

AN EMPIRICAL EXAMINATION OF THE DIRECT ACCESS COSTS TO CHAPTER 7 CONSUMER BANKRUPTCY:
A PILOT STUDY IN THE NORTHERN DISTRICT OF ALABAMA

by

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*“Bankruptcy relief is not free.”*¹

I. INTRODUCTION

The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Reform Act)² on April 20, 2005 was the most significant overhaul to the Bankruptcy Code³ (Code) since its creation in 1978.⁴ The changes to the Code became effective, with limited exceptions,⁵ on October 17, 2005. It is much too early to make any meaningful evaluation about the overall success or failure of Reform Act. Solid empirical analysis is needed to effectively evaluate the reform, and that requires sufficient data, which requires the passage of time.⁶ Any evaluation of the Reform Act without a strong foundation in empirical analysis will amount to nothing more than a continuation of the pre-Reform Act debate, which was based largely on recriminations between pro-creditor and pro-debtor groups about purported problems with the bankruptcy system.⁷

This paper leaves the bi-polar debate behind and empirically examines one possible impact of the Reform Act: whether the Reform Act has led to an increase in the direct access costs of filing for consumer Chapter 7 relief. It was predicted that the Reform Act would make access in terms of direct costs to consumer bankruptcy relief more difficult.⁸ In fact, some argued that after the Reform Act, the “price” of filing, may be a bar to those who need relief.⁹ The focus of the predicted increase was primarily based on expected increases in on attorneys’ fees, but other direct access costs such as the filing fee were expected to increase, as well as the addition of new direct access costs for credit counseling and financial management courses.

Empirical analysis of the direct access costs and how those have or have not changed in relation to the Reform Act is needed. Carefully considering these direct access costs in light of the Reform Act is vital to the continuing policy debate on consumer bankruptcy, and now, the exact impact of the Reform Act on the consumer bankruptcy system. For example, if in the long run the number of consumer Chapter 7 filings is reduced, it may not be the result of the substantive changes to the statutory framework, but rather be the result of these increased direct access costs. If this is the case, the bankruptcy system is not any more effective in terms of providing relief to consumers in need. Rather, the Reform Act merely reduced the number of Chapter 7s, by pricing out a segment of consumers. A consumer bankruptcy system is of no use if the direct access costs make attaining the relief impossible for those that need it most. As this example shows, the direct access costs of attorneys’ fees and filing fees are threshold costs that need to be considered in any serious analysis of the Reform Act and future reform efforts.¹⁰

The central objective of the study is to gather data in both pre and post-Reform Act time periods from a sufficient number of consumer Chapter 7 cases in the Northern District of Alabama (NDAL) so that conclusions can be drawn concerning the direct access costs of filing in the NDAL. It is a central hypothesis that the Reform Act has had a positive association with direct access costs. This study will test this hypothesis.

The authors recognize the limitations of a one district study, as well as the limitations due to the timing of the selection of the sample. Nevertheless, the question raised in this study is important to the public policy debate. Moreover it is the first study to empirically examine direct access costs in the post-Reform Act era. This study is a pilot study for a comprehensive analysis drawing on a national sample of consumer cases studying direct access costs, as well as indirect costs, of filing Chapter 7 and 13 consumer bankruptcies in the pre and post-Reform Act periods.

Following this Introduction is an overview of the four major components of the direct access costs to consumer Chapter 7 relief. Part III examines prior research and reported direct access cost data. Part IV discusses the methodology employed. Part V reports the results of the study. Finally, Part VI concludes with a review of policy implications and suggestions for future research.

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II. OVERVIEW OF DIRECT ACCESS COSTS TO CHAPTER 7

In the post-Reform Act era, direct access costs to filing a consumer Chapter 7 case encompass four separate costs: attorneys' fees, filing fees, credit counseling fees and debtor education course fees. The latter two costs are new in light of the Reform Act. This section provides an overview of each cost component.

A. Attorneys' Fees

Fees in typical no-asset Chapter 7 cases are usually a flat charge,¹¹ typically paid in advance of filing.¹² The fee covers most basic services associated with the routine consumer case.¹³ Services beyond routine services are subject to further agreement, likely at an hourly rate, between the debtor and the attorney.¹⁴ The range of attorneys' fees depends largely on conditions in the market and any limitations on attorneys by bankruptcy judges.¹⁵ The fees can be anywhere from a few hundred dollars into the thousands of dollars.¹⁶ In most cases attorneys' fees are the largest component of direct access costs.¹⁷

Chapter 7 debtors' attorneys' fees were expected to increase¹⁸ after the Reform Act for two reasons. First, the Reform Act required means test calculations, enhanced paperwork and new burdens were placed on attorneys. Each of these attributes of the Reform Act made filing more complex and time-consuming, and, therefore, more expensive.¹⁹ Some have estimated that due to the new complexity of the law attorneys' fees in consumer cases have risen 50-100%.²⁰ A second, yet related, reason for an expected increase in attorneys' fees was due to an expectation that general practitioners would leave the bankruptcy practice area in light of the increased burdens.²¹

Since the Reform Act, anecdotal evidence suggests that Chapter 7 attorneys' fees have in fact increased, but the extent of such increases is unclear.²² Prior to beginning this study we reviewed attorneys' fees around the country and our impression was consistent with the general view that attorneys' fees were increasing in the post-BAPCPA era. Other scholars, without conducting any empirical analysis, have reached similar conclusions. For example, Professor Robert Lawless testified that in a preliminary review of cases, he found that Chapter 7 attorneys' fees increased from \$1,000 to \$1,500.²³ Judge Randall Newsome recently made a similar observation in which he stated: "By all reports, these new paperwork requirements have substantially increased the time and expense of representing consumer debtors."²⁴

B. Filing Fees

Although the most significant direct access cost is attorneys' fees, the bankruptcy court filing fee is an important direct cost to consider. Chapter 7 filing fees have increased dramatically since the passage of Reform Act. Since the Reform Act Chapter 7 filing fees have increased from \$155 to \$299,²⁵ an increase of 92.9%.

The increase needs to be placed in context. In 1999 the filing fee was increased from \$130 to \$155, a 19.23% increase. In 2005 the fee was increased from \$155 to \$220, a 29.03% increase. In 2006 the fee was increased from \$220 to \$245, a 12.5% increase. In April of 2006 the filing fee was increased to \$299, which includes an administrative and trustee fees, on top of the base filing fee of \$245.²⁶ These increases are substantial, but not quite as substantial when the filing fee of \$155 in 1999 is adjusted for inflation. In 2006 constant dollars the filing fee of \$155 is \$240.81.²⁷ The increase from 1999 to 2006, when inflation is taken into account, is an increase of \$58.19, a 24.16% increase as opposed to a 92.9% increase as indicated by the unadjusted numbers.

Regardless of the exact percentage increase, even after adjusting for inflation, the filing fee increase in Chapter 7 cases has been substantial. Even with the recent increases, there is pending legislation that would increase the filing fee in Chapter 7 cases by another \$40, up to \$339.²⁸ If the bill becomes law, nominal Chapter 7 filing fees will have more than doubled since 2005.

C. Credit Counseling

The Reform Act added a pre-petition requirement of credit counseling for consumer debtors.²⁹ New Bankruptcy Code § 109(h)(1) provides as follows:

an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.³⁰

The intent of the new provision is to provide consumers with an opportunity to learn of the consequences of filing for bankruptcy prior to deciding to actually file.³¹ Consumer debtors must obtain a certificate evidencing pre-petition credit counseling prior to filing or meet a statutory exemption and fulfill the requirement within 30 days of filing.³² This

requirement can be waived in very limited circumstances, such as active military duty in combat zone, incapacity or disability.³³ As such, most debtors must meet this requirement prior to obtaining relief.

The service is provided by nonprofit organizations approved by U.S Trustee or U.S Bankruptcy Administrator.³⁴ The nonprofit organizations charge for this service. The only parameters the Reform Act provides on the amount of fee is that the fee be reasonable and services provided without regard to the ability to pay the fee.³⁵ This new fee is an additional access fee applicable in most cases.³⁶ The typical credit counseling fee is currently approximately \$50.³⁷

This additional fee seems small, but when considered in conjunction with other direct access costs, this inflates the cost of obtaining relief substantially.³⁸ More importantly, imposing this additional cost does not seem to render any benefit to consumers. In practical application it is not clear if the pre-petition requirement of credit counseling is achieving the intended result of informing consumers before they choose to file for bankruptcy relief. Early anecdotal evidence indicates that that by the time consumers obtain the counseling, they are in such dire straits that bankruptcy is the only viable alternative.³⁹ If this anecdotal evidence is correct, this additional charge maybe an unnecessary additional monetary cost.

Beyond the monetary cost, which in and of itself is relatively modest, the opportunity cost in terms of time lost that could be used for work, or other family obligations, should be considered.⁴⁰ These opportunity costs should be considered in any future reforms, particularly if the benefits of the credit counseling requirement proves to be very limited.

D. Debtor Education Fees

Beyond the threshold access costs discussed above, in order to obtain the relief sought, a discharge, debtors must pay for and fulfill post-petition debtor education requirements mandated by the Reform Act.⁴¹ The cost of debtor education is approximately another \$50.⁴² This expense is not a threshold cost to obtain bankruptcy relief, but it is necessary to obtain the ultimate discharge of debts because the failure to complete such a course will be grounds for denial of a discharge.⁴³ Therefore, it is should be included any analysis of direct access costs.

III. PRIOR RESEARCH

A substantial and growing body of empirical work on the costs of businesses filing under Chapter 7⁴⁴ and Chapter 11⁴⁵ has emerged. Empirical research on the costs associated with the filing of consumer cases in much more limited. There do not appear to be any studies designed to empirically examine the direct access costs associated with filing consumer Chapter 7 which are incurred by debtors. There have been several studies that have collected data on some aspects of the costs associated with filing consumer Chapter 7. Those studies are useful and provide some information on direct costs in consumer Chapter 7 cases. The cost data collected or reported, as reflected below, are usually limited to attorneys' fees. This is probably because the other primary direct access cost prior to the Reform Act, the filing fee, is set by law and not subject to changes to market conditions or case attributes as attorneys' fees are.

The first comprehensive modern empirical study of bankruptcy collected attorney fee data as part of the overall research project.⁴⁶ This 1964 Brookings Institute study is certainly outdated, but it is useful in that it provides a threshold of what debtors' attorney fees were at the time of the study. The study included eight districts and found that the median fee charged for a straight bankruptcy was \$196 and the median fee actually paid was \$145.⁴⁷ Adjusting those figures for inflation, the fee charged in 1964 is \$1321.53 in 2006 dollars, and the fee actually paid is \$977.66 in 2006 dollars.

One of the most recent significant empirical studies in which direct cost data was collected was in Phase III of the Consumer Bankruptcy Project in early 2001.⁴⁸ In a sample of 780 Chapter 7 bankruptcy filings⁴⁹ drawn from five judicial districts from across the United States, the mean cost of attorneys' fees was \$738.⁵⁰ The attorneys' fees ranged from zero for pro bono services, \$450 at the 25th percentile, \$700 at the 50th percentile, \$1000 at the 75th percentile, to a maximum fee of \$2,700.⁵¹ The study also reported the filing fee for Chapter 7 cases at the time of the collection of data in 2001 was \$155.⁵² The sum of the mean cost of attorneys' fees, \$738, and the filing fee, \$155, provide an average total direct access cost of \$893.⁵³

The literature is sprinkled with reports of typical consumer Chapter 7 fees attorneys' fees. For example, one treatise reports that typical fees have in recent years ranged anywhere from \$400 and \$1000.⁵⁴ A more dated figure by Judge Geraldine Mund reported that in 1994 Chapter 7 attorneys' fees in a typical no-asset case were between \$700 to \$1200 in Los Angeles.⁵⁵

Caselaw over the years sheds some light on what typical consumer Chapter 7 attorneys' fees have been. In most instances the court mentions the typical fee in passing without any type of empirical study. For example, in a 2005 case involving the reasonableness of a debtor's attorney Chapter 7 fee in a routine case, the bankruptcy judge found that in the Eastern District of Wisconsin the typical chapter 7 attorney fee ranged from \$700 to \$800.⁵⁶ Similarly, in 2001 the Ninth Circuit Court of Appeals affirmed the reduction of debtor attorney's fees in a "simple Chapter 7 bankruptcy" from \$1000 down to \$750.⁵⁷ In the Eastern District of Oklahoma in 1999, the bankruptcy court found that the reasonable fee for a debtor's attorney in a simple no-asset Chapter 7 case was between \$500 and \$750.⁵⁸

In an interesting case one court went beyond merely reporting the typical fee by conducting a survey of Chapter 7 attorneys' fees over a three month period in 1988.⁵⁹ The survey was comprised of 345 no-asset cases and data was collected from the Chapter 7 No-Asset Reports filed with the court.⁶⁰ The survey found as follows:

In 68 (20%) the blank for fees of debtor's counsel was either left blank or reported at zero.

In 14 (4%) the fees reported were \$1,000 or more.

In 44 (13%) the fees reported were more than \$850 but less than \$1,000.

In 125 (36%) the fees reported were between \$500 and \$850.

In 94 (27%) the fees reported were \$500 or less.

The fees reported ranged from a low of \$100 to a high of \$2,000.⁶¹

IV. METHODOLOGY

A. Sample

The sample for this study was drawn from Chapter 7 cases filed in Northern District of Alabama in two time periods: the fourth quarter of 2004 (Period 1) and the fourth quarter of 2006 (Period 2). These two time periods were selected because they represent sufficient time before and after the passage (April 2005) and enactment of the Reform Act (October 2005) to capture changes to direct access costs after the Reform Act.

A list of Chapter 7 cases filed during each time period was generated by PACER.⁶² During Period 1 the total number of case filings was 3,282. During Period 2 the total number of case filings was 1,241. A random sample of 105 cases from the total population for each period was selected through a computerized random number generator.

The sample was further refined because the sample included all Chapter 7 case filings, not just consumer cases. During the data collection process corporations, partnerships and other legal entities were excluded from the sample so that the sample consists of individual cases only.⁶³ Furthermore, individual cases in which the debts were primarily business debts were excluded from the sample.⁶⁴ The resulting cases were included in the sample for each period. Period 1 had a sample size of 92 and Period 2 had a sample size of 99.

B. Variables

There were two dependent variables employed in this study: Total Direct Access Costs and Attorneys' Fees. Total Direct Access Costs in Period 1 was measured as the sum of attorneys' fees and the filing fee. Total Direct Access Costs in Period 2 was measured as the sum of attorneys' fees, filing fees, credit counseling fees and debtor education fees. The petition and schedules were used to collect this data.⁶⁵ The data are reported in dollars.⁶⁶ Since the filing fees, credit counseling and debtor education expenses will likely not vary greatly among the cases in each period, further analysis was performed with Attorneys' Fees as the dependent variable. All dollar figures were adjusted for Period 1 and reported in 2006 constant dollars.

The independent variables are characteristics of debtors and the cases that may impact the dependent variables. Five independent variables were employed:⁶⁷ Total Unsecured debt, Current Income of the Debtor, Total Assets, Total liabilities and the Number of Reaffirmations. The petition and schedules were used to collect the data. The Number of Reaffirmations was reported as the actual Number of Reaffirmations, from 0 to 4, any number greater than 4 coded as 4. The other four independent variables are reported in dollars, with data from Period 1 adjusted and reported in 2006 constant dollars.

C. Methods

First, we employed an independent sample t-test was employed to determine if there was a statistically significant difference in the means of the Attorneys' Fees and Total Direct Access Costs in Period 1 and Period 2. Secondly, we used a pooled multiple regression methodology to analyze the impact of various debtor and case attributes, as well as a dummy variable to capture any impact associated with the time periods, on Attorneys' Fees and Total Direct Access Costs. The methods are discussed in more detail below in Part V.

V. RESULTS

A. Descriptive Statistics

Table 1 reports the descriptive statistics for the dependent variables employed in this study, Total Direct Access Costs and Attorneys' Fees, for both time periods employed in this study: Period 1 (2004) and Period 2 (2006).

TABLE 1: Descriptive Statistics, 2004 and 2006 (N= 191 for 51 states)

	2004		2004*		2006	
	Mean	Standard Deviation	Mean	Standard Deviation	Mean	Standard Deviation
Dependent variables						
Tot. Dir. Access Costs	870.08	392.16	928.57	418.52	1232.53	431.16
Attorneys' Fee	661.08	337.89	741.35	390.65	901.07	412.25

*2006 constant dollars

The mean Attorneys' Fee in 2004 is \$661.08 and in 2006 is \$901.07. Attorneys' Fees, without adjusting for inflation, have increased by \$240.62 since the Reform Act. The mean Attorneys' Fee in 2004, when adjusted for inflation, is \$741.35 in 2006 constant dollars. Therefore, in 2006 dollars the mean Attorneys' Fees increased by \$159.72 since the Reform Act, a 21.54% increase.

An independent sample t-test was performed to determine if a statistical difference in Attorneys' Fees exists between the two samples: Period 1 (2004) and Period 2 (2006). The null hypothesis assumes equal variances among both samples, however, the t statistic is significant at the .01 level disproving the null hypothesis, thus indicating that a significant difference does exist between the two sample means.

The mean Total Direct Access Costs in 2004 is \$870.08 and in 2006 is \$1,232.53. Total Direct Access Costs, without adjusting for inflation, have increased by \$362.45 since the Reform Act. The mean Total Direct Access Costs in 2004, when adjusted for inflation, is \$928.57 in 2006 constant dollars. Therefore, in 2006 dollars the mean Total Direct Access Costs increased by \$303.96 since the Reform Act, a 32.73% increase.

Again, an independent sample t-test was performed to determine if a statistical difference in Total Direct Access Costs exists between the two samples: Period 1 (2004) and Period 2 (2006). The null hypothesis assumes equal variances among both samples, however, the t statistic is significant at the .01 level disproving the null hypothesis, thus indicating that a significant difference does exist between the two sample means.

B. Regression Analysis

The review of the descriptive statistics and t-test indicates that Total Direct Access Costs and Attorneys' Fees have increased between the two time periods. This is consistent with the hypothesized positive relationship between the Reform and Total Direct Access Costs and Attorneys' Fees. Pooled multiple regression analysis was employed to further test this hypothesis. Regression analysis permits testing a hypothesis while controlling for other factors that may influence the dependent variables.

The independent variables employed were case and debtor attributes that may impact the dependent variables, Total Access Direct Costs and Attorneys' Fees. We used the following independent variables: Total Unsecured Debt, Current Monthly Income, Total Assets, Total Liabilities and the number of Reaffirmations. The data collected for the independent variables in Periods 1 and 2 was pooled. To take into account the impact of the Reform Act, which occurred in between the two time Periods, a dummy variable was added to the model. The dummy variable was code 0 for cases in Period 1 (2004) data set and 1 for cases in Period 2 (2006) data set. The dummy variable is called Reform Act. A separate pooled multiple regression analysis was performed for each dependent variable, Total Direct Access Costs and Attorneys' Fees.⁶⁸ Table 2 reports regression results.

TABLE 2: Regression Results (N = 182 for 51 states)⁶⁹

Independent Variables	Dependent Variables	
	Total Direct Access Costs	Attorneys' Fees
R Squared	.276	.211
Adjusted R Squared	.251	.184
Standardized Coefficients		
Reform Act	.446 (.000)**	.266 (.000)**
Total Unsecured Debt	-.052 (.425)	-.081 (.238)
Current Monthly Income	.018 (.822)	-.022 (.791)
Total Assets	.039 (.704)	.093 (.384)
Total Liabilities	.183 (.053)	.286 (.004)**
Reaffirmations	.104 (.167)	.068 (.422)

*Indicates significance at .05 level (one-tailed test)

**Indicates significance at .01 level (one-tailed test)

1. Attorneys' Fees Analysis

The regression analysis with Attorneys' Fees as the dependent variable yielded statistically significant results for Total Liabilities and Reform Act. The adjusted R^2 indicates that approximately 18.4% of the change in Attorneys' Fees is explained by the regression model. Consistent with our hypothesis, our review of the descriptive statistics and the t-test, the Reform Act, our variable of primary interest, was statistically significant in our regression model. The Reform Act measures the change in Attorneys' Fee due to implementation of bankruptcy reform in 2005. The unstandardized coefficient for Reform Act was 142.004. Therefore, Attorneys' Fees have increased by \$142.00 due to the Reform Act.

The other independent variables, with the exception of Total Liabilities, were not significant. This is not surprising because in most consumer Chapter 7 cases the fees are generally a flat fee and an attorney does not vary the flat fee a great deal among most cases. In short, the level work involved for a routine consumer Chapter 7 case does not vary among most cases, unless the case is extraordinarily large. In larger cases, where perhaps Total Liabilities are great, the level of work in terms of dealing with creditors and paperwork would increase. We would expect Attorneys' Fees to increase in those cases, but the increase would only occur in very large cases. This is consistent with the regression results. It is worth noting that unstandardized coefficient for Total Liabilities is very small (.001), indicating that substantial increases in Attorneys' Fees would only occur with very large increases to Total Liabilities.

2. Total Direct Access Costs Analysis

The regression analysis with Total Direct Access Costs as the dependent variable yielded statistically significant results for Reform Act. The adjusted R^2 indicates that approximately 27.6% of the change in Total Direct Access Costs is explained by the regression model. Consistent with our hypothesis, our review of the descriptive statistics and the t-test, the Reform Act, our variable of primary interest, was statistically significant in our regression model. The Reform Act measures the change in Total Direct Access Costs due to implementation of bankruptcy reform in 2005. The unstandardized coefficient for Reform Act was 288.715. Therefore, Total Direct Access Costs have increased by \$288.72 due to the Reform Act.

The other independent variables were not significant, but Total Liabilities approaches significance. As discussed above this is not surprising. Again, the unstandardized coefficient for Total Liabilities was very small (.001), so substantial increases in Total Direct Access Costs would only occur with very large increases to Total Liabilities. This is because Attorneys' Fees, the single largest component of Total Direct Access Costs, is the only cost measure that would be responsive to changes in Total Liabilities. This is reflected in the above regression analysis with Attorneys' Fees as the dependent variable. The other cost components of Total Direct Access Costs, the filing fee, credit counseling fee and debtor education fee, do not vary based on debtor or case attributes. These components have either increased, as in the case of the filing fee, or are new fees in the post-Reform era.

VI. CONCLUSIONS AND FUTURE RESEARCH

This paper takes a small step towards analyzing the impact of the Reform Act on the direct access costs to consumer Chapter 7 bankruptcy. Since the sample is from one district, extrapolating the results and applying them to the entire consumer bankruptcy system is not possible. Nevertheless, at least in the NDAL, attorneys' fees and total direct access costs have increased since the Reform Act. This confirms the expectations and early anecdotal evidence, but the magnitude of the increase due to the Reform Act is not as great as expected. These findings need to be confirmed and explored in broader studies that include a sample drawn from a much larger population over geographic regions and time periods. This study provides a model for such a national comprehensive study.

The results obtained raise many more questions than answers. A particularly important question to be addressed, assuming future studies confirm the findings herein, is whether the increased direct access costs have impacted the ability of individuals seeking relief from actually obtaining it.⁷⁰ Increased direct access costs in and of itself is not problematic, but if it has the effect of shutting the bankruptcy courthouse to those that truly need the relief, perhaps the reforms that have increased direct access costs should be reconsidered.

In this regard, aspects of the Reform Act that are a direct increase on access to relief, such as credit counseling or debtor education, should be analyzed to determine if the additional requirements are making any meaning improvement to the consumer bankruptcy system. Outcomes need to be empirically measured to see if the results obtained warrant the additional cost.

Beyond expanding the scope of this study, attempting to examine if direct access costs actually limit access to relief and studying discrete aspects of the Reform Act that lead to increased direct access costs, a host of other cost related issues are ripe for research. For example, an economic analysis of how the market for consumer bankruptcy has changed due to the Reform Act should be employed. Economic models can explore the behavior lawyers, debtors and other players in the

market for consumer bankruptcy relief. An important player, for which there is a dearth in the literature on, is the bankruptcy court system. Economic analysis can be used to explore how filing fee changes impact the behavior of individuals.

Further studies of direct access costs will only explain a small part of the consumer bankruptcy system. Further research on a whole host of policy domains that intersect with the consumer bankruptcy system need to continue to be studied.⁷¹ These other policy areas, such as access to affordable healthcare, financial literacy, access to high quality education or minimum wage laws, all impact individuals who may find themselves seeking bankruptcy relief. If we can improve these other policy areas, individuals will be better off on the whole and less likely need bankruptcy relief. It is only when we have solid empirical analysis in a host of policy areas, and we consider reforms in those areas in conjunction consumer bankruptcy policy reforms, will meaningful reform be attained. Otherwise we may be doomed to make incremental reforms to consumer bankruptcy that lead to higher direct access costs, which possibly price out consumers, while leaving them with no other meaningful or affordable component of the social safety net on which they can rely upon.

Footnotes

¹ Katherine A. Porter and Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 81 (November 2006).

² Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

³ 11 U.S.C. §§ 101–1527 (2005). Unless otherwise noted, all references to Bankruptcy Code, code, or section are to Title 11 of the United States Code, including amendments made by the Reform Act that will be codified.

⁴ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). The Bankruptcy Reform Act of 1978 took effect on October 1, 1979. *Id.* § 402(a), 92 Stat. at 2682.

⁵ Some provisions of the Reform Act were effective immediately upon enactment. For example, several amendments to the homestead exemptions and delay in granting a discharge in limited situations were effective immediately. *See* 11 U.S.C. §§ 522(o), (p), (q), 727(a)(12), 1141(d), 1228(f), 1328(f). For a complete list of the effective dates, see WILLIAM HOUSTON BROWN & LAWRENCE AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS (2005), Section II.C.

⁶ For example, one of the primary purposes of the Reform Act was to reduce the Chapter 7 filing rate. *See* Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 RUTGERS BUS. L.J. 2, 15 (March 2006). The “means test” as an eligibility requirement was expected to shift some Chapter 7 debtors to Chapter 13. Robert J. Landry, III and Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Deserts" for Deadbeats?*, 36 Golden Gate L. Rev. 91, 92 (Spring 2006). Judge Randall Newsome recognized that “[g]iven the dearth of filings experienced since BAPCPA became effective on October 17, 2005, and the lack of any empirical data, there is no way to determine whether the new provisions have steered debtors into chapter 13 who otherwise would have not filed a chapter 13.” Testimony of Honorable Randall Newsome at the “Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act” Hearings Before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee, 110th Cong. (Dec. 6, 2006), available at: http://judiciary.senate.gov/testimony.cfm?id=2442&wit_id=5939 (hereafter “Newsome”).

⁷ For an example of two very different ways to view the same law, see Jonathan Alter, *A Bankrupt Way to do Business*, NEWSWEEK, April 25, 2005, at 29 (“this bill, like so many others moving through Congress, comforts the comfortable and afflicts the afflicted. Worse, it provides for no distinction between those who get unlucky in Las Vegas and those who get cancer. . . . [C]redit-card companies . . . insist the point of the bill is to restore the stigma of bankruptcy. That’s just what a seriously ill, jobless or abandoned person needs—more stigma”).

⁸ Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WIS. L. REV. 969, 1011 (2005) (“Jean Braucher and others asserted that the pending consumer bankruptcy legislation ‘would make access to bankruptcy more difficult for all, imposing new costs and hurdles and thus pricing the worst off out of the system.’”) (citing see e.g. Jean Braucher, *Means Testing Consumer Bankruptcy: The problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 408 (2002); see also Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?* 18 BANKR. DEV. J. 1, 34 (2001) (“The Reform Bill contains additional provisions that also will create entry barriers [to bankruptcy].”). *See, e.g.*, Jean Braucher, *Response to Eric Posner*, 7 FORDHAM J. CORP. & FIN. L. 463, 468 (2002) (While debating the pending reform legislation, Professor Braucher implies that the legislation will make access to bankruptcy more difficult.).

⁹ *See, e.g.*, Richard M. Hynes, *Why (Consumer) Bankruptcy?* 56 ALA. L. REV. 121, 125 (Fall 2004) (Recognizing that scholars argue that “the proposed reforms . . . will raise the cost of filing for bankruptcy to a price beyond the reach of consumer who truly need bankruptcy relief.”).

¹⁰ *See* Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy* 79 AM. BANKR. L. J. 169, 186 (Spring 2005) (recognizing that legal fees and other “access costs” should be included in a framework making a comparative analysis of consumer bankruptcy).

¹¹ ARNOLD COHEN AND MITCHELL MILLER, CONSUMER BANKRUPTCY MANUAL, 2D § 15:7 (September 2006).

¹² L David A. Lander, *Essay: A Snapshot of Two Systems that Are Trying to Help People* 7 AM. BANKR. INST. L. REV. 161, 172 (Spring 1999) (citations omitted).

¹³ COHEN AND MILLER, *supra* note 11, at § 15:7.

¹⁴ *Id.*

¹⁵ Lander, *supra* note 12, at 171-72 (citations omitted).

¹⁶ *Id.* at 172.

¹⁷ *Id.* (“[T]he primary component of costs in a consumer bankruptcy proceeding are attorney’s fees.”).

¹⁸ *In re Murray*, 330 B.R. 732, n.2 (Bankr. E.D. Wis. 2005)(The court recognized that the typical “flat fee is expected to increase for cases filed under the Bankruptcy Abuse Prevention and Consumer Protection Act 2005).

¹⁹ See Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. UNIV. L. REV. 1295, 1308-1311 (June 2006). See also, Jean Braucher and Charles W. Mooney, Jr., *Means Measurement Rather Than Means-Testing: Using the Tax System to Collect from Can Pay Consumer Debtors After Bankruptcy*, 22 AM. BANKR. INST. J. 6 (February 2003)(recognizing means testing is more complex and time consuming which may lead to higher legal fees).

Increased attorneys’ fees in typical consumer cases in light of additional work requirements was seen with the 1984 amendments to the Code which required more detailed explanation of relief available, and an acknowledgement by the debtor of the differences in the chapters available for relief. This resulted in more time spent with debtors and increased costs. See COHEN AND MILLER, *supra* note 11, at § 15:3.

²⁰ Testimony of Professor Robert M. Lawless at the “Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act” Hearings before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee, 110th Cong. (Dec. 6, 2006), available at:

http://judiciary.senate.gov/print_testimony.cfm?id=2442&wit_id=5936 (hereafter “Lawless”).

²¹ Braucher, *supra* note 19, at n. 65 (citations omitted).

²² Testimony of Professor Todd Zywicki at the “Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act” Hearings before the Subcommittee on Administrative Oversight and the Courts of the Senate Judiciary Committee, 110th Cong. (Dec. 6, 2006), available at

http://judiciary.senate.gov/print_testimony.cfm?id=2442&wit_id=5934 (hereafter “Zywicki”).

²³ Lawless, *supra* note 20.

²⁴ See also Newsome, *supra* note 6.

²⁵ Braucher, *supra* note 19, at 1311.

²⁶ U.S. Courts Website, Fee Issues in Bankruptcy Courts, available at

<http://www.uscourts.gov/fedcourtfes/bankruptcyfee2006a.pdf>.

²⁷ The Bureau of Labor Statistics’ Consumer Price Index (CPI-U-RS) is 166.6 for 1999 and 201.6 for 2006. To adjust the 1999 filing fee to 2006 constant dollars, multiply the 1999 value by 201.6/166.6, or 1.210084. The Consumer Price Index data is available at

<ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.

²⁸ Mary-Beth McLaughlin, 4th *Boost Sought for Bankruptcy Filing Fee*, available at

<http://toledoblade.com/apps/pbcs.dll/article?AID=/20060719/BUSINESS04/607190400/-1/BUSINESS> (July 19, 2006).

²⁹ 11 U.S.C. §§ 109(h), 521(b) (2005).

³⁰ 11 U.S.C. § 109(h)(1) (2005).

³¹ The legislative history clearly states the intended purpose of the pre-petition credit counseling:

The legislation’s credit counseling provisions are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy – such as the potentially devastating effect it can have on their credit rating (citation omitted) before they decide to file for bankruptcy relief.

H.R.Rep. No. 109-31, Part 1 at 18 (2005), U.S. Code Cong. & Admin. News 2005, p. 104.

³² Landry and Mardis, *supra* note 6, at 107.

³³ *Id.*

³⁴ 11 U.S.C. §§ 111(b) (2005). For a discussion of the U.S. Trustee and U.S. Bankruptcy Administrator programs, see Robert J. Landry, III, *Individual Chapter 11 Reorganizations: Big Problems with the New “Big” Chapter 13*, __ U. ARK. LITTLE ROCK L. Rev. __, n.17 (forthcoming 2007).

³⁵ 11 U.S.C. §§ 111(c) and 111(d)(1)(E) (2005).

³⁶ The statute requires the service be provided “without regard to ability to pay the fee.” 11 U.S.C. § 111(c)(2)(B) (2005).

Early evidence indicates that the fee is being waived for clients unable to pay, but the extent and standard applied for the waiver is not clear. See GAO, *Bankruptcy Reform: Value of Credit Counseling Requirement Is Not Clear*, GAO-07-203, at 29-31 (Washington, D.C: Apr. 6, 2007) (hereafter “GAO Report”).

³⁷ Braucher, *supra* note 19, at 1311-12.

³⁸ As discussed in Part V, the mean total direct access cost in 2006 was \$1232.53, the credit counseling fee was approximately 4% of the total direct access costs. When the debtor education fees are considered along with the credit counseling fee, these account for about 8% of the direct access costs in 2006.

³⁹ GAO Report, *supra* note 36, at 4.

⁴⁰ Landry and Mardis, *supra* note 6, at n.120.

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- ⁴¹ 11 U.S.C. § 727(a)(11) (2005). *See also* Landry and Mardis, *supra* note 6, at 112-113.
- ⁴² Braucher, *supra* note 19, at 1313.
- ⁴³ 11 U.S.C. § 727(a)(11) (2005). *See also* Landry and Mardis, *supra* note 6, at 112-113.
- ⁴⁴ *See* Arturo Bris, Ivo Welch and Ning Zhu, *The Costs of Bankruptcy: Chapter 7 Cash Auctions vs. Chapter 11 Bargaining*, March 15, 2004, EFA 2004 Maastricht Meetings Paper No. 5155, available at SSRN: <http://ssrn.com/abstract=556930> (Empirically examines the direct and indirect costs of both small and large corporate Chapter 7 and 11 bankruptcies from 1995-2001 in two states: Arizona and New York.)
- ⁴⁵ There have been several studies on the costs associated with Chapter 11. For a through review of these studies to date, see Stephen J. Lubben, *The Microeconomics of Chapter 11*, January 3, 2006, Seton Hall Public Law Research Paper No. 47, at 6-15, available at SSRN: <http://ssrn.com/abstract=869817>. These studies and others are useful in the Chapter 11 area, but are not useful regarding consumer Chapter 7 cases.
- ⁴⁶ DAVID STANLEY AND MARJORIE GIRTH, *BANKRUPTCY: PROBLEM, PROCESS REFORM* (1971).
- ⁴⁷ *Id.* at 185.
- ⁴⁸ *See* Porter and Thorne, *supra* note 1, at 81 and 122.
- ⁴⁹ *Id.* at 81. The sample also included an additional 470 Chapter 13 bankruptcy filings; however, the focus of this research is on Chapter 7 costs.
- ⁵⁰ *Id.* at n.245.
- ⁵¹ *Id.*
- ⁵² *Id.* at n.244 (citing 28 U.S.C. § 1930(a)(1) (2000)).
- ⁵³ It is worth noting that in Phase I of the Consumer Bankruptcy Project, with data collection in the early 1980s, data was collected on attorneys' fees. Detailed information on that data is not published, but the study does report that the average fee, without any breakdown between Chapter 7 or 13, was \$500, with a range of \$60 to \$5000. TERESA A SULLIVAN, ELIZABETH WARREN AND JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS* 23 (1989).
- ⁵⁴ COHEN AND MILLER, *supra* note 11, at § 15:7.
- ⁵⁵ Hon. Geraldine Mund, *Paralegals: The Good, The Bad and The Ugly*, 2 AM. BANKR. INST. L. REV. 337, 344 (1994).
- ⁵⁶ *In re Murray*, 330 B.R. 732, 733 (Bankr. E.D. Wis. 2005).
- ⁵⁷ *In re Jastrem*, 253 F.3d 438, 442 (9th Cir. 2001).
- ⁵⁸ *In re Sturgeon*, 242 B.R. 724, 727 (Bankr. E.D. Okla. 1999).
- ⁵⁹ *In re Wyslak*, 94 B.R. 540 (Bankr. N.D. Ill. 1988).
- ⁶⁰ *Id.* at 541.
- ⁶¹ *Id.* at 541-42.
- ⁶² PACER is an acronym for Public Access to Court Electronic Records. PACER is an electronic public access service which contains the case filing information. It was also used to collect data from the actual case files which are available in electronic format through PACER. For more information regarding PACER, see John Golmant and Tom Ulrich, *Bankruptcy Repeat Filings*, 14 AM. BANKR. INST. L. REV. 169, at n. 26-27 (Spring 2006).
- ⁶³ Page 1 of Official Form 1 (Voluntary Petition) includes a box titled: "Type of Debtor." The debtor(s) check one of four options: Individual (include joint Debtors), Corporations (includes LLC and LLP), Partnership and Other (If debtor is not one of the above entities, check this box and state type of entity below). Only those cases in which the debtor(s) checked "Individual" are included in the sample.
- ⁶⁴ Page 1 of Official Form 1 (Voluntary Petition) includes a box titled: "Nature of Debts." The debtor(s) check one of two options: Debts are primarily consumer debts, defined in 11 U.S.C. 101(8) as "incurred by an individual primarily for personal, family, or household purpose"; or Debts are primarily business debts. Only those cases in which the debtor(s) checked the box indicating the debts were consumer debts were included in the sample.
- ⁶⁵ A Codebook was developed to collect and code the data from the petition and schedules. The Codebook was developed using the instrument Phase III of the Consumer Bankruptcy Project as a model. The authors are grateful to the willingness of Professor Katherine Porter, and the other scholars involved in the Consumer Bankruptcy Project, for their willingness to share their coding instruments. For more information regarding the Consumer Bankruptcy Project generally, see SULLIVAN, ET AL., *supra* note 53, at 342-354; TERESA A. SULLIVAN, ELIZABETH WARRANT AND JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS* 263-287 (2000). *See also* Porter and Thorne, *supra* note 1; Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003 (2002).
- ⁶⁶ The credit counseling and debtor education data was coded based on type of class/course and the nonprofit organization providing the services. Once the data was collected and coded, the results were then converted to dollars based on the type of class/course and nonprofit organization providing the services. There were five nonprofit organizations that provided these services in the sample. Each organization was consulted to determine the fee charged for each type of service.
- ⁶⁷ Data on a panoply of attributes of the debtors and cases was collected, but these characteristics were expected to impact attorneys' fees charged in a typical Chapter 7 case.
- ⁶⁸ The data for both dependent variables were screened for normality. Five cases that are outliers were removed from the analysis. These cases were beyond 3 standard deviations of the mean. The data was then re-screened for normality and the

distribution was normal. The variables were also screened for multicollinearity, and although a mild correlation exists between total assets and total liabilities, this was not judged to be a problem.

⁶⁹ Analysis was performed using SPSS 14.

⁷⁰ Zywicki, *supra* note 22.

⁷¹ *See e.g.*, Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 Mo. L. Rev. 963, 1078 (2006)(The author recognizes a whole host of policy areas that intersect with the bankruptcy system and the importance of empirical research on the relationship between those areas and consumer bankruptcy.)