An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review

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INTRODUCTION

What is the ideal structure for appellate review? Without providing a definitive answer to the question, commentators have suggested several factors that may improve the process, and thus perhaps the accuracy, of appellate review. First, it is said that panels of judges are preferable to review by a single judge. Second, expertise in the relevant area of law is a benefit. Third, other indicia of lawfinding ability—such as the ability of lawyers and judges to focus on legal issues without the distraction of factual conflicts and the amenability of judges' schedules to careful contemplation and reflection—contribute to the quality of appellate review. Fourth, a court's adherence to traditional notions of appellate hierarchy, as exemplified by following its earlier precedents, has been deemed to produce better results. Finally, it is said that the independence of appellate judges—that is, the extent to which job features such as life tenure and a guaranteed salary tend to insulate judges from pressures to decide cases or issues one way or another—is of value.

In this Article, we endeavor to evaluate empirically the relative quality of appellate review. To do this, we rely upon data obtained from the appellate review of bankruptcy matters. The current federal bankruptcy appellate structure provides an excellent setting in which to study appellate review because it offers litigants two paths for obtaining appellate review. First, after the bankruptcy judge issues a ruling, litigants may have the district court—in the person of a single district judge—review that ruling. Alternatively, the parties may agree (in circuits that have them) to have the bankruptcy judge's

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ruling reviewed by a panel of bankruptcy judges—a so-called "bankruptcy appellate panel" or "BAP." Further appeal in both cases—whether from the district court or the bankruptcy appellate panel—lies with the proper federal circuit court of appeals.

We have collected data on affirmance rates in and citation rates to appellate bankruptcy opinions. Analyses of the data generally—and analyses of the citation data in particular—support the notion that BAP decisions in our study are perceived to be of greater quality than are district court decisions. First, we find support for the proposition that courts of appeals are more likely to uphold upon review the conclusions of BAPs than district courts. Second, BAP decisions are, with statistical significance, cited more frequently by bankruptcy courts, BAPs, federal courts of appeals, and courts in other circuits than are district court decisions. Only district courts are not more likely to cite BAP decisions than decisions rendered by district courts.

Our findings will be of interest both to theoreticians and policymakers. If courts try to reach "correct" decisions, then our findings generally buttress the various theories about how to structure appellate tribunals so as to maximize the quality of appellate review. This, in turn, should guide policymakers in designing appellate tribunals and appellate structures in general. In particular, multimember tribunals that adhere to traditional notions of appellate hierarchy and that have subject-matter expertise in the area of the appeal appear to be desirable. And, even if judges do not strive to resolve issues and cases "correctly," our findings still seem to support the notion that judges perceive that appellate tribunals that have certain attributes will reach correct conclusions. In this sense, our findings show the persuasive strength of the theoreticians' story, or at least judges' perceptions of the strength of that story.

The Article proceeds in the following manner. Part I provides an overview of the theoretical literature discussing the quality of appellate review. Part II discusses the means by which we undertook to evaluate the quality of appellate review: Part II.A presents the legal setting of appeals of core bankruptcy proceedings, and Part II.B sets out the hypotheses we sought to test. Part III explains how we tested the hypotheses. Part III.A details the data we compiled and the essential features of those data. The next two subparts present the findings of our statistical analyses, with Part III.B explicating the bivariate descriptive statistics and Part III.C presenting the results of regression tests we conducted. Part III.D interprets these results and considers the implications of our findings.

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I. EVALUATING THE QUALITY OF APPELLATE REVIEW

Assembling an exhaustive list of the ideal elements of appellate review would present no small task. However, the academic literature does suggest several attributes that will tend to contribute to better appellate review.

First, commentators laud the use of panels of judges, rather than single judges, to hear appeals. There are two justifications for this. First, to the extent that there is an objectively "correct" answer to a question of law posed on appeal, and to the extent that there is a greater than 50% chance that each appellate judge will reach that "correct" answer, the Condorcet Jury Theorem instructs that a panel of judges will more likely reach the "correct" answer than will a single appellate judge.[1] Second, even to the extent that one might question the validity of the assumptions underlying the applicability of the Condorcet Jury Theorem in the context of appellate review,[2] there is an argument that the collegial nature of multimember appellate panels contributes to reflective decisionmaking and thus to the quality of appellate review.[3]

A second factor that strengthens the quality of appellate review is expertise of the appellate decisionmaking body in the subject matter of the appeals it hears.[4] Thus, for example, Congress created the United States Court of Appeals for the Federal Circuit with an eye to

1. *See* Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 1022–23 (2004) (describing the Condorcet Jury Theorem).

2. *See* Jonathan Remy Nash, *A Context-Sensitive Voting Protocol Paradigm for Multimember Courts*, 56 STAN. L. REV. 75, 112–13 & 112 nn.130–31 (2003) (questioning the applicability of the Condorcet Jury Theorem in the context of appellate judicial decisionmaking).

3. *See, e.g.*, Harry T. Edwards, *The Effects of Collegiality on Judicial Decisionmaking*, 151 U. PA. L. REV. 1639, 1649 (2003) (arguing that collegiality contributes to sound decisionmaking that focuses on the legal issues at hand); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 100–02 (1986). *But see* Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (finding empirical evidence that judges on an appellate panel of the same political party are more likely to vote ideologically); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 316–25 (2004) (finding some evidence of ideological voting on federal courts of appeals).

4. *See* Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997) ("Specialization offers two major advantages: expertise and uniformity."). For an argument that it might benefit the legal system to have some judges with expertise in areas other than law, see Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1587–98 (2007).

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creating an appellate body with the expertise to deal effectively with the complex area of patent law.[5]

Third, courts and commentators identify general "lawfinding ability"—as distinct from expertise in particular areas of law—as a virtue for appellate review.[6] While the Supreme Court has characterized the presence of multijudge panels as "[p]erhaps most important" in assessing lawfinding ability,[7] it has also indicated other factors that tend to enhance lawfinding ability in the appellate setting. Specifically, lawfinding ability is greater when (i) the judges have schedules that allow time for reflection,[8] (ii) the judges resolve legal issues once the factual record is fully developed,[9] and (iii) the attorneys may focus on the relevant legal issues without the distraction of trial advocacy.[10]

A fourth factor that tends to be associated with the quality of appellate review is the extent to which an appellate court conforms to traditional appellate hierarchy.[11] Courts in the United States are organized according to a standard hierarchy: trial courts decide cases in the first instance, with a first appeal as of right to an intermediate appellate court and a second appeal to a high court at the discretion of

5. *See, e.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 7 (1989) (citing predictability and efficiency as reasons for creating a specialized patent court to relieve the burden of technical patent cases on generalist judges); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1114–17 (2004) (giving an account of the establishment of the Federal Circuit's exclusive appellate jurisdiction over patent law).

6. *See* Nash, *supra* note 1, at 1022.

7. Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991).

8. *Id.* at 231 (noting, with a negative connotation from the perspective of lawfinding ability, that district judges "preside alone over fast-paced trials").

9. *Id.* at 232.

10. *Id.* at 231–32.

11. *See, e.g.*, Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2047 (2004) (suggesting that appellate review and appellate hierarchy are integrally related by noting that "the various characteristics and functions of appellate review . . . suggest that some gradation of judicial authority is central to the nature of appellate review," and that "[a]n appellate system of review . . . is one defined by hierarchy"); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 998 (2002) ("[T]he development of an appellate hierarchy with collegial courts at the higher levels and stringent rules of vertical stare decisis operates structurally to ensure that no individual judge can, by his or her actions alone, inflict too much damage on the judiciary by making aberrant or overly ambitious decisions."); Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 68 (2006) ("The essence of the American system of precedent as experienced in practice resides in the great authority and hierarchical arrangement of the courts."). *But cf.* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 387–88 (2007) (arguing that the common principal-agent model for analyzing lower court efforts to fulfill appellate court mandates ignores the allocation of discretion to lower courts).

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that high court.[12] Within that hierarchy are rules of precedent that, while not absolute, create barriers against courts overruling earlier cases. As a general matter, under so-called horizontal stare decisis, high courts and intermediate appellate courts will follow their own earlier precedents.[13] Further, vertical stare decisis binds inferior courts generally to the precedents issued by superior courts within the hierarchy.[14]

It is true that court systems need not have the features of appellate hierarchy and stare decisis to function, nor indeed to function well.[15] Commentators debate whether Congress can statutorily alter or abrogate the traditional rules of stare decisis, as

12. *See, e.g.*, Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1607–08 (1995) (elucidating the traditional appellate hierarchy).

13. Absent en banc review, courts of appeals are bound by prior decisions issued by the court (independent of panel composition). *E.g.*, United States v. Myers, 200 F.3d 715, 720 (10th Cir. 2000).

In general, horizontal stare decisis does not extend beyond the court that issued an opinion to sibling courts of the same hierarchical level. While intermediate appellate courts will follow decisions issued by earlier panels of the same court—notwithstanding that the composition of the judges on the panels may vary—intermediate appellate courts generally are under no precedential obligation to follow decisions issued by sibling intermediate appellate courts of similar hierarchical rank. Thus, for example, a Ninth Circuit panel may find First Circuit precedent to be persuasive and choose to follow it, but stare decisis does not demand that the Ninth Circuit so act; rather, stare decisis leaves the Ninth Circuit free to disagree with and to disregard the First Circuit precedent. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 824–25 (1994). Also, the rule of horizontal precedent does not extend to trial courts, as discussed below. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003); Caminker, *supra*, at 825 ("[A] district court judge may ignore the decisions of 'foreign' courts of appeals as well as other district court judges, even within the same district." (footnote omitted)); Kornhauser, *supra* note 12, at 1609. *But see* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1095 (1994) (noting a "long tradition" of district judges deviating from prior precedent in the same district only in extraordinary circumstances); *infra* note 71 and accompanying text.

14. *See, e.g.*, Chemerinsky, *supra* note 4, at 111 ("[C]ourts generally issue written decisions that, when published, have precedential effect on future rulings involving different parties."); Susan B. Haire, Stefanie Lindquist & Donald R. Songer, *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 145 (2003) ("Appellate oversight in the lower tiers of the federal judicial hierarchy . . . provides a process through which circuit judges are expected to promote legal rules that will guide decision making in subsequent cases."); Kornhauser, *supra* note 12, at 1609.

15. For example, civil law systems do not rely upon as stringent a hierarchy, or upon rules of precedent as stringent. *See, e.g.*, Caminker, *supra* note 13, at 826; Kornhauser, *supra* note 12, at 1608; Thomas Lundmark, *Interpreting Precedents: A Comparative Study*, 46 AM. J. COMP. L. 211, 214 (1998) (reviewing INTERPRETIVE PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997)) ("One of the classic differences between civil-law and common-law jurisdictions is that the former . . . do not recognize judicial precedent as an independent source of law." (footnote omitted)). For an exposition, and critique, of the necessity and desirability of stare decisis, see Caminker, *supra* note 13, at 865–67.

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well as the normative question of whether it should.[16] Nonetheless, whether it is constitutionally mandated or normatively desirable, the assumption underlying the dominant U.S. judicial structure is that horizontal and vertical stare decisis provide precedential power to decisions by appellate courts. Assuming that judges seek to arrive at correct outcomes,[17] these standard rules of precedent presumably increase the quality of appellate review. It stands to reason that a court that knows that its opinions will bind itself, and possibly bind lower courts, will consider more carefully its reasoning before issuing judgments and opinions that announce new rules of law.[18] Relatedly, a focus on cases that raise novel legal questions should allow appellate courts to conserve judicial resources, apply those resources in cases in which they are truly needed, and thus to reach correct answers more frequently.[19]

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16. *Compare, e.g.*, Caminker, *supra* note 13, at 828–34 (arguing that the constitutional case for the binding nature of Supreme Court precedent on lower federal courts is "quite powerful"), *and* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577–85 (2001) (arguing in favor of the constitutional status of stare decisis), *with* John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503, 513 (2000) (arguing to the contrary), Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43, 92 (2001) (same), Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 204–07 (2001) (same), *and* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey?, 109 YALE L.J. 1535, 1546–47 (2000) (same).

17. *See* Kornhauser, *supra* note 12, at 1606 (taking as a baseline assumption in developing economic theory of stare decisis that "the 'judicial team' seeks to answer the expected number of 'correct' answers subject to its resource constraint"); *cf.* Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746–47 (1982) (discussing how judges belong to an "interpretive community" that subscribes to the rule of law).

Even if goals other than arriving at the correct outcome motivate judges, *see, e.g.*, Erin O'Hara, *Social Constraint or Implicit Collusion? Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 738–42 (1993) (arguing that judges' self-interest—including judges' interest in expanding their influence—explains the development of horizontal stare decisis); *infra* notes 100–102 and accompanying text, the fact remains that, to the extent that the U.S. judicial system substantially relies on the traditional hierarchical form and rules, the extent to which a court comports with that norm will increase the *perception* that it is reaching correct decisions.

18. *See* Kornhauser, *supra* note 12, at 1623 ("In a completely decentralized system each judge would have to attend to the caseload of every other judge in order to identify appropriate cases for review; in a hierarchical system, only the appellate judges need have a systemic perspective on caseload."); *cf. id.* at 1620 (noting that, absent horizontal precedent, "each judge is more likely to give *each case* intensive consideration" (emphasis added)); *id.* at 1624 (arguing in favor of "strict vertical precedent because the hierarchical structure creates a division of labor between levels of the hierarchy"); *id.* at 1625–27 (arguing in favor of horizontal precedent at the appellate, but not the trial, level).

19. *See* Kornhauser, *supra* note 12, at 1622–24; Caminker, *supra* note 13, at 839–43. Of course, a cost in such a system is that the first court may resolve the legal question incorrectly, and then bind future courts to that rule. *See* O'Hara, *supra* note 17, at 736 n.3 (identifying the "primary social cost of *stare decisis*" as "the entrenchment of bad decisions"); *see also* Lewis A.

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A fifth factor that many commentators identify as an ingredient of judicial quality is judicial independence.[20] It is said that judges who enjoy greater independence are less likely to be swayed by irrelevant, nonjudicial concerns. The American Founding Fathers subscribed to this view,[21] and accordingly vested Article III judges with presumptive life tenure and the guarantee of nonreduction in salary.[22]

II. INVESTIGATING APPELLATE STRUCTURE AND THE PERCEIVED QUALITY OF APPELLATE REVIEW

At its essence, an appeal involves a claim that a trial court committed some form of error—for example, failure to follow proper procedure or improper application of the law. Accordingly, we might say that one of the primary functions of an appellate court, if not the principal function, is to ascertain whether the alleged error truly occurred. As we have already discussed, theorists have posited various attributes that improve the quality of appellate review. While plausible that some of these factors may contribute more than others to improving the quality of appellate review, it seems reasonable to conclude that, on balance, as between two different appellate tribunals, the one that has more of the theorized features of quality appellate review will perform the appellate function better.

Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 67–73 (1989) (discussing reliance by a court on earlier decisions by that court, even if wrongly decided, as an optimization problem and as varying depending upon institutional structure).

There are other social benefits that rules of stare decisis provide—certainty, predictability, fairness, and consistency. *See* Caminker, *supra* note 13, at 843–56 (discussing the desire to avoid "delayed justice," the greater decisionmaking proficiency of superior courts, and uniform interpretation and application of law as consequentialist justifications for stare decisis); Kornhauser, *supra* note 12, at 74–78 (discussing fairness, competence, and certainty as justifications for stare decisis). These benefits, however, are not the result of the courts necessarily reaching correct conclusions. Indeed, these benefits would inhere if courts uniformly reached bad decisions. *See* Kornhauser & Sager, *supra* note 3, at 105 (contrasting consistency, soundness, and coherence).

20. *See, e.g.*, Daniel Berkowitz & Karen Clay, *The Effect of Judicial Independence on Courts: Evidence from the American States*, 35 J. LEG. STUD. 399, 422–24 (2006) (finding a strong correlation between judicial independence and court quality); Jonathan Remy Nash, *Prejudging Judges*, 106 COLUM. L. REV. 2168, 2171 (2006) (characterizing judicial independence and judicial accountability as "competing demands upon the judiciary"). *But see* Daniel M. Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development* 1 (Univ. S. Cal. Law Sch. Legal Studies Research Paper Series, Paper No. C06-1, 2006), *available at* http://ssrn.com/abstract=877490 ("There is some evidence that judicial independence is associated witb economic growth, but the evidence is mixed and causation is unclear.").

21. *See* THE FEDERALIST NOS. 78, 79, 81 (Alexander Hamilton); *id.* NOS. 47, 48, 51 (James Madison).

22. U.S. CONST. art. III, § 1.

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The two-tiered system of bankruptcy appeals is an excellent field for an empirical investigation of how alternative appellate structures may affect the quality of appellate review. The current appellate structure provides for appeals of bankruptcy court decisions in "core" bankruptcy proceedings to be heard by one of two appellate tribunals: federal district courts or federal bankruptcy appellate panels (commonly referred to as "BAPs"). Based on the criteria we identified above in Part I, we conclude that the BAP is the stronger of the two appellate courts—that is, better equipped to carry out the principal function of identifying alleged error. We investigate this hypothesis through the study of appeals in core bankruptcy proceedings. We seek to unearth evidence that will inform scholarly inquiry into the hallmarks of quality appellate review and that will illuminate areas warranting further exploration.

This Part sets the backdrop for our empirical study. First, we describe the bankruptcy judicial structure, with primary emphasis on the manner in which appeals progress through it. We then discuss our approach for empirically investigating the theoretical proposition that BAPs are the stronger of the two appellate courts in performing appellate function at the first tier of review. We finally develop a series of hypotheses to test the theory.

A. *The Bankruptcy Appellate Process*

Unlike any other part of the federal judicial system, the bankruptcy appeals process routinely involves two levels of intermediate review. This anomalous state of affairs can be traced to congressional reform efforts during the 1970s that sought to improve the quality of the bankruptcy court while simultaneously maintaining it in a subordinate relationship to the district court.[23]

Under the predecessor to the current Bankruptcy Code, the Bankruptcy Act of 1898,[24] district courts delegated much of their responsibility over bankruptcy cases to "bankruptcy referees," individuals appointed by a panel of district judges for a six-year term.[25] The limited role and status of the referees at the inception of the Bankruptcy Act expanded over time, which in turn increased the cadre of full-time judicial officers involved in the administration of

23. *See* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 123 (1997) (noting that the "double appeal system was a concession to the federal judges, a symbol of the subordination of the bankruptcy court to the district court").

24. *See* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

25. Posner, *supra* note 23, at 61–62.

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bankruptcy cases.[26] Eventually, the Supreme Court promulgated rules of bankruptcy procedure in 1973 that redesignated referees as "bankruptcy judges."[27] This change, however, did not remove the distinction between bankruptcy judges and Article III judges, including, for example, "prohibitions against bankruptcy judges using the elevators, parking lots, and dining rooms reserved for Article III judges."[28] Moreover, some Article III judges continued to refer to bankruptcy judges as "referees" in spite of the titular change.[29] Sentiments such as these infused their way into the policymaking debates over bankruptcy reform in the 1970s.

In 1970, Congress established the Commission on the Bankruptcy Laws of the United States to analyze the Bankruptcy Act and to suggest recommendations for its reform.[30] While the original resolution creating the Commission proposed that the Chief Justice would appoint two bankruptcy referees as commissioners, strident opposition—led by, among others, District Judge Edward Weinfeld, chair of the Judicial Conference's Committee on the Administration of the Bankruptcy System—resulted in passage of the resolution without constraints on whom the Chief Justice could appoint.[31] The Chief Justice did not appoint any bankruptcy referees to the Commission, instead appointing Judge Weinfeld and District Judge Hubert Will.[32] Judge Weinfeld's efforts resulted in the exclusion of bankruptcy referees from policymaking discussions on bankruptcy reform within the organizational framework of both the Commission and the Judicial Conference.[33] That the federal judiciary went to great lengths to oppose the inclusion of bankruptcy referees in the reform process highly suggests that Article III judges feared loss of power and prestige in the event Congress increased the power of bankruptcy

26. *See* Geraldine Mund, *Appointed or Anointed: Judges, Congress and the Passage of the Bankruptcy Act of 1978: Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 3–6 (2007).

27. BANKR. R. 901(7) (1973) (repealed 1978).

28. Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 2 (1985). Hearsay evidence suggests that at least one Article III judge viewed bankruptcy judges as occupying the professional status equivalent to a janitor. *See* Mund, *supra* note 26, at 12 n.34.

29. Posner, *supra* note 23, at 61 & n.25; *cf.* Mund, *supra* note 26, at 12 n.34 ("As late as 1978, even though Judge James Browning, then chief judge of the Ninth Circuit, specifically invited five bankruptcy judges to attend the circuit conference, Senior District Judge Lloyd George (formerly a bankruptcy judge) reports that 'they wouldn't call me "judge." They called me mister.' " (quoting Interview with Lloyd George (Dec. 20, 2004))).

30. Pub. L. No. 91-354, 84 Stat. 468 (1970).

31. Mund, *supra* note 26, at 7.

32. *Id.* at 8.

33. *Id.*

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referees.[34] It is this dynamic that underlies the current bankruptcy judicial structure and the anomaly of double appeals. Only one level of intermediate appellate review would have been needed had Congress made today's bankruptcy judges coequals with district court judges, but that was not to be the case.

With enactment of the Bankruptcy Code in 1978,[35] Congress effectuated a complete overhaul of the federal bankruptcy system that had been in place for eighty years. While there were proposals to vest bankruptcy judges with Article III status,[36] Congress ultimately rejected that notion, a decision supported by most current and former Article III judges.[37] Congress instead decided to establish the bankruptcy courts as "adjuncts" of the federal district courts. Bankruptcy jurisdiction was vested statutorily in the district courts, yet the statute also directed that all of that jurisdiction was to be exercised by the bankruptcy courts, which were to be staffed by non-Article III judges.[38]

The Supreme Court rejected the 1978 Act's jurisdictional structure in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[39] The Court in *Marathon* held that the 1978 Act violated Article III by vesting federal judicial power in non-Article III bankruptcy judges. The decision forced Congress to repair the constitutional infirmity. Lobbying by Article III judges led Congress yet again to reject a solution of affording bankruptcy judges Article III status.[40] Instead, Congress simply modified the 1978 structure. The Bankruptcy Amendments and Federal Judgeship Act of 1984

34. *See* Posner, *supra* note 23, at 75.

35. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C. §§ 101–1532 and in scattered sections of 28 U.S.C.).

36. *See* Countryman, *supra* note 28, at 7–8.

37. *See id.* at 8–9; Posner, *supra* note 23, at 77 ("The federal judges opposed the creation of more independent bankruptcy courts, because (1) they would lose their appointment power over bankruptcy judges, and thus one of their main patronage opportunities, and (2) their status would be diluted through the vast increase in the number of federal judicial positions.").

Interestingly, as Congress considered various proposals for reorganizing the court structure of the bankruptcy system in its reform efforts from the 1970s that led to enactment of the Bankruptcy Code, bankruptcy judges did not seek Article III status. Instead, they lobbied Congress for appointment by the judicial council, rather than the president, for two reasons: First, they believed their merit would be properly recognized in a nonpolitical judicial appointment process; and, second, they feared that sitting judges would lack the political connections necessary for presidential appointment. *See* Mund, *supra* note 26, at 20–21, 24–25, 29. For a political economic analysis of the 1978 Act's treatment of bankruptcy judges, see Posner, *supra* note 23, at 74–94.

38. *See* 28 U.S.C. § 1471(b), (c) (Supp. II 1978), *invalidated by* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

39. 458 U.S. at 87.

40. Countryman, *supra* note 28, at 31.

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statutorily established the bankruptcy judges, who are appointed by the courts of appeals,[41] as "unit[s]" of the district courts.[42] Thus, parties technically should file bankruptcy cases in federal district court. However, the Act authorizes each district court to "refer" "any or all cases" or "proceedings" to the bankruptcy judges.[43] District courts in turn have implemented "standing orders" to refer bankruptcy cases in the first instance to the bankruptcy courts.[44]

In determining the scope of the bankruptcy judge's authority to resolve a dispute within a bankruptcy case,[45] it is necessary to categorize the proceeding as core or non-core. Absent the consent of all parties, bankruptcy judges may only issue recommendations for the resolution of non-core proceedings, with de novo district court review upon objection by either party.[46] Appellate review thereafter lies to the appropriate federal court of appeals,[47] and thence to the Supreme Court,[48] in line with the typical federal appellate hierarchy.

Core proceedings, on the other hand, are those that lie at the heart of a bankruptcy case.[49] Bankruptcy judges are empowered to

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41. 28 U.S.C. § 152(a)(1) (Supp. V 2005).

42. *Id.* § 151 (2000); *see also id.* § 152(a)(1) (Supp. V 2005) ("Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.").

43. *Id.* § 157(a) (2000).

44. 9 AM. JUR. 2D *Bankruptcy* § 731 (2008); Bussel, *supra* note 13, at 1066 & n.12.

45. Disputes in bankruptcy cases generally assume one of two forms: (1) an adversary proceeding, or (2) a contested matter. Adversary proceedings include, for example, a proceeding to recover money or property; a proceeding to determine the validity, priority, or extent of a lien; a proceeding to object to or revoke a discharge; and a proceeding to determine the dischargeability of a debt. FED. R. BANKR. P. 7001. Such proceedings are initiated and advance much as any other federal lawsuit, insofar as Part VII of the Federal Rules of Bankruptcy Procedure, which governs such proceedings, virtually incorporates the Federal Rules of Civil Procedure (occasionally with modification). *See, e.g.*, *id.* 7003 (FED. R. CIV. P. 3); *id.* 7004(a) (portions of FED. R. CIV. P. 4); *id.* 7005 (FED. R. CIV. P. 5); *id.* 7012(b) (FED. R. CIV. P. 12(b)–(h)); *id.* 7013 (FED. R. CIV. P. 13); *id.* 7014 (FED. R. CIV. P. 14); *id.* 7056 (FED. R. CIV. P. 56). Disputes between parties that are not adversary proceedings are called "contested matters," and they proceed according to less complex procedures than adversary proceedings—including request for relief by motion rather than the filing of a complaint. FED. R. BANKR. P. 9014; *see also* Khachikyan v. Hahn (*In re* Khachikyan), 335 B.R. 121, 125 (B.A.P. 9th Cir. 2005) ("In a contested matter, there is no summons and complaint, pleading rules are relaxed, counterclaims and third-party practice do not apply, and much pre-trial procedure is either foreshortened or dispensed with in the interest of time . . . .").

46. The Judicial Code describes a non-core proceeding as "a proceeding that is not a core proceeding but is otherwise related to a case under title 11." 28 U.S.C. § 157(c)(1) (2000 & Supp. V 2005).

47. 28 U.S.C. §§ 1291, 1292 (2000).

48. *Id.* § 1254(1).

49. Section 157(b)(1) of the Judicial Code speaks of "core proceedings arising under title 11, or arising in a case under title 11." *Id.* § 157(b)(1). In turn, section 157(b)(2) lists examples of core proceedings, which include matters concerning (1) administration of the estate, (2) the allowance

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resolve these cases definitively, in the first instance, with appellate review to follow.[50] Here, however, there may be more than one possible appellate path.

The statute authorizes the judicial council of each circuit to establish a "bankruptcy appellate panel"—commonly known as a "BAP"—comprised of bankruptcy judges from that circuit.[51] BAPs are now constituted—and have been constituted since 1996—in the First, Sixth, Eighth, Ninth, and Tenth Circuits.[52] For a BAP to be empowered to hear appeals from bankruptcy courts in a given district, a majority of district judges in the district must vote to authorize it.[53] In circuits that have created BAPs and in districts that have authorized the BAP to hear appeals, the default rule is that, unless a party elects otherwise, appeals of bankruptcy judges' rulings in core proceedings will lie to the BAP.[54] Appeals from BAP rulings lie to the

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of claims, (3) objections to discharge, and (4) plan confirmation. *Id.* § 157(b)(2) (2000 & Supp. V 2005).

50. *Id.* § 157(b)(1) (2000). Unless, that is, the district court withdraws the reference to the bankruptcy court. *Id.* § 157(d). In that case, the district court hears the matter in the first instance, with appeals in the ordinary course lying to the court of appeals and then the Supreme Court. *See supra* notes 47–48.

51. 28 U.S.C. § 158(b)(1). The statute also authorizes the creation of intercircuit BAPs, *id.* § 158(b)(4), but none has yet been created. Much as the bankruptcy court is a unit of the district court, the bankruptcy appellate panel may be seen as "a unit of the federal courts of appeals." Admin. Office of the U.S. Courts, The Federal Judiciary—United States Courts of Appeals, *Bankruptcy Appellate Panels*, http://www.uscourts.gov/courtsofappeals/bap.html (last visited Oct. 11, 2008); *see also* 28 U.S.C. § 158(b)(1) (requiring BAPs to be established and BAP judges to be appointed by the circuit judicial council); B.A.P. 8TH CIR. R. 8016A(a)(1) ("The Clerk of the United States Court of Appeals for the Eighth Circuit shall serve as the Clerk of the United States Bankruptcy Appellate Panel for the Eighth Circuit."). *Compare* Coyne v. Westinghouse Credit Corp. (*In re* Globe Illumination Co.), 149 B.R. 614, 620–21 (Bankr. C.D. Cal. 1993) (describing BAP as unit of the circuit court), *with* Kathleen P. March & Rigoberto V. Obregon, *Are BAP Decisions Binding on Any Court?*, 18 CAL. BANKR. J. 189, 197 (1990) (describing BAP as unit of the district court).

52. The 1994 amendments to the Bankruptcy Code were designed to encourage circuit courts to create BAPs by directing that each circuit "shall establish" a BAP unless the circuit judicial council finds that existing judicial resources are insufficient to establish one or that its establishment would result in undue delay or increased cost to parties in cases under the Bankruptcy Code. 28 U.S.C. § 158(b)(1). The six regional circuits that voted against establishing BAPs "concluded that the appellate process was functioning well as already constituted and that BAPs would create undue delay or increase the cost of appeals." Henry J. Boroff, *The Precedential Effect of Bankruptcy Appellate Panel Decisions*, 103 COM. L.J. 212, 214 n.10 (1998) (citing Elizabeth Abbott, *Bankruptcy Review Panel Makes Debut*, NAT'L L.J., Mar. 3, 1997, at B1). For a historical discussion of BAPs, see Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1648–60 (1997); *infra* note 75.

53. 28 U.S.C. § 158(b)(6). In the mid-1990s, when a Second Circuit BAP was in existence, "only three districts participate[d]—and these together typically receive[d] less than a third of all bankruptcy petitions filed in the Second Circuit." Camp, *supra* note 52, at 1660. These facts, presumably, played a large role in the ultimate decision to disband the Second Circuit BAP.

54. 28 U.S.C. § 158(c)(1) (2000 & Supp. V 2005).

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circuit courts of appeals.[55] Parties may seek discretionary review by the Supreme Court of rulings by the courts of appeals.[56]

If either the appellant or the appellee so elects—or if the circuit has not created a BAP or, even if it has, if the district court in question has not voted to authorize BAP appeals—then the district court (in the person of a single district judge) initially hears appeals of bankruptcy court rulings in core proceedings.[57] The judgment of the district court may then be appealed to the appropriate circuit court of appeals,[58] with discretionary Supreme Court review as the remaining appellate step.[59] In short, then, certain parties in some circuits have an option between two possible appellate paths.[60] We illustrate this in Figure 1.[61]

55. *Id.* § 158(d)(1) (Supp. V 2005).

56. *Id.* § 1254(1) (2000).

57. *Id.* § 158(c)(1) (2000 & Supp. V 2005).

58. *Id.* § 158(d)(1) (Supp. V 2005).

59. *Id.* § 1254(1) (2000).

60. *See generally* Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 490–500 (elucidating the differences between the standard federal judicial hierarchy and the bankruptcy appellate system).

61. We should note that a third possible appellate path not yet discussed—that of direct appeal from the bankruptcy court to the court of appeals—exists for a limited set of circumstances. By virtue of amendment to the Judicial Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, appeal may proceed directly to the court of appeals pursuant to a certification procedure if one of the following circumstances exists: (1) the appeal involves a question of law unresolved by the court of appeals for the circuit or by the Supreme Court; (2) the appeal involves a matter of public importance; (3) the appeal involves a question of law requiring resolution of conflicting decisions; or (4) the appeal may materially advance the progress of the case or proceeding in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A) (Supp. V 2005).

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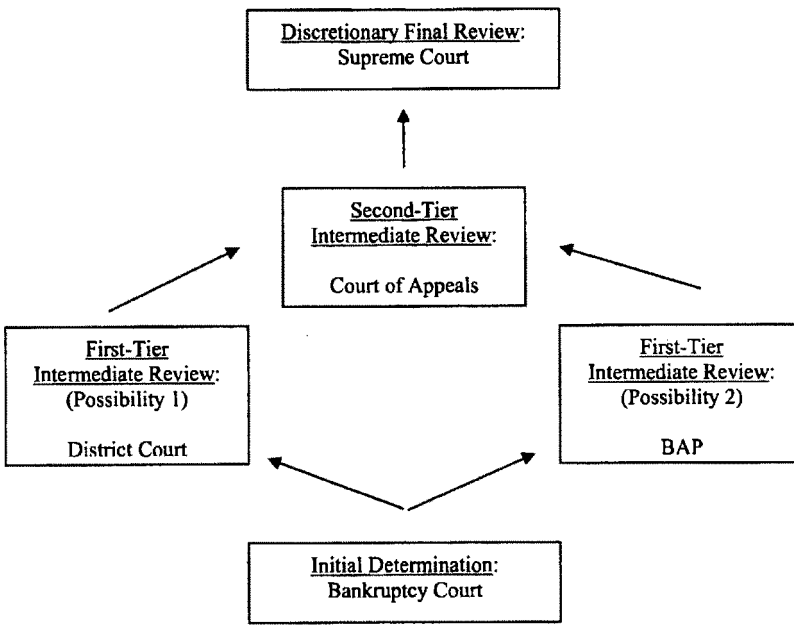
FIGURE 1
FEDERAL BANKRUPTCY APPELLATE STRUCTURE
FOR CORE PROCEEDINGS



A comparison of BAPs to district courts suggests that BAPs have more of the features of quality appellate review than do the district courts. First, bankruptcy appellate panels are collegial bodies that decide cases in three-judge panels. Indeed, bankruptcy judges who serve on BAPs themselves believe that reviewing cases in panels of judges benefits decisionmaking.[62] By contrast, bankruptcy appeals to district courts are heard by a single district judge.

Second, the bankruptcy judges who comprise bankruptcy appellate panels are (by virtue of their appointment as bankruptcy

62. Ralph R. Mabey, *The Evolving Bankruptcy Bench: How Are the "Units" Faring?*, 47 B.C. L. REV. 105, 123 (2005).

judges) presumably experts in bankruptcy law.[63] Thus, they are well suited to resolve legal issues that might arise in core bankruptcy proceedings.[64] District judges, by contrast, are more often characterized as generalists in the law, without special training or experience in bankruptcy law.[65]

The third factor—"other" lawfinding ability[66]—appears to favor neither district judges nor bankruptcy appellate panels. Attorneys filing appellate briefs may focus on the legal issues without the distractions of trial advocacy, whether the briefs are filed with the district court or appellate panel. Similarly, both district judges and bankruptcy appellate panels hear legal issues once a factual record has been established. Last, while district judges and bankruptcy judges both preside over trials, neither the district judge hearing a bankruptcy appeal, nor bankruptcy judges sitting on a bankruptcy appellate panel, are presiding over a trial as part of the appellate process.[67]

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63. *See, e.g.*, *id.* at 107 ("Most of the bankruptcy judges were bankruptcy practitioners in their prior careers."); *see also id.* at 123 (noting that, of a random survey of bankruptcy judges in 2005, "[a]bout 83% . . . were bankruptcy practitioners before taking the bankruptcy bench," and that, "[o]f the 17% . . . who were not bankruptcy practitioners, almost all came from a business law background, as commercial litigators or corporate transactional lawyers," and further noting that the surveyed bankruptcy judges felt that their prior experience was very helpful on the bench); *cf. id.* at 113–16 (discussing the trend among bankruptcy judges to hire more permanent, as opposed to term, law clerks, and noting that those bankruptcy judges who preferred permanent clerks often hired clerks with legal experience, and in particular practice experience in bankruptcy law).

64. *See* Chemerinsky, *supra* note 4, at 128 ("[T]he BAP is desirable because it allows specialist bankruptcy judges to replace nonspecialist federal district court judges."); *see also* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1230–31 (2006) (reporting empirical finding that bankruptcy judges as specialized actors perform "at least as well" as generalist judges in terms of not exhibiting typical biases often reflected in judgments).

65. One might argue that even district judges with no experience in bankruptcy before ascending to the bench gain some experience by virtue of hearing a steady stream of bankruptcy cases. A study by the Federal Judicial Center of the bankruptcy appellate structure, however, reached the opposite conclusion, observing that "[t]he number of first-level reviewers greatly exceeds the number of bankruptcy judges producing the judgments reviewed, and appellate caseloads are spread thinly among district judges, giving few judges much opportunity to develop bankruptcy expertise." Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 627 (2002).

66. We employ the modifier "other" because, as noted above, the Court suggested that the use of multi-judge panels is "[p]erhaps most important" in assessing lawfinding ability. *Supra* note 7 and accompanying text.

67. It is this factor that, presumably, vests district judges with lawfinding ability when they sit by designation on court of appeals panels. *See* Nash, *supra* note 1, at 1031 (explaining that the better term is lawfinding "ability" and not lawfinding "expertise"). One might argue that lawfinding ability is enhanced to the extent that the judge (whether district or bankruptcy) enjoys relief from her other responsibilities while hearing appeals. This seems not to be the case, however, at least for bankruptcy judges:

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Fourth, bankruptcy appellate panels conform to traditional notions of appellate review: their rulings are generally seen to be binding on future bankruptcy appellate panels drawn from the same circuit.[68] Further, at least one BAP has held that its decisions are binding on all bankruptcy courts within that circuit,[69] even if the bankruptcy courts themselves do not share this view.[70] In contrast,

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> When asked how BAP service affects their service as a bankruptcy judge, several of the [surveyed bankruptcy judges] indicated that it required adjustments to their bankruptcy court trial and hearing schedule and that it substantially added to their workload. Some of the Survey Participants suggested that those bankruptcy judges who serve full-time on the BAP should have the option of employing an additional law clerk. One Survey Participant indicated that service on the BAP was "like having a second job."

Mabey, *supra* note 62, at 122 (footnote omitted); *see also* Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329, 1330 (1993) ("The fundamental truth which is the basis for this article is that the bankruptcy caseload in many districts in this country is so overwhelming that the bankruptcy judges are sorely pressed in the struggle to cope with it.").

68. BAPs in three circuits—the Eighth, Ninth, and Tenth—have reached this conclusion. *E.g.*, Concannon v. Imperial Cap. Bank (*In re* Concannon), 338 B.R. 90, 95 (B.A.P. 9th Cir. 2006) (reaffirming that the BAP will not overrule its prior rulings unless an intervening circuit court or Supreme Court decision, or subsequent legislation, undermines those rulings); Salomon N. Am. v. Knupfer (*In re* Wind N' Wave), 328 B.R. 176, 181 (B.A.P. 9th Cir. 2005) (same); Blagg v. Miller (*In re* Blagg), 223 B.R. 795, 804 (B.A.P. 10th Cir. 1998) ("Our decision is dictated by the principle that we are bound by prior panel decisions. A panel cannot overrule the judgment of another panel of the court."), *appeal dismissed*, 198 F.3d 257 (10th Cir. 1999); Smolen v. Hatley (*In re* Hatley), 227 B.R. 757, 761 (B.A.P. 10th Cir. 1998) (same), *aff'd*, 194 F.3d 1320 (10th Cir. 1999); Luedtke v. Nationsbanc Mortgage Co. (*In re* Luedtke), 215 B.R. 390, 391 (B.A.P. 8th Cir. 1997) (relying on circuit court precedent that circuit court panel decisions bind subsequent circuit court panels to announce rule that BAP decisions bind subsequent BAP panels); Ball v. Payco-Gen. Am. Credits, Inc. (*In re* Ball), 185 B.R. 595, 597 (B.A.P. 9th Cir. 1995) ("We will not overrule our prior rulings unless a Ninth Circuit Court of Appeals decision, Supreme Court decision or subsequent legislation has undermined those rulings.").

69. Philadelphia Life Ins. Co. v. Proudfoot (*In re* Proudfoot), 144 B.R. 876, 879 (B.A.P. 9th Cir. 1992) ("[B]AP decisions originating in any district in the Ninth Circuit are binding precedent on all bankruptcy courts within the Ninth Circuit in the absence of contrary authority from the district court for the district in which the bankruptcy court sits."); *In re* Windmill Farms, Inc., 70 B.R. 618, 622 (B.A.P. 9th Cir. 1987), *rev'd on other grounds*, 841 F.2d 1467 (9th Cir. 1988).

70. *Compare, e.g.*, Ore. Higher Educ. Assistance Found. v. Selden (*In re* Selden), 121 B.R. 59, 62 (D. Ore. 1990) (stating that BAP decisions bind only those bankruptcy courts sitting in the district out of which the appeal arose), *with* Daly v. Deptula (*In re* Carrozzella & Richardson), 255 B.R. 267, 273 (Bankr. D. Conn. 2000) (rejecting argument that substantial motivation of Congress in creating BAPs was to generate a uniform body of bankruptcy law within the circuits, concluding that there is no principled reason why decisions of a BAP should have more precedential authority than those of district courts, and finding it odd and unseemly, if not unconstitutional, for a BAP—comprised of three non-Article III judges—to be generating for bankruptcy judges, and perhaps also for district judges, the law of the circuit until the circuit court had spoken), *In re* Virden, 279 B.R. 401, 409 n.12 (Bankr. D. Mass. 2002) (quoting *In re Carrozzella*, 255 B.R. at 272-73), *and* Life Ins. Co. of Va. v. Barakat (*In re* Barakat), 173 B.R. 672, 676–80 (Bankr. C.D. Cal. 1994) (concluding that BAPs bind bankruptcy courts on matters arising in core proceedings even though district courts do not), *aff'd on other grounds*, 99 F.3d 1520 (9th Cir. 1996). For further discussion regarding the precedential effect of BAP decisions,

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one district judge is generally not bound to follow the ruling of another district judge—even one in the same district—on matters of bankruptcy or otherwise.[71] And bankruptcy courts have held that they are not bound by the holding of a single district judge on a multijudge district court.[72] Therefore, BAPs comport more with the standard model of appellate hierarchy than do district courts hearing bankruptcy appeals.[73]

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see *Salomon N. Am.*, 328 B.R. at 181 n.2 (noting the Ninth Circuit BAP's prior holding that its decisions bind bankruptcy courts within the circuit, but also recognizing that some bankruptcy courts have rejected that holding); Zimmer v. PSB Lending Corp. (*In re* Zimmer), 313 F.3d 1220, 1225 n.3 (9th Cir. 2002) (describing "binding nature of Bankruptcy Appellate Panel decisions" as "an open question," and "join[ing] Judge O'Scannlain's call for the [Ninth Circuit] Judicial Council to consider an order clarifying whether the bankruptcy courts must follow the BAP"); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1989) ("BAP decisions cannot bind the district courts themselves. As article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction."); *id.* at 472 (O'Scannlain, J., concurring) (writing "separately to propose that the Judicial Council of this Circuit consider adoption of an order requiring that Bankruptcy Appellate Panel . . . decisions shall bind all of the bankruptcy courts of the circuit, subject to the restrictions imposed by article III so well discussed in the [court's] opinion"); Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance*, 69 AM. BANKR. L.J. 525, 531 (1995) ("Even stronger arguments can be made against any *stare decisis* effect at all for the opinion of a bankruptcy appellate panel."); Chemerinsky, *supra* note 4, at 129–30 ("I would argue that district courts should be bound by BAP decisions. The view that an Article I court can never bind an Article III court is an overstatement."); Trujillo, *supra* note 60, at 494 n.23 (arguing that BAPs function as district courts, and accordingly cannot issue binding opinions).

71. *See* Baisier & Epstein, *supra* note 70, at 529 (noting that "[n]one of the district judges is bound by a bankruptcy appeals decision of a district judge from one of the other 93 district courts," and that "district judges in multi-judge districts are not even bound by the bankruptcy appeals decisions of other judges from that same district"). *But see* Bussel, *supra* note 13, at 1095–96; *id.* at 1096 n.116 ("I am aware of only a handful of cases where district judges in the same district adopt differing views of the same question of bankruptcy law and in those cases one or both of the decisions is unpublished.").

72. *See, e.g.*, *In re* Romano, 350 B.R. 276, 281 (Bankr. E.D. La. 2005) ("[A] single decision of a district court in this multi-judge district is not binding upon this court."); *id.* at 277–81 (summarizing authority for both sides); Paul Steven Singerman & Paul A. Avron, *Of Precedents and Bankruptcy Court Independence*, 22 AM. BANKR. INST. J. 1, 56–57 (2003) (noting conflict, gathering authorities, and finding that a majority of bankruptcy courts have held that they are not bound by the decision of a single district court judge in a multi-judge district); Trujillo, *supra* note 60, at 494 (arguing that a bankruptcy decision by one bankruptcy judge cannot bind other bankruptcy judges in the same district, and that a bankruptcy decision by one district judge cannot bind other district judges or bankruptcy judges in the same district). *But see* Chemerinsky, *supra* note 4, at 129 ("While a district court exercising original jurisdiction cannot bind other district courts, its decisions should be binding on bankruptcy courts when the district court is serving as an appeals court.").

73. Our point here is simply that BAPs seem to fit more cleanly into the standard hierarchical appellate model than do district courts sitting on appeal, not that that is necessarily mandated under the current statutory scheme or normatively desirable. The latter two points are debatable.

With respect to the current statutory scheme, there are statements in the legislative history indicating that Congress created the BAPs to help foster greater uniformity in bankruptcy law.

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See, e.g., 140 CONG. REC. S14,463 (daily ed. Oct. 6, 1994) (statement of Sen. Heflin) ("It should be recognized that the creation of a bankruptcy appellate panel service can help to establish a dependable body of bankruptcy case law."). *But see Daly*, 255 B.R. at 273:

> Any suggestion that Congress' authorization of the creation of BAP Services was motivated substantially by its desire to create a uniform body of bankruptcy law within the circuits is not supported by the BAP Service's history, which instead suggests that BAPs were conceived primarily as a tool for relieving district court judges of an ofttimes undesirable and burdensome aspect of their workload.

At the same time, one can point to the certification procedure in section 158(d)(2) of the Judicial Code—under which courts of appeals may decide interlocutory appeals when, among other circumstances, the question raised is one "as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States," 28 U.S.C. § 158(d)(2)(A)(i) (Supp. V 2005)—as evidence that Congress chose other, explicit means of increasing bankruptcy law uniformity. *See* H.R. REP. NO. 109-31, at 148 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 206.

Commentators are divided over whether BAP decisions bind bankruptcy courts. *Compare, e.g.*, Bussel, *supra* note 13, at 1098 (arguing that bankruptcy courts should consider both BAP and district court decisions as binding precedent), Chemerinsky, *supra* note 4, at 128 ("From [a] functional perspective, I think that BAP decisions clearly should be binding on bankruptcy courts."), *and* Camp, *supra* note 52, at 1676–84 (arguing that BAPs should bind both bankruptcy and district courts within a circuit), *with* Trujillo, *supra* note 60, at 492 ("[O]nly opinions of the U.S. courts of appeals and the U.S. Supreme Court bind bankruptcy courts by reason of formal hierarchy."), *and* Caminker, *supra* note 13, at 870–72 (arguing that theoretical considerations argue in favor of bankruptcy courts being bound by district court decisions). Moreover, strict application of vertical stare decisis is difficult, insofar as it is not certain until after the bankruptcy court has issued judgment into which appellate path the case will proceed. *Cf.* Camp, *supra* note 52, at 1682:

> Since bankruptcy judges do not know at the time they make a decision whether it will be a BAP or a district court that will hear any appeal, and since no district court has so far considered itself bound by a BAP, it is no surprise that many bankruptcy judges feel free to disregard BAP decisions.

Compare this to the United States Tax Court, which considers itself bound by its own precedent, except insofar as it has also held that it is bound "to follow a Court of Appeals decision which is squarely in point where appeal from [the] decision lies to that Court of Appeals." Golsen v. Comm'r, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). Because the court of appeals to which a taxpayer will appeal is determined by his state of residence, 26 U.S.C. § 7482(b)(1) (2000), it is always clear at the time of decision which circuit's precedent is binding.

As to the normative question, there are those who argue that an increase in application of stare decisis would be normatively desirable. *See, e.g.*, Boroff, *supra* note 52, at 215, 221 (arguing that the current dual track appellate system makes it difficult to generate binding precedent, and that the system be changed to allow for development of binding precedent); Bussel, *supra* note 13, at 1095 n.114 ("[L]ogically . . . district courts . . . as well as bankruptcy courts might be bound by prior BAP decisions."). There also are strong arguments, however, that a structure other than the standard appellate hierarchy might be desirable. First, one of the bases on which the pyramidal appellate hierarchy functions is the notion that issues "percolate" up from the lower courts to the higher courts. It is the desire for percolation that, commentators argue, restricts (and properly so) application of horizontal stare decisis to the same court and not to sibling courts of equal hierarchical stature. *See* Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831, 834 (1990) ("The rejection of intercircuit stare decisis is premised upon—and given the obvious costs in deferring uniformity, is explainable only in terms of—the benefits of dialogue among the circuits."); *see also* Maxwell Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL.

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L. REV. 1309, 1351–52 (1995) (arguing, based upon social choice theory, that the Supreme Court "would desire intra- but not inter-circuit stare decisis," since such a regime "avoids the irrationality that would result from cyclical preferences *within* particular circuits, while, at the same time, reducing the likelihood that legal doctrine that results from path manipulation in a *given* circuit will be replicated *across* the circuits."). *But cf.* O'Hara, *supra* note 17, at 772 (arguing that the absence of stare decisis across circuits is justified on the ground that "an agreement to follow another circuit's precedents will not save the judges in a particular circuit much time"). In the case of appeals of core bankruptcy matters, there are, anomalously, two levels of intermediate appeals. Perhaps, then, in order for issues properly to percolate up to the courts of appeals, there ought to be no horizontal stare decisis at the first intermediate level—that is, at the level of the BAPs and district courts.

Second, given that the BAPs and district courts lie at the same hierarchical level, it might not make sense for horizontal stare decisis rules to apply to BAPs but not district courts. Perhaps, once again, horizontal stare decisis should not apply at all. One might argue, to the contrary, that horizontal stare decisis should apply to both courts. *See* Chemerinsky, *supra* note 4, at 129.

Third, perhaps bankruptcy law and society would be better served by a system other than the traditional appellate hierarchy, at the lower levels of appeals of core bankruptcy matters. Civil law systems rely far less on precedent than does the common law system dominant in the United States. *See supra* note 15 and accompanying text. Civil law judiciaries decide cases based largely upon the proper interpretation of the governing "code." Insofar as bankruptcy turns upon the content of a code—the "Bankruptcy Code"—bankruptcy seems to provide an ideal setting for application of such judicial review. *Cf.* Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 216 (2000) (arguing for "a softer, more nimble, rule of precedent [that] would improve the quality of outcomes in particular bankruptcy cases"). Interestingly, while Ponoroff facially argues in favor of increased reliance on a civil law jurisprudential approach in the bankruptcy context, his arguments do not seem to accord so well with the principles underlying the structure of judicial review in civil law systems. Dean Ponoroff laments:

> The opportunity for two levels of appeal as a matter of right has contributed to the crush of reported decisions, a phenomenon that, in my view, has hampered pragmatic and considered decisionmaking in the bankruptcy courts. That problem is compounded by the disturbing rise in adherence to textual or plain meaning methods of interpretation in bankruptcy cases, particularly in the decisions of the circuit courts of appeal[s].

Id. at 181 (footnotes omitted). Ponoroff thus seems more concerned with allowing different interpretations of the Bankruptcy Code to percolate up through the judiciary. He also seems to embrace more of a realist conception of bankruptcy law than a civil law conception, explaining that "[a] more forward-looking, and less technical and 'busy,' code would abate the pressure to decide and review cases on the kind of formal, textualist grounds that typically prove the most difficult to distinguish in subsequent cases." *Id.* at 216. Indeed, Ponoroff acknowledges that he endorses "a different style of judging, one that eschews a strict adherence to precedent, but not by any means civilian, to the extent that style is perceived as the unimaginative and rote application of positive legal rules to particular fact situations performed by a cadre of mid-level bureaucrats." *Id.* at 223. "Rather," he endorses "a style that actually places greater responsibility on the decisionmaker to reason analogically from code principles, as well as from subsidiary sources such as custom, usages, settled jurisprudential doctrine, and equity." *Id.* at 223–24.

To the possible objection that the fact that the higher levels of bankruptcy judicial review—courts of appeals and the Supreme Court—rely upon the standard appellate hierarchy, one can point to the coexistence of Louisiana's civil law system within the United States judicial system as an example of how such a system can function. *See, e.g.*, Shelp v. Nat'l Sur. Corp., 333 F.2d 431, 439 (5th Cir. 1964) (in determining Louisiana law under *Erie*, federal courts should apply precedential rules that Louisiana's highest court would apply); Alvin Rubin, *Hazards of a*

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It is only the final criterion—the question of judicial independence—on which district courts have some advantage over bankruptcy appellate panels. Judicial independence has been considered to be a function of life tenure and the guarantee of nonreduction in salary. Both attributes are enshrined in the Article III status conferred on district judges, whereas bankruptcy judges who sit on bankruptcy appellate panels do not get the benefit of either attribute because of their non-Article III status.[74]

On this basis, one might readily conclude that district judges enjoy judicial independence while bankruptcy judges do not. But this would be a facile conclusion that improperly casts the assessment of judicial independence as an all-or-nothing proposition—that is, judicial independence is attainable only through life tenure and the guarantee of nonreducible remuneration. Careful consideration of the matter, however, suggests that the difference may be narrower than that generally perceived by courts and commentators.

A more felicitous account reveals that the term of appointment for bankruptcy judges, the standard for their removal from office, the treatment of their compensation, and the manner of their appointment afford bankruptcy judges a moderate amount of judicial independence. First, although bankruptcy judges are not granted life

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Civilian Venturer in Federal Court: Travel and Travail on the Erie *Railroad*, 48 LA. L. REV. 1369 (1988). *But see* John Burritt McArthur, *Good Intentions Gone Bad: The Special No-Deference* Erie *Rule for Louisiana State Court Decisions*, 66 LA. L. REV. 313 (2006). Indeed, the notion that bankruptcy courts do not consider themselves bound by rulings of single district judges in multi-judge districts—and therefore presumably do at some point consider themselves bound once a number of district judges in the same district reach the same conclusion—resembles the "jurisprudence constante" under which precedent develops in Louisiana and other civil law systems. *See, e.g.*, Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century*, 63 LA. L. REV. 1, 6 (2002) (describing jurisprudence constante as a doctrine under which "a case may be used to discern a pattern [of decisions] that may aid in interpretation"); Stearns, *supra*, at 1357 n.143 (discussing jurisprudence constante); *cf.* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 257 (1985) (proposing, "as a special rule of *stare decisis*, the practice that when the first three circuits to decide an issue have decided it the same way, the remaining circuits defer to that decision"). Any potential difficulties in integrating a civil law precedential model into the larger common law-based federal court system would be mitigated by the fact that the vast majority of bankruptcy cases are not appealed beyond the first level of intermediate appellate review. *See* Bussel, *supra* note 13, at 1091; *cf.* Chemerinsky, *supra* note 4, at 122 (noting that "[b]ankruptcy law matters seem to fit in between . . . two poles" in that "bankruptcy statutes are filled with ambiguities that require court interpretation," while there also "probably exist particular types of disputes where the law-giving function of the court is less important and alternative dispute resolution would be potentially more efficient"). *But see* Bussel, *supra* note 13, at 1097 ("I would have difficulty understanding why Congress would intend BAPs and district courts to serve merely as rest-stops on the road to real appellate review.").

74. *See supra* notes 36–38 and accompanying text.

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tenure, their terms last fourteen years.[75] Moreover, their appointments may be renewed,[76] and indeed in most cases are renewed.[77] While judicial independence may be fostered by life tenure, the renewable, fourteen-year term of bankruptcy judges effectively allows them to serve as long as many of their Article III counterparts.[78] Even if the absence of life tenure gives Congress leeway to reduce the term of bankruptcy judges[79]—an option that it has never exercised since it created the bankruptcy courts—the fourteen-year, renewable term still grants a fair amount of judicial independence to bankruptcy judges.[80]

Second, the Judicial Code prescribes that a bankruptcy judge may be removed "only for incompetence, misconduct, neglect of duty, or physical or mental disability,"[81] whereas the Constitution mandates that an Article III judge will hold his or her office only "during good Behaviour."[82] The broad language of the good-behavior standard for

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75. 28 U.S.C. § 152(a)(1) (2000 & Supp. V 2005).

76. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 303, 110 Stat. 3847, 3852 (providing that, "[w]hen filling vacancies, the court of appeals may consider reappointing incumbent bankruptcy judges under procedures prescribed by regulations issued by the Judicial Conference of the United States").

77. *See* Mabey, *supra* note 62, at 107 (noting that, of the 115 bankruptcy judges who left the bench in the decade prior to 2005, only 10 did so as a result of not being reappointed); *see also* U.S. Court of Appeals for the Ninth Circuit, Bankruptcy Judge Reappointment Regulations § 1(e) (2001), *available at* http://207.41.19.15/Web/OCELibra.nsf (follow "Bankruptcy" hyperlink; then follow "Bankruptcy Judge Reappointment Regulations" hyperlink) (last visited Oct. 25, 2008) (providing that "[t]he court of appeals shall decide whether or not to reappoint the incumbent [bankruptcy] judge *before* considering other potentially qualified candidates" (emphasis added)). To the contrary, one might argue that the fact that bankruptcy judges must seek, and generally receive, reappointment, demonstrates the *absence* of judicial independence.

78. *See In re* Grabill Corp., 976 F.2d 1126, 1129 (7th Cir. 1992) (Easterbrook, J., dissenting) ("Rhetoric about life tenure notwithstanding, there is no substantial difference between the 14-year term to which bankruptcy judges are appointed and service 'during good Behavior' for Article III judges."). Article III judges (other than Supreme Court Justices) whose service on the federal bench terminated between 1983 and 2003 served, on average, twenty-four years. Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 618 chart 4 (2005).

79. While Congress may reduce the duration of the fixed-term appointment for bankruptcy judges at any point via statute, the constitutionally guaranteed life tenure granted to Article III judges could only be stripped away via constitutional amendment (an exponentially more difficult proposition).

80. *See* COMM'N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 95 (1973) (proposing various reforms "to enhance the real and apparent judicial independence of bankruptcy judges," including "[e]xtension of the term of the bankruptcy judges from the present six years to the proposed fifteen years"); *cf.* Nash, *supra* note 20, at 2196 (observing that "one can question the degree to which life tenure in fact secures for judges a larger measure of judicial independence").

81. 28 U.S.C. § 152(e) (2000).

82. U.S. CONST. art. III, § 1.

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removal arguably encompasses the grounds set forth by the Judicial Code for removal of bankruptcy judges. Moreover, while Article III judges may be removed only by impeachment,[83] and bankruptcy judges may be removed by a majority of all of the judges of the judicial council of the bankruptcy judge's circuit,[84] the practical reality is that very few bankruptcy judges have been removed from office.[85] If the specter of removal does not appear to be greater for bankruptcy judges than Article III judges, it follows that bankruptcy judges need not limit their behavior in ways that would prevent them from acting as independently as Article III judges.

Third, although the Supreme Court has identified the "fixed and irreducible" compensation provided to Article III judges by the Compensation Clause as a hallmark of an independent judiciary,[86] the lack of a similar guarantee in the salaries of bankruptcy judges should not be overemphasized in assessing their judicial independence. Since Congress enacted the Bankruptcy Code in 1978 and created the current scheme for federal bankruptcy judgeships, the salary of bankruptcy judges has only increased.[87] Moreover, since 1987, bankruptcy judges have received a salary at an annual rate that equals 92% of the salary of district court judges (as determined by section 135 of the Judicial Code).[88] Thus, for the past two decades, bankruptcy judges have had fixed compensation that nearly equals that of district court judges.

Finally, if one takes into account the substantive differences in the appointment processes of bankruptcy judges and district judges and the consequences that flow therefrom, it becomes clear that bankruptcy judges may be better situated than district judges to resist the political influence that would threaten to compromise an independent judiciary. While the judicial appointment process for

83. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (Brennan, J., plurality opinion) ("The 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment."). *But see* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE. L.J. 72 (2006) (arguing that federal judges may be removed from office by means other than impeachment).

84. 28 U.S.C. § 152(e).

85. *See* Mabey, *supra* note 62, at 107 (listing reasons for departure from the bench for the 115 bankruptcy judges who did so in the decade prior to 2005, but not mentioning removal as one of those reasons). On the other hand, one might argue that the low rate of removal of bankruptcy judges reflects the *absence* of judicial independence: bankruptcy judges have behaved in a way so as to avoid removal.

86. *N. Pipeline*, 458 U.S. 50 at 59 (Brennan, J., plurality opinion).

87. *See* Mabey, *supra* note 62, app. A.

88. 28 U.S.C. § 153(a). Congress amended the Judicial Code in 1987 to provide for the current salary structure for bankruptcy judges. Pub. L. No. 100-202, § 408(a), 101 Stat. 1329, 1329-26 (1987).

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Article III judges has become increasingly politicized, evidenced most recently by the tendency for close examination of the ideology of nominees,[89] the appointment process for bankruptcy judges has seemingly remained nonpolitical. The Judicial Code charges the appointment task to the court of appeals for the circuit in which there exists a vacancy for a bankruptcy judgeship.[90] Thus, the appointment process involves judges selecting judges—a presumably nonpolitical process.[91] This nonpolitical process has produced a bankruptcy bench

89. *See* Nash, *supra* note 20, at 2182–92.

90. 28 U.S.C § 152(a)(1) (Supp. V 2005); *id.* § 152(a)(3) (2000).

91. The possibility exists, however, that the judicial appointment of judges may substitute judicial patronage for political patronage and thus compromise judicial independence. *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 673 (2002). *But see* Posner, *supra* note 23, at 81–82 ("Appointments by the judicial branch are not as controversial, because judges belong to different parties."). Furthermore, one may argue that, insofar as the circuit judges are a product of a politicized appointment process, they themselves may be politicized and thus infuse politics into the appointment process for bankruptcy judges. The merit-selection process for appointing bankruptcy judges, however, seems to have provided little opportunity for such politicization to take root. A quick look at the manner in which the Ninth Circuit conducts this process (one that seems representative of the process conducted in other circuits) suggests why this has been the case.

Interested candidates must submit applications for the position. *See* Judicial Council of the Ninth Circuit, Regulations Governing the Appointment of U.S. Bankruptcy Judges § 2.02 (2001), *available at* http://207.41.19.15/Web/OCELibra.nsf (follow "Bankruptcy" hyperlink; then follow "Regulations Governing the Appointment of U.S. Bankruptcy Judges" hyperlink) (last visited Oct. 25, 2008). The Circuit advertises nationally and encourages the federal judicial districts within the circuit to advertise intensely and locally. *Id.* § 2.01. A local merit screening committee, which generally consists of (1) the chief judge of the district in which the bankruptcy judge is to be appointed, (2) the president of the state bar association, (3) the president of one or more local bar associations within the district, (4) the dean of a law school located within the district, (5) the administrative circuit judge of the circuit geographical unit in which the bankruptcy judge is to be appointed, and (6) the chief bankruptcy judge of the district in which the bankruptcy judge is to be appointed. *Id.* § 3.02(a). The committee recommends five applicants to the Court-Council Committee on Bankruptcy Appointments, whose membership includes three circuit judges who serve as voting members. *See id.* §§ 3.03(c)(1), 3.04(b). The Court-Council Committee circulates a report to the Ninth Circuit Judicial Council recommending a candidate for appointment, and that report will be deemed to be the Judicial Council's recommendation to the Court of Appeals (unless the Council determines that the Court-Council Committee should reconsider its recommendation). *Id.* §§ 3.04(c)(5), 3.05(a). The recommended candidate is appointed upon a majority vote of the members of the Court of Appeals. 28 U.S.C § 152(a)(3) (2000).

For the argument that the nonpolitical nature of the bankruptcy bench may be attributable to the opacity of the process for selecting bankruptcy judges, see Rafael I. Pardo, *The Utility of Opacity in Judicial Selection*, 64 N.Y.U. ANN. SURV. AM. L. (forthcoming 2008), *available at* http://ssrn.com/abstract=1205002.

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populated mostly by specialists with bankruptcy expertise[92] who themselves could be characterized as nonpolitical.[93]

When one considers the type of jurist produced by the judicial selection process for bankruptcy judges in conjunction with their term of appointment, the standard for their removal, and the treatment afforded to their compensation, it would appear that bankruptcy judges have achieved a considerable degree of judicial independence.[94] Accordingly, while the district court seems to enjoy some advantage over BAPs with respect to this final attribute identified as improving the quality of appellate review, the advantage is not likely to be substantial. We summarize the differences in the attributes of the BAPs and district courts below in Table 1.

TABLE 1
STRUCTURE OF DISTRICT COURTS AND BANKRUPTCY APPELLATE PANELS

First-Tier Appellate Court	Number of Judges	Bankruptcy Expertise	Other Lawfinding Ability	Traditional Appellate Hierarchy	Judicial Independence
District Court	Single judge	Unlikely	Some	Weak	Strong
Bankruptcy Appellate Panel	Panel of three judges	Yes	Some	Strong	Moderate

B. Hypotheses

Insofar as BAPs exhibit more of the features associated with quality appellate review than do federal district courts, the discussion in Part I suggests that BAPs will provide a higher quality of

92. *See* Mabey, *supra* note 62, at 107 ("Most of the bankruptcy judges were bankruptcy practitioners in their prior careers.").

93. *Cf.* Resnik, *supra* note 91, at 670 ("Turn first to the advantages of judicial appointment of judges. As a few details of current practices illustrate, the judiciary has selected a high-quality and relatively nonpolitical corps of judges . . . .").

94. This state of affairs can be traced to congressional efforts in the 1970s to elevate the status of bankruptcy judges. Congress established in 1970 the Commission on the Bankruptcy Laws of the United States to evaluate the then-existing bankruptcy system and to suggest recommendations for its reform. Pub. L. No. 91-354, 84 Stat. 468 (1970). In its report, the Commission envisioned that improvements in the appointment, tenure, and compensation of bankruptcy judges would enhance their "real and apparent judicial independence." COMM'N ON THE BANKR. LAWS OF THE U.S., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt.1, at 95 (1973).

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bankruptcy appellate review than their district court counterparts—assuming, of course, that the question of judicial independence does not outweigh other factors. Many challenges stand in the way of investigating this general claim, chief among them the difficulty in empirically testing the "correctness" of the dispositions rendered by the appellate court. Knowledge of this would be crucial for purposes of ascertaining whether the appellate court had appropriately performed its appellate function—that is, identifying error in those instances when it occurred. Making such a determination would necessarily involve content analysis of appellate opinions according to a particular metric of correctness. It is difficult to develop such a metric without infusing a degree of inherent subjectivity into its design. What we may deem to be a "correct" decision may be "incorrect" according to others. Accordingly, at the initial stage of empirical inquiry, we are not persuaded that detailed content analysis of appellate opinions is warranted.[95]

Absent detailed content analysis of appellate opinions, how might we empirically proceed with our inquiry into the quality of appellate review? Although we cannot empirically test the "correctness" of decisions, we can empirically test the *perception* held by other actors within the bankruptcy judicial system of the correctness of those decisions. For those bankruptcy appeals that proceed to the second tier of review, we can consider whether the court of appeals deemed proper the disposition rendered by the first-tier appellate court.

There are several ways in which the rate at which a higher court upholds a lower court's disposition may shed light upon judicial perceptions of correctness of lower court decisions.[96] First, there is a tautological sense in which what an appellate court says is, by

95. Professor Frank Cross has expressed a similar view in his empirical study of decisions rendered by U.S. Courts of Appeals:

> [T]here are typically nonfrivolous legal arguments for each side in circuit court cases, so it is impossible to code certain cases as being legally correct (or incorrect) without the researcher second-guessing and effectively overriding the judge. Such an approach offers an unreliable tool for evaluating judicial decisions because it probably reflects more about the researcher than about the judges being evaluated. Research requires a more objective tool for evaluating the law.

FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 46–47 (2007).

96. *But see* Wagner & Petherbridge, *supra* note 5, at 1127–28 (noting the limits of "result-oriented statistical studies"); Stephen J. Choi & G. Mitu Gulati, *Bias in Judicial Citations: A New Window into the Behavior of Judges?* 5 (N.Y.U. Law & Econ. Research Paper Series, Paper No. 06-29, 2006), *available at* http://ssrn.com/abstract=913663 (using empirical data to argue that judges of one political party are more likely to cite opinions authored by judges of the same party, especially in particular "high stakes" settings).

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definition, correct (unless, that is, the appellate court decision is itself reversed). Thus, if an appellate court affirms the disposition of a lower court, then the lower court's disposition was correct. Second, one can presume that the appellate court wishes to resolve the legal issues "correctly" for the parties and for future courts.[97] The law generally calls upon appellate courts to examine legal issues de novo without deference to the reasoning or conclusion of the court below.[98] Still, if the appellate court ultimately reaches the same conclusion as the court below, then it is accurate to say that the appellate court perceived the lower court's conclusion to be correct.[99]

However, courts of appeals may not always affirm a decision because they believe the earlier decision was "correct." Judges need not be so selfless. Indeed, there is a school of thought that views judges, like all people, as self-interested actors.[100] Judges may be interested in keeping their jobs—for bankruptcy judges, this translates to reappointment. Insofar as district judges enjoy Article III status, they have life tenure and are guaranteed not to suffer any salary reductions. Still, even Article III judges may have dreams of

97. *See supra* note 17.

98. *See, e.g.*, Concannon v. Imperial Capital Bank (*In re* Concannon), 338 B.R. 90, 93 (B.A.P. 9th Cir. 2006) ("[W]e review the bankruptcy court's conclusions of law and interpretation of the Bankruptcy Code *de novo*."); Official Unsecured Creditors Comm. of Valley-Vulcan Mold Co. v. Ampco-Pittsburgh Corp. (*In re* Valley-Vulcan Mold Co.), 237 B.R. 322, 326 (B.A.P. 6th Cir. 1999) (stating that conclusions of law by bankruptcy court are reviewed by BAP de novo); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 470 (2006).

99. It is possible that, notwithstanding the legal standard to the contrary, appellate courts do not always reexamine legal issues de novo in practice. Perhaps, for example, courts of appeals are inclined to rely upon the expertise of BAPs (*sub rosa*, of course, since the law dictates otherwise) and thus are inclined to affirm BAP opinions. Or, perhaps equally, the appellate courts might more often than not affirm district court opinions on the ground that district judges enjoy Article III status and thus are independent. In either case, it would be accurate to view an appellate court affirmance as embracing the lower court opinion as correct.

100. *See* O'Hara, *supra* note 17, at 737–38 (suggesting that judges make decisions "to impose their normative views, beliefs, and mores on [society]"); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 39 (1993) ("Judges are rational, and they pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do.").

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higher office.[101] Article III judges—and, for that matter, BAP judges—may also wish to avoid the "ignominy" of reversal by a higher court.[102]

Even if BAP judges and district judges have an aversion to reversal, that ought not to change appellate judges' behavior in terms of upholding the conclusion of lower court decisions, assuming at least that the reappointment or elevation process does not demand political decisionmaking.[103] Put another way, a judge—whether a bankruptcy judge serving on a BAP or a district judge—who wants to be reappointed or elevated has essentially the same incentive to decide cases correctly as do judges who simply want to decide the disputes before them correctly. As such, a court reviewing a first-level intermediate bankruptcy appellate decision—whether a panel of a court of appeals or the Supreme Court—should adopt the conclusion of the lower court if it deems that conclusion to be "correct." Similarly, appellate court judges should seek to affirm correct decisions—and reverse incorrect ones—even if their motives are not strictly to reach correct outcomes.

Based upon the foregoing, we offer the following hypothesis.

Hypothesis 1: Courts of appeals more likely will uphold the dispositions rendered by BAPs than those rendered by district courts.

Citation rates provide yet another basis on which to test empirically the *perceived* correctness of an appellate opinion.[104] To the

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101. *See* Nash, *supra* note 20, at 2196. Indeed, Professor Resnik has identified such careerism by bankruptcy judges. *See* Resnik, *supra* note 91, at 673 (observing that "[a]n increasingly well-trodden path is for a person to shift from magistrate or bankruptcy judge to district court judge"). A recent study of the bankruptcy bench, however, indicated that only eight of the 115 bankruptcy judges who left the bench from 1995 to 2005 did so as a result of appointment to an Article III judgeship. Mabey, *supra* note 62, at 107.

102. *See, e.g.*, Caminker, *supra* note 13, at 827 & n.40 and the authorities cited therein; *see also* Nash, *supra* note 20, at 2197–98 (discussing the desire of Article III judges to avoid impeachment, public chastisement, and overruling by the legislature).

103. Note, however, that other motivations may explain bankruptcy judges' behavior. *See, e.g.*, LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005) (arguing that bankruptcy judges in different districts compete for large corporate bankruptcy cases); Marcus Cole, *'Delaware Is Not a State': Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845, 1890–93 (2002) (arguing that, in order to conform to dominant state culture favorable to corporations, Delaware bankruptcy judges compete for corporate bankruptcy filings).

104. *See, e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976) (arguing that citation practices are not essentially a matter of taste but rather are systematic and susceptible to empirical study); John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613 (1954); John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S.

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extent that citation of one court by another reflects the citing court's view that the other court was "correct" in some way, the notion of correctness is, in different ways, both narrower and broader than correctness in the context of affirmation on direct appeal. It is narrower in that the citing court well may be citing a case not based upon a broad holding, but rather based upon some narrow holding or even dicta. It is broader in that, unlike a court that affirms a lower court's disposition even though it disagrees with its reasoning, a court that cites to another court's decision positively at some level agrees with some aspect of the court's reasoning.[105] Of course, there may be situations where a court cites another court's opinion simply because it perceives the other court's opinion to be binding precedent.[106] For this reason, we consider the results of extracircuit citations and citations by courts of appeals to BAPs and district courts—settings where there is no issue of binding precedent and citation is purely a matter of choice—to be especially informative.[107]

Within this context, one can point to two broad notions as to why courts cite other courts' opinions; both accord with our broad understanding of "correctness." First, a court may cite to another court's decision because it is truly influenced by the other court's reasoning.[108] If this is true, then the citing court in some sense finds the other court's reasoning to be "correct." Alternatively (or perhaps in addition), a court may cite to another court's decision not so much to explain the basis for its decision as to justify that decision, thus

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CAL. L. REV. 381 (1977) [hereinafter Merryman, *Toward a Theory of Citations*]; *cf.* William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 271–76 (1998) (noting that "[c]itations are at best a crude and rough proxy for measuring influence," and identifying potential drawbacks and limitations to empirical analyses of judicial citations).

105. *See* Landes & Posner, *supra* note 104, at 251 & n.3 (excluding from citation study "citations indicating rejection of the cited case as a precedent"). Our study also includes only positive citations. *But see* Landes et al., *supra* note 104, at 273 (deciding "not [to] distinguish . . . between favorable, critical, or distinguishing citations" insofar as "[c]ritical citations, in particular to opinions outside the citing circuit, are also a gauge of influence since it is easier to ignore an unimportant decision than to spell out reasons for not following it").

106. *See* Landes & Posner, *supra* note 104, at 251 (excluding from citation study nonprecedential citations).

107. David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC'Y REV. 337, 340–41 (1997) (stating that cases cited for their influential nature will depend more on the quality of the decisions than the stature of the cited court).

108. *See id.* at 339 (suggesting that citations may "indicate intercourt communication and influence on judicial decisionmaking"); *cf.* McKenna & Wiggins, *supra* note 65, at 651 ("The availability of published opinions is generally thought to be an important aspect of the appellate process because written opinions provide guidance to judges and litigants by explaining the reasons for the appellate decision.").

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making the "primary function" of citations one of "legitimation."[109] Even if a court simply cites to another court to legitimate its own conclusions, we would say that the citing court perceives of the other court's reasoning as "correct" in some sense. Indeed, the citing court is using the citation to bolster the perception that its own reasoning and conclusions are "correct."

In light of the foregoing, and as detailed below, we proceed to test the *perceived* correctness of an appellate opinion by considering (1) the propensity of other federal courts within the bankruptcy judicial structure to cite the opinions issued by first-tier appellate courts, (2) the depth of treatment given to such opinions by federal citing courts (including direct quotation),[110] and (3) the immediacy with which such opinions garner a citing reference. Accordingly, we offer the following additional hypotheses.

Hypothesis 2A: Federal courts more likely will positively cite to BAP opinions than to district court opinions.

Hypothesis 2B: Federal courts will positively cite to BAP opinions more frequently than to district court opinions.

Hypothesis 3: Courts of appeals will cite more frequently to BAP opinions than to district court opinions.

Hypothesis 4: Bankruptcy courts will cite more frequently to BAP opinions than to district court opinions.

Hypothesis 5: BAPs will cite more frequently to BAP opinions than to district court opinions.

Hypothesis 6: District courts will cite more frequently to district court opinions than to BAP opinions.

Hypothesis 7: Federal courts outside of the circuit of the first-tier appellate court that issued the opinion (extracircuit federal courts) will cite more frequently to BAP opinions than to district court opinions.

Hypothesis 8: Positive federal citing references will afford a greater depth of treatment to BAP opinions than to district court opinions.

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109. Walsh, *supra* note 107, at 339.

110. *Cf. id.* at 342 (distinguishing between "strong" and "weak" citations).

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Hypothesis 9A: Positive federal citing references are more likely to quote directly BAP opinions than district court opinions.

Hypothesis 9B: Positive federal citing references will directly quote BAP opinions more frequently than district court opinions.

Hypothesis 10: The time within which a federal citing reference will be made to opinions issued on appeal by BAPs will be faster than to those issued by district courts.

Notably, in Hypotheses 2B, 3, 4, 5, and 7, we hypothesize that BAP opinions will be cited more often than district court opinions. We suggest this on the ground that several factors weigh in favor of the conclusion that BAPs will resolve issues of bankruptcy law "correctly," while only one factor—judicial independence—weighs in favor of district courts.

It seems to us highly probable, a priori, that bankruptcy judges and BAP judges are unlikely to be concerned with the fact that the bankruptcy judges who serve on BAPs do not enjoy Article III status.[111] Accordingly, we have developed Hypotheses 4 and 5. Hypothesis 3 is to similar effect. It seems to us that courts of appeals would be more focused on the structural factors favoring BAPs than the lack of Article III status—particularly with respect to subject-matter expertise.[112] Note first that, to the extent that the absence of Article III status may suggest a lack of independence vis-à-vis the issues in the case or the parties, that problem is greatly ameliorated by the fact that the parties must have consented in order to have the BAP issue a decision in the first place. Second, court of appeals judges presumably do not need the buffer of Article III status to remind them that they sit several notches above bankruptcy judges and BAPs on the judicial food chain.[113]

The same cannot be said for district judges. That district judges lobbied *against* giving bankruptcy judges Article III status demonstrates how important it is to district judges that bankruptcy

111. *See* McKenna & Wiggins, *supra* note 65, at 628 ("Bankruptcy appellate panel (BAP) judges provide specialized bankruptcy expertise that their bankruptcy colleagues . . . value highly as a source of authority.").

112. *See id.* at 678 ("Circuit judges, on average, have less specialized knowledge than bankruptcy judges, particularly those selected to serve on BAPs.").

113. It is also conceivable that courts of appeals in circuits that have BAPs are somewhat favorably inclined to cite to those BAPs, to the extent that they consider the BAPs to be adjuncts of the courts of appeals. *See supra* note 51.

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judges not enjoy this status.[114] Further, district judges lie on the same level as BAPs on the bankruptcy appellate hierarchy.[115] In short, it seems that district judges will think of BAPs as coequals in terms of hierarchy at best, and as subordinates at worst. Accordingly, we think it comparatively less likely that district judges, as opposed to other federal judges, would look to opinions authored by BAPs as opposed to district judges. It is on these bases that we preliminarily offer Hypothesis 6.

Given our hypotheses that other courts within the bankruptcy judicial structure are more likely to cite to BAP opinions (with the exception of Hypothesis 6), we further hypothesize that the underlying motivations prompting such citation practices will also lead these courts to discuss BAP opinions in greater detail and to cite to BAP opinions with more immediacy. We thus propose Hypotheses 9 and 10.

We now turn to evidence from the findings of our study and use that evidence to evaluate our hypotheses empirically.

III. EMPIRICAL ANALYSIS OF THE PERCEIVED QUALITY OF APPELLATE REVIEW: EVIDENCE FROM APPELLATE BANKRUPTCY OPINIONS

This Part presents the results of our empirical study of appellate bankruptcy opinions issued both at the first-tier and second-tier levels of appellate review in the bankruptcy judicial system. We test the hypotheses discussed above in Part II.B through the use of quantitative methodology and look for patterns that point to a relationship between the type of appellate court and the manner in which others perceive the quality of review provided by the court. In doing so, we seek to evaluate the theoretical assumptions that have evolved regarding those attributes considered to improve the quality of appellate review. We emphasize, however, that we do not purport to provide either a definitive or exhaustive account. We readily admit that we have chosen to study a narrow set of data from a snapshot in time that is not necessarily representative of the general universe of bankruptcy appeals. Aware of these limitations, we nonetheless have strong convictions that a great deal of valuable information can be gleaned from the data and that this information will help guide future discussions. Ultimately, our goal is to begin a shift away from generalization and abstraction and to generate a more concrete

114. *See supra* note 37 and accompanying text.

115. *See supra* fig.1.

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understanding of how differences in appellate structure affect the quality of appellate review.

This Part proceeds as follows. Part III.A sets forth the selection criteria used to constitute the sample for our study, discusses the major variables that we studied and incorporated into our statistical models, and details the general characteristics of the sample. Part III.B presents descriptive statistics comparing perceptions of the quality of appellate review provided by BAPs with perceptions of the quality of appellate review provided by district courts. Part III.C presents the central findings from our regression models, and Part III.D interprets our results.

If those attributes identified as improving the quality of appellate review truly do so, we would expect to see a positive relationship between BAP opinions and their perceived quality. Furthermore, we would expect this relationship to be stronger than the relationship, if any, between district court opinions and their perceived quality. In summary, we find that the rates at which courts of appeals affirm appeals from BAPs and district courts provide support for the claim that BAPs are perceived to provide a better quality of review than the district courts. Furthermore, data on subsequent citation by federal courts to the opinions rendered on appeal by BAPs and district courts lend considerable support to the claim. Given the possible impact of selection effects on the affirmance data as opposed to the citation data, we consider the strongly robust results we observe in the citation context to be more informative.

A. Sample Selection and Variables of Interest

1. Sample Selection

To constitute the sample of appellate bankruptcy opinions for this study, we formulated a search query in Westlaw's FBKR-CS database, which contains reported and unreported case law documents (i.e., decisions and orders) relating to bankruptcy that were issued by various courts—including the Supreme Court, circuit courts of appeals, BAPs, district courts, and bankruptcy courts.[116] Because we sought to create two separate databases, one for first-tier appellate dispositions by BAPs and district courts (the "first-tier database") and one for second-tier appellate dispositions by courts of appeals (the

116. Reported case law documents are those released for publication in *West Federal Reporters*.

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"second-tier database"), we ran two separate search queries. The first query consisted of the single term "11 U.S.C.," the standard citation to title 11 of the United States Code (commonly referred to as the "Bankruptcy Code"), coupled with (1) a date restriction that limited query retrieval to decisions and orders issued during the three-year period beginning on October 1, 1997 and ending on September 30, 2000;[117] and (2) a field restriction that limited query retrieval to decisions and orders whose preliminary field contained either the term "district court" or "bankruptcy appellate panel," but not "court of appeals."[118] The second query mirrored the first query with the exception that the field restriction limited query retrieval to decisions and orders whose preliminary field only contained the term "court of appeals."[119] The first query produced 1,487 documents, while the second query produced 871 documents. These large numbers clearly presented a challenge by virtue of the time it would take to review each document. We sought to reduce the time demand by randomly selecting for review approximately one-quarter of the documents produced by each search query—specifically, 372 documents from the first search query and 218 documents from the second search query.[120] In order to identify those that would be selected for inclusion and analysis in the two databases, we reviewed these documents according to the procedures described below.

We sought to include in the databases appeals that involved the resolution of dispositions rendered by bankruptcy courts in core proceedings.[121] We included only those documents that disposed of the appeal on the merits. (Because most of these documents were opinions rather than orders, for ease of reference we will collectively refer to the documents as opinions for the remainder of the Article.) Opinions that solely involved procedural dispositions (e.g., dismissal for lack of

117. Coverage for the FBKR-CS database begins with the year 1789.

118. The preliminary field for case law documents (i.e., decisions or orders issued by a court) in Westlaw is found at the top of such documents and generally contains the name of the court that issued the document. In its entirety, the first search query was as follows: "11 u.s.c." & pr ("district court" "bankruptcy appellate panel" % "court of appeals") & da (aft 9/30/1997 & bef 10/01/2000).

119. In its entirety, the second search query was as follows: "11 u.s.c." & pr ("court of appeals") & da (aft 9/30/1997 & bef 10/01/2000).

120. Each search query produced a numbered result list in which the opinions were listed in reverse chronological order. For the first-tier database, the results were organized by court in reverse chronological order (i.e., district court opinions were listed first in reverse chronological order followed by BAP opinions listed in reverse chronological order). We used a random number generator to select the opinions from each result list that we would analyze. For each result list, we randomly generated a set of unique numbers falling within the range of the total documents retrieved by the search query.

121. *See supra* notes 49–50 and accompanying text.

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jurisdiction) were excluded. In most instances, each opinion generated one observation. However, some opinions generated multiple observations. For example, some opinions resolved multiple appeals in separate and unrelated bankruptcy cases. In other instances, an opinion would resolve an appeal of separate orders that were entered by the bankruptcy court in distinct proceedings within the same case. Finally, by virtue of the identical date restriction included in both search queries, each opinion was issued during one of three government fiscal years: 1998, 1999, or 2000.[122]

Pursuant to these selection procedures, our first-tier database consists of 268 observations drawn from 264 opinions,[123] 4 of which produced a second observation. Our second-tier database consists of 170 observations drawn from 165 opinions,[124] 5 of which produced a second observation. Not surprisingly, for both databases, the majority of appeals wended their way through the district courts rather than the BAPs—although more so for appeals in the second-tier database (approximately 81%) than the first-tier database (approximately 60%).

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122. We tailored our search in this manner for two reasons. First, we wanted to facilitate comparisons of our data with official government data regarding bankruptcy appeals. Generally, such data track the government's fiscal year, which begins on October 1st and ends on September 30th, rather than the calendar year.

Second, we chose the specific time period for this study in order to capture the BAP experience at its apex in terms of participating circuits. BAPs did not become a fixture of the bankruptcy judicial system until 1996. The enactment of the Bankruptcy Code in 1978 amended the Judicial Code to permit, but not require, the establishment of BAPs on a circuit-by-circuit basis. Only the First and Ninth Circuits chose to do so, establishing their BAPs in 1979 and 1980, respectively. In the wake of the *Marathon* decision, however, the First Circuit concluded that continued operation of a BAP would be inappropriate until Congress remedied the defects in the constitutionally infirm, bankruptcy jurisdictional scheme. Massachusetts v. Dartmouth House Nursing Home, Inc., 726 F.2d 26 (1st Cir. 1984).

The Ninth Circuit reached the opposite conclusion in *Briney v. Burley* (*In re* Burley), 738 F.2d 981 (9th Cir. 1984), holding that circuit court supervision of the BAP satisfied *Marathon*'s requirement of Article III judicial review. Despite the measures taken by Congress in 1984 through the Bankruptcy Amendments and Federal Judgeship Act to address the *Marathon* decision, the First Circuit Judicial Council chose not to reauthorize its BAP, thus leaving the Ninth Circuit as the only circuit with an operating BAP. This state of affairs changed with the Bankruptcy Reform Act of 1994, which amended the Judicial Code to require the judicial council of each circuit to create a BAP absent a finding by the council that (1) insufficient judicial resources in the circuit would preclude its establishment, or (2) that establishment of a BAP would produce undue delay or increased cost to parties in bankruptcy cases. Pub. L. No. 103-394, § 104(c)(3), 108 Stat. 4106, 4109 (codified at 28 U.S.C. § 158(b)(1)). Prompted into action by this amendment, in 1996 the First Circuit reauthorized and the Second, Sixth, Eighth, and Tenth Circuits established BAPs. The Second Circuit BAP, however, ceased operations on July 1, 2000.

123. Thus, our selection criteria reduced the random sample of documents relating to the first-tier database by approximately 18%.

124. Similar to the first-tier database, see *supra* note 123, our selection criteria reduced the random sample of documents relating to the second-tier database by approximately 17%.

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The distributions of opinions by circuit in each database roughly approximate one another.[125]

As stated before, we do not seek in our study to make claims about the unobserved population of bankruptcy appeals but rather confine our commentary to the observed sample of data we have amassed. That said, we recognize that the story we seek to tell may not be as compelling if selection bias accounts for the results that we present. Accordingly, we seek to alleviate concerns regarding two major types of potential selection bias stemming from litigant choices that could produce a distorted picture: (1) case-selection bias and (2) forum-selection bias.

It has been theorized that cases adjudicated at the trial level represent a nonrandom group by virtue of litigant choices.[126] For a host of reasons, litigants may choose only a select group of cases for which to pursue a final adjudication by a trial court. If tried cases substantively differ from settled cases, a study that focuses solely on tried cases will misrepresent the larger world of litigation because most cases settle.[127] An appeal further exacerbates the selection bias because (1) not all adjudicated cases are appealed and (2) not all appealed cases are disposed of by court decision. The bankruptcy appellate structure doubly compounds the problem given the two levels of intermediate appellate review.

If these assumptions are correct, should they be of overriding concern in a study such as ours? We think not for the following reasons. First, case-selection bias should not impact our citation data insofar as a court is generally constrained to written opinions when it chooses those opinions to which it cites. Second, cases settled either at the trial or at the appellate level are not a relevant population for purposes of our study. Our study asks whether the circuit court will perceive the BAP to have performed the appellate function better than the district court. Because circuit courts are not autonomous decisionmaking bodies and can only resolve those appeals brought before them by the litigants, the only cases that can and should be measured for this purpose are those cases actually appealed to and

125. *See infra* Appendix tbl.1.

126. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

127. According to a recent empirical study, approximately 2% of federal civil lawsuits in 2002 ended in trial. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 463 tbl.1 (2004). The bankruptcy analogue of a federal civil lawsuit is an adversary proceeding. *See supra* note 45. In 2002, approximately 5% of adversary proceedings terminated during or after trial. Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915, 930 (2005).

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resolved by the circuit courts.[128] Last, Professor Frank Cross's comprehensive empirical study of decisionmaking by the courts of appeals has documented that litigant effects are not a major determinant of circuit court decisions, both generally and in particular types of cases (i.e., criminal decisions and labor decisions).[129]

We also recognize that our data potentially include a forum-selection bias because attorneys in circuits that have BAPs may be more likely to prefer appeals relating to certain subject matters to be heard by BAPs than by district courts, or vice versa.[130] Thus, it is possible that there are some issues that BAPs never or only rarely hear. (Assuming that bankruptcy cases are at some level homogenous nationwide, that will not be the case for district courts, because there are circuits in which district courts hear substantially all appeals from bankruptcy court rulings.) More generally, it is possible that BAP and district court dockets vary substantially. While we cannot eliminate this possibility, we have looked for evidence of such a bias and have found no such evidence.[131] Thus, while recognizing that such a bias

128. Even if the group of appeals resolved by the circuit courts are nonrandom such that our results would not hold if the circuit courts also decided those cases that were not appealed beyond the first level of intermediate review, such theorizing is an exercise in futility. Simply put, we cannot measure the outcomes of circuit court decisions that do not exist. In other words, because we look to measure quality of appellate review that the circuit court *perceives*, we ought not to fret about those cases that will never see light of day in the circuit court.

129. CROSS, *supra* note 95, at 123–47.

130. Because the Judicial Code mandates that, in circuits with BAPs, bankruptcy appeals will be heard by the BAP *unless* one of the parties to the appeal elects to have the district court hear the appeal, 28 U.S.C. § 158(c)(1) (2000 & Supp. V 2005), the dynamic of any potential selection bias at work in the BAP perhaps should be understood as the product of the subset of appeals where the forum preferences of the parties to the appeal have aligned. Although there could be instances where all parties prefer to have the appeal heard by the district court, there would also be instances where only one party had such a preference. Thus, a BAP docket is unique in that all of its appeals theoretically involve litigants with a consistent forum preference. We say "theoretically" since it is conceivable that a party with an inconsistent forum preference may have failed, in a timely fashion, to elect a district court to hear the appeal.

131. Because we do not differentiate between district courts from circuits with BAPs (BAP circuits) and those from circuits without BAPs (non-BAP circuits) in our analyses, there is concern that any potential selection bias at work in BAP circuits could be masked by those observations from non-BAP circuits. Approximately 31% of the observations in the first-tier database and 36% of the observations in the second-tier database consisted of district court opinions from non-BAP circuits. *See infra* Appendix tbl.1. We conducted bivariate statistical analyses to ascertain whether selection bias existed in the BAP circuits by focusing on those circumstances in which one would expect to see such bias have a disproportionate effect—namely, (1) the subject matter of the appeal and (2) affirmance rates by the court of appeals. For neither of these circumstances did we find evidence of selection bias.

First, we examined whether a statistically significant relationship exists in BAP circuits between the subject matter of the appeal and the first-tier appellate court to hear the appeal. To do so, we classified observations according to whether the subject of the appeal fell into one of the four most frequently occurring subjects of appeal heard by first-tier appellate courts. For the

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may lurk at more refined levels of case-type delineation, we are at least confident that the size of any forum-selection bias is confined, not pernicious, and thus probably has not had a meaningful effect upon our data and analysis.[132]

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first-tier database, for all observations, and for those observations from BAP circuits, the four most frequently occurring subjects were matters relating to discharge, procedure/jurisdiction, avoiding powers, and multiple subjects. For the second-tier database, for all observations and for those observations from BAP circuits, the four most frequently occurring subjects were matters relating to discharge, claims, avoiding powers, and multiple subjects. For the first-tier database, approximately 56% of the appeals heard by district courts in BAP circuits *as well as* all district courts combined involve one of the four most frequently occurring subjects. For the second-tier database, approximately 64% of the appeals heard by district courts in BAP circuits and 59% of the appeals heard by all district courts combined involve one of the four most frequently occurring subjects. After applying a chi-square test with one degree of freedom, we found no statistically significant relationship in BAP circuits between the subject matter of the appeal and the first-tier appellate court to hear the appeal (a p-value of 0.288 for the first-tier database and a p-value of 0.876 for the second-tier database).

Second, for all observations in the first-tier database, we examine whether a statistically significant relationship exists between the subject matter of the appeal and whether there is a subsequent appeal to the circuit court. Again, we classify observations according to whether the subject of the appeal fell into one of the four most frequently occurring subject matter categories. For those observations involving subsequent appeal to the circuit court, approximately 62% involved a top subject matter category. For those observations without circuit court review, approximately 56% involved a top subject matter category. Applying a chi-square test with one degree of freedom, we found no statistically significant relationship ($p = 0.475$) between the subject matter of the appeal and subsequent appeal to the circuit court.

Finally, we found that courts of appeals affirm district courts in BAP circuits at a rate similar to that of their counterparts in non-BAP circuits. In the first-tier database, there were 77 observations for which there was a subsequent appeal to the court of appeals. The subsequent history for 10 of those observations, however, already existed in the second-tier database (i.e., the circuit court opinion from the second-tier database reviewed an opinion from the first-tier database). When combining the 67 unique observations from the first-tier database involving a subsequent appeal to the court of appeals with the 170 observations in the second-tier database, courts of appeals partly or fully affirmed district courts in BAP circuits approximately 77% of the time and partly or fully affirmed district courts in non-BAP circuits approximately 71% of the time. Bivariate analysis confirms that no statistically significant difference exists between the rate at which courts of appeals partly or fully affirmed district courts from BAP circuits and district courts from non-BAP circuits (chi-squared = 0.9094, df = 1, $p = 0.340$). Furthermore, if one considers only those observations where the court of appeals *fully* affirmed district courts, the affirmance rates in BAP and non-BAP circuits are similar. The circuit court affirmance rate of district court dispositions in BAP circuits was approximately 67% in comparison to 65% in non-BAP circuits. Bivariate analysis confirms that this difference is not statistically significant (chi-squared = 0.1419, df = 1, $p = 0.706$).

132. With respect to citations, if there is a forum-selection bias, then the BAPs are not deciding some categories of cases—and, perhaps, certain issues—that the district courts are. This logically should translate into an increase in citations to district court opinions as compared to BAP opinions, since other courts facing such issues and wishing to include citations will have no opportunity to cite to any BAP opinions. Yet, as we discuss below, our data analyses generally show that BAP citations are favored. In short, if there is a selection bias, then our statistical analyses, if anything, *understate* the extent to which BAP citations are favored.

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2. Variables of Interest

Recall that we sought to test our broad inquiry into the perceived quality of appellate review by focusing on (1) how two distinct appellate courts in the bankruptcy judicial system—the BAPs and district courts—perform their error-finding function and (2) how other judicial actors perceive the quality of that performance. As our hypotheses indicate, we concerned ourselves with an array of dependent variables that fall within one of two categories: (1) affirmance by the court of appeals and (2) citations by other federal courts to the appellate opinions issued by BAPs and district courts. We will discuss each category and the variables associated with each in turn.

First, we tracked the disposition rendered by the BAP or district court on appeal according to three ordered outcomes: (1) "negative" for those dispositions where the reviewing court reversed, remanded, or vacated the disposition rendered below; (2) "hybrid" for those dispositions where the reviewing court partly affirmed the disposition rendered below; and (3) "positive" for those dispositions where the reviewing court fully affirmed the disposition rendered below.[133] We define circuit court affirmance in two ways: broadly and narrowly. Broadly defined, affirmance occurred when the circuit court either partly or fully affirmed the disposition rendered by the first-tier appellate court (i.e., those observations with hybrid or positive outcomes).[134] Narrowly defined, affirmance occurred only when the circuit court fully affirmed the disposition rendered by the first-tier appellate court (i.e., those observations with positive outcomes).[135] Second, in order to document citation data to the opinions in our databases, we relied upon KeyCite, West's citation research service.[136] We documented for each first-tier level opinion all

133. For the frequency of the dispositions rendered on appeal in first-tier and second-tier level opinions, see *infra* Appendix tbl.2.

134. As set forth below, we denominate this variable "Affirmance." *See infra* text accompanying notes 150–151.

135. As set forth below, we denominate this variable "Full Affirmance." *See id.*

136. KeyCite organizes citing references for a case by segregating negative citing references from positive citing references. KeyCite further organizes negative and positive citing references according to the depth of treatment given by the citing reference to the cited opinion. Four categories exist for the depth of treatment provided by the citing reference: (1) "examined," indicating that the citing reference contains an extended discussion of the cited opinion, usually more than a printed page of text; (2) "discussed," indicating that the citing reference contains a substantial discussion of the cited opinion, usually more than a paragraph but less than a printed page; (3) "cited," indicating that the citing reference contains some discussion of the cited opinion, usually less than a paragraph; and (4) "mentioned," indicating that the citing reference

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positive citations made to it by any federal court—aside from those citations made in connection with the direct appellate history of the opinion—during the five-year period following the date that the opinion was issued. Pursuant to these criteria, approximately 75% of the first-tier appellate opinions had citing references. We further documented (1) citations by type of court, (2) citations by depth of treatment, (3) citations directly quoting the cited opinion, and (4) the immediacy with which first-tier appellate opinions were cited.[137]

The major explanatory variables (i.e., independent variables) in the databases include (1) whether the BAP or district court heard the initial appeal, (2) whether the appellant was solely the debtor in whose case the appeal arose, (3) whether the appellee was solely the debtor in whose case the appeal arose, (4) whether the appeal arose in the context of a case filed under Chapter 7 of the Bankruptcy Code, (5) whether the bankruptcy case in which the appeal arose was filed by an individual, (6) whether the type of dispute proceeding within which the appeal arose was an adversary proceeding or contested matter, and (7) the subject matter of the appeal.

B. Bivariate Descriptive Statistics

Our primary interest lies in the statistical relationship between the identity of the first-tier appellate court and various dependent variables: (1) affirmance by the court of appeals, (2) the number of positive federal court citations to the opinion issued by the first-tier appellate court, (3) the depth of treatment given to first-tier appellate opinions when positively cited by other federal courts, (4) direct quotation of the first-tier appellate opinion by positive citing references, and (5) the immediacy with which the first-tier appellate opinion is positively cited. By searching for a statistically significant relationship between the identity of the first-tier appellate court and each of these dependent variables, we can look for those relationships warranting further inquiry through regression analysis that will confirm the existence of the relationship when controlling for other factors.

Hypothesis 1 posits that courts of appeals more likely will uphold the dispositions rendered on appeal by BAPs than those rendered by district courts. Our data support this hypothesis. In the

contains a brief reference to the cited opinion, usually in a string citation. Finally, KeyCite identifies citing references that directly quote the cited opinion.

137. For citation data for those first-tier appellate opinions with positive citing references, see *infra* Appendix tbl.3.

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first-tier database, there were 77 observations for which there was a subsequent appeal to the court of appeals.[138] The subsequent history for 10 of those observations, however, already existed in the second-tier database (i.e., the circuit court opinion from the second-tier database reviewed an opinion from the first-tier database). Combining the 67 unique observations in the first-tier database involving a subsequent appeal to the court of appeals with the 170 observations in the second-tier database, we generated a database of 237 observations for purposes of analyzing circuit court affirmance rates of first-tier appellate dispositions (the "affirmance database"). When defining affirmance broadly to include those dispositions where the circuit court either partly or fully affirmed the first-tier appellate court, the court of appeals affirmed BAPs approximately 91% of the time as opposed to 74% for district courts.[139] If no association had existed between the type of first-tier appellate court to have initially decided the appeal and the disposition rendered on subsequent appeal by the court of appeals, we would have expected to see first-tier appellate dispositions partly or fully affirmed by the court of appeals approximately 78% of the time. Our analysis confirms that there is less than a 0.01 probability that random chance alone would have yielded a difference as large as the one witnessed. Similarly, when defining affirmance narrowly to include only those dispositions where the circuit court fully affirmed the first-tier appellate court, the court of appeals affirmed BAPs approximately 81% of the time as opposed to 66% for district courts.[140] If no association had existed between the

138. Of the 77 observations in the first-tier database for which there was a subsequent appeal to the court of appeals, 50 were district court dispositions and 27 were BAP dispositions. As there were a total of 162 district court and 106 BAP dispositions in the first-tier database, *infra* Appendix tbl.1, approximately 31% of the district court dispositions and 25% of the BAP dispositions involved subsequent appeal. As our first-tier database only includes opinions that disposed of the appeal on the merits, these figures seem to be consistent with empirical evidence that has estimated that up to a third of first-tier appellate dispositions rendered on the merits have been further appealed to the court of appeals. *See* McKenna & Wiggins, *supra* note 65, at 630; *see also* U.S. BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT, STATISTICAL REPORT: JANUARY 1, 2005 – DECEMBER 31, 2005 (2005), *available at* http://www.ca8.uscourts.gov/newbap/stats/q4-05.pdf (documenting that approximately 30% of bankruptcy appeals in the Eighth Circuit in 2005 were taken to the U.S. Court of Appeals).

139. The 91% circuit court affirmance rate of BAP dispositions approximates the rate at which the U.S. Court of Appeals for the Tenth Circuit partly or fully affirmed merit-based BAP dispositions—that is, 90%—during the eleven-year period beginning on July 1, 1996 and ending on June 30, 2007. *See* U.S. BANKRUPTCY APPELLATE PANEL FOR THE TENTH CIRCUIT, ANNUAL REPORT OF BANKRUPTCY APPEALS IN PARTICIPATING BAP DISTRICTS FOR THE STATISTICAL YEAR JULY 1, 2006 – JUNE 30, 2007 (INCLUDING DISPOSITION STATISTICS FOR APPEALS DISPOSED OF SINCE JULY 1, 1996) 8 (2007), *available at* http://www.bap10.uscourts.gov/stats/2007.pdf.

140. The 81% full affirmance rate of BAP dispositions by circuit courts approximates the rate at which the U.S. Court of Appeals for the Tenth Circuit fully affirmed merit-based BAP

type of first-tier appellate court and circuit court affirmance, we would have expected to see first-tier appellate dispositions fully affirmed by the court of appeals approximately 70% of the time. Our analysis confirms that there is less than a 0.05 probability that random chance alone would have yielded a difference as large as the one witnessed.[141]

Hypotheses 2 through 7 generally predict that, with the exception of district courts, other federal courts will positively cite to BAP opinions more than they positively cite to district court opinions. For district courts, we hypothesize that they will cite more often to district court opinions than BAP opinions. Finally, we predict that extracircuit citations to BAP opinions will exceed extracircuit citations to district court opinions. As an initial matter, BAP opinions had a higher propensity to be positively cited by other federal courts than district court opinions. Approximately 91% of the BAP opinions in the first-tier database had been positively cited by federal courts, whereas slightly less than two-thirds (65%) of the district court opinions had received similar treatment. In the absence of a relationship between the type of first-tier appellate opinion and positive citation thereto by other federal courts, we would have expected to see approximately three-quarters (75%) of the first-tier appellate opinions positively cited. Our analysis confirms that there is less than a 0.0001 probability that random chance alone would have yielded a difference as large as the one witnessed. It would thus appear that the type of first-tier appellate opinion has some influence on a federal court's decision to cite that opinion.

We can further elaborate on this relationship by examining the number of citing references to the opinions according to the type of federal court making the citing reference. We note that 53% of the observations in the first-tier database that have positive citing references are district court opinions.[142] Assuming a random, or at

dispositions—that is, approximately 89%—during the ten-year period beginning on July 1, 1996, and ending on June 30, 2006. *Id.*

141. For the details of these results, see *infra* Appendix tbl.4.

142. The first-tier database contained 202 observations in which a federal court positively cited to the opinion issued by the first-tier appellate court. In conducting our bivariate analyses, we exclude extreme outliers (i.e., those observations involving extreme values in the tails of the distribution of the positive citing reference data). We define an extreme outlier to be any observation with a total number of positive citations that falls above the third quartile of the positive citing reference data (7 citations) by more than three times the interquartile range for such data (5 citations). *See infra* Appendix tbl.3 (describing distribution of positive citing references to first-tier opinions). Accordingly, we excluded any observations with more than 22 positive citing references. Pursuant to this measure, we eliminated 2 observations from our analysis—both BAP opinions—leaving us with a total of 200 observations for analysis. Accordingly, approximately 99% of the first-tier appellate opinions in our sample that were cited

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least somewhat random, distribution of issues and factual settings, we would expect citation rates to favor district court opinions slightly.[143] Our data, however, generally show that citation rates favor BAP opinions. Specifically, we find strong differences between the BAP and district court samples that are statistically significant at both the mean and the median. For example, a BAP opinion that was positively cited had, on average, approximately 7 citations by other federal courts, whereas a district court opinion averaged approximately 3 citations. Furthermore, by disaggregating our citation data according to the type of federal court that cited the first-tier appellate opinion, we find that the BAP opinions in our study had a statistically significantly greater number of citing references by courts of appeals, BAPs, and bankruptcy courts than did district court opinions. On the other hand, district court opinions had a statistically significantly greater number of citing references by other district courts than did BAP opinions. Finally, the data indicate that extracircuit federal courts cited more to BAP opinions than to district court opinions and that the difference is statistically significant. Some of these results are illustrated below in Figure 2.[144]

positively by other federal courts are included in our bivariate analyses of the citing reference data.

143. *Cf.* Merryman, *Toward a Theory of Citations*, *supra* note 104, at 403 (arguing that the larger number of citations by the California Supreme Court to opinions issued by the courts of New York State may be due to the large case literature arising out of New York).

144. For a full accounting of these results, see *infra* Appendix tbl.5.

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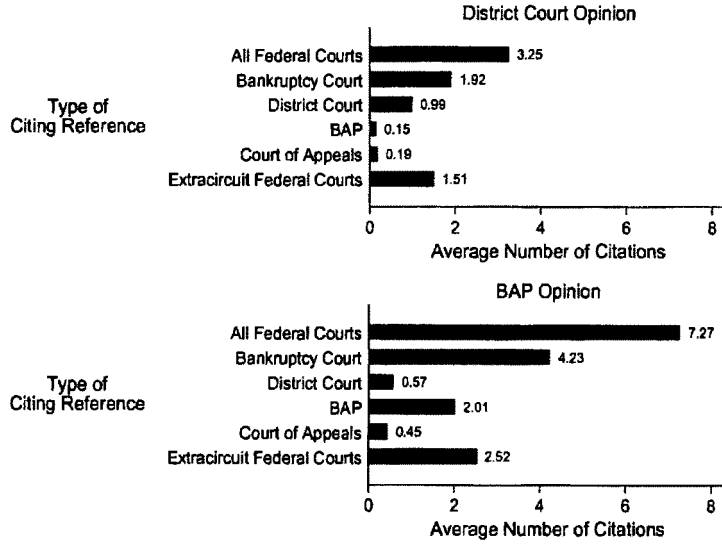
FIGURE 2
AVERAGE NUMBER OF POSITIVE CITING REFERENCES TO
FIRST-TIER APPELLATE OPINION BY CITING REFERENCE TYPE



Additional evidence of the perceived correctness of the first-tier appellate opinions can be gleaned from examining the depth of treatment provided to those opinions by the federal courts that cited to them. Hypothesis 8 predicts that the citing references to BAP opinions will have afforded a greater depth of treatment than district court opinions. Our data generally support this hypothesis. We find that, at both the median and the mean, BAP opinions had a statistically significant higher number of citing references by other federal courts that cited (i.e., provided discussion of less than a paragraph) and discussed (i.e., provided discussion of more than a paragraph but less than a printed page) the opinion.[145] We also find that, at the median, BAP opinions had a statistically significant higher number of citing references by other federal courts that mentioned the opinion (i.e., contained a brief reference to the cited opinion, usually in a string

145. For purposes of this analysis, we once again exclude extreme outliers according to the criteria discussed in *supra* note 142.

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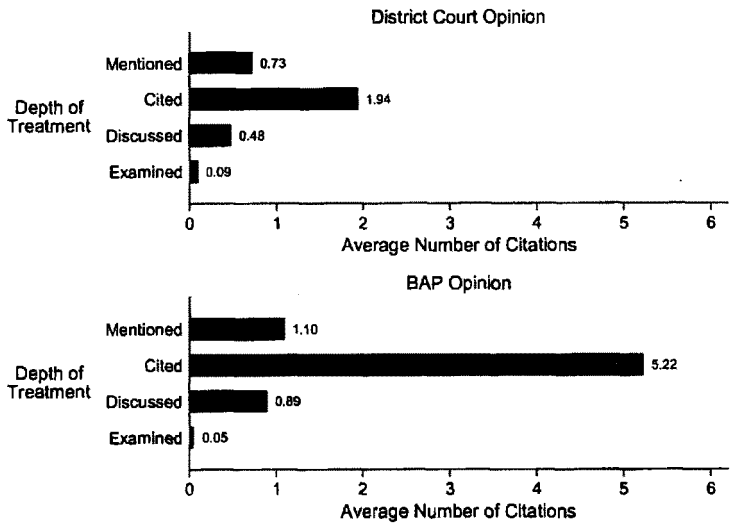
citation). We do not find, however, either at the median or the mean, any association between the type of first-tier appellate opinion and the number of positive citing references that examine the opinion (i.e., contain an extended discussion of the cited opinion usually more than a printed page of text). Figure 3 illustrates some of these results.[146]

FIGURE 3
AVERAGE NUMBER OF POSITIVE CITING REFERENCES TO
FIRST-TIER APPELLATE OPINION BY DEPTH OF TREATMENT



We tracked the number of citing references that directly quoted the first-tier appellate opinion as yet another metric for evaluating the perceived correctness of the first-tier appellate opinions in our study. First, we find evidence to support our hypothesis that a greater likelihood exists that positive federal citing references will have quoted BAP opinions as opposed to district court opinions. Approximately 65% of the federal courts that positively cited BAP opinions also directly quoted those opinions, whereas only 38% of district court opinions with positive federal citing references were directly quoted. If no relationship existed between the type of first-tier

146. For a full accounting of these results, see *infra* Appendix tbl.5.

appellate opinion and positive direct quotation thereto by other federal courts, we would have expected to see slightly more than half (51%) of the first-tier appellate opinions to have been quoted directly. Our analysis confirms that there is less than a 0.0001 probability that random chance alone would have yielded a difference as large as this, thus indicating a statistically significant association between the type of first-tier appellate opinion and a federal court's decision to quote the opinion directly when positively citing to it. Furthermore, we observe that, on average, approximately 1.5 of the positive citing references to BAP opinions directly quote such opinions as opposed to only 0.58 of the positive citing references to district court opinions. Also, whereas 65% of the positively cited BAP opinions have at least one directly quoting citing reference, only 39% of the positively cited district court opinions did so. These differences are highly statistically significant and further support our contention that positive federal citing references will have directly quoted BAP opinions more frequently than district court opinions.[147]

Finally, the immediacy with which a federal court cites to such an opinion serves as yet another indicator of its perceived quality. Accordingly, we consider the period of time for which it took a first-tier appellate opinion to be positively cited by a federal court for the first time.[148] Our data show that, for the group of positively cited first-tier appellate opinions, a BAP opinion would receive its first positive citing reference by another federal court, on average, within approximately 10 months (306 days), while it took nearly twice as long—approximately 17 months (533 days)—for a district court opinion. Moreover, slightly more than half (51%) of the BAP opinions from this group received their first positive citation within approximately a 6-month period. This starkly contrasts with district court opinions, only about a quarter (24%) of which received their first positive citation within the same period of time. These highly statistically significant differences indicate that the type of first-tier appellate opinion has

147. For purposes of these analyses, we excluded extreme outliers according to the criteria discussed in *supra* note 142. For a full accounting of these results, see *infra* Appendix tbl.5.

148. We might assume that an opinion that comprehensively and effectively addresses an unresolved or debated issue of law that has been repeatedly litigated not only will be heavily cited, but also will be cited more quickly. Thus, for purposes of this analysis, we exclude the extreme outliers we identified with respect to total number of positive citing references. *See supra* note 142. We further sought to identify whether there were any extreme outliers in terms of the number of days it took for the first-tier appellate opinions to be cited. In this instance, we define an extreme outlier to be any observation with a total number of days that falls above the third quartile of the immediacy data (638 days) by more than 3 times the interquartile range for such data (520.5 days). On the basis of these parameters, there were no additional extreme outliers.

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some association with the time within which the opinion will garner its first positive citation by another federal court.[149]

In summary, based on the affirmance rates of courts of appeals on subsequent review of BAP and district court opinions, we find that courts of appeals perceive BAPs to provide a better quality of appellate review than district courts. Moreover, based on citations to the opinions issued by BAPs and district courts, we find strong evidence that most nonreviewing federal courts perceive the quality of BAP opinions to be better. We now look to confirm whether these associations will persist when controlling for other potential explanatory variables and, if so, we attempt to measure the strength of such associations.

C. Regression Analyses

Here, we seek to provide a more comprehensive analysis of the perceived quality of appellate review by constructing a series of regression models that will test whether the statistically significant relationships we identified in Part III.B persist when controlling for the independent variables discussed in Part III.A.

1. Circuit Court Affirmance

For the 237 observations in the affirmance database,[150] we used a logistic regression model to predict the binary dependent variable of circuit court affirmance (no affirmance coded 0 and affirmance coded 1), both broadly and narrowly defined (respectively, Affirmance and Full Affirmance),[151] based on the following independent variables:

whether the first-tier appellate court was a district court (coded 0) or a BAP (coded 1) (Court);

whether the appeal arose within the context of an adversary proceeding (coded 0) or a contested matter (coded 1) (Dispute Type);

the fiscal year in which the first-tier appellate court issued its opinion (for which we created three indicator variables with the response categories 0 for those opinions issued outside of the

149. For a full accounting of these results, see *infra* Appendix tbl.5.

150. *See supra* Part III.A.2.

151. *See supra* text accompanying notes 134–135.

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fiscal year in question and 1 for those opinions issued during the fiscal year in question) (Fiscal Year);[152]

whether the first-tier appellate court had published its disposition (negative responses coded 0 and positive responses coded 1) (Published);

whether the only party to appeal to the first-tier level court was the debtor (negative responses coded 0 and positive responses coded 1) (Appellant);

whether the debtor was the only party appearing as an appellee at the first-tier level of review (negative responses coded 0 and positive responses coded 1) (Appellee);

whether the appeal arose in the context of a Chapter 7 case (negative responses coded 0 and positive responses coded 1) (Chapter 7);

whether the bankruptcy case in which the appeal arose was that of an individual debtor (negative responses coded 0 and positive responses coded 1) (Debtor Type); and

whether the subject of the appeal could be classified as falling into one of the four most frequently occurring subjects of appeal heard by first-tier appellate courts for which there was subsequent appeal to the court of appeals (negative responses coded 0 and positive responses coded 1) (Subject).[153]

According to the model, even when controlling for other potential explanatory variables, the type of first-tier appellate court to have initially determined the appeal remains a statistically significant predictor of Affirmance and Full Affirmance by the court of appeals.[154] The model indicates that the shift from the district court to the BAP as the first-tier appellate court made the odds of Affirmance 3.95 [1.41, 11.07] times higher and the odds of Full Affirmance 2.54 [1.12,

152. The opinions in the database were issued during one of three government fiscal years—1998, 1999, or 2000. *See supra* note 122 and accompanying text. The reference category was first-tier opinions issued during the 2000 fiscal year and was accordingly excluded from the model.

153. The four most frequently occurring subjects were matters relating to discharge (24%), multiple subjects (17%), avoiding powers (10%), and procedure/jurisdiction (9%).

154. Both the Court and Published variables are significant predictors of Affirmance and Full Affirmance. The Appellant, Appellee, and Subject variables are significant predictors of Full Affirmance (but not Affirmance). For detailed results from this regression model, see *infra* Appendix tbl.6.

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5.74] times higher.[155] Put another way, holding all other variables constant, a first-tier appellate disposition rendered by a BAP increased the odds of Affirmance by 295% [41, 1007] and Full Affirmance by 154% [12, 474].

It is helpful to elucidate these findings in terms of predicted probabilities. Using the actual values of all of the independent variables included in the model, we can calculate the predicted probability of circuit court affirmance for the 237 first-tier appellate dispositions upon which the model is based. In Figures 4 and 5 below, we present the predicted probabilities for Affirmance and Full Affirmance, respectively, of the actual observations in our regression model through use of a histogram that displays the distribution of those probabilities for district court dispositions and BAP dispositions separately. The width of each bar represents a specific interval of predicted probability of affirmance, and the height of each bar represents the percentage of dispositions that fall within that interval. For any observation with a predicted probability of over 50% (i.e., greater than 0.5), the model assigned the positive outcome of circuit court affirmance.

155. When performing inference, we implement the recommended practice of conveying levels of uncertainty by using the notation [#, #] to indicate the lower and upper bounds of the 95% confidence interval around our estimates. *See* Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1835–37 (2006).

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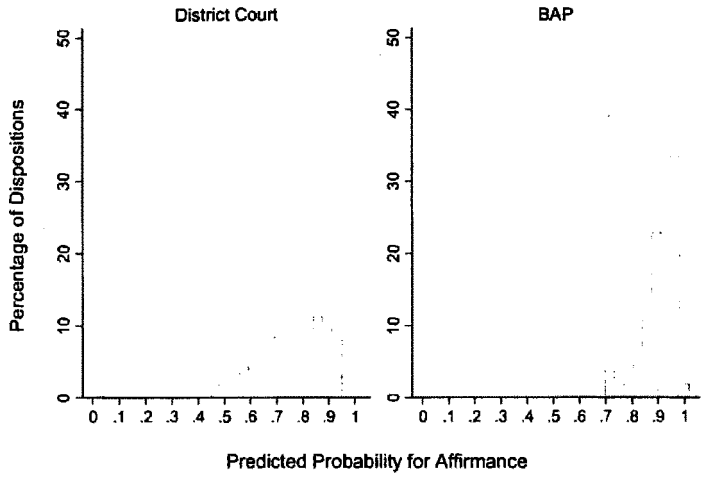
FIGURE 4
PREDICTED PROBABILITIES FOR AFFIRMANCE



Source: Affirmance Database

First, we find that, when holding other variables at their mean, a BAP disposition is predicted to have a 93% [86, 99] chance of being either partly or fully affirmed by the court of appeals in contrast to 77% [70, 84] for district court dispositions. Thus, when holding other variables at their mean, the likelihood of partial or full affirmance by the court of appeals is predicted to increase by 16 [7, 25] percentage points when it reviews BAP dispositions. Second, we find that, when holding other variables at their mean, a BAP disposition is predicted to have an 85% [76, 95] chance of being fully affirmed by the court of appeals in contrast to 69% [62, 77] for district court dispositions. Thus, when holding other variables at their mean, the likelihood of full affirmance by the court of appeals is similarly predicted to increase by 16 [4, 28] percentage points when it reviews BAP dispositions. These findings support our hypothesis that courts of appeals will more likely uphold the dispositions rendered by BAPs than those rendered by district courts.

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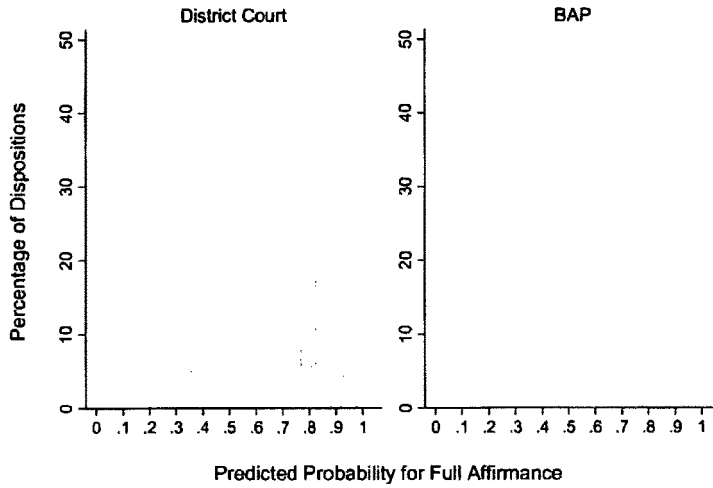
FIGURE 5
PREDICTED PROBABILITIES FOR FULL AFFIRMANCE



Source: Affirmance Database

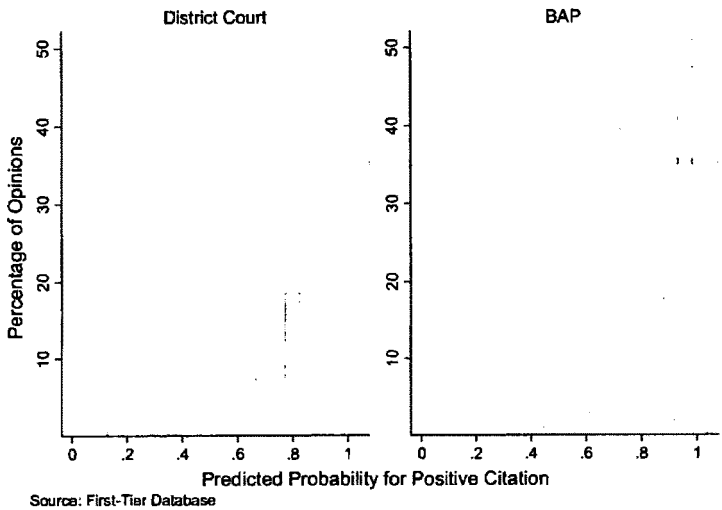
2. Positive Citing References by Other Federal Courts

To further explore (1) the decision of federal courts to cite positively to the opinions issued by first-tier appellate courts, (2) the extent to which they do so, (3) the manner in which they do so, and (4) the immediacy with which they do so, we construct a series of binary logistic regression models as well as various count regression models (e.g., negative binomial and Poisson). First, we examine whether the association between the identity of the first-tier appellate court and positive citation to its opinion persists when controlling for other factors. For all 286 observations in the first-tier database, we use a binary logistic regression model to predict whether a federal court will have cited positively to the first-tier appellate opinion (coding opinions with no positive citations as 0 and coding opinions with at least one positive citation as 1) based on the following independent variables: (1) Court; (2) whether the first-tier appellate court fully affirmed the disposition rendered by the bankruptcy court (negative responses

coded 0 and positive responses coded 1) (First-Tier Full Affirmance); (3) Published; (4) Appellant; (5) Appellee; (6) Chapter 7; (7) Debtor Type; (8) Dispute Type; (9) Subject; (10) whether the first-tier court's disposition was subsequently appealed to the court of appeals (negative responses coded 0 and positive responses coded 1) (Subsequent Appeal); and (11) Fiscal Year.

The model identifies the type of first-tier appellate court to have initially determined the appeal as a statistically significant predictor of whether the court's opinion will have been positively cited by another federal court.[156] Figure 6 below illustrates the predicted probability of positive citation to the first-tier appellate opinion based on the actual values of all of the independent variables included in the model.

FIGURE 6
PREDICTED PROBABILITIES FOR POSITIVE CITATION OF
FIRST-TIER APPELLATE OPINIONS BY FEDERAL COURTS



156. For detailed results from this regression model, see *infra* Appendix tbl.7.

We find that, when holding other variables at their mean, a BAP opinion is predicted to have a 90% [84, 97] chance of being positively cited by another federal court in contrast to 73% [65, 81] for district court opinions. Accordingly, when holding other variables at their mean, the likelihood of positive citation to a first-tier appellate opinion by another federal court is predicted to increase by 17 [7, 27] percentage points for BAP opinions. These data support our hypothesis that, if a BAP issued the first-tier appellate opinion, it will increase the chances of the opinion being positively cited by other federal courts.[157]

The question arises whether this association persists when analyzing the extent to which other federal courts cite to first-tier appellate opinions, whether analyzing citations in the aggregate (i.e., total number of positive citations) or disaggregated according to the type of citing federal court. To answer the question, we implement a variety of count regression models that analyze the 200 observations in the first-tier database where a federal court positively cited to the opinion issued by the BAP or district court.[158] First, in order to predict the aggregate number of positive citations, we conduct a zero-truncated negative binomial regression analysis.[159] We then proceed to analyze the number of positive citations by citing court type pursuant to a negative binomial regression model (with one exception).[160] For both of these models, we incorporate the same independent variables from the binary logistic regression model used to predict whether the first-tier appellate opinion would be cited. Figures 7 and 8 compare (1) the observed probabilities for each value of the number of positive citations to the first-tier appellate opinions from the first-tier database with (2) the average predicted probabilities of observing those specific

157. The model also identifies the Published, Dispute, and Subject variables as significant predictors of whether the first-tier appellate opinion will have been cited by other federal courts.

158. There were actually 202 such observations. For purposes of our regression analyses, however, we eliminated 2 extreme outliers, which left 200 observations to be analyzed. *See supra* note 142.

159. A zero-truncated negative binomial regression model is appropriate here since (1) the aggregate number of positive citations is a count variable that is overdispersed, and (2) there are no zero values for this subset of observations (i.e., all opinions have at least one positive citing reference).

160. We ran the regression model four times to account for four different types of citing federal courts (i.e., bankruptcy court, district court, BAP, and extracircuit federal courts). In order to predict the number of citing references by courts of appeals, however, we used a Poisson regression model. When fitting a negative binomial regression model, the likelihood ratio test for alpha—the overdispersion parameter—was not significant (chi-squared = 2.52, df = 1, $p = 0.056$), thus indicating that the Poisson model is preferred. We do not use a zero-truncated model for any of these dependent variables since some of the observations do have zero values.

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counts based on the actual values of all of the independent variables included in the fitted models.

The models indicate that a statistically significant relationship exists between the type of first-tier appellate court that issued the opinion and the total number of positive citing references as well as positive citing references by bankruptcy courts, BAPs, district courts, courts of appeals, and extracircuit federal courts. A BAP opinion increased the expected number of total positive citations over a five-year period by approximately 154% [84, 251], holding all other variables constant. If we focus on the type of citing federal court, holding all other variables at their mean, BAP opinions are predicted to receive approximately (1) 2.0 [1.1, 3.0] more bankruptcy court citations; (2) 1.3 [0.8, 1.7] more BAP citations; (3) 0.2 [0.1, 0.3] more court of appeals citations; and (4) 0.6 [0.04, 1.2] more citations by extracircuit federal courts.

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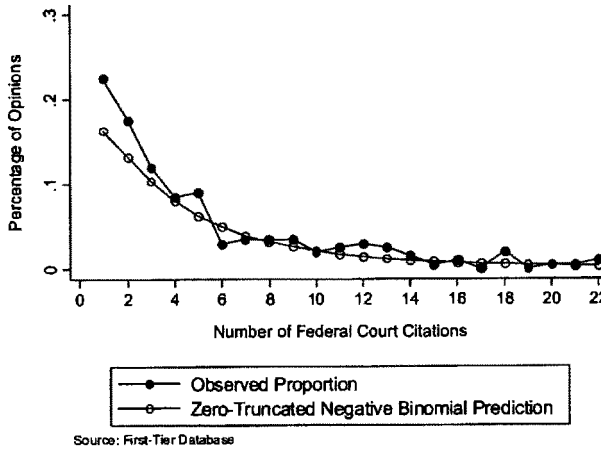
FIGURE 7
COMPARISON OF OBSERVED AND PREDICTED COUNTS OF POSITIVE CITATION TO FIRST-TIER APPELLATE OPINIONS BY ALL FEDERAL COURTS AND EXTRACIRCUIT FEDERAL COURTS



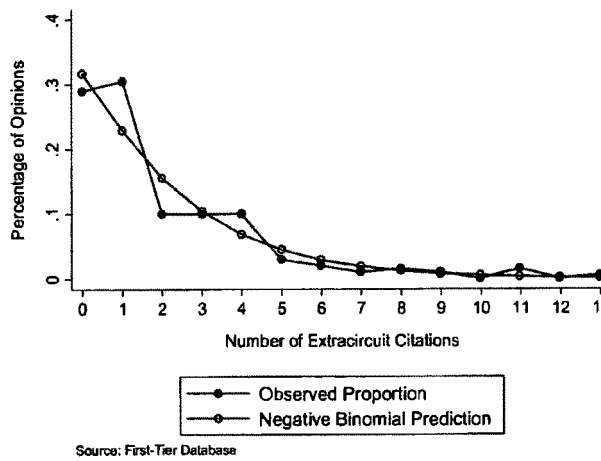


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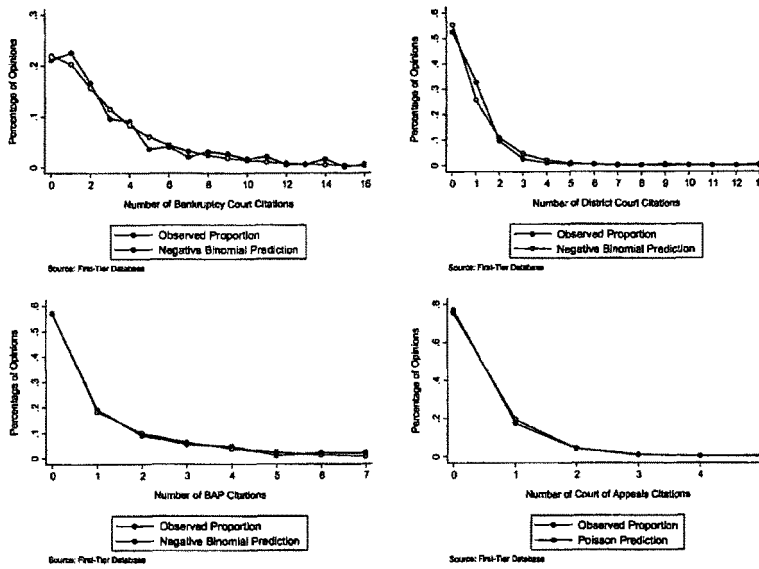
FIGURE 8
COMPARISON OF OBSERVED AND PREDICTED COUNTS OF POSITIVE CITATION TO FIRST-TIER APPELLATE OPINIONS BY TYPE OF CITING FEDERAL COURT



These results support Hypotheses 2B, 3, 4, 5, and 7. We also find that, holding all other variables at their mean, district court opinions are predicted to receive approximately 0.34 [0.03, 0.65] more district court citations than BAP opinions, thus confirming the distinction we drew in Hypothesis 6.[161] Overall, the bulk of our evidence suggests that other actors within the bankruptcy judicial system perceived BAPs to provide a better quality of appellate review than district courts.[162]

161. To predict the total number of positive district court citations to first-tier appellate opinions, we initially fitted a negative binomial regression model that included all of the independent variables in the negative binomial regression model used for the other types of citations (the full model). Although the Court variable was a statistically significant predictor in the full model, the model as a whole was not statistically significant (chi-squared = 19.21, df = 12, p = 0.0836). Accordingly, using a backward-selection stepwise regression, we fitted a partial model that only included the Court, Debtor, Subject, and Fiscal Year variables. This partial model was statistically significant (chi-squared = 16.70, df = 5, p = 0.0051), and the Court variable continued to be a statistically significant predictor (p = 0.032).

162. For detailed results from these regression models, see *infra* Appendix tbl.8.

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Using the same negative binomial regression model we used to predict the extent to which federal courts would cite to the first-tier appellate opinions, we find limited results for whether the type of first-tier appellate opinion will be a statistically significant predictor of the depth of treatment provided to the opinion by the citing federal court when controlling for other factors.[163] Again, when holding all other variables at their mean, we find that BAP opinions are predicted to have a statistically significant higher number of citing references by other federal courts that (1) provided discussion of less than a paragraph but more than a brief reference to the cited opinion—approximately 2.96 [1.99, 3.92] more citing references of this type—and (2) provided discussion of more than a paragraph but less than a printed page of the opinion—approximately 0.39 [0.09, 0.68] more citing references of this type.[164] On the other hand, we find no statistically significant relationship between the type of first-tier appellate court that issued the opinion and the number of citing references that either mentioned the opinion (i.e., contained a brief reference to the cited opinion, usually in a string citation) or examined the opinion (i.e., contained an extended discussion of the cited opinion usually more than a printed page of text).[165]

Including the same observations and independent variables from the regression models we used to predict the extent of citation and depth of treatment by citing references, we predict through binary logistic regression the tendency of first-tier appellate opinions to be directly quoted by federal courts that positively cite to those opinions. We find that, when holding other variables at their mean, a BAP opinion is predicted to have a 64% [53, 75] chance of being directly

163. In one instance, we do not use a negative binomial regression model. In order to predict the number of citing references that examined the first-tier appellate opinion (i.e., an opinion that contains an extended discussion of the cited opinion usually more than a printed page of text), we used a Poisson regression model since the values for this dependent variable were not overdispersed. When using a negative binomial model, the likelihood ratio test for alpha—the overdispersion parameter—was not significant (chi-squared = 0.0019, df = 1, p = 0.483), thus indicating that the Poisson model is preferred.

164. To predict the total number of positive citations that provided discussion of more than a paragraph but less than a printed page of the opinion, we initially fitted a negative binomial regression model that included all of the independent variables included in the negative binomial regression model used for the other types of citations (the full model). Although the Court variable was a statistically significant predictor in the full model, the model as a whole was not statistically significant (chi-squared = 15.41, df = 12, p = 0.2200). Accordingly, using a backward-selection stepwise regression, we fitted a partial model that only included the Court and Subject variables. This partial model was statistically significant (chi-squared = 9.67, df = 2, p = 0.0080), and the Court variable continued to be a statistically significant predictor (p = 0.008).

165. For detailed results from this regression model, see *infra* Appendix tbl.9.

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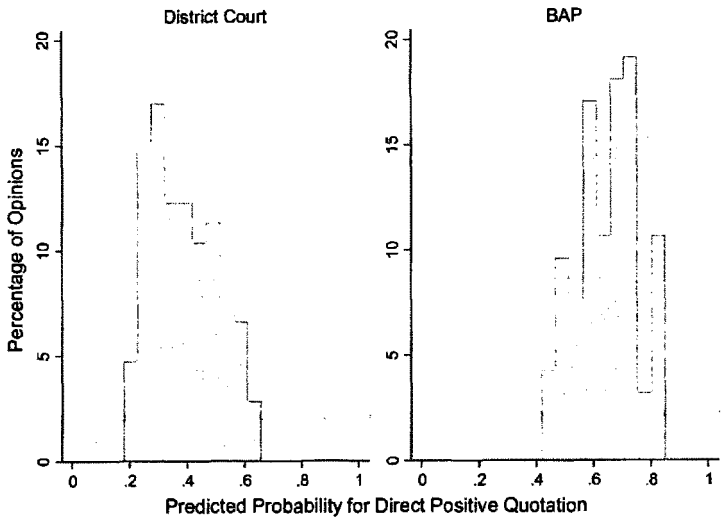
quoted in contrast to 40% [29, 50] for a district court opinion.[166] Thus, when holding other variables at their mean, the likelihood of direct quotation of a first-tier appellate opinion by a citing federal court is predicted to increase by 25 [9, 40] percentage points when the court cites to a BAP opinion. We present the distribution of predicted probabilities for direct quotation (based on the actual values of all of the independent variables included in the model) in Figure 9 below.

FIGURE 9
PREDICTED PROBABILITIES FOR DIRECT QUOTATION OF
FIRST-TIER APPELLATE OPINIONS BY CITING FEDERAL COURTS



Moreover, if we look to the extent of direct quotation of first-tier appellate opinions, a negative binomial regression model indicates that a statistically significant relationship exists between the type of first-tier appellate court to have issued the opinion and the extent to

166. None of the other independent variables was a statistically significant predictor of direct quotation of the first-tier appellate opinion by its citing reference. For detailed results from this regression model, see *infra* Appendix tbl.11.

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which other federal courts directly quoted the opinion.[167] Specifically, we find that, holding all other variables at their mean, a BAP opinion is predicted to have approximately 0.75 [0.35, 1.16] more citing references that directly quote it than a district court opinion.[168] These findings support Hypotheses 9A and 9B.

Finally, we find support for Hypothesis 10, even when controlling for other factors. A zero-truncated negative binomial regression model indicates that the type of first-tier appellate court to have issued the opinion influenced the immediacy with which it was cited. A BAP opinion is predicted to decrease the expected number of days before a federal court first cites positively to a first-tier appellate opinion by approximately 44% [25, 58], holding all other variables constant. It would seem, therefore, that BAP opinions command the attention of other federal courts more quickly than district court opinions.[169]

D. Interpretation of Results

Our inquiry into the perceived quality of appellate review has focused on two types of perception: (1) the manner in which courts of appeals, upon direct review, have perceived BAPs and district courts to perform their error-finding function; and (2) the manner in which other federal courts have signaled, through citation practices, their perception of the quality of appellate review provided by BAPs and district courts. We conducted our inquiry by testing a series of hypotheses predicting that BAPs, by virtue of their structural features, would be perceived to provide a quality of appellate review superior to that of their district court counterparts. In the end, our statistical analyses generate considerable evidence in support of our hypotheses. We repeatedly find a statistically significant, positive association between BAPs and various measures for the perception of the quality of appellate review. However, as statistical significance does not necessarily translate into substantive significance, we seek to give a richer account of the different ways in which our results buttress our claims.

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167. The model incorporates the same independent variables and observations from the binary logistic regression model used to predict the tendency for direct quotation of first-tier appellate opinions.

168. No statistically significant relationship existed between any of the other independent variables and the number of citations that directly quoted the first-tier appellate opinion. For detailed results from this regression model, see *infra* Appendix tbl.9.

169. For detailed results from this regression model, see *infra* Appendix tbl.10.

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First, consider our findings that, even when holding other variables at their mean, the likelihood of some affirmance (whether in part or in full) by the court of appeals is predicted to increase from 77% for district courts to 93% for BAPs, and that the likelihood of full affirmance by the court of appeals is predicted to increase from 69% for district courts to 85% for BAPs.[170] Given that affirmance deference has been documented to be a major determinant of circuit court outcomes,[171] the statistically significant difference in affirmance rates takes on added significance. While legal procedural requirements generally require a court of appeals to accord deference to a lower court's findings of fact, the legal standard most often applicable to a lower court's conclusions of law—de novo review—calls for no such deference. If courts of appeals affirm BAPs at a statistically significant greater rate than district courts, notwithstanding the affirmance bias created by legal review standards, our results suggest that the circuit courts perceive the BAP to perform its error-finding function better than the district court.[172]

Second, consider our statistically significant findings that BAP opinions received higher numbers of positive citations by other federal

170. *See supra* Part III.C.1.

171. *See* CROSS, *supra* note 95, at 39–68.

172. A study conducted by the Federal Judicial Center found that courts of appeals fully affirmed the judgments of district courts in bankruptcy appeals approximately 73% of the time, and the study further estimated that the affirmance rates for BAP judgments would be similar. *See* McKenna & Wiggins, *supra* note 65, at 630. We conclude that our statistically significant evidence contravenes the prior understanding of outcomes in the bankruptcy appeals system.

In response to the account we have provided regarding circuit court affirmance, one might argue that courts of appeals simply prefer to reduce their workload and that they accordingly tend to defer to BAPs (even if the legal standard calls for more exacting review). Assuming, however, that the predilection toward leisure does not outweigh the desire of courts of appeals to resolve appeals correctly, then one must assume that, to the extent that courts of appeals affirm—and, on this story, defer to—BAPs more than district courts, they do so because they believe that BAPs are structurally more likely to resolve the issues correctly than are district courts. It is true that, to the extent that the courts of appeals simply defer to BAPs to a greater extent on principle (i.e., with less review of how the BAPs actually resolve particular cases), we cannot say whether the affirmance rate measures actual quality of appellate review. Even on this story, however, the affirmance rate does measure the perceived quality of appellate review.

One also might argue that courts of appeals in BAP circuits are heavily invested in the success of the BAPs given that the judicial councils in those circuits have decided to establish BAPs in the first instance, *see* 28 U.S.C. § 158(b)(1) (2000) (setting forth procedures for establishing a BAP), and given that the judicial councils have also selected the bankruptcy judges who will serve on the BAPs, *see id.* § 158(b)(3) (setting forth procedures for selecting BAP judges). The desire to legitimate the BAP as an institution, in other words, may motivate the greater tendency of courts of appeals to affirm BAPs. Insofar as review by a court of appeals is transparent, however, it is unlikely that the court would simply affirm BAP judgments and reasoning that were obviously wrong. Put another way, it seems unlikely that the desire of a court of appeals to legitimate a BAP would entirely outweigh the desire to resolve appeals correctly.

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courts, BAP opinions were cited in greater depth, and BAP opinions were cited with greater immediacy. We noted above that citations rates are most relevant and most informative in the absence of a stare decisis obligation.[173] Accordingly, we find that our results regarding the citation practices of courts of appeals and extracircuit federal courts merit particular attention.

At first blush, one might not consider substantively significant our statistically significant finding that, when holding other variables at their mean, BAP opinions are predicted to receive approximately 0.2 more citations by courts of appeals. Placed in its proper context, however, this finding takes on new light. As an initial matter, courts of appeals were incredibly parsimonious in their citing of first-tier appellate opinions. Specifically, 82% of the first-tier appellate opinions did not receive *any* circuit court citations, thus making any amount of citation by the courts of appeals impressive. Furthermore, we estimate pursuant to our regression analysis that the rate of citation over a five-year period to BAP opinions by courts of appeals is 2.33 [1.30, 4.21] times greater than for district court opinions.[174] These findings confirm anecdotal evidence reported by the Federal Judicial Center that circuit judges perceive BAP opinions to be of a higher quality than district court opinions.[175] Thus, although the size of the statistically significant effect we witness with respect to circuit court citations appears small, we interpret it to have substantive significance. Finally, we uncovered statistically significant evidence to support our hypothesis that extracircuit federal courts would positively cite with greater frequency to BAP opinions—specifically, a rate predicted to be 1.45 [1.03, 2.03] times greater than that for district court opinions.[176] In light of "the dearth of binding precedent [on questions of substantive bankruptcy law] from the courts of appeals or the Supreme Court,"[177] one might interpret the extracircuit favoritism of BAP opinions over district court opinions as the next-best source of authority.

When we consider these findings in concert with the rest of our findings on citation practices, we conclude that there exists strong support for the notion that, in a variety of ways, other judicial actors

173. *See supra* notes 106–107 and accompanying text.

174. *See infra* Appendix tbl.8.

175. *See* McKenna & Wiggins, *supra* note 65, at 678 ("There is anecdotal evidence that circuit judges find the BAP decisions they review better reasoned and the cases better prepared for review than decisions from the district courts, *and that this impression is independent of the likelihood of affirmance or reversal*." (emphasis added)).

176. *See infra* Appendix tbl.8.

177. *See* McKenna & Wiggins, *supra* note 65, at 628.

in the bankruptcy appeals process perceive BAPs to provide a better quality of appellate review than district courts. These conclusions provide strong validation to commentators who have theorized about the ideal attributes of appellate review. To the extent that courts in fact strive to resolve cases correctly, the findings suggest that BAPs in fact offer higher quality appellate review than do district courts. That conclusion, in turn, has important ramifications for policymakers. It would seem desirable for policymakers to introduce more multimember appellate tribunals staffed by judges with particular expertise in the subject matter of the appeals.[178]

It is important to emphasize again that those conclusions clearly result only if courts in fact strive to reach correct resolution of cases and issues. That is a question on which our data do not and cannot shed light. It may be the case that, partly as a result of theoreticians' writings, courts favor BAPs over district courts not because they truly conclude that BAPs are correct more often, but rather because they simply *believe* (without truly examining) that BAPs are correct, which in turn inclines them simply to affirm the conclusions of BAPs. If so, the lesson for policymakers is murkier.

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178. *See, e.g.*, *id.* at 634:

> [U]sers of the complex bankruptcy system probably want precedent not just settled, but settled right . . . . If early (and in the Ninth Circuit, not so early) impressions about the quality of work by the bankruptcy appellate panels hold up, the dual needs for binding authority and substantive correctness . . . argue for some sort of a dual or hybrid system involving bankruptcy appellate panels in some form.

The benefits of establishing such tribunals may impose various costs, although they may be minimized depending on the manner in which such tribunals are integrated within existing judicial operations. *See, e.g.*, *id.* at 629; *Bankruptcy Appeals, Lawyers Wary of New System Begun This Month*, N.Y.L.J., July 11, 1996, at 5 ("Steven Flanders, the Second Circuit Executive, though, while noting that the BAPs represent a 'major institutional change' for the circuit, believes the costs will be manageable. Mr. Flanders indicated that the calendaring of appeals will be integrated into the circuit clerk's office . . . ."). From the perspective of litigants, a cost of particular concern would be that of disposition time. In the bankruptcy appeals context, however, preliminary evidence tentatively suggests that BAPs appear to have reduced such costs. A study by the Federal Judicial Center reported that, "[i]n most circuits, the overall mean and median disposition times for BAPs are lower than the national figure for bankruptcy appeals to the district courts, but in most circuits they are based on a rather small number of cases, which limits the conclusions to be drawn from the figures." McKenna & Wiggins, *supra* note 65, at 661.

We emphasize that our findings do not speak to whether it is more desirable to have many such tribunals—as is the case with BAPs—or just one national tribunal—as is the case, for example, with the United States Court of Appeals for the Federal Circuit for patent appeals. That issue would seem to turn largely on the importance of having an intermediate appellate tribunal announce legal rules with national uniformity. *See, e.g.*, *id.* at 649.

CONCLUSION

In this Article, we have shown that, in different ways, federal courts have expressed a general preference for the quality of appellate review afforded by BAPs as opposed to district courts. On the hardly implausible assumption that courts in fact strive to resolve cases and issues correctly, this finding tends to validate theoreticians' claims about the ideal attributes of appellate review, because BAPs, more so than district courts, tend to feature those attributes. Upon the same assumption, this finding also should prompt policymakers to introduce more appellate tribunals with these attributes—specifically, multimember panels whose members enjoy an expertise in the types of matters likely to fill up the docket of the tribunals.

We believe that future research in the area will offer even more insights. We intend to continue our exploration by refining our consideration of issues that come before courts. Perhaps, for example, some issues lend themselves more to solution by expert panels than do others. We also hope to consider the effect of competition between appellate tribunals, such as the one that exists between BAPs and district courts in the bankruptcy appeals context.

APPENDIX

Table 1: Sample of Appellate Bankruptcy Opinions

Panel A: District Court and Bankruptcy Appellate Panel (BAP) Opinions by Fiscal Year

Fiscal Year	*District Court Opinions*	*Column Percentage*	*BAP Opinions*	*Column Percentage*
1998	56	34.57	34	32.08
1999	53	32.72	44	41.51
2000	53	32.72	28	26.42
Total	162	100.00	106	100.00

Source: First-Tier Database
Note: Column percentages may not total 100% due to rounding.

Panel B: District Court and Bankruptcy Appellate Opinions by Circuit

Circuit	*District Court*	*Column Percentage*	*BAP*	*Column Percentage*	*Total*	*Column Percentage*
First	7	4.32	10	9.43	17	6.34
Second	32	19.75	5	4.72	37	13.81
Third	26	16.05	0	0.00	26	9.70
Fourth	9	5.56	0	0.00	9	3.36
Fifth	14	8.64	0	0.00	14	5.22
Sixth	16	9.88	11	10.38	27	10.07
Seventh	23	14.20	0	0.00	23	8.58
Eighth	2	1.23	22	20.75	24	8.96
Ninth	14	8.64	31	29.25	45	16.79
Tenth	7	4.32	27	25.47	34	12.69
Eleventh	12	7.41	0	0.00	12	4.48
District of Columbia	0	0.00	0	0.00	0	0.00
Total	162	100.0	106	100.00	268	100.00

Source: First-Tier Database
Note: Column percentages may not total 100% due to rounding.

Panel C: Court of Appeals Opinions by Fiscal Year and First-Tier Court Reviewed

Fiscal Year	*Reviewing District Court*	*Column Percentage*	*Reviewing BAP*	*Column Percentage*
1998	42	30.66	13	39.39
1999	44	32.12	9	27.27
2000	51	37.23	11	33.33
Total	137	100.00	33	100.00

Source: Second-Tier Database
Note: Column percentages may not total 100% due to rounding.

Panel D: Court of Appeals Opinions by Circuit and First-Tier Court Reviewed

Circuit	*District Court*	*Column Percentage*	*BAP*	*Column Percentage*	*Total*	*Column Percentage*
First	3	2.19	3	9.09	6	3.53
Second	14	10.22	2	6.06	16	9.41
Third	7	5.11	0	0.00	7	4.12
Fourth	8	5.84	0	0.00	8	4.71
Fifth	23	16.79	0	0.00	23	13.53
Sixth	15	10.95	2	6.06	17	10.00
Seventh	16	11.68	0	0.00	16	9.41
Eighth	10	7.30	2	6.06	12	7.06
Ninth	26	18.98	23	69.70	49	28.82
Tenth	8	5.84	1	3.03	9	5.29
Eleventh	6	4.38	0	0.00	6	3.53
District of Columbia	1	0.73	0	0.00	1	0.59
Total	137	100.00	33	100.00	170	100.00

Source: Second-Tier Database
Note: Column percentages may not total 100% due to rounding.

Table 2: Frequency of Dispositions Rendered on Appeal

Panel A: First-Tier Dispositions

Disposition	*Frequency*	*Percentage*
Negative	78	29.10
Hybrid	22	8.21
Positive	168	62.69
Total	268	100.00

Source: First-Tier Database

Panel B: Second-Tier Dispositions

Disposition	*Frequency*	*Percentage*
Negative	33	19.41
Hybrid	17	10.00
Positive	120	70.59
Total	170	100.00

Source: Second-Tier Database

Table 3: Data for First-Tier Appellate Bankruptcy Opinions with Positive Citing References

Panel A: Frequency of Positive Citation to First-Tier Appellate Opinions

Number of Citations	*Frequency*	*Percentage*
1	45	22.28
2	35	17.33
3	24	11.88
4	17	8.42
5	18	8.91
≥ 6	63	31.18
Total	202	100.00

Source: First-Tier Database

Panel B: Distribution of Positive Citations to First-Tier Appellate Opinions

N	*25%*	*Median*	*75%*	*Mean*
202	1	2	5	4

Source: First-Tier Database

Table 4: Circuit Court Affirmance of First-Tier Appellate Dispositions

Panel A: Partial or Full Affirmance

	Circuit Court Affirmance		
First-Tier Appellate Court	*No*	*Yes*	**Total**
BAP	5 (8.77)	52 (91.23)	57 (100.00)
District Court	47 (26.11)	133 (73.89)	180 (100.00)
Total	52 (21.94)	185 (78.06)	237 (100.00)

Source: Affirmance Database
Note: Row percentages are reported in parentheses. The *p*-value from a chi-square test with one degree of freedom is 0.006.

Panel B: Full Affirmance

	Circuit Court Affirmance		
First-Tier Appellate Court	*No*	*Yes*	**Total**
BAP	11 (19.30)	46 (80.70)	57 (100.00)
District Court	61 (33.89)	119 (66.11)	180 (100.00)
Total	72 (30.38)	165 (69.62)	237 (100.00)

Source: Affirmance Database
Note: Row percentages are reported in parentheses. The *p*-value from a chi-square test with one degree of freedom is 0.037.

Table 5: Citing Reference Data

Panel A: Federal Court Positive Citing Reference by Type of First-Tier Appellate Opinion

	Positive Citing Reference by Federal Court		
First-Tier Appellate Opinion Type	*No*	*Yes*	**Total**
BAP	10 (9.43)	96 (90.57)	106 (100.00)
District Court	56 (34.57)	106 (65.43)	162 (100.00)
Total	66 (24.63)	202 (75.37)	268 (100.00)

Source: First-Tier Database

Note: Row percentages are reported in parentheses. The *p*-value from a chi-square test with one degree of freedom is less than 0.0001.

Panel B: Citing Reference Data by Type of Citing Court for Positively Cited First-Tier Bankruptcy Appellate Opinions

	Citing References		
***Citing Court**: All Federal Courts*	*Median*	*Mean*	*N*
BAP Opinions	6.00	7.27	94
District Court Opinions	2.00	3.25	106
t-test of difference in means: $t = -6.5107$ ($p < 0.0001$)*** Wilcoxon rank-sum test: $z = -6.257$ ($p < 0.0001$)***			
***Citing Court**: Court of Appeals*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.45	94
District Court Opinions	0.00	0.19	106
t-test of difference in means: $t = -2.7414$ ($p = 0.0067$)** Wilcoxon rank-sum test: $z = -2.560$ ($p = 0.0105$)*			
***Citing Court**: Bankruptcy Appellate Panel*	*Median*	*Mean*	*N*
BAP Opinions	1.00	2.01	94
District Court Opinions	0.00	0.15	106
t-test of difference in means: $t = -9.7270$ ($p < 0.0001$)*** Wilcoxon rank-sum test: $z = -9.368$ ($p < 0.0001$)***			
***Citing Court**: District Court*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.57	94
District Court Opinions	1.00	0.99	106
t-test of difference in means: $t = 2.0821$ ($p = 0.0386$)* Wilcoxon rank-sum test: $z = 3.194$ ($p = 0.0014$)**			
***Citing Court**: Bankruptcy Court*	*Median*	*Mean*	*N*
BAP Opinions	3.00	4.23	94
District Court Opinions	1.00	1.92	106
t-test of difference in means: $t = -5.2142$ ($p < 0.0001$)*** Wilcoxon rank-sum test: $z = -4.593$ ($p < 0.0001$)***			
***Citing Court**: Extracircuit Federal Courts*	*Median*	*Mean*	*N*
BAP Opinions	1.50	2.52	94
District Court Opinions	1.00	1.51	106
t-test of difference in means: $t = -3.0581$ ($p = 0.0025$)** Wilcoxon rank-sum test: $z = -3.337$ ($p = 0.0008$)***			

Source: First-Tier Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Panel C: Citing Reference Data by Depth of Treatment for Positively Cited First-Tier Bankruptcy Appellate Opinions

	Citing References		
***Depth of Treatment**: Mentioned*	*Median*	*Mean*	*N*
BAP Opinions	1.00	1.10	94
District Court Opinions	0.00	0.73	106
t-test of difference in means: $t = -1.8837$ ($p = 0.0611$) Wilcoxon rank-sum test: $z = -2.288$ ($p = 0.0221$)*			
***Depth of Treatment**: Cited*	*Median*	*Mean*	*N*
BAP Opinions	4.50	5.22	94
District Court Opinions	1.00	1.94	106
t-test of difference in means: $t = -7.3435$ ($p < 0.0001$)*** Wilcoxon rank-sum test: $z = -6.941$ ($p < 0.0001$)***			
***Depth of Treatment**: Discussed*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.89	94
District Court Opinions	0.00	0.48	106
t-test of difference in means: $t = -2.8311$ ($p = 0.0051$)** Wilcoxon rank-sum test: $z = -2.349$ ($p = 0.0188$)*			
***Depth of Treatment**: Examined*	*Median*	*Mean*	*N*
BAP Opinions	0.00	0.05	94
District Court Opinions	0.00	0.09	106
t-test of difference in means: $t = 1.0285$ ($p = 0.3050$) Wilcoxon rank-sum test: $z = 0.889$ ($p = 0.3741$)			

Source: First-Tier Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Panel D: Federal Court Positive Quoting References by Type of First-Tier Appellate Opinion

	Positive Quoting Reference by Federal Court		
First-Tier Appellate Opinion Type	*No*	*Yes*	**Total**
BAP	33 (35.11)	61 (64.89)	94 (100.00)
District Court	65 (61.32)	41 (38.68)	106 (100.00)
Total	98 (49.00)	102 (51.00)	200 (100.00)

Source: First-Tier Database
Note: Row percentages are reported in parentheses. The p-value from a chi-square test with one degree of freedom is less than 0.0001.

Panel E: Citing Reference Data for Positively Quoted First-Tier Bankruptcy Appellate Opinions

	Citing References		
First-Tier Appellate Opinion Type	*Median*	*Mean*	*N*
BAP Opinions	1.00	1.43	94
District Court Opinions	0.00	0.58	106
t-test of difference in means: $t = -4.4839$ ($p < 0.0001$)*** Wilcoxon rank-sum test: $z = -4.473$ ($p < 0.0001$)***			

Source: First-Tier Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Panel F: Immediacy Data for Positively Quoted First-Tier Bankruptcy Appellate Opinions

	Number of Days		
First-Tier Appellate Opinion Type	*Median*	*Mean*	*N*
BAP Opinions	177	306	94
District Court Opinions	387	533	106
t-test of difference in means: $t = 4.0459$ ($p = 0.0001$)*** Wilcoxon rank-sum test: $z = 4.166$ ($p < 0.0001$)***			

Source: First-Tier Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$.

Table 6: Binary Logistic Regression Model of Circuit Court Affirmance

Variable	Affirmance	Full Affirmance
Court	3.947** (1.407, 11.069)	2.535* (1.119, 5.742)
Published	0.295** (0.129, 0.673)	0.287*** (0.138, 0.598)
Appellant	2.003 (0.815, 4.924)	4.293*** (1.886, 9.776)
Appellee	0.993 (0.434, 2.272)	2.372* (1.072, 5.249)
Chapter 7	1.594 (0.770, 3.299)	1.683 (0.852, 3.323)
Debtor Type	1.279 (0.581, 2.812)	0.936 (0.438, 2.000)
Dispute Type	0.940 (0.431, 2.048)	1.142 (0.544, 2.394)
Subject	0.596 (0.260, 1.365)	0.452* (0.206, 0.990)
FY 1998	1.103 (0.485, 2.511)	0.527 (0.247, 1.122)
FY 1999	0.721 (0.323, 1.611)	0.729 (0.336, 1.582)
N	237	237
Log likelihood	-110.133	-122.660
McFadden's R^2	0.117	0.157

Source: Affirmance Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. Odds ratios presented with 95% confidence intervals in parentheses.

Table 7: Binary Logistic Regression Model of Positive Citation by a Federal Court to First-Tier Appellate Opinion

Variable	Positive Federal Court Citation
Court	3.445** (1.515, 7.836)
First-Tier Full Affirmance	1.459 (0.724, 2.942)
Published	6.810*** (3.391, 13.673)
Appellant	0.868 (0.361, 2.086)
Appellee	1.278 (0.524, 3.118)
Chapter 7	1.335 (0.644, 2.765)
Debtor Type	0.783 (0.321, 1.908)
Dispute Type	2.881* (1.148, 7.231)
Subject	3.392** (1.379, 8.346)
Subsequent Appeal	0.937 (0.450, 1.951)
FY 1998	0.745 (0.336, 1.653)
FY 1999	1.072 (0.469, 2.452)
N	268
Log likelihood	-116.625
McFadden's R^2	0.220

Source: First-Tier Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. Odds ratios presented with 95% confidence intervals in parentheses.

Table 8: Regression Analyses of Number of Positive Federal Court Citing References to Positively Cited First-Tier Appellate Bankruptcy Opinions (by Type of Federal Court)

Variable	All Federal Court Citations[a]	Bankruptcy Court Citations[b]	District Court Citations[c]	BAP Citations[b]	Court of Appeals Citations[d]	Extracircuit Citations[b]
Court	2.538*** (1.836, 3.509)	2.072*** (1.509, 2.845)	0.628* (0.410, 0.962)	9.702*** (5.462, 17.231)	2.336** (1.297, 4.206)	1.447* (1.030, 2.031)
First-Tier Full Affirmance	0.995 (0.732, 1.352)	0.985 (0.726, 1.337)		1.088 (0.738, 1.605)	0.873 (0.517, 1.473)	1.000 (0.716, 1.397)
Published	1.838** (1.128, 2.994)	1.563 (0.968, 2.526)		4.276 (0.985, 18.561)	3.524 (0.820, 15.141)	4.814*** (2.443, 9.488)
Appellant	1.020 (0.685, 1.519)	1.023 (0.686, 1.527)		0.925 (0.573, 1 493)	1.381 (0.614, 3.104)	1.055 (0.681, 1.633)
Appellee	1.005 (0.681, 1.485)	1.096 (0.740, 1 623)		0.470** (0.275, 0 802)	2.306* (1.101, 4.830)	1.194 (0.780, 1.828)
Chapter 7	1.395* (1.011, 1.924)	1.386* (1.010, 1.904)		1.330 (0.873, 2.026)	1 629 (0.901, 2.948)	1.112 (0.783, 1.581)
Debtor Type	0.741 (0.490, 1.120)	0.782 (0.517, 1.183)	0.673 (0.432, 1.050)	1.475 (0.803, 2.709)	0.400* (0.188, 0.852)	0.800 (0.512, 1.249)
Dispute Type	0.817 (0.551, 1.212)	0.796 (0.538, 1.178)		1.452 (0.871, 2.418)	0.678 (0.326, 1.413)	0.930 (0.614, 1.408)
Subject	1.435 (0.971, 2.121)	1 160 (0.783, 1.720)	1.492 (0.976, 2.280)	1.870* (1.125, 3.107)	1.341 (0.634, 2.838)	1.202 (0.797, 1.814)
Subsequent Appeal	1.092 (0.795, 1.501)	1.063 (0.777, 1.455)		1.169 (0.789, 1.731)	0.949 (0.536, 1.682)	1.127 (0.805, 1.579)
FY 1998	1.134 (0.778, 1.652)	0.845 (0.584, 1.223)	1.687* (0.999, 2.847)	1.657* (1.018, 2.697)	0.700 (0.376, 1.302)	0.914 (0.606, 1.378)
FY 1999	1.004 (0.711, 1.418)	0.926 (0.659, 1.301)	1.324 (0.789, 2.223)	1.237 (0.799, 1.915)	0.447* (0.240, 0.832)	0.867 (0.595, 1.263)

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Table 8 (continued)

	All Federal Court Citations[a]	Bankruptcy Court Citations[b]	District Court Citations[c]	BAP Citations[b]	Court of Appeals Citations[d]	Extracircuit Citations[b]
N	200	200	200	200	200	200
Log likelihood	-473.506	-427.097	-238.131	-209.440	-130.134	-359.980
McFadden's R^2	0.063	0.050	0.034	0.242	0.124	0.053

Source: First-Tier Database

Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. Incidence rate ratios presented with 95% confidence intervals in parentheses.

[a] Zero-truncated negative binomial regression model.

[b] Negative binomial regression model.

[c] We have fitted a negative binomial regression model that does not include all of the independent variables in the table for the reasons set forth in *supra* note 161.

[d] Poisson regression model. When fitting a negative binomial regression model, the likelihood ratio test for alpha—the overdispersion parameter—was not significant (chi-squared = 2.52, df = 1, $p = 0.056$), thus indicating that the Poisson model is preferred.

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Table 9: Regression Analyses of Number of Positive Federal Court Citing References to Positively Cited First-Tier Appellate Bankruptcy Opinions (by Depth of Treatment)

Variable	Cited[a]	Discussed[b]	Quoted[a]
Court	2.525*** (1.922, 3.317)	1.798** (1.164, 2.779)	2.338*** (1.527, 3.580)
First-Tier Full Affirmance	1 023 (0.789, 1.325)		0.828 (0.561, 1.222)
Published	1.521 (0.997, 2 321)		1.535 (0.771, 3.056)
Appellant	1.127 (0.809, 1.569)		1.288 (0.761, 2.179)
Appellee	1.021 (0.735, 1.420)		1.373 (0.817, 2.307)
Chapter 7	1.352* (1.027, 1.779)		1.302 (0.853, 1.988)
Debtor Type	0.766 (0.541, 1.085)		0.663 (0.388, 1.135)
Dispute Type	0.853 (0.608, 1.197)		0.913 (0.549, 1.517)
Subject	1.174 (0.839, 1.643)	1.397 (0.882, 2.213)	1.059 (0.645, 1.741)
Subsequent Appeal	0.915 (0.699, 1.197)		0.676 (0.438, 1.043)
FY 1998	1.101 (0.804, 1.506)		1.450 (0.885, 2.374)
FY 1999	0.969 (0.725, 1.296)		1.366 (0.862, 2.163)
N	200	200	200
Log likelihood	-436.214	-221.011	-257.881
McFadden's R^2	0.076	0.021	0.060

Source: First-Tier Database

Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. Incidence rate ratios presented with 95% confidence intervals in parentheses. We have only presented the results from those regression analyses in which the Court variable was a statistically significant predictor.

[a] Negative binomial regression model.

[b] We have fitted a negative binomial regression model that does not include all of the independent variables in the table for the reasons set forth in *supra* note 164.

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Table 10: Zero-Truncated Negative Binomial Regression Model of Number of Days for First Positive Federal Court Citing Reference to Positively Cited First-Tier Appellate Bankruptcy Opinions

Variable	Number of Days
Court	0.565*** (0.423, 0.753)
First-Tier Full Affirmance	0.913 (0.698, 1.194)
Published	0.922 (0.631, 1.345)
Appellant	1.116 (0.781, 1.595)
Appellee	1.097 (0.761, 1.582)
Chapter 7	0.767 (0.579, 1.016)
Debtor Type	0.889 (0.619, 1.275)
Dispute Type	0.836 (0.596, 1.174)
Subject	0.670* (0.480, 0.937)
Subsequent Appeal	0.681* (0.507, 0.914)
FY 1998	0.860 (0.607, 1.220)
FY 1999	0.927 (0.676, 1.272)
N	200
Log likelihood	-1392.339
McFadden's R^2	0.013

Source: First-Tier Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. Incidence rate ratios presented with 95% confidence intervals in parentheses.

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Table 11: Binary Logistic Regression Model of Direct Quotation of Positively Cited First-Tier Appellate Opinion by Positive Citing Federal Courts

Variable	Direct Quotation
Court	2.727** (1.393, 5.339)
First-Tier Full Affirmance	0.563 (0.297, 1.067)
Published	1.142 (0.455, 2.868)
Appellant	1.079 (0.473, 2.461)
Appellee	1.173 (0.514, 2.681)
Chapter 7	1.083 (0.555, 2.112)
Debtor Type	1.300 (0.572, 2.954)
Dispute Type	0.861 (0.381, 1.946)
Subject	1.050 (0.474, 2.328)
Subsequent Appeal	0.702 (0.360, 1.370)
FY 1998	1.079 (0.501, 2.323)
FY 1999	2.007 (0.964, 4.178)
N	200
Log likelihood	-126.033
McFadden's R^2	0.091

Source: First-Tier Database
Note: *** $p \leq 0.001$, ** $p \leq 0.01$, * $p \leq 0.05$. Odds ratios presented with 95% confidence intervals in parentheses.

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"The Threes": Re-Imagining Supreme Court Decisionmaking

Tracey E. George
Chris Guthrie

61 Vand. L. Rev. 1825 (2008)

Article III authorizes "one Supreme Court," but it says virtually nothing about the Court's institutional design. Consistent with this Constitutional silence, the Court's size, docket, and courtroom practices have changed dramatically. For example, the Court has had as many as ten and as few as six members, and for nearly four decades, the Court delegated decisionmaking in the summer to one Justice! In this Essay, the first in a series of essays designed to re-imagine the Supreme Court, we argue that the Court should alter its decisionmaking processes in what might seem to be a radical way but, in fact, is not. We argue that the Court, like the United States Courts of Appeals and several foreign high courts, should adopt panel decisionmaking. Based on a theoretical and empirical analysis of the costs and benefits of a panel system, we contend that if the Court were to embrace panel decisionmaking, it would be better able to fulfill its Constitutional role as the leader of an ostensibly "coequal" branch of government.

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Misbehavior and Mistake in Bankruptcy Mortgage Claims

Katherine Porter*

The greatest fear of many families in serious financial trouble is that they will lose their homes. Bankruptcy offers a last chance for families to save their homes by halting a foreclosure and by repaying any default on their mortgage loans over a period of years. Mortgage companies participate in bankruptcy by filing proofs of claim with the court for the amount of the mortgage debt. To retain their homes, bankruptcy debtors must pay these claims. This process is well established and, until now, has been uncontroversial. The assumption is that the protective elements of federal bankruptcy shield vulnerable homeowners from harm.

This Article examines the actual behavior of mortgage companies in consumer bankruptcy cases. Using original data from 1,700 recent Chapter 13 bankruptcy cases, I conclude that mortgage companies frequently do not comply with bankruptcy law. A majority of mortgage claims are missing one or more of the required pieces of documentation for a bankruptcy claim. Furthermore, fees and charges on claims often are poorly identified, making it impossible to verify if such fees are legally permissible or accurate. In nearly all cases, debtors and mortgage companies disagree on the amount of outstanding mortgage debt.

Despite these irregularities, mortgage claims in bankruptcy are contested infrequently. Imposing unambiguous legal rules does not ensure that a system will actually function to safeguard the rights of parties. The findings of this Article are a chilling reminder of the limits of formal law to protect consumers. The observation that laws can underperform has crucial implications for designing legal systems that function as intended and for evaluating the appropriate scope of consumer protections.

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* Associate Professor of Law, The University of Iowa College of Law. David Baldus, Patrick Bauer, Robert Lawless, Lynn LoPucki, Ronald Mann, and Elizabeth Warren provided helpful comments on this Article. I thank Tara Twomey for her participation as co-investigator in developing the Mortgage Study database, and Ann Casey for invaluable assistance in data collection and analysis. John Eggum, Sarah Hartig, Kati Jumper, Chris Jerry, Gina Lavarda, Brian Locke, and Nece McDaniel provided research assistance.

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Misbehavior or mistake by mortgage servicers can have grave consequences. Undocumented or bloated claims jeopardize a family's ability to save its home. Beyond bankruptcy, poor or abusive mortgage servicing undermines the United States' home-ownership policies by exposing families to the risks of overpaying or suffering unjustified foreclosure. This Article's findings offer an empirical measure of the validity of concerns about whether consumers can trust mortgage companies to adhere to applicable laws.

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Families in serious financial trouble are under great stress. The telephone rings with repeated calls from debt collectors, each paycheck is at risk of garnishment, and the next knock on the door could be a process server or a repo agent. Yet, for many families, the greatest fear is losing their homes to foreclosure. A home is not only most families' largest asset, but also a tangible marker of their financial aspirations and middle-class status. A threatened or pending foreclosure can signal the end of a family's ability to struggle against financial collapse and begin an unrecoverable tumble down the socioeconomic ladder.

Bankruptcy offers these families one last chance to save their homes.[1] A bankruptcy filing halts a pending foreclosure and gives families the right under federal law to cure any defaults on mortgage loans over a period of years.[2] The bankruptcy system offers refuge from the vagaries of state foreclosure law, substituting the protections of the federal court system and uniform legal rules to ensure that these families get one final opportunity to preserve their homes.

But this protection comes at a cost. Mortgage companies file proofs of claim with bankruptcy courts for the amount of mortgage debts. In turn, bankrupt debtors must pay these claims or lose their homes. The balance between the family and the mortgage lender is clearly spelled out in the bankruptcy laws, which specify the manner in which the amount owed is to be established and obligate both the homeowner and the mortgage company to disclose information accurately.[3]

This claims process is well established and, until now, has been uncontroversial. Homeowners—backed up by lawyers, policy makers, and news reporters—assume that bankruptcy functions according to the official rules and that it provides a realistic opportunity for families to save their homes if they follow those rules. The data revealed in this Article suggest, however, that home-mortgage lenders often disobey the law and that the legal system does not function to substantiate the amounts that lenders assert that consumers owe. These problems can cripple a family's efforts to save its home and undermine policies that promote sustainable home ownership.

This Article examines the actual behavior of mortgage companies in the consumer bankruptcy system. Using original data from 1,700 recent Chapter 13 bankruptcy cases, I conclude that mortgagees' behavior significantly threatens bankruptcy's purpose of helping families save their homes. Despite

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1. *See* Raisa Bahchieva et al., *Mortgage Debt, Bankruptcy, and the Sustainability of Homeownership*, *in* CREDIT MARKETS FOR THE POOR 73, 104 (Patrick Bolton & Howard Rosenthal eds., 2005) (explaining that Chapter 13 bankruptcy is frequently used by families facing foreclosure).

2. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 306 (5th ed. 2006).

3. *Id.* at 143; *see* FED. R. BANKR. P. 9011 (requiring that all petitions, pleadings, motions, and other papers filed with the court in a bankruptcy action have factual support).

unambiguous federal rules designed to protect homeowners and ensure the integrity of the bankruptcy process,[4] mortgage companies frequently fail to comply with the laws that govern bankruptcy claims. A majority of mortgage companies' proofs of claim lack the documentation necessary to establish a valid debt. Fees and charges on bankruptcy claims often are identified poorly and sometimes do not appear to be legally permissible. On an aggregate level, mortgage creditors assert that bankrupt families owe them at least $1 billion more than the families who file bankruptcy believe they owe.[5] Although infractions are frequent and irregularities are sometimes egregious, the bankruptcy system routinely processes mortgage claims that do not comply with legal procedures. Far from serving as a significant check against mistake or misbehavior, the bankruptcy system routinely processes mortgage claims that cannot be validated and are not, in fact, lawful.

The data revealed here are important because they offer a rare glimpse into the high-stakes world of mortgage servicing. Whether a bankrupt family can save its home turns on the family's being able to find the money to cure its mortgage arrearage. The data on missing documentation, unsubstantiated fees, and discrepancies in record keeping, combined with the growing body of case law penalizing mortgage servicers for their conduct in bankruptcy cases, raise the specter that many bankrupt families may be overcharged or may unfairly lose their homes. Such realities undermine bankruptcy's core purpose of helping financially distressed families save their homes.[6]

The misbehavior and mistakes of mortgage servicers that this Article identifies in the bankruptcy data are not specific to the bankruptcy process. Indeed, the reliability of mortgage servicing may be worse for ordinary, nonbankrupt Americans. When these families face foreclosure, they lack the safeguards of the bankruptcy system—such as specific and uniform federal laws, bankruptcy trustees, specialized federal courts, and the representation of counsel—that are intended to ensure that mortgage servicers are complying with consumer-protection laws. This Article's findings suggest that a flawed system of mortgage servicing is a key contributor to the current crisis in the American home-mortgage market. Crafting an effective policy response to help homeowners requires that regulators and policy makers recognize how poor mortgage servicing can threaten families' efforts to save their homes.

The evidence that unreliable mortgage servicing is pervasive provides a powerful lesson on the limits of formal law. The procedures for bankruptcy claims were thoughtfully designed to balance the concerns of consumers and

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4. *See, e.g.*, *In re* Matus, 303 B.R. 660, 675 (Bankr. N.D. Ga. 2004) ("The [bankruptcy] statutes are designed to insure complete, truthful and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction." (quoting *In re* Bratcher, 289 B.R. 205, 218 (Bankr. M.D. Fla. 2003))).

5. *See infra* text accompanying note 224.

6. *See* WARREN & WESTBROOK, *supra* note 2, at 306 (explaining that nearly every state had granted some level of protection from creditors by the end of the nineteenth century).

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industry.[7] The written law contains clear instructions, and parties are given the opportunity to object to inappropriate conduct.[8] Indeed, the claims system has functioned for decades without generating calls for reform. Yet these data show that reality is far from the ideal suggested by these external markers of system reliability. These data show that there are significant defects in the bankruptcy system, a chilling reminder that imposing unambiguous legal rules does not ensure that a system will actually function to protect the rights of parties. In the context of consumer transactions—where individuals are not repeat players or institutional actors—the observation that laws underperform has crucial implications that echo far beyond bankruptcy policy. An effective legal system requires more than merely putting words into law and then relying on silence as an indication of acceptable and just behavior. These data show that effective enforcement mechanisms or structural incentives for industry compliance can be as important as the rigor of substantive rules.

Part I of this Article examines the incentives for mortgage servicers to comply with applicable laws and describes reported incidences of abusive servicing. Part II describes the Study's methodology. Part III presents original data on the legality and accuracy of mortgage claims. These data show a high incidence of unreliable servicing behavior, even in the context of the heightened procedural protections in bankruptcy. Part IV develops the policy implications of the findings and proposes structural solutions to reduce the risks that poor mortgage servicing imposes on homeowners and the legal system. Without improved procedures and enforcement activity, homeowners in financial trouble—both inside and outside of bankruptcy—remain vulnerable to mortgagees' misbehavior and mistakes.

I. Statement of the Problem

Americans pursue home ownership to build wealth and to improve their financial positions. The explosion of subprime lending and the rapid maturation of the securitization market for mortgages have fueled occasional criticisms of mortgage servicers, who are the intermediaries between consumers and mortgage holders.[9] Consumers have complained of over-charges and difficulty in obtaining accurate loan information. Increasingly, these problems erupt into litigation, most frequently in bankruptcy courts. Although policy makers have focused on loan origination,[10] consumers can

7. *See* MARGARET HOWARD, BANKRUPTCY: CASES AND MATERIALS 44 (4th ed. 2005) (noting that bankruptcy law attempts to protect the interests of both debtors and creditors).

8. *See infra* notes 228–29 and accompanying text.

9. In this Article, I refer only to servicers, but lenders who service their own loans may behave similarly to third-party servicers.

10. *See, e.g.*, Press Release, Iowa Attorney Gen., States Settle with Household Finance: Up to $484 Million for Consumers (Oct. 11, 2002), *available at* http://www.state.ia.us/government/ag/latest_news/releases/oct_2002/Household_Chicago.html (reporting that the multistate settlement with mortgage lender Household Finance Corp., for its misrepresentation and disclosure violations

suffer dire harms from poor mortgage servicing. Errors or overcharges increase the cost of home ownership and expose families to the risk of wrongful foreclosure. This Part explains the serious consequences of mortgage servicing and collects the scattered reports of servicing abuse. This review highlights the need for a systematic examination of the reliability of mortgage servicing.

A. The Structure and Function of Mortgage Servicing

Mortgage servicing is the collection of payments from borrowers and the disbursement of those payments to the appropriate parties, such as lenders, investors, taxing authorities, and insurers.[11] The rise of servicing as a distinct industry resulted from the widespread use of securitization in the mortgage market.[12] Put simply, securitization is the process of creating debt instruments (usually bonds) by pooling mortgage loans, transferring those obligations to a trust, and then selling to investors fractional interests in the trust's pool of mortgages.[13] These investors receive periodic payments on their investments.[14] Servicers act as intermediaries between the borrower and the other parties to the securitization.[15] A pooling-and-servicing agreement sets out the servicer's responsibilities for collecting and remitting the mortgage payments.[16] The participation of servicers complicates the borrower–lender relationship and limits flexibility in loss mitigation and default situations.[17]

Mortgage servicers do not have a customer relationship with homeowners; they work for the investors who own the mortgage-backed securities.[18] Borrowers cannot shop for a loan based on the quality of the

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at the loan origination phase, was the largest direct- restitution settlement ever in a state or federal case).

11. Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POL'Y DEBATE 753, 755 (2004).

12. *See Possible Responses to Rising Mortgage Foreclosures: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. app. at 97 (2007) (statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation) ("Prior to the widespread use of securitization, home finance typically involved a bank or savings institution granting a loan to a borrower. The lending institution would make the decision to grant credit, fund the loan, and collect payments.").

13. *See* STEVEN L. SCHWARCZ ET AL., SECURITIZATION, STRUCTURED FINANCE, AND CAPITAL MARKETS 2 (2004) (providing an introduction to securitization and examining the legal issues relevant to securitized transactions).

14. *Id.*

15. *Id.* at 15.

16. *See Hearing*, *supra* note 12, app. at 101–02 (statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation) (explaining that a servicer must comply with the relevant securitization documents).

17. *See id.* app. at 102–06 (describing the conflicts of interest faced by servicers when managing mortgagees).

18. *Id.* app. at 103. However, lenders do have a customer relationship with borrowers and may want to retain them as repeat customers. SCHWARCZ ET AL., *supra* note 13, at 15. Some lenders retain the servicing obligations when they sell loans on the secondary market, but the active market for servicing contracts means that very few customers will find that their loans are serviced by the

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servicing, and they have virtually no ability to change servicers if they are dissatisfied with the servicers' conduct.[19] The only exit strategy for a dissatisfied borrower is refinancing the mortgage, and even then, the homeowner may find the new loan assigned to the prior servicer.[20] Because their customers are the trustees who hire them to collect on behalf of investors, servicers have few reputational or financial constraints pushing them to work to satisfy homeowners with their performance.[21]

In fact, servicers have a financial incentive to impose additional fees on consumers. Mortgage servicers earn revenue in three major ways. First, they receive a fixed fee for each loan. Typical arrangements pay servicers between 0.25% and 0.50% of the note principal for each loan.[22] Second, servicers earn "float" income from interest accrued between when consumers pay and when those funds are remitted to investors.[23] Third, servicers often are permitted to retain all, or part, of any default fees, such as late charges, that consumers pay.[24] In this way, a borrower's default can boost a servicer's profits. A significant fraction of servicers' total revenue comes from retained-fee income.[25] Because of this structure, servicers' incentives upon default may not align with investors' incentives.[26] Servicers have incentives to make it difficult for consumers to cure defaults.

A consumer is only obligated to pay charges if the charges are permitted by the terms of the mortgage and by state and federal law. To validate such charges, consumers must know how the servicer calculated the amount due and whether such fees are consistent with their loan contracts. A lending industry representative has admitted that "[m]ost people don't understand the

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originating lender. *See* Jack M. Guttentag, A Mortgage Servicing System for Borrowers?, http://www.mtgprofessor.com/A%20-%20Servicing/a_servicing_system_for_borrowers.htm ("The great majority of loans today are serviced by firms that don't own them.").

19. Jack M. Guttentag, Why Is Mortgage Servicing So Bad?, http://www.mtgprofessor.com/A%20-%20Servicing/why_is_servicing_so_bad.htm (last modified Dec. 13, 2004) (explaining that borrowers cannot easily choose a servicer based on the quality of servicing, nor can they fire a servicer for poor servicing).

20. *See id.* (describing borrowers' inability to select their mortgage servicers).

21. *Id.*

22. NAT'L CONSUMER LAW CTR., FORECLOSURES 148 (2d ed. 2007).

23. Kurt Eggert, *Comment on Michael A. Stegman et al.'s "Preventive Servicing Is Good for Business* and *Affordable Homeownership Policy": What Prevents Loan Modifications?*, 18 HOUSING POL'Y DEBATE 279, 286 (2007).

24. Eggert, *supra* note 11, at 758.

25. Some information can be gleaned from the securities filings of public companies that service mortgages. Late charges accounted for approximately 11% of revenues for Ocwen's residential-mortgage-servicing division in 2006. *See* Ocwen Fin. Corp., Annual Report (Form 10-K), at 30 (Mar. 16, 2007); *cf.* RONALD J. MANN, CHARGING AHEAD 23 (2006) (reporting that credit-card issuers earn 9% of their revenue from penalty fees).

26. *See Hearing*, *supra* note 12, at 9 (describing the conflicting interests of the participants in a securitization).

most basic things about their mortgage payment[s]."[27] Mortgage servicers can exploit consumers' difficulty in recognizing errors or overcharges by failing to provide comprehensible or complete information. In fact, poor service to consumers can actually maximize servicers' profits.[28] Indeed, it appears that servicers fail to satisfy customers. A study of consumer satisfaction with business services found that only 10% of borrowers are happy with their mortgage servicers.[29]

Spiking foreclosure rates and pressure from Wall Street may exacerbate problems with mortgage servicing.[30] Falling real-estate prices have changed the profit calculus of foreclosure, encouraging lenders to reach out to delinquent borrowers.[31] Facing political and financial pressure, lenders and servicers are struggling to develop cost- and time-effective strategies for loss mitigation.[32] However, cash-strapped lenders have fewer resources than ever to devote to loan servicing.[33] Just as more borrowers risk losing their homes, servicers may have to lay off employees, skimp on procedural safeguards, or reduce investment in technology. These changes do not portend well for borrowers in high-cost loans or those seeking loan modifications.[34] Mortgage servicing is a crucial part of the home-ownership process that must be part of any response to the rising foreclosure rate and downturn in the mortgage market.

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27. *Lenders Look for Way to Avoid Bankruptcy Maze*, NAT'L MORTGAGE NEWS, Aug. 30, 2004, at 23 [hereinafter *Lenders Look*], *available at* http://www.nationalmortgagenews.com/premium/archive/?id=147519.

28. *See* Guttentag, *supra* note 19 (arguing that the normal financial incentives to provide quality service do not exist within the current structure of the loan-servicing industry).

29. Press Release, J.D. Power & Assocs., Customer Service and Attention to Detail Drive Home Mortgage Satisfaction 1 (Nov. 26, 2002) (on file with the Texas Law Review).

30. *See* Posting of Tara Twomey to Credit Slips, http://www.creditslips.org/creditslips/2007/03/subprime_servic.html (Mar. 19, 2007, 23:32 PDT) ("Financial troubles, staff layoffs and potentially higher servicing costs on defaulting loans have led to concerns that servicing quality may decline.").

31. *See, e.g.*, Carrick Mollenkamp, *Faulty Assumptions: In Home-Lending Push, Banks Misjudged Risk*, WALL ST. J., Feb. 8, 2007, at A1 (discussing mega-bank HSBC's recent efforts to work with troubled borrowers, including hiring more employees to work out payment plans and implementing a top-down overhaul of its entire mortgage-services branch).

32. *See id.* (describing HSBC's expanded loss-mitigation efforts); Ruth Simon, *Digging Out of Delinquency*, WALL ST. J., Apr. 11, 2007, at D1 ("The sharp rise in delinquencies in recent months is straining mortgage companies' ability to respond quickly to borrowers, with such solutions as new repayment plans or modifications to loan agreements.").

33. *See* Simon, *supra* note 32, at D1 (describing the heightened strains on servicers as the volume of default increases).

34. *See* Eggert, *supra* note 23, at 284–92 (documenting barriers that servicers face in loan modifications).

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B. Homeowners in Bankruptcy

Most consumers who file Chapter 13 bankruptcy cases are homeowners.[35] The requirements of the Bankruptcy Code impose new burdens on mortgage servicers. In turn, these complexities create new opportunities for mortgage-servicing abuse. The harms of poor mortgage servicing are heightened in bankruptcy, a supposed refuge for families trying to save their homes.

When a borrower files for bankruptcy, the creditor is barred by the automatic stay from pursuing other legal action to collect the debt.[36] Pending foreclosures may not proceed against the debtor's home, unless the court grants the creditor permission to do so.[37] Many homeowners are in default on their mortgage loans when they seek bankruptcy relief.[38] Because families typically struggle for months before filing bankruptcy,[39] their mortgage accounts at the time of bankruptcy may be loaded with default charges, penalty fees, and foreclosure costs. To retain their homes in bankruptcy, Chapter 13 requires debtors to pay these arrearage amounts in full (including any regular monthly payments that were not made before the bankruptcy).[40]

To establish the arrearage amount that must be cured, creditors usually file proofs of claim.[41] Even if their loans are not in default, many mortgagees

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35. *See* TERESA SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 202 (2000) (stating that half of all bankruptcy debtors are homeowners); Bahchieva et al., *supra* note 1, at 104–05 (explaining that although most debtors prefer Chapter 7, homeowners disproportionately choose Chapter 13 because Chapter 7 does not protect home equity).

36. 11 U.S.C. § 362(a) (2006).

37. *See id.* § 362(b) (setting out the exceptions to the automatic stay).

38. *See* Bahchieva et al., *supra* note 1, at 73, 104 (finding that bankrupt homeowners are about 50% more likely to file Chapter 13 than Chapter 7, and attributing this preference to Chapter 13's special protections for homeowners in default).

39. The median family that files for bankruptcy reports seriously struggling with debts for more than one year before filing bankruptcy. This query was posed to Chapter 7 and Chapter 13 debtors in telephone interviews one year after the respondent filed for bankruptcy. *See* Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 381–82, 382 fig.12 (2008) (reporting data from telephone surveys of families in bankruptcy).

40. *See* 11 U.S.C. § 1322(b)(2) (2000) (providing that the Chapter 13 bankruptcy plan may "modify the rights of holders of secured claims, *other than* a claim secured by a security interest in real property that is the debtor's principal residence") (emphasis added); § 1322(b)(5) (providing that "notwithstanding paragraph (2) of this subsection," the bankruptcy plan may "provide for the curing of any default within a reasonable time"); *see also* Mark S. Scarberry & Scott M. Reddie, *Home Mortgage Strip Down in Chapter 13 Bankruptcy: A Contextual Approach to Sections 1322(b)(2) and (b)(5)*, 20 PEPP. L. REV. 425, 431 (1993) ("Most homeowners in Chapter 13 must, as a practical and ultimately a legal matter, use § 1322(b)(5) to cure their defaulted home mortgages if they wish to keep their homes.").

41. *See* Official Bankruptcy Form 10 (2007), *available at* http://www.uscourts.gov/rules/BK_Forms_1207/B_010_1207f.pdf (instructing secured creditors to list the amount of any arrearage as of the time that the case is filed). *See generally* David Gray Carlson, *Proofs of Claim in Bankruptcy: Their Relevance to Secured Creditors*, 4 J. BANKR. L. & PRAC. 555 (1995) (describing the reasons why secured creditors file proofs of claim).

will file claims to establish the amount of outstanding principal. While liens on a debtor's property pass unaffected through bankruptcy[42] barring a specific challenge based on special bankruptcy avoidance powers,[43] creditors who wish to receive distributions from the trustee must file claims.[44] Trustees normally pay arrearage amounts to servicers from debtors' Chapter 13 payments.[45] In some jurisdictions, trustees also collect and transmit the regular ongoing mortgage payments to servicers.[46]

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42. *See* 11 U.S.C. § 524(a) (stating that discharge "voids any judgment at any time obtained, to the extent that such judgment is a determination of the *personal liability* of the debtor") (emphasis added); Johnson v. Home State Bank, 501 U.S. 78, 83 (1991) (noting that discharge extinguishes *only* the personal liability of the debtor and that a creditor still has the right to foreclose on a mortgage); Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 714 (1999) ("Valid liens on collateral survive the discharge.").

43. *See* 11 U.S.C. §§ 544, 547 (2006) (establishing the powers of the trustee and allowing avoidance of a transfer when several conditions are satisfied).

44. *See* FED. R. BANKR. P. 3002 (providing that, with certain exceptions, an "unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed"); FED. R. BANKR. P. 3021 (providing that distribution under the plan will be made to creditors whose claims have been allowed and to certain others); *see also* WARREN & WESTBROOK, *supra* note 2, at 219 ("To receive any distribution, each Chapter 7 or Chapter 13 creditor must submit a proof of claim.").

45. *See* 11 U.S.C. § 1326(c) ("Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan."); *see also* Henry E. Hildebrand III, *The Sad State of Mortgage Service Providers*, AM. BANKR. INST. J., Sept. 2003, at 10, 10 (explaining that trustees are required by the terms of confirmed Chapter 13 plans to make arrearage payments to mortgage companies).

46. *See* Scott F. Norberg & Nadja Schreiber Compo, *Report on an Empirical Study of District Variation, and the Roles of Judges, Trustees and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 446 (2007) (reporting that in three of the seven bankruptcy districts surveyed in the article, the practice was for Chapter 13 debtors to make mortgage payments through the trustee). Practices for paying mortgage creditors in Chapter 13 cases vary. In some jurisdictions, ongoing mortgages are paid "outside the plan," meaning that the debtor continues to make the ongoing principal and interest payments directly to the mortgage servicer without trustee involvement. *See id.* (finding three other bankruptcy districts where the practice was for Chapter 13 debtors to make mortgage payments directly to the creditor); *see also* Timothy D. Moratzka, *Commission-Free: Chapter 13 Debtor as Dispersing Agent*, AM. BANKR. INST. J., Oct. 2007, at 14, 14 (presenting cases from jurisdictions where the debtors were allowed to make mortgage payments "outside the plan"). Even in these jurisdictions, the trustee usually collects the debtor's payment of any arrearages on the mortgage loan; in other districts, the trustee collects both the arrearage amounts and the ongoing mortgage payments. *See* Hildebrand, *supra* note 45, at 40 ("More and more chapter 13 trustees are being required by the terms of confirmed plans to make not only the arrearage payments to mortgagees, but also the payments to maintain the regular monthly payments.").

These practices are yet another example of the well-documented phenomena of "local legal culture" in bankruptcy cases. *See generally* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501 (1993) (contrasting the cultures of bankruptcy practices in different locations); Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498 (1996) (using examples of local bankruptcy practices to explain the nature and evolution of law); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801 (1994) (using examples of the differing bankruptcy practices in various locales to stress the importance of "local legal culture").

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A claims process is incorporated into every bankruptcy case to determine how much each creditor is owed and to adjudicate any disputes about the debt. These proofs of claim are bankruptcy's alternative mechanism to separate lawsuits by each creditor to collect a debt. In the mortgage context, a proof of claim functions similarly to a complaint to foreclose and collect a deficiency judgment. That is, the claim should establish a creditor's interest in the debtor's home as a mortgagee and the amount owed on the mortgage note. The debtor has the opportunity to "answer" by objecting to the claim. The bankruptcy court then has authority to fix the claim. Because proofs of claim are the most common interaction between debtors and creditors in the bankruptcy system,[47] they offer an excellent mechanism for examining the behavior of mortgage servicers in bankruptcy cases.

C. *The Harms of Abusive Servicing*

Mortgage-servicing abuse can take several forms. The Federal Trade Commission (FTC) believes that poor servicing can be a serious problem for homeowners and has identified several abusive practices, including the imposition of unwarranted late fees, unnecessary force-placed insurance, and illegal fees.[48] Two cases illustrate the problems that incorrect or inaccurate mortgage servicing imposes on borrowers. In *Rawlings v. Dovenmuehle Mortgage, Inc.*,[49] the servicer repeatedly asserted that the homeowners had failed to make payments even though the servicer itself had erred by applying the payments to the wrong account.[50] After the servicer sent notices of default and imposed late fees, the homeowners spent over seven months attempting to resolve the servicer's error.[51] In another instance, *Islam v. Option One Mortgage Corp.*,[52] the borrowers refinanced, but the prior servicer continued to threaten to foreclose on the borrowers' home and to report adverse information to credit bureaus.[53] This year, the *Boston Globe* reported that mortgage companies typically include projected foreclosure costs in payoff amounts given to borrowers in default.[54] These fees are estimates for anticipated services, which may never be rendered. While a

47. While claims are the most common creditor activity in bankruptcy cases, claims are not filed by every creditor. *See* 1 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 67.1 (3d ed. 2000 & Supp. 2004) (stating that numerous creditors fail to file proofs of claim).

48. DIV. OF CONSUMER & BUS. EDUC., FED. TRADE COMM'N, MORTGAGE SERVICING: MAKING SURE YOUR PAYMENTS COUNT 3 (2008), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea10.pdf.

49. 64 F. Supp. 2d 1156 (M.D. Ala. 1999).

50. *Id.* at 1159–60.

51. *Id.*

52. 432 F. Supp. 2d 181 (D. Mass. 2006).

53. *Id.* at 183–84.

54. Sacha Pfeiffer, *Hidden Legal Fees Push Some into Foreclosure*, BOSTON GLOBE, Jan. 18, 2007, at D1.

consumer advocate described the practice as a "license to steal from homeowners," an industry representative conceded that it was "pretty much industry standard."[55]

The likelihood that such practices translate into concrete harms is sharpened because consumers report serious difficulty in communicating with mortgage servicers when they perceive that an error or overcharge has occurred.[56] Consumers allege that they have to speak with dozens of representatives to address servicing mistakes or to receive basic information such as a payment history.[57] These problems are exacerbated when a borrower defaults on a loan, in part because the loan is often transferred to the loss-mitigation department or sold to a different servicer that specializes in troubled loans.[58]

Abusive servicing can push a homeowner into default or can make it hard or impossible for a homeowner to climb out of trouble. Research has shown that the quality of loan servicing can affect the incidence of loan default.[59] Servicers may alter their practices and delay foreclosure to drive up their profits because they do not have incentives to care about preventing foreclosure.[60] While preventive servicing can reduce loss severities,[61]

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55. *Id.*

56. *See, e.g.*, S.P. Dinnen, *Mortgage Complaints Can Take Extra Effort*, DES MOINES REG., May 2, 2004, at 1D (detailing scenarios in which consumers had to repeatedly argue with their mortgage servicers over the servicers' accounting mistakes); Adolfo Pesquera, *Paper Trail of Problems: Some Fairbanks Clients Report Nightmare Errors*, SAN ANTONIO EXPRESS–NEWS, Aug. 9, 2002, at 1E (reporting repeated complaints that Fairbanks Capital Corporation does not properly record payments and then holds its customers responsible for the errors).

57. *See* Posting of Ben Popken to The Consumerist, http://consumerist.com/5047947/12-confessions-of-a-home-mortgage-collector (Sept. 10, 2008, 12:36 EDT) (reporting that mortgage-servicing employees frequently hang up or transfer homeowners back into queue in order to avoid work); Posting of Katie Porter to Credit Slips, http://www.creditslips.org/creditslips/2008/07/the-really-sad.html (July 15, 2008, 10:01 PDT) (providing a transcript of a debtor's call to his mortgage servicer in which he was transferred and put on hold and was unable to learn the reason for a charge).

58. *See* Popken, *supra* note 57 ("The Loss Mitigation department has NO CLUE what they are doing."); *see also Policing Lenders and Protecting Homeowners: Is Misconduct in Bankruptcy Fueling the Foreclosure Crisis? Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Robin Atchley), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3327&wit_id=7158 (testifying that while her account was in bankruptcy, no person with Countrywide could ever give her clear information on what they claimed was owed or why that amount was owed).

59. *See* Anthony Pennington-Cross & Giang Ho, *Loan Servicer Heterogeneity and the Termination of Subprime Mortgages* 19, 19–20 (Fed Reserve Bank of St. Louis, Working Paper No. 2006-024A, 2006), *available at* http://research.stlouisfed.org/wp/2006/2006-024.pdf (finding "strong evidence" that the identity of the individual mortgage servicer substantially affected the chance of default among a large sample of subprime mortgages).

60. *See* Yingjin Hila Gan & Christopher Mayer, *Agency Conflicts, Asset Substitution, and Securitization* 19–20 (Nat'l Bureau of Econ. Research, Working Paper No. 12,359, 2006), *available at* http://www.nber.org/papers/w12359 (finding that mortgage servicers often delay foreclosure proceedings so that they can avoid the costs associated with foreclosure and collect additional fees while the loan spends time in special servicing).

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abusive servicing can heighten them. Without servicers' reaching out to consumers and spending the necessary time and money, sensible loan modification opportunities will be missed.[62] Families who could have saved their homes with a repayment plan or modification will lose their homes, and investors will suffer unmitigated losses.[63]

The harms of servicing abuse may be even higher for families in bankruptcy, which often file Chapter 13 in a final effort to save their homes. If bankruptcy claims contain illegal fees, debtors will face increased burdens in confirming repayment plans and be forced to find extra income to make bloated payments. Even if the servicing harm is limited to informational problems, debtors suffer harms. As one bankruptcy court recognized, mistakes by creditors, who are in control of the accounts, impose additional costs on debtors—the parties who can least afford such expense—to sort out such problems.[64] Servicing problems also jeopardize the ability of courts and trustees to administer bankruptcy cases correctly and fairly. Other creditors are harmed if mortgage companies wrongly divert money that should be available to pay unsecured creditors and increase the administrative costs of bankruptcy. If servicing abuse is routine, this also weakens our collective confidence in the integrity of the bankruptcy system and the power of law to balance the rights of consumers and businesses.

D. Litigation on Mortgage-Servicing Practices

Mortgage-servicing abuse is a nascent legal issue.[65] Depending on the type of misbehavior, consumers may have both federal and state claims and both common law and statutory remedies.[66] While the case law is growing, there are still relatively few adjudicated decisions on mortgage-servicing

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61. *See* Michael A. Stegman et al., *Preventive Servicing Is Good for Business* and *Affordable Homeownership Policy*, 18 HOUSING POL'Y DEBATE 243, 246 (2007) (presenting data that show that effective preventive-servicing strategies increase dollars collected, reduce overall operating costs, and slow the rate at which mortgages progress into delinquency).

62. *See* Eggert, *supra* note 23, at 282 (recounting a 2007 statement from a federal regulatory authority encouraging mortgage servicers to use loan modification and other loss-mitigation techniques to keep borrowers in their homes).

63. *See id.* at 284 ("Effective loan modifications, which can result from preventive servicing, can both reduce borrowers' payments, helping to keep them in their homes, and save investors from credit losses that result from foreclosure.").

64. *See* Williams v. Fairbanks Capital Corp. (*In re* Williams), Case No. 00-00770-W, Adv. No. 01-80105-W, 2001 WL 1804312, at *1–2 (Bankr. D.S.C. Nov. 19, 2001) (awarding punitive damages to the debtor after the debtor incurred substantial attorneys fees, other costs, and lost wages responding to inaccurate court documents filed by the creditor due to errors in its records).

65 NAT'L CONSUMER LAW CTR., *supra* note 22, at 147 n.1 (citing recently published authorities describing the growing problem of mortgage-servicing abuse).

66. *See id.* at 179 (explaining that, in addition to federal claims brought under the Real Estate Settlement Procedures Act, 15 U.S.C. §§ 2601–2617 (2006), consumers often may bring claims under state unfair-and-deceptive-trade-practices acts and common law breach-of-contract, breach-of-fiduciary duty, and tort claims).

problems.[67] Several explanations exist. Consumers may not be aware of their rights or be able to afford attorneys.[68] The relative youth of mortgage servicing as an industry means that few attorneys or judges understand the legal and factual issues involved.[69] Regulatory authority for mortgage servicing is fractured.[70] The paucity of decisions suggests that many consumers may respond to mortgage claims by "lumping it" rather than seeking any formal redress.[71] Consumers who litigate these disputes face all the challenges of typical consumer-protection litigation, including limited access to attorneys, expensive and complicated evidentiary issues, and insufficient remedies to justify such suits.[72]

Most litigation against mortgage servicers has occurred in the context of bankruptcy cases.[73] Bankruptcy changes the dynamic between borrowers and servicers. The vast majority of consumers hire attorneys to represent them in their bankruptcies.[74] Without counsel, consumers may be unable to raise such claims. They may also have trouble identifying attorneys who are familiar with such issues or willing to take such suits on a stand-alone basis. As part of the bankruptcy case, the attorney may find it difficult to obtain the cooperation of the mortgage servicer,[75] and litigation may be necessary to fulfill the attorney's duty of representation.[76] While bankruptcy is the context for most servicing disputes, the problems identified in bankruptcy

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67. *See generally* Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosure*, N.Y. TIMES, Nov. 6, 2007, at A1 (chronicling several ongoing lawsuits alleging serious misconduct by mortgage-servicing providers).

68. *See* Eggert, *supra* note 11, at 768 (arguing that most borrowers are unable to enforce their legal rights because they rarely read their mortgage-loan contracts and usually cannot afford to retain an attorney to pursue litigation under consumer-protection statutes).

69. *See, e.g.*, NAT'L CONSUMER LAW CTR., *supra* note 22, at 201–03 (documenting conflicting decisions in the federal courts regarding mortgage servicers' claims that the requirements of the Fair Debt Collection Practices Act (FDCPA) and Real Estate Settlement Procedures Act (RESPA) are preempted by the Bankruptcy Code).

70. *See* Eggert, *supra* note 11, at 774–75 (expressing concern that legislation passed by several states to curb servicer abuses may be subject to federal preemption).

71. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 14 (1983) ("Even where injuries are perceived, a common response is resignation, that is, 'lumping it.'").

72. *See* JOHN A. SPANOGLE ET AL., CONSUMER LAW: CASES AND MATERIALS 772 (3d ed. 2007) (discussing the barriers to consumer litigation).

73. *See Lenders Look*, *supra* note 27 (quoting an employee of a servicer remarking that "[b]ankruptcy is becoming fertile ground for a lot of loopholes and a lot of lawsuits and a lot of costs to servicers").

74. *See* TERESA SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 22–23 (1989) (finding that only 4% of debtors in a sample of 1,529 bankruptcy cases filed pro se petitions).

75. *See* Hildebrand, *supra* note 45, at 10 (describing mortgage servicers' inability or lack of effort to make their records match debtors' plans or to comply with the requirements of the Bankruptcy Code, such as disclosing fees and costs).

76. *See* MODEL RULES OF PROF. CONDUCT pmbl. para. 2 (2007) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

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cases often originate months or years earlier and are equally likely to occur when a borrower is in default but does not file for bankruptcy.[77]

Bankruptcy courts have repeatedly expressed frustration with mortgagees' failure to provide complete and accurate information.[78] Courts and litigants have struggled to obtain comprehensible records from servicers. In *Maxwell v. Fairbanks Capital Corp.*,[79] the court described the creditor's pleadings: "Thus, Fairbanks, in February 2000, represented that the Debtor owed it $48,691.36 *less* than what it demanded of the Debtor in April of 1998 and $192,963.64 *more* than it demanded of her on July 13, 1999."[80] The court found that "Fairbanks, in a shocking display of corporate irresponsibility, repeatedly fabricated the amount of the Debtor's obligation to it out of thin air."[81] The court held that this behavior violated both federal and state law.[82] After the court's ruling on liability, the debtor settled the case for a full discharge of her mortgage and $125,000 in damages and attorneys fees.[83]

Other courts have identified a similar pattern of confusing or incomplete record keeping as evidenced by servicers' proofs of claim. Unable to decipher a servicer's records, even after ordering further document production, one court finally resorted to creating its own amortization table.[84] The judge stated, "The poor quality of the papers filed by Fleet to support its claim is a sad commentary on the record keeping of a large financial institution. Unfortunately, it is typical of the products generated by lenders and loan servicers in court proceedings."[85] In some instances, mortgagees apparently are unable to offer any accounting to support their claims. In *Litton Loan Servicing v. Garvida*,[86] when the servicer failed to respond to a court order to provide information, the bankruptcy appellate panel affirmed that a downward adjustment of the mortgagee's claim was an appropriate

77. Email from Keith M. Lundin, Bankr. Judge, U.S. Bankr. Court for the Middle Dist. of Tenn., to Henry J. Sommer (July 12, 2004) (on file with the Texas Law Review) (recounting the discussion at a session on mortgage-servicing problems in Chapter 13 cases, which occurred at a 2004 National Association of Chapter 13 Trustees meeting). The grievances aired were: (1) servicers are unable to prepare correct pre-petition claims in Chapter 13 cases; (2) proofs of claim are filed without balances or are bloated with illegal and fraudulent fees sometimes totaling several thousand dollars; (3) irreconcilable and unexplained balances appear on amended proofs of claim; (4) servicers provide no contact information; and (5) servicers refuse to provide loan payment histories. *Id*

78. *See* Hildebrand, *supra* note 45, at 40 (describing judges' critical responses to mortgagees' "deplorable records").

79. Maxwell v. Fairbanks Capital Corp. (*In re* Maxwell), 281 B.R. 101 (Bankr. D. Mass. 2002).

80. *Id.* at 114.

81. *Id.* at 117.

82. *Id.* at 120, 132.

83. Agreement for Judgment at 2, *In re* Maxwell, 281 B.R. 101 (No. 00-142383) (on file with the Texas Law Review).

84. *In re* Wines, 239 B.R. 703, 706 (Bankr. D.N.J. 1999).

85. *Id.* at 709.

86. *In re* Garvida, 347 B.R. 697 (B.A.P. 9th Cir. 2006).

remedy.[87] Another court reduced a mortgagee's claim under the equitable theory of recoupment after finding that the servicer violated the Real Estate Settlement Procedures Act[88] (RESPA) by failing to respond to the debtor's requests for an account balance.[89] The opinion's first sentence reveals the court's frustration: "Is it too much to ask a consumer mortgage lender to provide the debtor with a clear and unambiguous explanation of the debtor's default prior to foreclosing on the debtor's house?"[90] In some instances, creditors have paid the price for their attorneys' poor record keeping. In *In re Hight*,[91] the court disallowed the portion of a mortgagee's claim that pertained to attorneys fees because neither the creditor nor its law firm could provide evidence of the legal work, such as the hourly rate or the time spent.[92] In one egregious case, a mortgage company filed a proof of claim for more than $1 million when the principal balance on the note was $60,300.03.[93] The inaccuracy likely stemmed from the claimant's mistake in reporting the cost of the insurance policy that the servicer forced on the debtor after the debtor's insurance lapsed. These types of problems led a prominent Chapter 13 trustee to conclude that mortgage servicing in bankruptcy is in a "sad state."[94]

Mortgage-servicing problems have surfaced in other procedural contexts besides proofs of claim. The nature of this misconduct is rarely due to the posture of the case, however, and similar problems may infect mortgage claims or nonbankruptcy servicing. For example, bankruptcy motions for relief from the automatic stay put debtors at direct risk of losing their homes in a state-law foreclosure action. This context may spur debtors and their attorneys to respond by confronting servicing inaccuracies that went unidentified in proofs of claim. Several courts have complained about unsubstantiated or patently false allegations in mortgagees' motions for relief from the stay.[95] Courts have lamented mortgage servicers' practice of filing motions to vacate the automatic stay based on nonexistent records or inaccurate information stemming from poor accounting practices, and have

87. *Id.* at 707–08.

88. 12 U.S.C. § 2617(c)(1) (2006).

89. *See In re* Thompson, 350 B.R. 842, 852 (Bankr. E.D. Wis. 2006) (explaining that the debtors could reduce the amount of the claim via recoupment even though RESPA does not explicitly authorize it).

90. *Id.* at 844–45.

91. No. 07-36683, 2008 WL 3539802 (Bankr. S.D. Tex. Aug. 13, 2008).

92. *Id.* at *13.

93. Proof of Claim, *In re* Farmer, No. 04-35273 (Bankr. D. Mass. June 1, 2004) (on file with the Texas Law Review).

94. *See* Hildebrand, *supra* note 45, at 10.

95. *See, e.g.*, *In re* Schuessler, 386 B.R. 458, 492–93 (Bankr. S.D.N.Y. 2008) (imposing sanctions requiring the creditor to pay the debtors' attorneys fees and costs caused by the filing of an unsubstantiated motion for relief from the stay); *In re* Parsley, 384 B.R. 138, 180 (Bankr. S.D. Tex. 2008) (finding that an attorney's misrepresentation of the stay-relief motion was conducted in bad faith, but declining to impose sanctions).

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rejected what one court termed the mortgage servicers' "dog ate my homework" excuses for such problems.[96] These courts have emphasized two main harms: (1) damage to the judicial process when a court is asked to rule on incorrect or baseless facts, and (2) the danger that a family will lose its home without just cause and in violation of the Bankruptcy Code.

In *Jones v. Wells Fargo Home Mortgage*,[97] the court identified a variety of accounting errors and impermissible behavior by a mortgage company, including miscalculations of both pre-petition and post-petition obligations and attempts to collect impermissible fees.[98] Wells Fargo also applied payments in violation of the debtor's confirmed Chapter 13 plan, which increased the interest charged above what was actually due.[99] The court noted that Wells Fargo's actions "resulted in such a tangled mess that neither Debtor, who is a certified public accountant, nor Wells Fargo's own representative could fully understand or explain the accounting offered."[100] In another protracted dispute, a court that initially was concerned about whether Countrywide lacked a basis for a motion for relief from the stay or may have misapplied plan payments eventually heard hours of evidence on the propriety of servicers' and attorneys' practices in bankruptcy cases.[101] The court stated that it was "very disheartened" by the conduct of Countrywide and its attorneys, and emphasized that the court's determination that the standard for sanctions had not been met should not be interpreted as its condoning the servicing practices evidenced in the case.[102]

The misapplication of plan payments purportedly results from the operation of servicers' computer software rather than human intent. Nonetheless, courts have held that the failure to comply with an order of a

96. *In re* Gorshtein, 285 B.R. 118, 126 n.4 (Bankr. S.D.N.Y. 2002).

97. 366 B.R. 584 (Bankr. E.D. La. 2007).

98. *Id.* at 591–98. Perhaps most egregiously, Wells Fargo charged the debtor for sixteen property inspections during the bankruptcy case, but its representative "could not list a single reason why an inspection would have been ordered post-petition, nor could she detail any reason why continuous monthly monitoring of the property was necessary or reasonable." *Id.* at 598, 597–98.

99. *Id.* at 589.

100. *Id.* at 590–91. As a remedy, the court imposed a sanction award of $67,202.45 and ordered Wells Fargo to implement an accurate accounting system for cases in the court's jurisdiction. Jones v. Wells Fargo Home Mortgage (*In re* Jones), Case No. 03-16518, Adv. No. 06-01093, 2007 WL 2480494, at *8 (Bankr. E.D. La. Aug. 29, 2007) (supplemental memorandum opinion).

101. *See In re* Parsley, 384 B.R. 138, 181–82 (Bankr. S.D. Tex. 2008) (criticizing the practices of the servicer and its attorneys but determining that the standard for sanctions had not been met); *In re* Parsley, No. 05-90374, slip op. at 1 (Bankr. S.D. Tex. Feb. 12, 2007) (order requiring Countrywide to appear and show cause) (finding that the servicer and its attorneys failed to sufficiently review the debtor's payment history before filing its motion for relief from the stay, and ordering that representatives of the servicer and its attorneys appear to show cause for why they should not be sanctioned).

102. *Parsley*, 384 B.R. at 183.

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bankruptcy court confirming a plan cannot be excused by the failure to develop appropriate technology.[103]

Some courts also have targeted the creditors' law firms for misbehavior.[104] A New Jersey law firm was fined for filing 250 court pleadings in which the signature page had been pre-signed before review by the servicer.[105] The court's opinion sternly reminds servicers and attorneys that technological "advances" do not absolve the responsible humans of their duties to the court.[106] Another court has observed "instances in which attorneys representing alleged mortgagees or their servicing agents did not know whether the client was a mortgagee or a serving agent, or how their client came to acquire its role."[107] In addition, several class action lawsuits have been filed based on allegedly inappropriate efforts to collect attorneys fees in bankruptcy.[108]

When problems are systemic, private lawsuits may be an ineffective solution. The Federal Trade Commission (FTC) joined the National Consumer Law Center in bringing a class action lawsuit against a large servicer, Fairbanks Capital Corporation, for alleged violations of consumer-protection laws.[109] The lawsuit settled in 2003 after Fairbanks agreed to pay

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103. *See, e.g.*, Payne v. Mortgage Elec. Registration Sys. (*In re* Payne), 387 B.R. 614, 625 (Bankr. D. Kan. 2008) (focusing on the fact that the creditor did not change its accounting when a homeowner filed bankruptcy, and describing how the creditor misapplied the debtor's Chapter 13 plan payments); Nosek v. Ameriquest Mortgage Co. (*In re* Nosek), 363 B.R. 643, 650 (Bankr. D. Mass. 2007) (rejecting computer-software shortcomings as an excuse for failing to correctly apply the debtors' payments).

104. *See, e.g.*, *In re* Allen, No. 06-60121, slip op. at 7–8 (Bankr. S.D. Tex. Jan. 9, 2007) (finding that a large creditor's law firm had filed an erroneous and unsubstantiated objection to a plan's confirmation).

105. *In re* Rivera, 342 B.R. 435, 463–64 (Bankr. D.N.J. 2006).

106. *Id.* at 467; *see also Allen*, No. 06-60121, slip op. at 7 (describing the close relationship between servicers and their "outside" counsel, who receive some pleadings "set up" with data from the servicer's computer system).

107. *In re* Schwartz, 366 B.R. 265, 266 (Bankr. D. Mass. 2007). In *Schwartz*, the "creditor" claimed to have foreclosed before the bankruptcy filing but was ultimately unable to show that it had the right to undertake any foreclosure activity. *Id.* at 269.

108. *See* Harris v. First Union Mortgage Corp. (*In re* Harris), Case Nos. 96-14029-MAM & 00-11321-MAM-13, Adv. No. 99-1144, 2002 Bankr. LEXIS 771, at *10, *13, *30 (Bankr. S.D. Ala. May 10, 2002); Slick v. Norwest Mortgage Inc. (*In re* Slick), Case No. 98-14378-MAM, Adv. No. 99-1136, 2002 Bankr. LEXIS 772, at *11–12, *25 (Bankr S.D. Ala. May 10, 2002) (both refusing to award attorneys fees to a mortgagee for proof-of-claim-preparation fees that were not fully disclosed to the mortgagor). In Nevada, a proposed class action suit was filed to challenge Ocwen Federal Bank's practice of including a "proof of claim fee" in claims filed in Chapter 13 cases; the case was transferred to the Panel on Multidistrict Litigation and remains pending. *See In re* Dunlap, Case No. 03-14317, Adv. No. 03-1429, slip op. at 1–4 (Bankr. D. Nev. Jan. 26, 2005) (describing the facts of the case).

109. The National Consumer Law Center's Web site lists the *Fairbanks Capital Corp.* case as one of its recent successes and provides the pertinent case documents. Nat'l Consumer Law Ctr., Examples of NCLC's Litigation, http://www.consumerlaw.org/action_agenda/cocounseling/eamples_litigation.shtml#fairbanks; *see also* Complaint for Permanent Injunction and Other Equitable Relief and Monetary Civil Penalties at 1–2, United States v. Fairbanks Capital Corp., No. 03-12219 (D. Mass. Nov. 12, 2003), *available at* http://www.consumerlaw.org/initiatives/

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$47 million, including funding a $5 million foreclosure-redress fund for consumers who lost their homes in part due to unwarranted charges or difficulties in obtaining information from Fairbanks.[110] Despite this victory, the FTC did not pursue any other major enforcement activities against servicers for several years until it reached a settlement with EMC Mortgage Corporation and its parent company, Bear Stearns, about mortgage-servicing practices that allegedly violated several consumer-protection laws.[111] The U.S. Department of Housing and Urban Development (HUD) also has authority to address servicing misbehavior. It enforces RESPA, which obligates mortgage servicers to provide certain information to homeowners upon receiving a "qualified written request."[112] While a failure to respond to a qualified written request can give rise to a private right of action, there is no empirical evidence on how frequently this law is used to help consumers.[113] Forty percent of consumer complaints to HUD concern servicing issues,[114] yet HUD does not routinely investigate these complaints or collect data from servicers on compliance issues.[115]

In 2007 and 2008, the U.S. Trustee filed several complaints against Countrywide for alleged wrongdoing in servicing bankruptcy cases.[116]

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mortgage_servicing/content/ftc_complaint.pdf (claiming that Fairbanks Capital engaged in "unfair or deceptive acts or practices" in violation of the Federal Trade Commission Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act); First Amended and Consolidated Class Action Complaint at 3, Curry v. Fairbanks Capital Corp., No. 03-10895 (D. Mass. Dec 1, 2003), *available at* http://www.consumerlaw.org/initiatives/mortgage_servicing/content/Consolidated_Class_Complaint.pdf ("Fairbanks has engaged in a nationwide scheme of illegal, unfair, unlawful, and deceptive practices that violate both federal and state law.").

110. *See* Settlement Agreement and Release at 12, 25–27, Curry v. Fairbanks Capital Corp., No. 03-10895 (D. Mass. Nov. 14, 2003), *available at* http://www.consumerlaw.org/initiatives/mortgage_servicing/content/settlement.pdf (providing for the creation of a $40-million-dollar Redress Fund and for additional benefits to class members).

111. *Bear to Pay $28 Million to Settle Loan Complaint*, N.Y. TIMES, Sept. 10, 2008, at C4; *see also* Fed. Trade Comm'n v. EMC Mortgage Corp., No. 4:08-CV-338 (E.D. Tex. Sept. 9, 2008) (stipulated final judgment and order).

112. 12 U.S.C. § 2605 (2006).

113. Consumers themselves, or their attorneys (including bankruptcy attorneys), may not be aware of the law. Also, consumers often do not hire attorneys until foreclosure is imminent, at which time a qualified written request and its sixty-day response window may not be an expedient option.

114. Guttentag, *supra* note 19.

115. For example, on its Web site, HUD lists eight categories of complaints that consumers can file. None of the categories include mortgage servicing. U.S. Dep't of Housing and Urban Dev., Complaints, http://www.hud.gov/complaints (last updated Oct. 6, 2006) [hereinafter U.S. Dep't of Housing and Urban Dev., Complaints]. In addition, HUD does not make available any data sets on mortgage-servicing abuse. *See* U.S. DEP'T OF HOUSING AND URBAN DEV., DATA SETS AVAILABLE FROM HUD USER 4–10, *available at* http://www.huduser.org/Datasets/datasets06.pdf (describing the data sets that are available from HUD).

116. *See* Peg Brickley, *Countrywide Deal with Critic is Disputed*, WALL ST. J., Aug. 11, 2008, at A3 (reporting that the Justice Department has brought actions in Pittsburgh, Atlanta, Ohio, and Florida for purported misbehavior by Countrywide in consumer bankruptcy cases); Carrie Teegardin, *Couple Lose Home in Countrywide Dispute, but May Yet Win*, ATLANTA J.-CONST.,

However, the U.S. Trustee may have limited powers to pursue such remedies. A court has dismissed one of the actions that the U.S. Trustee filed against a mortgage servicer, ruling that the agency does not have the authority to bring legal action to request monetary sanctions against creditors that have engaged in abusive practices.[117] The court also refused to grant the injunction that the U.S. Trustee requested.[118] This decision may undermine the potential of the U.S. Trustee to protect bankruptcy debtors, although other courts have affirmed the right of the U.S. Trustee to participate in litigation that could result in sanctions against creditors for abusive practices.[119] Clearly, the U.S. Trustee does not have regulatory authority to investigate or challenge mortgage-servicing abuse outside the bankruptcy system.

The anecdotal reports of mortgage-servicing abuse are growing, and the cited decisions are quite recent. However, regulatory enforcement remains weak, and cases outside of bankruptcy are exceedingly rare. Given the millions of consumers who may face foreclosure in the next few years,[120] and the hundreds of thousands of homeowners who file for Chapter 13 bankruptcy to save their homes each year,[121] there is a definite need to probe the reliability of mortgage servicing. The harms from poor servicing carry severe consequences, and empirical data can help draw attention to the need to consider how servicing contributes to failed home ownership.

II. Methodology

The Mortgage Study is a large, multistate study of the home loans of families in financial distress. Its principal objective is to create an original database to facilitate new research on the intersection of mortgage lending and bankruptcy. Tara Twomey[122] and I are the principal investigators in the

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Mar. 30, 2008, at 1E (describing the U.S. Trustee's involvement in a Georgia bankruptcy case after the debtor lost her home to foreclosure despite filing for bankruptcy).

117. *See, e.g.*, Walton v. Countrywide (*In re* Sanchez), Case No. 01-042230, Adv. No. 08-1176, slip op. at 5 (Bankr. S.D. Fla. Oct. 2, 2008) (memorandum opinion and order granting Countrywide's motion to dismiss) (holding that the U.S. Trustee does not have authority to "pursue punitive sanctions on behalf of the public by way of an adversary proceeding").

118. *Id.*

119. *See, e.g.*, *In re* Parsley, 384 B.R. 138, 145–47 (Bankr. S.D. Tex. 2008) (finding that the U.S. Trustee acted within its authority in participating in show-cause proceedings against a mortgage servicer and its attorneys); *see* 11 U.S.C. § 307 (2006) (granting wide authority to the U.S. Trustee in bankruptcy cases).

120. Press Release, Pew Charitable Trusts, 1 in 33 Homeowners Projected to Be in Foreclosure Within the Next Two Years (Apr. 16, 2008), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=37950.

121. Ben Rooney, *Bankruptcy Filings Surge to 1 Million—Up 29%*, CNNMONEY.COM, Aug. 27, 2008, http://money.cnn.com/2008/08/27/news/economy/bankruptcy/.

122. When the study began, Tara Twomey was a clinical instructor at Harvard Law School. She is currently a Lecturer in Law at Stanford Law School and a consultant for the National Association of Consumer Bankruptcy Attorneys and the National Consumer Law Center. Neither organization had any involvement in this research.

Mortgage Study, which was funded by the National Conference of Bankruptcy Judges' Endowment for Education.[123]

The Mortgage Study sample contains 1,733 Chapter 13 bankruptcy cases filed by homeowners. The sample includes cases from forty-four judicial districts in twenty-three states and the District of Columbia, which represented 61% of all Chapter 13 cases filed in 2006.[124] The sample captures variations in local bankruptcy practices and represents all large mortgage lenders and servicers. In each district, the sample was constructed by selecting every fifth case filed in April 2006 in which the debtor owned a home.[125] If a case was converted from another chapter or if the debtor did not own a home, that case was excluded and the next case that met the selection criteria was included in the sample. Thus, the sample roughly reflects the proportional size of Chapter 13 filings among all judicial districts in the sample.[126]

The sample is not representative of all homeowners in bankruptcy for two reasons. First, the sample includes only Chapter 13 bankruptcy cases and excludes Chapter 7 cases. Prior studies have confirmed that the percentage of homeowners in Chapter 13 bankruptcy is much higher than in Chapter 7 bankruptcy.[127] The exclusive focus on Chapter 13 enhances the data's usefulness to examine bankruptcy as a home-saving device.[128] Chapter 13 is particularly attractive to homeowners who are in default on their mortgage loans because it permits them to retain their homes by curing arrearages over time through repayment plans.[129] Although the data are only

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123. The Endowment for Education is a nonprofit and nonpartisan organization. In funding the grant, the Endowment does not endorse or express any opinion about the methodology utilized, any conclusions, opinions, or results contained in this Article, or any other findings based on the research funded by the Endowment.

124. Am. Bankr. Inst., Annual Non-business Filings by Chapter (2000–2006), http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=47461&TEMPLATE=/CM/ContentDisplay.cfm

125. All homeowners were included in the sample, regardless of whether they had mortgages. In the sample, 96% of homeowners had outstanding mortgage debt when they filed bankruptcy.

126. For example, the sample contains only two cases from Wyoming, a district with few Chapter 13 filings. At the other extreme, the sample contains 164 cases from the Northern District of Georgia because that district has a large number of Chapter 13 cases.

127. Data from the Consumer Bankruptcy Project III (CBP) indicate that home ownership is much more prevalent among Chapter 13 debtors than Chapter 7 debtors In the CBP's core sample of 1,250 cases filed in 2001 in five judicial districts, 30% of Chapter 7 cases were filed by homeowners. In contrast, 75% of Chapter 13 debtors owned their homes when they filed bankruptcy. The CPB data are on file with the author.

128. Scarce data exist on how homeowners fare in bankruptcy. *See* Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 345 ("Although scholars of mortgage debt and foreclosure generally are aware that some bankruptcy filers own homes, chapter 13's specific anti-foreclosure function has not received sufficient scholarly attention."). The most extensive study to date was based on cases filed in 2001 and did not rely on proofs of claim or home-loan documents. *See* Bahchieva et al., *supra* note 1, at 94 (detailing the sources of data collected for the 2001 study).

129. *See* 11 U.S.C. § 1322(b)(3), (b)(5) (2006) (providing for a bankruptcy-repayment plan to cure a default on a debtor's primary residence).

from Chapter 13 cases, the rules and procedures to ensure accurate bankruptcy claims are identical for Chapter 7 cases.[130] However, mortgage claims are much less frequently filed in Chapter 7 cases because there are fewer homeowners who file Chapter 7, and also because Chapter 7 does not offer the remedies to homeowners in default that Chapter 13 does.[131]

Second, the sample was drawn only from districts where the applicable state law permits nonjudicial foreclosures of debtors' principal residences.[132] We limited the sample in this way because the more favorable remedies available to mortgagees in nonjudicial-foreclosure states may reduce servicers' incentives to negotiate with consumers after default. That is, because nonjudicial foreclosure is faster and less expensive for creditors than judicial foreclosure,[133] debtors may have a greater need to file bankruptcy in nonjudicial-foreclosure states to contest a foreclosure. Restricting sampling to states that permit nonjudicial foreclosure probably boosted the proportion of homeowners in default on mortgage loans in the sample. Nevertheless, because bankruptcy law is uniform nationally on the requirements for proofs of claim and the rights of homeowners with mortgages in default, a random national sample, including judicial-foreclosure states, may not produce different data.[134]

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130. *See, e.g.*, FED. R. BANKR. P. 3001 (describing the procedures for claims, without differentiation for various chapters of bankruptcy relief).

131. *See* Jacoby, *supra* note 128, at 327–28 (reviewing the additional legal tools available to defaulting mortgage borrowers filing under Chapter 13 as compared to Chapter 7).

132. Our sample represents 49% of the judicial districts in the United States. The sample includes twenty-three states in addition to the District of Columbia: Alabama, Arkansas, California, Colorado, Georgia, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, North Carolina, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

133. *See* BARLOW BURKE, REAL ESTATE TRANSACTIONS 336 (4th ed. 2006) (discussing nonjudicial power-of-sale foreclosure and stating that it is both cheaper and faster than judicial foreclosure); GRANT NELSON & DALE WHITMAN, REAL ESTATE FINANCE LAW 636 (5th ed. 2007) (characterizing the rationale of power-of-sale foreclosure as removing the "substantial additional burdens" of judicial foreclosure). Judicial foreclosure procedures vary depending on state law. Typically these steps include the filing of a lawsuit and a judgment, followed by a court order authorizing a judicial sale conducted pursuant to statutory procedures. BURKE, *supra*, at 334. Nonjudicial foreclosure typically proceeds under a deed of trust that permits a third-party trustee, upon default, to sell the property in a private sale. *See id.* at 336 (identifying the deed of trust as "the more commonly used form of security instrument" in a power-of-sale foreclosure, and noting that the individual conducting the sale under this system will usually be a trustee). Although some public notice is required by all states, a nonjudicial foreclosure, as its name suggests, does not require court supervision or the filing of a lawsuit. *See id.* at 337 (describing how a power-of-sale foreclosure relieves mortgagees of the burden of initiating litigation to enforce a lien).

134. For those cases in which a foreclosure was filed before bankruptcy, it is possible that in judicial-foreclosure states the lenders were more likely to have retained attorneys before the bankruptcy than in nonjudicial-foreclosure states. It is unclear if such attorney involvement would result in more complete or accurate bankruptcy pleadings.

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Data were drawn from the public court records filed in each case.[135] Like other leading studies of consumer bankruptcy, we coded data from debtors' schedules.[136] Filed under penalty of perjury, these schedules may provide more complete and reliable evidence of debtors' financial situations than survey or interview methods.[137] For each case, we coded the debtor's income; the debtor's valuation of the home; and any information about mortgage obligations on the debtor's principal residence,[138] including total debt, any arrearages, and the amount of monthly payments.[139]

The innovation of the Mortgage Study was to code mortgage creditors' proofs of claim and supporting documentation. These files give more information on home loans than is available from debtors' schedules. Data came from four documents, when available: (1) the proof of claim itself; (2) an itemization of the amount claimed; (3) a copy of the mortgage that secured the obligation; and (4) a copy of the note evidencing the debt. From these documents, we coded the type and terms of each loan; the names of the mortgagee, originating lender, and servicer; the amount of the initial

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135. Most documents were obtained from the Public Access to Court Electronic Records (PACER) service. We thank the chief judges of each district in the Mortgage Study, with the sole exception noted below, for granting us a research waiver of PACER fees. The Southern District of Texas denied our application for a fee waiver, stating that it had a blanket policy against such waivers, notwithstanding the written policy of the Judicial Conference of the United States that individual researchers associated with educational institutions are eligible for waivers if they can show cause. *See* U.S. Judicial Conference, Electronic Public Access Fee Schedules, (effective Mar. 11, 2008), *available at* http://pacer.psc.uscourts.gov/documents/epa_feesched.pdf. When PACER did not appear to contain complete court files, we obtained paper records. For example, in the Eastern and Middle Districts of North Carolina, proofs of claim are not available on PACER. We thank Edward Boltz, of the Law Offices of John T. Orcutt, and Reid Wilcox, Clerk of the Bankruptcy Court for the Middle District of North Carolina, for their help in obtaining these documents.

136. *See* Culhane & White, *supra* note 42, at 767 (mentioning that their study data included information from debtors' Schedule I and J filings); Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 486 n.25 (2006) (identifying their data as collected from debtors' Schedule I filings); 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, 219 (2006) (describing financial data used in the study as drawn from "schedules filed with the court").

137. *See* MANN, *supra* note 25, at 61 (suggesting that one of the problems with the Federal Reserve's Survey of Consumer Finance data is that those surveyed often underreport their spending); David B. Gross & Nicholas S. Souleles, *Do Liquidity Constraints and Interest Rates Matter for Consumer Behavior?: Evidence from Credit Card Data*, 117 Q.J. ECON. 149, 151 n.2 (2001) (asserting that a 1995 survey understates household borrowing on bankcards because survey participants "substantially underreport their bankcard debt").

138. Real property that was not the debtor's principal residence was ignored, as were any corresponding proofs of claim for such properties. No debtor in the sample was permitted to have more than one principal residence.

139. We coded data from each debtor's docket; petition; Schedules A, C, D, I, and J; Form B22; and Chapter 13 plan. These documents were available and complete in over 99% of sampled cases; there are very few missing observations. We coded only the original version of the schedules, including any separate or later filed schedules that were not included in the original schedules. We did not code amendments to schedules because we were interested in the debtors' initial ability to gauge the amount of their mortgage debts.

mortgage debt; and the amount of mortgage debt, including arrearages, when the bankruptcy was filed. We also coded any objections to mortgage creditors' proofs of claim and any amended claims. For cases with only one mortgage loan, we coded 152 data points; when debtors had more loans, there were more data points to capture.[140] Combining data from creditors' and debtors' pleadings, the Mortgage Study database offers a rich and detailed picture of bankrupt families' mortgages.

Data were coded into a specially designed database. We deployed several standard procedures to ensure the data's accuracy. First, if the initial coding, which occurred six months after a case's filing, did not locate a mortgagee's proof of claim or an objection to any filed proof of claim, we rechecked the court records a year later to locate any records that were filed later or were missed in the initial coding. These were added to the database. To reduce concerns about coding reliability, we used only three coders, each of whom either has a law degree or prior experience on academic bankruptcy projects. All coders received individual training on practice cases to develop consistent coding practices. Coders referred to a written manual while coding and noted any unusual situations or questions. We individually reviewed the coding in each of these flagged cases. We also performed two types of error checks on the data. First, we ran error traps to improve the accuracy of the database and corrected any identified errors.[141] Second, a random sample of 10% of the cases—approximately 175 cases—was recoded blindly, without reference to the prior coding. We then compared each variable of each case between the initial coding and the recoding, noted any discrepancies, and checked for mistakes in the initial coding. The data were 99% accurate, and no systematic errors were identified between coders.[142]

The final data were transferred to Microsoft Excel and SPSS for Windows for analysis. All dollar figures are presented as reported in court records without adjustment for inflation.

III. Findings

The Mortgage Study data permit multiple analyses of the reliability of mortgage claims. The overall pattern of findings is disturbing. Many creditors do not comply with applicable law governing claims. Routinely, fees are not identified with specificity, making it impossible to determine if these charges are legal. In most instances, mortgagees believe the debt is

140. The exact number of data points actually coded varied across cases based on several factors, including the number of home loans, the type of loan, and the quantity of documentation attached to the proof of claim.

141. Two examples illustrate this type of check: (1) we reviewed any proof of claim dated before April 2006, when the cases were filed; and (2) we checked for any dollar figures that began with a decimal point or exceeded $1 million.

142. The error rate was 1.04%. To calculate the error rate, we compared the original coding to the recoding, determined the number of errors in the initial coding, and divided this number by the number of data points.

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greater than debtors do; these differences typically represent thousands of dollars. Yet, creditors are rarely called to task for these behaviors. The vast majority of all claims (96%) pass undisturbed through the bankruptcy system without objection. Attorneys do not aggressively enforce their clients' rights against mortgage companies because the costs are too high and the incentives are too low in the current system. The combination of the widespread deficiencies in claims and the lack of objections weakens the integrity of the bankruptcy process and can harm both debtors and other creditors by skewing distributions in favor of mortgage creditors.

A. Required Documentation for Mortgage Claims

Mortgage creditors who want to receive distributions from the bankruptcy estate for mortgage arrearages must file a proof of claim.[143] In the Chapter 13 cases in the sample, mortgage creditors filed proofs of claim to correspond with 81.7% of the home loans that debtors listed on their bankruptcy schedules.[144]

Creditors who file claims are required to use Official Form 10 or a similar document that substantially conforms to the form.[145] Form 10 directs creditors to attach an itemized statement if their claim "includes interest or other charges" in addition to the principal amount.[146] This requirement would apply to nearly all typical mortgage claims, as these obligations bear interest. Federal Rule of Bankruptcy Procedure 3001 imposes two additional evidentiary requirements on proofs of claim:[147] (1) a copy of the writing if one evidences the claim,[148] and (2) evidence of perfection if the creditor asserts a security interest in the property of the debtor.[149]

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143. *See* Official Bankruptcy Form 10 (2007), *supra* note 41 (requiring a creditor who fills out a proof of claim for a secured claim to state the value of property that is collateral for the debt, attach copies of documentation of the lien, and state the amount past due on the claim (the arrearage) as of the date the bankruptcy case was filed). Note that the proof-of-claim form has been amended slightly and that the new version will go into effect in December 2008. *See* Official Bankruptcy Form 10 (2008), *available at* http://www.uscourts.gov/rules/BK_Forms_Pending_2008/B10_Form10_1208.pdf.

144. As noted in Part II (Methodology), we checked for proofs of claim at two points—six months after each case's filing date and over one year after each case's filing date—to ensure the completeness of the proof-of-claim data. For a discussion of mortgagees' incentives to file claims, see *supra* text accompanying notes 41–46.

145. FED. R. BANKR. P. 3001(a).

146. Official Bankruptcy Form 10 (2007), *supra* note 41.

147. It is possible that a single, integrated document could perform the function of both the note and the mortgage in creating the parties' rights and obligations in the transaction. We did not identify such instances in the sample. Because consumer home loans are typically intended for sale on the secondary market, separation of the note and the mortgage helps ensure that the note is a negotiable instrument that will be subject to the holder-in-due-course defense upon transfer.

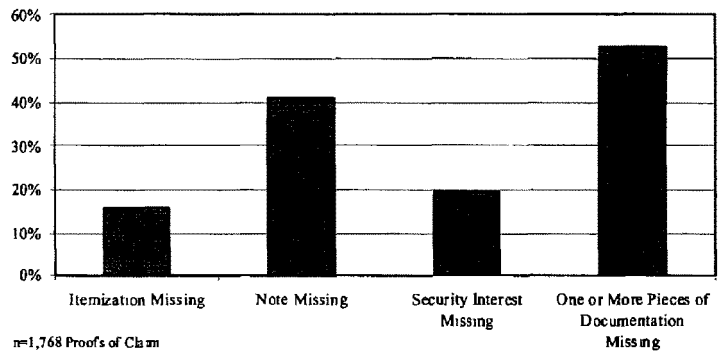
148. FED. R. BANKR. P. 3001(c) ("When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim.").

149. *Id.* 3001(d) ("If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.").

Requiring this trio of documentation (itemization, note, and mortgage) permits all parties in a bankruptcy case—debtor, trustee, and other creditors—to ensure the accuracy and legality of the claim. Without documentation, parties cannot verify that the claim is correctly calculated and that it reflects only amounts due under the terms of the note and mortgage and permitted by other applicable law.[150] A lack of documentation hampers efforts to ensure that any payments on mortgage claims are made in accord with the Bankruptcy Code.

The documentation requirements for mortgage proofs of claim are unambiguous and long-standing.[151] Nevertheless, these laws are not consistently respected. A majority of claims (52.8%) lacked one or more required attachments. Figure 1 illustrates the findings for mortgagees' proofs of claim on loans secured by a debtor's home.[152] The data show that in a majority of instances mortgagees do not provide the required documentation.

Figure 1: Percentage of Proofs of Claim
Missing Required Documentation



A majority of claims (83.9%) had the itemization attached to them. Despite the applicable, clear instruction on Form 10, the remaining claims (16.1%) did not have any itemization attached. For the one in six claims not

150. For example, some states have specific laws that govern foreclosure costs and fees. *See, e.g.*, MICH. COMP. LAWS § 600.2431 (2007) (capping attorneys fees in a nonjudicial foreclosure at no more than $75 if the mortgage does not specifically contract for such attorneys fees).

151. *See, e.g.*, FED. R. BANKR. P. 3001 advisory committee's notes (indicating that the requirements for mortgage proofs have remained largely identical since at least 1983).

152. These data come from the proof of claim initially filed in each case and do not reflect any attachments that may have been added if mortgagees filed amended claims. The purpose here is to measure compliance with the clear obligations of the rules in the first instance, not to determine whether creditors responded if a party objected or requested information.

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supported by an itemization, the debtor and other parties are unable to discern the specific bases for the creditor's asserted right to be paid the total amount of the claim. Further, the usefulness of these itemizations varied greatly.[153]

The most fundamental piece of evidence to support a claim is a copy of the promissory note or instrument establishing the existence and terms of the debt. A note is necessary to establish the existence of a debt, its key terms, and the creditor's standing to collect the debt. Despite its importance, a note was not attached to 41.1% of claims.

The finding that four out of ten claims were not supported by a note is troubling for several reasons. First, the note is not easily available from another source. Unlike mortgages, notes are not recorded in public records. If the debtor does not have a copy of the note, and the servicer does not provide one, the servicer has an informational advantage, which Rule 3001 was presumably designed to eliminate. Next, the promissory note or other debt instrument is absolutely necessary to enable the debtor, trustee, and other creditors to verify that the amount asserted as owed on the proof of claim is correct. The note contains the initial account balance, the applicable interest rate, and the terms that govern the mortgagee's ability to charge fees upon default.[154] In subprime loans, such terms are nonstandard and may vary widely, increasing the importance of having a copy of the note. Third, a copy of the note is necessary to trace the ownership of the obligation and to ensure that a creditor has standing to bring an action to collect from a debtor. As an avalanche of securitized home loans have entered default in the last year, courts have become frustrated at the difficulty in determining the chain of title of the note.[155] Finally, Rule 3001(c)'s requirement that a copy of a writing be attached applies widely. Nearly all debts are evidenced by writing in today's commercial economy. Yet, even when the claim is for a large debt such as a mortgage, creditors do not comply with the proof-of-claim rules.

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153. *See infra* subpart III(B).

154. In most instances, the note contains broad language on charges and costs. For example, the Fannie Mae uniform instrument gives the noteholder a "right to be paid back by [the borrower] for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees." Fannie Mae, Multistate Fixed-Rate Note—Single Family 1 (instrument revised Jan. 2001), *available at* https://www.efanniemae.com/sf/formsdocs/documents/notes/pdf/3200.pdf. Even under this broad language, debtors may have challenges to the mortgagees' claims. For example, they could contest the "reasonableness" of asserted attorneys fees or argue that the language on "costs and expenses" is modified by "enforcing this Note" so that costs such as fax fees cannot be justified by this provision.

155. *See* Nosek v. Ameriquest Mortgage Co. (*In re* Nosek), 386 B.R. 374, 383–85 (Bankr. D. Mass. 2008) (imposing monetary sanctions on Ameriquest, Wells Fargo, and several attorneys for misrepresenting the identity of the holder of the note in bankruptcy proceedings); *see also In re* Foreclosure Cases, 521 F. Supp. 2d 650, 654 (S.D. Ohio 2007) (dismissing foreclosure cases for lack of standing when ownership of the note was not established).

The mortgage data hint that compliance with Rule 3001(c) may be even worse for smaller claims evidenced by a writing, such as credit-card debts.[156]

Creditors were more diligent about attaching documentation to prove a valid security interest in the debtor's home. A perfected security interest such as a copy of a recorded mortgage or deed of trust accompanied 80.4% of mortgagees' proofs of claim. As shown in Figure 1, 19.6% of claims were not supported by a security interest to document the creditor's lien in the debtor's home. In light of the dismal compliance on attachment of notes, it may be tempting to view this finding on security interests as a relative success that may not merit policy attention. However, several risks are created when creditors do not prove a valid security interest.

The first potential harm is to the integrity of the bankruptcy system. The data show that nearly one in five mortgagees ignores a clear disclosure rule when they participate in a bankruptcy case. With much less evidence of misbehavior by debtors,[157] Congress imposed audits on debtors' schedules to ensure full disclosure of assets[158] and permitted dismissal of debtors' cases as a penalty for failing to provide documentation.[159] These laws evidence Congress's belief that bankruptcy is a serious and important process and that full disclosure is necessary to preserve the system's integrity. Creditors who make affirmative filings to a court, such as a proof of claim, also affect public confidence in the integrity of the bankruptcy system.[160] The failure of approximately 20% of creditors to attach security interests to their claims damages the structural integrity of the process to ensure that claims are accurate and that all assets are distributed according to bankruptcy law and procedure.

The second reason that the finding on attachment of mortgages is troubling results from the serious distributional consequences to all parties in

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156. *See* John Rao, *Debt Buyers Rewriting of Rule 3001: Taking the "Proof" Out of the Claims Process*, AM. BANKR. INST. J., July–Aug. 2004, at 16, 16 (stating that Rule 3001 supporting documents are not provided to purchasers of credit-card debt).

157. *See* Steven W. Rhodes, *A Preview of "Demonstrating a Serious Problem with Undisclosed Assets in Chapter 7 Cases,"* NORTON BANKR. L. ADVISER, May 2002, at 1, 1–2 (finding in a one-district sample that 70% of asset cases—a small fraction of all Chapter 7 cases generally—contained undisclosed or undervalued assets in the debtors' lists of assets and valuations); *see also* Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, *in* REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 1029, 1057–58 (1997), *available at* http://govinfo.library.unt.edu/nbrc/report/ 24com mvi.pdf ("The Commission repeatedly heard testimony that the information reported in the debtors' schedules is often unreliable.").

158. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, § 603, 119 Stat. 23, 122 (codified at 11 U.S.C. §§ 521, 727 and 28 U.S.C. § 586 (2006)) (authorizing random audits of debtors).

159. *Id.* § 316, 119 Stat. at 92 (codified at 11 U.S.C. § 521(i)) (automatically dismissing a bankruptcy case if the debtor does not provide required information, such as payment advices).

160. Because debtors almost always affirmatively seek bankruptcy relief, it may be fair to impose increased burdens for disclosure on them as the "moving party." Nonetheless, creditors who participate in cases also submit themselves to federal process and should be required to comport with the rules that govern their actions in bankruptcy cases.

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a bankruptcy if a mortgagee cannot prove it holds a valid security interest. Under bankruptcy law, a mortgage that is not properly perfected can be avoided.[161] Avoidance typically relegates the obligation to unsecured status in bankruptcy and significantly reduces the debtor's obligation to pay the full amount of the debt.[162] Even a credible threat of avoidance could cause an allegedly secured party to lower its claim to prevent the risk of litigating its secured status. Thus, the ability to challenge whether a mortgage is properly perfected redounds to the benefit of both the debtor and to all unsecured creditors, whose distributions from the bankruptcy estate will be higher if the mortgage is not entitled to treatment as a secured claim. In light of these very powerful benefits, the rate of noncompliance is alarming. The failure to attach a security interest should serve as a red flag that prompts scrutiny of the claim. While some trustees or debtors may themselves be checking the public records to determine if the creditor holds a valid mortgage, this state of affairs effectively reflects creditors' ability to shift the burdens of their disclosure duties onto other parties in the system. The law requires creditors to prove that they are entitled to preferential treatment as secured creditors;[163] their failure to do so creates a risk that some creditors who may not in fact have valid mortgages will receive higher payments than they are entitled to under the law.[164]

Finally, the security interest is necessary for the same reason as the note: it contains the terms that bear on the calculation of the amount owed. Further, the mortgage usually contains provisions on how a loan should be serviced. For example, in most states the model Fannie Mae instrument requires the lender to either apply or refund partial payments within a

161. 11 U.S.C. § 544 (2006). This provision is commonly called the "strong arm" power because it permits the trustee to "knock off" security interests that are not properly perfected under state law to defeat certain other types of creditors.

162. *See* WARREN & WESTBROOK, *supra* note 2, at 478 (explaining that a creditor in an avoidance action "may face the loss of its security interest or an order requiring it to pay back amounts it received from the debtor shortly before bankruptcy"); *id.* at 285 ("Just as secured creditors in Chapter 7 enjoy enhanced status and are entitled to greater repayment than unsecured creditors, the secured creditor in Chapter 13 enjoys substantially better protection than the unsecured creditor."). Without a security interest, the mortgage is an unsecured obligation. Thus, the house is immediately available to the debtor as an asset to use as collateral. After committing all disposable income for the applicable commitment period in the Chapter 13 case, a debtor then may discharge any remaining obligation on the mortgage claim because it is an unsecured debt. The combination of avoiding a security interest and completing a Chapter 13 plan results in the debtor owning the house free and clear.

163. FED. R. BANKR. P. 3001(d).

164. In addition to the failure to properly perfect the mortgage by complying with state recording statutes, some trustees who routinely demand and scrutinize mortgage documents have identified other errors that invalidate a mortgage (such as the failure of a notary to witness the mortgage). *See, e.g.*, *In re* Fisher, 320 B.R. 52, 65 (E.D. Pa. 2005) (holding that a bankruptcy trustee may avoid a mortgage under 11 U.S.C. § 544 on the basis that it was improperly proved and recorded); *In re* Marsh, 12 S.W.3d 449, 454 (Tenn. 2000) (ruling that, under Tennessee law, a deed of trust that lacks a notary seal acknowledging execution is invalid as a lien).

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"reasonable period of time."[165] Based on this language, a debtor could challenge a servicer's practice of holding payments for extended periods, usually by placing the funds in "suspense accounts" and by not applying the payment to the debtor's obligation.

Mortgagees' compliance with the documentation requirements for claims varied among judicial districts. Figure 2 shows the variation among districts for the three types of claims documentation.[166] The boxes in Figure 2 demarcate the middle two quartiles of documentation compliance. The bottom of each box shows the percentage of attached documentation in the district that was at the first quartile (i.e., 25% of districts had worse compliance). The top of each box shows the percentage of attached documentation in the district that was at the top quartile (i.e., 75% of districts had worse compliance). The diamond in the middle of each box shows the rate of attached documentation in the median district.

The relatively small heights of the boxes in Figure 2 indicate that most jurisdictions do not approach full compliance with documentation requirements. The overall pattern of findings is not driven by outlying districts with very poor compliance. Even in the districts that boast compliance that is better than the other three quartiles of districts, the fraction of claims without documentation is significant. The problem is particularly acute with respect to mortgagees' failure to attach notes. Among the districts with the worst compliance (those in the bottom quartile), the percentage of claims with a note attached was 50% or lower, ranging all the way to zero complying claims. In these jurisdictions, a majority of claims will not be supported by copies of the notes.

165. To access the Fannie Mae/Freddie Mac uniform instruments for each state, see Fannie Mae, Legal Documents—Security Instruments, https://www.efanniemae.com/sf/formsdocs/documents/secinstruments/#standard [hereinafter Fannie Mae Standard Instruments]. To access the standard instrument for a particular state, follow the hyperlink in the *Standard.doc* column in the *Standard Instruments* table. Note that the standard instrument for Maine does not include "reasonable period of time" language, and the standard instrument for New Jersey requires the lender to immediately apply any payments it accepts. *Id.*

166. The top and bottom of the vertical lines in Figure 2 show that there was at least one district in which no claims (0%) had a required type of documentation and at least one district in which all claims (100%) had a required type of documentation. These findings largely result from the presence in the sample of some districts with very few cases. Because the addition of a single case could dramatically change the compliance rate in those districts, the absolute range of compliance is not very useful. Thus, the data on interdistrict variation are best used to observe a general pattern, as shown by the quartile findings.

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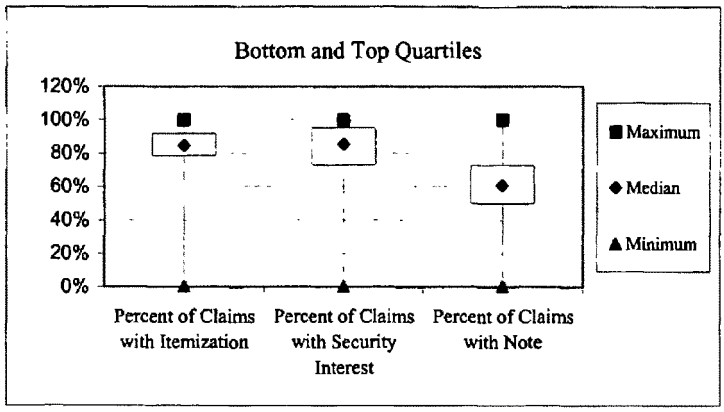
Figure 2: Variation Among Judicial Districts in Attached Documentation



The variation among districts reinforces concerns about uniformity, a feature of bankruptcy law that is explicit in the U.S. Constitution's Bankruptcy Clause.[167] While uniformity challenges to bankruptcy law have had little success,[168] the variations in claims documentation reveal systematic differences based on where a debtor files for bankruptcy. While the law is identical, the realities of compliance vary among judicial districts. Proofs of claim are another example of a "local legal culture" effect in bankruptcy.[169] To the extent that uniformity is crucial to ensure the integrity of the bankruptcy system, creditors' inconsistent compliance with claims procedures is troubling. Depending on the place of residence, debtors and their counsel receive varying amounts of information about mortgage obligations.

The data on proofs of claim show that in at least one important respect creditor behavior is not uniform, and that the reality of practice does not match the clear requirements of the law. Despite long-standing and unambiguous documentation rules that apply in all bankruptcy cases, most mortgage proofs of claim lack one or more pieces of documentation. This pattern of noncompliance undermines the purpose of the proof-of-claim rules and effectively shifts the burden to verify the accuracy of claims to debtors or

167. *See* U.S. CONST. art. I, § 8, cl. 4 (stating that Congress has the power "to establish . . . uniform laws on the subject of bankruptcies throughout the United States"). *See generally* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 592–94 (2005) (discussing the effect of the uniformity requirement in the Bankruptcy Clause and the judicial interpretations of what constitutes uniformity).

168. *See* Chemerinsky, *supra* note 167, at 592–94 (cataloging unsuccessful challenges under the uniformity requirement).

169. *See supra* note 46 (describing other local-legal-culture effects in bankruptcy).

trustees. Undocumented or insufficiently documented claims create obstacles to ensuring that mortgage creditors are paid in accordance with the law. At worst, creditors' failure to provide documentation can manipulate the bankruptcy system to overpay on these obligations, harming the debtor and all other creditors.[170] The requirements for claims documentation should be consistently respected and enforced to prevent these harms.

B. Default Fees in Mortgage Claims

Itemizations were the most common form of documentation attached to claims. The prevalence of itemizations, however, is a misleading cue as to their usefulness in ensuring the accuracy of mortgage claims. Two major problems undermined the itemizations' use as a tool to evaluate the propriety of a creditor's claim. First, there is no standard form for itemizations. Even with a single servicer or attorney, the itemization format and amount of detail varied.[171] Without a standard format, itemizations cannot be reviewed using a semiautomated or routine process. In high-volume systems such as the consumer bankruptcy system, the result is to dramatically limit the scrutiny of claims. To make affordable services available to debtors, the consumer attorney has to employ standardized procedures that can be applied in hundreds of cases a year. Trustees are similarly bound by cost and efficiency concerns.[172] The wide variation in the form of itemizations means that debtors and trustees will be severely hampered in reviewing and objecting to claims. The result is a system that does not ensure that even obvious mistakes or overcharges in claims will be reviewed and objections will be filed, if appropriate.

The second, and related, problem is the tremendous variation in the quantity of detail provided on itemizations. Some "itemizations" contain so little detail as to be a perversion of the proof-of-claim form's use of that term to describe the attachment. In a few instances, the itemization simply consisted of a breakout of the amount of arrears that was part of the

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170. *See In re* Wingerter, No. 06-50120 (Bankr. N.D. Ohio Oct. 1, 2007) (opinion resolving a show-cause order) ("A policy of filing a proof of claim without having possession of the supporting documents, but withdrawing the claim if the debtor subsequently files an objection to the claim's validity smacks of gamesmanship and creates an unacceptable risk that distributions to other creditors will be unfairly reduced.").

171. In some districts, the variation was obviously due to the differing practices of the attorneys hired to represent the servicer. In other instances, however, the same attorney filed proofs of claim in several different formats, probably reflecting the fact that the servicer itself is preparing the proof of claim and merely transmitting it to the attorney for review and filing with the court.

172. *See* 11 U.S.C. § 704(1) (2006) (prescribing that the trustee shall "close such estate as expeditiously as is compatible with the best interests of parties in interest"). A trustee is potentially subject to liability to the creditors for failing to close an estate in a cost-efficient manner. *See In re* C. Keffas & Son Florist, Inc., 240 B.R. 466, 474 (Bankr. E.D.N.Y. 1999) ("If the trustee fails to make this necessary cost–benefit analysis, then the trustee will necessarily breach the statutory mandate under 11 U.S.C. § 704(1), and incur a liability for the damages unjustifiably imposed upon the creditors . . . .").

creditor's total claim. Since the proof-of-claim form itself already requires that information,[173] the itemization added nothing to the one-page claim form itself. Other creditors merely listed three categories: the total amounts of principal, interest, and "other/miscellaneous."

To analyze the variation in detail, the Mortgage Study coded all the itemization detail into several categories based on the types of charges that debtors allegedly owe.[174] Despite using the servicing industry's own categories,[175] 43% of itemizations either made reference to fees that did not fit one of the dozen specific categories or proffered an aggregate sum of many types of varying charges that could not be separated. One common technique was the use of a temporal category that did not provide any legal basis for the permissibility of the charges. For example, several itemizations labeled charges only as "pre-petition," without identification of whether these amounts resulted from missed payments, default charges, or accrued interest.[176] Among claims with debt identified only as pre-petition, the average of this type of debt was $1,651, a fairly substantial sum without any specific basis. Another common label was "prior/previous servicer," which again does not pinpoint the basis for the charges or permit any examination of whether the amount claimed is correct. Perhaps most egregiously, some amounts were labeled merely "other" or included in a column of summed figures with absolutely no description at all.[177] These vague or temporal descriptions do not meet the requirement of Form 10 to itemize any additional charges and do not permit meaningful review of the accuracy or legality of servicers' calculations of debt.

The itemizations were plagued by another troubling feature: the use of laundry-list descriptions. The most common such label in the sample was "Inspection, Appraisal, NSF, and other charges."[178] Over thirty proofs of claim used that recitation with the words in that order and no additional breakdown of fees in that line item. For this description to be literally

173. Official Bankruptcy Form 10 (2007), *supra* note 41.

174. Each charge was categorized as one of the following: principal, interest, escrow, late charges, foreclosure fees or costs, nonsufficient funds charges, property inspection fees, broker price opinions or appraisals, corporate advances, post-petition fees, suspense funds, or other. The last category was residual and used when the charge did not fit another category or the fees were not broken out into one of the above categories.

175. The categories set out above, *supra* note 174, are consistent with those on the Model Proof of Claim itemization developed by a joint committee of Chapter 13 trustees and mortgage servicers. *See* NAT'L ASS'N OF CHAPTER 13 TRUSTEES MORTGAGE COMM., MODEL PROOF OF CLAIM ATTACHMENT 2–3 (2007) [hereinafter MODEL PROOF OF CLAIM ATTACHMENT]. This model proof of claim attachment was included in a 2007 report issued by the National Association of Chapter 13 Trustees Mortgage Committee. NAT'L ASS'N OF CHAPTER 13 TRUSTEES, REPORT OF MORTGAGE COMMITTEE (2007) [hereinafter REPORT] (on file with the Texas Law Review).

176. Charges or amounts labeled merely as pre-petition were identified in sixty-three claims, fewer than 5% of all claims. This count excludes any fees labeled as "pre-petition attorneys' fees."

177. For example, one claim's "itemization" listed $5,391 described only as "other." Another claim requested $3,023 for "delinquency expenses."

178. "NSF" stands for nonsufficient funds.

accurate, the servicer should have actually conducted an inspection and an appraisal, one or more of the debtor's payments should have been returned for nonsufficient funds, and the debtor should have engaged in some other behavior that resulted in a permissible charge. While plausible, the laundry-list description with its inclusion of "other charges" suggests that servicers are taking shortcuts in describing the actual fees that debtors owe.

The poor quality of itemizations causes real harms. First, confidence in the bankruptcy system is undermined when the quality of information provided does not satisfy the rules designed to ensure fair claims distribution. Vague or laundry-list descriptions do not satisfy the instructions on the proof-of-claim form, which were written to balance the rights and needs of debtors and creditors. Second, without a true itemization that identifies the nature of each fee, parties cannot verify that a mortgage claim is correctly calculated. The servicer could have made a mistake when aggregating fees and charges. Alternatively, the servicer could be overreaching and charging fees that are not permitted by law or by the terms of the contract. The case law described in Part I shows that when courts scrutinize the nature of mortgage claims, they frequently find evidence of servicer misbehavior.[179] Yet, the itemizations do not provide sufficient information to permit a review of the charges' legality. Individual debtors would need to engage in extensive discovery to verify the permissibility of the servicer's calculations. This reality makes it equally impossible to use the Mortgage Study data to apply systematic analyses to determine if servicers are actually charging illegal fees. The available bankruptcy court records simply do not provide the necessary information. Indeed, the courts that have adjudicated disputes over mortgage claims have needed dozens of hours of evidentiary testimony to decipher the basis for the total amount claimed by mortgage servicers. This, in fact, is the key point. By obscuring the information needed to determine the alleged basis for the charges, servicers thwart effective review of mortgage claims. The system can only function as intended if complete and appropriate disclosures are made.

Notwithstanding the limitations of the servicers' itemizations, I attempted to conduct an individual review of claims that were merely categorized as "other." Given that the categories used to code the claims data (e.g., "foreclosure costs") were deliberately broad enough to encompass all likely charges, these charges seemed per se suspicious. I identified dozens and dozens of claimed fees that appeared to be impermissible or, at minimum, should have been challenged to ensure that the creditor had a basis for such unusual charges. Table 1 gives a few examples of causes for concern.

179. *See supra* Part I.

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Table 1: Actual Fees from Mortgagees' Claims

Description	*District*	*Fee Amount*
Attorneys fees	Western District of Virginia	$31,273
Bankruptcy fees & costs	Northern District of Georgia	$2,275
Broker price-opinion fee	Eastern District of Arkansas	$1,489
Demand fee	District of Massachusetts	$145
Overnight delivery	Eastern District of Michigan	$137
Payoff-statement fee	Southern District of California	$60
Fax fee	Eastern District of Virginia	$50

The law constrains the charges that debtors must pay in several ways. Based just on their descriptions and amounts, the fees in Table 1 appear vulnerable to legal challenge. Yet, none of these claims were objected to by any party in the bankruptcy proceedings. The law's various limits on fees were never invoked to test the validity of these charges.

The first legal constraint on fees and charges is private contract law. The note and mortgage themselves are agreements that limit the parties' obligations.[180] Most mortgage notes only obligate the borrower to pay the lender for "reasonable" costs incurred to collect on the debt or enforce the security interest.[181] The standard mortgage permits the lender, upon default (including a bankruptcy filing) to "do and pay for whatever is reasonable or appropriate" to protect the lender's interest in the property and rights under the security agreement.[182] While this language is quite broad, it is not

180. This point reinforces the problems created when claims are not supported by this documentation, particularly for subprime loans that do not conform to Fannie Mae's or Freddie Mac's standards.

181. For example, one of the notes from a Tennessee case included in the Mortgage Study sample contains the following language: "COSTS OF COLLECTION AND ATTORNEYS' FEES—I agree to pay you all reasonable costs you incur to collect this debt or realize on any security. This includes, unless prohibited by law, reasonable attorneys' fees."

182. *See* Fannie Mae Standard Instruments, *supra* note 165. In almost all states, the Fannie Mae standard instrument provides:

> If [Borrower defaults (including by filing bankruptcy)], then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

unlimited. For example, at least one court has held that payoff fees are impermissible because they constitute a nonreimbursable expense under the terms of the note.[183] Another court ruled that a servicer could not charge a homeowner for property inspections because it had failed to give the debtor notice of the inspections as required by the note.[184] The typical amount of a fax fee ($50) could also be challenged as unreasonable. Such requests are apparently handled automatically by fax-back technology at minimal cost to the servicer.[185] Thus, some of the fees shown in Table 1 may be neither reasonable nor permitted by contract. Paying such claims would distort the claims-distribution process and impose unfair burdens on debtors in making bankruptcy payments.

State or federal statutes also limit the fees that debtors must pay. Certain charges that appear on proofs of claim simply are not legal. Some states prohibit the "pyramiding" of late fees[186] or have promulgated specific rules about the use of suspense accounts to hold partial payments in abeyance.[187] Because mortgage servicers operate on a national basis, they may be unaware of these state laws. Alternatively, servicers may apply the same fees to all loans covered by one securitization agreement, despite the fact that varying state law actually applies to the loans. The propriety of fees may be impossible to verify without a payment history for the loan, which almost never was attached to the proof of claim.[188] For example, the

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> attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding.

Id. The standard instruments of Georgia, New York, and Wisconsin include substantially similar language. *Id.* Maine's standard instrument provides that the lender may "do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property." *Id.*

183. *See, e.g.*, Dougherty v. N. Fork Bank, 753 N.Y.S.2d 130, 131 (N.Y. App. Div. 2003) (holding that the payoff-quote fee of $25 was not permissible under state law); *see also* GA. CODE ANN. § 7-6A-3(4) (2004) (generally prohibiting a payoff fee but allowing a limited fee of $10 if the borrower requests a faxed copy of the payoff amount or has made other recent payoff requests).

184. *In re* Stewart, 391 B.R. 327, 344–45 (Bankr. E.D. La. 2008).

185. *See* Michael LaCour-Little, *The Evolving Role of Technology in Mortgage Finance*, 11 J. HOUSING RES. 173, 192 (2000) ("Payoff requests can be handled by incorporating the related fax-back technology, in which printed payoff statements (as would be required for a refinance loan) can be automatically faxed back to a telephone number entered during the same automated telephone transaction.").

186. The standard Fannie Mae note seems to prohibit the pyramiding of late fees, stating that the borrower will pay a late charge "only once on each late payment." *See* Fannie Mae Standard Instruments, *supra* note 165. Some transactions use different notes (and thus, it is important that a copy of the note accompanies the proof of claim), and some servicers may not honor the terms of the notes, either intentionally or inadvertently.

187. *See* JOHN RAO ET AL., NAT'L CONSUMER LAW CTR., FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING 154–55 (2d ed. 2007) (discussing the use of suspense accounts).

188. The instruction on the proof-of-claim form says that the claimant "must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed." Official Bankruptcy Form 10 (2007), *supra* note 41. This arguably requires not just the note to show the existence of the original debt, but also a current payment history that supports that the debtor actually owes the amount of the claim.

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payment history may show that the servicer imposed late charges on the homeowner, despite the fact that the homeowner's check cleared the bank before the payment was due,[189] or that the servicer held funds in suspense accounts without application to the amount due.[190]

Some servicing practices may constitute consumer abuse. For example, the FTC alleged that Fairbanks Capital Corporation had engaged in an unfair or deceptive practice by repeatedly and unnecessarily assessing property-preservation fees, which usually means an agent drove by the property to determine its condition.[191] The settlement enjoined the assessment of such fees more frequently than every thirty days and permitted such charges only if Fairbanks was unable to contact the borrower or had determined that the property was vacant.[192] Nonetheless, servicers continue to be faulted for conducting an unreasonable number of inspections.[193] One bankruptcy court has stated that it is "done allowing lenders reimbursement for property inspections," unless the lenders can show "that those property inspections actually happened and that they're worthwhile."[194] If the fees cannot meet these criteria, they may not legally be charged. Imposing such fees could give rise to a counterclaim against the servicer for engaging in an unfair or deceptive practice. The amount of the property-preservation fees in the sampled itemizations varied greatly, suggesting either that many of these fees resulted from multiple inspections or that a few servicers may be charging an unreasonable amount for a single inspection service.[195] The "broker price opinion" charge in Table 1 would grossly exceed the standard cost for this type of property inspection, which is essentially an abbreviated appraisal. If the $1,489 sum represents several inspections, the servicer should have separated these charges in its detail of fees.

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189. *See, e.g.*, *In re* Ocwen Fed. Bank FSB Mortgage Servicing Litig., Case No. 04-CV-2714, MDL-1604, 2006 WL 794739, at *1 (N.D. Ill. Mar. 22, 2006) (denying a motion to dismiss a multidistrict litigation suit that alleged, *inter alia*, that the servicer misapplied payments and improperly imposed late fees).

190. Most loan instruments specify how payments are to be applied, and violations of this language are potential breaches of contract.

191. *See* United States v. Fairbanks Capital Corp., No. 03-12219, 2004 WL 3322609, at *1 (D. Mass. May 12, 2004) (approving the settlement agreement of the FTC's deceptive-trade claims against Fairbanks Capital Corporation).

192. United States v. Fairbanks Capital Corp., No. 03-12219 (D. Mass. Nov. 21, 2003) (order preliminarily approving stipulated final judgment), *available at* www.ftc.gov/os/2003/11/0323014 order.pdf.

193. *See In re* Stewart, 391 B.R. 327, 343–45 (Bankr. E.D. La. 2008) (criticizing a servicer for inspecting the debtor's property on average every fifty-four days after default, notwithstanding that every inspection reported the property to be in good condition).

194. Transcript of Hearing at 3, *In re* Waring, No. 06-40614 (Bankr. D. Mass. July 27, 2007).

195. In addition to the example given in Table 1, two different proofs of claim from the Northern District of Texas requested payment of property-preservation fees of $105; another property-preservation fee from the Southern District of Georgia was $240. Inspection and appraisal were frequently combined in a laundry list of fees, making it impossible to determine whether the inspection or appraisal parts of these charges were reasonable. *See supra* notes 176–78 and accompanying text.

Another limitation on charges is found in the general law of contracts. Even if the parties' agreement does not contain a reasonableness requirement for default fees, egregious charges could be challenged as unconscionable as a matter of contract law.[196] For example, the overnight delivery charge of $137 in Table 1 may meet this standard. A court could rule that this charge violated public policy. It is quite possible, of course, that the $137 represents the sum of many charges, rather than one mailing. Alternatively, perhaps it reflects a data-entry error and should have been $13, or $17, or $37. The crucial problem is that the bankruptcy system did not flag this item as a potential cause for concern and seek to determine if this charge was legally permissible.

Federal bankruptcy law imposes additional legal constraints on the charges that debtors must pay their mortgage companies. Many claims in the sample included a flat "bankruptcy fee" in the proof of claim.[197] The propriety of this practice is unclear. Some courts have held that, to the extent these fees are for creditors' attorneys fees, it is impermissible to include them in claims.[198] Instead, creditors must file fee applications pursuant to Federal Rule of Bankruptcy Procedure 2016.[199] Other courts have reached a contrary conclusion and permitted attorneys fees in claims.[200] Some courts have modified this approach, requiring that the disclosure of the attorneys fees be "specific,"[201] or ruling that while including fees is prima facie permissible, a fee application will be required only if the debtor objects to the fees.[202] These inconsistent rulings make it more difficult for both servicers and

196. *See generally* U.C.C. § 2-302 (2004) (acknowledging the authority of courts to void unconscionable portions of a contract).

197. In the remainder of this subpart, I use the term "bankruptcy fee" as shorthand to describe these fees. I did not include any fees that were identified as related to actual post-petition litigation, such as a motion for relief from the stay or an objection to confirmation.

198. *See, e.g.*, Tate v. NationsBanc Mortgage Corp., 253 B.R. 653, 655–56 (Bankr. W.D.N.C. 2000) (ruling that a creditor cannot "hide" attorneys fees for preparing a proof of claim in the claim itself without court approval).

199. *See In re* Ezzell, No. 07-34780, slip op. at 5–6 (Bankr. S.D. Tex. Jan. 14, 2008) (disallowing attorneys fees for failure to comply with Rule 2016); *Tate*, 253 B.R. at 665 (ruling that a creditor's attempts to claim attorneys fees under a proof of claim is a violation of Rule 2016); *see also* FED. R. BANKR. P. 2016 (setting forth the application requirements for an entity seeking compensation for services from the bankruptcy estate).

200. *See, e.g.*, Atwood v. Chase Manhattan Mortgage Co. (*In re* Atwood), 293 B.R. 227, 232 (B.A.P. 9th Cir. 2003) (rejecting *Tate*'s reasoning and holding that a proof of claim satisfies the due process requirements for recovering attorneys fees).

201. *See, e.g.*, *In re* Madison, 337 B.R. 99, 103, 103–04 (Bankr. N.D. Miss. 2006) ("[T]he attorney fees, costs and charges must be itemized so that any interested party may object if so desired."); Powe v. Chrysler Fin. Corp. (*In re* Powe), 281 B.R. 336, 347 (Bankr. S.D. Ala. 2001) (concluding that fees labeled "attorneys fee" or "atty fee" were not specific enough to provide the requisite notice of the nature of the fee).

202. *See, e.g.*, *In re* Plant, 288 B.R. 635, 644 (Bankr. D. Mass. 2003) (holding that there is no need for a creditor to incur the time and expense of preparing a fee application absent a challenge by a debtor).

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attorneys to know how to handle these charges in preparing bankruptcy claims.

The amounts of attorneys fees disclosed in the claims varied considerably. The data revealed several clusters of bankruptcy fees; the most common amounts were $125, $150, $250, $275, and $500. On a dollar basis, the difference in these amounts is small. On a percentage basis, however, many mortgagees charge two or three times as much as other mortgagees.[203] Because the fees varied within judicial districts, the discrepancy does not seem to be attributable merely to regional cost differences.[204] The consistency of such fees also suggests that many servicers use a flat fee rather than a lodestar method based on hourly rate, which is required in some jurisdictions.[205] Given the nonexistent or minimal scrutiny of most mortgage claims,[206] the system appears to permit mortgagees to effectively make their own determinations of what constitutes reasonable attorneys fees for a routine Chapter 13 bankruptcy.

A related problem is that one cannot discern from a flat bankruptcy fee whether such charges actually represent an actual expense for attorneys. Some creditors use such bankruptcy fees to collect "monitoring" fees due to the purported additional burden of having to service a loan in bankruptcy.[207] In other instances, servicers may seek to impose bankruptcy fees for the purported administrative costs of preparing proofs of claim.[208] If such work

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203. A review of the claims in the Mortgage Study shows that the bankruptcy fee of Bank of America was $250. Yet, Chase Home Finance, LLC imposed a bankruptcy fee of half that amount, or $125. Because these lenders are large, national institutions, presumably their actual costs for preparing a proof of claim would be quite similar. Nevertheless, the data show a disparity. It appears that debtors whose mortgages are held by Bank of America must pay $125 more than debtors whose mortgages are held by Chase Home Finance, LLC in order to complete their plans.

204. For example, in the Eastern District of Arkansas, bankruptcy fees ranged from $125 to $800.

205. *See, e.g.*, *In re* Boddy, 950 F.2d 334, 337 (Bankr. W.D. Ky. 1991) (holding that a lower court abused its discretion by employing a "normal and customary" standard, rather than a lodestar analysis, to calculate the fee award).

206. *See infra* subpart III(D).

207. The lodestar-versus-flat-fee issue was apparently a point of contention in the work of the National Association of Chapter 13 Trustees' committee on proofs of claim. The servicers wrote separately on this issue to argue that a flat fee should be permissible, analogizing to the flat "no-look" fee that some courts permit for Chapter 13 representation to avoid debtors' counsel having to file a fee application pursuant to Rule 2016 in each case. NAT'L ASS'N OF CHAPTER 13 TRUSTEES MORTGAGE COMM., NOTES BY MORTGAGE SERVICERS ON MORTGAGE SERVICING DURING A CHAPTER 13 BANKRUPTCY 3–4 (2007) (included in REPORT, *supra* note 175)

208. This may be particularly true when the charge was described as "POC prep fee" or "plan review" fee. Arguably, neither of the prior-quoted activities is strictly necessary to "defend th[e] mortgage," nor are they costs from "prosecut[ing] all necessary claims and actions to prevent or recover for any damage to or destruction of the property," although such language commonly appears in the standard mortgage documents upon which lenders rely to collect bankruptcy fees. *See* RAO ET AL., *supra* note 187, at 176 (reproducing a provision contained in standard mortgages that a large loan-servicing company relies on to impose bankruptcy-monitoring fees). Further, the preparation or filing of a proof of claim and the review of a proposed Chapter 13 plan may not

is performed by internal employees and not by licensed attorneys, the corresponding fees cannot be claimed under the "reasonable attorneys fees" provision of the security agreements or notes.[209] Arguably such expenses are mere costs of servicing a mortgage that the servicer was previously compensated for by the owners of the note.[210] Without better disclosure, bankruptcy courts cannot even ensure that creditors are respecting the bankruptcy law that governs attorneys fees.

Delinquency and default fees can be a substantial source of profit for servicers.[211] The requirement that an itemization be attached to a bankruptcy claim could be a valuable check to the financial incentives of mortgage servicers to overreach and to charge unreasonable or illegal fees. However, the itemizations suffer two fatal defects—a lack of standardization and a lack of detail—that inhibit any meaningful review of the amount of mortgagees' claims. By describing charges in vague generalities, creditors can eviscerate the purpose of the proof-of-claim process, which is to ensure that creditors offer evidence of their debts.

Individualized review of "other" fees on claims highlights some instances of suspicious fees. While the data admittedly do not permit concrete findings of servicer misconduct, courts that have conducted evidentiary hearings to determine the validity of servicing fees have invalidated charges similar to these and sanctioned creditors for misbehavior.[212] The key point that can be substantiated by the itemization data is that servicers fail to provide the necessary information to allow debtors or trustees to review the claims. The resulting situation permits servicers to overcharge debtors without fear of challenge. These problems suggest that the bankruptcy system may be harboring mortgage-servicing abuse, rather than functioning as a system to protect homeowners from imper-missible charges.

Anecdotal reports suggest that creditors proffer similarly vague itemizations to borrowers facing state-law foreclosure.[213] Indeed, given the additional safeguards inherent in the bankruptcy process, the data may understate the difficulty that nonbankrupt homeowners face in reviewing

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constitute an "appearance" by the lender, which is a prerequisite to the borrower's becoming obligated to pay the lender's costs and expenses. *Id.*

209. *See id.* at 177 ("If all the lender is doing is 'monitoring' the bankruptcy, that is, receiving court notices, reading them, keeping them, and so forth, then these activities do not constitute the practice of law and should not be compensable as an attorney fee.").

210. *See id.* (concluding that routine administrative services are generally not compensable under any reading of typical mortgage provisions that permit the recovery of costs).

211. *See* Gretchen Morgenson, *Can These Mortgages Be Saved?*, N.Y. TIMES, Sept. 30, 2007, § 3, at 1 ("Borrower advocates fear that fees imposed during periods of delinquency and even foreclosure can offset losses that lenders and servicers incur.").

212. *See supra* subpart I(D) (discussing the *Jones v. Wells Fargo* and *In re Parsley* cases).

213. *See* Morgenson, *supra* note 211, at 8 (reporting that a payoff-demand statement that Countrywide provided to a borrower had line items identified only as "fees due" and "additional fees and costs" that totaled $8,525).

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default or foreclosure costs. Inside or outside of bankruptcy, the law does not appear to be functioning as intended to ensure that creditors must satisfy the evidentiary burden to show that charges are permissible under applicable law.

C. *Discrepancies Between Debtors' Schedules and Mortgagees' Claims*

The proof-of-claim process is the mechanism for fixing the amount of the debtor's obligation. When they file Chapter 13 bankruptcy, most homeowners are in default on their mortgages.[214] Thus, most claims seek to establish both the amounts of the arrearages and the amounts of the outstanding principal remaining on the loans. These amounts are treated differently in Chapter 13 cases. To retain their homes, debtors must "cur[e] any default within a reasonable time,"[215] normally by making payments over the period of the Chapter 13 plan (three to five years) or a shorter period as fixed by the bankruptcy courts.[216] Any regular mortgage payments also continue to be due as set forth in the note. Debtors must pay both the arrearages and their ongoing mortgage payments to retain their homes and receive discharges of remaining unsecured debt.[217] Thus, part of the pre-bankruptcy calculus that debtors and their attorneys should consider in determining whether debtors can save their homes in bankruptcy is whether they will have sufficient income to make both payments.[218] To weigh the viability of Chapter 13 bankruptcy and consider alternatives such as Chapter 7 bankruptcy or surrendering the home, debtors and their attorneys need a fairly accurate estimate of the amount of the outstanding arrearage and the amount of the total mortgage debt.

This subpart analyzes data to measure whether debtors and creditors agree on the amount of mortgage debt. The goal was to determine if either party had a substantial misunderstanding of the amount of the debt. For this analysis, I matched each home loan listed on a particular debtor's schedule to its corresponding proof of claim.[219] I then measured the direction and extent of the gap between the debtor's and mortgagee's calculations of the mortgage debt.[220] If the amount on the claim exceeded the mortgage debt on the

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214. *See supra* note 38 and accompanying text.

215. 11 U.S.C. § 1322(b)(5) (2006).

216. *See* 2 LUNDIN, *supra* note 47, § 133.1 (noting that several bankruptcy courts have formulated factor tests for the reasonableness determination and citing decisions that permitted the curing of defaults for a wide variety of time periods).

217. *See* 11 U.S.C. § 1328(a) (requiring the debtor to complete all payments under the plan before the court may discharge debts provided thereunder).

218. *See* Jacoby, *supra* note 128, at 337 (arguing that the failure of debtors' lawyers to screen their clients for their ability to complete a Chapter 13 repayment plan results in more unsuitable debtors in Chapter 13 bankruptcy).

219. It was not possible to perform this matching for every home loan. Among the 2,164 home loans in the sample, only 1,768 proofs of claim were filed.

220. For the gap analysis, some loans and their corresponding claims had to be eliminated. First, loans were eliminated if the Schedule D or the proof of claim had a zero or a blank entry for

debtor's schedule, I termed the gap in the "creditor's favor." In these instances, the creditor was asserting that more dollars were owed in the mortgage debt than the debtor believed were owed. Conversely, if the scheduled amount of mortgage debt exceeded the amount on the mortgagee's claim, I termed the gap in the "debtor's favor." Here, the gap between the schedule and the claim resulted from the debtor's overreporting the amount of mortgage debt.

Figure 3 shows what fraction of claims fell into each of three categories—creditor's favor, debtor's favor, and no discrepancy—based on the existence of discrepancies between the claims and the scheduled amounts of debt. Debtors and creditors agreed on the amounts owed for only 74 of 1,675 loans (4.4%). For the vast majority of loans (95.6%), the debtor and mortgagee did not agree on the amount of mortgage debt. In about one-quarter of instances (25.2%), the debtor's scheduled amount exceeded the mortgagee's claim. However, the majority of claims exceeded the debtor's calculation. Seven in ten (70.4%) claims asserted that the mortgage debt was greater than what the debtor listed on the schedule.

Figure 3: Percentage of Claims by Type of Gap

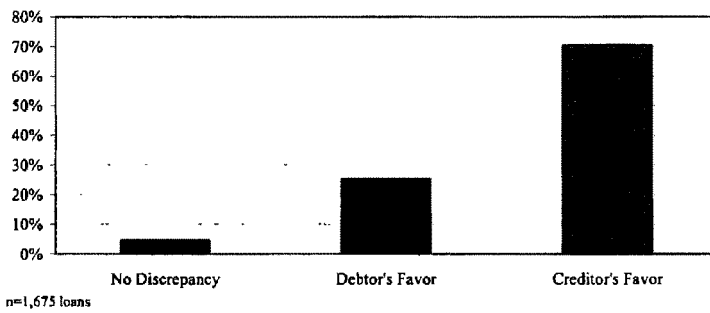

Figure 3 shows that, as an initial matter, the debtor and creditor do not agree on the amount of the debt in the vast majority of cases. The mere

the amount of the debt. These are usually placeholders, akin to listing the debt as "unknown." Second, loans were eliminated if the schedules and claims were not attempting to calculate the same thing. This usually occurred because one party listed only the arrearage amount and the other calculated the entire outstanding mortgage debt—both arrearage and principal. These cases were excluded from the gap analysis because the disagreement was in large part a result of the parties' not trying to communicate the same debt. In a very small number of instances, when both the creditor and the debtor clearly provided only the arrearage amount, the cases were used in the gap analysis because the discrepancy in calculation can be fairly compared. Finally, twelve loans were removed as outliers. Two criteria were used to identify these situations. Six loans were eliminated because the gap between the claim and the scheduled debt exceeded 200% of the amount of the scheduled debt. An additional six loans were deemed outliers because the gap exceeded $100,000 in absolute dollars and the gap was greater than 50% of the amount of the scheduled debt.

existence of discrepancies is not itself alarming. The findings in Figure 3 could merely reflect minor differences in record keeping. Alternatively, the claims could consistently be larger because of the addition of modest and explainable postbankruptcy charges such as accrued interest.[221] I explore these explanations with additional analyses, ultimately concluding that the data do not suggest that either reason can fully explain the discrepancies in creditors' and debtors' calculations.

The first indication that the disagreements may be genuine and serious comes from evidence on the dollar size of the gaps. Among all loans, the median claim exceeded its corresponding scheduled debt by $1,366. The average difference between a claim and its scheduled debt was $3,533.[222] In the typical bankruptcy, a mortgage creditor asserted that it was owed a significantly larger amount than the debtor believed was the home debt. These errors are too large to reflect small, record-keeping situations, such as a single late charge imposed since the debtor's most recent mortgage statement or a postbankruptcy property inspection.

The second indication that postbankruptcy charges cannot explain most of the differences in debtors' and creditors' calculations is the existence of claims in which the debtor overestimated the amount of the debt. Postbankruptcy charges can only explain discrepancies in favor of creditors. Debtors do not know whether such charges will be imposed and cannot include them in their schedules. The debtor's-favor gaps suggest that the disagreement occurs for a different reason, at least in many instances.

Further analysis reinforces the conclusion that the gaps between claims and scheduled debts reflect a serious misunderstanding. Figure 4 shows the distribution of the size of the gap amounts between claims and the corresponding scheduled debt. At every interval, the number of times in which the creditor's claim exceeded the scheduled amount was greater than the number of times in which the debtor estimated a higher debt. While the disagreements go in both directions (with debtors and creditors each reporting a higher amount of debt in some instances), creditors more frequently charge more than debtors think is owed.

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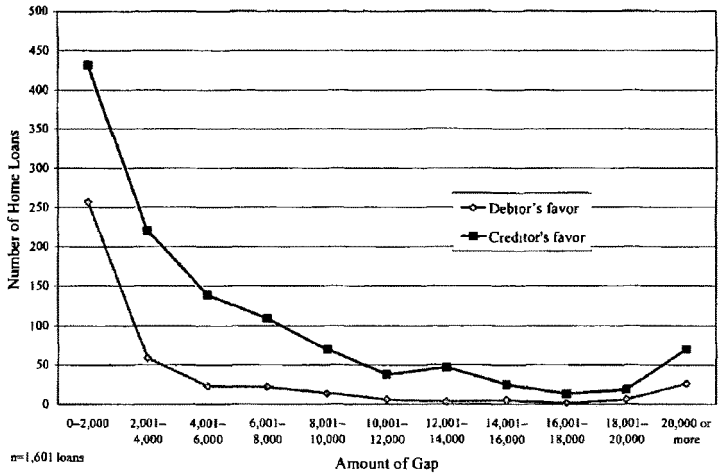
221. The debtors' schedules should only reflect the amount due at the time of the bankruptcy. The proof-of-claim forms should be identical, as the instructions specify that the amount should be the "Amount of Claim as of Date Case Filed." Official Bankruptcy Form 10 (2007), *supra* note 41. However, some creditors ignored this instruction and listed charges that arose after the bankruptcy was filed and before the claim was filed (a period of usually less than sixty days).

222. The sample size was 1,675. The analysis included those loans in which the claim amount and the scheduled amount were identical (no gap). The standard deviation for the entire sample was $11,480.

Figure 4: Gap Between Proofs of Claim and Schedule D Amounts



Creditor's-favor gaps were consistently larger than debtor's-favor gaps. The median gap for loans in which the claim exceeded the scheduled amount (creditor's favor) was $3,311. The average creditor's-favor gap was $6,309. The size of the typical gap in the debtor's favor was much less. The median was $1,090, less than one-third of the gap for creditor's-favor loans.[223] The bottom line in Figure 4 shows that debtor's-favor gaps were of modest amounts, with the vast majority of such differences calculated at less than $2,000. The top line in Figure 4, however, shows that very large gaps were much more common when the creditor's calculation exceeded the debtor's calculation. Many creditors requested payment on the proof of claim of several thousand more dollars than debtors thought they owed.

Of course, mortgage debts are relatively large in absolute size. It is difficult to articulate an exact standard for a "minor" versus "major" disagreement and to know at what point the gaps are sufficiently large that the bankruptcy process is undermined if these discrepancies are not being identified and resolved. An alternative to measuring the gaps in absolute dollars is to consider the size of the gaps in relation to the amount of the claims. For this analysis, I calculated the percentage size of each gap in relation to the amount of the debtor's scheduled debt. For example, if a

223. The average gap among the debtor's-favor claims was $5,376. As with the creditor's-favor claims, the size of the average reflects a substantial number of claims with very large gaps. The standard deviation of the debtor's-favor claims was $13,704. The standard deviation for the creditor's-favor claims was $9,143.

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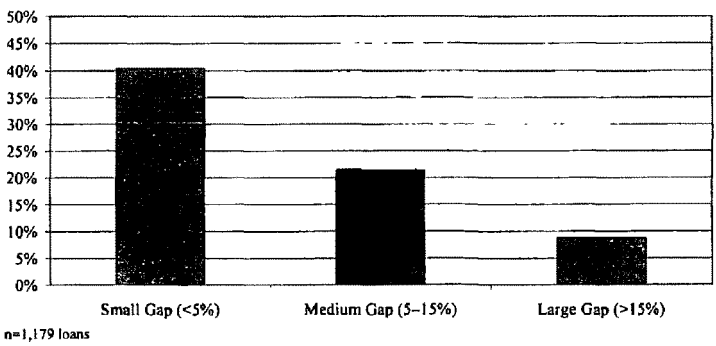
debtor's schedule listed an outstanding mortgage obligation of $100,000 and the corresponding proof of claim was for $110,000, the gap is $10,000. As a percentage of the amount of scheduled debt, the gap is 10%. I grouped these percentage-size data into categories as shown in Figure 5 for creditor's-favor claims (70.6% of all loans). About four in ten (40.4%) of all loans in the Mortgage Study sample had a mortgage claim that exceeded the corresponding debtor's scheduled amount by less than 5%. The more alarming findings concern the portion of claims in which the creditor's claim was much higher than the debtor's amount. The gap was between 5% and 15% of the debtor's calculation of the mortgage debt for 21.4% of all loans in the sample. Another 8.8% of loans had mortgage claims that were more than 15% higher than the amount of debt as calculated by the debtors on their schedules. Given their size, it seems implausible that these discrepancies resulted from valid postbankruptcy charges or an underestimation by debtors relying on the prior month's mortgage statements to complete the bankruptcy schedules. Instead, the magnitude of these differences suggests a real misunderstanding between debtors and creditors about the amounts of mortgage debt.

Figure 5: Frequency of Creditor's-Favor Gaps, Calculated as Percentage of Claimed Amount

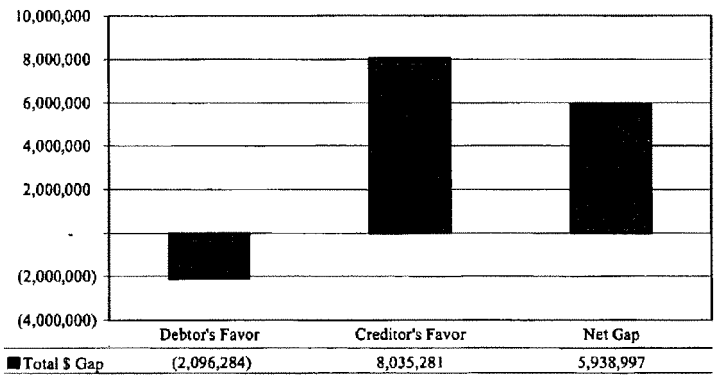


Unfortunately, the data do not permit an analysis of what portion of the disagreement about the debts relate to arrearage and what fraction, if any, is due to differing calculations of outstanding principal. Creditors and debtors were not consistent enough in separating these amounts to make any systematic comparison. Given that the outstanding principal appears on each mortgage statement that a debtor receives, it seems likely that at least some fraction of the disagreement is attributable to default charges and fees. These costs cannot be easily calculated by debtors, who may only take into account missed payments in determining the arrearage amounts. To the extent the

gaps between claims and scheduled amounts represent default costs, they offer a powerful reminder of how quickly mortgage debt can mushroom and how difficult it can be for debtors to find the income to cure arrearages.

A final rebuttal to the assertion that the gap data indicate the existence of only minor misunderstandings comes from a system-wide analysis. On an aggregate basis, the disagreements between debtors and mortgagees are a multibillion-dollar problem. Based solely on the Mortgage Study sample of approximately 1,700 loans, millions of dollars are at risk of misallocation. Figure 6 shows the total of all debtor's-favor claims (scheduled amount exceeded claim) and all creditor's-favor claims (claim exceeded scheduled amount). When viewed from a systems standpoint,[224] the cumulative effect of the discrepancies is enormous. Mortgage creditors in the sample requested nearly $6 million more on proofs of claim than the debtors reflected on their schedules. The mismatch between debtors' and creditors' calculations tilts sharply in favor of creditors.

Figure 6: Aggregate Gap Between Claims and Scheduled Amounts



Extrapolating this finding beyond the Mortgage Study sample shows the scope of the problem for the entire bankruptcy system. About 400,000 homeowners per year have filed Chapter 13 bankruptcy in recent years.[225] Multiplying the $6 million gap from the sample of 1,700 cases to the total homeowners in Chapter 13 indicates that each year mortgagees claim over $1

224. *See* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 481 (1997) (describing systems analysis as a methodology developed to manage complexity).

225. Am. Bankr. Inst., Quarterly Non-business Filings by Chapter (1994–2008), http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&CONTENTID=49785&TEMPLATE=/CM/ContentDisplay.cfm.

billion more than debtors believed was owed. If even a small fraction of this aggregate sum represents creditors overreaching in their claims, the damage to the bankruptcy process is tremendous. Debtors are surprised after filing bankruptcy by the burden of paying their mortgage debts, and distributions to other creditors could be unfairly skewed.

The substantial number of cases with large discrepancies shows that debtors and creditors operate in bankruptcy with very different understandings of the amounts of mortgage debt. The most likely explanation for this phenomenon may be that debtors and creditors simply have different records or lack reliable records. The finding that debtors overestimate their obligations in just over one-quarter of loans is consistent with this hypothesis. Debtors get no benefit from inflating their mortgage debt on their bankruptcy schedules. In most cases, neither debtors nor their attorneys appear to confirm the amount of the mortgage debt with the creditors at the time of the bankruptcy filing.[226] The data strongly suggest that many debtors file bankruptcy without knowing how much their mortgage creditors think is owed. The problem could reflect a different phenomenon. Creditors' claims may themselves be bloated and overstate the accurate amounts of debt. Such problems could result from servicers' practices of loading claims with default fees that are not disclosed to debtors, or from mistaken calculations of the amounts due in preparing the proofs of claim. Case law has documented both effects.[227]

Regardless of which party's calculation is correct, and even assuming all parties' behavior is unintentional, serious policy consequences occur from the system's failure to resolve these discrepancies. If the mortgagee was actually owed a smaller amount than the debtor thought was due, the counseling process regarding the advisability of bankruptcy was based on misinformation. If the arrearages were significantly less than the debtor believed, viable alternatives to Chapter 13 bankruptcy could have existed. Perhaps the debtor could have borrowed the amount necessary to cure the default in one payment. Or perhaps the debtor would have tried asking the servicer for a repayment plan outside of bankruptcy.

The creditor's-favor gaps raise equal, or more serious, harms. Additional amounts of mortgage debt have meaningful effects on families in bankruptcy. If creditors are overreaching by even half of the amount suggested by either the absolute-dollar analysis or the percentage analysis, they are imposing a hefty burden on debtors' disposable incomes and diverting money from unsecured creditors. Claims that are bloated by

226. Servicer practices may deter debtors from getting such information. As explained above in subpart I(A), servicers have no reputational concern about poor customer-service response, and so many servicers make it time consuming and difficult for a debtor to reach them. Additionally, the industry practice of imposing "payoff" or "statement" fees discourages debtors from making account inquiries.

227. *See supra* text accompanying notes 86–91.

default fees or enlarged due to a servicer's miscalculations diminish bankruptcy's potential as a home-saving device.

To prevent the harms from either type of gap, two changes are needed. Debtors attorneys should obtain up-to-date statements of their clients' mortgage obligations from creditors before counseling debtors to file Chapter 13. Then, after a bankruptcy is filed, attorneys and debtors should verify the accuracy and reasonableness of the mortgagees' claims, examining the source of any discrepancies between the claims and the scheduled amounts. To enable this latter practice, creditors must be held to the evidentiary standard for proofs of claim and must produce complete and clear documentation of their calculations. Without these changes, the functioning of the bankruptcy process is impaired.

D. Claims Objections

The findings in the prior three Parts of this Article offer a trio of indicia that undermine confidence in the claims system. Mortgagees often presented claims without required documentation;[228] many claims contained requests for suspicious fees;[229] and mortgagees' claims and debtors' records were rarely identical.[230] The proof-of-claim process has an existing, internal mechanism to address such problems. Under § 502(a) of the Bankruptcy Code, any party in interest may object to a claim.[231] If such an objection is made, "the court, after notice and a hearing, shall determine the amount of such claim."[232]

Despite these procedures, mortgage creditors are rarely called to task for the widespread deficiencies in their claims. Objections were identified to correspond with only 67 of the 1,768 proofs of claim in the sample. In other words, objections were filed in response to only 4% of all claims. Debtors, trustees, and other creditors simply did not object to mortgagees' claims—even when such claims did not meet the standard for prima facie validity because the claims did not comply with the unambiguous requirements of Rule 3001;[233] even when such claims contained vague or suspicious fees; and even when such claims exceeded the debtors' calculations of their debts by thousands of dollars. A debtors attorney who has developed a training program to educate attorneys about mortgage-servicing issues[234] has

228. *See supra* text accompanying notes 149–54.

229. *See supra* text accompanying notes 173–74, 209–11.

230. *See supra* subpart III(C).

231. 11 U.S.C. § 502(a) (2006).

232. *Id.* § 502(b).

233. FED. R. BANKR. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

234. *See infra* note 238.

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concluded "that the vast majority of Chapter 13 debtors and their attorneys do little or nothing about these illegal fees and charges."[235]

Among the objections that were filed, there were no observable patterns. The objections came from a variety of districts.[236] While many districts had only one objection, no district had more than seven objections. It appears that no jurisdiction has a strong local practice of reviewing and objecting to claims that would distinguish it from national norms.

Debtors filed more than two-thirds of all objections (forty-four objections); Chapter 13 trustees filed the remaining objections. Debtors' objections usually alleged substantive problems with the claims. The most common basis for objection was a disagreement about the amount of the claim. These situations alleged a variety of wrongs: the claim contained excessive fees; the escrow amount was incorrect; the attorneys fees were not itemized; or the mortgagee double-charged for property tax. In a few instances, the debtor contested the inclusion of any arrearages in the claim because the debtor believed the loan was current. Chapter 13 trustees typically focused on procedural problems with claims. The trustees' most frequent basis for objection was simply that a claim was a duplicate of a previously filed claim. Trustees' other objections were for egregious or facial errors. The sample contains trustee objections because a claim was for a borrower other than the bankruptcy debtor and because a claim was filed after the bar date for filing claims. The tiny number of objections makes it difficult to develop any useful model of why objections were filed in these cases and not in other claims with documentation deficiencies, unidentified fees, or discrepancies with debtors' schedules.

Neither the few high-profile cases about mortgage-servicing abuse nor the anecdotal allegations of widespread problems with the reliability of mortgage claims appear to have sparked more scrutiny of claims. The formal objection process for deficient or incorrect claims is largely dormant. The written law that governs claims does not appear in reality to translate into a functional check on mortgage-servicing abuse. Many mortgage claims fail to comply with the bankruptcy rules and procedures; many also request unidentified or suspicious fees or reflect a serious discrepancy between debtors' and creditors' records. Yet no objection was filed in response to 96% of all claims, despite these problems. While Congress has emphasized the importance of a reliable bankruptcy system that garners the public's trust, creditors face no meaningful consequences when they disregard the law and this public policy and submit incomplete or unsubstantiated claims for judicial approval.

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235. O. Max Gardner III, *Mortgage Securitization, Servicing, and Consumer Bankruptcy*, 2 GP SOLO LAW TRENDS & NEWS, Sept. 2005, http://www.abanet.org/genpractice/newsletter/lawtrends/0509/business/mortgagesecuritization.html.

236. Twenty-five of the forty-four judicial districts had at least one claim objection.

The number of formal objections could understate the scrutiny that claims receive. Parties could be informally working out disagreements about claims. This hypothesis, however, is incongruent with the rare incidence of amended claims. Amended claims were located to correspond with only 9.7% of all mortgagees' initial claims. If creditors were being called to task through informal processes like phone calls from debtors' counsel or negotiations at plan-confirmation hearings, the result in most of such situations should be an amended claim.[237] Further, my interviews with dozens of consumer attorneys before beginning this study revealed that only a few practitioners regularly review all mortgage claims.[238] The high-volume nature of consumer practice undoubtedly explains this situation, but it does not excuse it. The missing documentation and the lack of standardized and detailed itemizations only heighten the financial and time costs to review claims.

The data offer a cautionary tale about relying on the formal law to actually function as intended to protect parties. Very few mortgage claims meet the ideal of the bankruptcy process; a majority of claims lack documentation and reflect a sizeable discrepancy in record keeping between debtors and creditors. Unambiguous law exists to address such problems. For decades, the system has relied on these procedures to safeguard the integrity of bankruptcy distributions. Yet, the paucity of objections shows a collective failure of the system to identify even patently defective claims.

Verifying that debtors only pay the amounts to which creditors are legally entitled should be a routine part of bankruptcy representation. This is a reasonable burden to impose on attorneys given the large size of mortgage claims and the requirement that debtors must pay all mortgage arrearage debt in full to save their homes. Similarly, trustees have a statutory obligation to object to improper claims,[239] yet rarely do so. The current system fails to

237. Another possibility is that the plan-confirmation process serves as a check on the accuracy of claims. In their proposed Chapter 13 repayment plans, debtors may be relying on their own calculations of the amounts due, rather than using the amounts of the mortgagees' claims as the basis for the required repayment. If the creditor does not object to the plan, the order confirming the plan would trump the claim for purposes of the required payment in bankruptcy. Conversely, creditors may be objecting to the amounts of mortgage debt in the plans, and if the objections are sustained, the plans would be conformed to the creditors' claims. The extent to which confirmed Chapter 13 plans reflect the creditors' claims or the debtors' scheduled amounts, or some compromise between these discrepant numbers, is an empirical question. The difficulty in testing this hypothesis is that, in most districts, the plan contains only the amount of pre-petition arrearage. Yet, some claims did not specify the arrearage at all, while other claims reflect only the combination of pre-petition and post-petition amounts. Thus, despite my efforts to do so, it is impossible to compare either the total claims or the total arrearages contained in confirmed plans to those contained in the proofs of claim in any significant fraction of cases.

238. *See also* Vicki Mabrey & Ely Brown, *Playing the Odds*, ABCNEWS.COM, Dec. 14, 2007, http://abcnews.go.com/Business/RealtyCheck/Story?id=4002397&page=1 (interviewing Max Gardner about the "bankruptcy boot camp" that he developed to train attorneys on mortgage issues in bankruptcy cases).

239. 11 U.S.C. § 704(a)(5) (2006).

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offer sufficient incentives to encourage attorneys and trustees to obtain the additional information necessary to ensure that the amounts paid to mortgagees are correct. Similarly, the current system suggests that creditors can operate with the knowledge that their claims will not be reviewed or challenged. Combined with the financial incentives of servicers to overreach and the anecdotal evidence of servicing abuse,[240] there is a serious risk that mortgage servicers' overreaching and errors are imposing unfair burdens on families trying to save their homes. It is also possible that creditors' claims for nonmortgage debt are plagued with problems similar to those that exist in mortgage claims.[241] Indeed, because such debts are usually for smaller amounts, they may be subject to even less scrutiny for their accuracy. The evidence from the bankruptcy courts calls into question the ability of consumers to trust creditors to accurately and fairly account for their payments and assess charges.

IV. Implications

The systemic failure of the claims process to ensure that mortgage creditors are collecting only what they are legally owed harms debtors, other nonmortgage creditors, and the integrity of the bankruptcy system. Yet the most distressing implication may be the data's suggestion that mortgage-servicing abuse may be even more prevalent beyond bankruptcy.

A. Proof-of-Claim Process

The problems with mortgage claims are structural. Creditors should comply with federal law if they expect to receive distributions in bankruptcy. Debtors and their attorneys also must bear responsibility for ensuring accurate payments. Objections to claims do not appear with sufficient frequency to police claims, even with regard to large debts such as mortgages. The current claims process is malfunctioning.

Mortgagees' failure to satisfy Rule 3001 should not be dismissed as a mere technicality. The rules governing claims were implemented to provide adequate procedures to help parties identify claims for which a valid objection may exist, thus ensuring the accurate payment of claims.[242] Without documentation of the debt, the debtor and other creditors cannot

240. *See supra* subparts I(A), I(D).

241. The U.S. Trustee recently settled a complaint against Capital One that alleged that the credit-card issuer had filed claims and accepted payments in bankruptcy cases for debts that had been discharged in debtors' prior bankruptcies. Complaint of the U.S. Trustee Phoebe Morse for a Permanent Injunction & Other Equitable Relief at 3, Morse v. Capital One Bank (*In re* Galley), No. 06-12142-JNF (Bankr. D. Mass. Oct. 2, 2008); *see also* Amir Efrati, *Capital One in Settlement Over Card Debt*, WALL ST. J., Oct. 3, 2008, at B3 (announcing the settlement between Capital One and the U.S. Trustee).

242. *See* Alane A. Becket, *Proofs of Claims: A Look at the Forest*, AM. BANKR. INST. J., Dec.–Jan. 2005, at 10, 53 (describing how the rules governing claims are designed to give parties information and evidence to use in determining whether to object to the claim).

verify the legitimacy or accuracy of claims, each of which cuts into the limited dollars available for distribution. Poor compliance with the claims rules effectively deflects creditors' obligations onto cash-strapped, bankrupt families, who must choose between the costs of filing an objection or the risks of overpayment. Deficiencies in the claims process can permit unmeritorious or excessive claims to dilute the participation of legitimate creditors and to prevent the just administration of bankruptcy estates.[243] Further, from a systems standpoint, it is hard to discern the benefit of allowing parties to opt-out of rules at will. Reforms to the claims process will protect the integrity of the bankruptcy system.

Mortgagees' frequent failure to comply with Rule 3001 results from weaknesses in the current rules, which do not deter creditors from disregarding the documentation requirements. While the rules themselves use mandatory language, phrased in terms of "shall,"[244] the reality is that some creditors treat them as aspirations—or ignore them entirely. In most instances, there is no negative consequence when a mortgagee fails to attach the required documentation. Under the current system, the main tool to fight improper claims is Federal Rule of Bankruptcy Procedure 9011, which requires all factual contentions in pleadings to have evidentiary support.[245] While courts have sanctioned creditors for filing unsubstantiated claims,[246] Rule 9011 was not designed to correct the systematic failure of other rules. Rule 3001(f) provides a "carrot" to encourage compliance by granting prima facie validity to claims that are executed and filed in compliance with Rule 3001.[247] Yet, as a practical matter, all claims receive this treatment if neither the debtor nor another party in interest objects to the claim. Creditors can rely on the lack of scrutiny to validate their claims and sidestep the burdens of Rule 3001.

The consequences of disregarding Rule 3001 need to be sharpened. Even when an objection is filed, there is typically no sanction for missing

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243. *See* Gardner v. New Jersey, 329 U.S. 565, 573 (1947) (acknowledging the deleterious effects of unmeritorious or excessive claims on participation by legitimate bankruptcy claimants).

244. FED. R. BANKR. P. 3001(c)–(d). The proof-of-claim form also contains the following instructions:

> You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If the documents are not available, you must attach an explanation of why they are not available"; and "[y]ou must . . . attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed.

Official Bankruptcy Form 10 (2007), *supra* note 41.

245. FED. R. BANKR. P. 9011(b)(3).

246. *See, e.g.*, *In re* Cassell, 254 B.R. 687, 691 (B.A.P. 6th Cir. 2000) ("Proofs of claim must meet the standards of [Rule 9011.]"); *In re* Berghoff, No. 06-10375, 2006 WL 1716299, at *2 (Bankr. N.D. Ohio June 30, 2006) (finding that a mortgage lender violated Rule 9011 by including in a claim certain fees that were not warranted by existing law).

247. FED. R. BANKR. P. 3001(f).

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documentation.[248] Some courts have concluded that failure to comply with Rule 3001 is not a permissible basis for disallowing a claim[249] because this behavior is not listed in § 502(b) of the Bankruptcy Code, which governs the allowance of claims.[250] A few jurisdictions have taken a different approach and ruled that incomplete claims documentation can be a basis for disallowing a claim.[251] The majority rule seems to be that a claim that does not comply with Rule 3001 loses its prima facie evidentiary effect, which shifts the burden to creditors to prove their claims.[252] However, courts usually require the debtor to advance some evidence that disputes the claim rather than merely pointing to noncompliance with the rule.[253] If the servicer is uncooperative and, for example, refuses to promptly provide a complete and comprehensible payment history, the debtor may have a difficult time actually forcing the creditor—the party in control of the records—to meet the burden that the rules impose upon it. An affidavit from the debtor may suffice in such cases, and the courts seem to be increasingly sympathetic to debtors' frustrations with obtaining information from mortgage servicers.[254]

The simplest route to boosting the reliability of mortgage claims is to revise § 502(b) to include the failure to provide the attached documentation

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248. *But see In re* Prevo, No. 08-30815, 2008 WL 4425799, at *3–4 (Bankr. S.D. Tex. Aug. 7, 2008) (issuing a show-cause order to determine whether the creditor should be required to pay the debtor's attorneys fees for objecting to a mortgage claim that was disallowed for failure of the creditor to meet its evidentiary burden).

249. *See, e.g.*, *In re* Stoecker, 5 F.3d 1022, 1028 (7th Cir. 1993); *In re* Heath, 331 B.R. 424, 431–32 (B.A.P. 9th Cir. 2005); *In re* Gurley, 311 B.R. 910, 915–16 (Bankr. M.D. Fla. 2001) (all holding that the failure to comply with Rule 3001 either can be fixed by amending the claim or is not a valid objection), *see also* Becket, *supra* note 242, at 53 (concluding that disallowance on Rule 3001 grounds is not within a court's statutory authority because, under 28 U.S.C. § 2075, the bankruptcy rules are not supposed to "abridge, enlarge, or modify substantive rights").

250. 11 U.S.C. § 502(b) (2006).

251. *See, e.g.*, *In re* Shaffner, 320 B.R. 870, 879 (Bankr. W.D. Mich. 2005) (permitting a trustee to refuse to administer the proof of claim as filed); *see also* NANCY H. DREHER & JOAN N. FEENEY, BANKRUPTCY LAW MANUAL § 6:4 (5th ed. 2008) ("There is a split of authority on whether the failure to comply with Rule 3001(c) requires disallowance of the claim."); *cf. In re* McLaughlin, No. 05-63927, 2007 WL 2571943, at *4 (Bankr. N.D. Ohio Aug. 31, 2007) (disallowing claims filed by a trustee pursuant to Rule 3004 because the trustee did not reasonably investigate the claims or provide documentation to support them).

252. *In re* Gilbreath, No. 08-32404-H4-13, 2008 WL 4569965, at *76 (Bankr. S.D. Tex. Oct. 14, 2008) (ruling that proofs of claim that failed to comply with Rule 3001 are not prima facie valid, and disallowing such claims when the creditor did not meets its burden of proof to prove the claims).

253. *See, e.g.*, *In re* Campbell, 336 B.R. 430, 434 (B.A.P. 9th Cir. 2005) (holding that a proof of claim lacking documentation required by Rule 3001(c) is not disallowed unless the debtor's objection to the claim contests the amount of the debt and not merely the violation of the Rule); *In re* Stewart, No. 07-11113, 2008 WL 2676961, at *9 n.15 (Bankr. E.D. La. Apr. 10, 2008) (shifting the burden of proof onto the creditor because the debtor had objected and presented sufficient evidence to overcome the presumption of the claim's validity).

254. *See, e.g.*, *In re* Heath, 331 B.R. 424, 437 (B.A.P. 9th Cir. 2005) (stating that a creditor's failure to provide information or to support its claim "in itself may raise an evidentiary basis to object to the unsupported aspects of the claim, or even a basis for evidentiary sanctions, thereby coming within Section 502(b)'s grounds to disallow the claim" (internal citations omitted)).

as a basis for the disallowance of claims. This reform would ratchet up the consequences for failing to attach a note or security interest. In effect, a creditor who could not validate the existence of the purported debt with a note (or could not adequately explain why a note was unavailable) could not receive more in bankruptcy than it would have been entitled to had it been put to its proof in a judicial-foreclosure lawsuit.[255] In this way, the bankruptcy process would be at least as rigorous as the state-law foreclosure schemes.

Another strategy is to squarely impose the burden of reviewing mortgage claims on trustees. The Bankruptcy Code already states that a trustee shall, "if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper."[256] Many trustees apparently believe that no purpose would be served by objecting to claims without the documentation required by law. For example, while notes were missing from 40% of claims, trustees filed only one or two objections that raised that issue.[257]

The U.S. Trustee Program could, in its program handbook, mandate the review of mortgage claims as an official duty of panel and standing trustees, and trustees could be evaluated, in part, on their fulfillment of this duty. This solution is informal, requiring no legislative reform. The proposal merely posits that the U.S. Trustee Program would ensure that trustees carry out the statutory mandate in a rigorous fashion. This solution eliminates the need to create incentives for debtors attorneys to make claims objections in the first instance. The U.S. Trustee Program could use standards and procedures that parallel those used when auditing debtors' schedules. If the Chapter 13 trustees' examinations revealed serious or systematic misconduct, the problems could be referred to the U.S. Trustee for enforcement activity. In 2007, the U.S. Trustee took a step in this direction by becoming involved in litigation over alleged wrongdoing by mortgage servicers.[258]

A complementary tactic to these enforcement strategies would improve the clarity of claims. The varying formats and levels of detail in the itemizations dramatically increase the costs of reviewing claims, rendering it prohibitively expensive and inefficient for the high-volume consumer bankruptcy system. If itemizations were standardized, it would be easier to train

255. *See supra* note 154 and accompanying text.

256. 11 U.S.C. § 704(a)(5) (2006).

257. *See supra* text accompanying note 152.

258. *See, e.g.*, Statement of the U.S. Tr. Regarding This Court's Order Requiring Countrywide Home Loans, Inc., [and Barrett Burke Wilson Castle Daffin & Frappier, L.L.P. Attorneys and Personnel] to Appear and Show Cause Why [They] Should Not Be Sanctioned for Filing a Motion for Relief From Stay Containing Inaccurate Debt Figures and Inaccurate Allegations Concerning Payments Received from the Debtor, *In re* Parsley, 384 B.R. 138 (Bankr. S.D. Tex. 2008) (No. 05-90374) (evidencing the United States Trustee's willingness to become involved in litigation). However, the U.S. Trustee may have limited authority to pursue creditors for abusive claims practice because its powers are circumscribed by statute. *See supra* notes 116–18 and accompanying text.

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legal assistants and junior attorneys to review claims. Standardization would also facilitate the development of computer programs to analyze creditors' calculations for items such as escrow accounts and arrearage payment streams. Indeed, creditors themselves have identified variations in local practice as an obstacle to accurate servicing.[259] A model itemization attachment was promulgated by a committee of mortgage-industry representatives, Chapter 13 trustees, and mortgage servicers.[260] The model attachment would require servicers to provide details such as the type of the loan, its interest rate, and any payment-adjustment dates.[261] It also sets out a standardized format for servicers to break out the amount of any pre-petition arrearages, categorize each charge, and report how many times each type of charge had been imposed. The Advisory Committee on Bankruptcy Rules should review the model itemization and consider incorporating it into the Official Form 10 and Rule 3001(a), at least for mortgage claims. Voluntary adoption seems unlikely as the form has not yet been adopted, despite its existence for many months. Notably, the participation of industry representatives in creating the model itemization does reflect some willingness by servicers to admit that their bankruptcy procedures need improvement.

The solutions outlined here would systematically improve mortgage claims.[262] Given the empirical evidence of widespread problems with mortgage claims, these approaches may be the most efficient solution. The realities of consumer bankruptcy practice may dictate structural solutions that do not rely on the voluntary participation of individual actors. While such reforms would modestly increase the administrative burdens, the benefits of increased reliability in mortgage claims justify these policy changes.

B. Bankruptcy as a Home-Saving Device

Mortgage claims are a key determinant of the outcomes of consumer bankruptcy cases. A core function of Chapter 13 bankruptcy is helping families save their homes,[263] which the Bankruptcy Code effectuates by

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259. *Hearing*, *supra* note 58, at 5 (statement of Steve Bailey, Chief Executive for Loan Administration, Countrywide Financial Organization), *available at* http://judiciary.senate.gov/pdf/08-05-06Steve_%20Bailey_Testimony.pdf (testifying that, as a result of variations across jurisdictions in the rules governing bankruptcy, bankruptcy-loan servicing is a borrower-by-borrower process that requires manual input of data unique to each borrower, and that this type of processing can occasionally result in mistakes).

260. MODEL PROOF OF CLAIM ATTACHMENT, *supra* note 175, at 2–3.

261. The model attachment would also require the creditor to provide the Mortgage Electronic Registration System (MERS) number for the loan, the real property tax number and parcel number, and a contact person for the servicer (not just the servicer's attorney).

262. *Cf. In re* Coates, 292 B.R. 894, 899–900 (Bankr. C.D. Ill. 2003) (noting that the frequent appearance of attorneys fees and expenses in mortgage claims justifies a systematic approach to this aspect of Chapter 13 cases).

263. *See* 1 LUNDIN, *supra* note 47, § 129.1 ("[I]t is not unusual for rehabilitation of a home mortgage to be the principal reason for filing a Chapter 13 case.").

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permitting debtors to cure arrearages on mortgages over time.[264] Because mortgage creditors are most Americans' largest creditor, their actions in bankruptcies heavily influence debtors' success in saving their homes from foreclosure.[265] A family's ability to confirm a Chapter 13 plan or cure a default may turn on the amount fixed as being owed to the mortgage creditor.[266] Debtors cannot easily generate additional disposable income if alleged obligations to mortgagees magically increase or if fees multiply without justification. The debtor's ability to pay mortgage arrearages, as a practical matter, determines the success of a case. Plan confirmation turns on this issue. What is more, if the debtor misses any plan payments, the mortgage creditor frequently will seek relief from the stay to proceed with a foreclosure, and the debtor's bankruptcy may be dismissed. Thus, the amounts of mortgage proofs of claim have direct effects on bankruptcy's usefulness as a home-saving device.

Miscalculations about mortgage debt have grave consequences for families at nearly every point in the bankruptcy system. From the outset, debtors may be harmed if they make their bankruptcy-filing decisions without accurate knowledge of their mortgage debts. If debtors underestimate the amount of their outstanding obligations to mortgagees, which the data show occurs in the majority of cases, their attorneys may misadvise them about the feasibility of confirming a Chapter 13 plan and the likelihood that they can cure their mortgage defaults. Conversely, if debtors overestimate their arrearages, they could file bankruptcy without pursuing other types of relief, such as borrowing from families or friends, seeking forbearance from the mortgagee, or selling an asset. Debtors' inability to report their mortgage debts with reasonable accuracy indicates a serious shortcoming in the prebankruptcy counseling process. The data suggest that attorneys who do not verify the mortgage debt may give suboptimal advice to their clients about the advisability of Chapter 13 bankruptcy. This situation could be one factor that contributes to the low success rate of debtors completing Chapter 13 repayment plans.[267]

After families file for bankruptcy, discrepancies in debtors' and creditors' records of the amount of mortgage debt and incomplete mortgagee proofs of claim lead to either of two undesirable consequences. In most instances, the data show that debtors do not verify the amounts requested on

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264. *See* 11 U.S.C. § 1322(b)(5) (2006) (providing debtors with the right to cure mortgage arrearages within a reasonable time).

265. *See* Bahchieva et al., *supra* note 1, at 74 ("Our results also suggest that rising mortgage debt has important consequences for federal bankruptcy policy.").

266. *See In re Coates*, 292 B.R. at 899 ("A debtor's obligation to cure the prepetition mortgage arrearage is enforceable as a condition of confirmation. A plan that fails to provide for a complete cure is not confirmable over the objection of the mortgagee.").

267. *See, e.g.*, Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 439 (1999) (finding that approximately one-third of Chapter 13 debtors complete their plans).

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mortgagees' claims and consequently risk overpaying those creditors. In so doing, debtors increase their burdens in confirming and completing their Chapter 13 plans. This outcome, however, saves debtors the litigation and negotiation costs of seeking clarification from the mortgagees. When mortgagees' claims are challenged, debtors face increased costs for their attorneys' time in this work. Proofs of claim with unexplained or impermissible fees, or without adequate documentation, drive up the expense of bankruptcy relief, a consequence that financially strapped families can ill afford.

Despite these costs, debtors may benefit substantially by challenging mortgage claims. Bloated claims make it more difficult for a family to confirm repayment plans. Because arrearages must be paid in full, every dollar of savings is a direct benefit to a family who would have to dismiss its Chapter 13 case and surrender its home if the original arrearage amount were allowed to stand. Improved accuracy by mortgage servicers in bankruptcy cases could save litigation costs in response to motions for relief from the stay that are based on incorrect accounting.

Scrutinizing proofs of claim to ensure that only valid fees are included in arrearage claims can help reduce the burdens that debtors face in making all payments required to complete their Chapter 13 plans. Reduced arrearages could improve the success rate of debtors in completing Chapter 13 plans and receiving discharges. Better outcomes in Chapter 13 could help encourage more debtors to consider this alternative, which could in turn boost recovery to all creditors. Further, ensuring that the mortgagee's accounting is accurate at the time of the confirmation can help prevent disputes about the amount of mortgage debt that remains to be paid after the bankruptcy case is complete.

Debtors would benefit substantially if consumer bankruptcy attorneys incorporated a routine review of mortgage claims in the scope of their representation. Given the recent escalation in attorneys fees that occurred after the Bankruptcy Abuse Protection and Consumer Protection Act (BAPCPA),[268] it is discouraging to suggest that the solution lies in passing the costs of claims review along to debtors. The structural changes suggested in the prior subpart would reduce the costs of claims review in various ways, and in some instances they would change the incentives of debtors attorneys to monitor the accuracy of claims.

Taking those suggestions a step further, attorneys need to be educated about how challenging mortgage claims can potentially benefit their practices. While challenging a claim does not per se generate revenue for an attorney, claims review can reveal other causes of action. Most obviously, if

268. GOV'T ACCOUNTABILITY OFFICE, DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 25, 26 fig.7 (2008) (reporting analysis that showed that the Chapter 13 standard fee had increased after BAPCPA in nearly all judicial districts for which information was collected).

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debtors attorneys request information from mortgage servicers and do not receive responses or receive inadequate responses, the servicers may have violated RESPA.[269] If successful, these claims entitle plaintiffs to actual damages and the costs of reasonable attorneys fees.[270] An objection may also generate evidence of a practice that can be challenged under a state's unfair or deceptive practices act, which typically also permits the recovery of attorneys fees if the plaintiff is successful.[271] In some instances, review of mortgage claims can reveal causes of action that allege violations in how the loan was originated. For example, a review of a loan's statutorily required Truth in Lending disclosure can give rise to a claim for actual or statutory damages, or even rescission of the loan under some circumstances.[272] The Truth in Lending Act[273] also is fee-shifting so that mortgage companies may be ordered to pay the attorneys fees and costs of successful actions.[274] These examples show how bankruptcy can be the locus for identifying a variety of illegal lending activity. Reviewing mortgage claims should be merely the first step in helping a family stop a foreclosure or untangle itself from the harm of an inappropriate or predatory home loan.

The data provide systematic evidence that mortgage servicers do not adequately document their claims and may be engaged in overreaching in assessing fees and calculating outstanding obligations. The current state of mortgage claims puts debtors at risk. Each time a family loses its home based on an inaccurate claim, the bankruptcy system fails. Inflated mortgage claims undercut a core bankruptcy policy—helping families in financial trouble save their homes and right themselves financially.

C. Sustainable Homeownership Policy

The findings on the unreliability of mortgagees' claims have implications beyond bankruptcy. All families who are trying to pay off a home loan are put at risk if subject to poor or predatory mortgage servicing. Most families rely on their mortgage servicers to credit payments, calculate payoff balances, and apply fees only when justified. Most families do not and cannot separately verify the servicers' accounting. Bankruptcy data provide a lens for examining whether Americans should trust servicers to carry out these tasks and whether the servicing industry is adequately regulated.

It seems likely that default by a borrower may exacerbate servicing problems because default triggers the imposition of fees and sometimes a

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269. *See* 12 U.S.C. § 2605(e) (2006) (detailing the proper response to a borrower's request).

270. *Id.* § 2605(f)(3).

271. DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON CONSUMER LAW 481 (3d ed. 2002).

272. 15 U.S.C. §§ 1635, 1640 (2006).

273. *Id.* §§ 1601–1667f.

274. *Id.* § 1640(a)(3).

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transfer to a loss-mitigation department or even to a new servicer. Nonetheless, the reality is that most defaults and pending foreclosures occur outside the bankruptcy system.[275] Thus, most families in default on their mortgages lack the protections—albeit, the existing weak protections—of the bankruptcy claims process to shield them from impermissible or unreasonable default fees. Indeed, servicers' accounting should be better inside the bankruptcy system than outside of it because, at least in theory, a bankruptcy is a check on mortgage overreaching. If a Chapter 13 case is filed, the servicer usually hires an attorney who is supposed to review the claim for accuracy and illegality, and the servicer knows that homeowners usually have retained an attorney to represent them. Not only are mortgagees' misbehavior and mistakes probably not confined to bankruptcy debtors, the frightening prospect is that servicing problems among non-bankrupt families who are behind on their mortgages may be even worse than the bankruptcy data reveal.

Very recent case law lends legitimacy to this fear. In late 2007, two federal courts in Ohio dismissed dozens of foreclosure lawsuits on standing grounds because the plaintiffs could not prove they were the record owners of the mortgage and note.[276] Two class action lawsuits are pending that allege that consumers paid bloated, illegal fees for default charges.[277] Mortgage servicers are increasingly being fingered as the primary parties who are frustrating homeowners' efforts to obtain modifications of unaffordable loans.[278]

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275. Foreclosure filings appear to outnumber bankruptcy cases filed by homeowners by a four-to-one ratio. In 2006, there were 597,965 nonbusiness bankruptcy filings. Press Release, Admin. Office of the U.S. Courts, Bankruptcy Filings Plunge in Calendar Year 2006 (Apr. 26, 2007), *available at* http://www.uscourts.gov/Press_Releases/bankruptcyfilings041607.html. The best available data, which is from the 2001 Consumer Bankruptcy Project, indicate that about 52.5% of all families in bankruptcy are homeowners. Bahchieva et al., *supra* note 1, at 92. In 2006, there were 1,259,118 foreclosure filings. Press Release, RealtyTrac, More Than 1.2 Million Foreclosure Filings Reported in 2006 (Jan. 25, 2007), *available at* http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=1855&accnt=64847; *see also* Dennis R. Capozza & Thomas A. Thomson, *Subprime Transitions: Lingering or Malingering in Default?*, 33 J. REAL ESTATE FIN. & ECON. 241, 241–58 (2006) (reporting that in a study of borrowers who were identified as ninety-days delinquent on their loans, only 11% had filed for bankruptcy eight months later).

276. *See, e.g.*, *In re* Foreclosure Cases, 521 F. Supp. 2d 650, 654 (S.D. Ohio 2007) (giving plaintiffs thirty days to submit evidence proving that they had standing to file the complaint); *In re* Foreclosure Cases, No. 07CV2282, 2007 WL 3232430, at *3 (N.D. Ohio Oct. 31, 2007) (finding that plaintiffs could not show proof of ownership of the note or mortgage).

277. *See In re* Harris, No. 03-44826, 2008 WL 924939, at *1 (Bankr. S.D. Tex. Jan. 16, 2008) (alleging that default servicers had impermissible and undisclosed arrangements with attorneys to retain a portion of the fees); Complaint at 2, Trevino v. Merscorp, Inc., No. 07-568 (D. Del. Nov. 6, 2007) (alleging that Merscorp overcharged and extracted improper fees from mortgage borrowers).

278. *See* Eggert, *supra* note 23, at 286–87 (describing servicers' self-interest as a barrier to loan modification); Larry Cordell et al., *The Incentives of Mortgage Servicers: Myths and Realities* 3 (Fed. Reserve Bd., Fin. and Econ. Discussion Series, Paper No. 2008-46, 2008) (reporting that available evidence suggests that the inadequate loss-mitigation capacity of mortgage servicers and certain servicing practices are factors contributing to avoidable disclosures).

Poor mortgage servicing is an assault on America's policy of promoting sustainable home ownership. If families are hit with unreasonable fees and cannot understand what is owed on their mortgage loans, they are at risk of foreclosure. Servicing abuse can begin before bankruptcy, but may ultimately drive some families into bankruptcy as a last resort for trying to address this issue. The current policy debate on home ownership is focused on loan-origination issues, such as whether mortgage brokers or lenders placed families in appropriate loans.[279] Servicing problems may be less visible, but no less harmful. Research shows that the quality of preventive servicing affects the incidence and outcome of default.[280] The rising foreclosure rate will only escalate the number of families who must struggle to understand the amounts of their arrearages and who are at risk of having to pay unreasonable default costs to save their homes.[281] Policies that aim to protect families from foreclosure should address the weaknesses in mortgage servicing and not just alter the process for loan origination. For families who are already trapped in unaffordable loans, other relief will come too late. Improving mortgage servicing would provide immediate protection to families facing foreclosure.

Paying a mortgage is most families' most important financial obligation. Unreliable servicing can cause ordinary families to overpay, even for those who avoid default and bankruptcy. For example, inaccurate payoff balances can penalize families when they refinance a home loan. Even families who try to get ahead on their mortgages may lose such benefits if servicers fail to credit additional payments to principal, instead holding them in suspense or treating them as prepayments despite instructions to the contrary from the borrowers. These practices create a needless barrier to home ownership.

Under the current regime, consumers have no choice in servicers. Any market exists solely based on the needs of lenders and bond issuers, whose concerns are distinct—if not opposed—to borrowers. Jack Guttentag, emeritus professor at the Wharton School of Business, has suggested that consumers be allowed to "fire" their servicers, essentially receiving a one-

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279. *See Prepared Statement of the Federal Trade Commission on Home Mortgage Disclosure Act Data and FTC Lending Enforcement: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 5–9 (2007) (statement of Lydia B. Parnes, Director of the Bureau of Consumer Protection, Federal Trade Commission), *available at* http://www.ftc.gov/os/testimony/P064806hdma.pdf (describing the FTC's collection of data on the pricing of subprime mortgages marketed to consumers)

280. *See* Pennington-Cross & Ho, *supra* note 59, at 19 (finding that the probability of loan default varied widely by loan servicer, even after controlling for loan-, housing-, and labor-market conditions).

281. *See generally* Press Release, RealtyTrac, Foreclosure Activity Up Over 55% in First Half of 2007 (July 30, 2007), *available at* http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=2932&accnt=64847 (summarizing the results of a mid-year foreclosure-market report showing dramatic increases in foreclosure filings nationwide); Danielle Reed, *Rising Foreclosure Rates Point to a Normalizing Home Market*, WALL ST. J. ONLINE, Apr. 17, 2006, http://www.realestatejournal.com/buysell/markettrends/20060417-reed.html (discussing rising foreclosure rates and mortgage delinquencies in the United States in the first half of 2006).

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time option to choose a different servicer.[282] He postulates that servicers would compete for this additional business, driving up quality, and balancing servicers' incentives between lenders and borrowers.[283] Another policy response to concerns about mortgage servicing is to step up enforcement action. However, single actions against egregious servicers may not produce systematic reform, as the Mortgage Study data suggest that servicing issues are industry-wide. A bigger problem may simply be focusing HUD on its duties to enforce RESPA and to police mortgage servicers. HUD's Web site for complaints does not even mention mortgage servicing,[284] and the FTC, rather than HUD, has taken the lead in recent actions against servicers.[285]

The Mortgage Study data suggest that policy makers who focus on promoting home ownership need to concern themselves with mortgage servicing, which is a crucial aspect to enabling families to achieve home ownership. Mortgage-servicing abuse weakens families' efforts to manage their mortgages successfully and can result in families being wrongfully deprived of their homes through foreclosure or unsuccessful outcomes in bankruptcy. Mortgagees' failure to honor the terms of their loans and applicable law weakens America's home-ownership policies and threatens families' financial well-being.

The findings are a tangible reminder that merely enacting a law does not ensure its success. Without the correct structural incentives and without robust safeguards, a law can fail to deliver its promised protections. In the consumer context, this observation has particular power. Consumers face disadvantages to industry in a legal system: consumers are not repeat players; they have fewer resources; and they do not have institutional incentives to shape the system. The claims process in bankruptcy exemplifies the difficulty in developing and monitoring an effective legal system. The findings should caution policy makers and advocates from blindly trusting in the written law as a decontextualized instrument to shape behavior.

V. Conclusion

Hundreds of thousands of Americans file Chapter 13 bankruptcy each year hoping to save their homes from foreclosure. Reliable claims are crucial to the success of the bankruptcy system because the claims mechanism implements the two core goals of bankruptcy policy: to help debtors obtain a fresh start by paying their debts and to ensure that creditors receive a fair

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282. Jack Guttentag, Borrowers Should Be Able to Fire Mortgage Servicers, http://www.mtgprofessor.com/A%20%20Servicing/borrowers_should_be_able_to_fire_servicers.htm.

283. *Id.*

284. *See* U.S. Dep't of Housing and Urban Dev., Complaints, *supra* note 115 (handling complaints for housing discrimination; landlord–tenant disputes; manufactured-housing issues; land sales; deceptive contractors; and fraud, waste, and abuse).

285. *See* DIV. OF CONSUMER & BUS. EDUC., *supra* note 48 (describing what consumers should expect of mortgage servicers and the process for filing complaints against servicers).

share of debtors' assets. From external indicia, the claims process in consumer bankruptcy cases seems like an exemplar of a well-designed legal system that balances the interests of consumers and industry. The claims rules are unambiguous; all parties typically are represented; the process is uniform; the federal judicial system brings gravitas to the procedures; and specialized actors such as bankruptcy judges and trustees are present to police the system.

Yet, despite these reassuring features, the empirical data show that many mortgagees fail to comply with applicable law. The data establish a widespread, current practice of filing incomplete claims with vaguely identified fees. This hinders any meaningful or effective scrutiny of whether mortgage companies are only charging the correct amounts to struggling homeowners. The structural incentives are insufficient to uphold bankruptcy's potential as a home-saving device and to ensure the integrity of the bankruptcy system. The problems with mortgagees' calculations are likely to be even worse outside of bankruptcy, where the rules are less clear and the procedural safeguards are fewer. Systematic reform of the mortgage-servicing industry is needed to protect all homeowners—inside and outside of bankruptcy—from overreaching or illegal behavior. The findings on the unreliability of mortgage servicing are a high-stakes reminder of the challenges of designing a legal system that actually functions to protect consumers.

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An Empirical Study of Consumer Bankruptcy Papers

by

*The Honorable Steven W. Rhodes**

I. INTRODUCTION

An empirical study was performed on the schedules, the statements of financial affairs and other initial papers in 200 randomly chosen consumer bankruptcy cases filed in the first half of 1998 in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division at Detroit. The objective of the study was to measure the care and understanding with which consumer debtors and their attorneys prepare these initial bankruptcy papers.[1] The methodology was to test the completeness and internal consistency of nineteen specific disclosures. Other errors were noted and catalogued as found.

Three conclusions are drawn from this study. First, the lack of care and understanding of the debtors and their attorneys in fulfilling the disclosure requirements is palpable and disturbing. Second, the Official Bankruptcy Forms do not adequately communicate the disclosure requirements. Third, in some ways, the disclosure requirements are unrealistic and unnecessary, and serve only to make knaves of otherwise honest debtors and their attorneys.[2]

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I want to thank the many individuals who assisted and encouraged this project. When preliminary results were presented to the Detroit Consumer Bankruptcy Association, the Bankruptcy Section of the Eastern District Federal Bar Association and the Eastern District Trustee's Association, several listeners gave me very helpful comments and suggestions. Both Dean Nancy Rapoport of the University of Nebraska College of Law and Professor Elizabeth Warren of the Harvard Law School spent some time with me discussing the project, giving me guidance and encouragement. Tim Reagan of the Federal Judicial Center reviewed some of the statistical aspects of the study with me. Bankruptcy Judges Arthur J. Spector of Bay City and Keith M. Lundin of Nashville assisted with edits on the nearly-final draft. Finally, Kelli Dexter, Caroline Edwards and Lisa Harris performed their wonderful law clerk magic. Thanks to all. Of course, the mistakes are all mine.

[1]The study examined only the initial papers. Amended papers were not examined.

[2]This characterization is borrowed from *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 432 (6th Cir. 1982) (Courts should not allow a debtor to obtain money through dishonesty and keep the gain by filing a chapter 13 case within a few days. This "runs the risk of turning otherwise honest consumers and shopkeepers into knaves."). As stated by the National Bankruptcy Review Commission, "While there will never be a substitute for good legal advice, no one benefits when a system for financially distressed consumers becomes a trap for the unwary." 1 NATIONAL BANKRUPTCY REVIEW COMMISSION, BANK-

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Any effort to motivate more complete, accurate and careful disclosures must address all of these issues.

The study also compared subgroups of the sample to determine whether the disclosure problems predominated in any of these subgroups. Individual debtors were compared to joint debtors. Married, separated and single debtors were compared. Debtors whose attorneys filed in higher volumes were compared to debtors with other attorneys. None of these comparisons revealed any significant distinctions in the results.

The study also examined for any correlations with the economic characteristics of the cases, including fees charged and paid, assets, liabilities, expenses and income, and again found no significant correlations.

Part II reviews the disclosure obligations established in the Bankruptcy Code and the Bankruptcy Rules, and the standards established in the case law. Part III discusses the methodology of the study. Part IV reviews the specific test questions and their results. Part V compiles the results of the study and reviews the subgroup and the correlation analyses. Part VI reviews the current remedies for incomplete or inaccurate schedules and concludes that because these remedies are cumbersome, time consuming and expensive, they have not been effective in addressing the issues raised here. Finally, Part VII suggests some remedies, both local and national, to address the problem.

The scope of this study is limited in significant respects. First, no investigation was made beyond the filed papers to determine the truth of any disclosures. The study was not designed to detect or measure fraud or intentional concealment. Second, although the motivation for this study was the author's nagging suspicion that consumer debtors' bankruptcy papers are a persistent and widespread problem,[3] this study was not designed to prove that

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RUPTCY: THE NEXT TWENTY YEARS, NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT, 235 (October 20, 1997) (hereinafter, "COMMISSION REPORT").

This article is based on the premise that it is "a mistake to suppose that every act of bankruptcy is a fraudulent act, and every bankrupt, perforce, a knave." Summers v. Abbot, 122 F. 36, 38 (8th Cir. 1903). It is also presumed that most debtors qualify as "honest but unfortunate." Grogan v. Garner, 498 U.S. 279, 287, 111 S. Ct. 654, 659, 112 L. Ed. 2d 755 (1991); Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934). On the other hand, it is recognized that "[d]ebtors are not perfectly trustworthy," Payne v. Wood, 775 F.2d 202, 206 (7th Cir. 1985), *cert. denied*, 475 U.S. 1085, 106 S. Ct. 1466, 89 L. Ed. 2d 722 (1986), and therefore the trustee is empowered to "investigate the financial affairs of the debtor." 11 U.S.C. §§ 704(4) and 1302(b)(1).

[3]*See* In re Attanasio, 218 B.R. 180, 229 (Bankr. N.D. Ala. 1988), *infra* note 123 and accompanying text; *In re* Bruzzese, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997), *infra* note 168 and accompanying text.

Other investigators have observed these kinds of problems. *See, e.g.*, Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 SPG LAW & CONTEMP. PROBS. 195, 229 (1987) ("We have found a large number of errors in the completed bankruptcy forms."); Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 767 n.56 (1991) (reporting that the specific information provided by debtors on the statement of

suspicion beyond the one court location and the limited time period from which the study cases were drawn. Third, because only a portion of the disclosures was tested, the study was not designed to expose all of the omissions and inconsistencies in the papers. The study cases may have additional problems not quantified in this study. Nevertheless, the study does establish substantial cause for concern, and for further study and consideration.

II. THE DISCLOSURE REQUIREMENTS IN CONSUMER BANKRUPTCY CASES

A. The Statutory Basis

Section 521(1) of the Bankruptcy Code requires the debtor to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs[.]"[4] With respect to consumer debts secured by property of the estate, § 521(2)(A) requires the debtor to file "a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property[.]"[5]

Rule 1007(b)(1) of the Federal Rules of Bankruptcy Procedure supplements the requirements of the Bankruptcy Code by requiring that the debtor also file "a schedule of executory contracts and unexpired leases[.]"[6] This rule requires that all of these disclosures be "prepared as prescribed by the appropriate Official Forms."[7] Rule 1008 then provides that all such papers "shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746."[8] Rule 9009 provides, "The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations

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financial affairs regarding lawsuits was "often wrong," and that some debtors who suggested that judgments or garnishments had been issued against them gave no specifics).

[4] 11 U.S.C. § 521(1) (1994).

[5] 11 U.S.C. § 521(2)(A) (1994).

[6] Fed. R. Bankr. P. 1007(b)(1).

[7] *Id.*

[8] Fed. R. Bankr. P. 1008. Section § 1746 of the United States Code (1994) provides for this form of declaration, "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." The verification in the official form for the schedules is, "I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of __ sheets, and that they are true and correct to the best of my knowledge, information, and belief." Official Bankruptcy Form 6. The verification in the official form for statement of financial affairs omits the language, "to the best of my knowledge information and belief," and is thus closer to the statutory format. It provides, "I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct." Official Bankruptcy Form 7. There is no official explanation for the difference.

as may be appropriate."[9]

In addition, the Code and the Rules create a special obligation on the debtor in disclosing assets. Section 521(3) obligates the debtor to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties."[10] Under Rule 2015(a)(1), the trustee's duties include filing a complete inventory of the debtor's property, if that has not already been done.[11] Further, Rule 4002(4) specifically requires the debtor to "cooperate with the trustee in the preparation of an inventory."[12]

Very little official comment is available relating to the purposes of the required disclosures. The purposes of the disclosures are not discussed in the advisory committee notes to Bankruptcy Rules 1007 or 9009. The advisory committee note to Official Bankruptcy Form 1 (the voluntary petition) states the purposes of only a few of its disclosure requirements.[13] The advisory committee note to Official Bankruptcy Form 6 (the schedules) obliquely suggests that the requirements of the schedules relate to the trustee's functions, stating, "The schedules require a complete listing of assets and liabilities but leave many of the details to investigation by the trustee."[14] Finally, nothing in the notes to Official Bankruptcy Form 7 (the statement of financial affairs) suggests the purposes of any of its required disclosures.

B. The Requirements According to Case Law

In describing the nature and extent of the disclosure obligations of debtors in chapter 7, the judicial pronouncements in the cases are firm:[15]

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[9]Fed. R. Bankr. P. 9009.

[10]11 U.S.C. § 521(3) (1994).

[11]Fed. R. Bankr. P. 2015(a)(1).

[12]Fed. R. Bankr. P. 4002(4). *See also In re* Moses, 792 F. Supp. 529, 531 (E.D. Mich. 1992); Kaler v. Olmstead (*In re* Olmstead), 220 B.R. 986, 998 (Bankr. D.N.D. 1998); *In re* Mohring, 142 B.R. 389, 394 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *aff'd without op.*, 24 F.3d 247 (9th Cir. 1994) (unpublished table decision).

[13]For example, this advisory committee note states that the requirement to disclose a prior bankruptcy in the petition is "to alert the trustee to cases in which an objection to discharge pursuant to § 727(a)(8) or (9) or a motion to dismiss under § 109(g) may be appropriate." Official Bankruptcy Form 1 advisory committee note. The same note states that the purpose of the requirement to disclose information about pending related cases is so that the clerk can "assign the case to the judge to whom any related case has been assigned." *Id.* The statistical information on the petition is required "to assist the clerk in providing statistical information required by the Director of the Administrative Office of the United States Courts pursuant to the Congressional reporting requirements of 28 U.S.C. § 604." *Id.*

[14]Official Bankruptcy Form 6 advisory committee note.

[15]Most of the case law interpreting the disclosure requirements arises in context of objections to the debtor's discharge under 11 U.S.C. §§ 727(a), which provides that the debtor shall be granted a discharge, unless:

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be, transferred, removed, destroyed, mutilated, or concealed—

"A debtor's complete disclosure is essential to the proper administration of the bankruptcy estate."[16]

"The veracity of the [debtor's] statements is essential to the successful administration of the Bankruptcy Code."[17]

"The obligation of full disclosure is crucial to the integrity of the bankruptcy process."[18]

"The debtors have a duty to truthfully answer questions presented in the various schedules and filings carefully, completely and accurately."[19]

"The debtor is imposed with a paramount duty to carefully consider all questions included in the Schedules and Statement and see that each is answered accurately and completely."[20]

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

. . .

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account[.]

See infra notes 124-27 and accompanying text.

[16]Cohen v. McElroy (*In re* McElroy), 229 B.R. 483, 488 (Bankr. M.D. Fla. 1998). *See also In re* Sochia, 231 B.R. 158, 160 (Bankr. W.D.N.Y. 1999).

[17]Van Roy v. Watkins (*In re* Watkins), 84 B.R. 246, 250 (Bankr. S.D. Fla. 1988) (citing Chalik v. Moorefield (*In re* Chalik), 748 F.2d 616, 618 (11th Cir. 1984)).

[18]*In re* Hyde, 222 B.R. 214, 218 (Bankr. S.D.N.Y. 1998), *rev'd on other grounds*, 235 B.R. 539 (S.D.N.Y. 1999) (citing *In re* Wincek, 202 B.R. 161, 166 (Bankr. M.D. Fla. 1996), *aff'd*, 208 B.R. 238 (M.D. Fla. 1996) ("[F]ull disclosure of all relevant information has always been an important policy of the bankruptcy laws." (internal quotations and citations omitted) (alteration in original)).

[19]*In re* Famisaran, 224 B.R. 886, 891 (Bankr. N.D. Ill. 1998). *See also* Cole Taylor Bank v. Yonkers (*In re* Yonkers), 219 B.R. 227, 232 (Bankr. N.D. Ill. 1997); National Am. Ins. Co. v. Guajardo (*In re* Guajardo), 215 B.R. 739, 741 (Bankr. W.D. Ark. 1997); United States v. Trembath (*In re* Trembath), 205 B.R. 909, 914 (Bankr. N.D. Ill. 1997); Netherton v. Baker (*In re* Baker), 205 B.R. 125, 131 (Bankr. N.D. Ill. 1997), *motion to amend judgment denied*, 206 B.R. 510 (Bankr. N.D. Ill. 1997); *In re* Robinson, 198 B.R. 1017, 1022 n.6 (Bankr. N.D. Ga. 1996); Torgenrud v. Benson (*In re* Wolcott), 194 B.R. 477, 486 (Bankr. D. Mont. 1996); Hollar v. United States (*In re* Hollar), 184 B.R. 25, 29 (Bankr. M.D.N.C. 1995), *aff'd*, 188 B.R. 539 (M.D.N.C. 1995), *aff'd*, 92 F.3d 1179 (4th Cir. 1996) (unpublished table decision available at 1996 WL 442883); Cundiff v. Wiethuchter (*In re* Wiethuchter), 147 B.R. 193, 199 (Bankr. E.D. Mo. 1992); Jones v. United States (*In re* Jones), 134 B.R. 274, 279 (N.D. Ill. 1991); Banc One, Texas, N.A. v. Braymer (*In re* Braymer), 126 B.R. 499, 502 (Bankr. N.D. Tex. 1991).

[20]Casey v. Kasal (*In re* Kasal), 217 B.R. 727, 734 (Bankr. E.D. Pa. 1998), *aff'd*, 223 B.R. 879 (E.D. Pa. 1998). *See also* FDIC v. Sullivan (*In re* Sullivan), 204 B.R. 919, 942 (Bankr. N.D. Tex. 1997); Morton v. Dreyer (*In re* Dreyer), 127 B.R. 587, 593-94 (Bankr. N.D. Tex. 1991); MacLeod v. Arcuri (*In re* Arcuri), 116 B.R. 873, 879-80 (Bankr. S.D.N.Y. 1990) ("A debtor has an 'affirmative duty' to identify all assets, liabilities, and to answer all questions fully and with the utmost candor. Creditors and those charged with administration of the bankruptcy estate are entitled to a 'truthful' statement of the debtor's financial condition." (citations omitted)); Friedman v. Sofro (*In re* Sofro), 110 B.R. 989, 991 (Bankr. S.D. Fla. 1990).

But see Hoc, Inc. v. McAllister (*In re* McAllister), 215 B.R. 217, 233 n.8 (Bankr. N.D. Ala. 1996) ("The purpose of the official forms is to provide basic information regarding a debtor's assets, liabilities and

> "The burden is on the debtors to complete their schedules accurately."[21]
> "The burden is on the debtors to use reasonable diligence in completing their schedules and lists."[22]
> "Candor, accuracy and integrity are required of a debtor in bankruptcy."[23]
> "Even if the debtor thinks the assets are worthless he must nonetheless make full disclosure."[24]
> "[S]chedules are to be complete, thorough and accurate in order that creditors may judge for themselves the nature of the debtor's estate."[25]
> "The bankruptcy laws impose a strict obligation on debtors to file complete and accurate schedules."[26]
> "If there is any doubt or uncertainty whatsoever as to a possible interest in any property, the asset should be scheduled with an appropriate explanation."[27]

The obligations of the debtor's attorney in this context have also been addressed in the cases:[28]

> The duty of reasonable inquiry imposed upon an attorney by Rule 11 and by virtue of the attorney's status as an officer of the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) check the

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financial affairs. They are not intended to be made a comprehensive record or journal of the debtor's business dealings.").

[21]Rion v. Spivey (*In re* Springer), 127 B.R. 702, 707 (Bankr. M.D. Fla. 1991). *See also* Faden v. Insurance Co. of N. Am. (*In re* Faden), 96 F.3d 792, 795 (5th Cir. 1996).

[22]Lubeck v. Littlefield's Restaurant Corp. (*In re* Fauchier), 71 B.R. 212, 215 (B.A.P. 9th Cir. 1987). *See also In re* Matthews, 154 B.R. 673, 678 (Bankr. W.D. Tex. 1993) (citing *In re* Braymer, 126 B.R. at 502).

[23]Holder v. Bennett (*In re* Bennett), 126 B.R. 869, 875 (Bankr. N.D. Tex.1991). *See also Wiethuchter*, 147 B.R. at 199 ("[A]ll debtors have a duty to update the schedules they file with the Bankruptcy Court[.]").

[24]Armstrong v. Lunday (*In re* Lunday), 100 B.R. 502, 508 (Bankr. D.N.D. 1989). *See also* United States v. Haught (*In re* Haught), 207 B.R. 269, 271 (Bankr. M.D. Fla. 1997).

[25]Garcia v. Coombs (*In re* Coombs), 193 B.R. 557, 563-64 (Bankr. S.D. Cal. 1996) (quoting *Lunday*, 100 B.R. at 508). *See also Sullivan*, 204 B.R. at 942.

[26]*In re* Dubberke, 119 B.R. 677, 680 (Bankr. S.D. Iowa 1990).

[27]American State Bank v. Montgomery (*In re* Montgomery), 86 B.R. 948, 959 (Bankr. N.D. Ind. 1988).

[28]*See, e.g., Robinson*, 198 B.R. at 1024; *In re* Armwood, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994); *Matthews*, 154 B.R. at 680; *In re* Huerta, 137 B.R. 356, 379 n.8 (Bankr. C.D. Cal. 1992).

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> debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.[29]

The connection between the debtor's obligation to file complete and accurate schedules and the fair administration of the bankruptcy case is clear.[30] This administration includes "determining whether crimes have been committed, whether objections to exemptions should be filed, and whether property should be claimed for the estate or abandoned."[31] To a substantial extent the trustee's ability to perform the duties set forth in 11 U.S.C. § 704 depends on the accuracy and completeness of debtor's disclosures.[32] Under 11 U.S.C. § 554(c), only scheduled property (not otherwise administered) is deemed

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[29]*Armwood*, 175 B.R. at 789 (citations omitted). *See also Aetna Fin. Co. v. Martinez* (*In re Martinez*), 22 B.R. 419, 421 (D.N.M. 1982) ("We would also remind the debtors' attorney that it is his duty as an officer of this court to take all possible steps to assure himself that the information listed in his clients' petition is correct.").

[30]*See supra* notes 16-17 and cases cited therein. *See also* North River Ins. Co. v. Baskowitz (*In re* Baskowitz), 194 B.R. 839, 843 (Bankr. E.D. Mo. 1996) ("The dual purposes of a Chapter 7 bankruptcy case are to grant the honest debtor a discharge of his or her prepetition debts, and to provide a mechanism for the fair and orderly distribution of the debtor's assets that are subject to administration by the Trustee. These purposes are [only] realized when a debtor complies with the requirement to submit accurate and complete information concerning identification of creditors and assets.").

[31]*In re* Gaines, 106 B.R. 1008, 1013 (Bankr. W.D. Mo. 1989), *rev'd on other grounds*, 121 B.R. 1015 (W.D. Mo. 1990). *See also* Payne v. Wood, 775 F.2d 202, 206 (7th Cir. 1985) ("The requirement that the debtor list the property serves at least two functions. One is to settle claims of title, so that on the day of discharge everyone knows who owns what. The other is to allow the trustee to decide which claims to challenge."); *Andermahr v. Barrus* (*In re* Andermahr), 30 B.R. 532, 533 (B.A.P. 9th Cir. 1983); First Nat'l Bank of Mason City, Iowa v. Cook (*In re* Cook), 40 B.R. 903, 906 (Bankr. N.D. Iowa 1984) ("The purpose of the question [on the statement of financial affairs asking whether the debtor has made any transfers of property in the year preceding the filing of the bankruptcy petition] is to allow the trustee and the creditors of the debtor to determine if there should be other assets in the bankruptcy estate.").

[32]Section 704 provides:

> The trustee shall—
>
> (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
>
> . . .
>
> (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
>
> (4) investigate the financial affairs of the debtor;
>
> (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
>
> (6) if advisable, oppose the discharge of the debtor[.]

abandoned to the debtor when the case is closed.[33] In addition, the debtor's financial rehabilitation can be advanced by preparing and filing complete and accurate papers.[34]

In chapter 13 cases, the schedules play a uniquely significant role. For example, the schedules are considered in determining whether the debtor meets the eligibility requirements for the debt limits in chapter 13.[35] The schedules also assist in determining whether the debtor's plan was filed in good faith,[36] and whether to dismiss or convert the case for cause.[37] They are also considered in determining whether the plan proposes to pay creditors at least what they would receive in a hypothetical chapter 7 liquidation.[38] Finally, the schedules are used to evaluate whether the plan meets the confir-

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[33]Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995). *See also* Vreugdenhill v. Navistar Int'l Transp. Corp., 950 F.2d 524, 525-26 (8th Cir. 1991). Section 554(c) provides:

> [A]ny property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

[34]"[T]he debtors themselves are better served in their financial rehabilitation efforts if they can develop clear and complete pictures of their financial condition." COMMISSION REPORT, *supra* note 2, at 108.

[35]Section 109(e) establishes the secured and unsecured debt limits for chapter 13 debtors. *See* Comprehensive Accounting Corp. v. Pearson (*In re* Pearson), 773 F.2d 751, 757 (6th Cir. 1985) ("Chapter 13 eligibility should normally be determined by the debtor's schedules checking only to see if the schedules were made in good faith."). *See also* Henrichsen v. Scovis (*In re* Scovis), 231 B.R. 336, 340 (B.A.P. 9th Cir. 1999); Barcal v. Laughlin (*In re* Barcal), 213 B.R. 1008, 1015 (B.A.P. 8th Cir. 1997); *In re* Tabor, 232 B.R. 85, 89 (Bankr. N.D. Ohio 1999); *In re* Berenato, 226 B.R. 819 (Bankr. E.D. Pa. 1998); *In Re* Griggs, 181 B.R. 111, 114 (Bankr. N.D. Ala. 1994) (noting the court should consider the debtor's chapter 13 schedules in determining eligibility for conversion from chapter 7 to chapter 13); People's Bank v. Winder (*In re* Winder), 171 B.R. 728, 730-31 (Bankr. D.Conn. 1994); *In re* White, 148 B.R. 283, 285 (Bankr. N.D. Ohio 1992); *In re* Koehler, 62 B.R. 70, 72 (Bankr. D. Neb. 1986).

[36]Section 1325(a)(3) establishes that one of the requirements for confirmation of the plan is that "the plan has been proposed in good faith." *See In re* Lindsey, 183 B.R. 624, 628 (Bankr. D. Idaho 1995) (noting that the accuracy of the debtor's schedules is one factor to consider in judging the debtor's good faith in proposing the plan). *See also* New Jersey Lawyers' Fund For Client Protection v. Goddard (*In re* Goddard), 212 B.R. 233 (D.N.J. 1997); *In re* Allard, 196 B.R. 402 (Bankr. N.D. Ill. 1996), *aff'd*, 202 B.R. 938 (N.D. Ill. 1996); *In re* Cockings, 172 B.R. 257 (Bankr. E.D. Ark. 1994); *In re* Hagel, 171 B.R. 686, 688 n.3 (Bankr. D. Mont. 1994), *aff'd*, 184 B.R. 793 (B.A.P. 9th Cir. 1995); *In re* Sitarz, 150 B.R. 710 (Bankr. D. Minn. 1993); *In re* Lawson, 93 B.R. 979 (Bankr. N.D. Ill. 1988).

[37]11 U.S.C. § 1307(c) (1994). Molitor v. Eidson (*In re* Molitor), 76 F.3d 218, 220 (8th Cir. 1996); *In re* Buchanan, 225 B.R. 672, 673-74 (Bankr. D. Minn. 1998); *In re* Famisaran, 224 B.R. 886, 893 (Bankr. N.D. Ill. 1998); *In re* Nassar, 216 B.R. 606, 608 (Bankr. S.D. Tex. 1998); *In re* Blankstyn, 210 B.R. 164, 167 (Bankr. D. Ariz. 1997); *In re* Rosencranz, 193 B.R. 629, 636-37 (Bankr. D. Mass. 1996); *In re* Green, 141 B.R. 440, 442-43 (Bankr. M.D. Fla. 1992); *In re* Powers, 48 B.R. 120, 121 (Bankr. M.D. La. 1985).

[38]11 U.S.C. § 1325(a)(4) (1994). Heritage Fed. Credit Union v. Cox (*In re* Cox) 175 B.R. 266, 275 (Bankr. C.D. Ill. 1994). *See also In re* Short, 176 B.R. 886, 888 (Bankr. S.D. Ind. 1995); *In re* Santa Maria, 128 B.R. 32, 36 (Bankr. N.D.N.Y. 1991); GFC Corp. of Missouri v. Bixby (*In re* Bixby), 10 B.R. 456, 458-59 (Bankr. D. Kan. 1981); *In re* Fredrickson, 5 B.R. 199, 200-201 (Bankr. M.D. Fla. 1980).

Section 1325(a)(4) provides for confirmation of the plan if:

> [T]he value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount

mation requirement to propose the debtor's best effort.[39]

The disclosure obligations of consumer debtors are at the very core of the bankruptcy process[40] and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge.[41] This study seeks to measure the responses of consumer debtors to their disclosure obligations and thus the extent to which debtors keep their end of the "bankruptcy bargain."[42]

III. THE METHODOLOGY OF THE STUDY

A. Selecting Random Study Cases

The first task was to select consumer bankruptcy cases at random from the cases filed during the first half of 1998 in the Eastern District of Michigan, Southern Division at Detroit. The criterion to identify consumer cases was the debtor's statement on the petition that the debts are primarily consumer in nature, although the study establishes that this statement is not always accurate.[43]

Initially, it was thought that a study sample of 100 cases would be sufficient, and the first group of that number, Group 1, was selected. After a preliminary analysis of Group 1, it was concluded that a second group of 100 cases, Group 2, should also be selected, to provide a larger sample and to attempt to assure some greater reliability of the final results.

The two groups of cases were chosen in different ways. The cases in Group 1 were chosen from cases filed on three dates. For each date, the cases that were chosen were consecutive filings. No particular method was used to

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that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

[39]11 U.S.C. § 1325(b)(1)(B) (1994). *In re* Pickering, 195 B.R. 759, 763-64 (Bankr. D. Mont. 1996); *In re* McCray, 172 B.R. 154, 156-57 (Bankr. S.D. Ga. 1994). *See also In re* Fields, 190 B.R. 16, 18 n.1 (Bankr. D.N.H. 1995); *In re* Hutcherson, 186 B.R. 546, 551 (Bankr. N.D. Ga. 1995).

Section 1325(b)(1)(B) provides for confirmation if "the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan." Section 1325(b)(2) states, "For purposes of this subsection, 'disposable income' means income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor."

[40]*See supra* notes 16-18 and accompanying text.

[41]In chapter 7 cases, § 727(b) discharges the debtor from all prepetition debts except those set forth in § 523(a). In chapter 13 cases, § 1328(a) discharges the debtor from all prepetition debts except those set forth in that subsection. Section 524 imposes an injunction upon the collection of any discharged debt.

[42]Fidelity Nat'l Title Ins. Co. v. Franklin (*In re* Franklin), 179 B.R. 913, 927 (Bankr. E.D. Cal. 1995) (holding that the debtor "elected not to perform his end of the 'bankruptcy bargain' by fully, candidly, and completely disclosing all his financial affairs and debts").

[43]*See infra* notes 87-89 and accompanying text.

select the dates or the set of consecutive cases on each date. Table 1 shows the number of cases chosen on each date for the Group 1 cases.

TABLE 1. THE GROUP 1 CASES

Filing Date	Number of Cases
April 14, 1998	15
April 16, 1998	68
April 17, 1998	17
Total	100

The cases in Group 2 were chosen using a formula based upon a computer random number generator to return a random series of actual case filing numbers during the six-month study period.

B. Recording the Data from the Study Cases

For each of the 200 study cases, a copy of the petition, the schedules, the statement of financial affairs, the statement of intention and the attorney's fee statement under Rule 2016(b) was obtained. Thirty-nine items of data from each case were then reviewed and manually entered into a computer database program.[44] These data and their sources are listed below. A question mark indicates that information was recorded yes or no; otherwise, the actual data were recorded.

In addition, it was noted whether the debtor's residence appeared to be a home that the debtor owned, a mobile home or a rental.[45] Also, other incidental findings regarding problems with the papers were recorded.

Petition:
- Case number
- Joint filing?
- Chapter
- Stated consumer case but actually business?
- Stated asset/no asset
- Attorney
- Date petition filed

Summary of Schedules:
- Total assets
- Total liabilities
- Income
- Expenses
- Date schedules filed

Schedules A & B:
- HWJC disclosed?

[44]The database program is Microsoft Access 97. The author is willing to share the database for any legitimate research purposes, or to verify the results of this study.

[45]The residence was recorded as "home" if the debtor disclosed a home on schedule A and the address of that home matched the debtor's residence address on the petition. The residence was recorded as "mobile home" if the debtor disclosed a mobile home in schedule A or B and nothing suggested any other residence. The residence was recorded "rental" in all other cases.

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Schedule B:
- Cash on hand
- Security deposit disclosed?
- Life insurance disclosed?
- Pension interest disclosed?

Schedule D:
- Secured creditors?

Schedules D, E & F:
- HWJC disclosed?

Schedule G:
- Lease disclosed?

Schedule I:
- Marital status
- Union dues?
- Pension income?
- Pension plan contribution?

Schedule J:
- Rent or mortgage payment
- Life insurance expense?
- Auto expense but no auto disclosed in Schedule B or G?
- Includes all debt to be reaffirmed per Statement of Intent?

Schedules I & J:
- Debtor in business?
- Detailed statement attached?

Verification:
- Date signed

Statement of Financial Affairs:
- Question 3a answered other than "none"?
- Answer to question 9 regarding fees paid

Statement of Intent:
- All secured creditors disclosed?
- Any debt to be reaffirmed?

2016(b) Statement:
- Total fee
- Fee paid
- Other fee disclosure problems

C. Examining the Sample Cases

The next task was to determine whether the sample of 200 cases is reasonably representative of the universe of consumer cases filed in the Eastern District of Michigan, Southern Division at Detroit during the study period, based on available data. The bankruptcy clerk provided demographic data pertaining to this universe of cases from the court's official BANCAP computer data base. The available demographic data consisted of (1) the proportion of consumer cases filed under chapter 7 and chapter 13, and (2) the proportion of cases filed as individual cases and as joint cases.

Table 2 demonstrates that the demographics of the sample cases in Groups 1 and 2, and the combined sample, are similar to the demographics of the universe of cases.

TABLE 2. THE DEMOGRAPHICS OF THE STUDY SAMPLE CASES COMPARED TO THE UNIVERSE OF CONSUMER CASES DURING THE STUDY PERIOD

	Study Sample			Universe of Cases
	Group 1	Group 2	Total	
Chapter 7	80%	72%	76%	74%
Chapter 13	20%	28%	24%	26%
Individual	78%	76%	77%	77%
Joint	22%	24%	23%	23%

IV. TESTING THE DISCLOSURES

To accomplish the goal of objectively measuring the care with which the initial papers in consumer bankruptcy cases are prepared, a series of tests were performed on the data recorded from papers in each case. These tests examine for specific instances of (a) incomplete disclosures, (b) inconsistent disclosures, and (c) disclosures that, although not themselves demonstrably inaccurate or incomplete, raise a substantial question about the care with which the other disclosures were made.

A. Incomplete Disclosures

Eleven areas were examined for incomplete disclosures. Each of these questions tests whether the debtor made a disclosure that was required either (1) by the Official Forms in every case, or (2) in the debtor's case based on other information that the debtor did disclose.

> 1. Does the petition state the required estimate of whether funds will be available for distribution to unsecured creditors?

The petition requires the debtor to estimate whether the case is an "asset" case or a "no-asset" case by checking the appropriate box to indicate either that "funds will be available for distribution to unsecured creditors," or that "after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors."[46] In each study case, the debtor's response or failure to respond was recorded.[47]

> *4% of debtors failed to indicate on the petition whether the case was asset or no asset. (8 of 200 cases)*

> 2. If the debtor is married, do schedules A & B disclose

[46]Official Bankruptcy Form 1.

[47]The accuracy of this response is tested in question 16, *infra*, at 673.

whether the property is owned by the husband, wife or both?

The instructions at the top of schedules A and B state, "If the debtor is married, state whether husband, wife, or both own property by placing an 'H', 'W', 'J' or 'C' in the column labeled 'Husband, Wife, Joint, or Community.'"[48] This question tests whether married debtors made these required disclosures regarding property ownership. The debtor's marital status was recorded from schedule I. In 90 cases, the debtor was married.

54% of married debtors did not state whether the property listed in schedules A and B was owned by the husband, the wife, jointly, or as community property. (49 of 90 cases)

3. If the debtor pays rent for a residence or a mobile home lot, does schedule B disclose a security deposit?

Line 3 of schedule B requires the debtor to disclose, "Security deposits with public utilities, telephone companies, landlords, and others."[49] It was inferred that a debtor was in a residential rental arrangement if (1) the debtor did not disclose owning either real property on schedule A or a mobile home on schedules A or B, and (2) the debtor disclosed an amount on the first line of schedule J for "Rent or home mortgage payment (include lot rented for mobile home)."[50] By these criteria, one hundred seven debtors paid rent for a residence.[51] Similarly, it was inferred that a debtor was in a mobile home lot rental arrangement if (1) schedule A or B disclosed a mobile home, (2) schedule A did not disclose real property, and (3) the first line on schedule J disclosed rent. By these criteria, fifteen debtors paid rent for a mobile home lot.[52] This test assumes that a security deposit is a part of any arrangement under which the debtor pays rent for a residence or a mobile home lot.[53]

81% of debtors paying rent disclosed no security deposit. (99 of 122 cases) This is divided as follows:

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[48]Official Bankruptcy Form 6, schedules A and B.

[49]*Id.*, schedule B.

[50]Similar criteria were utilized in Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 50 (1998).

[51]Official Bankruptcy Form 6, schedule J. One hundred twenty debtors in the study sample disclosed no real property or a mobile home. Of these, thirteen disclosed no rent and were probably living rent-free with relatives or associates. Thus, 107 debtors paid rent for a residence.

[52]Sixteen debtors disclosed mobile homes and no real property. One of these disclosed no rent. Thus, fifteen debtors owned mobile homes and paid lot rent.

[53]This assumption is untested in this study. It is recognized that in some cases, a debtor's landlord might not require a security deposit. Nevertheless, it is appropriate and illuminating to examine how often debtors who were paying rent for a residence or a mobile home lot did not disclose a security deposit.

81% of debtors paying rent on a residence disclosed no security deposit. (87 of 107 cases)
80% of debtors paying rent on a mobile home lot disclosed no security deposit. (12 of 15 cases)

4. If schedule J discloses expenses for life insurance, is life insurance disclosed in schedule B?

Line 9 of schedule B requires the debtor to disclose, "Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each."[54] A debtor who discloses an expense for life insurance on schedule J should disclose an interest in that insurance on schedule B.[55] In 37 cases, the debtor disclosed an expense for life insurance.

73% of debtors who disclosed an expense for life insurance disclosed no life insurance. (27 of 37 cases)

5. If schedule I shows income from a pension, or if schedule J shows contributions to a pension, or if schedule I or J shows an expense for union dues, does schedule B show an interest in a pension?

Line 11 of schedule B requires the debtor to disclose and itemize, "Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans."[56] This question tests whether the debtor disclosed a pension interest when it appeared that the debtor would have such an interest. Certainly a debtor must disclose a pension interest if the debtor discloses pension income in schedule I or pension contribution expenses on schedule I or J. In addition, this question assumes that a debtor who is a union member has an interest in a pension

[54]Official Bankruptcy Form 6, schedule B, line 9. Although nothing in this instruction limits the disclosure requirement to life insurance, no debtors disclosed any other kind of insurance. *See* Payne v. Wood, 775 F.2d 202, 207 n.6 (7th Cir. 1985) ("The cash surrender value of the [property damage] policy was an asset of the estate. In order to keep the policy, the [debtors] should have charged the surrender value against their maximum exclusion.").

[55]It is possible that a debtor might pay for life insurance without having any interest in it. For example, a debtor might pay the premiums for a life insurance policy for a parent, spouse or child, without having any interest in the policy or its proceeds. However, this scenario seems rare and the inquiry was deemed appropriate for study purposes. In such a case, the debtor should, depending on the circumstances, disclose the payments on the statement of financial affairs as either payments to a creditor (question 3), gifts (question 7), or transfers (question 10). No such responses were made in the study sample.

[56]Official Bankruptcy Form 6, schedule B, line 11. Several courts have stated that a debtor must disclose a pension interest even if that interest would be either exempt under § 522(d) or excluded from the estate under § 541(c)(2) and *Patterson v. Shumate*, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519 (1992). *See, e.g.*, *In re* Turpen, 218 B.R. 908, 914 (Bankr. N.D. Iowa 1998); *In re* Comp, 134 B.R. 544, 553 (Bankr. M.D. Pa. 1991); *In re* Maide, 103 B.R. 696, 698 (Bankr. W.D. Pa. 1989).

But see Vaughn v. Aboukhater (*In re* Aboukhater), 165 B.R. 904, 910 (B.A.P. 9th Cir. 1994) ("Non-estate property need not be disclosed in the debtor's schedules."); Duval v. Portner (*In re* Portner), 109 B.R. 977, 986 (Bankr. D. Colo. 1989) (holding that the debtor's discharge cannot be denied for failing to disclose property that is not property of the estate.).

plan that must also be disclosed.[57] The debtor's union membership was determined through the disclosure of union dues as a payroll deduction on schedule I or as an expense on schedule J. In 50 cases, the debtor disclosed pension income, pension expense or union dues.

> *54% of debtors who disclosed pension income, pension expense or union dues disclosed no pension interest. (27 of 50 cases)*

6. If the petition is a joint petition, do schedules D, E and F disclose whether the debts are owed by the husband, wife, jointly or as community debts?

The instructions at the top of schedules D, E and F each state, "If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an 'H,' 'W,' 'J,' or 'C' in the column labeled 'Husband, Wife, Joint, or Community.'"[58] This question tests whether joint debtors made the required disclosures regarding liability on debts. In 49 cases, a joint petition was filed.

> *16% of debtors who filed joint petitions did not state whether the debts were owed by the husband, the wife, joint, or community. (8 of 49 cases)*

7. If the debtor rents either a residence or a mobile home lot, is the lease disclosed in schedule G?

The instructions for schedule G require the debtor to disclose "all executory contracts of any nature and all unexpired leases of real or personal property."[59] This question tests whether the debtor disclosed an expense for rent for a residence or a mobile home lot in schedule J and did not disclose the lease in schedule G.[60] One hundred seven debtors rented a residence and paid rent.[61] Fifteen debtors owned a mobile home and paid lot rent.[62]

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[57]In the Detroit area, most union members belong to national unions associated with the auto industry or to other major national unions. In the author's experience, members of such unions do have pension interests. However, if a debtor is employed only part-time or if the debtor's union is a small unaffiliated local union, the debtor may not have a pension interest. In any event, although the assumption is untested, it is worthwhile to examine the issue for purposes of this study.

[58]Official Bankruptcy Form 6, schedules D, E, and F.

[59]*Id.*, schedule G. This question assumes that schedule G requires the disclosure of both written and oral leases. However, it might be concluded that schedule G is ambiguous on this point. *See infra* note 180 and accompanying text. Nevertheless, in light of the functional purposes of schedule G, the assumption is warranted in this study.

[60]The criteria for determining whether the debtor rented a residence are set forth in the discussion on question 3, *supra*, at 665. *See also supra* note 45.

[61]*See supra* note 51.

[62]The criteria for determining whether the debtor rented a mobile home lot are set forth in the discussion on question 3, *supra*, at 665. *See also supra* note 52.

85% of renting debtors did not disclose a lease. (104 of 122 cases) These are divided as follows:
88% of debtors paying rent for a residence did not disclose a lease. (94 of 107 cases)
67% of debtors paying mobile home lot rent did not disclose a lot lease. (10 of 15 cases)

8. If the debtor is in business, did the debtor attach a detailed statement of income and expenses to schedules I and J?

The line on schedule I that requires the debtor to disclose "Regular income from operation of business or profession or farm" and instructs the debtor to "attach detailed statement."[63] Schedule J imposes a similar requirement for business expenses.[64] Thus, a debtor with business income or expenses is required to attach detailed statements of income and expenses. This was determined by examining the specific disclosure on the business income line on schedule I and the business expense line on schedule J, as well as other similar disclosures, for example, on the "other monthly income" line on schedule I.[65] Twelve debtors had such business income or expenses.[66]

83% of debtors with business income or expenses failed to attach the required detailed statements of income and expenses.[67] (10 of 12 cases)

9. In a chapter 7 case, does schedule J address payments for all debts that the debtor intends to reaffirm?

Section 521(2)(A) requires the debtor to file a statement of intent regarding secured consumer debts.[68] When a debtor states an intention to reaffirm a secured debt, schedule J requires the debtor to disclose the resulting monthly payment.[69] A notation was made in each case in which monthly

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[63]Official Bankruptcy Form 6, schedule I.

[64]*Id.*, schedule J.

[65]*Id.*, schedule I.

[66]Only two of the twelve debtors with business income or expenses had debts that appeared to be primarily business debts. *See infra* question 17 at 674 and note 89. The other ten debtors with business income or expenses appeared to have primarily consumer debt. However, it can sometimes be difficult to determine from the schedules whether credit card debt or other bank debt is consumer debt or business debt. *See, e.g.*, *In re* Goodson, 130 B.R. 897, 900 (Bankr. N.D. Okla. 1991); *In re* Berndt, 127 B.R. 222, 224 (Bankr. D.N.D. 1991); *In re* Hammer, 124 B.R. 287, 290 (Bankr. C.D. Ill. 1991), *vacated on other grounds, sub nom.*, Meeker v. Pilgrim (*In re* Pilgrim), 135 B.R. 314 (C.D. Ill. 1992); *In re* Bell, 65 B.R. 575 (E.D. Mich. 1986); *In re* Almendinger, 56 B.R. 97 (Bankr. N.D. Ohio 1985).

[67]Of the two debtors who did attach statements of income and expenses, one attached a form that appeared to be a preprinted, commercially available form and the other attached schedule C from a Form 1040 federal tax return.

[68]11 U.S.C. § 521(2)(A) (1994). Official Bankruptcy Form 8.

[69]Schedule J has a line for the disclosure of "Installment payments." Official Bankruptcy Form 6. *See In re* Hovestadt, 193 B.R. 382, 385 (Bankr. D. Mass. 1996) ("This Court has observed that in the

payments on debts to be reaffirmed are not included in schedule J. In seventy-seven chapter 7 cases, the debtor's statement of intention stated an intent to reaffirm debt.

> *21% of chapter 7 debtors who stated an intent to reaffirm secured consumer debt did not include in schedule J the monthly payments for all of the debts to be reaffirmed. (16 of 77 cases)*

> 10. Are the declarations concerning the debtor's schedules and statement of financial affairs dated?

Official Bankruptcy Form 6 includes a signed declaration concerning debtor's schedules, and to the left of the debtor's signature line, there is a blank for a date.[70] Similarly, Official Bankruptcy Form 7 includes a signed declaration concerning the statement of financial affairs, with a blank line for a date to the left of the debtor's signature line.[71] This question tests whether the debtor filled in a date on the declaration for either the schedules and the statement of financial affairs.[72]

> *10.5% of debtors failed to date the schedules and the statement of financial affairs. (21 of 200 cases)*

> 11. In a chapter 7 case, does the statement of intention under § 521(2)(A) address all secured creditors?

A debtor must list all secured creditors in schedule D. Further, § 521(2)(A) requires a chapter 7 debtor to disclose whether the debtor intends to reaffirm each secured consumer debt or to redeem the collateral. Official Bankruptcy Form 8 requires the debtor to state an intention either to surrender the collateral or to avoid the lien under § 522(f). This question tests whether the debtor's statement of intent addresses all secured creditors holding consumer debt. Ninety-one chapter 7 debtors disclosed secured consumer debt in schedule D.

> *14% of chapter 7 debtors with secured consumer debt did*

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majority of cases in which reaffirmation agreements are filed pursuant to section 524(c) the debtors' Schedules I and J reveal that debtors do not have sufficient income to afford even the de minimis payments set forth in the reaffirmation agreements filed with the Court." (footnote omitted)); *In re* Bruzzese, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997) ("[A] sampling of the debtors' schedules I and J in the 30 cases raised a prima facie concern whether the debtors could meet their repayment obligations under these agreements."). *See also In re* Melendez, 224 B.R. 252, 259 (Bankr. D. Mass. 1998); *In re* Kamps, 217 B.R. 836, 846 (Bankr. C.D. Cal. 1998); *In re* Latanowich, 207 B.R. 326, 335 (Bankr. D. Mass. 1997) ("[T]he Debtor's schedule of income and expenses showed no excess income with which to pay the debt he was reaffirming.").

[70]*See also supra* note 8, and *infra* questions 18 and 19, at 675-76.

[71]*Id.*

[72]If either the schedules or the statement of financial affairs were dated, this was considered sufficient for purposes of this study, although perhaps not as a matter of fully completing the papers.

not address all of their secured debt in their statements of intention.[73] *(13 of 91 cases)*

B. INCONSISTENT DISCLOSURES

Six areas were examined for inconsistent disclosures:

12. Does schedule J show an expense for an automobile payment but schedules B and G disclose no automobile?

Generally, a debtor disclosing an expense for automobile payments in schedule J will have an interest in the automobile that must be disclosed.[74] If the debtor owns the automobile, the disclosure would be on schedule B. If the debtor leases the automobile, the disclosure would be on schedule G. This question tests whether the debtor inconsistently disclosed an expense for automobile payments but no interest in any automobile.

5% of debtors inconsistently disclosed expenses for automobile payments but no automobile. (10 of 200 cases)

13. In a chapter 7 case, are the expenses in schedule J within 10% of the income in schedule I?

In many cases, the debtor has established a pattern of increasing borrowing to carry on a lifestyle beyond the debtor's means, which has caused the debtor's bankruptcy. It is entirely reasonable to expect that as part of the bankruptcy process, the debtor will come to understand and appreciate the basic economic fact that one's income provides a natural limit on one's expenses. Without assets or credit, one's expenses simply cannot exceed one's income. This fact applies with special urgency to a debtor in bankruptcy because as the bankruptcy approaches, during the bankruptcy, and for a time after the bankruptcy, the debtor's assets and credit are likely to be limited. If the debtor's expenses still substantially exceed the debtor's income, the debtor has a problem, or soon will. Indeed it might be questioned whether such a debtor yet understands and appreciates the basic economic principles of budgeting income and expenses. This question tests the debtor's understanding and appreciation of this fact of life as of the moment of filing bankruptcy.[75]

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[73]This includes one chapter 7 case in the study sample in which the required statement of intent was not filed.

[74]There is an infrequent scenario in which a debtor makes payments on a vehicle that is formally titled or leased in another's name, such a child. In that event, a response might not be required on either schedule B or G, depending on the circumstances. However, in such a case, the debtor should, again depending on the circumstances, disclose the payments on the statement of financial affairs. *See supra* note 55. No such responses were made in the study sample.

[75]"One of the most difficult problems faced by every bankruptcy attorney is helping the debtors to prepare a realistic, post-bankruptcy budget, but this is probably the most important thing [the attorney] will do to help them. Their financial and emotional rehabilitation starts with this." Hon. John C. Akard,

On the other hand, if a chapter 7 debtor's income substantially exceeds the debtor's expenses, so that there is net disposable income under 11 U.S.C. § 1325(b), there may be a question of whether the case is a "substantial abuse" under 11 U.S.C. § 707(b).[76]

Accordingly, this question tests whether a chapter 7 debtor's disclosures regarding income and expenses are consistent. Somewhat arbitrarily, a 10% leeway was structured into the test. This leeway was chosen because schedules I and J require the disclosure of any anticipated changes in income and expenses of more than 10% within one year.

> *43% of chapter 7 debtors disclosed expenses not within 10% of income.*[77] *(66 of 152 cases) These debtors are further described as follows:*
>
> > *6% of chapter 7 debtors showed no income. (9 cases)*
> >
> > *35% of chapter 7 debtors showed expenses more than 10% above income. (53 cases)*
> >
> > *3% of chapter 7 debtors showed expenses more than 10% below income. (4 cases)*

14. Is the debtor's disclosure of the attorney fee paid in response to question 9 of the statement of financial affairs consistent with the attorney's disclosure of attorney fee paid in the Rule 2016(b) statement?

Question 9 of the statement of financial affairs requires *the debtor* to disclose all attorney fees paid within one year before filing for "consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy . . ."[78] Rule 2016(b) requires the *debtor's attorney* to disclose the information required by 11 U.S.C. § 329(a), which includes the compensation paid within one year of the filing for "services rendered or to be rendered in contemplation of or in connection with the case . . ."[79] This

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The Human Side of Bankruptcy, 18-FEB AM. BANKR. INST. J. 28, 28 (1999). "The budgeting process is as important in a chapter 7 case as it is in a chapter 13. The chapter 7 should be a solution to the debtor's problems, not just temporary relief. Chapter 7 debtors must make some hard choices about what items they can really afford and must examine their lifestyle carefully. Their attorney must guide them toward a realistic budget so they can move forward in their lives without financial pressures." *Id.* at 29 n.3.

[76]*See infra* notes 116-20. *See also* Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices – A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 181 (1997) ("A debtor who chooses chapter 7 should not file schedules that show disposable income that would not be there if expenses had been listed accurately. Listing expenses realistically minimizes the risk of a substantial abuse challenge in a chapter 7 case.")

[77]None of these debtors provided an explanation regarding anticipated changes in income or expenses.

[78]Official Bankruptcy Form 7, question 9.

[79]FED. R. BANKR. P. 2016(b); 11 U.S.C. § 329(a) (1994).

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question tests whether these disclosures are consistent.[80]

> *In 12.5% of cases, the debtor's disclosure about the fee paid was not consistent with the attorney's disclosure. (25 of 200 cases)*

15. Are there other problems with the fee disclosures?

Other problems with the debtor's disclosure in response to question 9 of the statement of financial affairs and with the attorney's disclosure in the Rule 2016(b) statement were noted and catalogued as they were found.

> *10% of cases had other fee disclosure problems. (20 of 200) These are further described as follows:*
>
> *Seven attorney statements indicated that the source of the fee was "wages," but the debtor disclosed no wages in schedule J.*
>
> *Five attorney statements indicated that the balance due from the debtor was a negative amount. In four of these cases, the attorney stated that the debtor had paid $495; that the debtor had agreed to pay $0; and that the balance due was "-$495." In the other case the stated balance due was "-$650."*[81]
>
> *Two attorney statements regarding the attorney fees were inconsistent with the statements of the attorney fees in the chapter 13 plans.*

Six cases had other similar problems.[82]

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[80]Literally taken, these requirements are slightly different, in that the debtor may have to disclose payments for debt consolidation services that the attorney might not have to disclose. Nevertheless, experience indicates that it is rare for the debtor's attorney to provide such debt consolidation services apart from the services provided in preparation for the bankruptcy. Most often, the consumer debtor goes to a bankruptcy attorney for legal services in filing a bankruptcy. In that event, the disclosures should be identical.

[81]These five cases were filed by the same attorney.

[82]The following problems were found, once each in different cases:

(1) The debtor's attorney did not file a Rule 2016(b) statement.
(2) The Rule 2016(b) statement disclosed a fee paid that was greater than fee agreed.
(3) The debtor's response to question 9 stated that the attorney fee was paid on a date after the petition was filed, but the attorney's Rule 2016(b) statement stated that the fee was paid before the petition was filed.
(4) The debtor's response to question 9 disclosed that the debtor paid Attorney A, but the Rule 2016(b) statement disclosed that the debtor paid Attorney B.
(5) The debtor's response to question 9 did not state amount of fee paid.
(6) The Rule 2016(b) statement indicated that the source of fee was "N/A".

In addition, the study revealed that in 46% of the chapter 7 cases, a balance on the attorney fees remained due when the bankruptcy was filed. (70 of 152 cases) Although the fee balance may constitute

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16. Is the estimation of whether assets will be available for distribution to creditors consistent with the disclosures in the schedules or in the chapter 13 plan?

In chapter 7 cases, the statement regarding the estimated availability of funds for distribution to unsecured creditors was compared with the schedules.[83] If the debtor exempted all unencumbered property on schedule C, and if the debtor disclosed no preferences or fraudulent conveyances, the debtor should have estimated that no funds would be available for distribution. In chapter 13 cases, the debtor's estimate was evaluated according to whether the debtor's plan proposed a distribution to unsecured creditors.[84]

25.5% of debtors incorrectly estimated whether funds would be available for distribution to creditors. (51 of 200 cases) By chapter, the results are:

11% of chapter 7 debtors estimated that funds would be available for distribution to creditors

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a prepetiton debt, this debt was not listed in schedule F in any of the cases. "The practice of not scheduling debts for prepetition fees may mislead debtors as to the dischargeability of these debts." Marianne B. Culhane & Michaela M. White, *Reaffirmation and Discharge Problems*, 1114 PLI/Corp 703, 721-22 (April-May, 1999) (reporting empirical study results showing 38% of consumer debtors' attorneys extended fee credit and that none listed the debt in schedules D or F, although a few disclosed the representation agreement on schedule G).

Granting fee credit raises the issue of whether the postpetition collection of these fees by the debtor's attorney violates the automatic stay of § 362(a) or the discharge injunction of § 524(a). On this issue one court of appeals recently stated:

> This small-dollars but large-issue litigation poses a problem that pervades each of the many thousands of no-asset or low-asset personal bankruptcies in the federal court system: the legal posture of the attorneys' fees paid or payable by Chapter 7 debtors. Whether the debtor is required by his or her attorney to pay all of the fees up front—even before the filing in bankruptcy—or, as here, enters into a prefiling arrangement for payment of the fees (or a material portion of the fees) after filing, the legal status of the fees attributable to postpetition services does not fit comfortably within the provisions of the Bankruptcy Code.

Gordon v. Hines (*In re* Hines), 147 F.3d 1185, 1186 (9th Cir. 1998). This issue has not been addressed in the Eastern District of Michigan.

[83]In the discussion of question 1, *supra* at 664, the language on the petition form establishing this requirement is quoted.

[84]Although in chapter 7 cases the proper criteria is fairly obvious, in chapter 13 cases, attorneys appeared to use two different criteria. In estimating whether there will be a distribution to unsecured creditors, many chapter 13 attorneys applied a hypothetical chapter 7 liquidation analysis, while others relied on the chapter 13 plan.

The Administrative Office of the United States Courts, which collects this data for statistical purposes, states that the proper test is whether the chapter 13 plan proposes a distribution to unsecured creditors. Telephone Interviews with Frank Szczebak, Director of the Bankruptcy Division, and Patricia Channon, Administrative Office United States Courts (August 13, 1999). Accordingly, that was the test utilized in this study.

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when the schedules suggested otherwise.[85] *(17 of 152 cases)*

71% of chapter 13 debtors improperly estimated that no funds would be distributed to creditors.[86] *(34 of 48 cases)*

17. Is the statement that the debts are primarily consumer debts consistent with schedules D, E and F?

The petition requires the debtor to state, by checking the appropriate box, whether the "nature of debt" is "non-business/consumer" or "business."[87] As noted, pursuant to the selection criterion for this study, all 200 debtors stated that the nature of the debt was consumer debt.[88] This question compares that statement with the information regarding the debts disclosed in schedules D, E and F.

2% of debtors who indicated primarily consumer debt should have indicated primarily business debt.[89] *(4 of 200 cases)*

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[85]Indeed, the schedules in all 152 chapter 7 cases suggested that all of them should have been estimated to be no asset cases.

[86]In fact, the plans in all forty-eight chapter 13 cases provided for distribution of funds to unsecured creditors.

[87]Official Bankruptcy Form 1. The term "consumer debt" is defined in 11 U.S.C. § 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." No further official instructions are provided for this disclosure. Some cases addressing the difficulties that can arise in distinguishing between consumer and business debt are cited *supra* note 66.

Inaccuracies in statement of whether the nature of the debt is business or consumer have been reported previously. Jennifer Conners Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307, 334 (Winter 1996) (reporting error rates of 7.5, 13 and 26% for business cases in chapter 7, 11, and 13, respectively); Hon. Lisa Hill Fenning & Craig A. Hart, *Measuring Chapter 11: The Real World of 500 Cases*, 4 AM. BANKR. INST. L. REV. 119, 123 (1996) ("[T]he proportion of business chapter 11 cases is 7% higher than the number of business cases reported in the Administrative Office demographic data for our district. The understatement in the official statistics results primarily from a lack of adequate instructions to debtors on how to classify their cases.").

The Administrative Office of the United States Courts is aware that on this point, "the information provided by some debtors is inaccurate." COMMISSION REPORT, *supra* note 2, Appendix C-1, Report of the Bankruptcy Statistics Task Force of the Administrative Office of the United States Courts, § 5, at 10. The task force explained, "Many small-capitalized debtors derive most of their income from their own businesses, and their business and personal assets and debts are often intertwined and not easily distinguishable, particularly if they do not maintain sound records." *Id.* As a result, the task force recommended changing the form to ask about the filing of federal tax schedule C or K, incorporation or business licenses, as well as verification of this information by the trustee. *Id.*

[88]*See supra* note 43 and accompanying text.

[89]Because the selection criterion for the study was the debtor's statement that the nature of the debt was consumer debt, these four cases were not excluded, even though the debtor's statement was incorrect. Including these cases allowed the study to measure how often the statement regarding the nature of the debt was inaccurate. Further observations regarding these four cases are made *supra* note 66.

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C. Disclosures That Raise Questions

Three areas were examined, not because the responses are demonstrably inaccurate, but rather because they raise substantial questions about the care with which the papers were prepared:

> 18. Are the schedules dated more than fifteen days before the petition was filed?

Neither the Bankruptcy Rules nor the Official Forms establish any requirement or provide any instruction on when the debtor should date the schedules. The study tested whether the schedules and the statement of financial affairs were dated more than fifteen days before the case was filed. Although somewhat arbitrary, this criterion was selected because under Bankruptcy Rule 1007(c), the debtor has fifteen days after filing the petition to file the schedules and statement of financial affairs.[90]

Although the Official Bankruptcy Forms provide no instruction on this point, dating the disclosures on or near the filing date is important in administering the bankruptcy case because the financial information required in the forms naturally changes over time. Stale information is less likely to be accurate. Also, several of the required disclosures are explicitly time sensitive.[91] In any event, questions regarding the current accuracy of the disclosures arise when the papers are dated substantially before they are filed.

> *19% of debtors dated the papers more than fifteen days before the petition was filed.*[92] *(38 of 200 cases) Half of those debtors dated the papers more than thirty days before the petition was filed. (17 of 200 cases) The two longest time periods were 154 and 145 days.*

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[90]Fed. R. Bankr. P. 1007(c).

[91]The disclosures that are explicitly time sensitive include the responses to the questions in the statement of financial affairs about: income from employment or operation of business for the previous two calendar years and calendar year to date (question 1); other income during the previous two years (question 2); payments to creditors within ninety days, and within one year for payments to insiders (question 3); suits and administrative proceedings, executions, garnishments and attachments within one year (question 4); repossessions, foreclosures and returns within one year (question 5); assignments within 120 days and receiverships within one year (question 6); gifts within one year (question 7); losses within one year (question 8); payments related to debt counseling or bankruptcy within one year (question 9); other transfers within one year (question 10); closed financial accounts within one year (question 11); safe deposit boxes within one year (question 12); setoffs within ninety days (question 13); and, prior address of debtor within two years (question 15).

[92]One explanation for this is that in these cases, the debtor's attorney completed the forms and held them for some reason, perhaps relating to the debtor's payment of the attorney fees and costs. Some evidence of this is reported in Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 Am. Bankr. L.J. 501, 549 (1993) (finding that interviews with chapter 7 lawyers disclosed that fifteen of thirty-three lawyers did not grant credit on their fees; however, some of these took fees in prefiling installments of two to six months, but the petition would not be filed prior to full payment). This study did not test these hypotheses.

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19. Were the schedules filed after the petition but dated before?

Another circumstance raising questions about the preparation of the schedules occurs when the schedules are dated before the petition is filed, but are then held for filing until after the petition is filed.[93] The explanation for this odd circumstance was not investigated further.

5.5% of debtors signed their papers before filing the petition but filed them after filing the petition. (11 of 200 cases)

20. Is there any substantive response to question 3a on the statement of financial affairs regarding payments aggregating more than $600 to any creditor within ninety days before the petition?

Question 3a on the statement of financial affairs requires disclosure of payments aggregating more than $600 to any creditor within 90 days before the filing.[94] In testing the responses to this question, the initial effort was to identify the subset of debtors who were most likely to have made a payment required to be disclosed. The criteria were (1) a monthly rent or mortgage payment on schedule J over $600, and (2) monthly income on schedule I over $2,000. Thus, a debtor in this subset who makes even one rent or mortgage payment within the ninety days before filing bankruptcy would be required to respond affirmatively to question 3a.[95] Twenty debtors had monthly incomes over $2000 and monthly rent or mortgage payments over $600. The lack of response to question 3a, especially by the higher income debtors in the study sample, raises questions about the care and understanding of debtors in completing these papers.

85% of the debtors with over $600 in monthly rent or mortgage payments and with over $2000 in monthly in-

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[93]Perhaps the debtor's attorneys in these cases held the signed papers until the fee balance was paid. *Id.*

[94]Official Bankruptcy Form 7, question 3a. The debtor's disclosure of such transfers facilitates prompt action by the trustee, the importance of which was explained by one court:

> Recovery of property pursuant to § 548 is intended to insure fairness to the creditors in the distribution of the assets of the bankrupt's estate. As a fiduciary of the estate, the trustee has a duty to avoid such transfers if to do so would benefit the estate and it is usually advisable for the trustee to act quickly. By waiting, the trustee is merely risking the loss of his ability to trace the property and the transferees.

Lovell v. Mixon, 719 F.2d 1373, 1378 (8th Cir. 1983). *See also supra* note 31 and cases cited therein.

[95]It appears that many attorneys perceive that question 3a on the statement of financial affairs is limited to payments to unsecured creditors. However, nothing in the language of the question justifies this conclusion. Thus, a debtor must also disclose payments to secured creditors and lessees.

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come disclosed nothing in response to question 3a on the statement of financial affairs. (17 of 20 cases)

21. Other errors

Other errors were incidentally found and recorded.

26.5% of the cases had other errors. These included:

Schedule A listed a mobile home.

Schedule B listed cash on hand in a "Brokerage Account."

Schedule C did not exempt a mobile home.[96]

Schedules D and F did not disclose a debt on a loan from a pension plan, the payments on which were disclosed in schedules I or J.

Schedule E included debts that are not priority debts.[97]

Schedule I did not disclose spouse employment information, or did not identify the spouse, or did not list payroll deductions for taxes, or stated that the marital status is "single" but disclosed spouse information.

Schedule J disclosed payments for property that the statement of intent indicated would be surrendered, or for property that was not disclosed as collateral in schedule D.

The statement of intent included creditors not listed in schedule D, or for creditors listed as unsecured creditors.

V. COMPILING THE RESULTS

A. For the Study Cases as a Whole

The results are disturbing by any measure. Six of the eleven specific inquiries into missing disclosures turned up problems in more than 50% of the cases in which the missing disclosures were required.[98] Ten of these eleven inquiries revealed problems in more than 10% of the cases in which disclo-

[96]Technically, this may not be a disclosure error, as a debtor could rationally choose not to exempt all exemptible property. In this case, however, it was an error, later corrected.

[97]Priority debts are set forth in 11 U.S.C. § 507(a). The debts erroneously scheduled as priority debts included debts for student loans and for unemployment overpayments. Apparently, these debtors were advised that any debt to a governmental unit is a priority debt. Also included here was a debt to "Best Buy," which was erroneously scheduled as a "consumer deposit" under § 507(a)(6).

[98]See the results on questions 2 (54%), 3 (81%), 4 (73%), 5 (54%), 7 (85%) and 8 (83%), *supra*, at ___.

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sures were required.[99] Three of the five specific inquiries into inconsistent disclosures revealed problems in more than 10% of the cases.[100] Two of the three specific inquiries designed to expose disclosures that raise substantial questions revealed problems in more than 10% of the cases.[101] Table 3 compiles these results.

TABLE 3. SUMMARY OF RESULTS BY TEST QUESTION

Question Number	Test Criteria	Percent with Problems
1	Not state asset or no asset	4.0%
2	Married debtor not state H, W, J or C for property	54.0%
3	Renting debtor not disclose security deposit	81.0%
4	Debtor with life insurance expense not disclose life insurance	73.0%
5	Debtor with likely pension interest not disclose pension interest	54.0%
6	Joint debtors not disclose H, W, J or C for debts	16.0%
7	Renting debtor not disclose lease	85.0%
8	Debtor in business not attach detailed statement	83.0%
9	Chapter 7 debtor not list expenses for all debts to be reaffirmed	21.0%
10	Not date papers	10.5%
11	Chapter 7 statement of intent not address all secured creditors	14.0%
12	Not disclose automobile	5.0%
13	Chapter 7 debtor with expenses not within 10% of income	43.0%
14	Attorney fee disclosures inconsistent	12.5%
15	Other fee disclosure problems	10.0%
16	Asset/no asset estimation incorrect	25.5%
17	Consumer debt statement incorrect	2.0%
18	Papers dated more than 15 days before filing	19.0%
19	Schedules dated before petition but filed after	5.5%
20	Not disclose prepetition debt payments	85.0%
21	Other errors	26.5%

A total of 687 errors and problems were found. These errors and problems were observed in 99% of the study cases. (198 of 200 cases) The median number is 3.0 per case. The mean (average) is 3.4 per case, with a standard deviation of 1.6.

Chart 1 shows the number of cases with each number of errors. This chart demonstrates that 26% of the cases had five or more errors and problems. (52 of 200 cases) Nearly 10% of the cases had six or more errors and problems. (19 of 200 cases)

[99]*See*, in addition to the results summarized in note 98, *supra*, the results on questions 6 (16%), 9 (21%), 10 (10.5%), and 11 (14%), *supra*. Only one inquiry in this category, question 1 (4%), *supra*, at 664, revealed problems in less than 10% of cases.

[100]*See* the results on questions 13 (43%), 14 (12.5%) and 16 (25.5%), *supra*, at 670.

[101]*See* the results on questions 18 (19%) and 20 (85%), *supra*, at 675-76.

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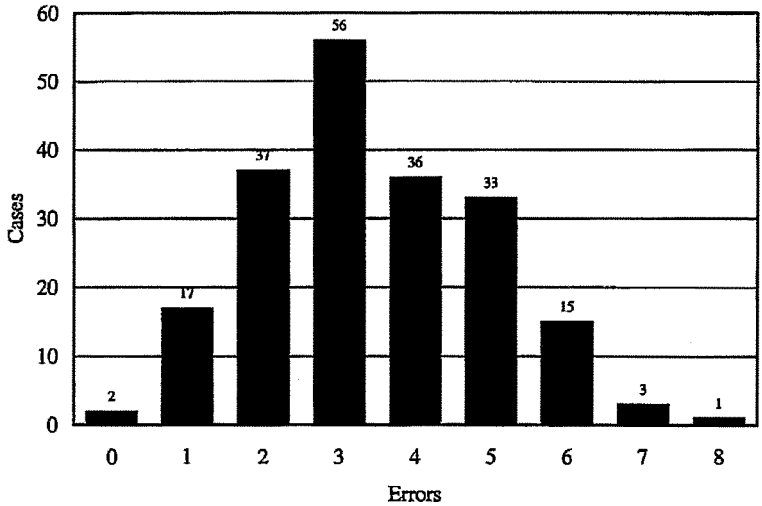
CHART 1. THE NUMBER OF CASES WITH EACH NUMBER OF ERRORS



B. COMPARISONS BASED ON DEBTOR CHARACTERISTICS

Subgroups of debtors were analyzed by certain identifiable characteristics. This was done in an attempt to determine whether remedial efforts should be more focused on any of the subgroups. However, none of the subgroups did significantly better or worse compared to the others.

When an adjustment is made to compare the results on the eighteen questions applicable in both chapter 7 and chapter 13, the average number of problems for the one hundred fifty-two chapter 7 cases is 2.93, and for the forty-eight chapter 13 cases, 3.04.[102] The average for the ninety-four single debtors was 3.17, for the fourteen separated debtors, 3.07, and for the ninety married debtors, 3.74.[103] For the one hundred fifty-four individual petitions, the average was 3.42, and for the forty-six joint petitions, 3.48.[104]

For both chapter 7 and chapter 13, the cases filed by the higher volume firms had slightly better averages. The thirty-six chapter 7 cases filed by the

[102]Three test questions (9, 11 and 13) applied only to chapter 7 cases. For this comparison, the results of these questions were removed. Accordingly, these averages compare the results on the same eighteen test questions.

[103]For this comparison, no adjustment was made for the results of the test question directed only to married debtors (question 2). These three subgroups total 198 debtors because 2 debtors did not state their marital status on schedule I.

[104]For this comparison, no adjustment was made for the results of the test question directed only to joint debtors (question 6).

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nine firms that filed the most chapter 7 cases during the study period had an average of 3.31; the average of the other one hundred sixteen chapter 7 cases was 3.64.[105] The twenty-three chapter 13 cases filed by the nine firms that filed the most chapter 13 cases during the study period had an average of 2.74; the average of the other twenty-five chapter 13 cases was 3.32. Thus, this effect was somewhat greater in chapter 13, where the filings are more concentrated in the higher volume firms.[106]

These results suggest that the observed differences have no functional significance.

C. Correlations with the Fee and Financial Data in Each Case

1. *The Chapter 7 Fee*

The data permit an examination of the premise that the chapter 7 fee fixed in the marketplace is too low to permit debtors' attorneys sufficient time to prepare fully accurate and complete schedules and statements of financial affairs.[107] This premise was examined in Chart 2, a scatterplot in which each point represents a chapter 7 case with its associated fees and number of errors.[108] The nearly flat trendline on Chart 2 demonstrates that there is no significant relationship between the chapter 7 fee and the number of errors found in this study.[109]

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[105]These chapter 7 averages are not adjusted as set forth *supra* note 102.

[106]48% of the chapter 13 cases were filed by the higher volume firms. Just 24% of the chapter 7 cases were filed by the higher volume firms.

[107]No purpose is served in examining this issue in the chapter 13 cases in this study, because in the Eastern District of Michigan, Southern Division at Detroit, the fee in most such cases is $1200. In 81% of the chapter 13 cases in the study, the agreed fee was $1200 according to the attorney's Rule 2016(b) statement. (39 of 48 cases) In three chapter 13 cases, the fee was $0, probably because the attorney so agreed or because representation was provided by legal aid or a prepaid legal services program. In two chapter 13 cases, the fee was under $1200 ($950 and $1000), and in four cases it exceeded $1200 (one case at $1250 and three cases at $1500).

[108]The fees reflected on Chart 1 are taken from the attorneys' Rule 2016(b) statements, not from the debtors' responses to question 9 on the statement of financial affairs. As noted in the discussion on question 14, *supra* at 671-72, the study found differences in the disclosures in these papers in 12.5% of the cases. The disclosure made in the Rule 2016(b) statement was chosen because it presumably better reflects what the attorney thinks the fee is, and this data point is more relevant to the attorney's economic incentives.

However, Chart 1 does reflect one set of adjustments to the fee data from the Rule 2016(b) statements, in an attempt to better approximate reality. As noted in the discussion on question 15 (relating to other fee disclosure errors), *supra* at 672, five statements filed by one attorney indicated that the agreed fee was $0, even though the debtor had paid either $495 or $650. For purposes of correlating the agreed fee and the number of errors, the paid fee data in these five cases was used rather than the agreed fee data. This adjustment assumes that the fee paid by the debtor was the actual agreed fee. *See supra* note 81 and accompanying text.

[109]All of the scatterplots and their associated trendlines were created using the Microsoft Excel spreadsheet program.

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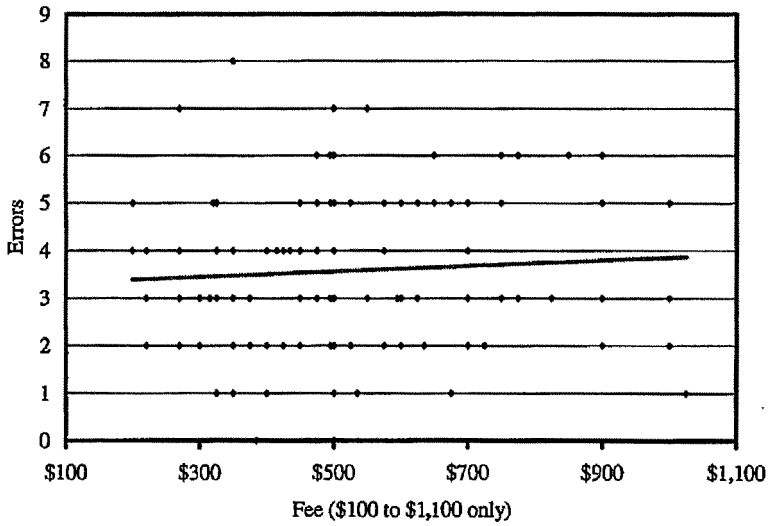
CHART 2. CHAPTER 7 FEE



2. *The Prepetition Fee Paid*

Whereas Chart 2 addresses the total attorney fee, Chart 3 addresses the actual fees paid before the petition was filed, for both chapter 7 and chapter 13 cases. Again, this is to test whether a higher "up front" fee permits the attorney the time necessary to file more complete and accurate papers.

However, Chart 3 appears to demonstrate somewhat the opposite. It shows that the number of errors actually increases slightly with the amount of the fee paid before the petition is filed. At the lower end, where the prepetition payment is up to $200, the errors approximate 3. At the other end, where the prepetition payment is over $800, the errors approximate 4. The explanation for this was not examined further.

In six chapter 7 cases, the fee was $0, for the probable reasons indicated in note 107, *supra*. These cases were excluded from Chart 2 because the economic incentives under scrutiny here do not seem to apply when considerations other than those arising from market forces dictate the attorney fee.

Further, for presentation purposes only, Chart 2 also excludes two chapter 7 cases in which the fees were $1375 and $1600. These fees substantially exceeded the upper end of the primary range of fees (approximately $200 - $1000). There were four errors in each of these two cases, which is approximately what the trendline on Chart 2 would have predicted.

The median fee in the chapter 7 cases (excluding the six no fee cases) was $500 (range $199 - $1600). The average was $520 with a standard deviation of $209.

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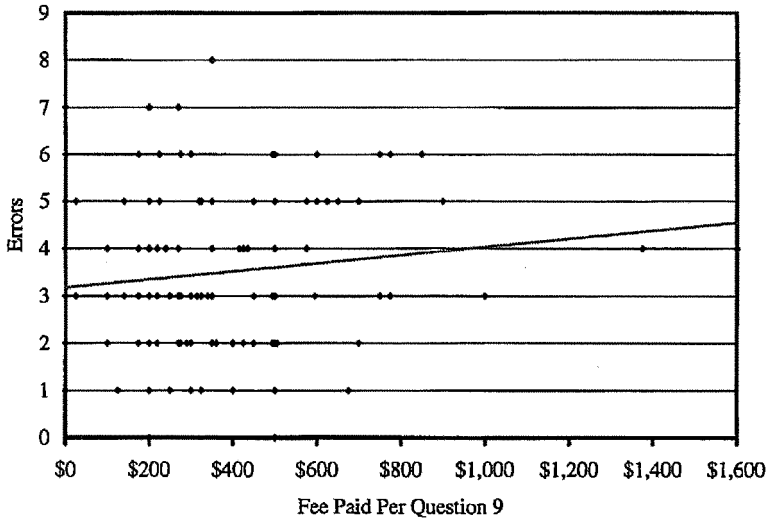
CHART 3. FEE PAID PREPETITION — CHAPTERS 7 AND 13



3. *The Income, Expenses, Assets and Liabilities*

An analysis was made of whether other available financial data in each case could be correlated with the number of problems and errors in each case. Charts 4 (Income), 6 (Assets) and 7 (Liabilities) showed no significant correlations. Chart 5 (Expenses) shows a slight direct correlation between expenses and errors, but the basis for this was not further examined. In any event, the correlation does not appear to have much functional significance.

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CHART 4. INCOME

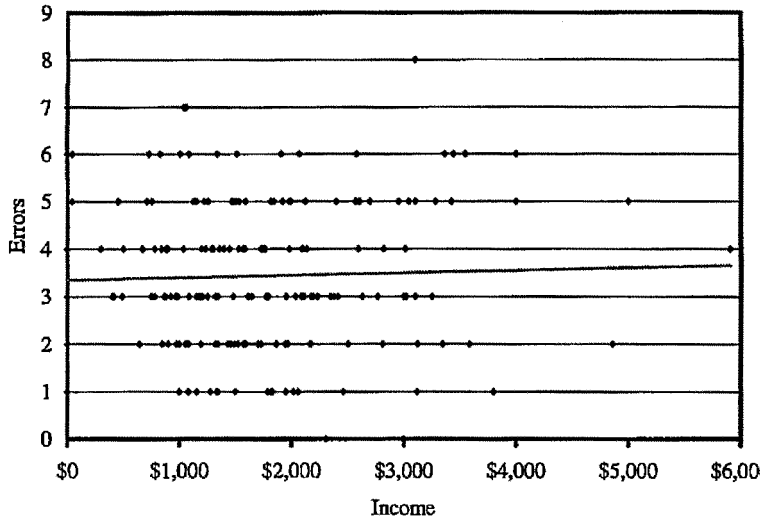

CHART 5. EXPENSES

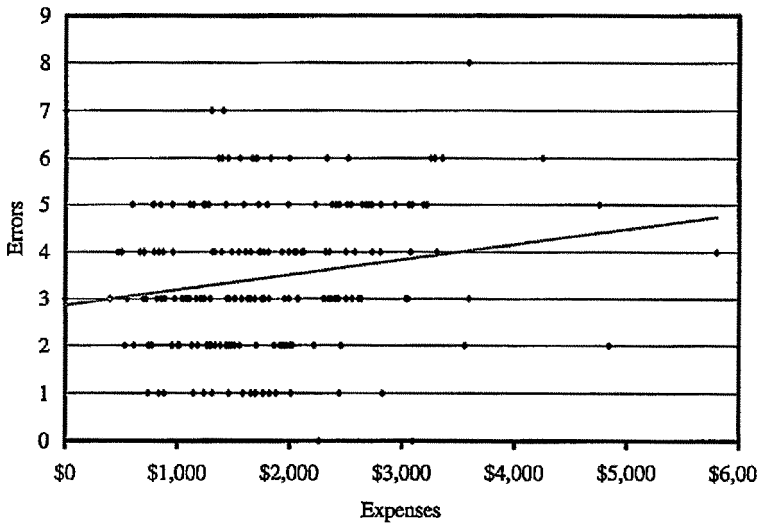

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CHART 6. ASSETS

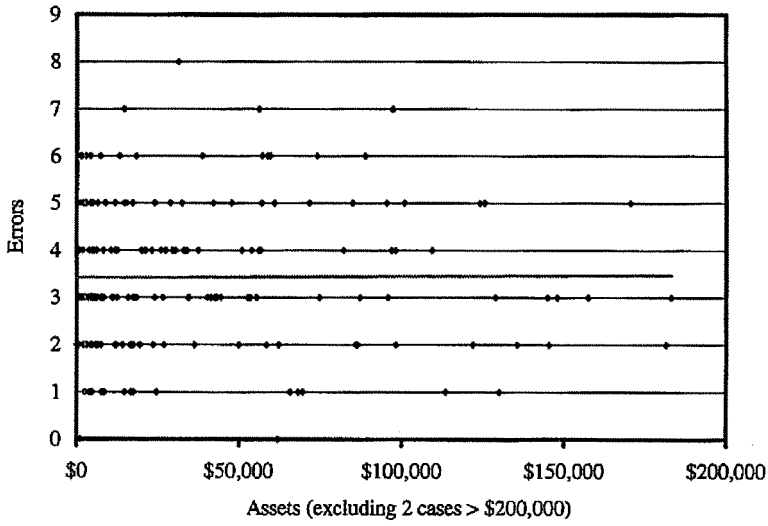
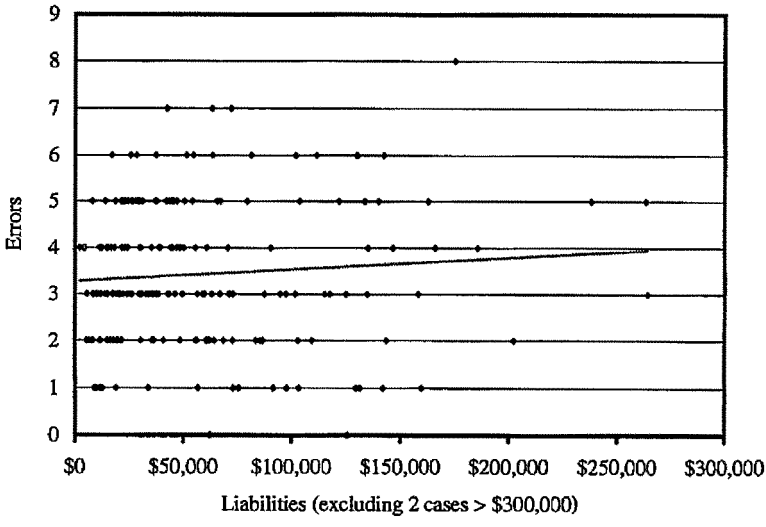


CHART 7. LIABILITIES



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VI. THE INADEQUACY OF PRESENTLY AVAILABLE REMEDIES

The data reviewed in this article suggest that the bankruptcy papers filed by consumer debtors and their attorneys are not accurate and complete, and are not prepared with the necessary care and understanding. The fundamental question raised by this study is how to motivate consumer debtors to file more accurate and complete disclosures.

The bankruptcy process offers a wide array of remedies for a debtor's intentionally wrongful conduct in a bankruptcy case.[110] This Part demonstrated that these remedies were not designed to address the issues raised in this study. For several reasons, attempts to invoke them for this purpose have not been and cannot be effective. First, these remedies are largely based upon a degree of wrongful intent that is well beyond the carelessness and inadvertence that this study found. Second, the parties with standing to pursue these remedies often lack the economic motivation to do so in these cases, because the processes that must be undertaken to invoke these remedies are time consuming, cumbersome and expensive. In this Part, each remedy was reviewed and its inadequacy explained.

The next Part will discuss other possible solutions that may be more effective.

A. Dismissal of the Chapter 7 or 13 Bankruptcy Case

The Bankruptcy Code firmly establishes the bankruptcy court's authority to dismiss chapter 7 and chapter 13 cases for "cause."[111] The debtor's "bad faith" can constitute cause for dismissal in either chapter 7 or chapter 13.[112]

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[110] *See* Wayne D. Holly, *Criminal and Civil Consequences of False Oaths in Bankruptcy Help Ensure Reliable Information*, 71-MAR N.Y. St. B.J. 38 (1999) (discussing bankruptcy crimes under 18 U.S.C. § 152 and objections to discharge under 11 U.S.C. § 727(a)).

[111] 11 U.S.C. §§ 707(a) and 1307(c) (1994).

[112] In chapter 7: Industrial Ins. Serv. v. Zick (*In re* Zick), 931 F.2d 1124, 1129 (6th Cir. 1991) (noting that dismissal under § 707(a) for bad faith "should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence"). *See also In re* Kamen, 231 B.R. 275, 278 (Bankr. N.D. Ohio 1999); *In re* Houck, 199 B.R. 163, 164-65 (S.D. Ohio 1996); *In re* Moses, 227 B.R. 98, 101 (E.D. Mich. 1996) (holding that dismissal under § 707(a) was proper for the debtor's failure to provide sufficient information to permit the trustee to administer the estate); *In re* Cappuccetti, 172 B.R. 37, 39 (Bankr. E.D. Ark. 1994); Cassady-Pierce Co., Inc. v. Burns (*In re* Burns), 169 B.R. 563, 568 (Bankr. W.D. Pa. 1994); *In re* Hammonds, 139 B.R. 535, 542 (Bankr. D. Colo. 1992); *In re* Clark, 86 B.R. 593, 594 (Bankr. E.D. Ark. 1988). *See also* Hon. Tamara O. Mitchell, *Dismissal of Cases Via 11 U.S.C. § 707: Bad Faith and Substantial Abuse*, 102 Com. L.J. 355 (1997). *But see* Katie Thein Kimlinger and William P. Wassweiler, *The Good Faith Fable of 11 U.S.C. § 707(a): How Bankruptcy Courts Have Invented a Good Faith Filing Requirement for Chapter 7 Debtors*, 13 Bankr. Dev. J. 61 (1996).

In chapter 13: Leavitt v. Soto (*In re* Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999); *In re* Williams, 144 F.3d 544, 550 (7th Cir. 1998); *In re* Lilley, 91 F.3d 491, 496 (3rd Cir. 1996); Molitor v. Edison (*In re* Molitor), 76 F.3d 218, 220 (8th Cir. 1996); Gier v. Farmers State Bank of Lucas, Kansas (*In re* Gier), 986

In weighing whether there is bad faith constituting cause for dismissal, the bankruptcy court may consider the intentional concealment of assets or the lack of candor and completeness in the debtor's bankruptcy papers.[113] The focus of the court's inquiry is upon the debtor's honesty of intention.[114] Thus, inadvertent omissions or omissions due to the attorney's failure to properly review the papers do not establish cause for dismissal for bad faith.[115]

The court can also dismiss a consumer bankruptcy chapter 7 case if granting relief would be a "substantial abuse" of the provisions of chapter 7.[116] In defining "substantial abuse," many cases hold that the primary or exclusive focus is upon the debtor's ability to pay creditors through a hypothetical

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F.2d 1326, 1329 (10th Cir. 1993); Society Nat'l Bank v. Barrett (*In re* Barrett), 964 F.2d 588, 591 (6th Cir. 1992); Neufeld v. Freeman, 794 F.2d 149, 152 (4th Cir.1986); Shell Oil Co. v. Waldron (*In re* Waldron), 785 F.2d 936 (11th Cir.) *cert. dismissed*, 478 U.S. 1028, 106 S. Ct. 3343, 92 L. Ed. 2d 763 (1986); Johnson v. Vanguard Holding Corp. (*In re* Johnson), 708 F.2d 865, 867-68 (2nd Cir. 1983); United States v. Estus (*In re* Estus), 695 F.2d 311, 316 (8th Cir.1982).

[113]In Chapter 7: Industrial Ins. Serv. v. Zick (*In re* Zick), 931 F.2d 1124, 1128 (6th Cir. 1991); *In re* Moses, 227 B.R. 98, 101 (E.D. Mich. 1996).

In Chapter 13: Molitor v. Edison (*In re* Molitor), 767 F.3d 218, 220 (8th Cir. 1996) ("The bad faith determination focuses on the totality of the circumstances, specifically: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court[.]"). *See also* Leavitt v. Soto, 1717 F.3d 1219, 1224 (9th Cir. 1998); Eisen v. Curry (*In re* Eisen), 14 F.3d 469, 470 (9th Cir. 1994); *In re* Love, 957 F.2d 1350, 1356 (7th Cir. 1992); Hardin v. Caldwell (*In re* Caldwell), 851 F.2d 852, 859 (6th Cir. 1988); *Estus*, 695 F.2d at 317 (Among the factors to be considered are "the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court."); *In re* Graffy, 216 B.R. 888, 891 (Bankr. M.D. Fla. 1998); *In re* Fernandez, 212 B.R. 361, 368 (Bankr. C.D. Cal. 1997), *aff'd*, 227 B.R. 174 (B.A.P. 9th Cir. 1998); New Jersey Lawyers' Fund for Client Protection v. Goddard, 212 B.R. 233, 238 (D.N.J. 1997); *In re* Cockings, 172 B.R. 257, 261 (Bankr. E.D. Ark. 1994) (Bad faith due in part to "incomplete schedules, most noteworthy, inadequate breakdown of expenses"); *In re* Bandini, 165 B.R. 317, 319 (Bankr. S.D. Fla. 1994); *In re* Meisner, 155 B.R. 519, 520 (Bankr. D. Neb. 1993); *In re* Standfield, 152 B.R. 528, 535 (Bankr. N.D. Ill. 1993), *appeal dismissed*, 1993 WL 192957 (N.D. Ill. 1993); *In re* Powers, 48 B.R. 120, 121 (Bankr. M.D. La. 1985).

[114]In Chapter 7: *In re* Marks, 174 B.R. 37, 40 (E.D. Pa. 1994); Cassidy-Pierce Co., Inc. v. Burns (*In re* Burns), 169 B.R. 563, 567 (W.D. Pa. 1994); *In re* Hammonds, 139 B.R. 535, 541 (Bankr. D. Colo. 1992); *In re* Campbell, 124 B.R. 462, 464 (Bankr. W.D. Pa. 1991).

In Chapter 13: Johnson v. Vanguard Holding Corp. (*In re* Johnson), 708 F.2d 865, 868 (2nd Cir. 1983); Barnes v. Whalen, 689 F.2d 193, 200 (D.C. Cir. 1982); *In re* Powers, 135 B.R. 980, 992 (Bankr. C.D. Cal. 1991).

[115]In Chapter 7: *In re* Khan, 172 B.R. 613, 625 (Bankr. D. Minn. 1994); Fahey Banking Co. v. Parsell (*In re* Parsell), 172 B.R. 226, 231 (Bankr. N.D. Ohio 1994); *In re* Josey, 169 B.R. 138, 140-41 (Bankr. S.D. Ohio 1994). *See also In re* Price, 211 B.R. 170, 172 (Bankr. M.D. Pa. 1997); *In re* Marks, 174 B.R. 37, 40 (E.D. Pa. 1994); Buck v. Buck (*In re* Buck), 166 B.R. 106, 109 (Bankr. M.D. Tenn. 1993).

Chapter 13: *In re* Stoutamire, 201 B.R. 592 (Bankr. S.D. Ga. 1996) (dismissing the case for failing to disclose an injury claim, but refusing to dismiss with prejudice because the attorney's interview form was inadequate to elicit the correct information); *In re* Fulton, 148 B.R. 838, 842-43 (Bankr. S.D. Tex. 1992) (holding that the debtor's failure to disclose his non-filing wife's interest in community property was not bad faith because debtor intended to disclose community nature of the interest).

[116]11 U.S.C. § 707(b) (1994). *See* Mitchell, *supra* note 112, at 359-72.

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chapter 13 plan; in this view, the accuracy and completeness of the debtor's papers are not explicitly considered.[117] Other courts apply the "totality of circumstances" test,[118] and some of the courts adopting this approach explicitly consider, as one factor, whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the debtor's true financial condition.[119] Despite the differences in the approaches to this issue, there is general agreement that in adopting § 707(b), Congress was concerned about chapter 7 filings by "non-needy debtors."[120] Nevertheless, it is reasonably clear that a chapter 7 case will not be dismissed for "substantial abuse" merely because of inadvertent omissions in the debtor's papers.[121]

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[117]*See* Carl Felsenfeld, *Denial of Discharge for Substantial Abuse: Refining - Not Changing - Bankruptcy Law*, 67 FORDHAM L. REV. 1369 (1999); Richard E. Coulson, *Substantial Abuse of Bankruptcy Code Section 707(b): An Evolving Philosophy of Debtor Need*, 52 CONSUMER FIN. L.Q. REP. 261, 279 (1998); Carlos J. Cuevas, *The Consumer Credit Industry, The Consumer Bankruptcy System, Bankruptcy Code Section 707(b), and Justice: A Critical Analysis of the Consumer Bankruptcy System*, 103 COM. L.J. 359, 407 (1998).

[118]*See, e.g.*, Stuart v. Koch (*In re* Koch), 109 F.3d 1285, 1288 (8th Cir. 1997); Huckfeldt v. Huckfeldt (*In re* Huckfeldt), 39 F.3d 829, 831 (8th Cir. 1994); Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992); Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 914 (9th Cir. 1988).

In any event, § 707(b) provides "There shall be a presumption in favor of granting the relief requested by the debtor."

[119]*In re* Krohn, 886 F.2d 123, 126 (6th Cir. 1989) ("It is not possible, of course, to list all the factors that may be relevant to ascertaining a debtor's honesty. Counted among them, however, would surely be the debtor's good faith and candor in filing schedules and other documents[.]"). *See also* Stewart v. United States Trustee (*In re* Stewart), 215 B.R. 456, 464 (B.A.P. 10th Cir. 1997), *aff'd*, 175 F.3d 796 (10th Cir. 1999); *In re* Rodriguez, 228 B.R. 601, 603 (Bankr. W.D. Va. 1999); *In re* Wisher, 222 B.R. 634, 637 (Bankr. D. Colo. 1998); *In re* Heasley, 217 B.R. 82, 87 (Bankr. N.D. Tex. 1998); *In re* Adams, 206 B.R. 456, 460 (Bankr. M.D. Tenn. 1997), *vacated on other grounds*, 209 B.R. 874 (Bankr. M.D. Tenn. 1997); United States Trustee v. Duncan (*In re* Duncan), 201 B.R. 889, 894 (Bankr. W.D. Pa. 1996).

Several courts of appeals have adopted the "totality of circumstances" test without explicitly suggesting that the accuracy of the schedules should be considered. *Stewart*, 175 F.3d 796; Kornfield v. Schwartz (*In re* Kornfield), 164 F.3d 778, 781 (2nd Cir. 1999); First USA v. Lamanna (*In re* Lamanna), 153 F.3d 1, 5 (1st Cir. 1998); Kestell v. Kestell (*In re* Kestell), 99 F.3d 146, 149 (4th Cir. 1996); Green v. Staples (*In re* Green), 934 F.2d 568, 572 (4th Cir. 1991).

[120]Stewart v. United States Trustee, 175 F.3d 796, 806 (10th Cir. 1999); *In re* Lamanna, 153 F.3d at 3-4; Stuart v. Koch (*In re* Koch), 109 F.3d 1285, 1290 (8th Cir. 1997); United States Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992); Green v. Staples (*In re* Green), 934 F.2d 568, 570 (4th Cir. 1991); *In re Krohn*, 886 F.2d 123, 125-26 (6th Cir. 1989); *In re* Walton, 866 F.2d 981, 983 (8th Cir. 1989).

In a comprehensive study of published decisions under § 707(b), one commentator found, "Despite rhetoric to the contrary, the preponderance of cases shows that the courts routinely apply only an excess income test." Felsenfeld, *supra* note 117, at 1369. This commentator concluded, "Courts frequently give lip service to the totality of the circumstances test(s) but fail to apply it in any meaningful sense." *Id.* at 1394.

See also Coulson, *supra* note 117, at 279 (explaining that ability to pay is the primary factor in totality of circumstances test); Cuevas, *supra* note 117, at 407 ("the real focus of [the totality of the circumstances] test is whether the debtor has the ability to pay").

[121]*In re* Hudson, 56 B.R. 415, 420 (Bankr. N.D. Ohio 1985), *order modified*, 64 B.R. 73 (Bankr. N.D. Ohio 1986) (explaining that under § 707(b), the court may examine whether debtor has exhibited good faith and has made full and accurate disclosure, but primary focus should be ability to pay); *In re* Penna, 86 B.R. 171, 173 (Bankr. E.D. Mo.1988) (denying a motion to dismiss because there no evidence that the

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Moreover, § 707(b) implicitly prohibits the trustee from bringing a motion to dismiss for substantial abuse.[122] Prohibiting the one who may be in the best position to discover and assert problems with the debtor's papers further suggests that this remedy was not designed to address those problems.

In denying a motion to dismiss under § 707(b), one court summarized the difficulty of using this remedy to address the problems with many debtors' papers:

> Mistakes and omissions are too frequent for this Court to assume that deceit is evident simply because mistakes are present. Insufficient information or poor advice is more likely one of the causes. A large percentage of income and expense statements are probably erroneous in some fashion or other, either because of simple negligence or oversight, or because of a lack of understanding of the forms or the significance of the questions asked, or because of miscommunication between debtors and their attorneys or, in joint cases, because of miscommunication between spouses.[123]

B. Denial of Discharge in Chapter 7 Cases

A chapter 7 debtor's discharge may be denied for an omission from or

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debtor's original understatement of income and expenses was intentional). *See also In re* Laury-Norvell, 157 B.R. 14, 16 (Bankr. N.D. Ohio 1993) (denying motion to dismiss because the inaccuracies in the debtor's schedules were properly attributable to the debtor's counsel rather than the debtor).

[122]Section § 707(b) provides that "the court, on its own motion or on motion by the United States Trustee, but not at the request or suggestion of any party in interest, may dismiss . . ." *See In re* Christian, 804 F.2d 46, 48 (3rd Cir. 1986) (holding that a creditor lacks standing to file a motion to dismiss under § 707(b)); *In re* Wisher, 222 B.R. 634, 636 (Bankr. D. Colo. 1998); Perniciaro v. Natale (*In re* Natale), 136 B.R. 344, 352 (Bankr. E.D.N.Y. 1992). This limitation was designed to insure "that such motions are not routinely made in every Chapter 7 case," Kornfield v. Schwartz (*In re* Kornfield), 164 F.3d 778, 784 (2nd Cir. 1999), and to protect the debtor from harassment by the creditors. Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 917 (9th Cir. 1988); United States Trustee v. Joseph (*In re* Joseph), 208 B.R. 55, 60 (B.A.P. 9th Cir. 1997); *In re* Fitzgerald, 155 B.R. 711, 715 (Bankr. W.D. Texas 1993).

Nevertheless, the United States Trustee can rely on information from the trustee and creditors, and once the United States Trustee brings a motion to dismiss, these parties may participate. 11 U.S.C. § 707(b) (1994); United States Trustee v. Clark (*In re* Clark), 927 F.2d 793, 797 (4th Cir.1991). *Contra*, *In re* Restea, 76 B.R. 728, 732-34 (Bankr. D.S.D. 1987) (denying the United States Trustee's motion to dismiss because creditors suggested to the United States Trustee's office that it should investigate the case for abuse).

If panel trustees are given standing under § 707(b), one court speculated, probably accurately: unfortunately, most panel trustees would never bring such motions anyway, as there is no economic incentive to do so, especially in no-asset cases where the trustee will only be paid $45 for handling the case. The cost of bringing the action is, in the usual case, not compensable unless the estate has assets. *In re* Fitzgerald, 155 B.R. 711, 713 n.1 (Bankr. W.D. Tex.1993).

[123]*In re* Attanasio, 218 B.R. 180, 229 (Bankr. N.D. Ala. 1988).

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misstatement in a schedule or a statement of financial affairs,[124] if it was knowing and fraudulent, and related to a material matter.[125] In addition, the discharge may be denied for intentionally concealing property by failing to disclose it in the schedules.[126] However, denying the discharge is not warranted for misstatements or omissions resulting from confusion, misunderstanding, haste, inadvertence or attorney error.[127] Further, this remedy does not apply to a chapter 13 debtor.[128]

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[124]Under 11 U.S.C. § 727(a)(4)(A), quoted in note 15, *supra*, such an omission or misstatement may constitute a "false oath." *In re* Chavin 150 F.3d 726 (7th Cir. 1998); Beaubouef v. Beaubouef (*In re* Beaubouef), 966 F.2d 174 (5th Cir. 1992); Williamson v. Fireman's Fund Ins. Co., 828 F.2d 249 (4th Cir. 1987); *Chalik*, 748 F.2d at 617-18; Smith v. Grondin (*In re* Grondin), 232 B.R. 274, 277 (B.A.P. 1st Cir. 1999). *See also* Craig H. Averch, *Denial of Discharge Litigation*, 16 REV. LITIG. 65, 106-07 (1997); Wayne D. Holly, *Criminal and Civil Consequences of False Oaths in Bankruptcy Help Ensure Reliable Information*, 71-MAR N.Y. ST. B.J. 38, 38-39 (1999).

[125]Desmond v. Varrasso (*In re* Varrasso), 37 F.3d 760, 764 (1st Cir. 1994); Bennett v. Hollingsworth (*In re* Hollingsworth), 224 B.R. 822, 830 (Bankr. M.D. Fla. 1998).

[126]11 U.S.C. § 727(a)(2), quoted in note 15, *supra*. *Chavin*, 150 F.3d 726; Gullickson v. Brown (*In re* Brown), 108 F.3d 1290, 1295 (10th Cir. 1997).

[127]Gullickson v. Brown (*In re* Brown), 108 F.3d 1290, 1295 (10th Cir. 1997); Citizens First Nat'l Bank v. Hunter (*In re* Hunter), 229 B.R. 851, 858 (Bankr. M.D. Fla. 1999); Kilburn v. Filby (*In re* Filby), 225 B.R. 532 (Bankr. D.N.H. 1998); Cohen v. Pond (*In re* Pond), 221 B.R. 29, 34 (Bankr. M.D. Fla. 1998); Williamson Constr., Inc. v. Ross (*In re* Ross), 217 B.R. 319 (Bankr. M.D. Fla. 1998); Hunter v. Shoup (*In re* Shoup), 214 B.R. 166, 177 (Bankr. N.D. Ohio 1997); Kirchner v. Kirchner (*In re* Kirchner), 206 B.R. 965 (Bankr. W.D. Mo. 1997); Stone v. Stone (*In re* Stone), 199 B.R. 753 (Bankr. N.D. Ala. 1996); Roeder v. Ziegler (*In re* Ziegler), 156 B.R. 151 (Bankr. W.D. Pa. 1993); Perniciaro v. Natale (*In re* Natale), 136 B.R. 344, 349 (Bankr. E.D.N.Y. 1992); Ashton v. Burke (*In re* Burke), 83 B.R. 716, 720-21 (Bankr. D.N.D. 1988). *But see* Boroff v. Tully (*In re* Tully), 818 F.2d 106, 111 (1st Cir. 1987) ("Nor can an attorney's willingness to bear the burden of reproach provide blanket immunity to a debtor; it is well settled that reliance upon advice of counsel is, in this context, no defense where it should have been evident to the debtor that the assets ought to be listed in the schedules."). *See also* Gregory E. Maggs, *Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument*, 69 AM. BANKR. L.J. 1 (1995).

Similarly, many courts do not deny the discharge if the debtor reports the omission or misstatement at the creditors meeting. *Brown*, 108 F.3d at 129; Baker v. Mereshian (*In re* Mereshian), 200 B.R. 342, 346 (B.A.P. 9th Cir. 1996); Williamson Constr., Inc. v. Ross (*In re* Ross), 217 B.R. 319 (Bankr. M.D. Fla. 1998). *But see* Barnett Bank of Tampa, N.A. v. Muscatell (*In re* Muscatell), 113 B.R. 72, 75 (Bankr. M.D. Fla. 1990); Job v. Calder (*In re* Calder), 93 B.R. 734, 738 (Bankr. D. Utah 1988), *aff'd*, 907 F.2d 953 (10th Cir. 1990).

It is no defense that the debtor believed that the omitted property was worthless. Chalik v. Moorefield (*In re* Chalik), 748 F.2d 616, 618 (11th Cir. 1984); Krudy v. Scott (*In re* Scott), 227 B.R. 834, 842 (Bankr. S.D. Ind. 1998); Law Office of Larry A. Henning v. Mellor (*In re* Mellor), 226 B.R. 451, 458 (D. Colo. 1998); Stanley v. Hoblitzell (*In re* Hoblitzell), 223 B.R. 211, 215 (Bankr. E.D. Cal. 1998); Congress Talcott Corp. v. Sicari (*In re* Sicari), 187 B.R. 861, 882 (Bankr. S.D.N.Y. 1994); Lister v. Gonzalez (*In re* Gonzalez), 92 B.R. 960, 962 (Bankr. S.D. Fla. 1988).

[128]Generally, the provisions of chapter 7 apply only in chapter 7 cases. 11 U.S.C. § 103(b) (1994). Nothing in chapter 13 allows an objection to the discharge of a chapter 13 debtor for false oath or concealment. Deans v. O'Donnell (*In re* Deans), 692 F.2d 968, 971 n.5 (4th Cir. 1982); Gayton v. Haney (*In re* Gayton), 61 B.R. 612, 613 (9th Cir. B.A.P. 1986); *In re* Girdaukas, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988); United States v. Vlavianos (*In re* Vlavianos), 71 B.R. 789, 795 n.3 (Bankr. W.D. Va. 1986) ("The provisions of 11 U.S.C. § 727(a), which set out ten grounds for denying a debtor a discharge, do not apply to discharges granted in Chapter 13 cases."); Cornett v. Galt (*In re* Galt), 70 B.R. 57, 59 (Bankr. S.D. Ohio 1987).

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An adversary proceeding is required to deny a debtor's discharge.[129] This process involves a complaint, an answer, discovery, motions, a trial, and, possibly, multiple appeals.[130] The party objecting to the discharge bears the burden of proof by a preponderance of the evidence.[131]

An objection to the discharge can be filed by a creditor, the trustee or the United States Trustee.[132] However, it is rare for a creditor to be motivated to object to the debtor's discharge, probably because in most cases the debtor's conduct does not meet the strict requirements for denying the discharge and the creditor's debt does not justify the expense.[133] Similarly, although the trustee is under a duty to oppose the discharge "if advisable,"[134] the trustee rarely has sufficient assets to fund such litigation.[135] Even if the

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[129]FED. R. BANKR. P. 7001(4); *In re* Little, 220 B.R. 13, 16 (Bankr. D.N.J. 1998); *In re* Goodwin, 163 B.R. 825, 834 (Bankr. D. Idaho 1993).

[130]*See* FED. R. BANKR. P. 7001 - 8020. These rules incorporate by reference most of the Federal Rules of Civil Procedure.

[131]Fed. R. Bankr. P. 4005; Peterson v. Scott (*In re* Scott), 172 F.3d 959, 966-67, (7th Cir. 1999); Barclays/American Bus. Credit, Inc. v. Adams (*In re* Adams), 31 F.3d 389, 394 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 903, 130 L. Ed. 2d 786 (1995); Farouki v. Emirates Bank Int'l, Ltd. (*In re* Farouki), 14 F.3d 244, 249 n.17 (4th Cir. 1994); Beauboeuf v. Beauboeuf (*In re* Beauboeuf), 966 F.2d 174 (5th Cir. 1992); First Nat'l Bank of Gordon v. Serafini (*In re* Serafini), 938 F.2d 1156, 1157 (10th Cir. 1991).

[132]11 U.S.C. § 727(c)(1) (1994).

[133]*In re* Sebosky, 182 B.R. 912 (Bankr. M.D. Fla. 1995). Some courts allow attorney fees as an administrative expense under § 503(b) to a creditor that prosecutes an objection to discharge. *In re* Zedda, 169 B.R. 605 (Bankr. E.D. La. 1994); Jacobson v. Reese Speece Properties, Inc. (*In re* Speece), 159 B.R. 314 (Bankr. E.D. Cal. 1993); *In re* Rumpza, 54 B.R. 107 (Bankr. D.S.D. 1985); Johnson Mem'l Hosp. v. Hess, 44 B.R. 598, 600 (W.D. Va. 1984); *In re* George, 23 B.R. 686, 687 (Bankr. S.D. Fla. 1982) (trustee was awarded fees of $330, the trustee's attorney, $2,000, and the creditor's attorney, $1873 plus $486 in costs; the funds in the estate were $4970).

There is a split in the cases on whether prior court approval is required for an award of fees. Some cases hold that such approval is not required. *E.g., Zedda*, 169 B.R. 605. However, other courts deny fees in the absence of such approval. *In re* Lagasse, 228 B.R. 223 (Bankr. E.D. Ark. 1998); *In re* Monahan, 73 B.R. 543 (Bankr. S.D. Fla. 1987); *In re* Romano, 52 B.R. 590 (Bankr. M.D. Fla. 1985); *In re* Spencer, 35 B.R. 280 (Bankr. N.D. Ga. 1983); Lazar v. Casale (*In re* Casale), 27 B.R. 69 (Bankr. E.D.N.Y. 1983); *In re* Johnson, 72 B.R. 115, 118 (Bankr. E.D.N.C. 1987) ("The reason for a rule prohibiting compensation for unauthorized services is to enable the court to maintain control of costs and to insure that estate assets are not wasted. Duplication of services between a creditor and the trustee or a creditors' committee is to be avoided. By asking for prior approval to bring a complaint, a creditor provides the trustee with an opportunity to indicate whether he is willing and able to pursue the action in question." (citations omitted)). One court requiring prior approval granted that approval nunc pro tunc and allowed fees to the creditor's attorney for objecting to the debtor's discharge. *In re* Antar, 122 B.R. 788 (Bankr. S.D. Fla. 1990).

[134]11 U.S.C. § 704(6) (1994).

[135]As observed in note 85, *supra*, all of the chapter 7 cases in this study were no asset cases.

"It may be true that the cost of opposing a discharge may be too great to make opposing a discharge 'advisable,' particularly where all creditors are given notice of the trustee's dilemma but not a single one shows interest in helping the trustee deal with the problem of costs." Moister v. Vickers (*In re* Vickers), 176 B.R. 287, 289 (Bankr. N.D. Ga. 1994)

See also Jacobson v. Robert Speece Properties, Inc. (*In re* Speece), 159 B.R. 314, 322 n.12 (Bankr. E.D. Cal. 1993) ("The realities are that trustees commonly take a back seat when a creditor objects to discharge in order to conserve resources[.]"); Mary Jo Heston, *The United States Trustee: The Missing Link of*

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trustee has assets, allocating them to opposing the debtor's discharge may well reduce the dividend to creditors.[136] The United States Trustee rarely objects to the discharge, probably as a matter of resource allocation and prioritization within that program.[137] As a result, this remedy is of little value in motivating more accurate schedules in consumer chapter 7 cases.[138]

C. Denial or Limitation of the Debtor's Exemptions in Chapter 7

The inadequate disclosure of a debtor's assets in chapter 7 may result in

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Bankruptcy Crime Prosecutions, 6 Am. Bankr. Inst. L. Rev. 359, 361 (1998) ("Bankruptcy trustees are often unable to thoroughly investigate estates where there are no readily accessible assets available to fund the costs of administration." (footnote omitted)); Ralph C. McCullough II, *Bankruptcy Fraud: Crime Without Punishment II*, 102 Com. L.J. 1, 12 (1997) ("In these 'no asset' cases, the trustee, who represents the unsecured creditors, does not see the ability to recover money for them, and he sends the bankruptcy case through with little questioning; not necessarily because the trustee doesn't wish to bother with the case, with the tremendous demands on his time, rather it is simply impossible for him to do so.") Hon. Jim D. Pappas, *We've Got to Stop Meeting Like This*, 14-SEP Am. Bankr. Inst. J. 35, 35 (September, 1995) ("As a practical matter, these 'meetings' are a joke. Depending upon the local practice, 10 or more meetings are scheduled per hour, guaranteeing that no meaningful examination of the debtor occurs." (footnote omitted)).

"If the trustee has information that would support an objection to discharge but deems such an action inadvisable, the trustee should promptly bring such facts to the attention of the United States Trustee." United States Department of Justice, Executive Office for United States Trustees, Handbook for Chapter 7 Trustees, pp. 6-9 (effective October 1, 1998).

[136]*See, e.g.*, *In re* Arnold, 162 B.R.775 (Bankr. E.D. Mich. 1993) (awarding trustee's counsel fees of $4053.75 from the estate for prosecuting an unsuccessful objection to discharge); *In re Kearns*, 162 B.R. 10 (Bankr. D. Kan. 1993) (awarding trustee's attorney fees of $6561.75 to pursue objection to discharge; estate had funds of $1347.65).

The trustee's economic disincentive to pursue an objection to discharge is further exacerbated by the public policy against settling an objection to discharge claim upon the debtor's payment of money. *See Vickers*, 176 B.R. at 290 ("Discharges are not property of the estate and are not for sale. It is against public policy to sell discharges. Selling discharges would be a disease that would attack the heart of the bankruptcy process, its integrity." (citation omitted)); *In re* Moore, 50 B.R. 661, 664 (Bankr. E.D. Tenn. 1985) ("Under no circumstances, not even where the intent is innocent, may a debtor purchase a repose from objections to discharge. A discharge in bankruptcy depends on the debtor's conduct; it is not an object of bargain."). *See also In re* Wilson, 196 B.R. 777, 778-79 (Bankr. N.D. Ohio 1996); *Jacobson*, 159 B.R. 314.

But see In re Bates, 211 B.R. 338, 348 (Bankr. D. Minn. 1997) ("[T]he proposed settlement represents an attempt by the Trustee to act in the best interests of the estate by limiting the estate's exposure to the risks and expenses of trial in the face of an uncertain outcome."); *In re* Mavrode, 205 B.R. 716 (Bankr. D.N.J. 1997).

Whatever the merits of these considerations, it must also be recognized that a trustee's incentive to file an objection to discharge might well be impaired if the trustee will not be permitted to settle it and must either take it to trial or seek to dismiss it.

[137]Nothing in the United States Department of Justice, United States Trustee Manual, volume 1 (August 1988) or volume 2 (October 1996), addresses the circumstances under which the United States Trustee will object to a debtor's discharge.

[138]In 1998 in the Eastern District of Michigan, in 20,905 consumer chapter 7 cases, 108 objections to discharge were filed (0.5%). These objections to discharge were not further analyzed to determine the number that alleged false oath under § 727(a)(4) or concealment of property under § 727(a)(2).

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denying or limiting the debtor's exemptions, but only if accompanied by bad faith, concealment, fraud, abuse of process or intention to deceive.[139] In the absence of such circumstances, the court will permit the debtor to amend the schedules to exempt any omitted property.[140] Moreover, the focus of the exemption issue is strictly upon asset disclosure, while the problems observed in the study involved many other disclosure obligations. Also, exemption issues are much less significant in chapter 13 cases.[141] Accordingly, like the

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[139]Payne v. Wood, 775 F.2d 202, 205 (7th Cir. 1985); *In re* Montanez, 233 B.R. 791, 796 (Bankr. E.D. Mich. 1999); *In re* Barber, 223 B.R. 830, 833 (Bankr. N.D. Ga.1998); *In re* Stinson, 221 B.R. 726, 728 (Bankr. E.D. Mich. 1998); *In re* Lundy, 216 B.R. 609, 610 (Bankr. E.D. Mich. 1998); *In re* Schachter, 214 B.R. 767, 778 (Bankr. E.D. Pa. 1997); *In re* St. Angelo, 189 B.R. 24, 26 (Bankr. D.R.I. 1995); *In re* Markmueller, 165 B.R. 897, 900 (Bankr. E.D. Mo. 1994), *order corrected*, 167 B.R. 899 (Bankr. E.D. Mo. 1994), *aff'd*, 51 F.3d 775 (8th Cir. 1995); *In re* Mohring, 142 B.R. 389 (Bankr. E.D. Cal. 1992), *aff'd*, 153 B.R. 601 (B.A.P. 9th Cir. 1993), *aff'd without op.*, 24 F.3d 247 (9th Cir. 1994) (unpublished table decision); B.K. Medical Sys., Inc. Pension Plan v. Roberts (*In re* Roberts), 81 B.R. 354, 360 (Bankr. W.D. Pa. 1987); *In re* Wenande, 107 B.R. 770 (Bankr. D. Wyo. 1989).

Exemptions may be limited in value due to inadequate disclosure. *In re* Doyle, 209 B.R. 897, 902 (Bankr. N.D. Ill. 1997) ("The Schedules filed in this case are illustrative of the problems resulting from hasty and incomplete draftsmanship - inadequately detailed information which effectively precludes the Trustee, the creditors, and the Court from learning what the Debtors' assets really are, especially what is being properly claimed exempt."). Ambiguities in the claim of exemption may be construed against the debtor. Addison v. Reavis, 158 B.R. 53, 59 (E.D. Va. 1993), *aff'd sub nom.*, *In re* Grablowsky, 32 F.3d 562 (4th Cir. 1994); Anislie v. Grablowsky (*In re* Grablowsky), 149 B.R. 402, 406 (Bankr. E.D. Va. 1993); *In re* Mohring, 142 B.R. 389 (Bankr. E.D. Cal. 1992).

See also 11 U.S.C. § 522(g)(1) (1994), which permits the debtor to exempt property recovered by the trustee, but only if the transfer of the property was neither voluntary nor concealed by the debtor. Glass v. Hitt (*In re* Glass), 60 F.3d 565, 568 (9th Cir. 1995); Sherk v. Texas Bankers Life & Loan Ins. Co. (*In re* Sherk), 918 F.2d 1170, 1176 (5th Cir. 1990); Simonson v. First Bank of Greater Pittston (*In re* Simonson), 758 F.2d 103, 106 (3rd Cir. 1985); Redmond v. Tuttle, 698 F.2d 414 (10th Cir. 1983); Trujillo v. Grimmett (*In re* Trujillo), 215 B.R. 200, 204-05 (B.A.P. 9th Cir. 1997), *aff'd*, 166 F.3d 1218 (9th Cir. 1998).

The party objecting to the exemption has the burden of proof. FED. R. BANKR. P. 4003(c).

[140]Doan v. Hudgins (*In re* Doan), 672 F.2d 831, 833 (11th Cir. 1982); *In re* Martin, 205 B.R. 145, 146 (Bankr. E.D. Ark. 1997), *aff'd*, 213 B.R. 574 (E.D. Ark. 1997), *rev'd on other grounds*, 140 F.3d 806 (8th Cir. 1998); *In re* Williams, 197 B.R. 398, 403-04 (Bankr. M.D. Ga. 1996); *In re* Brown, 178 B.R. 722, 728 (Bankr. E.D. Tenn. 1995); *In re* Corbi, 149 B.R. 325, 330 (Bankr. E.D.N.Y. 1993); *In re* Gaudet, 109 B.R. 548, 549 (Bankr. D.R.I. 1989); Jones v. Burgess (*In re* Burgess), 1 B.R. 421, 426 (Bankr. M.D. Tenn. 1979).

[141]Exemptions, which are set forth in § 522(d) and state law, apply in both chapter 7 and chapter 13. 11 U.S.C. § 103(a) (1994); *In re* Schnabel, 153 B.R. 809, 817 (Bankr. N.D. Ill. 1993). However, in chapter 13 cases, their significance is "greatly diminished." 11 U.S.C. § 103(a) (1994). In chapter 13, the debtor is permitted to keep all assets, exempt or not. *In re* Cornelius, 195 B.R. 831, 835 (Bankr. N.D.N.Y. 1995); *In re* Mitchell, 80 B.R. 372, 380 (Bankr. W.D. Tex. 1987) ("On confirmation of the plan, all the property of the debtor, whether claimed exempt or not, will belong to the debtor, and upon completion of the plan, the debtor and all of his or her unencumbered property will be discharged from creditors' claims. *See* 11 U.S.C. §§ 1327(b), 1328(a). The *raison d'etre* for objecting to a debtor's exemption claims thus evaporates in a chapter 13 case"). Exemptions under chapter 13 are only informational. *In re* Morris, 48 B.R. 313, 314 (W.D. Va. 1985). Exemptions are listed in chapter 13 only to permit the court to determine in confirming the plan that the creditors receive more under the plan than they would in a chapter 7 liquidation, pursuant to § 1325(a)(4) (1994). Armstrong v. Lindberg (*In re* Lindberg), 735 F.2d 1087, 1089 (8th Cir.), *cert. denied*, 469 U.S. 1073, 105 S. Ct. 566, 83 L. Ed. 2d 507 (1984). *See also In re* Edwards, 105 B.R. 10, 11 (Bankr. W.D. Va. 1989).

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remedies previously reviewed, this remedy does not address the problems observed in the study.

D. Denial or Reduction of Fees for Debtor's Attorney

11 U.S.C. § 329(b) allows the bankruptcy court to order the return of any payment to the debtor's attorney, or cancel any fee agreement, if the compensation exceeds the reasonable value of the attorney's services. In a few reported cases, courts have reduced or denied fees for consumer debtor attorneys due to inaccurate or incomplete disclosures in the bankruptcy papers.[142] However, nothing suggests that this remedy has been used on a regular basis to address problems in debtors' papers.

E. Monetary Sanctions Under Bankruptcy Rule 9011

On December 1, 1997, major changes took effect in Bankruptcy Rule 9011. Previously, the rule provided that the bankruptcy court could sanction a party for signing and filing any paper that was not well grounded in fact "to the best of the party's knowledge, information and belief, formed after a reasonable inquiry."[143] If the debtor's initial bankruptcy papers violated this rule, the debtor could be sanctioned.[144] However, the debtor's attorney was excused from the requirement to sign the schedules or the statement of financial affairs, and was not ordinarily subject to sanctions under this rule.[145]

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[142]Matter of Geraci, 138 F.3d 314, 318 (7th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 63, 142 L. Ed. 2d 50 (1998) (The attorney's performance was "not up to a level that [the bankruptcy court] sees from the majority of practitioners who regularly appear before it.") (quoting from *In re* Chellino, 209 B.R. 106, 120-21 (Bankr. C.D. Ill. 1996)); Slaton v. Raleigh, 1998 WL 684210 (N.D. Ill. 1998); Bill Parker & Assocs. v. Flatau (*In re* Rainwater), 124 B.R. 133, 139 (M.D. Ga.,1991), *aff'd*, 943 F.2d 1318 (11th Cir. 1991) (conflicting information in schedules); *In re* Woodward, 229 B.R. 468, 476 (Bankr. N.D. Okla. 1999) (failure to disclose fee paid and undervaluing asset); *In re* Barber, 223 B.R. 830, 834 (Bankr. N.D. Ga. 1998) (failure to disclose debtor's personal injury claim); *In re* Ludwick, 185 B.R. 238, 244 (Bankr. W.D. Mich. 1995) (attorney's forgery of the debtor's signature); *In re* Corbett, 145 B.R. 332 (Bankr. M.D. Fla. 1992) (having clients sign forms in blank); *In re* Bennett, 133 B.R. 374, 378-79 (Bankr. N.D. Tex. 1991) (undisclosed retainer); *In re* Dalton, 95 B.R. 857, 860 (Bankr. M.D. Ga. 1989), *aff'd*, 101 B.R. 820 (M.D. Ga. 1989) (false statement of compensation).

[143]Fed. R. Bankr. P. 9011 (prior to December 1, 1997 amendment).

[144]Caldwell v. Unified Capital Corp. (*In re* Rainbow Magazine, Inc.), 77 F.3d 278, 282 (9th Cir. 1996) (debtor's principal sanctioned $45,000 for filing a false statement of financial affairs); Stuebben v. Gioioso (*In re* Gioioso), 979 F.2d 956 (3rd Cir. 1992) (explaining that sanctions must be awarded for bad faith opposition to motion for summary judgment on claim of intentional omission of assets); *In re* Famisaran, 224 B.R. 886, 893 (Bankr. N.D. Ill. 1998); *In re* Graffy, 233 B.R. 894 (Bankr. M.D. Fla. 1999) (awarding sanctions against the debtor under Rule 9011 and the inherent power of the court under § 105(a)); *In re* Eatman, 182 B.R. 386, 396 (Bankr. S.D.N.Y. 1995); Railroad Center v. Thompson (*In re* Thompson), 165 B.R. 30, 32-33 (Bankr. M.D. Tenn. 1994). *But see In re* Smith, 143 B.R. 912, 914 (Bankr. D. Neb. 1992) (refusing to impose sanctions against debtors for claiming property as exempt in bankruptcy schedules without any legal basis, because "mistake in bankruptcy schedules was due to admitted error of counsel").

[145]McGarhen v. First Citizens Bank & Trust Co. (*In re* Weiss), 111 F.3d 1159, 1170 (4th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 369, 139 L. Ed. 2d 287 (1997); Cohn v. United States Trustee (*In re* Ostas), 158 B.R. 312, 319 (N.D.N.Y. 1993); *In re* Palumbo Family Ltd. Partnership, 182 B.R. 447, 475-76

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Nevertheless, on occasion, courts did impose sanctions against attorneys.[146] In several cases, joint liability was imposed.[147] However, in several cases involving inaccurate schedules, courts refused to impose sanctions under this rule.[148]

The amended rule effects four substantial changes.[149] First, although the debtor's attorney is still excused from the signing requirement, the new rule provides that the act implicating the legal responsibility for a paper is presenting the paper to the court, whether by signing, filing, submitting or later advocating it.[150] Second, the new certification that is triggered upon presentation of the paper is that to the best of that person's knowledge, information and belief, "the allegations and other factual contentions have evidentiary support."[151] This may well be interpreted to require a greater standard of prefiling inquiry than the "well grounded in fact" standard of the old rule. Thus, taken together, these two changes appear to place on a debtor's attor-

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(Bankr. E.D. Va. 1995); *In re* Eatman, 182 B.R. 386, 396 (Bankr. S.D.N.Y. 1995); *In re* Remington Dev. Group, Inc., 168 B.R. 11, 15 (Bankr. D.R.I. 1994); Barnett Bank of Tampa, N.A. v. Muscatell (*In re* Muscatell), 116 B.R. 295, 298 (Bankr. M.D. Fla. 1990); *In re* Alderson, 114 B.R. 672, 677 (Bankr. D.S.D. 1990). *See also In re* Saturley, 131 B.R. 509, 518-19 (Bankr. D. Me. 1991) ("The Chapter 7 debtor's attorney, although not without obligations regarding the truthfulness and accuracy of documents filed by or on behalf of his client, is specifically relieved of the requirement that he or she sign, and thereby certify, the debtor's schedules.").

In *Eatman*, 182 B.R. at 396, the court concluded that although sanctions against the attorney were not appropriate under Rule 9011, the attorney should be sanctioned under 11 U.S.C. § 105 and 28 U.S.C. § 1927. *See also* White v. Mitchell (*In re* Hardee), 165 F.3d 18 (4th Cir. 1998) (unpublished table decision available at 1998 WL 766699).

[146]*In re* Moix-McNutt, 220 B.R. 631, 636 (Bankr. E.D. Ark. 1998); *In re* Cossey, 172 B.R. 597, 601 (Bankr. E.D. Ark. 1994); *In re* Ridner, 102 B.R. 247, 249-50 (Bankr. W.D. Okla. 1989); *In re* Smith, 143 B.R. 912, 914 (Bankr. D. Neb. 1992) ("The fact that [debtor's] counsel does not sign bankruptcy schedules does not provide a justification for counsel to assume the position of ostrich, head buried in the sand, while client claims exemptions unsupported by law. . . . If claimed exemptions are not supported by law, counsel is subject to sanctions."); Iannacone v. Hill (*In re* Hill), 39 B.R. 599, 601 (Bankr. D. Minn. 1984) (the debtor's attorney was sanctioned $1000 for claiming improper exemptions on schedule C; the court also relied on 28 U.S.C. § 1927).

[147]Estate of Perlbinder v. Dubrowsky (*In re* Dubrowsky), 206 B.R. 30, 36 (Bankr. E.D.N.Y. 1997); *In re* Armwood, 175 B.R. 779, 788 (Bankr. N.D. Ga. 1994); *In re* Pasko, 97 B.R. 913, 918 (Bankr. N.D. Ill. 1988); Snow v. Jones (*In re* Jones), 41 B.R. 263, 268 (Bankr. C.D. Cal. 1984). *See also* National Indem. Co. v. Proia (*In re* Proia), 35 B.R. 385, 388-89 (Bankr. D.R.I. 1983).

[148]In *In re Bove*, 29 B.R. 904 (Bankr. D.R.I. 1983), the petition and schedules contained significant omissions and misstatements, but the court declined to hold the debtors in contempt or to impose monetary sanctions against the debtors, because the capacity and general awareness of one debtor was diminished and she bore none of the responsibility, and the misrepresentations made by the other debtor were induced partly by the principal of a consumer credit organization, probably on behalf of an attorney, and no action was sought against the principal of the credit counseling firm or the attorney.

[149]FED. R. BANKR. P. 9011. *See* Arnold M. Quittner, *Current Developments in Bankruptcy and Reorganization: Employment and Compensation of Appointed Professionals*, 788 PRAC. L. INST./COM. L. & PRAC. COURSE HANDBOOK SERIES 561, 971 (1999).

[150]FED. R. BANKR. P. 9011(b).

[151]FED. R. BANKR. P. 9011(b)(3).

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ney substantial new responsibilities for the debtor's schedules and statement of financial affairs.[152]

The third change is that generally, a motion for sanctions under the rule must be served twenty-one days before filing, to give a "safe harbor" opportunity to correct the alleged deficiency.[153]

The fourth change is that even if a violation of the rule is found, the imposition of sanctions is now discretionary, not mandatory.[154]

Even though the debtor's attorney now bears responsibility for the schedules and statement of financial affairs, it is unlikely that Rule 9011, as amended, will have any substantial impact on the problems of incomplete and careless schedules. Even when the rule mandated sanctions for a violation, bankruptcy courts were reluctant to do so unless the circumstances were outrageous.[155] Further, as noted, the imposition of sanctions is now explicitly discretionary.[156]

F. Administrative Sanctions Against the Debtor's Attorney

In extraordinary circumstances, the court may respond more severely. For example, in *In re Ludwick*, the bankruptcy court suspended debtor's attorney from practice for two years for forging the debtor's signature on the petition and lying about it to the court.[157] In *O'Connell v. Mann (In re Davila)*, an attorney representing chapter 13 debtors was denied fees in one

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[152]"The new Rule 9011, which requires attorneys to make reasonable inquiry into the accuracy of the information being provided to the courts, will remind lawyers that they serve as gatekeepers for the truth." *The Commission's Consumer Bankruptcy Recommendations*, Consumer Bankruptcy News, November 20, 1997, at 3. The Bankruptcy Review Commission actually recommended making Rule 9011 explicit that "an attorney's responsibility to make a reasonable inquiry into the accuracy of information extends to the bankruptcy schedules, statement of affairs, lists and amendments." Commission Report, *supra* note 2, at 113.

[153]Fed. R. Bankr. P. 9011(c)(1)(A). *See In re* Russ, 218 B.R. 461, 468 (Bankr. D. Minn. 1998), *aff'd*, 221 B.R. 237 (B.A.P. 8th Cir. 1998) (denying a motion under Bankruptcy Rule 9011 due to the moving party's failure to comply with the new safe harbor provisions); *In re* Smith, 230 B.R. 437, 440-41 (Bankr. N.D. Fla. 1999).

See also In re Melendez, 235 B.R. 173, 201 n.24 (Bankr. D. Mass. 1999) (the "safe harbor" provision does not apply when the court initiates the sanctions issue); H.J. Rowe, Inc. v. Spiegel (*In re* Talon Holdings, Inc.) 1999 WL 150337 at *3 (Bankr. N.D. Ill. 1999) (the "safe harbor" provision does not apply to the petition itself under Rule 9011(c)(1)(A)).

[154]"If . . . the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction . . ." Fed. R. Bankr. P. 9011(c).

[155]Nathalie D. Martin, *Fee Shifting in Bankruptcy: Deterring Frivolous, Fraud-Based Objections to Discharge*, 76 N.C. L. Rev. 97, 147 (1997) ("Bankruptcy courts still are reluctant to impose sanctions under Rule 9011 unless the behavior in question is truly outrageous and not just ignorant.").

[156]*See supra* note 154.

[157]185 B.R. 238 (Bankr. W.D. Mich. 1995). *See also* D. H. Overmyer Co., Inc. v. Robson, 750 F.2d 31, 33 (6th Cir. 1984) ("The bankruptcy court has both statutory and inherent authority to deny [an attorney] the privilege of practicing before it."); Peugeot v. Unites States Trustee (*In re* Crayton), 192 B.R. 970 (B.A.P. 9th Cir. 1996); *In re* Moix-McNutt, 220 B.R. 631 (Bankr. W.D. Ark. 1998) (suspending debtor's attorneys for four years in part for filing false and misleading schedules.); *In re* Nesom, 76 B.R. 101 (Bankr.

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hundred fifty-five cases and suspended from practice for failing to support the fees, for inaccurate and incomplete disclosures, and for incompetent and inadequate representation.[158] In *In re Brantley*, the court found that the schedules prepared by the debtor's attorney were inaccurate and warned the attorney that if the conduct continued in future cases, the court would recommend a hearing on suspension from practice.[159] Nevertheless, disciplinary actions against bankruptcy attorneys are rare.[160]

G. LEGAL MALPRACTICE CLAIMS

A debtor who suffers injury from an attorney's improper or inadequate advice in preparing the bankruptcy papers may assert a claim for legal malpractice.[161] However, several legal and practical obstacles explain why this remedy does not address systemic problems with bankruptcy papers. First, a substantial majority of courts have concluded that because the debtor must have known of any problems with the papers before they were filed, the malpractice claim accrued prepetition and is therefore property of the bankruptcy estate under 11 U.S.C. § 541(a)(1).[162] In these circumstances, the trustee is the only proper party to pursue the claim,[163] but may not have the

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N.D. Tex. 1987) (suspending debtor's attorney from practice for sixty days for forging the debtor's signatures on the initial bankruptcy papers).

[158]210 B.R. 727 (Bankr. S.D. Tex. 1996).

[159]84 B.R. 508 (Bankr. S.D. Ohio 1988).

[160]*See* Maggs, *supra* note 127, at 28:

> Disciplinary actions against bankruptcy attorneys, however, seldom occur for two reasons. First, state bars and federal law enforcement agencies have very limited resources. They learn about bankruptcy fraud mostly through referrals and they usually have more serious matters to address. Second, charges against attorneys may be difficult to prove. Merely showing that an attorney gave bad advice does not suffice; the prosecutor also must demonstrate, at a minimum, that the lawyer knew that advice was wrong. It is often difficult to obtain such evidence. (footnotes omitted.)

[161]*See, e.g.*, Wheeler v. Magdovitz (*In re* Wheeler), 137 F.3d 299 (5th Cir. 1998) (the debtor's claim for malpractice allegedly resulting in his bankruptcy fraud conviction accrued prepetition because the debtor should have known that his schedules concealed assets); *In re* Tomaiolo, 205 B.R. 10 (Bankr. D. Mass. 1997) (relying on Segal v. Rochelle, 382 U.S. 375, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966)); *In re* J.E. Marion, Inc., 199 B.R. 635 (Bankr. S.D. Tex. 1996); Haaland v. Corporate Management, Inc., 172 B.R. 74 (S.D. Cal. 1989); Ellwanger v. Budsberg (*In re* Ellwanger), 140 B.R. 891 (Bankr. W.D. Wash. 1992); Jones v. Hyatt Legal Servs. (*In re* Dow), 132 B.R. 853 (Bankr. S.D. Ohio 1991). *See generally* Barry K. Tagawa, *Collection and Bankruptcy Practice: The Third Highest Area of Malpractice Exposure*, 3 No. 2 LEGAL MALPRACTICE REP. at 15 (1992) ("The most common category of errors alleged against collection and bankruptcy attorneys is 'failure to know or properly apply the law.'").

But see, Alvarez v. Johnson, Blakely, Pope, Bokor, Ruppel and Burns, P.A. (*In re* Alvarez), 228 B.R. 762 (Bankr. M.D. Fla. 1998); Swift v. Seidler (*In re* Swift), 198 B.R. 927 (Bankr. W.D. Tex. 1996), *aff'd sub nom.*, State Farm Life Ins. Co. v. Swift, 129 F.3d 792 (5th Cir. 1997); Collins v. Federal Land Bank of Omaha, 421 N.W.2d 136, 139-40 (Iowa 1988).

[162]*See supra* note 161 and cases cited therein.

[163]*Id.*

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resources or motivation to do so.

Second, if, as the majority of courts hold, the debtor who claims malpractice either knew or should have known of any problems with the papers, it would seem that an attempt to fault the attorney for the subsequent consequences may not succeed.[164] This might be especially so when the consequences were imposed based on a judicial finding of the debtor's fraudulent intent, such as would be necessary for a criminal conviction for bankruptcy fraud[165] or denial of the discharge.[166]

Third, the estate's recovery on the debtor's legal malpractice claim may result in a windfall, because the estate may have actually benefitted from the malpractice.[167] The prospect of a windfall might impair the viability of the claim.

Addressing the malpractice remedy for consumer debtors, one bankruptcy judge recently lamented:

> To operate "profitably" in this area, a consumer debtors' lawyer has to do a high volume business. So if a court suspects that a chapter 7 lawyer ineffectively represents a client in one case, that level of poor performance is likely to affect many other clients. The most frustrating aspect of this judicial position is opening case files on a daily basis and discovering clients who are not effectively represented by their lawyers. A bankruptcy court should not adopt an existential posture by wryly or sadly observing: if a chapter 7 debtor suffers from malpractice, then tort remedies are available to that victim. Many chapter 7 debtors, in fact, never discover that their attorneys have committed malpractice.[168]

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[164]"If it is truly the debtor who is attempting to take advantage of the bankruptcy system, then the debtor's chances of recovering against his professionals are slim." Swift v. Seidler (*In re* Swift), 198 B.R. 927, 938 (Bankr. W.D. Tex. 1996).

[165]*See, e.g.*, Wheeler v. Magdovitz (*In re* Wheeler), 137 F.3d 299 (5th Cir 1998); *In re* Tomaiolo, 205 B.R. 10 (Bankr. D. Mass. 1997).

[166]*Swift*, 198 B.R. at 937.

[167]As the court stated in *Swift*, 198 B.R. at 937:

> Assuming for the sake of argument that the Debtor's contentions are meritorious, i.e., that but for the negligence and breaches of the Defendants the debtor would have been able to successfully claim his IRA as exempt and would not have been denied his discharge, then the estate has actually benefitted from the alleged misconduct of the Defendants. Because of the alleged conduct of the Defendants, the IRA, which would otherwise have been the Debtor's exempt property, became property of the estate and subject to the claims of the Debtor's creditors. The Debtor's creditors also benefitted, allegedly because of the Defendants' actions, in that the Debtor remains personally liable to them for the full amount of their claims since his discharge was denied.

[168]*In re* Bruzzese, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997).

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H. CRIMINAL REFERRAL AND PROSECUTION

Under 18 U.S.C. § 152,[169] knowingly and fraudulently omitting assets from bankruptcy papers is a crime.[170] When there is reasonable cause to believe that a bankruptcy crime has been committed, 18 U.S.C. § 3057(a) authorizes the bankruptcy judge or the trustee to refer the case to the United States Attorney for investigation and prosecution.[171] The United States

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[169]18 U.S.C. § 152 provides in pertinent part:

> A person who–
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> . . .
>
> (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
>
> (3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;
>
> . . .
>
> shall be fined under this title, imprisoned not more than 5 years, or both.

[170]United States v. Mohamed, 161 F.3d 1132, 1136 (8th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1345, 143 L. Ed. 2d 508, (1999) (the act of concealing assets when filing a bankruptcy petition suffices to warrant a two-level sentencing enhancement for violation of judicial process, due to increased culpability when the defendant conceals assets from bankruptcy court officers and thus hinders the bankruptcy process); United States v. Hernandez, 160 F.3d 661 (11th Cir. 1998); United States v. Holland, 160 F.3d 377 (7th Cir. 1998); United States v. Guthrie, 144 F.3d 1006, 1010 (6th Cir. 1998); United States v. Sheinbaum, 136 F.3d 443 (5th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1808, 143 L. Ed. 2d 1011 (1999); United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997).

See also United States v. Willey, 57 F.3d 1374 (5th Cir.), *cert. denied*, 516 U.S. 1029, 116 S. Ct. 675, 133 L. Ed. 2d 524 (1995); United States v. West, 22 F.3d 586, 589 n.8 (5th Cir.), *cert. denied*, 513 U.S. 1020, 115 S. Ct. 584, 130 L. Ed. 2d 498 (1994); United States v. Hubbard, 16 F.3d 694 (6th Cir. 1994), *rev'd on other grounds*, 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995) (the court of appeals upheld convictions under 18 U.S.C. § 152; the Supreme Court reversed other convictions under 18 U.S.C. § 1001); Tamara Ogier & Jack F. Williams, *Bankruptcy Crimes and Bankruptcy Practice*, 6 AM. BANKR. INST. L. REV. 317 (1999); Craig Peyton Gaumer, *Bankruptcy Fraud: Crime And Punishment*, 43 S.D. L. Rev. 527 (1998).

Debtors' attorneys are also subject to prosecution. *See, e.g.*, United States v. Webster, 125 F.3d 1024 (7th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 698, 139 L. Ed. 2d 642 (1998); United States v. Dolan, 120 F.3d 856 (8th Cir. 1997); United States v. Smithson, 49 F.3d 138 (5th Cir. 1995); United States v. Edgar, 971 F.2d 89 (8th Cir. 1992); United States v. Brown, 943 F.2d 1246 (10th Cir. 1991); United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991).

[171]*See* Seidel v. Durkin (*In re* Goodwin), 194 B.R. 214, 223 (B.A.P. 9th Cir. 1996); *In re* Famisaran, 224 B.R. 886 (Bankr. N.D. Ill. 1998); State Bank of India v. Kaliana (*In re* Kaliana), 207 B.R. 597 (Bankr. N.D. Ill. 1997); *In re* Holder, 207 B.R. 574 (Bankr. M.D. Tenn. 1997); *In re* Lewis, 51 B.R. 353 (Bankr. E.D.N.Y. 1985); Flushing Sav. Bank v. Parr (*In re* Parr), 13 B.R. 1010 (E.D.N.Y. 1981).

18 U.S.C. § 3057 (1985) provides:

> (a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

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Trustee has similar authority.[172] Again however, the threat of criminal prosecution is too remote to be effective in addressing the problems disclosed in this study.[173]

These kinds of negative reinforcements were not designed to address the problems of inaccurate and incomplete schedules in consumer cases, nor are they effective for that purpose. Indeed, the results of this paper demonstrate as much. Three reasons appear for this. First, these procedures are designed primarily to address intentional misconduct, rather than carelessness or inadvertence in completing the bankruptcy forms. Second, imposing these consequences on a debtor may be seen as too severe in such circumstances. Third, because the case is most likely a no asset case, the trustee probably does not have the resources in the case to hire counsel to initiate and pursue these remedies in court. Therefore, motivating more careful disclosures will require more creative responses.

VII. SUGGESTING SOME REMEDIES

This part will review some national and local responses that might be considered in addressing the problems revealed in this study, including: (a) revising the official forms and expanding their instructions; (b) creating

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> (b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

Several cases have concluded "that § 3057 was intended primarily as an administrative measure - a congressional directive to the district offices of the United States Attorneys to become more active in the prosecution of bankruptcy fraud cases." United States v. Filiberti, 353 F. Supp. 252, 253 (D. Conn. 1973) (citing congressional record). *See also* United States v. Laurenti, 581 F.2d 37 (2d Cir. 1978), *cert. denied*, 440 U.S. 958, 99 S. Ct. 1499, 59 L. Ed. 2d 771 (1979); *In re* Valentine, 196 B.R. 386 (Bankr. E.D. Mich. 1996).

See also Maureen A. Tighe, *A Guide to Making a Criminal Bankruptcy Fraud Referral*, 6 AM. BANKR. INST. L. REV. 409 (1999).

[172]28 U.S.C. § 586(a)(3)(F) (1993). *See* Heston, note 135 *supra*. *See also*, United States Department of Justice, LEGAL MANUAL FOR UNITED STATES TRUSTEES, volume 1, pages 91-93 (August 1988).

[173]Indeed, it is not clear that threat of prosecution even deters debtors intent on committing fraud. "In 1996, the Attorney General announced 'Operation Total Disclosure,' which resulted in the prosecution of 127 defendants for their involvement in 111 bankruptcy crimes between December 1995 and February 1996. After the initial fanfare associated with Operation Total Disclosure, the prosecution of bankruptcy crimes has slowed." Ogier & Williams, *supra* note 170, at 325-26 (footnote omitted). "[T]he vast majority of prosecutions occur in cases involving substantial sums of money, particularly egregious behavior, concealments, transfers or misrepresentations by the debtor and/or his attorney." *Id.* at 348. "The lack of prosecution means that there is little motivation for a dishonest debtor to sober up and not attempt to defraud his creditors." *Id.* at 349. "[P]rosecutions under § 152 itself are comparatively infrequent." McCullough, *supra* note 135, at 2. "[It is] incredible that out of nearly 883,457 bankruptcies filed in 1995, only one hundred fifty eight criminal complaints were filed." *Id.* at 41.

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local guidelines for completing the official forms; (c) creating inexpensive and expedited procedures in the bankruptcy court to resolve these issues concerning the completeness of the papers; and (d) creating continuing legal education opportunities for attorneys and paralegals for improving client interview skills and for understanding the legal requirements of the forms.[174]

The suggestions made in this part reflect the judgment that the problems of inadequate disclosure revealed in this study have two primary causes. First, the official forms are in legal language and are ambiguous. Second, debtors and their attorneys are insufficiently motivated to exercise the care necessary to complete the forms. These distinct causes will be discussed with potential remedies for them.

A. The Official Forms

1. *Issues Debtors Face in Completing the Forms*

The results of some of the test questions in this study can be explained, at least in part, by the interpretive issues that debtors and their attorneys face in completing the Official Forms:[175]

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[174]In an effort to address asset disclosure problems in bankruptcy, the Bankruptcy Review Commission recommended, "The Bankruptcy Code should direct trustees to perform random audits of debtors' schedules to verify the accuracy of the information listed." Commission Report, *supra* note 2, § 1.1.2, at 107. In expanding on the concept of audits, the Commission stated, "Information could be verified by the submission of recent to pay stubs, tax returns if available, and other similar documentation. Trustees would report material irregularities to the bankruptcy courts . . . Whether irregularities warrant revocation of discharge or criminal prosecution would be subject to the discretion of the parties and Department of Justice, as under current law." *Id.* at 109.

However, such audits would not address the problems identified in this study. Although auditing may be a useful tool in identifying concealed assets and transfers, and in discouraging fraud, the Commission proposes resolving such problems through the traditional processes and remedies. It offers no new remedies specific to the problems of careless and inadvertent omissions and inconsistencies identified in this study. *See* Gary Klein, *Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors*, 5 Am. Bankr. Inst. L. Rev. 293, 300-301 (1997) ("Audits would supplement Rule 9011, objections to discharge, complaints to determine dischargeability, good faith requirements, Rule 2004 examinations, creditor's meetings, dismissals for substantial abuse, and criminal sanctions as tools to root out fraud." (footnotes omitted)).

[175]Recognizing that the forms require interpretation, one court of appeals attempted to give debtors and their attorneys some guidance:

> It would be silly to require a debtor to itemize every dish and fork, even to list the electric knife separately from the crock pot. The necessary degree of specificity varies with the value of separate listings. The lower the value of the items, the less reason to identify each. But it does not follow that a generic listing always encompasses the low-value items within a category.
>
> . . .
>
> The debtor must furnish enough information to put the trustee on notice of the wisdom of further inquiry. The trustee, who protects the interests of the creditors, then may make a calculation of the benefits of more detailed listing in each case, and he may ask the bankruptcy court to require the debtor to do more.
>
> . . .

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Under what circumstances should a debtor estimate that funds will be available for distribution to creditors?[176]

Should the debtor determine whether the "nature of the debt" is consumer or business based on the preponderance of the number of debts, the preponderance of the amount of the debts or some other test?[177]

Should a debtor disclose all types of insurance, including health, dental, long term care, disability, home, renter, auto and life, or only insurance in which the debtor has some equity, such as whole life or prepaid insurance?[178]

Should a debtor disclose a pension interest even if it would not be property of the estate under 11 U.S.C. § 541(c)?[179]

Should a debtor disclose a month to month lease or other verbal rental arrangement?[180]

What detailed income and expense information should a debtor in business disclose?[181]

Should the debtor sign the schedules and statement of financial affairs within a fixed time, such as 15 days, before they are filed?[182]

Should the debtor disclose payments to secured creditors and on executory contracts, or only to unsecured creditors?[183]

> No bankrupt will itemize every possession; none should. Every bankrupt must do enough itemizing to enable the trustee to determine whether to investigate further[.]

Payne v. Wood, 775 F.2d 202, 205-07 (7th Cir. 1985).

Nevertheless, this standard for disclosing assets is too vague to provide any functional guidance to consumer debtors. Another court suggested an equally vague standard. "There are, however, no bright-line rules for how much itemization and specificity is required. What is required is reasonable particularization under the circumstances." *Mohring*, 142 B.R. 389, 395 (Bankr. E.D. Cal. 1992). The instructions on Official Bankruptcy Form 6 simply state, "[L]ist all personal property of the debtor of whatever kind" and, "if additional space is needed in any category, attach a separate sheet[.]"

[176]Official Bankruptcy Form 1, voluntary petition. As noted in the discussion on test question 16, *supra* at 673-74, this is a more acute problem in chapter 13 cases.

[177]*See supra* note 176. *See supra* test question 17, at 674.

[178]Official Bankruptcy Form 6, schedule B, line 9. *See supra* test question 4, at 666. Payne v. Wood, 775 F.2d 202 (7th Cir. 1985).

[179]Official Bankruptcy Form 1, schedule B, line 11. *See supra* test question 5, at 666-67. *See also* the conflicting decisions discussed *supra* note 56.

[180]Official Bankruptcy Form 1, schedule G. *See supra* test question 7, at 668.

[181]Official Bankruptcy Form 1, schedules I and J. *See supra* test question 8, at 668.

[182]Official Bankruptcy Forms 6 and 7. *See supra* test questions 18 and 19, at 675-76.

[183]Official Bankruptcy Form 7, statement of financial affairs, question 3. *See* question and text accompanying note 95.

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In addition to the issues specifically reviewed in this study, many other questions may arise in completing the official forms:

> How should the debtor disclose those matters that change often, or even daily, such as cash on hand and deposits in financial institutions?[184]
>
> How much detail is required in disclosing household goods?[185]
>
> How much detail is required in disclosing wearing apparel?[186]
>
> How much detail is required in disclosing information relating to unsecured creditors regarding the date the claim was incurred and the consideration for the claim, especially when the debt is on a credit card?[187]
>
> How should a debtor estimate current monthly income, especially when the debtor's hours and overtime are uncertain?[188]
>
> Should the debtor's disclosure of property held for another person include property of the minor children in the household?[189]

These are only examples of the issues that debtors and their attorneys face in attempting to respond to the legal requirements of filing bankruptcy. There may well be similar questions of interpretation for every disclosure requirement. Even regarding a matter as simple as prior names used by the debtor,[190] a question can arise about disclosing a prior corporate name that the debtor used. Or, concerning the disclosure of the debtor's social security number, a debtor may face an issue of whether to disclose an incorrect number attributed to the debtor by a creditor.

These and other difficulties with the official forms reviewed below can be addressed both nationally and locally.

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[184]Official Bankruptcy Form 6, schedule B, lines 1 and 2.

[185]Id., schedule B, line 4. *See, e.g.*, Payne v. Wood, 775 F.2d 202 (7th Cir. 1985); *Mohring*, *supra*, 142 B.R. at 395-96 ("The one thing that is certain about this debtor's lists and schedules is that the generic listing of 'household goods' worth $1,000 is incomplete and ambiguous. There is no description of the household goods; they are merely said to be 'at debtor's residence' and worth $1,000. This does not substantially comply with the requirements of Official Form 6. And it is not adequate to permit the trustee and creditors to determine whether the property is validly exempt.").

[186]Official Bankruptcy Form 1, schedule B, line 6.

[187]Id., schedule F.

[188]Id., schedule I.

[189]Official Bankruptcy Form 7, statement of financial affairs, question 14.

[190]Official Bankruptcy Form 1, voluntary petition.

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2. *National Remedies for the Official Forms*

Substantial consideration ought to be given to a complete overhaul of the Official Forms, for several purposes. First, plain English ought to be the primary goal.[191] Second, a multidisciplinary approach is necessary to assure that the language on the forms maximizes the chances that unsophisticated debtors will understand what is required.[192] Third, the diversity of the experiences and cultures of consumer debtors ought to be given special consideration, along with the potential impact of that diversity upon debtors' ability to meet the bankruptcy disclosure requirements.[193] Fourth, functional and organizational efficiencies within the forms should be incorporated.[194] Finally, the instructions accompanying the official forms should be expanded

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[191]Several definitions have been offered for "plain English" in legal writing. *See, e.g.*, CAL. GOV'T CODE § 11342(e) (West 1995) ("'Plain English' means language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English."). Another commentator lists the ten typical elements of plain English: (1) a clear, organized, easy-to-follow outline or table of contents, (2) appropriate captions or headings, (3) reasonably short sentences, (4) active voice, (5) positive form, (6) subject-verb-object sequence, (7) parallel construction, (8) concise words, (9) simple words and (10) precise words. George H. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 MICH. B.J. 945, 945 (1983). *See also*, Michael S. Friman, *Plain English Statutes: Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103 (1995) (reviewing the various statutory approaches to plain English and critiquing the various federal and state attempts to legislate it.); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333 (1987).

The Advisory Committee on Bankruptcy Rules has begun to address plain English considerations. The 1997 committee notes refer to plain English in connection with amended Form 9 (Notice of Bankruptcy Case, Meeting of Creditors, and Deadlines), amended Form 18 (Discharge of Debtor in a Chapter 7 Case), and new Form 20A (Notice of Motion or Objection). The suggestion here is to expand those considerations to the other forms.

[192]This approach could involve the sciences of linguistics, communication, sociology, psychology and survey research. This effort could also involve the Federal Judicial Center, the statutory purpose of which is "to further the development and adoption of improved judicial administration in the courts of the United States." 28 U.S.C. § 620(a) (1993).

[193]*See* Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to The Law's Marginalization of Outsider Voices*,103 DICK. L. REV. (1998); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. (1992).

[194]Presently, the organization of the official forms must create a struggle both for those who complete them and for those who review them after filing. For example, locating the pertinent information regarding a debtor's vehicle in a chapter 7 case now requires reference to *five* different papers: (1) schedule B for ownership and value, (2) schedule C for exemption, (3) schedule D for the secured debt on the vehicle, (4) the statement of intent regarding the debtor's intent to surrender the vehicle or reaffirm the debt, and (5) schedule J for payment on the debt if it is to be reaffirmed. The first four pieces of data could and should be disclosed in a combined format on a single schedule. Such organizational efficiencies would enhance the likelihood of complete and accurate disclosures, and would make it easier for trustees and creditors to review the information after it is filed.

In the same vein, consideration might be given to creating a national electronic filing form for the required bankruptcy disclosures. This electronic form could be used either for printing paper copies of the official forms or for electronic filing. Functionally, the electronic form could include barriers to the kinds of omissions and inconsistencies found in this study.

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and clarified as necessary.[195]

3. *Local Responses to the Problems with the Official Forms*

On the local level, representatives of all participants in the process, including bankruptcy judges, debtor attorneys, creditor attorneys, trustees and representatives of the United States Trustee's office, can come together to create a set of published guidelines for completing the Official Forms.[196] These guidelines would express local needs and expectations regarding the content and detail of the required disclosures on the bankruptcy papers, line by line as necessary. They would also supplement and clarify the presently inadequate instructions on the official forms.

As part of the process of creating local guidelines, the bar and the court might also consider creating a local client interview form that attorneys could

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[195]In *Payne*, 775 F.2d at 206, the court suggested that clarifying and simplifying the official forms is a national issue, not a local issue:

> [A] court may not announce a specific rule such as: "List separately each item that a trustee might think could be sold for $25 or more." When writing the bankruptcy code Congress had to choose between a specific set of rules, such as a $25 line of demarcation, and a more general standard. The code selects a standard rather than a rule, and a court may not reverse this choice just because the rule seems more easily administrable. The degree of specificity must be left in the charge of those who draft the bankruptcy schedules, and so far they have allowed many items to be lumped together for a single valuation.

[196]It appears that a few bankruptcy courts have adopted local rules establishing limited expectations for completing the official forms. *See* O'Connell v. Mann (*In re* Davila), 210 B.R. 727, 729 n.2 (Bankr. S.D. Tex. 1996) ("The Court notes that at least since 1989 the local rules of the Bankruptcy Courts for the Southern District of Texas have required a debtor's schedules to contain a detailed inventory of the debtor's assets with a separate valuation for each item."); *In re* Reid, 97 B.R. 472, 479 (Bankr. N.D. Ind. 1988) ("For guidance on specificity the parties should refer to the local rules of this court, which provide: 'When property of the debtor is claimed as exempt under applicable law, such property shall be adequately described and itemized in the schedules in the place provided therefore. General terms of description (i.e. 'automobiles,' 'common stock,' etc.) are not sufficiently descriptive.' Rules of the United States Bankruptcy Court for the Northern District of Indiana, Rule B-206[.]").

See also C.D. CAL. LBR 1002-1(c) ("If the petition fails to specify the chapter under which relief is being sought, the case will be deemed to have been filed under chapter 7. If the petition fails to specify whether it is a consumer or business case, it will be presumed to be a consumer case. If the petition fails to indicate the number of creditors or equity holders, or the amount of assets or debts, it will be presumed that the case falls in the smallest category of each."); D. MAINE LBR 4003-1 ("A debtor's claim of exemptions shall be specific and shall, as to each item or category of items claimed as exempt, designate by title, section and subsection, the statutory basis for the claim. Exempt assets need not be inventoried and valued item by item in every case. However, the schedules must disclose the debtor's exemption claims with meaningful particularity and the debtor must be prepared to provide detailed information regarding assets claimed as exempt at the meeting of creditors. In joint cases, exemptions claimed by each debtor shall be listed separately."); D.R.I. LBR 4003-1, (same); D.N.J. LBR 1007-1, ("In addition to the requirements of D.N.J. LBR 1002-1(a) in a joint petition, the assets and liabilities of each debtor shall be separately listed and tabulated on the schedules and statements under appropriately identified columns or entries. Joint assets and liabilities of the debtors shall be listed and tabulated as such, under appropriately identified columns or entries.").

The suggestion in the text is for substantially more extensive guidance.

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use with their clients on an optional basis. Such a local interview form would be designed to carry out the local guidelines and to facilitate accuracy in the completion of the Official Forms.

B. Remedies for The Lack of Care by Debtors and Their Attorneys

1. *The Lack of Care in Completing the Bankruptcy Papers*

The results of a majority of the test questions in this study cannot be attributed to ambiguities in the forms, but rather reflect insufficient care in completing the forms. This is certainly true regarding the results of several of the questions that tested for incomplete and inconsistent disclosures, such as:

> Did the debtor estimate whether assets will be available for distribution to creditors?[197]
> If married, did the debtor state who owns the property?[198]
> If renting, did the debtor disclose a security deposit?[199]
> If a joint petition, did the debtors state who owes the debts?[200]
> If intending to reaffirm debt, did the debtor include the expense for the monthly payments?[201]
> Did the debtor date the papers?[202]
> Did the debtor address all secured creditors in the § 521 statement of intent?[203]
> Did the fee disclosures of the debtor and the attorney agree?[204]

In addition, the study noted other errors that reflect inadequate care.[205]

2. *National Responses to the Lack of Care*

Consideration should be given to creating inexpensive and prompt judicial processes that would be available in these circumstances and that would

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[197]Official Bankruptcy Form 1, voluntary petition. *See supra* note 46 and accompanying question and text.

[198]Official Bankruptcy Form 6, schedules A and B. *See supra* test question 2.

[199]Official Bankruptcy Form 6, schedule B, line 3. *See supra* note 49 and accompanying question and text.

[200]Official Bankruptcy Form 6, schedules D, E and F. *See supra* note 58 and accompanying question and text.

[201]Official Bankruptcy Form 6, schedule J. *See supra* note 68 and accompanying question and text.

[202]Official Bankruptcy Forms 6 and 7, schedules and statement of financial affairs. *See supra* note 70 and accompanying question and text.

[203]Official Bankruptcy Form 8, statement of intent. *See supra* question and text accompanying note 73.

[204]Official Bankruptcy Form 7, statement of financial affairs, question 9; statement required by Fed. R. Bankr. P. 2016(b). *See supra* question and text accompanying note 78.

[205]*See* test questions 15 at p.672 (other fee disclosure errors) and 21 at p.677 (other errors).

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motivate consumer debtors and their attorneys to file complete and accurate bankruptcy papers. One suggestion is a new bankruptcy rule that would give the trustee or the United States Trustee the authority to file, without an attorney, a simple paper identifying the deficiencies in the debtor's papers. The filing of such a paper would then have the effect of placing a hold on the debtor's discharge.[206] This hold could then be released upon an order of the court obtained upon a motion filed by the debtor establishing that the papers have been remedied (or are not in need of remedy.) The court would then grant relief upon such terms as it deems just.

Thus, for example, if it appears to the trustee that the debtor has not disclosed, say, pension or insurance interests, the trustee could file a check-box form pleading identifying those deficiencies. That filing would then signal the court not to issue the discharge. The debtor would then be required to file an amended schedule B, and file either a motion or a stipulation to obtain an order permitting the discharge to be issued. In that process, the court could condition the order upon just terms, such as a reduction in attorney fees under § 329(a), or costs in favor of the trustee against either the debtor or the attorney as appropriate. If the court determines that the trustee's filing violated Bankruptcy Rule 9011, the court could impose sanctions under that rule.

Such a procedure would have several advantages. First, it would be inexpensive and prompt. Second, it would restore meaning to that part of the bankruptcy bargain that states that full disclosure by the debtor is a major condition of the discharge.[207] Third, the availability of such a simple process might strongly motivate the accurate and complete disclosures that the law requires in the first instance. Fourth, because the process could not be invoked by a creditor, it would protect the debtor against creditor harassment.[208]

Another suggestion is to create a specific process for the trustee, the United States Trustee or any party in interest to file a motion to compel the debtor to amend. This rule might further require the imposition of costs in

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[206]In Detroit, one mechanism that trustees occasionally use in these circumstances is to continue the meeting of creditors to give the debtor an opportunity to correct the deficiencies. Reportedly, this can be effective in motivating correction of the problem.

However, trustees are under a mandate from the United States Trustee program to close no asset cases promptly and are evaluated accordingly. HANDBOOK FOR CHAPTER 7 TRUSTEES, *supra* note 135, at 6-14 and 10-1; United States Department of Justice, UNITED STATES TRUSTEE MANUAL, volume 2, page 43-44 (October 1996). As a result of this unfortunate disincentive, a trustee may decide to conclude the reconvened meeting even if the problems with the papers have not been fully remedied.

Obviously, the United States Trustee would have to allow some leeway in this mandate for cases in which the trustee invokes the suggested new process.

[207]*See* Fidelity National Title Ins. Co. v. Franklin (*In re* Franklin), 179 B.R. 913, 927.

[208]This consideration is the basis for the current limitation permitting only the United States Trustee to bring a motion to dismiss for substantial abuse under § 707(b). *See supra* note 122.

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favor of the moving party if the court determines that the debtor's papers are deficient, and in favor of the debtor if the court determines otherwise. Such a process would have advantages similar to the first suggested process.

A final suggestion on the national level is for the United States Trustee program to focus on this issue, to make it a priority and to bring its resources to bear upon it.[209] Such a priority could give the trustee substantial support in dealing with this problem.

3. *Local Responses to the Lack of Care*

The focus of a local response to this problem should be specific educational opportunities for the debtor bar. The agenda for such education might include both a review of the legal requirements for disclosure in the initial papers, as supplemented by the local guidelines, and workshop opportunities to improve client interview skills.[210] These workshops might be modeled after the trial advocacy skills workshops offered to trial lawyers, which include demonstration and mock trial opportunities for the participants.[211] Thus, under supervision and with review by experienced attorneys or others, each participant would interview a mock debtor for the purpose of eliciting the disclosures necessary and required to complete the forms. The participants would then complete the bankruptcy forms for the "debtor," and this work product would be reviewed for accuracy and completeness.

This study demonstrates a disturbing disconnect between the declared law of consumer bankruptcy disclosure and the actual execution of that law in consumer cases. Most fundamentally, this disconnect can affect the administration of bankruptcy cases. Beyond that, it can trap unwary debtors in highly prejudicial ways. Finally, it tends to undermine the confidence of the parties and public in the bankruptcy process. Accordingly, further examination of this issue is warranted and important.

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[209]Presently, neither the HANDBOOK FOR CHAPTER 7 TRUSTEES, *supra* note 135, nor the UNITED STATES TRUSTEE MANUAL, *supra* note 137, provides any guidance to United States Trustees or to chapter 7 trustees in dealing with the problems identified in this study.

[210]*See* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counselling*, 27 GOLDEN GATE L. REV. 345 (1997); Gary S. Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5 (1975).

[211]*See* Gilda Tuoni, *Two Models For Trial Advocacy Skills Training in Law Schools - A Critique*, 25 LOY. L.A. L. REV. 111 (1991); Thomas F. Geraghty, *Foreword: Teaching Trial Advocacy in The 90s And Beyond*, 66 NOTRE DAME L. REV. 687 (1991).

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PUBLICATIONS

Reconceptualizing Present-Value Analysis in Consumer Bankruptcy, 68 WASH. & LEE L. REV. (forthcoming 2011)

Opinion, *Resolution Oversight*, NAT'L L.J., May 31, 2010, at 34 (with Jonathan R. Nash)

An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors, 26 EMORY BANKR. DEV. J. 5 (2009)

Setting the Record Straight: A Sur-Reply to Professors Lawless et al., 33 SEATTLE U. L. REV. 93 (2009)

Failing to Answer Whether Bankruptcy Reform Failed: A Critique of the First Report from the 2007 Consumer Bankruptcy Project, 83 AM. BANKR. L.J. 27 (2009) (peer-reviewed)

The Real Student-Loan Scandal: Undue Hardship Discharge Litigation, 83 AM. BANKR. L.J. 179 (2009) (peer-reviewed) (with Michelle R. Lacey)

- cited in *In re* Miller, 409 B.R. 299 (Bankr. E.D. Pa. 2009)

The Utility of Opacity in Judicial Selection, 64 N.Y.U. ANN. SURV. AM. L. 633 (2009) (symposium issue)

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, 61 VAND. L. REV. 1745 (2008) (with Jonathan R. Nash)

Examining the Perceived Quality of Appellate Review in the Bankruptcy System, NORTON BANKR. L. ADVISER, Aug. 2008, at 1 (with Jonathan R. Nash)

Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt, 35 FLA. ST. U. L. REV. 505 (2008)

Eliminating the Judicial Function in Consumer Bankruptcy, 81 AM. BANKR. L.J. 471 (2007) (peer-reviewed)

- cited in *In re* Cox, 393 B.R. 681 (Bankr. W.D. Mo. 2008); *In re* Quigley, 391 B.R. 294 (Bankr. N.D. W. Va. 2008); *In re* Turner, 384 B.R. 537 (Bankr. S.D. Ind. 2008); *In re* Waters, 384 B.R. 432 (Bankr. N.D. W. Va. 2008)

Analyzing Chapter 7 Abuse Dismissal Motions Post-BAPCPA: A Reply on Cortez, AM. BANKR. INST. J., December/January 2007, at 16

- cited in *In re* Henebury, 361 B.R. 595 (Bankr. S.D. Fla. 2007)

Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, 74 U. CIN. L. REV. 405 (2005) (with Michelle R. Lacey)

- cited in *In re* Cumberworth, 347 B.R. 652 (B.A.P. 8th Cir. 2006); *In re* Woody, 345 B.R. 246 (B.A.P. 10th Cir. 2006); *In re* Greenwood, 349 B.R. 795 (Bankr. D. Ariz. 2006)

On Proof of Preferential Effect, 55 ALA. L. REV. 281 (2004), *reprinted in* 13 J. BANKR. L. & PRAC. 95 (2004)

- cited in *In re* Bankvest Capital Corp., 375 F.3d 51 (1st Cir. 2004)

8/25/2010

Comment, *Bankruptcy Court Jurisdiction and Agency Action: Resolving the NextWave of Conflict*, 76 N.Y.U. L. REV. 945 (2001)

Note, *Beyond the Limits of Equity Jurisprudence: No-Fault Equitable Subordination*, 75 N.Y.U. L. REV. 1489 (2000)

AMICUS BRIEF

Brief for Amicus Curiae Professor Rafael I. Pardo in Support of Neither Party, *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010) (No. 08-1134), 2009 WL 2875368

CONGRESSIONAL TESTIMONY

An Undue Hardship? Discharging Educational Debt in Bankruptcy: Hearing Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary, 111th Congress (September 23, 2009)

SELECT PRESENTATIONS

2009

Reconceptualizing Present-Value Analysis in Consumer Bankruptcy, Faculty Workshop, University of California, Irvine School of Law (December 3, 2009)

Reconceptualizing Present-Value Analysis in Consumer Bankruptcy, Faculty Colloquium, University of Washington School of Law (November 23, 2009)

The Real Student-Loan Scandal: Undue Hardship Discharge Litigation, Seattle Economics Council, Seattle, Washington (October 14, 2009) (inaugural speaker for 2009-2010 season)

Reconceptualizing Present-Value Analysis in Consumer Bankruptcy, Faculty Colloquium, Emory University School of Law (September 9, 2009)

An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors, Harvard-Texas Joint Conference on Commercial Law Realities, University of Texas School of Law (March 28, 2009) (in absentia)

2008

An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors, Research Conference on Access to Civil Justice: Empirical Perspectives, New York University School of Law (November 13, 2008)

The Real Student Loan-Scandal: Undue Hardship Discharge Litigation, Faculty Workshop, Arizona State University, Sandra Day O'Connor College of Law (October 22, 2008)

An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors, Annual Meeting of the Midwestern Law & Economics Association, Northwestern University School of Law (October 4, 2008)

The Real Student Loan-Scandal: Undue Hardship Discharge Litigation, 2008 Washington Bankruptcy Judges Conference, Blaine, Washington (September 19, 2008)

The Real Student Loan-Scandal: Undue Hardship Discharge Litigation, Third Annual Conference on Empirical Legal Studies, Cornell Law School (September 12, 2008) (poster session)

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, Annual Fall Symposium of the Ninth Circuit Bankruptcy Appellate Panel, Ashland, Oregon (August 26, 2008) (co-presented with Jonathan R. Nash)

The Real Student Loan-Scandal: Undue Hardship Discharge Litigation, Houston Higher Education Finance Roundtable, University of Houston Law Center (May 19, 2008)

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, Annual Meeting of the American Law and Economics Association, Columbia Law School (May 16, 2008)

The Utility of Opacity in Judicial Selection, NYU Annual Survey of American Law Symposium, *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?*, NYU School of Law (March 11, 2008)

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The Real Student Loan-Scandal: Undue Hardship Discharge Litigation, Annual Meeting of the Midwestern Law & Economics Association, University of Minnesota School of Law (October 13, 2007)

The Real Student Loan-Scandal: Undue Hardship Discharge Litigation, Federal Judicial Center Workshop for Bankruptcy Judges II, Austin, Texas (September 17 & 18, 2007)

Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt, Federal Judicial Center Workshop for Bankruptcy Judges II, Austin, Texas (September 17 & 18, 2007)

Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, Federal Judicial Center Workshop for Bankruptcy Judges II, Austin, Texas (September 17 & 18, 2007)

Eliminating the Judicial Function in Consumer Bankruptcy, National Bankruptcy Administrators Conference, Asheville, North Carolina (July 31, 2007) (keynote address)

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, Joint Annual Meetings of the Law and Society Association and Research Committee on Sociology of Law, Humboldt University (July 28, 2007) (co-presented with Jonathan R. Nash)

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, Stanford/Yale Junior Faculty Forum, Stanford Law School (May 18, 2007) (co-presented with Jonathan R. Nash)

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, Reenvisioning Law Colloquium, University of Houston Law Center (January 26, 2007)

2006

An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, Annual Meeting of the Midwestern Law & Economics Association, University of Kansas School of Law (October 20, 2006) (co-presented with Jonathan R. Nash)

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Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, Faculty Workshop, St. John's University School of Law (October 26, 2005)

Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, Faculty Workshop, Seattle University School of Law (October 10, 2005)

Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, Young Scholars Workshop, Annual Meeting of the Southeastern Association of Law Schools, Hilton Head Island, South Carolina (July 17, 2005)

Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, Tulane-Loyola Junior Faculty Workshop, Tulane Law School (March 18, 2005)

MEDIA COMMENTARY

Diane Davis & Eileen J. Williams, *Supreme Court Says Ch. 7 Trustee Is Not Required to Object to Ambiguous Exemption*, 22 Bankr. L. Rep. (BNA) 855, 856 (June 24, 2010).

Diane Davis & Bernard J. Pazanowski, *Supreme Court Approves Forward-Looking Test to Calculate "Projected Disposable Income,"* 22 Bankr. L. Rep. (BNA) 781, 781 (June 10, 2010).

Ross Reynolds, *The Conversation: Trade School in Tough Times: Is It Worth It?*, KUOW Puget Sound Public Radio, Mar. 25, 2010.

Diane Davis, *Bankruptcy Attorneys Consider Impact of* Espinosa *Decision on Practitioners*, 22 Bankr. L. Rep. (BNA) 395, 401 (Mar. 25, 2010).

Peter S. Goodman, *In Hard Times, Lured into Trade School and Debt*, N.Y. TIMES, Mar. 14, 2010, at A1.

Thomas G. Dolan, *Does the Repaying of Private Student Loans Represent Undue Hardship?*, HISP. OUTLOOK HIGHER EDUC., Feb. 8, 2010, at 20.

Eric Kelderman, *Supreme Court Considers Case About Excusing Student Debt Through Bankruptcy*, CHRON. HIGHER EDUC., Nov. 29, 2009.

8/25/2010

Christine Dugas, *Student Loans Are Crushing New Grads; Without Jobs, Paying Off $100,000 in Debt Is Tough*, USA TODAY, May 13, 2009, at 6A.

Bill Virgin, *Beware the Latest 'C Level' Executive*, SEATTLE POST-INTELLIGENCER, Oct. 28, 2008, at D1.

Vesna Jaksic, *Your Attendance Is Required*, NAT'L L.J., Sept. 24, 2007, at 4.

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Member, Readmissions Committee, Tulane Law School, July 2005 – July 2006

Faculty Liaison, Honor Board, Tulane Law School, March 2005 – July 2006

Member, Special Clinical Appointments Committee for the Tulane Environmental Law Clinic, Tulane Law School, July 2004 – July 2005

Member, Faculty Appointments Committee, Tulane Law School, July 2004 – July 2005

Advisor, La Alianza del Derecho, Tulane Law School, September 2003 – July 2006

Member, Judicial Clerkship Committee, Tulane Law School, July 2003 – July 2004

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PROFESSIONAL ACTIVITIES

Member, AALS Committee on Research, August 2010 - present

Panelist, American Bankruptcy Institute Media Teleconference on *United Student Aid Funds v. Espinosa*, No. 08-1134 (U.S. Mar. 23, 2010), March 2010, http://www.abiworld.org/webinars/2010/Espinosa_Supreme_Court/index.html

Academic Member, Editorial Advisory Board, *American Bankruptcy Law Journal*, January 2010 – present

Chair-Elect, AALS Section on Creditors' and Debtors' Rights, January 2010 – present

Volunteer Attorney, King County Bar Association Debt Clinic, April 2009 – present

Secretary and Treasurer, AALS Section on Creditors' and Debtors' Rights, January 2009 – January 2010

Presenter, Washington Bankruptcy Judges Conference, Blaine, WA, September 2008

Panel Moderator, Third Annual Conference on Empirical Legal Studies, Cornell Law School, September 2008

Presenter, Annual Fall Symposium of the Ninth Circuit Bankruptcy Appellate Panel, Ashland, OR, August 2008

Discussant, "Microinitiatives," Globalization & Justice: Interdisciplinary Dialogues, Seattle University, February 2008

Program Faculty, Federal Judicial Center, Workshop for Bankruptcy Judges II, Austin, TX, September 2007

Program Faculty, Federal Judicial Center and Administrative Office of the U.S. Courts, National Bankruptcy Administrators Conference, Asheville, NC, July 2007

Newsletter Editor, AALS Section on Creditors' and Debtors' Rights, January 2007 – May 2008

Member, Board of Directors, Consumer Education and Training Services ("CENTS"), Seattle, WA, October 2006 – present

Guest Blogger, *Concurring Opinions*, http://www.concurringopinions.com, August 2006

Program Faculty, Thirtieth Annual Seminar on Bankruptcy Law and Practice, Stetson University College of Law, December 2005

Member, Southeastern Association of Law Schools (SEALS) Young Scholars Committee, April 2005 – September 2005

Consultant, New Orleans Legal Assistance Corporation, New Orleans, LA, September 2004 – September 2005

Advisory Board, Bankruptcy Litigation Skills Symposium, American Bankruptcy Institute/Tulane Law School, April 2004 – May 2005

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AWARDS AND PROFESSIONAL ORGANIZATIONS

Institute for Higher Education Law and Governance Fellow, Houston Higher Education Finance Roundtable, University of Houston Law Center, May 2008

American Bankruptcy Law Journal Fellow, Annual Meeting of the National Conference of Bankruptcy Judges, November 2005

Member, Bar of the United States Supreme Court, 2009 – present

Member, Society of Empirical Legal Studies, 2007 – present

Member, American Bankruptcy Institute, 2003 – present

Member, Washington State Bar Association, 2002 – present

PERSONAL

Born: Havre, Montana

Languages: Spanish (fluent) and French (proficient)

Interests: classical piano, mountaineering, squash

GOLDBERG KOHN ATTORNEYS AT LAW

Practice Areas

- Bankruptcy & Creditors' Rights
- Creditors' Rights
- Debtor Representations
- Equity Committees

Industry Focus

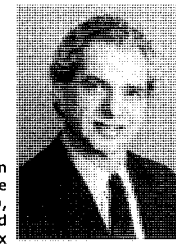
- Automotive Industry
- Banking & Financial Services

News

- Goldberg Kohn Principals Recognized in 2010 *Chambers USA: America's Leading Lawyers for Business*
- Goldberg Kohn Recognized as a Leading Law Firm by Chambers USA
- Goldberg Kohn Secures Major Victory for Beneficiaries of $440 Million Settlement
- Judge Confirms Bankruptcy Reorganization Plan for Goldberg Kohn Client
- Principal Ronald Barliant Presides Over Chapter 11 Bankruptcy Mediation
- Goldberg Kohn Represents Home Products International in Bankruptcy Reorganization Cases
- Bankrupt Network Carriers Treating Regionals Differently
- Bankruptcy Attorneys Cleaning Up
- Delta Ok'd to Pay Some Bills
- Who You Gonna Call?
- American College of Bankruptcy's 15th Class Includes Goldberg Kohn Principal
- Chicago Bankruptcy Judge Ronald Barliant to Join Goldberg Kohn

Events

Ronald Barliant



PRINCIPAL

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email ronald.barliant@goldbergkohn.com

vCard

Since joining Goldberg Kohn in September 2002 as a principal in the Bankruptcy & Creditors' Rights Group, Ronald Barliant has represented debtors and creditors in complex bankruptcy cases. As head of the firm's "burgeoning practice in debtor work,"[1] his debtor representations include a machine tool manufacturing company in a Delaware chapter 11 case involving significant environmental and mass tort liabilities (plan confirmed with future claimants trust 11 months after filing), a wireless telecommunications carrier in a chapter 11 case requiring the restructuring of debts owed the FCC for PCS licenses (plan confirmed 5 months after filing), and a home products manufacturing company in a pre-negotiated chapter 11 case involving a debt-for-equity swap and the issuance of new debt securities (plan confirmed 75 days after filing).

His creditor representations include the indenture trustee for most of the aircraft operated by United Airlines; the prepetition secured lenders and debtor in possession lenders in the chapter 11 cases of a large manufacturing company; a foundry and a food distributor, the secured creditor resisting substantive consolidation in the Delaware case of a sub-prime lender; and claimants in asbestos-related chapter 11 cases.

Mr. Barliant has also argued several appeals and counseled major financial firms in connection with distressed investments, and both debtors and creditors in connection with workouts. In addition, he has mediated disputes in over a dozen cases, including Delphi Corporation, U.S. Energy Biogas, HALO, Altheimer & Gray and Fleming Foods. He has also been engaged as a consultant by other law firms representing clients in bankruptcy cases, and as an expert witness. In addition, he is an estate representative in the Global Crossing case and was a director of a Delaware debtor in the automotive industry.

Before joining Goldberg Kohn, Mr. Barliant served as a United States bankruptcy judge for the Northern District of Illinois from 1988 to 2002. During his tenure on the bench, one of the largest cases over which he presided was Comdisco Inc. (in the technology services industry), involving more than $4 billion in debt. Other prominent cases he heard include Florsheim Group Inc. (men's shoes); Birmingham Steel Corp. (specialty steel); Archibald Candy Corp. (confectionaries under Fanny May and Fanny Farmer brands); e-spire Communications Inc. (telecommunications); Ben Franklin Retail Stores (retail); Keck, Mahin & Cate (law firm); Forty-Eight Insulations Inc. (asbestos

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PORT Exhibit 1098

Principal Ronald Barliant Speaks at 2010 Central States Bankruptcy Workshop

Principals Ronald Barliant, Randy Klein and Jonathan Cooper Participate in CBA Seminar on Bankruptcy Issues and Commercial Finance Cases

Principal Ronald Barliant to Speak at CBA Bankruptcy & Reorganization Meeting

Principal Ronald Barliant Participates in ABA Teleconference on Workouts

Principals Ronald Barliant and Jon Cooper Speak at AIRA Chicago Regional Conference

Principal Ronald Barliant Speaks at the Law Bulletin 2008 Real Estate Law Conference

Principal Randall Klein and Principal Ronald Barliant Participated in TMA Forum

Ronald Barliant speaks at TMA 2005 Annual Convention

The Uncertain Fate of Intellectual Property in Bankruptcy Cases

Strategies and Opportunities for Lenders in a Bankruptcy or Restructuring

Case Management Procedures: A Comparison of Delaware and Other Jurisdictions

products); Outboard Marine Corp. (boat engines); and the developers in several significant single-asset real estate cases. Before ascending to the bench, he represented the trustee in the chapter 7 case of the owner and operator of an oil refinery, Energy Cooperative Inc., which at the time was the largest chapter 7 case in the history of the Northern District of Illinois.

Mr. Barliant is a Fellow in the American College of Bankruptcy. He has taught debtor-creditor relations at John Marshall Law School and has frequently lectured and participated in panel discussions on bankruptcy-related topics at the invitation of many organizations, including the Federal Judicial Center, the National Conference of Bankruptcy Judges (NCBJ), the American Bankruptcy Institute (ABI), the American Bar Association (ABA), the Commercial Finance Association, the Turnaround Management Association, the Chicago Bar Association (CBA) and LexisNexis Mealey's. Mr. Barliant was a panelist for "Claims Trading: Implications for the Chapter 11 Process, Pitfalls for the Claims Trader," The National Conference of Bankruptcy Judges, 2008; "Do You Remember Lender Liability?," The Distressed Debt Conference, 2008; and "Valuation in the Context of Bankruptcy," 57th Annual Meeting of the Seventh Circuit Bar Association and Judicial Conference of the Seventh Circuit, 2008.

His published writings include articles on chapter 11 plans, executory contracts, preferences, and the anti-trust litigation in the United Airlines case (in which he represented an indenture trustee/defendant). He also co-authored an article featured in the American Bankruptcy Institute Law Review, "From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies (Winter 2004). He was a member of the board of governors of the NCBJ from 1998 to 2000 and of the NCBJ's Endowment for Education from 1997 to 1998. In addition, he served on national judicial committees and on working groups considering technology issues and the treatment of mass torts in bankruptcy cases. Mr. Barliant is listed in The Best Lawyers in America and Illinois Super Lawyers, as well as Chambers USA: America's Leading Lawyers for Business. He is currently a member of the ABI (Business Reorganization Committee), ABA (Business Law Section), and NCBJ (Former Judges Section). He is also Chair of the Bankruptcy and Reorganization Committee of the CBA.

Mr. Barliant is admitted to practice in Illinois. He received his law degree in 1969 from Stanford University School of Law, where he was a member of the editorial board of the Stanford Law Review. He received his B.A. in 1966 from Roosevelt University.

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[1] *Chambers USA: America's Leading Lawyers for Business 2006*, p. 773.

PROFESSIONAL ACTIVITIES

- American Bankruptcy Institute, Member, Business Reorganization Committee
- American Bar Association, Member, Business Law Section
- National Conference of Bankruptcy Judges, Member, Former Judges Section
- Chicago Bar Association, Chair, Bankruptcy and Reorganization Committee

EDUCATION

- Stanford University, J.D., 1969
- Roosevelt University, B.A., 1966

BAR ADMISSIONS

- Illinois

ARTICLES

- Bad Medicine: Cram Down, Section 1111(B)(2) Elections and Federal Regulations
- Principal Ronald Barliant quoted in The Deal
- United's Long Journey into the Far Reaches of Section 1110 - November/December 2005
- From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies
- Scope of a Lessee's Power to Reject Parts of Multiple-Unit Leases

VIEW MORE INFORMATION ON THIS ATTORNEY

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