.724	0.724	4.4334	0.0358821 *
Residuals	390	63.654	0.163	1.0000	---

In the above coefficient table, "estimate" is the coefficient estimate. For numeric variables, this is the predicted change in the outcome for a one-unit change in the predictor when all other predictors are held fixed. The "standard error" provides information about the uncertainty in the estimate. The "t-value" is the coefficient estimate divided by the standard effort. Pr(>[t]) is the p-value, which is the probability of getting this result under the null hypothesis that the coefficient estimate is zero—meaning that the predictor is unrelated to the outcome. The smaller the p-value, the more significant the predictor is. The retained model predictors all have a p-value that is less than 0.05.

The Analysis of Variance Table ("ANOVA Table") presents a test for the difference between two or more means. It is useful in showing the overall impact of

a categorical predictor. For numeric variables, the square of the t-value in the coefficient table is the F value in the ANOVA Table. The p-value is the probability of getting this result under the null hypothesis of no association between predictor and outcome. For numeric variables, the ANOVA Table provides the same p-values as the coefficient table.

In this model, the strongest predictor of higher Total Direct Access Costs is "Post-BAPCPA." Stated differently, taking potential confounders into account, Total Direct Access Costs are significantly higher, post-BAPCPA.⁸⁷ The number of documents in a case docket and the size of secured creditor claims (house and/or car) were also highly correlated. We recognized the number of documents in a case docket as a proxy for case complexity; the more motions, amendments, and other case documents filed, the more complex the case. Again, the ANOVA Table shows post-BAPCPA as having the greatest predictive value of high Total Direct Access Costs.

B. Chapter 7 – Total Direct Access Cost

Figure 5.2 below is a model analyzing Total Direct Access Costs in chapter 7, testing the six most highly correlated variables.⁸⁸ The most egregious outliers were omitted from analysis under this model.

⁸⁷ A confounding variable is an extraneous variable in a model that correlates, positively or negatively, with both the response variable and the variable predictors. These need to be controlled for to avoid a "false positive" conclusions.

⁸⁸ The same model was used to analyze the predictive value of variables present in chapter 7 cases: $y_i = \beta_0 + \beta_1 x_{1i} + \beta_2 x_{2i} + \dots + \beta_p x_{pi} + e_i$ 1. See Figure 5.1.

Figure 5.2**Model for Chapter 7 adjusted log Total Direct Access Costs (with certain outliers omitted)**Coefficients:

	Estimate	Std. Error	t value	Pr(> t)
(Intercept)	5.619473	0.151750	37.031	< 2e-16 ***
Number of Documents	0.195333	0.024729	7.899	1.60e-14 ***
Pre- or Post-BAPCPA	0.279029	0.035271	7.911	1.47e-14 ***
Current Monthly Income	0.034240	0.011357	3.015	0.00269 **
Estimated Debts	0.063182	0.021687	2.913	0.00372 **
Est.Val.Pers.Prpty.Assets	0.041746	0.015197	2.747	0.00622 **
Secured C.Claims	-0.013445	0.005017	-2.680	0.00759 **

Residual standard error: 0.3931 on 537 degrees of freedom

Multiple R-squared: 0.347, Adjusted R-squared: 0.3336

F-statistic: 25.94 on 11 and 537 D, p-value: < 2.2e-16

Analysis of Variance Table

	Df	Sum Sq	Mean Sq	F value	Pr(>F)
Number of Documents	1	9.639	9.639	62.3914	1.600e-14 ***
Pre- or Post-BAPCPA	1	9.669	9.669	62.5833	1.466e-14 ***
District	5	11.036	2.207	14.2869	3.820e-13 ***
Current Monthly Income	1	1.404	1.404	9.0887	0.002693 **
Estimated Debts	1	1.311	1.311	8.4880	0.003724 **
Est.Val.Pers.Prpty.Assets	1	1.166	1.166	7.5460	0.006216 **
Secured C.Claims	1	1.109	1.109	7.1813	0.007593 **
Residuals	537	82.963	0.154	1.0000	---

Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Again, the smaller the p-value, the more significant the predictor is. The retained model predictors all have a p-value that is less than 0.05. The strongest predictor of higher Total Direct Access Costs in chapter 7 cases is the number of documents in a case docket. The more complex the cases, the more it costs. In a chapter 7 case, this is likely to mean that in "complex cases" (cases with a higher number of documents filed), there were assets to administer; and so, the trustee received more than the minimum fee. It may also mean that there were more issues to be addressed by debtor's attorney. Current monthly income is also a significant predictor of higher Total Direct Access Costs.

The second most significant predictor in this model is "Post-BAPCPA." Total Direct Access Costs are significantly higher in chapter 7 cases post-BAPCPA. The ANOVA Table similarly shows "Number of Documents" as having the greatest

predictive value of high Total Direct Access Costs with post-BAPCPA coming in second.

C. Chapter 13 – Total Debtor Attorney Fees

Figure 5.3 below is a model analyzing Total Debtor Attorney Fees in chapter 13, analyzing the three most highly correlated variables. The most egregious outliers were omitted from analysis under this model.

Figure 5.3

Model for Chapter 13 log adjusted Total Debtor Attorney Fees (with certain outliers omitted)

Coefficients:

	Estimate	Std. Error	t value	Pr(> t)
(Intercept)	6.62008	0.13699	48.325	< 2e-16 ***
Pre- or Post-BAPCPA	0.22439	0.04920	4.561	6.81e-06 ***
Number of Documents	0.12276	0.02987	4.110	4.81e-05 ***
Estimated Assets	0.06015	0.02568	2.342	0.019678 *

Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Residual standard error: 0.4143 on 394 degrees of freedom

Multiple R-squared: 0.3018, Adjusted R-squared: 0.2876

F-statistic: 21.29 on 8 and 394 D, p-value: < 2.2e-16

Analysis of Variance Table

	Df	Sum Sq	Mean Sq	F value	Pr(>F)
District	5	21.326	4.265	24.8541	< 2.2e-16 ***
Pre- or Post-BAPCPA	1	3.570	3.570	20.8016	6.812e-06 ***
Number of Documents	1	2.900	2.900	16.8961	4.807e-05 ***
Estimated Assets	1	0.941	0.941	5.4849	0.01968 *
Residuals	394	67.614	0.172	1.0000	---

The strongest predictor of high Total Debtor's Attorney Fees in chapter 13 cases is "Post-BAPCPA." This is consistent with our descriptive findings: attorney fees are significantly higher following BAPCPA's enactment than prior to it. The number of documents in a case docket is also a highly correlated predictor. The ANOVA Table similarly shows "Post-BAPCPA" as having the greatest predictive value of high Total Debtor's Attorney Fees in chapter 13 cases.

D. Chapter 7—Total Debtor Attorney Fees

Figure 5.4 below is a model analyzing Total Debtor Attorney Fees in chapter 7 cases, testing the three most highly correlated variables. The most egregious outliers were omitted. Under this model (which includes chapter 7 no-asset cases), "Current Monthly Income" is the strongest predictor of high Attorney Fees. "Post-BAPCPA," in this case, has a lower degree of predictive significance.

Figure 5.4

Model for Chapter 7 log adjusted Total Debtor Attorney Fees (with certain outliers omitted)

Coefficients:

	Estimate	Std. Error	t value	Pr(> t)
(Intercept)	5.29004	0.30048	17.605	< 2e-16 ***
Current Monthly Income	0.11202	0.02889	3.877	0.000119 ***
Pre- or Post-BAPCPA	0.23140	0.09385	2.466	0.013986 *
Number of Documents.	0.14313	0.06605	2.167	0.030675 *

Residual standard error: 1.082 on 538 degrees of freedom

Multiple R-squared: 0.1036, Adjusted R-squared: 0.09027

F-statistic: 7.772 on 8 and 538 DF p-value: 6.804e-10

Analysis of Variance Table

	Df	Sum Sq	Mean Sq	F value	Pr(>F)
District	5	37.72	7.54	6.4407	7.94e-06 ***
Current Monthly Income	1	17.61	17.61	15.0325	0.0001187 ***
Pre- or Post-BAPCPA	1	7.12	7.12	6.0796	0.0139861 *
Number of Documents	1	5.50	5.50	4.6958	0.0306753 *
Residuals	538	630.23	1.17	1.0000	

Figure 5.5, Total Debtor's Attorney Fees in chapter 7 cases with no-asset cases omitted, reveals five correlated variables. "Post-BAPCPA" and "Number of Documents" are the most highly correlated variables in this model.

Figure 5.5

**Model for Chapter 7 log adjusted Total Debtor's Attorney Fees (16
observations with response = 0 deleted)**

Coefficients:

	Estimate	Std. Error	t value	Pr(> t)
(Intercept)	5.22144	0.24620	21.208	< 2e-16 ***
Pre- or Post-BAPCPA	0.26973	0.04022	6.707	5.17e-11 ***
Number of Documents	0.09861	0.02904	3.395	0.000737 ***
Current Monthly Income	0.04224	0.01303	3.242	0.001264 **
Unsecured C.Claims	0.04366	0.02032	2.149	0.032085 *
Estimated Debts	0.05450	0.02482	2.196	0.028539 *

Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Residual standard error: 0.456 on 523 degrees of freedom

Multiple R-squared: 0.2416, Adjusted R-squared: 0.2271

F-statistic: 16.66 on 10 and 523 D, p-value: < 2.2e-16

Analysis of Variance Table

	Df	Sum Sq	Mean Sq	F value	Pr(>F)
District	5	12.967	2.593	12.4723	1.881e-11 ***
Pre- or Post-BAPCPA	1	9.353	9.353	44.9825	5.171e-11 ***
Number of Documents	1	2.397	2.397	11.5285	0.0007375 ***
Current Monthly Income	1	2.185	2.185	10.5083	0.0012641 **
Unsecured C.Claims	1	0.960	0.960	4.6186	0.0320853 *
Estimated Debts	1	1.003	1.003	4.8219	0.0285391 *
Residuals	523	108.747	0.208	1.0000	---

VII. DISTRIBUTIONS TO UNSECURED CREDITORS

A. Chapter 13 Cases

Figure 6.1 below is a model analyzing distributions to unsecured creditors in chapter 13 cases. Distributions to unsecured creditors is negatively correlated with "Post- BAPCPA" (after deletion of one outlier) and positively correlated with Total Direct Access Costs. Stated differently, distributions to unsecured creditors in chapter 13 cases are lower post-BAPCPA than pre-BAPCPA. It is difficult, under this model, to necessarily assert a chain of causation.

Figure 6.1

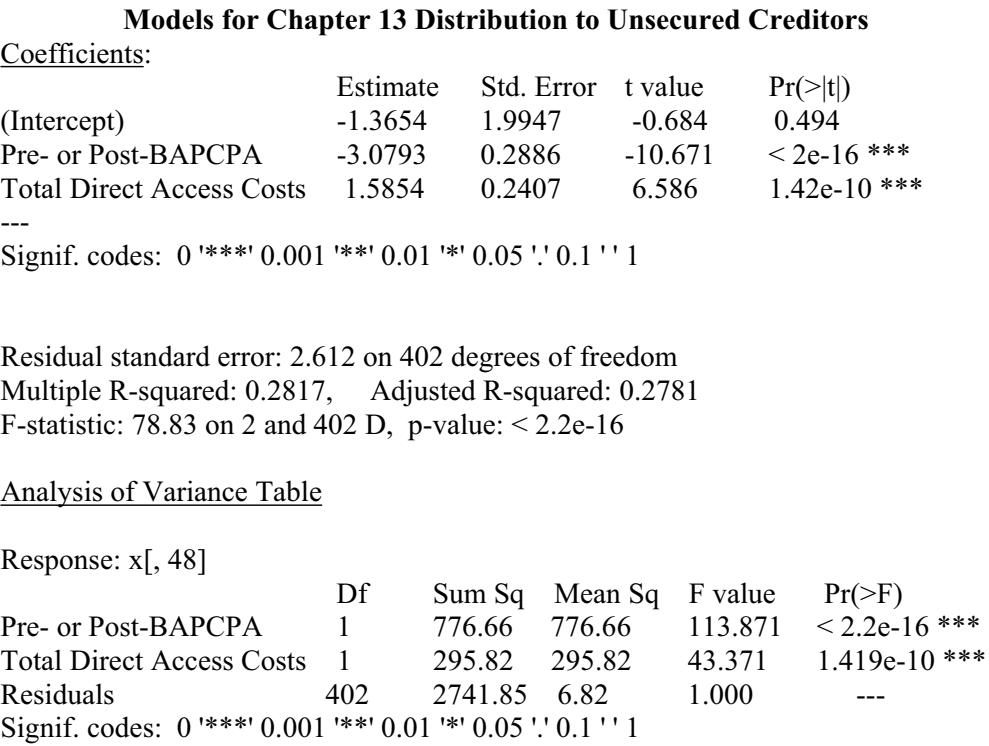
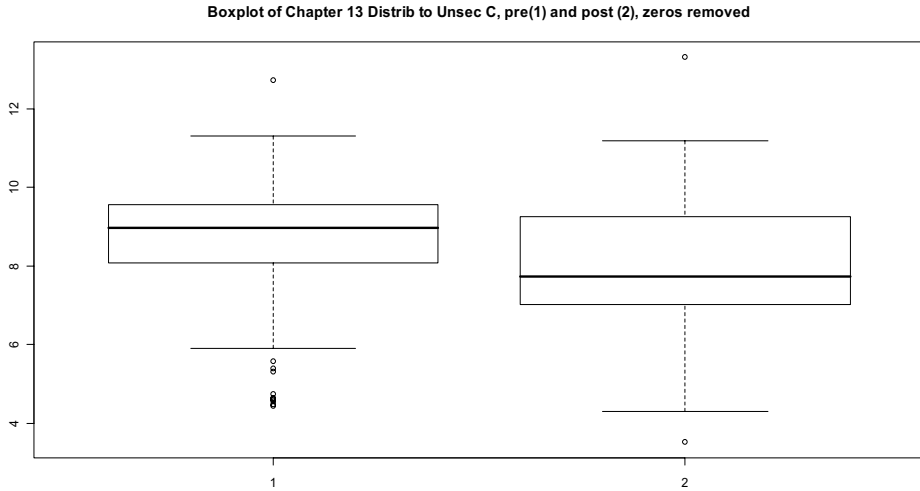


Figure 6.2 below is a box plot revealing lower distributions to unsecured creditors in chapter 13 cases post-BAPCPA, than they received pre-BAPCPA.

Figure 6.2

B. Chapter 7 Cases

Figure 7.1 below is a model analyzing distributions to unsecured creditors in chapter 7 cases (including no-asset cases) with a single predictor: "Post-BAPCPA." This model is complicated because distributions to unsecured creditors are sometimes zero. But, even eliminating those cases, the coefficient is negative.

Figure 7.1

Model for Chapter 7 Distribution to Unsecured Creditors

Coefficients:

	Estimate	Std. Error	t value	Pr(> t)
(Intercept)	11.5154	0.4120	27.95	<2e-16 ***
Pre- or Post-BAPCPA	-3.0849	0.3034	-10.17	<2e-16 ***

Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Residual standard error: 2.745 on 403 degrees of freedom
Multiple R-squared: 0.2042, Adjusted R-squared: 0.2022
F-statistic: 103.4 on 1 and 403 DF, p-value: < 2.2e-16

Figure 7.2 below is a model analyzing distributions to unsecured creditors in chapter 7 cases, excluding no-asset cases. The relationship to "Post-BAPCPA" is negative but not significant (most likely due to small sample size). There are several outliers, but omission of these outliers does not change the results. Figure 7.3 below is a box plot revealing lower distributions to unsecured creditors in chapter 7 cases post-BAPCPA than they received pre-BAPCPA.

Figure 7.2**Model for Chapter 7 adjusted, log, non-zero, Distribution to Unsecured Creditors**Coefficients:

	Estimate	Std. Error	t value	Pr(> t)
(Intercept)	-1.5683	1.7074	-0.919	0.36648
Pre- or Post-BAPCPA	-0.3837	0.3091	-1.242	0.22510
Total Direct Access Costs	1.2794	0.2015	6.349	8.47e-07 ***

Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Residual standard error: 0.8486 on 27 degrees of freedom

Multiple R-squared: 0.6967, Adjusted R-squared: 0.6405

F-statistic: 12.4 on 5 and 27 D, p-value: 2.621e-06

> fanova(tmp)

Analysis of Variance Table

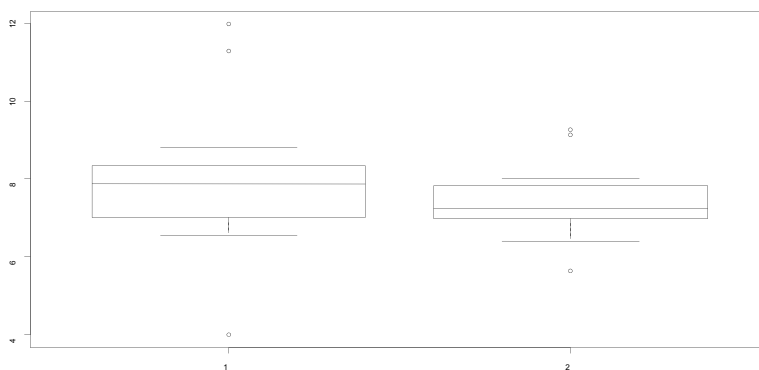
Response: x[i, 48]

	Df	Sum Sq	Mean Sq	F value	Pr(>F)
District	3	10.2735	3.4245	4.7555	0.008663 **
Pre- or Post-BAPCPA	1	1.1099	1.1099	1.5413	0.225098
Total Direct Access Costs	1	29.0310	29.0310	40.3143	8.472e-07 ***
Residuals	27	19.4432	0.7201	1.0000	---

Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1

Figure 7.3

**Box plot of Chapter 7 Adjusted Log
Non-Zero Distribution to Unsecured Creditors
Pre(1) and Post(2) BAPCPA**



CONCLUSION

The "new" consumer Bankruptcy Code, in operation for almost four years, set in motion a very different substantive policy for debt relief: it was cited by members of Congress as a new system that would weed out the system's "abusers" while still maintaining meaningful access for those debtors needing genuine relief.⁸⁹ In furtherance of this goal, the Bankruptcy Code now includes many new requirements that must be met by debtors, debtors' attorneys, and trustees. The Pilot Study examined both the direct and indirect costs of these new requirements.

The Pilot Study revealed that costs are higher post-BAPCPA than they were prior to the amendments' enactment. In particular, post-BAPCPA attorney fees increased significantly. The question remains whether the increase in costs is offset by the benefits of a more efficient system that is less vulnerable to abuse?⁹⁰ Or

⁸⁹ "With respect to the interests of creditors, the proposed reforms respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system." H.R. REP. NO. 109-31, *supra* note 2, at 2 (footnotes omitted).

⁹⁰ The concept of using a cost-benefit analysis in evaluating a public policy had its origin in the U.S. Federal Navigation Act of 1936. Pursuant to this Act, the U.S. Corp of Engineers was directed to carry out projects for the improvement of the waterway system only if "the benefit to whosoever they accrue are in

have the changes simply made the bankruptcy process more costly and less attractive to debtors and potential debtors?

The Pilot Study also analyzed whether, even in light of increased costs, creditors received a larger distribution than they received under the "old" bankruptcy regime. The study found that in both chapter 13 and chapter 7 cases, distributions to unsecured creditors decreased.

Many questions remain to be studied as part of the National Consumer Bankruptcy Costs Study. Quantitative data will be gathered from consumer bankruptcy petitions from a larger, nationally drawn sample. This data will be analyzed both descriptively and using regression analysis in order to identify significant predictors of observed changes. In addition, consumer bankruptcy attorneys, trustees, and bankruptcy judges will be surveyed in an effort to provide answers to some of the *why* questions raised by the raw data. Finally, focus groups comprised of bankruptcy professionals will be convened around the country allowing the opportunity to capture interactive discussions of the impact of BAPCPA on the costs of bankruptcy and on bankruptcy practice. Results of the National Consumer Bankruptcy Costs Study will be reported in December 2011.

excess of the estimated costs." D. Pierce, *Cost Benefit Analysis and Public Policy*, 14 OXFORD REV. OF ECON. POL'Y 84, 85 (1998).

