Saving Up for Bankruptcy

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INTRODUCTION

Bankruptcy is a numbers game. Policymaking, public perception, and the scholarly literature are captivated with the number of annual bankruptcy filings, which hit one million in 2008.[1] The number of annual bankruptcy filings has become a barometer of economic health, reflecting an implicit assumption that bankruptcy is a useful proxy for financial distress.

But at the level of the individual family, the causative relation between financial distress and bankruptcy filings is unclear. On the one hand, only a fraction of those in serious financial distress will ever file for bankruptcy. For example, a study by Michelle White examined a group of households in which bankruptcy relief would have afforded an economic benefit to about 15% of them, but only about 0.66–1% sought relief any given year.[2] That is, most families in serious financial distress do not file for bankruptcy. In fact, each year foreclosure filings outstrip bankruptcy filings because many families do not even try to use bankruptcy to save their homes.[3] Similarly, thousands of families are subject to collection calls for medical bills,[4] and yet the number of bankruptcy filings—even at its pinnacle—represents only a sliver of those struggling with bills. On the other hand, we know that many families that file for bankruptcy are so mired in poverty—with no substantial income or assets—that they gain little obvious financial advantage.[5] Those families discharge debts that

1. The premise of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was that the number of bankruptcy filings in the 1990s and first years of the 2000s was unacceptably high. Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 351–52 (2008). Although filings dropped immediately after BAPCPA's effective date and remain lower than the all-time high, the number of filings has been trending steadily upward for several years now. *See* Administrative Office of the U.S. Courts, Bankruptcy Statistics, http://www.uscourts.gov/bnkrpctystats/statistics.htm#quarterly (last visited Nov. 24, 2009).

2. *See* Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 206 (1998).

3. For example, the Mortgage Bankers Association reports that about 4,590,000 foreclosures were initiated during the fourth quarter of 2008. *See* MORTGAGE BANKERS ASS'N, NATIONAL DELINQUENCY SURVEY: Q408 (Mar. 2009) (copy on file with authors). During that same quarter, the Administrative Office of the U.S. Courts reported 236,982 nonbusiness bankruptcy filings. *See* ADMIN. OFFICE OF THE U.S. COURTS, QUARTERLY FILINGS: MARCH 2008, http://www.uscourts.gov/bnkrpctystats/statistics.htm#quarterly.

4. *See* ANDREW COHEN & CAROL PRYOR, IN DEBT BUT NOT INDIFFERENT: CHAPTER 58 AND THE ACCESS PROJECT'S MEDICAL DEBT RESOLUTION PROGRAM 21 (2008), *available at* http://www.accessproject.org/adobe/InDebtButNotIndifferent.pdf; MARK RUKAVINA, HEARING ON WORKING FAMILIES IN FINANCIAL CRISIS: MEDICAL DEBT BANKRUPTCY 4 (2007) (report of Mark Rukavina, Executive Director of The Access Project, submitted to the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary), *available at* www.accessproject.org/adobe/rukavina_testimony_July_2007.pdf.

5. In the 2007 Consumer Bankruptcy Project sample, 95.1% of the 1612 Chapter 7 cases were denominated on the debtors' petitions as "no-asset" cases. *See* 2007 CONSUMER BANKR. PROJECT, SURVEY DATA (on file with Katherine Porter); *see also* Ed Flynn et al., *Bankruptcy by the Numbers: Chapter 7 Asset Cases*, AM. BANKR. INST. J., Dec. 2002–Jan. 2003, at 22 (reporting, based on June 2001–June 2002 filings, that 96% of Chapter 7 cases are closed without any funds collected and distributed to creditors).

creditors could not have collected in any event.[6] These additional, and presumptively unnecessary, bankruptcies drive up the number of filings.

The equating of bankruptcy with financial distress misperceives the social and economic significance of bankruptcy. Bankruptcy is not the cause of financial distress; it is our institutional remedy for it. Thus, a central policy question is how to design a bankruptcy system so that it minimizes the societal costs of financial distress. Understanding why particular households seek relief in bankruptcy at particular times is the central empirical question for an intelligent assessment of that problem. Policymakers concerned about the role of bankruptcy in giving families a fresh start that redeploys their human capital to productive use should wonder whether the existing process, so loosely related to the severity of financial distress, is sorting the right families into bankruptcy at the right time. The social costs of financial distress, discussed more thoroughly in Part I, are too high if the system either attracts families who could repay their debts or hinders those for whom repayment will never be a realistic option. Intuitively, it seems obvious that there must be something that distinguishes the distressed families who choose bankruptcy from those who do not. Yet without an understanding of the mechanisms that motivate those in distress to seek bankruptcy relief, aggregate level data about the annual number of bankruptcy filings are of little value in assessing those questions.

This Article looks beneath the raw bankruptcy numbers and examines the mystery of why so few of the consumers for whom bankruptcy would be economically valuable actually choose to file. What prompts the few who seek bankruptcy relief at any given moment to separate themselves from the mass who do not? Is it too many calls from a debt collector? Is it the threatened loss of a home to foreclosure or an imminent wage garnishment? Scant research exists about such effects and how they contribute to a family's decision to file for bankruptcy. The focus on the rising tide of bankruptcy filings has obscured our collective understanding of what triggers a distressed consumer's decision to seek bankruptcy relief.

This project is a first effort to examine that problem. Specifically, we want to explore what leads consumers in financial distress to file for bankruptcy at the particular moment they choose to do so. Because our goal is to improve the way in which the bankruptcy system responds to financial distress, our research is agnostic regarding the nature of the underlying causes of household financial distress. We are focused directly on the last straw, the "trigger" that drives families into the bankruptcy system at any given instant.

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6. The relevant class of families is not those without any assets at all, but those whose assets are exempt from execution under applicable state law and thus cannot be taken by a creditor through coercive process to satisfy a judgment. Although those exemptions vary considerably from state to state, they often are sufficiently expansive to cover substantially all of the assets of a typical bankrupt family. *See* ROBERT J. HOBBS, FAIR DEBT COLLECTION 267–94 (Supp. 2006) (summarizing each state's exemption laws); *see generally* 14 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY (15th ed. 2008) (describing variations in state exemption laws).

Starting from the paradigms of bankruptcies driven by an imminent mortgage foreclosure or garnishment, our working hypothesis was that entry into the legal process for the ordinary consumer is an unfamiliar, intimidating, and serious step, and that debt burdens alone are rarely adequate to force a bankruptcy. Thus, we speculated, the typical consumer would seek formal debt relief through the bankruptcy system only when a creditor took some formal collection action that required a bankruptcy filing to stave off financial disaster for the household. Our expectation was that information about collection activities would explain how families are sorted into those who continue to struggle along with their debts and those who seek relief in bankruptcy.

To examine that theory, we combine three kinds of data. The first source is quantitative data collected from judicial records that show the weekly, monthly, and annual patterns of bankruptcy filings. The second is a series of more than forty interviews with industry professionals (debtor and creditor attorneys, trustees, and judges), predominantly from five states (Georgia, Iowa, Massachusetts, Nevada, and Texas). Those interviews examine why people file when they do and what distinguishes those who choose to file from those who delay or avoid filing. The third source is survey data from the 2007 Consumer Bankruptcy Project, the first nationally representative sample of bankrupt households. The survey data explore the struggles families endure before they choose to file.

The data support two empirical findings. The first is about the role of aggressive collection in motivating bankruptcy filings. Generally, apart from foreclosure-related filings, the emergency bankruptcy filing is largely a myth. Creditor collection activity does not force people into an immediate bankruptcy. On the contrary, it wears them down slowly but ineluctably, like water dripping on a stone. Second, the primary factor that affects the date on which people actually file is their ability to save up the money to pay their attorneys and filing fees. Thus, among other things, we see an annual peak in bankruptcies shortly after families receive their tax refunds and a semimonthly peak related to the receipt of paychecks.

Finally, we build two important policy recommendations on those findings. First, we argue that the existing collection process is flawed by a prisoner's dilemma that leads to excessive and wasteful "dunning" by creditors. Because each creditor has an incentive to be first in line to collect, and because the creditors can dun their debtors at little or no cost to themselves, creditors as a group engage in dunning activities that individual debtors find intolerable—a level of activities from which a rational single creditor would refrain. We recommend a variety of improvements to strengthen the Fair Debt Collection Practices Act. Some of these recommendations are detailed (extending the Act to in-house collection, increasing the statutory damages, and the like), but the most important innovation is a "do-not-dun" rule modeled on the do-not-call list for telemarketers. Specifically, we recommend a low-transaction-cost mechanism (activated by telephone call or Internet site) that would automatically and immediately stop all creditor collection activity other than litigation, at least for a fixed period of time. This mechanism would prevent the harms of excessive calls and letters to debtors who have signaled they will not pay voluntarily; if the creditors believe those debtors can pay, then they should move forward with litigation.

Second, corollary to our argument that excessive collection causes inappropriate bankruptcy filings, we also believe that excessive costs deter socially valuable bankruptcies. To respond to that problem, building on earlier work, we argue that low-income, low-asset filers should have access to a simplified administrative process that provides prompt relief without the costs and delay of judicial process.

The Article proceeds as follows: Part I explores the gap between the ample research on the underlying causes of financial distress and the scant research on the triggers of bankruptcy filing. Part II describes the methodology of our data collection and its relative strengths and weaknesses. Part III presents our qualitative and survey-based findings about the interplay between collection efforts and the urgency of bankruptcy filings. Part IV examines the lag between a consumer's initial decision to seek bankruptcy relief and the ultimate filing of the bankruptcy case, illustrating how debtors' constrained access to ready cash shapes the patterns of bankruptcies. And finally, Part V analyzes the implications of our findings for existing policy debates about both debt collection and the gatekeeping function of the bankruptcy process.

I. THEORIES OF BANKRUPTCY

Conventional theories of bankruptcy shed little light on the bankruptcy decision on which this Article focuses. The central concern of those theories is resolving the "moral hazard" problem inherent in a system in which borrowers receive loans at one point in time and promise to repay them at a later time. Early writers in that tradition argued that rules permitting borrowers to display their repayment proclivities by accepting contracts with such remedies as "arm-breaking" would result in stronger markets that prevented borrowers from succumbing to moral hazard.[7] Scholars applying that model to the bankruptcy discharge suggest that an optimal market would resolve the moral hazard problem by permitting consumer bankrupts to waive their bankruptcy remedies by contract.[8]

Similarly, Michelle White suggests that exemption laws that preserve a substantial asset base for consumer bankrupts will give consumers incentives to file for bankruptcy without adequate financial distress to justify the discharge

7. *See* Richard Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 159–62 (2004); Samuel A. Rea, Jr., *Arm-Breaking, Consumer Credit, and Personal Bankruptcy*, 22 ECON. INQUIRY 188, 193 & n.13 (1984).

8. *See* Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 609–10 (2000).

that they will receive.[9] More generally, writers in the populist vein emphasize the possibility that a loosening of the rigors of bankruptcy might lead to opportunistic borrowing. Thus, they contend that consumers often borrow *because* they know that bankruptcy will forgive their obligation to repay the loan.[10]

A contrary perspective in existing scholarship looks not to individuals' strategic options, but has emphasized the importance of exogenous financial shock in the etiology of consumer bankruptcy. This perspective attributes a large share of consumer bankruptcy filings to uncontrollable events like layoffs, illness, or divorce. For example, Sullivan, Warren, and Westbrook's study of 1991 consumer bankruptcy filings reports job-related disruptions in more than two-thirds of filings,[11] divorces in almost a quarter of bankrupt households (a rate more than twice the national average),[12] and medical reasons for almost one-fifth of bankruptcies.[13] A recent study suggests that medical problems contribute to a larger share of bankruptcies than the 1991 data suggest.[14]

More recent work has considered how the structure and nature of households may heighten the risk of exogenous shock and bankruptcy. In their book, *The Two-Income Trap*, Warren and Tyagi find that married couples with children are more than twice as likely to seek bankruptcy relief than are childless couples and contend that two-income families with children have ratcheted up their risk of financial collapse by eliminating the traditional option of deploying a mother into the work force to cope with an exogenous shock.[15] Such household decisions may seem remote, or even intuitively counter to financial risk, but both married and single people with children are overrepresented among bankruptcy debtors.[16]

The fundamental weakness of those models, however, is that they equate financial distress with bankruptcy. The implicit premise is that bankruptcy is an adequate proxy for financial distress: if some combination of profligate borrowing and exogenous shocks leads to debts that overwhelm a family's financial

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9. White, *supra* note 2, at 229; *see* Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at Incentives Under U.S. Bankruptcy Laws and a Proposal for Change*, 65 U. CHI. L. REV. 685, 708–09 (1998).

10. *See* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 206; Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1526 (2005).

11. TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 77–79 (2000).

12. *Id.* at 183.

13. *Id.* at 145–46.

14. *See* David U. Himmelstein et al., *Illness and Injury as Contributors to Bankruptcy*, HEALTH AFFAIRS, Feb. 2, 2005, at 63, *available at* http://content.healthaffairs.org/cgi/content/full/hlthaff.w5.63/DC1.

15. *See* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 6 (2003).

16. *See id.* (reporting that married couples with children are more than twice as likely to file bankruptcy as childless couples and that an unmarried woman with children is nearly three times as likely to file for bankruptcy as a woman without children).

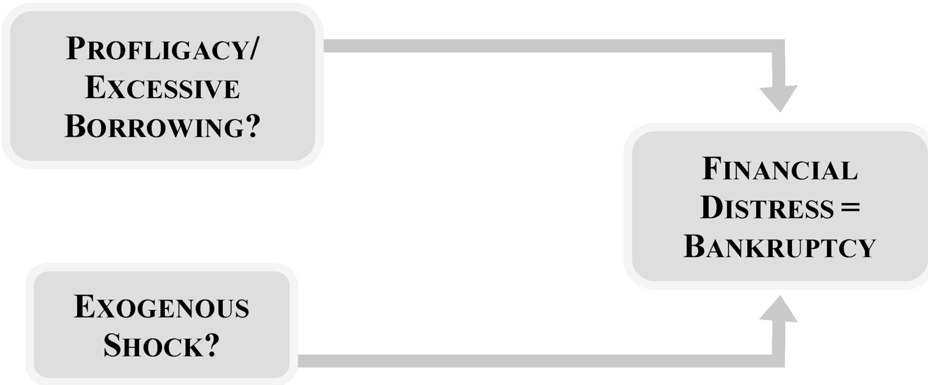

Figure 1. Conventional Models of Bankruptcy and Financial Distress

resources, the result is financial distress, upon which bankruptcy follows inexorably. The primary implication of that premise is that research about overindebtedness or the quality of the social safety net can use data about bankruptcy filings to quantify the incidence of financial distress. The two sides of the debate differ on the relevance of profligacy and exogenous shock, but they share a disinterest in distinguishing between financial distress that does, and does not, result in bankruptcy. Figure 1 illustrates that conventional view.

In practice, however, a strong majority of those in serious financial distress does not file for bankruptcy. This raises the question of whether, among the population of financially distressed consumers, those who do file for bankruptcy differ in any important way from those who do not file for bankruptcy. Figure 2 illustrates a new model, focusing on the distinction between those who choose to use the bankruptcy process and those who do not remediate their financial distress by filing for bankruptcy.

This revised model can provide important insights if we view the purpose of a bankruptcy system as balancing the benefits of prompt redeployment of human capital against the excessive moral hazard of an unduly lax system for the enforcement of debts. The principal basis for social concern about financial

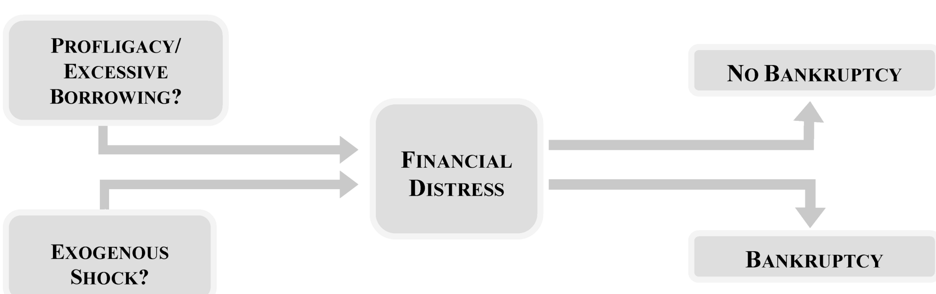

Figure 2. Revised Model of Bankruptcy and Financial Distress

distress is its adverse effect on the social productivity of the affected households. It is reasonable to expect that households in distress will engage in less of the fruitful economic activity characteristic of productive households, activity that benefits the surrounding community in various ways, ranging from tax payments to consumption expenditures (supporting economic growth) to employment (supporting yet another round of economic activity). More generally, households in distress are less likely to invest appropriately in health and education for their members and are more likely to be involved in divorce and similar processes.[17] An optimal process for the resolution of financial distress would minimize the amount of those social losses. Among other things, those losses can be minimized by a process that limits the time and expense consumed by the period of distress and returns the household to productive economic activity. The model illustrated in Figure 2 brings to the forefront the question of whether the sorting of distressed households into bankruptcy and nonbankruptcy responses reflects an optimal balancing of those social policies.

Relatively little empirical evidence addresses this question, primarily because of the difficulty of collecting data about distressed households that do not use the bankruptcy system to address their problems. Normally, legal scholars examine bankruptcy because it is an easy place to find data. A few papers in recent years have used data sets of distressed private firms in an effort to understand the differences between those that do and do not use the bankruptcy process when they fail.[18] In the consumer context, however, scholars have not yet undertaken such a study.

That is not to say that there is no evidence in the literature on the patterns and specific causes of bankruptcy filings. For example, we know from Stanley and Girth's landmark study under the pre-1978 Bankruptcy Act that threats of legal action were frequent triggers of bankruptcy filings during the 1960s.[19] However, actual legal actions, such as garnishments, were less commonly named by debtors as an immediate cause of their bankruptcy filings.[20] Herbert Jacob's study of households in the 1960s subjected to wage garnishment in four

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17. *Cf.* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 49–51 (2006) (stating that financial distress imposes "substantial costs on third parties," including externalities such as a decline in the mental and physical health of family members).

18. *See, e.g.*, Ronald J. Mann, *An Empirical Investigation of Liquidation Choices of Failed High-Tech Firms*, 82 WASH. U. L.Q. 1375, 1377–79 (2004); Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law* (The Ctr. for Law & Econ. Studies, Columbia Univ. Sch. of Law, Working Paper No. 320, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1065543.

19. *See* DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 47 (1971) (reporting threats of legal action as immediate cause for filing in 43% of personal bankruptcy cases).

20. *See id.* at 48 (finding that 18% of debtors named actual legal action as reason why they filed bankruptcy). Richard Hynes's recent study of garnishment suggests that the role of garnishment may have declined considerably since the 1960s. *See* Richard M. Hynes, *Bankruptcy and State Collections: The Case of the Missing Garnishments*, 91 CORNELL L. REV. 603, 626–30 (2006) (reporting that although bankruptcy rates have risen over a period of a dozen or more years, garnishment rates declined in Cook County, Illinois and remained flat in the Commonwealth of Virginia).

Wisconsin cities rejected the premise of a close link between the incidence of wage garnishment and bankruptcy, noting that *only* two-fifths of bankruptcy debtors had been subjected to garnishment before filing.[21] Notably, bankruptcy debtors reported creditor harassment or pressure more frequently than other delinquent debtors who did not file for bankruptcy; the study's author concluded that for most bankruptcy debtors, "the collector was constantly present and a source of continuous concern."[22]

Similarly, Martin Ryan's study of the Australian process identified a substantial relationship between creditor harassment and bankruptcy.[23] Although there are some significant differences, Australia is a useful comparison because it has a developed credit economy and relatively generous bankruptcy relief. Ryan found that approximately half (52%) of Australian bankrupts had received threats of legal action[24] and that 59% of them reported that pressure from creditors had a "crucial" or "significant" effect on their decision to petition for bankruptcy relief.[25] Ryan delved deeply into this relationship, finding that stronger perceptions about creditor pressure were associated with the frequency of creditor contact and the length of time the debtor was under collection pressure.[26]

Apart from, or in addition to, these effects from collection pressures, timing could affect bankruptcy filings. For two decades, the shared wisdom was that consumer filings surged after Christmas and in the late summer. Sullivan, Warren, and Westbrook report that bankruptcy court clerks and lawyers attributed the former to the arrival of holiday bills in January and the latter to "an analogous back-to-school 'rush' in late August."[27] Ultimately, they deem seasonality to be "putative" and suggest any such effects are stronger for filings in Chapter 7, which provides a rapid discharge, than Chapter 13 filings, in which debtors repay a portion of their debts over a period of years.[28] In a later study from 1991, they found little seasonality across months in Texas and California.[29]

Electronic filing technology and computerized record keeping allow us to test these dated conclusions with a more comprehensive and nuanced examination of filing patterns than these earlier efforts. More generally, a thorough understanding of the process requires an understanding not only of the filing patterns but also of their relation to the creditor collection efforts that precede them. As this discussion makes clear, however, there has been no sustained effort to examine

21. HERBERT JACOB, DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES 56–57 (1969).
22. *Id.* at 64.
23. *See* MARTIN RYAN, THE LAST RESORT: A STUDY OF CONSUMER BANKRUPTS 153 (1995).
24. *Id.* at 145.
25. *Id.* at 153–54.
26. *Id.* at 161.
27. TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 344–45 (1989).
28. *Id.* at 354 n.1.
29. Teresa A. Sullivan et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 AM. BANKR. L.J. 121, 148 (1994).

those subjects during the three decades since enactment of the Bankruptcy Code of 1978. This project provides a first step toward understanding that process.

II. METHODOLOGY

This section describes the methodology of our data collection, the problems we faced in designing our data collection, and the solutions we used to respond to those problems. We began our inquiry by collecting data on filing patterns in five states. We then conducted interviews with bankruptcy professionals to contextualize those patterns. We added data from a national survey of bankruptcy debtors to examine how consumers themselves explain the triggers for their bankruptcies.

A. SELECTING JURISDICTIONS

Our goal in selecting jurisdictions for our study was to balance the need to keep the size of the project manageable against the obvious variations among the states in both economic and legal conditions and in bankruptcy filing rates. Ultimately, we settled on five states designed to reflect diversity on several different metrics: Georgia, Iowa, Massachusetts, Nevada, and Texas.

To begin with, the states are geographically and culturally distinct: Massachusetts is in the heart of New England; Georgia and Texas are at polar ends of the South; Iowa is in the Midwest; and Nevada is in the far Southwest. With respect to foreclosure and bankruptcy attributes, Iowa requires judicial proceedings for foreclosure, while Texas, Georgia, Massachusetts, and Nevada permit nonjudicial foreclosure but have significantly different procedural requirements that affect the time needed to foreclose.[30] The states that permit nonjudicial foreclosure have high rates of foreclosures per capita.[31] The amount and type of assets that a party may shield from creditors also varies in these states. Nevada and Texas permit very generous exemptions, Iowa has moderate exemptions, and Georgia and Massachusetts are relatively parsimonious.[32]

30. For example, in Massachusetts, mortgagees typically file a complaint as an initial step to obtain a judgment that the mortgagor is not subject to the Servicemembers Civil Relief Act, which provides additional debtor protections to military personnel. *See* 50 U.S.C. app. §§ 532–33 (2009). This procedural step in Massachusetts Land Court, *see* MASS. LAND CT. R. 12, adds a delay of several weeks to the nonjudicial process that follows.

31. The foreclosures per capita rankings for the five states are: Georgia (second); Massachusetts (third); Nevada (fourth); Texas (seventh); and Iowa (twenty-fourth). The information in this paragraph relies on population estimates from the Census Bureau, foreclosure data from the Mortgage Bankers Association, and bankruptcy filing rates from the Administrative Office of the U.S. Courts, all as of 2007 (the latest data available when we selected the jurisdictions for our study).

32. *See* HENRY J. SOMMER ET AL., CONSUMER BANKRUTPCY LAW AND PRACTICE app. J (Supp. 2008) (summarizing each state's exemption laws).

These states also exhibit considerable diversity in bankruptcy filing rates. With regard to total bankruptcy filings, Georgia (third) is near the top. But Nevada (fifteenth) and Iowa (twenty-ninth) are in the middle tier, and Texas (thirty-fifth) and Massachusetts (fortieth) are closer to the bottom. The relative fraction of cases that are Chapter 7 (liquidation) bankruptcies or Chapter 13 (repayment) bankruptcies also varies considerably among these states. Chapter 13 filing rates per capita show this effect, ranging from Georgia yet again at the top of the scale (third), to Texas (fifteenth), Nevada (twentieth), and Massachusetts (thirty-first) in the middle, to Iowa near the bottom (forty-eighth).[33]

B. QUANTITATIVE FILING DATA

Next, we collected data from the public court records on the number of Chapter 7 and Chapter 13 bankruptcy filings for each day during 2004 and 2007 for our five jurisdictions.[34] We excluded 2005 and 2006 because of the abnormal pattern of filings during those years attributable to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005.[35] Thus, the two years for which we collected data are the two most recent, representative years for which complete data were available, and to the extent possible, this should isolate the effects of BAPCPA on the questions that we examine. We used the filings-per-day data to generate figures for each jurisdiction showing the patterns of filings by day of the week, day of the month, week of the year, and month of the year.

The quantitative data would have obvious problems if we intended to use them as a basis for drawing inferences about the reasons that particular individuals file at particular times. For one thing, the data are state-level aggregate data.[36] For another, we have only cross-sectional data rather than a longitudinal series. Finally, because there is good reason to expect variation from jurisdiction to jurisdiction, the limitation of the data collection to particular jurisdictions renders generalizations from the data problematic. Thus, our principal uses of the data were as a basis for generating questions for the qualitative interviews described below and for examining how variations in state collection processes affect decisions to file for bankruptcy.

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33. *See supra* note 31. We calculated these ourselves, specifically using the bankruptcy filing rates from the Administrative Office of U.S. Courts.

34. To collect the court-record data, we used the PACER service of the Administrative Office of the U.S. Courts and received data collected from those public records from a private company, AACER, which generously provided us with assistance. Although we are primarily interested in consumer filings, we did not distinguish between business and nonbusiness filings because the share of filings by individuals is such a high share of overall filings in the jurisdictions we examined that business filings are a trivial share of total filings.

35. For a preliminary discussion of the effects of BAPCPA on filing rates, see Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 397–401.

36. Although we collected the data by aggregating PACER records of individual filings, we analyzed the data only at the level of state jurisdictions. None of our hypotheses suggests important variations at levels below the state level.

C. SURVEY DATA

As a second source of data regarding our hypotheses, we turned to the 2007 Consumer Bankruptcy Project.[37] Its data come from the first nationwide random sample of households in bankruptcy, providing us with a wide lens for studying recent consumer filings. The 2007 Consumer Bankruptcy Project is the largest and most comprehensive family-level study of bankruptcy debtors to date.[38]

With the generous help of the Automated Access to Court Electronic Records (AACER),[39] the Consumer Bankruptcy Project drew a random sample of one thousand Chapter 7 or Chapter 13 bankruptcies filed by natural persons (rather than legal entities) for five consecutive weeks beginning the last week of January 2007.[40] Investigators mailed each of these five thousand households a letter explaining the study, a written questionnaire, a prepaid response envelope, and two dollars cash as a token of appreciation. Debtors were asked to return the questionnaire if they wished to participate. The investigators sent follow-up reminders in the weeks that followed. These efforts produced 2438 questionnaires, yielding a participation rate of 49.0%.[41] Of these returned questionnaires, 2314 were completed; the remaining 124 were returned incomplete.

The sample of 2438 returned questionnaires closely mirrored the universe of bankruptcy filings. For 2007, AACER data show that 29% of bankruptcy cases were joint cases. In the respondent sample, joint petitions were 29.9% of the cases. In the time period that corresponded to the sampling, 62.3% of all nonbusiness bankruptcies were Chapter 7 cases, and 37.7% were Chapter 13 cases. In the respondent sample, 66% of respondents had filed Chapter 7 cases, and 34% had filed Chapter 13 cases. To assess response bias, investigators downloaded court records for a sample of nonrespondents to determine whether the nonrespondents were statistically distinguishable from those who responded. According to the criteria available from the court records such as income, assets, debt, home value, and history of prior bankruptcy, investigators did not

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37. The research team includes law professors, sociologists, and medical doctors. Katherine Porter is one of the investigators in the Consumer Bankruptcy Project.

38. For a detailed discussion of the methodology of the 2007 Consumer Bankruptcy Project, see Lawless et al., *supra* note 1, at 391–97.

39. AACER is a provider of bankruptcy data. AACER Home Page, http://www.aacer.com (last visited Nov. 24, 2009).

40. The choice to sample in the first quarter of 2007 was difficult because it is impossible to discern precisely when the immediate effects from the enactment of BAPCPA had diminished and a new "normal" pattern of filings had been reached. Of course, we now know that a more recent sample would have risked contamination by the unusually adverse economic conditions of the ensuing season.

41. A few hundred questionnaires were returned as undeliverable. Investigators drew another random sample to replace these households and repeated the same procedures used for the initial sample. An additional eighty-three households responded to the questionnaire by affirmatively refusing to participate. Thus, responses were received (whether returned completed, returned incomplete, or refused via phone or letter) from 2521 households, an overall response rate of 50.7%.

detect significant differences between respondents and nonrespondents.[42]

To unpack the pressures that may have caused people in financial distress to seek bankruptcy relief, we used Consumer Bankruptcy Project data from two research instruments: written questionnaires and computer-assisted telephone interviews.[43] The eight-page questionnaire was mailed to debtors shortly after their bankruptcy filings and focused on demographic information and self-reported causes of bankruptcy. The questionnaires asked debtors if they were willing to participate in a follow-up telephone interview in return for fifty dollars compensation. A high proportion (86.7%) of respondents affirmed an interest.

A small team of trained researchers used computer-assisted technology to interview debtors six to twelve months after the respondent's bankruptcy filing. Interviews were completed with 1032 respondents, which is 51.4% of those who indicated a willingness to be interviewed and 42.3% of those who returned questionnaires. To minimize the consequences of the fact that some debtors were easier to reach, repeated efforts were made to contact each debtor who was willing to be interviewed. To test for possible response bias, investigators compared the group of completed interview subjects with the group of volunteers who were not ultimately interviewed according to several economic criteria; investigators identified no significant differences between the two groups.[44]

For this project, we used data from the general questions asked of all interview subjects.[45] Broadly speaking, questions in the general section addressed the following issues: prebankruptcy financial pressures, employment, types of debt, effects of indebtedness, privations before bankruptcy, and financial circumstances after bankruptcy. The median length of the interviews was seventy-five minutes.

D. QUALITATIVE DATA

The ultimate purpose of our project is to understand the triggering events that sort those few individuals who file for bankruptcy from the much larger number of individuals in financial distress. Because so little is known about the subject, it is difficult to develop crisp, testable hypotheses, and hence, a qualitative research strategy seemed the approach most likely to be practicable and yield fruitful insights. Ideally, we would have interviewed a random sample from

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42. This does not prove that the sample is void of response bias. Respondents and nonrespondents may have differed, for example, on criteria such as race or existence of health insurance, which are not available from the public court records and thus cannot be obtained for nonrespondents.

43. The Consumer Bankruptcy Project also coded hundreds of pieces of data from each debtor's bankruptcy court records, which were matched on a debtor-by-debtor basis with the questionnaire and telephone interview data.

44. For further details on the telephone interview methodology, see Lawless et al., *supra* note 1, at 396–97 & n.177.

45. The telephone interviews comprised up to five sections: general, medical, housing, small business, and military, depending on whether the debtor met eligibility criteria such as owning a home or having performed military service.

the population of those who file for bankruptcy and from the population of individuals in similar situations of financial distress who do not file. In practice, however, it is not practicable to identify the population of individuals who are similarly situated to bankruptcy debtors but choose not to file. There is simply no access point to the population of those in financial distress paralleling the public availability of data about bankruptcy debtors.

Accordingly, we decided to interview bankruptcy professionals, expecting that bankruptcy professionals who interact closely with those considering bankruptcy would have information about the motivations of those who do and do not file for bankruptcy. The hope was that combining the Consumer Bankruptcy Project survey data from bankruptcy debtors with a series of in-depth interviews with bankruptcy professionals would provide a richer picture of the triggers for bankruptcy filings.

We conducted a series of interviews with bankruptcy judges, trustees, and debtors' and creditors' attorneys. Unfortunately, even within those defined groups, we cannot be certain that we obtained a representative set of interviews. Although the population of bankruptcy judges and bankruptcy trustees is readily identifiable, their professional responsibilities do not require the level of sustained interaction with consumers in financial distress that characterizes the daily work of debtors' and creditors' attorneys. Moreover, because they interact only with those who actually file for bankruptcy and not the larger group of those in financial distress who may consider bankruptcy or be in financial distress (but do not ultimately file), judges and trustees are less useful as interview subjects for this project.

With respect to bankruptcy attorneys, the difficulty lies both in identifying the relevant population and in obtaining access for interviews. Ultimately, we attempted a combination of chain-referral sampling and targeted sampling.[46] Specifically, we started in each jurisdiction with preexisting contacts with bankruptcy trustees and judges. We then used referrals from the trustees and judges as a way to gain access for interviews with bankruptcy attorneys. Separately, using contacts at the national level, we attempted to locate for each jurisdiction some of the most prominent collection attorneys and the most successful high-volume debtors' attorneys. By using multiple entry points, we hoped to increase the likelihood that our pool of interview subjects provides an adequate basis for understanding the overall pattern of motivations for bankruptcies.

In the end, we obtained a total of forty-two interviews. We attempted to obtain interviews in each jurisdiction with each of our principal types of interview subjects (judge, trustee, creditors' attorney, and debtors' attorney) but focused our efforts on attorneys because of their deeper relationships with individuals in financial distress. By state, we had ten Massachusetts interviews,

46. For a general discussion of sampling methods for hidden and hard-to-reach populations, see Douglas D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, 44 SOC. PROBS. 174, 174–80, 190–97 (1997).

nine Iowa interviews, seven Texas interviews, six Nevada interviews, six Georgia interviews, and four interviews of attorneys and executives with national responsibility or practice expertise not confined to our five states. By job description, we had eleven interviews with bankruptcy trustees and staff, seventeen interviews with debtors' attorneys, ten interviews with creditors' attorneys and executives, and four interviews with bankruptcy judges. Even within those categories, there was considerable diversity. We talked to consumer attorneys from rural areas and urban areas, as well as solo practitioners and large-firm practitioners. We also made a conscious effort to target debtors' attorneys who solicit different types of clients including indigent people eligible for legal aid services and small business entrepreneurs with substantial incomes and assets. Similarly, the creditors' representatives included attorneys representing unsecured creditors, mortgage lenders, and government creditors, and ranged from solo practitioners who provide a range of collection services to the executive in charge of collection policy for one of the nation's largest credit card issuers.

The interviews were open-ended in nature, conducted either in person or over the telephone. All interviews were conducted by one of the principal investigators, recorded, and transcribed.[47] The interviews used a script designed to elicit general reactions to the topic rather than quantitative information. In an effort to focus discussion, we designed the scripts to revolve around questions related to the particular filing patterns developed in the quantitative data collection described above. Among other things, the interviews also asked questions related to the role of the subjects in the bankruptcy process, collection practices, the filing decision, and attorney's fees. The interviews ranged from twenty to ninety minutes, usually depending on the volubility of the interview subject.

Our sampling method has at least three obvious limitations. Most obviously, because we have no new interviews with debtors themselves—either those who filed or those who chose not to file—all the evidence about motivation that we obtain from these interviews is filtered through the professional perspectives of our interview subjects. We compensate for that problem by combining the material from these interviews with the Consumer Bankruptcy Project survey data discussed above, which comes directly from debtors. Second, because we relied heavily on a chain-referral sampling method, there is a possibility that the attorneys who we interviewed are not representative of all attorneys.[48] We attempted to compensate for that problem by completing interviews with identifiable types of practitioners, including high-volume filers identified through

47. One subject declined to be recorded but allowed the principal investigator to take contemporaneous notes. Additionally, for the sake of preserving the anonymity of the interview subjects, we have omitted identifying details such as names and city locations when citing their interview responses. As an alternative, we identify each with a descriptive title such as "Iowa Consumer Attorney Three," which corresponds to our records on file.

48. Because they have the most direct contact with bankruptcy debtors and with those who consider but ultimately do not file for bankruptcy, problems in the representativeness of our attorney sample are most important in assessing the reliability of our findings.

personal contacts at the national level, attorneys who work for legal aid on debt or bankruptcy issues, and those active in the leading consumer bankruptcy attorney trade organization. Finally, because of the relatively limited contact between the attorneys we interviewed and the people in financial distress who choose not to file for bankruptcy, there is a substantial basis for concern about the possibility that those who actually file for bankruptcy differ in important ways from those who choose not to file for bankruptcy. Absent a method for locating and identifying similarly situated nonfilers, we see no solution to that problem. We are conscious of that limitation in our assessment of the information gleaned from our interviews.

III. EMERGENCIES, EPIPHANIES, AND THE PERCEPTION OF DISTRESS

Families in financial distress are at constant risk. For every debt in default, a creditor has legal remedies that can deprive families of their property or subject them to legal process. Repossession of a vehicle and garnishment of wages are classic examples of collection activities that worry families. For some, such actions could halt their ability or incentive to continue working and thus cause immediate and total financial collapse. Although recent empirical research on debt collection is scant, it seems clear that creditors repeatedly warn debtors to expect imminent collection action.[49] Even if these are mere threats—frequently made but rarely exercised—collection efforts increase the pressure on a debtor who is not paying. For this reason, our hypothesis was that collection pressures were the primary trigger for consumers' decisions to file for bankruptcy. We anticipated that debtors would see an attorney in response to a specific, credible threat from a creditor and would file for bankruptcy quickly to halt the creditor's imminent action. We probed these intuitions by using both quantitative and qualitative data.

A. COLLECTION PRESSURES

For the most part, state law defines a creditor's ability to repossess collateral or file a garnishment action. Creditors can exercise such rights at the time they arise—typically after default for secured creditors and after a judgment for unsecured creditors.[50] Similarly, creditors are free to send dunning letters—letters that notify the

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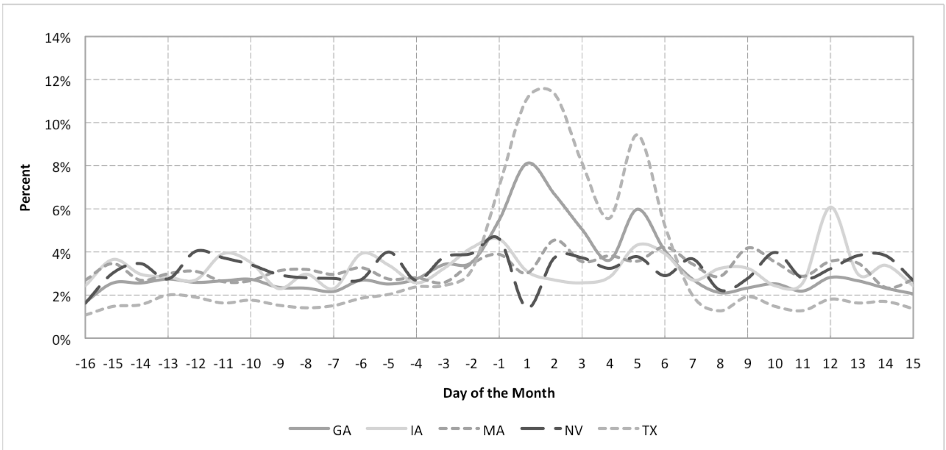
49. The initial contact is usually made by a "dunning" letter that notifies the debtor of the debt. *See* ROBERT J. HOBBS, FAIR DEBT COLLECTION 4 (2006). The debt collection industry contacts millions of consumers and makes over one billion contacts per year. *See* FED. TRADE COMM'N, ANNUAL REPORT 2006: FAIR DEBT COLLECTION PRACTICES ACT 3 (2006), *available at* http://www.ftc.gov/os/2006/04/P0648042006FDCPAReport.pdf (noting that millions of Americans are contacted by debt collectors); Robert M. Hunt, *Collecting Consumer Debt in America*, BUS. REV., 2d Quarter 2007, at 11 (stating that debt collectors contact consumers over one billion times a year).

50. *See, e.g.*, U.C.C. § 9-609 (2000) (permitting self-help repossession after default); GA. CODE ANN. § 18-4-20 (2004) (permitting wage garnishment); IOWA CODE § 626.1 (2007) (permitting execution following judgment); *id.* §§ 626.26, 642.1–.20 (permitting garnishment of wages); MASS. GEN. LAWS ANN. ch. 235, § 31 (West 2000) (permitting execution by creditors after default); NEV. REV. STAT. § 21.090(1)(g) (2007) (permitting wage garnishment); TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 2008) (allowing execution of judgments).

Figure 3. 2007 Chapter 13 Filings (Percent by Day of Month)[51]



Source: Authors' calculations from AACER filing data

debtor of the debt—or make collection calls to debtors without systematic time frames. State and federal law may limit the frequency of these calls and prohibit calls at inconvenient times,[52] but there is no legal restriction requiring collection activity to occur at any particular moment in time. These are self-help activities by creditors, and we expected that the quantitative data would show a steady and even pattern of bankruptcy filings in response to creditors' continual and persistent efforts to collect by exercising (or threatening to exercise) their legal remedies.

The quantitative data, however, show distinct patterns of bankruptcies over time that for the most part bear no obvious relation to collection activity. We looked at each pattern with an eye to understanding how collection efforts could push consumers to file for bankruptcy. Because state law governs most collection activities, we expected to see different patterns in each state. For example, the legal process for foreclosure varies dramatically in our sample states. Texas rules require all foreclosures to occur on the first Tuesday of the month.[53] This produces a pattern in which filing rates are about five times as high on the Monday preceding the first Tuesday of the month as on any other day of the month. Georgia has a similar pattern,[54] but the peak

51. On the horizontal axis, Day 1 is the first day of a calendar month, with negative numbers representing the days before the first day of a month.

52. *See, e.g.*, Fair Debt Collection Practices Act, 15 U.S.C. § 1692c (2006); GA. CODE ANN. § 7-3-25 (2004); IOWA CODE § 537.7103 (West Supp. 2009); MASS. GEN. LAWS ANN. ch. 93, § 49 (West 2006); NEV. REV. STAT. §§ 649.370, .375 (2007); TEX. FIN. CODE. ANN. § 392 (Vernon 2006).

53. TEX. PROP. CODE ANN. § 51.002 (Vernon Supp. 2008).

54. *See* GA. CODE ANN. § 9-13-161 (2006) (requiring foreclosure sales to be held between 10:00 a.m. and 4:00 p.m. on the first Tuesday of every month).

disappears in the other states where foreclosures are less predictable. This difference is readily attributable to formal differences in the legal systems. The Texas data, particularly for Chapter 13 filings, are consistent with our hypothesis that formal legal action drives bankruptcy filings. In other states, foreclosures are set for any business day or occur in small, irregular batches according to a judge's individual preference. In these states, foreclosure law has no discernable effect on the pattern of bankruptcy filings.

With the exception of foreclosure, we did not identify any collection-driven explanation for the other filing patterns. The law constrains such collection acts with procedural requirements but does not impose cyclical time patterns, at least in the five jurisdictions that we examined. Nonforeclosure collection efforts proceed, then, at the discretion of creditors. Large creditors, such as credit card issuers, have highly sophisticated and routinized processes for collection. Proprietary algorithms guide efforts to collect delinquent accounts.[55] An individual consumer's pleas or threats alter the collection process only within the bounds of these larger strictures.[56]

The survey data suggest that collection activity is typical during the period before bankruptcy. A majority of debtors had direct personal contact with debt collectors.[57] More than four in five consumers (81.9%) said they had received calls at their homes from debt collectors in the two years that preceded their bankruptcy filings.[58] More than half (52.9%) of respondents had received debt collection calls at their place of work.[59] This latter collection mechanism appears to exert more pressure than the more common, mundane dunning calls or letters. Attorneys explained that many debtors experienced the creditor reaching out to an external person as unbearable.[60]

55. *See* Telephone Interview with National Credit Card Executive 4 (Nov. 5, 8 & 12, 2007) (transcript for this and all subsequent interviews on file with authors).

> [W]e have another set of scores that if the account does go delinquent[,] we score it. So we kind of continuously monitor[,] and then we have treatment strategies and decision engines that are fed the score as activity changes to make a determination that would decide the appropriate course of action for different accounts. So that generally is how the industry, and certainly how we, operate[,] and you know those models are technological property of the banks. They are so critical . . . .

Id.; *see also* Telephone Interview with Iowa Creditor Attorney Two 7 (Sept. 16, 2008) ("Some of our clients use modeling to help us make decisions. They will give us a score to determine the collectability of the person.").

56. *See* Telephone Interview with Iowa Creditor Attorney Two, *supra* note 55, at 6 (describing variation in creditor clients between those who have very specific collection guidelines and internal determinations and those who permit the collection attorney to exercise his professional judgment); Telephone Interview with Ga. Creditor Attorney One 11 (Sept. 26, 2008) (noting that every lender has a different set of criteria for instituting litigation).

57. We use the term "debt collector" here because that is how the Consumer Bankruptcy Project survey question was worded, but we see little reason to expect that respondents interpreted the term narrowly to apply only to third-party debt collectors as defined in the FDCPA. *See* 15 U.S.C. § 1692a(6)(F) (2006). Instead, we believe respondents were more likely to use the term in its ordinary sense to include any person who is asking them to pay an outstanding obligation.

58. 2007 CONSUMER BANKR. PROJECT, TELEPHONE INTERVIEW ques. DC01 (2007) (on file with Katherine Porter) (n = 1032).

59. *Id.* at ques. DC02 (2007) (on file with Katherine Porter) (n = 1032).

60. *See* Telephone Interview with Ga. Consumer Attorney One 7 (Sept. 12, 2008) ("[A] lot of people say[,] 'I just don't answer my cell phone[,]' but when it goes to the job, I do think it crosses a line,

Before the automatic stay of bankruptcy halted the phone calls, debt collection was part of the daily routine of these financially distressed households, taking its place alongside other daily activities such as loading the dishwasher and checking the mail. Among those who reported getting debt collection calls either at home or work, the normal debtor received an average of thirteen debt collection calls in each of the weeks just prior to their bankruptcy filing. The median respondent reported getting six calls each week, more than one per business day.[61] Reasonable minds may differ regarding the question of how oppressive this collection activity is, and surely there are outlying experiences, but the survey data suggest that the typical consumers were enduring one or two calls per day in the period immediately preceding their bankruptcy.[62]

B. THE MYTH OF THE EMERGENCY FILING

None of the bankruptcy professionals to whom we spoke regarded emergency petitions as a major part of their practice.[63] To the extent the interviews suggest anything specific about emergency filings, they suggest (not surprisingly) that they are more common in Chapter 13 cases than Chapter 7 cases; this follows logically from the likelihood that Chapter 13 cases are more commonly used to

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yes."); *see also* Interview with Iowa Consumer Attorney One 10 (Sept. 17, 2007) (identifying calling a neighbor or calling at work as two debt collection techniques that prompt bankruptcy filings because debtors cannot tolerate them). The FDCPA prohibits debt collectors within its scope from contacting a debtor's employer if the collector knows that the employer forbids such communication. *See* 15 U.S.C. § 1692c(a)(3). The burden is on the debtor, however, to inform the collector, a request that consumers are unlikely to think to make until collectors have already contacted their employers.

61. *See* 2007 CONSUMER BANKR. PROJECT, *supra* note 58, at ques. DC03 (on file with Katherine Porter) (n = 826; standard deviation = 18.7). We excluded two responses as outliers.

62. The collection activity itself may not prompt bankruptcy filings because consumers are adept at developing coping mechanisms to mitigate the effects of the dunning calls. *See* Ronald Paul Hill, *Bill Collectors and Consumers: A Troublesome Exchange Relationship*, 13 J. PUB. POL'Y & MARKETING 20, 27–28 (1994) (describing how consumers alter their telephone use and go on the offensive in response to collection harassment); Deborah Thorne & Leon Anderson, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77, 86 (2006) ("In the face of unrelenting harassment, almost 90 percent of debtors developed strategies—such as the use of caller ID—for avoiding interaction with bill collectors."); Telephone Interview with Nev. Credit Counselor 9 (Feb. 6, 2009) (describing counseling of debtors, often unsuccessful, to change their telephone numbers).

63. *See, e.g.*, Interview with Iowa Chapter 7 Trustee 5 (Sept. 24, 2007) ("I don't see a lot of emergency filings."); Interview with Iowa U.S. Trustee 7–8 (Aug. 10, 2007) (noting that emergency filings by "quality" lawyers are rare because good lawyers recognize that they need time to advise their client); Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 13 ("So now we are turning away people who call the Thursday or Friday before foreclosure on Tuesday. I usually give them the number to one of the big firms who has 20 attorneys or something like that."); Telephone Interview with Nev. Credit Counselor, *supra* note 62, at 6 (saying that emergency filings "don't seem to be much of an issue" with people seeking mandatory prebankruptcy credit counseling); Telephone Interview with N.J. Debtor Attorney 3 (May 4, 2009) ("Most of my . . . clients come to me well in advance of a major problem that would shut them down. There are some notable exceptions[,] but most of them are smart enough to seek counsel well in advance."); Telephone Interview with Tex. Consumer Attorney Three 16 (Sept. 24, 2008) (confirming that emergency petitions are relatively rare).

avert foreclosure than Chapter 7 filings.[64] Also, the interviews suggest substantial variation across states, with a greater share of emergency cases in jurisdictions in which the time frame for foreclosure is shorter than in those in which the time frame for foreclosure is longer.[65]

Taking these points in order, first, our interviews suggest, at least among the clients seeking assistance from the attorneys to whom we spoke, that emergency Chapter 7 filings are quite rare.[66] For example, the initiation of a collection suit does not ordinarily result in an immediate bankruptcy petition. The reason is that the leisurely pace at which civil litigation proceeds gives consumers and their attorneys ample time to respond before anything might happen in the litigation that would cause sufficient dislocation to motivate an emergency bankruptcy filing. For example, one Texas consumer attorney said that a collection lawsuit "does not affect the timing [of bankruptcy] generally . . . . We explain to them, '[I]f you're gonna file bankruptcy, there is no huge rush. We need to file an answer[,] and then you have six months before anything is going to happen[.]' So that does not really affect the timing."[67] Chapter 7 bankruptcies

64. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 3; Telephone Interview with Mass. Consumer Attorney Three 2 (Oct. 9, 2007); Telephone Interview with Mass. Creditor Attorney Two 4–6 (Oct. 24, 2007); Telephone Interview with Nev. Consumer Attorney One 4 (Oct. 23, 2007); Interview with Nev. Creditor Attorney 2 (Oct. 29, 2007); Telephone Interview with Tex. Bankruptcy Judge Two 1–2 (Oct. 3, 2007); Telephone Interview with Tex. Consumer Attorney One 5 (Oct. 5, 2007).

65. *See* Interview with Iowa Creditor Attorney One 1–2 (Oct. 17, 2007) (reporting that most consumers get a six-month delay before the foreclosure sale and estimating that only 5 to 10% of foreclosures result in a bankruptcy filing); Interview with Nev. Chapter 13 Trustee 15–16 (Oct. 26, 2007) (stating that the longer process allows for a "grieving" period, a time for a debtor to realize he cannot keep his home); Telephone Interview with Ga. Bankruptcy Judge 5 (Sept. 11, 2008) (attributing high rate of emergency filings in Georgia to speed of foreclosure process); Telephone Interview with Ga. Trustee Two 3–4 (Feb. 5, 2009) (suggesting a peak of filings in Georgia just before the first Tuesday of the month); Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 15 (stating that clients file Chapter 13 because the foreclosure process is so fast and they need time to find a place to live).

66. We considered the possibility that the lack of information about emergency filings might reflect a selection bias in the types of attorneys to whom we spoke. *See* Interview with Iowa U.S. Trustee, *supra* note 63, at 7 ("The good attorneys very seldom had as many emergency filings."). For example, it is possible that the attorneys located by our chain referral methodology were more connected to broad social networks than attorneys in general and that the clients who contact attorneys to whom they are connected through a social network may be more willing to do so without the pressure of an emergency. If that is true, then the clients who contact attorneys located solely through market information (such as advertising) might require the greater stimulus of an emergency to force them to seek formal relief. *See* Telephone Interview with Ga. Trustee Two, *supra* note 65, at 7 (suggesting that high-volume filers are more likely to attract clients through advertising, especially on television); Telephone Interview with N.J. Debtor Attorney, *supra* note 63, at 2 (same). We have attempted to mitigate that concern by a series of interviews with high-volume filers who rely heavily on advertising to attract clients. Those interviews suggest very little, if any, greater propensity for emergency filings than the discussions with attorneys identified through our chain referral methodology.

67. Telephone Interview with Tex. Consumer Attorney Two 5 (Nov. 7, 2007); *see also* Interview with Iowa Consumer Attorney One, *supra* note 60, at 13 ("Just because the debt collector says[,] '[I]f you do not get a payment in here on Friday, I am going to garnish your wages on Friday[,]' does not mean he is garnishing your wages on Friday. What he . . . left out in the conversation is all the things that he has to do in the meantime before he can get to that point . . . ."); Telephone Interview with Nev.

typically lag behind the attorney consultation by several weeks or months, a delay that reflects the lack of immediate collection pressure on consumers.[68]

To be sure, collection pressure can eventually lead to collection activity of sufficient vigor to motivate an emergency filing, but this seems to be the exception rather than the rule. The basic problem is that, even when they institute litigation,[69] creditors face considerable difficulty in using litigation to recover from consumers. The vast majority of consumer Chapter 7 cases are no-asset cases.[70] Thus, although the return on collection efforts differs somewhat for those who have not chosen to file for bankruptcy, it surely is true that for many households in financial distress, state or federal law shields all of their assets from execution.[71] After a bankruptcy attorney tells a consumer that this body of law protects his property from seizure by his creditors, many consumers do not rush to file for bankruptcy immediately. An Iowa attorney explained:

> [O]nce they come and see me and talk it through and realize that they are pretty much in the driver seat in terms of when they can file and that it is not likely that the garnishments or anything will occur before they can file, they sometimes lose the sense of that urgency for a bit[,] and they can put up [with] a lot of harassment if they know that ultimately it is not going to cause [them] any loss of income or property.[72]

Indeed, in states in which garnishment is not available,[73] the creditor often can

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Consumer Attorney One, *supra* note 64, at 11 (explaining that he informs his clients that if "no one has sued you" they cannot garnish your wages).

68. *See* Interview with Tex. Consumer Attorney Three, *supra* note 63, at 4 (estimating that delay from retention of his services to filing of case was four to six months for most Chapter 7 cases); Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 3 (estimating that Chapter 7 cases are not filed for two to three months); Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 2 (noting that Chapter 7 cases tend to be filed in batches because they are not facing any definite deadline).

69. A substantial fraction of Chapter 7 cases are filed before a creditor has completed legal action. *See* Interview with Iowa Chapter 7 Trustee, *supra* note 63, at 10 (estimating that 25% of bankruptcy debtors have judgments against them); Interview with Iowa Consumer Attorney One, *supra* note 60, at 13 (saying that only a very small percentage of clients have actually been garnished); Telephone Interview with N.J. Debtor Attorney, *supra* note 63, at 4 (suggesting that clients with substantial non-exempt assets tend to file for bankruptcy before collection actions proceed to judgment); Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 10 (stating that probably less than 20% of Chapter 7 clients have had lawsuits filed against them).

70. *See supra* note 5.

71. The relevant question for the family that has not yet filed for bankruptcy is what assets are exempt from execution under state law. The answer differs markedly from state to state. *See generally* RESNICK & SOMMER, *supra* note 6 (describing variations in state exemption laws).

72. Interview with Iowa Consumer Attorney One, *supra* note 60, at 9; *see also* Telephone Interview with Nev. Consumer Attorney Two 2 (Feb. 4, 2009) ("I ask, 'Well is anybody suing you?' If not, then I go[,] '[A]lright well, we will just hold the creditors off again.' We do debt defense as well; that's part of the services that we offer . . . .").

73. *See* N.C. GEN. STAT. § 1-362 (2009) (prohibiting wage garnishment of a debtor who is supporting a family with wage income); 42 PA. CONS. STAT. § 8127 (2008) (prohibiting wage garnishment except in limited circumstances such as divorce or child support); S.C. CODE ANN. § 37-5-104 (2009)

do little to collect even after it has obtained a judgment. In states that offer no more protection from garnishment than federal law, such as Georgia, our interviews suggested that postjudgment garnishments do prompt debtors to consult bankruptcy attorneys.[74] But, even those filings are unlikely to be emergency filings given the lengthy period of litigation likely to precede the judgment necessary for the garnishment.[75]

The dynamic is different in Chapter 13, which involves repayment of debts over years and has special provisions to help homeowners catch up on missed payments. The discussion above suggests that some share of Chapter 13 filings are emergency filings directly motivated by the desire to forestall an imminent foreclosure sale. Although foreclosure is the most common triggering event among Chapter 13 debtors,[76] not all foreclosure-driven filings occur on the eve of the foreclosure sale. A few consumers contact an attorney shortly before a foreclosure sale—occasionally on the very day of the sale.[77] Most attorneys, however, reported a distaste for representing clients under that time pressure.[78] Substantial differences in foreclosure law from state to state suggest a wide variation in the typical time consumed by a foreclosure proceeding.[79] Thus, in

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(prohibiting wage garnishment for consumer credit agreements); TEX. CIV. PRAC. & REM. CODE ANN. § 31.0025 (Vernon 2008) (prohibiting wage garnishment except for child support).

74. *See* Telephone Interview with Ga. Bankruptcy Judge, *supra* note 65, at 8 ("Now, we get a fair amount of garnishment though."); Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 8 ("I think many, many, many clients are dealing with . . . [garnishment] by the time they come to see us . . . ."); Telephone Interview with Ga. Creditor Attorney One, *supra* note 56, at 8 (affirming that garnishment is common in Georgia and explaining that it is "very easy to garnish . . . . Georgia is a very, very, very creditor-friendly state[,] and as a result I think that's one of the reasons that our bankruptcy numbers are so high.").

75. *See* Telephone Interview with Ga. Debtor Attorney Two 9–10 (Jan. 23, 2009) (describing relative rapidity and limited procedural protections of Georgia's garnishment scheme compared to other states but noting that even in Georgia, it takes forty-five days to obtain a default judgment); Telephone Interview with N.J. Debtor Attorney, *supra* note 63, at 4 (suggesting that pace of postjudgment execution process in New Jersey motivates prejudgment bankruptcy filings).

76. *See* Telephone Interview with Iowa Consumer Attorney Four 2–3 (Sept. 11, 2008) (confirming that foreclosure is the most common cause of Chapter 13 bankruptcy); Telephone Interview with Mass. Consumer Attorney Three, *supra* note 64, at 2 (stating that, in his practice, Chapter 13 filings are triggered by foreclosures); Telephone Interview with Nev. Consumer Attorney One, *supra* note 64, at 5 (stating that the threat of foreclosure drives 40% of his Chapter 13 filings); Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 2 (stating that the biggest day for Chapter 13 filings in Texas is the Monday before "Foreclosure Tuesday").

77. *See* Telephone Interview with Ga. Bankruptcy Judge, *supra* note 65, at 5 (reporting that largest debtors' firm in area kept its office open until 10:00 or 11:00 p.m. on the evening before the foreclosure day and advertised that accommodation); Telephone Interview with Mass. Chapter 13 Trustee 5 (Sept. 24, 2007) ("I actually spoke to a debtor this morning who is having a sale at 12 noon today.").

78. *See, e.g.*, Interview with Iowa Chapter 7 Trustee, *supra* note 63, at 5 ("[V]ery rarely do you have someone come in and say, '[T]hey are going to have a sheriff sale tomorrow in my house. I've got to file today.' I mean, in fact, I don't like to take those kind of cases."); Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 15 (explaining reluctance to take emergency cases because "it would be too easy for us to make a mistake and to somehow become involved in something bad").

79. For example, the HUD foreclosure time frame table suggests a range from three months (Texas), to four months (Georgia), to six months (Nevada), to eight months (Massachusetts), to nine months (Iowa). THE NATIONAL MORTGAGE SERVICER'S REFERENCE DIRECTORY C13–14 (24th ed. 2007). In the

Iowa (which seems to have the most leisurely foreclosure process in our study), foreclosure-driven bankruptcies typically are filed in the middle of the process, a few months after a complaint was filed but a few months before a scheduled sale.[80] Emergency bankruptcy petitions were extremely rare in Iowa, even for foreclosure-driven Chapter 13 cases.[81] By contrast, attorneys in Texas, where a nonjudicial foreclosure can occur three weeks after notice of the sale,[82] reported a frequent pattern of emergency foreclosure-driven filings on short time lines.[83] As one experienced creditors' attorney put it, most Chapter 13 cases in Texas are "time driven by secured creditors" who are foreclosing on a home.[84] Georgia professionals reported nearly identical effects.[85] For those who have not experienced the spectacle of thousands of foreclosures occurring at a single location simultaneously at ten in the morning on the first Tuesday of the month, the time pressure imposed by the Texas and Georgia systems is difficult to comprehend.[86] The fast time frame for foreclosure reduces the amount of time for a consumer to decide whether to seek bankruptcy counsel and then sharply limits the ability of attorneys to proceed at a leisurely pace in filing the case. Professionals in Massachusetts and Nevada described an interaction between a foreclosure and a bankruptcy case that was somewhere in between the extremes of Iowa and Texas or Georgia.[87]

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experience of the authors, three months overstates the time required in Texas, while nine months understates the time required in Iowa.

80. *See* Interview Iowa Consumer Attorney Two 20 (Sept. 24, 2007); Telephone Interview with Iowa Consumer Attorney Four, *supra* note 76, at 3 (describing consultation right before sale as occurring "more rarely than not" and observing that "the majority by far" of homeowners facing foreclosure consult him at the beginning of that process shortly after they get served with the foreclosure petition).

81. *See* Telephone Interview with Iowa Consumer Attorney Four, *supra* note 76, at 3 (describing initial client consultations right before foreclosure sale as rare and observing that "the majority by far" of homeowners facing foreclosure consult him at the beginning of that process shortly after they get served with the foreclosure petition).

82. TEX. PROP. CODE ANN. § 51.002(b) (Vernon Supp. 2008).

83. Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 3 ("Most of them procrastinate until the last minute and come in with a week or less to go [before the foreclosure sale]."); *see* Telephone Interview with Ga. Bankruptcy Judge, *supra* note 65, at 5 (agreeing that Georgia has "lots of emergencies, a whole lot" and that filings motivated by foreclosure occur "very close in time to the sale"); Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 1.

84. Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 1.

85. *See* Telephone Interview with Ga. Debtor Attorney Two, *supra* note 75, at 8 (analogizing effect of Georgia's rapid foreclosure process to a gun to the head of homeowners and suggesting that debtors file to avoid making decisions under that immediate pressure).

86. Apparently, there is also a spectacle at debtors' law firms, as well. *See id.* at 7 ("You should be here on foreclosure Tuesday. We will probably have 25 or 30 people here at our office at 7 o'clock on Tuesday morning before the foreclosure.").

87. *See* Telephone Interview with Mass. Consumer Attorney Three, *supra* note 64, at 4 ("Massachusetts has effectively a four-month procedure [for foreclosure]. . . . [A] foreclosure Chapter 13 bankruptcy case, in my experience, will be filed during the last six weeks before the auction."); Telephone Interview with Nev. Consumer Attorney Two, *supra* note 72, at 5 ("A lot are coming in because of foreclosure. Basically they tell the story, '[H]ey I tried to do a mortgage modification[,] and they told me how to miss more payments. And now they are starting a foreclosure[,] and nobody will talk to me.' I get a lot of that."); *id.* at 10 (suggesting that most emergency filings are foreclosure-driven); Tele-

Though professionals reported that foreclosures trigger a significant fraction of Chapter 13 cases,[88] there are other reasons for Chapter 13 filings. Different interview subjects suggested, for example, bankruptcies motivated to save cars,[89] bankruptcies motivated by medical expenses,[90] and on rare occasions, bankruptcies steered out of Chapter 7 by the means test, which screens people for Chapter 7 eligibility based on their income and expenses.[91] For these cases, there is apparently very little time pressure to file at a particular moment.[92] In this regard, nonforeclosure Chapter 13 cases are similar to Chapter 7 cases.

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phone Interview with Nev. Credit Counselor, *supra* note 62, at 6–7 (suggesting that "there is not an emergency filing, in my opinion," because the only "emergency" that clients usually identify is an imprudent desire to file bankruptcy to keep a home that they cannot afford).

88. Though each individual bankruptcy professional offered his or her own estimate, the main variance was between attorneys in different states. *Compare* Interview with Iowa Consumer Attorney One, *supra* note 60, at 3 (Iowa attorney opining that "probably only 15% or so of my filings are Chapter 13's[,] and of those maybe half of those, or slightly more, are driven by foreclosures"), *and* Interview with Nev. Chapter 13 Staff Attorney 7 (Oct. 26, 2007) (Nevada attorney saying that "not a large percent" of foreclosures that she instigated as creditors' attorney resulted in a bankruptcy filing by the homeowner), *with* Telephone Interview with Ga. Creditor Attorney One, *supra* note 56, at 8 (estimating that 70% of Chapter 13 filings can be attributed primarily to foreclosure), Telephone Interview with Mass. Chapter 13 Trustee, *supra* note 77, at 4 (Massachusetts trustee opining that foreclosure is "[a]bsolutely" the most common reason for filing Chapter 13 cases), *and* Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 3 (estimating that foreclosure is bringing 60–70% of putative Chapter 13 debtors to consult him).

89. *See* Telephone Interview with Ga. Bankruptcy Judge, *supra* note 65, at 6 (expressing opinion that to him a "surprising" portion of Chapter 13 cases have only a car as secured debt).

90. The pattern here is a mature (often elderly) household with a steady income and important assets but medical expenses that cannot be defrayed using existing assets. *See* Telephone Interview with Tex. Bankruptcy Judge Two, *supra* note 64, at 7.

91. *See* Telephone Interview with Nev. Consumer Attorney One, *supra* note 64, at 5 (reporting that some of the 60% of non-foreclosure-driven Chapter 13 bankruptcies are people with excess income who file a Chapter 13 case because of the means test or to avoid a challenge for abuse); Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 3–4 (noting that a small percentage of bankruptcies are caused by people who cannot pass the means test but need to file a bankruptcy because of huge medical bills or tax debt). The means test requires all Chapter 7 filers to disclose their incomes for the past six months, and then a further subset must go through an expense calculation and comparison. Those whose financial position meets statutory criteria are not eligible for a Chapter 7 filing. *See* 11 U.S.C. § 707(b) (Supp. 2008).

92. *See* Telephone Interview with Tex. Chapter 13 Trustee 7 (Sept. 27, 2007) (explaining that what gets people to the door of a bankruptcy attorney on a particular day "is almost always foreclosure . . . . There are other reasons people file 13, but those do not really care so much about the timing."). A few professionals said that car repossession could prompt a bankruptcy, especially where a debtor was dependent on the car to travel to work, but that these filings seemed less immediate. Telephone Interview with Ga. Trustee Two, *supra* note 65, at 4–5 ("They may file to stop that repossession, but I don't see that as much as an emergency filing."). We can identify some reasons for the difference between foreclosures and car repossession. First, unlike a completed foreclosure sale, which is final, a repossessed car that has not yet been sold can be recovered in bankruptcy. Second, the exact date of a foreclosure sale is set in advance, and the debtor receives at least a month's notice of this date. By contrast, a creditor does not (unless it is very foolish) advise a consumer in advance of the date it will repossess a car. Finally, as we teach our students every year in secured credit, a debtor can hide tangible personal property or otherwise guard it from self-help repossession, an option that is not available for real property.

C. COMING TO TERMS WITH FINANCIAL FAILURE

In the aggregate, the data suggest that the great majority of bankruptcy filings are not frantic acts of desperation.[93] Indeed, as one trustee explained, "[Y]ou never know when someone is going to file until they do it. People say that they are going to file all the time and never get around to it."[94] With the exception of foreclosure-driven filings in states with rapid foreclosure processes, bankruptcy cases typically are the result of a long decision process.

During the period before bankruptcy, consumers deploy avoidance techniques to deter collection. An Iowa creditor's attorney explained:

> [M]ost people that I would call are using what I call the "ostrich defense." You know I am not the first person to get the file. . . . [M]ost people disappear. I am just another person calling on the obligation[,] and they don't answer the phone or they use caller ID technology.[95]

With property that is collateral, debtors sometimes initially refuse to surrender it or hide the property, eventually forcing the creditor to file a replevin action.[96] Most debtors do not immediately recognize the consequences of their financial plight.[97]

The survey data also provide support for the idea that a bankruptcy is the end-stage of a long process. The 2007 Consumer Bankruptcy Project asked debtors in the telephone interviews how long they had seriously struggled with their debts before they filed bankruptcy. The answers were closed-ended, blunt categories, and the distribution of responses suggests that the researchers substantially underestimated the length of hardship that precedes bankruptcy. The most common response was the longest time period, more than two years. As shown in Figure 4, more than seven in ten bankruptcy debtors reported a serious

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93. In every recent year, Chapter 7 nonbusiness cases have outnumbered Chapter 13 cases, usually by a ratio of two to one. For the twelve-month period ending June 30, 2008, 615,748 Chapter 7 cases were filed compared to 344,421 Chapter 13 cases. Administrative Office of the U.S. Courts, *supra* note 1. Given that only some fraction of Chapter 13 cases are foreclosure-driven and that only a subset of these are time-sensitive cases motivated by an imminent foreclosure sale, a generous estimate of the fraction of emergency bankruptcy petitions is probably 10%.

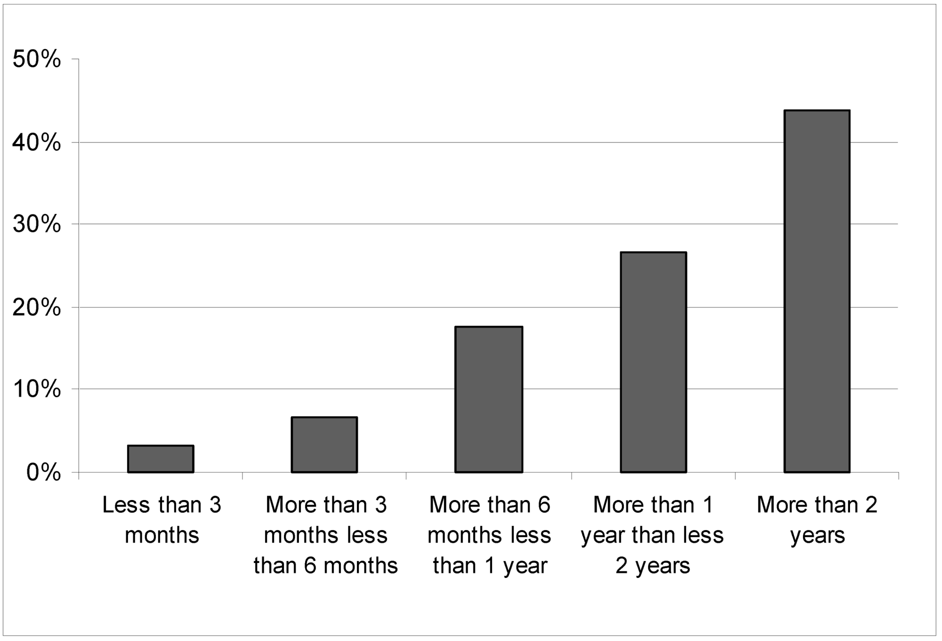
94. Telephone Interview with Mass. Consumer Attorney One 3 (Sept. 24, 2007). In the most egregious situation of this type reported to us, one consumer apparently considered a bankruptcy filing for nearly a decade. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 9 ("I had a client one time that took over eight years for her to finally file. She came along every couple of years and gave me a couple hundred more dollars to keep working for her and promising she was going to file in the next couple of weeks[,] and then I would not see her for about two years.").

95. Telephone Interview with Iowa Creditor Attorney Two, *supra* note 55, at 5.

96. *See* Telephone Interview with Ga. Creditor Attorney One, *supra* note 56, at 9 ("I mean there is almost a spiteful thing and they just don't want the lender to get the car back[,] and they don't want to have to pay on a car that they don't have. So they will give it to a family member[,] and then they will take it out of state and it will go to Texas[,] and then all of a sudden it ends up in Mexico.").

97. *See* Interview with Iowa U.S. Trustee, *supra* note 63, at 16 ("There is an unwillingness to recognize that financial trouble; there is an unwillingness to recognize that they are going to lose their family home.").

Figure 4. Time Seriously Struggling Before Bankruptcy



Source: 2007 Consumer Bankruptcy Project

struggle with debts that exceeded one year.

Interviews with debtors' attorneys reinforced our confidence in the self-reported data from debtors.[98] A Georgia attorney reported that "it's very, very common for people to say[,] 'I should have done this years ago' or 'I should have done this about two years ago.' So I don't think it's a snap decision to contact an attorney."[99] Consumers do not go broke at the first hint of collection pressure.

This is not to say that collection efforts are irrelevant to bankruptcy filings. On the contrary, if creditors did *nothing* to collect their debts, the rate of bankruptcy filings would drop precipitously. The lack of immediacy, however, does suggest (outside the foreclosure context) that the effect of collection activity is mediated by some intervening variable. Thus, we suggest, the most

98. *See* Interview with Iowa Creditor Attorney One, *supra* note 65, at 14 (estimating it took people six months to two years to reach resignation of need for bankruptcy); *see also* Thorne & Anderson, *supra* note 62, at 83 ("To avoid the stigma of bankruptcy altogether, the majority of debtors reported that they postponed filing for months and even years after recognizing that their debts were unmanageable.").

99. Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 21; *see also* Interview with Iowa Consumer Attorney Two, *supra* note 80, at 8 (estimating that it takes at least six months for people to realize their financial problems are irremediable without bankruptcy relief); Telephone Interview with Iowa Consumer Attorney Four, *supra* note 76, at 13 (reporting that people struggled a "long time" before they filed bankruptcy).

important effect of collection activity is not its potential to disrupt the household economy in a way that forces immediate recourse to bankruptcy.[100] It is, rather, an increasingly cacophonous "drum beat" of collection activity, which slowly but surely convinces the consumer that on balance the best response is to silence the creditors by seeking relief in bankruptcy.

Survey data from consumer debtors provide some support for this conceptualization of the bankruptcy decision. A written survey that debtors completed shortly after their bankruptcy filings provided a list of approximately a dozen reasons for bankruptcy and asked debtors to select all options that applied to their situations. Slightly less than half (43.8%) of all respondents chose "aggressive collection efforts by creditors."[101] Among homeowners, about one third (34.2%) of bankruptcy filers identified "a lender threatened to foreclose" as the event that prompted their bankruptcy filing.[102] These responses suggest that collection efforts do not drive the majority of bankruptcy filings in an obvious and linear way. Interestingly, when the question was framed differently, asking about "pressure from debt collectors," rather than "aggressive collection efforts," a much higher proportion of debtors affirmed that collection activity was either "very much" (56%) or "somewhat" (20.7%) a reason for their bankruptcies.[103] Although we are cautious in relying heavily on this difference, it does give some credence to our theory of the interaction between debt collection activity and bankruptcy filings.[104]

The bankruptcy professionals whom we interviewed offered rich descriptions of the emotional process that led debtors over time to consult them about bankruptcy. They described a grinding psychological toll from collection that eventually proved intolerable to debtors. "Most of it is that they cannot sleep at

100. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 15 ("That sort of legal explanation is not the issue. When I say[,] '[Y]ou are not going to stop the collection calls without a bankruptcy,' then they are going to file for bankruptcy . . . ."); *see also* Telephone Interview with Ga. Debtor Attorney Two, *supra* note 75, at 4–5 ("We can sit there and counsel them and say[,] '[L]ook, you just have Social Security, they can't take anything from you.' And some of them just start crying and they say[,] 'I am so embarrassed to be here, I was always taught to pay my debts[,] but they are calling me and calling me[,] and I can't make them stop . . . .'").

101. 2007 CONSUMER BANKR. PROJECT, WRITTEN SURVEY ques. 25 (2007) (on file with Katherine Porter) (n = 2438).

102. *Id.* at ques. 25 (on file with Katherine Porter) (n = 1175). Of course, some of these homeowners are current on their mortgage obligations but woefully behind on other debts. Most households that face imminent foreclosure filed Chapter 13 because of its greater home-saving potential. *See* Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 141–42 (2008).

103. The exact question posed: "Was pressure from debt collectors very much, somewhat, or not at all a reason that you finally filed for bankruptcy?" 2007 CONSUMER BANKR. PROJECT, *supra* note 58, at ques. DC08 (2007) (on file with Katherine Porter) (n = 1032).

104. Other plausible explanations exist for the disparity in responses besides the different wording of the questions. The question about pressure from debt collectors was asked in the telephone interview as opposed to the written survey; perhaps this medium affected responses. Also, the telephone interview was conducted later than the written survey, and perhaps time affected debtors' perceptions of why they filed for bankruptcy relief.

night because they cannot figure how to pay all their bills, and the phone is ringing excessively with the creditors who are incredibly rude and very difficult to deal with."[105] Another attorney said that people experienced immediate and palpable psychological relief. He described the dynamic of the attorney consultation as follows:

> At almost all of our initial consultations, people come in, their shoulders are up around their ears, they are very stressed, very tense, and you can see them start sinking back further and further in their chair relaxing, and then most of them will say, I mean I have heard this a million times, "You know, now I can sleep at night."[106]

Consumers do not reach the bankruptcy decision easily. Although this Article's title is primarily a reference to the financial costs of bankruptcy, debtors must "save up" certain emotional resources, such as humility, before they will consider bankruptcy. Indeed, it is precisely in the cases in which debtors act quickly—predominantly home foreclosure cases—that a bankruptcy filing often reflects a failure to come to grips with the reality of financial failure. In many of those cases, a consumer may have been better off allowing a foreclosure to proceed rather than suffering through a Chapter 13 process in which a home inevitably will be lost.[107]

A debtor's attorney described consumers' internal reckoning with their own capacities to manage their financial circumstances:

> I mean you can just get so many of those creditor calls before you finally blow[,] . . . and I think that most of the people, by the time they get here[,] they do not know what to do. . . . [W]hen they finally have exhausted everything they know they can do, they finally go to somebody else and say[,] "I don't know what to do now."[108]

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105. Telephone Interview with Mass. Consumer Attorney Two 7 (Oct. 1, 2007); *see also* Telephone Interview with Mass. Consumer Attorney One, *supra* note 94, at 9 ("[For] my clients universally, it is the psychological pressure . . . . There is something that is psychological and puts them over the edge . . . ."); Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 10 ("They are gaining what I would call peace of mind because phone calls are going to stop. The letters are going to stop, which was very stressful for a lot of these people because most if not all people take this stuff very seriously.").

106. Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 12.

107. *See* Telephone Interview with Nev. Credit Counselor, *supra* note 62, at 7.

108. Interview with Iowa Consumer Attorney Two, *supra* note 80, at 13; *see also* Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 7 ("[T]hey are calling multiple times a day, they are calling [the debtor's] job, they are calling [the debtor's] neighbors, they are calling [the debtor's] mom and dad . . . that kind of thing. That just gets unbearable[,] and the debtor says[,] 'I can't take this anymore.'"); Telephone Interview with Nev. Consumer Attorney One, *supra* note 64, at 10 ("As I said, there are people who are judgment proof. And they say[,] '[W]ell, I just can't stand the calls anymore.'"); Telephone Interview with Tex. Chapter 13 Trustee, *supra* note 92, at 10 ("What pushes them to make the filing . . . is that one phone call too many. They just can't stand the phone calls

Another attorney analogized consumers' reactions to financial distress to the stages of grief. He described an initial reaction of denial, followed by displacement in which the consumer blamed others for their financial pressures, followed by a period of anger or hostility, and concluding with resignation, during which time the consumer would then file for bankruptcy.[109] Ultimately, at least from the perspective of the attorneys to whom we spoke, the primary trigger for initiating a legal consultation about bankruptcy is the internal epiphanic moment when the consumer realizes that the likelihood of managing the debt burden is so small that it is no longer worth trying given the burden of continued collection efforts.[110]

As Deborah Thorne explains, the pattern is complicated by the internal dynamic of the household.[111] It is not enough for one spouse to fall into despair; the spouse must reach a level of despair sufficient to force an admission of the problem to the other.[112] Some attorneys noted an imbalance in the rapidity with which men and women come to terms with their financial collapse. A Texas attorney marketed specifically to women in recognition of this gendered pattern. "Mostly the women are the ones who make the decision to call . . . . The women say[,] 'I have wanted to come in here forever[,] but he would not come with me [because] he doesn't want to file.'"[113] Most respondents attributed men's reluctance to fully acknowledge the severity of the couple's financial problems to stereotypes about men's belief that they bear a disproportionate responsibility to

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anymore."); Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 9 ("It's just the emotional pressure of 'I can't handle this alone[,] and I am going to call somebody.'").

109. Interview with Iowa Creditor Attorney One, *supra* note 65, at 13; *see also* Interview with Iowa Consumer Attorney One, *supra* note 60, at 9 (saying that when people "realize that they don't want to be putting up with that [debt collection] day in and day out, they decide to file bankruptcy").

110. *See* Telephone Interview with Mass. Consumer Attorney Four 3 (Oct. 17, 2007) (stating that filing is a result of a "gradual realization"); *see also* Telephone Interview with Mass. Bankruptcy Judge 7 (Oct. 1, 2007) ("[S]ome debtors just get worn down by the harassing phone calls[,] and they just get tired of the whole thing . . . .").

111. *See* Deborah K. Thorne, Personal Bankruptcy Through the Eyes of the Stigmatized: Insight into Issues of Shame, Gender, and Marital Discord (May 2001) (unpublished doctoral thesis, Washington State University) (on file with author) (describing how couples interact during the prebankruptcy period of collection harassment).

112. *See* Telephone Interview with Iowa Consumer Attorney Four, *supra* note 76, at 7 ("Sometimes one of the parties is more driven to recognizing this is an unsolvable situation. The other wants to be more stoic about it or [is] thinking that after months and months, we will find a way to pay."); *see also* Interview with Iowa U.S. Trustee, *supra* note 63, at 16 (reporting that the marital discord that accompanies financial distress means that one person in a marriage is usually more interested in seeing an attorney).

113. Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 12; *see also* Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 19 ("I think my gut answer would be that generally the wife recognizes the need to do something more than the husband[,] and the husband is more apt to ignore it or tell the wife that 'this is your problem, you deal with it' or something of that nature. If I can tell one of the individuals wants to file and the other does not, then, if I can make a general statement, then it's the husband who doesn't want to file."); Thorne, *supra* note 111, at 233 ("From the managing of an unmanageable debt to the decision to actually file for personal bankruptcy, the responsibility falls primarily on women.").

provide for their families.[114] Although a rich area for further ethnographic work, this finding's primary relevance here is in revealing the existence of a self-realization process that must occur before a bankruptcy.

In the end, the appropriate metaphor is not the flood that washes away resistance, but the steady drip that wears away the stone. Because those effects are, for the most part, not driven by seasonal or other calendric patterns, they leave no trace in the quantitative data on filing patterns we discuss below. The survey data show that aggressive pressure or emergency reactions to imminent threats are relatively isolated events. Most bankruptcies occur only after consumers have endured a lengthy period of collection pressure and finally come to a realization of the dire state of their financial affairs.

IV. DOLLARS DRIVE BANKRUPTCY FILINGS

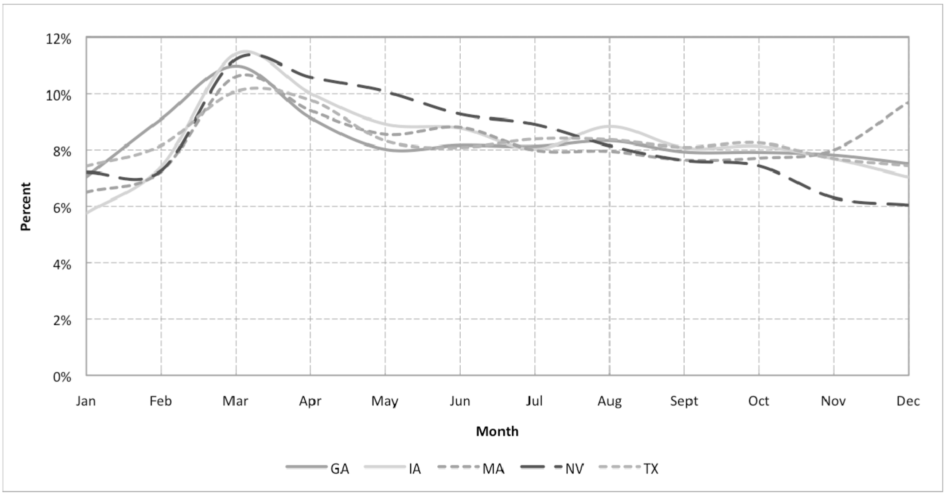
The second cluster of findings from our interviews provides explanations for the specific time of bankruptcy filings, separating the moment at which the consumer decides to file for bankruptcy from the moment the filing actually occurs. Although it was not one of our initial hypotheses, the findings suggest that the costs of filing for bankruptcy are an important determinant for the specific timing of the filing. Thus, the interviews suggest, in general, a lesser emphasis on the need for emergency relief from the bankruptcy court and a greater emphasis on the need to produce funds adequate to defray the fees of the attorney and other filing costs. The general pattern is illustrated by one attorney's suggestion that the decision to file for most of his clients was an easy, if not obvious, one and that "[t]he issue [that determines when they actually file] for a lot of them is simply saving up the retainer, which again if they had a lot of money[,] they wouldn't be coming to see me in the first place."[115]

What was most interesting about the patterns of filing data was the extent to which they not only bore out that perception, but revealed a multifaceted pattern, with a variety of different monetary effects evident at the annual, monthly, and weekly levels. This Part of the Article discusses the most obvious

114. *See* Interview with Iowa U.S. Trustee, *supra* note 63, at 21 ("The guy has learned the stoic WASP approach, you got to work harder; it is all my fault because I am not working it right[,] and so as a result he worries and the wife knows but they [the wives] do not want to bring it up too much[,] and so other parts of their relationship go to hell in a hand basket, too."); *see also* Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 21 (explaining that men often do not come in because they get nervous or lose confidence).

115. Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 11. For similar sentiments, see Interview with Iowa Consumer Attorney One, *supra* note 60, at 19–20 (suggesting that it is more common for debtors to have made the decision to file and need the money to do so than the reverse); Telephone Interview with Mass. Consumer Attorney One, *supra* note 94, at 5; Telephone Interview with Mass. Consumer Attorney Three, *supra* note 64, at 6 ("They tell themselves they were not [going to file for bankruptcy] when they come to see me, but I am sure that they know there is no alternative[,] and therefore the delay after they see me is always because they need time to come up with the money. It is a real sticker shock when I tell them what it costs these days."); Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 2, 4–5.

Figure 5. 2004 Chapter 7 Filings (Percent by Month of Year)



Source: Authors' calculations from PACER filing data

puzzles suggested by our quantitative data and the evidence from the interviews on which we rely to explain these puzzles as attributable to the costs and delays associated with the filing process.

A. THE TAX REFUND EFFECT AND THE ANNUAL PATTERN

The first of the puzzles is that bankruptcy filings rise steadily during the first third of the year before becoming relatively flat during the latter two-thirds of the year. Figure 5 illustrates the annual filing pattern for each of our five states, using Chapter 7 data, in which the pattern is particularly noticeable.

Based on preliminary informal conversations before we began our interviews, one of us started with the hypothesis that the most likely basis for the surge in Chapter 7 filings would be overspending during the December holiday season.[116] Some of our interview subjects accepted that explanation. But the more we talked to those who represent debtors, the more we became convinced that an alternate explanation is an important part of the story: debtors wait to file until their tax refunds become available to defray the costs of filing.[117] As one attorney explained, "They need . . . the money to pay their lawyer, which they have to wait for from the tax refunds[,] and no lawyer in his right mind is going to file a bankruptcy case on credit when somebody is about to get a three or

116. *See supra* notes 27–28 and accompanying text. The other one of us was skeptical about this hypothesis, speculating that the March peak had more to do with debtors making resolutions to deal with their financial problems in the new year.

117. *See* Interview with Iowa U.S. Trustee, *supra* note 63, at 9 (attributing "spiking" filings in February and March to tax returns).

four thousand dollar tax refund."[118] Another attorney explained that "in my practice there used to be a peak in the spring[,] and it was the attorney's fees issue and . . . people getting their tax refunds . . . . [T]hen they would come in and pay for the bankruptcy fee."[119] This tax refund effect reaches back several months, shaping the pattern of filings over nearly the entire year in some instances.[120]

We explored the possibility that the frequency of refunds suggested that a large share of the filers were sufficiently impoverished to be receiving earned income credits but were assured that these were more the kinds of "middle class" filers that "use [the tax withholding system] as a savings account."[121] Thus, although the pace of intake of potential filers is relatively steady throughout the year, the annualized pattern shows a pronounced upward trend through the first quarter.[122]

Notably, the effects of tax refunds (and paychecks, discussed below) depend substantially on the Chapter of filing. As an initial matter, we observe that

118. Interview with Iowa Consumer Attorney One, *supra* note 60, at 5; *see also* Interview with Iowa Consumer Attorney Two, *supra* note 80, at 5 ("Tax refund is my primary guess . . . ."); Telephone Interview with Mass. Consumer Attorney Three, *supra* note 64, at 1 (attorney asked why tax refunds might be relevant explained that "[t]hey have the money to pay me!"); Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 3 ("[I]t may be driven a lot by tax refunds coming in from January through April and May[,] and . . . they have that extra income[,] and they are able to pay their filing fees and lawyer."). As a related point, a debtor that filed just before the tax refund arrived would risk losing the tax refund to general creditors if it were determined not to be an exempt asset. This arguably darker side to the timing question also encourages filers to wait until after the refund has arrived. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 5; *see also* Interview with Iowa Chapter 7 Trustee, *supra* note 63, at 5 (explaining offhand that "I would think the people that are going to file in March probably have got their refunds back. They file with . . . the easy tax return and get the refunds back right away, spend it, and then file bankruptcy."); Interview with Nev. Chapter 13 Trustee, *supra* note 65, at 26–27 (expressing concerns that the trustee will "take" the tax refund if debtors file before they receive it).

119. Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 4.

120. *See* Interview with Iowa Consumer Attorney Three 7 (Aug. 6, 2008) (stating that her practice is to mention potential tax refunds in consultations in October or thereafter); Telephone Interview with Iowa Consumer Attorney Four, *supra* note 76, at 15 (reflecting on how trustees' interest in tax refund "gets earlier every year" and now begins in September); Telephone Interview with Nev. Consumer Attorney Two, *supra* note 72, at 2 (suggesting that trustees watch for incoming tax refunds in Chapter 13 cases filed as early as September 15); Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 7 ("And we will bring up the issue of the tax refund and say, 'In X weeks, you normally get a tax refund, how much you expecting this year?' Well let's go out with that[,] and let's plan on putting that towards your attorney's fees . . . .").

121. Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 5; *see also* Telephone Interview with Mass. Consumer Attorney Three, *supra* note 64, at 1–2 (criticizing the "interest-free loan to the government" resulting from "intentional overwithholding so that there is a forced savings"); Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 3 (suggesting that people use overwithholding as a "poor man's saving account" and that earned income credits are not relevant). For a general discussion of this pattern of behavior, see Michael S. Barr & Jane Dokko, *Paying to Save: Tax Withholding and Asset Allocation Among Low- and Moderate-Income Taxpayers* (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 100, 2007), *available at* http://ssrn.com/abstract=997866.

122. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 6 (suggesting an upward trend during the first months of the year, though fairly constant on a quarter-by-quarter basis).

attorney's fees for Chapter 13 filings are much more easily deferred than for Chapter 7 filings, which are for the most part incurred up front.[123] The result is that the need to save up for bankruptcy is less pronounced for Chapter 13 filings.[124] Another major effect is the relationship between paying the bankruptcy fees and the need to file quickly. As noted above, a much higher proportion of Chapter 13 filings are emergency filings than is the case with Chapter 7 filings. Such cases will serve their main purpose of avoiding a foreclosure sale only if filed promptly. Though delaying bankruptcy to use a tax refund is less plausible for homeowners, another causal force pushes a decline in Chapter 13 filings before and during the holiday season. Several people told us that the Christmas holiday deferred foreclosures in advance of December either because creditors feared negative publicity or because judges refused or were reluctant to evict homeowners in December.[125]

To be sure, there were some who credited the hypothesis of overspending at Christmas, including one judge who suggested that the pattern "may have more to do with just the way the bills come in after Christmas."[126] Similarly, one U.S.

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123. In Chapter 13, debtors may pay their attorneys some or all of their fees through their repayment plans. Local practice, even within a jurisdiction, varies as to the amount of the initial retainer fee that attorneys require consumers to pay up-front before filing. *See* Telephone Interview with Ga. Trustee Two, *supra* note 65, at 5 ("And in most of the cases that we see, I don't see any payment of attorney's fees at all on the front of the case.").

124. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 7; Telephone Interview with Mass. Consumer Attorney Three, *supra* note 64, at 3; Telephone Interview with N.J. Debtor Attorney, *supra* note 63, at 8; Telephone Interview with Tex. Chapter 13 Trustee, *supra* note 92, at 3. *But see* Telephone Interview with Mass. Consumer Attorney One, *supra* note 94, at 6 (requiring roughly half of fees up-front for Chapter 13, which is twice as expensive as the fees for Chapter 7, amounting to roughly the same payment for both Chapter 7 and Chapter 13 and thus accruing no savings either way).

125. Foreclosure extinguishes a debtor's ownership of the property, but unless a homeowner moves out voluntarily, an eviction action is necessary to obtain possession of the home. Because of liability concerns or fear of damage to an empty home, creditors prefer to evict immediately after foreclosure. Thus, a desire to avoid December evictions translates into a slow-down in foreclosure starts several weeks prior. *See* Interview with Nev. Chapter 13 Staff Attorney, *supra* note 88, at 4 (reporting that when she handled foreclosure cases in private practice, her clients would not refer foreclosures to her between the middle of November and the first week of the year); Telephone Interview with Ga. Bankruptcy Judge, *supra* note 65, at 10 ("[E]verybody kind of almost knows don't come in . . . asking for relief from the stay [to foreclose] in January and December."); Telephone Interview with Ga. Creditor Attorney One, *supra* note 56, at 7 (noting that firm refrained from foreclosing in November or December unless Fannie Mae or Freddie Mac foreclosure timeline guidelines mandated immediate action). Indeed, one attorney explained a peak in his state's Chapter 13 filings in September and October as a result of lenders working to close out delinquent mortgages before such a moratorium. *See* Telephone Interview with Ga. Trustee Two, *supra* note 65, at 2.

126. Telephone Interview with Tex. Bankruptcy Judge One 3 (Sept. 21, 2007); *see also* Telephone Interview with Ga. Trustee 2, *supra* note 65, at 7 (suggesting that high-volume filers are more likely to attract clients through advertising, especially on television); Telephone Interview with N.J. Debtor Attorney, *supra* note 63, at 2 (same); Telephone Interview with Tex. Bankruptcy Judge Two, *supra* note 64, at 6 ("I think the filings are higher in January, February, and March in Chapter 7 because people have gone nuts with their credit cards for Christmas gifts[,] and then they start getting their bills in January and February . . . ."). Some (but certainly not all) of those who took this perspective made it clear that they were not speaking from personal experience but instead were simply hypothesizing about possible explanations for the pattern. *See, e.g.*, Telephone Interview with Tex. Bankruptcy Judge Two, *supra* note 64, at 6; Interview with Iowa Chapter

Trustee attributed the early year peak following low December filings to a "psychological issue" that makes people unwilling to face their problems in December but willing to come to grips with them after the turn of the new year.[127] Most of those who offered this explanation did not represent debtors and thus might be relying more on speculation than on concrete knowledge of debtor motivations. Many debtors' attorneys were skeptical of this explanation. For example, when asked if the holiday overspending hypothesis rang true, one attorney explained:

> No, not at all. I look at it as having the resources to pay me. I know that [overspending] is an easy suspicion to reach, but I do not see that as affecting the timing of the bankruptcy. It is just a matter of when the cash is available to pay the lawyer.[128]

In the end, our data cannot exclude the post-Christmas possibility, and presumably it is important in some cases. On balance, however, the tax refund explanation seems to us the dominant explanation for the Chapter 7 pattern.[129] In the main, bankruptcy filings occur when a consumer can afford to pay an attorney.[130]

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13 Staff Attorney 9 (Sept. 24, 2007) (suggesting that overspending at Christmas would explain such a pattern but noting that she had never seen such a pattern in her practice); Telephone Interview with Mass. Consumer Attorney Four, *supra* note 110, at 2 ("I can opine only from speculation not from study but by inclination it was people [who] have maybe gone on spending sprees before Christmas, they get the bills from their credit card companies . . . come January or February, and they realize they don't have even enough money to be able to make their minimum payments on the credit cards."); Telephone Interview with Tex. Chapter 13 Trustee, *supra* note 92, at 4 (stating that her office "ha[s] always noticed this trend" and that "post-Christmas filings" is the only explanation that has occurred to them); Interview with Iowa Consumer Attorney Two, *supra* note 80, at 5 (suggesting possibility of Christmas overspending after stating that tax refunds is her "primary" guess).

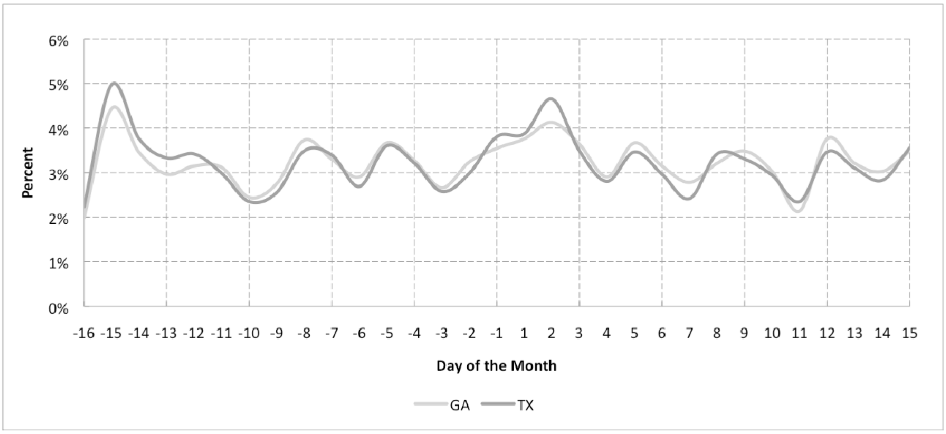
127. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 5 ("We have also got in our culture, I think, the sense that January is a time to re-evaluate and change what is wrong in your lives and such[,] and so generally I see an uptake in the interest coming in those first couple of months just like any health club would see a lot of new people signing up."); Telephone Interview with Mass. Chapter 13 Trustee, *supra* note 77, at 3; Telephone Interview with Mass. U.S. Trustee 3 (Sept. 26 & Oct. 16, 2007).

128. Telephone Interview with Mass. Consumer Attorney Three, *supra* note 64, at 2.

129. Consumer attorneys postulated a number of other theories for the phenomenon. These include the debtor's expectation that things will change for the better with the turn of the new year, *see* Telephone Interview with Mass. Consumer Attorney Two, *supra* note 105, at 3, or that people simply do not want to think about bankruptcy during the holiday season, *see* Telephone Interview with Mass. Consumer Attorney One, *supra* note 94, at 2. Finally one interview subject also pointed to seasonal employment patterns, such as construction workers who are typically laid off during winter months. *See* Interview with Iowa Consumer Attorney Two, *supra* note 80, at 5.

130. *See* Interview with Iowa Consumer Attorney Three, *supra* note 120, at 16 (explaining that delay in filing after attorney consultation results from consumers "just trying to scrape [the money] up" and that many people must "just save up" to find the money to file for bankruptcy).

Figure 6. 2004 Chapter 7 Filings (Percent by Day of Month) (Georgia and Texas)[131]



Source: Authors' calculations from PACER filing data

B. THE PAYCHECK EFFECT AND THE MONTHLY PATTERN

The other filing patterns are not as provocative or uniform across the states we have studied, but they provide further support for the basic hypothesis of this Part: a substantial part of the etiology of bankruptcies lies in the period of time between the consultation with the attorney and the moment of filing. In that vein, the second of the puzzles is why bankruptcy filings often exhibit a two-peaked pattern when analyzed by day of the month, with high points shortly after the first and fifteenth days of the month. Figure 6 illustrates the pattern for Chapter 7 filings from Texas and Georgia, the states where the pattern is most pronounced.

As discussed above, we started our interviews with the hypothesis that (at least in Texas and Georgia) foreclosure filings would justify a spike shortly after the first day of the month, but we had no explanation for why there would be a similar spike fourteen days before the end of the month. Our interviews offered a common explanation for that pattern. Generally, they suggested, clients come to the offices "pretty steadily,"[132] but the need to pay attorney's fees and filing costs drives the precise time of filing because the clients are waiting until "the paycheck comes in[,] and so they pay the attorney[,] and then they file the case . . . ."[133] Indeed, subjects in Nevada and Iowa suggested that a similar

131. On the horizontal axis, Day 1 is the first day of a calendar month, with negative numbers representing the days before the first day of a month.

132. *See* Interview with Iowa U.S. Trustee, *supra* note 63, at 4–5; *see also* Interview with Iowa Consumer Attorney One, *supra* note 60, at 5 ("I think that the interest level is fairly constant through the year. I think that the timing of bankruptcies is largely affected by the tax refund issue.").

133. Telephone Interview with Tex. Chapter 13 Trustee, *supra* note 92, at 4; *see also* Interview with Iowa U.S. Trustee, *supra* note 63, at 4; Telephone Interview with Mass. Chapter 13 Trustee, *supra* note

pattern does not appear in their states because so many employers pay on a weekly basis that a semimonthly pattern would be irrelevant.[134]

C. THE MEANS TEST EFFECT AND THE MONTHLY PATTERN

Yet another monthly pattern relates to the income and expense means test for Chapter 7 eligibility and its paperwork burdens.

When we conducted interviews in 2007 (at a time when we had data only for 2004), several attorneys told us that they had observed a pattern in which a large share of Chapter 7 filings appeared immediately *before* the end of the month, largely because of the cost and time consumed in recalculating the means test and gathering new payment advices for the bankruptcy filing when the expected filing date shifts to a later month.[135] Because this effect depended on the means test filing requirements imposed by BAPCPA in 2005,[136] it was not surprising that it did not appear in our 2004 data. As Figure 7 shows, the effect is quite obvious in the 2007 data available to us now. In each of our five states, the last day of the month is the peak day for Chapter 7 filings. Although very few debtors fail the means test, its requirements are reshaping the patterns of filings. The hurdles and paperwork that the means test imposes influence the moment at which debtors file for bankruptcy, but the effect works in two directions. On the one hand, debtors may defer their filings for additional time because they must save up to pay higher attorney's fees and locate additional paperwork. On the other hand, BAPCPA creates an informal deadline for filing, incentivizing

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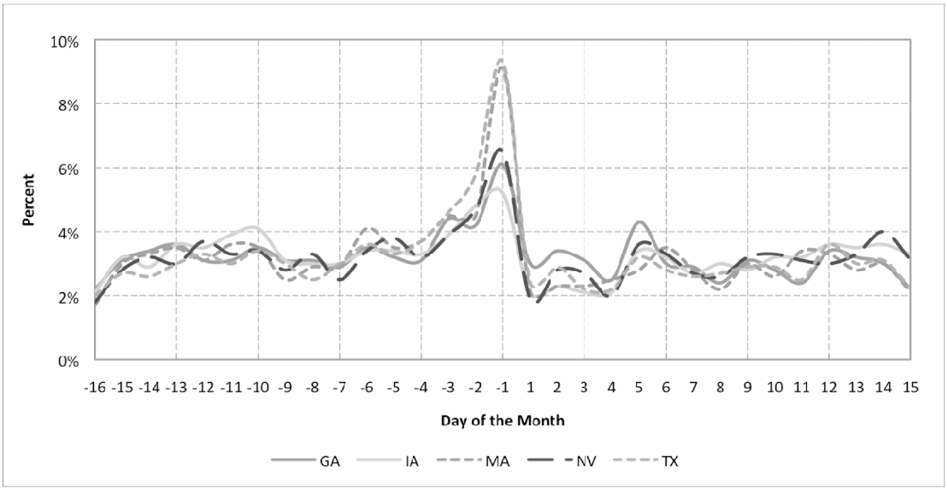
77, at 3; Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 3 (attributing the timing to "people get[ting] paid a lot on the 1st or the 15th"); Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 2 (suggesting that filers "get a paycheck and they go see their lawyer and either the petition is ready to go and they file them on the 15th or 16th or the lawyer does not start until they pay and then it takes two or three days to get everything in"). As with tax refunds, there is also the related concern that a filing just before the arrival of the paycheck will result in loss of the paycheck to the general creditors of the estate. *See* Interview with Iowa Consumer Attorney Two, *supra* note 80, at 4 ("I try to file them when they are owed the least amount of wages either right after they have been paid or the week following . . . ."); Telephone Interview with Nev. Consumer Attorney One, *supra* note 64, at 3 (suggesting that "it behooves us best [to file] when there's no money in the bank, and it's not that you yank out money, it's just that you're very careful about the moment you file"); Telephone Interview with Tex. Bankruptcy Judge One, *supra* note 126, at 2 ("[Y]ou curb the time of the filing so that it's right at the point when they get the paycheck and they can pay the bills and they can buy the groceries and they don't have to worry about reporting that income to the trustee[,] but at the same time they can spend it so that they get a bit of a cushion."). A reasonable perspective is that filers often are influenced both by the desire to protect the paycheck and by the need to pay their attorney. *See* Interview with Iowa Chapter 7 Trustee, *supra* note 63, at 2–3.

134. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 1; Interview with Nev. Chapter 13 Staff Attorney, *supra* note 88, at 3.

135. Interview with Iowa Consumer Attorney One, *supra* note 60, at 2–3; Telephone Interview with Mass. Consumer Attorney One, *supra* note 94, at 9–10.

136. The 2005 reforms of the bankruptcy law added the requirement of payment advices to the other paperwork that a debtor must file, *see* 11 U.S.C. §§ 521(a)(1)(B)(iv), (f) (2006) (requiring payment advices and tax returns, respectively), and resulted in an additional form for computation of the means test that is a required component of a bankruptcy filing, *see* Official Bankruptcy Form B 22C, *available at* http://www.uscourts.gov/rules/BK_Forms_08_Official/B_022C_0108v2.pdf.

Figure 7. 2007 Chapter 7 Filings (Percent by Day of Month)[137]



Source: Authors' calculations from AACER filing data

consumers to file before the end of a month to avoid wasted efforts and additional expenses. Perhaps some of these consumers would have delayed their bankruptcies for additional weeks or months if the need to recalculate monthly paperwork did not loom.

D. ATTORNEY WORKLOAD AND THE WEEKLY PATTERN

A final set of patterns are evident at the weekly level. These patterns varied considerably by state. For example, Wednesday was the peak day for filings in Nevada,[138] while Mondays and Fridays were dominant in Texas, as illustrated in Figure 8. The high share of Texas filings on Mondays likely reflects the foreclosure procedure that leads to a pronounced peak of filings on one particular Monday of each month. There was no obvious reason, however, why Friday filings should be so much higher than Tuesday, Wednesday, or Thursday filings.

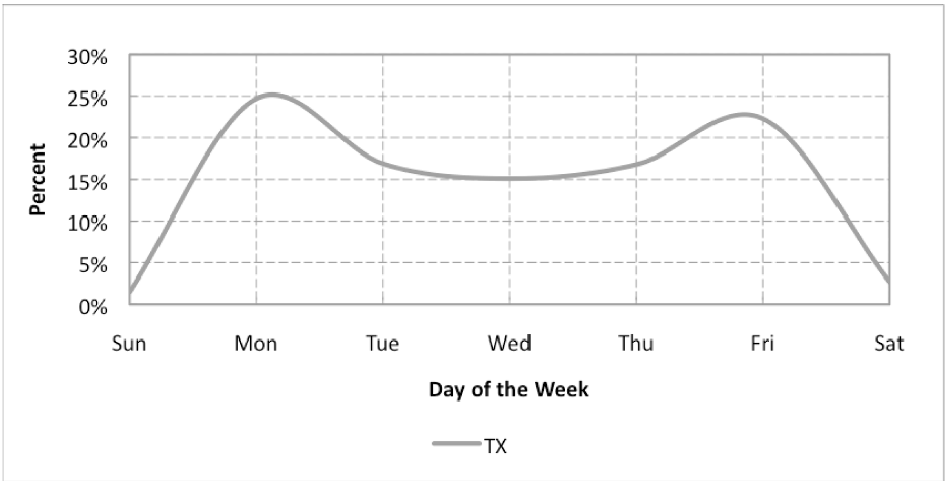
Our interview subjects consistently explained that the particular day of the week for filing a bankruptcy was both a matter of a particular attorney's practice and an issue of convenience for debtors. A Texas consumer bankruptcy attorney noted that Friday may be a common day for filings because "it is easier for the people to get off work on a Friday."[139] An Iowa Chapter 7 trustee explained that

137. On the horizontal axis, Day 1 is the first day of a calendar month, with negative numbers representing the days before the first day of a month.

138. One of our subjects attributed the state's filing patterns to a sharp drop in filings on Tuesday and Thursday when the courts commonly have day-long calendars of consumer matters so that attorneys are busy in court on those days and concentrate their filings on Monday, Wednesday, Friday, and Saturday. *See* Interview with Nev. Chapter 13 Trustee, *supra* note 65, at 11–12.

139. Telephone Interview with Tex. Consumer Attorney Two, *supra* note 67, at 1.

Figure 8. 2004 Total Filings (Percentages by Day of Week) (Texas)



Source: Authors' calculations from PACER data

many attorneys "clump" their filings on a particular day in response to the scheduling of creditors' meetings. She explained that "there is nothing worse than being a debtor's filer and having to go to meetings . . . four different days a week for four different trustees."[140] Typically, all cases filed on a particular day are assigned the same calendar day for meetings of creditors.[141] In the most extreme circumstance that we documented, a high-volume debtors' firm files its Chapter 7 cases on only two days each month so that meetings of creditors for its clients are scheduled together.[142] Attorney workload issues may also influence filing patterns. Some suggested that firms build up cases over the weekend, filing on Sunday night or Monday.[143] The ability to file cases electronically also may smooth filings over the week, permitting bankruptcy professionals to file at their convenience around the clock.

140. Interview with Iowa Consumer Attorney Two, *supra* note 80, at 3; *see also* Telephone Interview with Tex. Chapter 13 Trustee, *supra* note 92, at 2 ("[B]ecause of the way 341 meetings [of creditors] are set in this jurisdiction, I think they definitely group them together and file them so they can sit one afternoon at 341 meetings instead of several afternoons . . . . In a way, they save their workflow . . . .").

141. *See* Telephone Interview with Tex. Bankruptcy Judge One, *supra* note 126, at 2; Telephone Interview with Tex. Bankruptcy Judge Two, *supra* note 64, at 3; Telephone Interview with Tex. Chapter 13 Trustee, *supra* note 92, at 2; Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 2.

142. *See* Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 4 ("[W]e hold all of our Chapter 7s and file them at once and we do that twice a month. And so we pick a day towards the beginning of the month and then a day in the middle of the month[,] and the reason we do that is because when you file the case, the court automatically schedules their creditors meeting[,] and so if you just file them as you sign the people up, you are at court every day. So we batch them[,] and I think a lot of other firms do that as well.").

143. *See* Interview with Iowa Consumer Attorney Two, *supra* note 80, at 2; *see also* Interview with Iowa Chapter 7 Trustee, *supra* note 63, at 2 (stating that filings may go up on Mondays because of attorneys working on Saturdays and Sundays, building up filings for the first day of the work week).

The crucial point for our project was that the variance in filings over a week did not reflect legal factors or collection pressures. Individual attorney preference and issues of caseload management are the key determinants of the particular day of a bankruptcy filing. These data are additional modest evidence that bankruptcy filings reflect a complex interaction between debtors and attorneys rather than a linear effect from immediate creditor pressure driving a debtor straight to bankruptcy.

More generally, the variances in weekly, monthly, and annual filing patterns across states are difficult to square with an important role for emergency-driven bankruptcy filings. Given that collection remedies, such as the filing of a lawsuit or the repossession of a car, can occur on any day at a creditor's whim, bankruptcies driven by such events should be distributed evenly through a week or month. During the debates leading up to the passage of BAPCPA, many consumer advocates expressed concern that prerequisites to filing, such as prebankruptcy credit counseling, would be significant barriers to consumers seeking bankruptcy relief.[144] The fear was that consumers would not contact an attorney far enough in advance before a final collection activity.[145] The data presented here suggest that the problem was, and perhaps continues to be, overstated.

V. POLICY IMPLICATIONS

As we discuss in Part I, our model emphasizes bankruptcy as an element of a social system for alleviating the costs of financial distress; the role of bankruptcy in that system is to facilitate the redeployment of human capital that otherwise would be wasted. Viewed through that lens, even the preliminary discussion above illuminates two interrelated sets of policy issues: (1) how to regulate collection activities in a coherent and principled way and (2) how to manage the financial costs and bureaucratic hurdles that impede bankruptcy relief.

To explore these implications, we develop a crude taxonomy of collection activity as falling into three stages: communicating the obligation to the customer ("billing"); subsequent contacts to persuade the customer to repay ("dunning"); and the pursuit of forcible legal remedies ("litigation"). The analysis in

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144. *See Bankruptcy Reform Act of 1999 (Part II)*: *Hearing on H.R. 833 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 205 (1999) (statement of Henry E. Hildebrand, III, Chapter 13 Trustee, National Association of Chapter 13 Trustees) (stating that by the time individuals seek bankruptcy protection, it is too late for client counseling); *id.* at 134–35 (statement of Wayne Sigmon, National Association of Consumer Bankruptcy Attorneys) (noting the significant burdens that client counseling will have on debtors who file under "exigent circumstances"); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 34 (2001) (opining that the credit counseling requirement would be both a "hassle and expensive").

145. *See Bankruptcy Reform Act of 1999 (Part III): Hearing on H.R. 833 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 23 (1999) (Joan Entmacher, Vice-President and Director, Family Economic Center, National Women's Law Center) (discussing how unsophisticated debtors may wait until the "sheriff is at the door" before seeking help).

the preceding Parts of the Article suggests that in practice it is the "dunning" stage of collection that is important in the etiology of bankruptcy filings.[146] This is troubling to us, primarily because the social value of that activity is ambiguous at best. To understand the point, assume (with apologies for the stylized simplicity) that there are two kinds of debtors—those who can and those who cannot repay their debts. Among those who can pay, some wish to pay and some do not. Billing will produce payment from those who wish to and can pay but will have little or no effect on those who do not wish to or cannot pay. Subsequent communications, however, may generate relatively little in the way of repayment. Those who cannot pay of course will not pay. Nor is it clear that subsequent communications will bring payment from those who can pay but do not wish to pay.[147]

Litigation, by contrast, is well suited for sorting those who can pay from those who cannot because those who can pay might be forced to pay through litigation, while those who in truth cannot pay will not be forced to pay even in response to litigation.

That framework suggests that once the debtor understands the nature of the obligation and has decided not to pay it, subsequent dunning is a net social loss—it wastes the resources of those who are fruitlessly attempting to collect and diminishes the well-being of those who endure it. This outcome might trouble us little when the dunning falls on debtors who simply do not wish to pay. But when it falls on those who cannot pay, the activity seems to be a clear social loss. The distinction from litigation (which we view quite differently) illustrates our point. Because litigation imposes a substantial out-of-pocket cost on the creditor, the rational creditor will engage in litigation only if there is reason to believe that the debtor has assets from which payments can be made. It is for this reason that sophisticated debt collectors often do initiate litigation and so rarely experience bankruptcy filings as an immediate response. In sum, in contrast to dunning (which on the margin is close to costless, especially in the era of automated bucket shops[148]), the creditor's decision to litigate is likely to match the social costs and benefits of the activity much more closely.[149] To put it another way, dunning activity involves an asymmetric application of force;

146. The discussion below takes the view that this part of the collection process is for the most part socially wasteful. Our view is not driven primarily by fear of egregious or outrageous collection, which the law already bans. *See* 15 U.S.C. § 1692d (2006) (giving nonexclusive list of unacceptable collection practices). The effect that troubles us is cumulative and arises without malicious behavior from any creditor.

147. To be sure, if the subsequent communications are sufficiently harassing, they might overcome a weak desire not to pay. That effect, presumably, is one of the principal reasons for the communications.

148. The use of large, technologically integrated call centers ("bucket shops") for collection activity seems to be an unintended consequence of the do-not-call regulation, which limits the use of those facilities for affirmative marketing. *See* 47 C.F.R. § 64.1200(c), (f)(12) (2008) (forbidding companies from making telephone calls with the purpose of encouraging purchase, rental, or investment of goods or services to consumers who are on the do-not-call list).

149. *See* Telephone Interview with National Collection Attorney 10–14 (May 22, 2008) (discussing the level of expected recovery necessary to justify litigation and the rarity of bankruptcy responses).

the costs experienced by the debtor who receives numerous calls from creditors are likely to be much higher than the costs incurred by the creditors. This vitiates any sense that creditors are best placed to determine whether collection activities are socially worthwhile because they bear the costs of engaging in them and balance those costs against the anticipated benefits of future repayment.

A second problem, which we regard as more speculative, is the possibility that creditors face a collective-action problem because each creditor knows little about the collection efforts any particular individual debtor is facing. Creditors each have an individual incentive to move more rapidly than their peers to ensure that whatever assets a debtor may possess are used to repay their own institutions rather than their peers'. "If you sleep on your rights, then you lose."[150] It may well be rational for each individual credit card lender to call a borrower once each week, while it might not be rational for each of five lenders to call the same borrower each week.[151] And the experience of dunning from one credit card call each day will be quite different than the experience from one call each week.[152] We acknowledge that the evidence of a collective action problem here is relatively weak. To be sure, the anecdote resonates with our sense that individual creditors, even highly sophisticated creditors, will know relatively little about the collection efforts of their competitors. Of course, the most sophisticated collectors will dial into their collection models the effects of their competitors' likely collection efforts, but not all creditors will be as sophisticated as Capital One.[153] Information about the financial position of a particular debtor, or even about how (or when) to contact the debtor successfully, is valuable information, acquired at a cost, not readily to be shared with competitors. Moreover, especially for less sophisticated creditors, the path of collection activity often rests on client preferences rather than qualities of the debtor, suggesting to us that creditors will pursue strategies that are contrary to each other's interests.[154]

150. *Id.* at 5.

151. The problem here is no different in conceptual structure than the collective action problem identified by Thomas Jackson a generation ago in his analysis of the hypothetical creditor's bargain. *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 860–61 (1982).

152. *See* Telephone Interview with National Credit Card Executive, *supra* note 55, at 7–8 (describing the increasing levels of intensity with which creditors contact debtors while trying to avoid counterproductive results).

153. The scenes in MAXED OUT: HARD TIMES, EASY CREDIT AND THE ERA OF PREDATORY LENDERS (Trueworks 2006) on this subject are informative.

154. *See* Telephone Interview with Iowa Creditor Attorney Two, *supra* note 55, at 6 ("For each [creditor] . . . it's almost like it's kind of a different bucket if you will."); Telephone Interview with Mass. Chapter 13 Trustee, *supra* note 77, at 7 ("[P]er my experience in representing Chapter 7 [clients,] I think the pressure is that if you have one credit card company pushing you, you can further make a deal to pay those people $25 a week payments, though when you have three, and four, and five pressuring you then it just becomes overwhelming . . . .").

In the current system, dunning forces debtors to seek refuge in bankruptcy. As a practical matter, debtors might seek relief in bankruptcy because the relief from dunning provided by bankruptcy exceeds the direct (financial) and indirect (psychological, stigma, and humiliation) costs of bankruptcy. Notice that in this model, debtors are filing for bankruptcy even in cases in which they gain no economic benefit—a rational judgment-proof debtor would file for bankruptcy simply to avoid dunning.[155] As a matter of system design, that makes perfect sense as long as we believe that the balance between dunning and psychological costs matches the social balance between the debts discharged by the bankruptcy and the future value to be gained by the redeployment of the debtor's human capital.

But the debtor's patience for tolerating collection pressure is at best a remote proxy for the social costs and benefits of bankruptcy. This is particularly true if, as discussed above, the costs of dunning borne by creditors are so much lower than the wider social costs, meaning we should expect excessive dunning even from well-intentioned creditors. We would prefer a system that distinguishes, roughly speaking, between those who are in "irretrievable" distress and those who are in "episodic" distress.[156] Recognizing that observers with different normative baselines would categorize different debtors in different ways, for us the paradigmatic case of "episodic" distress would be the household that is in a stable financial position but because of a substantial exogenous shock (divorce, layoff, injury, illness, etc.) ceases making payments to creditors. Such a family, given time to recover, might be able to resume payments within a short time frame, eventually repay all of its obligations, and return to normal social productivity. The paradigmatic case of "irretrievable" distress would be the household suffering from a level of debt so far in excess of the household's expected income that there is no reasonable prospect of repayment in the foreseeable future. Putting concerns about moral hazard to the side,[157] society gains if that

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155. *See* Interview with Iowa U.S. Trustee, *supra* note 63, at 21 (explaining that people without any assets that creditors can reach file for bankruptcy because the other strategies do not "end the debt," and the constant burden of debt "destroys families," is "very corrosive," and just "keeps getting bigger and bigger").

156. *See* Telephone Interview with Iowa Creditor Attorney Two, *supra* note 55, at 10–11 (distinguishing between debtors whose financial setbacks were temporary and eventually can pay and those who have permanent circumstances with no solution other than bankruptcy).

157. Again, different observers will have different perspectives on the moral hazard inherent in the bankruptcy process. It has been the experience of the authors, however, that the bankruptcy process (including, among other things, the meeting of creditors with its attendant questioning by the bankruptcy trustee) is sufficiently humiliating to render moral hazard a relatively unimportant element of sensible system design. *See* Thorne & Anderson, *supra* note 62, at 93–94 (discussing the shame, humiliation, and stigma associated with filing bankruptcy for most consumers). This is not to say that debtors do not act strategically in deciding when to file. We do think, however, that the long period of struggle (one to two years or more) that we document before households file for bankruptcy suggests that concerns about bankruptcies of convenience are overstated. *See* Mann, *supra* note 35, at 376–77 (discussing the legislative history of BAPCPA and the concerns expressed therein about bankruptcies of convenience). We also note that debtors threaten bankruptcy repeatedly before they actually file, and many are deterred from ever filing. *See* Telephone Interview with Iowa Creditor Attorney Two, *supra*

family files promptly for bankruptcy, discharges its debts immediately, and returns to the ranks of productivity.[158] Until the irretrievably distressed family files for bankruptcy, it has a starkly diminished incentive to engage in productive economic activity because the future returns of such activity will accrue disproportionately for the benefit of creditors. For the family in episodic distress, however, the situation is much more ambiguous. Society loses if, in the current system, the "drum beat" of dunning presses that family into a bankruptcy that a brief respite from pressure might avoid.[159]

The adverse effects of the "drum beat" on debtor behavior are evident from a fascinating phenomenon revealed by our interviews, which we call the "$300 bankruptcy." Particularly after BAPCPA raised the out-of-pocket costs for bankruptcy filings,[160] a number of debtors have taken to retaining a bankruptcy lawyer, making a down payment in the range of $300 toward the full cost of attorney's fees for a bankruptcy filing.[161] Those who make these initial payments often never return and in other cases often wait several months before

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note 55, at 7 (saying that so many consumers threaten bankruptcy when he speaks to them to collect debts that to him "[i]t's the same as saying hello to me" but reporting that most people who threaten bankruptcy "won't do it").

158. *See* Interview with Iowa Consumer Attorney One, *supra* note 60, at 18 (suggesting that people in financial distress who do not file for bankruptcy go into an "underground economy"). As one of us has previously discussed, it is a challenging task to identify the optimal moment for bankruptcy. *See* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 121 (2006).

159. Arthur Leff offered a similar insight forty years ago about the collection process. As he elegantly framed it, the creditor's critical question is, "[D]o I coerce or cooperate?" He elaborated:

> To coerce the helpless is to waste money and effort; to cooperate with the deadbeat is to risk total loss. If, in fact, the majority of D[ebtor]s, especially consumer D[ebtor]s . . . are in the can't-pay category, then any method which takes collection out of a coercive mode (judicial coerive [sic] or informational-coercive) and into a cooperative model (where more time is given, earning potential is not interfered with and asset values are not destroyed) is likely to enhance the efficiency of the whole collection system, and benefit both C[reditor]s and D[ebtor]s.

Arthur Allen Leff, *Injury, Ignorance, and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 37 (1970).

160. Although the increase of fees after BAPCPA is widely asserted anecdotally (frequently in our interviews), there is little quantitative data on the subject. For a recent examination of the question, see generally Robert M. Lawless & Heather A. Miller, The Rising Cost of Going Broke (2008) (unpublished manuscript, on file with authors).

161. *See* Interview with Iowa Consumer Attorney Three, *supra* note 120, at 4, 14. Although other attorneys did not conceptualize it as an explicit alternative to bankruptcy, several practitioners spread throughout our jurisdictions of inquiry told us that they allow consumers to refer creditors to them during the period after an initial fee payment and noted that many people seemed content with such a service, delaying filing bankruptcy for a long period or never filing at all. *See* Telephone Interview with Ga. Consumer Attorney One, *supra* note 60, at 9 (explaining that when a consumer makes a partial payment toward bankruptcy attorney fees, they begin taking collection calls and continue for up to ninety days without further payments); Telephone Interview with Nev. Consumer Attorney Two, *supra* note 72, at 10–11 ("I give them my card[,] and I just say, okay, you . . . turn all the creditors over to us."); Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 8–9 (offering consumers who make an initial payment a "free" creditor referral number that consumers may give to creditors while they consider whether to make a bankruptcy filing).

returning to see the lawyer.[162] The perspective of the lawyers is that the clients are purchasing immunity from dunning because the debtor can direct all creditor correspondence and phone calls to the attorney after the down payment on the bankruptcy fee has been made.[163] If the borrower's affairs are repaired during the breathing space from dunning (a case of episodic distress), the borrower need never return to see the lawyer; if they cannot be repaired (irretrievable distress), the borrower ultimately will return, pay the remainder of the attorney's fee, and seek relief in bankruptcy.

The phenomenon of the "$300 bankruptcy" reflects the two-sided nature of the informational deficits that complicate determinations of can-pay/cannot-pay status. The literature exhibits a single-minded focus on the ability of debtors to shroud their capacity to pay and to deceive creditors and the concomitant difficulty that creditors face in assessing a debtor's capacity to repay.[164] The addition to bankruptcy of a "means test" as a tool to scrutinize capacity to repay ostensibly reflects such concerns. Yet debtors themselves lack perfect information about ability to repay because future income and expenses are unknown, even to them.[165] The extended time between an initial consultation with an attorney and an ultimate bankruptcy filing permits consumers to consider their financial options without dunning that might otherwise prompt an immediate (and costly) bankruptcy. Such a lull strikes us as beneficial to all—creditors, debtors, and society at large—because it facilitates the sorting of consumers into categories of irretrievable distress (who ultimately file for bankruptcy) and episodic distress (who recover their financial footing and try to repay their debts).

If we take seriously the adverse effects that dunning has on the collection process, and the collective-action problem that aggravates this process, it seems appropriate to suggest a few simple extensions of existing limitations on collection. First, the federal law regulating debt collection, the Fair Debt Collection Practices Act (FDCPA) should be extended so that its scope of coverage

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162. *See* Telephone Interview with Nev. Consumer Attorney Two, *supra* note 72, at 2 ("I am taking creditor phone calls for them. I have got files where I have had people who have seen me 18 months ago and said[,] '[O]kay, I am ready to file,' and I'm like[,] '[W]ho are you?'").

163. It is a surprising testament to the general norm of compliance by creditors that this device seems so effective from the perspective of borrowers. That is not to suggest that creditors do not find this situation frustrating. *See id.* at 10–11 ("We have a mantra. It's basically yes, we represent so and so, we have no filing of data at this time, we have been fully retained, we cannot disclose any further information. . . . And creditors will crab and they will say, '[W]ell you told us that 60 days ago, and we will call this again in 60 days.' I say fine, I'll probably tell you the same damn thing.").

164. *See, e.g.*, Jones & Zywicki, *supra* note 10, at 218–21 (questioning the morality of allowing can-pay debtors to escape repayment of their obligations). Even ignoring the moral hazard problem, it is supposed that the creditor cannot obtain the necessary information to determine ability to repay. *See* Rea, *supra* note 7, at 193 (arguing that although a debtor's "income is determined exogenously and depends on the state of the world," the lender is unable to determine if income has fallen).

165. The information technology available to sophisticated creditors gives them a pronounced informational advantage in assessing the likelihood that debtors will recover financial strength in the future, even if we ignore the overlapping cognitive deficits that are likely to plague self-assessment of that question.

includes all collection activities, regardless of whether they are undertaken by the creditors themselves or third-party collectors.[166] Any profitable collection activity that lawfully can be engaged in only by internal collectors will be sourced to such collectors either through a sale of the debt to the collector or by an assignment of the collection activity to a collector with an adequate relationship to "count" as internal.[167]

Second, the negative effects of dunning prompt us to urge careful scrutiny of the existing rules on dunning calls or other collection activity. Our findings from this initial project lead us to believe that current law is not sufficiently forceful in curbing activity that is socially harmful. At a comprehensive level, the improved technology available to creditors has driven down the costs of collection and increased the number and intensity of collection efforts.[168] Consumers are likely to face more consistent and sophisticated pressure to pay than in the past; the dunning stage of collection activity (as opposed to litigation activity such as garnishment or executions) seems to have significant force. Put another way, the "beating drums" of today's collection efforts may play at a louder volume than the static of yesteryear. Consumers may be unable to withstand a sufficient period of dunning activity to permit an optimal assessment of the likelihood that they can repay the debts.

One approach is for the law to provide the breathing room of bankruptcy's automatic stay—or the deflection from creditor dunning of the $300 bankruptcy—without an actual bankruptcy filing. In the following paragraphs, we develop a proposal to halt collection activity modeled on the do-not-call list applicable to telemarketing. As a preliminary matter, we note that such a proposal is quite modest. At least in theory, current law[169] already allows consumers to

166. 15 U.S.C. § 1692a(4), (6)(A) (1998) (excluding creditors collecting their own debts from the definition of a "debt collector").

167. The problem is exacerbated by language in the FDCPA that employs a lax standard for determining whether independent contractors can be treated as internal collectors. *See id.* § 1692a(6)(A) (excluding "any officer or employee of a creditor" from scope of the FDCPA); Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 403 (3d Cir. 2000) (stating that an assignee of debt is not generally considered a "debt collector" within the meaning of the statute if the obligation is not in default at the time of the assignment).

168. Although there are no ready statistics on the scope of debt collection, it appears that consumers perceive themselves to be suffering more pressure from collectors in recent years. According to a 2008 FTC report, more people file complaints against debt collection agencies than any other industry. *See* FED. TRADE COMM'N, ANNUAL REPORT 2008: FAIR DEBT COLLECTION PRACTICES ACT 4 (2008), *available at* http://www.ftc.gov/os/2008/03/P084802fdcpareport.pdf. The number of complaints has nearly tripled from 2000 to 2007. *See* Phuong Cat Le, *As Consumers Owe More, the Tactics Get Aggressive: Complaints Mount About Debt Collectors*, SEATTLE POST-INTELLIGENCER, Aug. 21, 2007, at A1, *available at* http://seattlepi.nwsource.com/local/328406_debt21.html. Indeed, new debt collection technology allows debt collectors to profitably target debtors with smaller debts. *See* Anne Kadet, *Who Profits Most From Debt? Debt Collectors*, SMARTMONEY, Jan. 23, 2007, http://www.smartmoney.com/personal-finance/debt/Who-Profits-Most-From-Debt-Debt-Collectors-20685/.

169. Although many states have statutes that supplement, and in some cases extend, the coverage of the FDCPA, none of them include provisions responsive to the concerns that we address here. The most common additional protection of state debt collection restrictions is their applicability to creditors collecting their own debts rather than just third-party debt collectors. But though some states have such

request that debt collectors cease communication.[170] In practice, however, the existing remedy lacks the global reach needed to halt the dunning. For one thing, as noted above, the FDCPA applies only to a subset of creditors. But the practical problems are much more important. The transaction costs of having to contact debt collectors individually overwhelm the perceived value of doing so, at least relative to the bankruptcy option as an alternative to halting collection. Contacting each creditor would require a substantial amount of effort because the median bankruptcy debtor has fourteen unsecured creditors.[171] Most consumers are likely to be unaware of the FDCPA and learn of their rights only upon consulting a bankruptcy attorney. In that context, they are likely to weigh the expense and efficacy of contacting each creditor and telling them to refrain from future contact against a global solution via bankruptcy in which an automatic stay on collection is followed by a permanent discharge of debt.[172]

In this regard, we note that most debtors' attorneys have given up on nonbankruptcy solutions to debt collection. One attorney described at length his difficulty in trying to use the FDCPA:

> I am almost never successful in getting anyone interested in doing that. I think that when you offer clients an alternative that they can file for bankruptcy in a fairly civil kind of arena where they are not likely to face a lot of intentional shaming of them[,] . . . they clearly are not interested in a private right of action. . . . You know[,] they are not litigious[,] and . . . the second thing is that even though they will be postured as plaintiffs, they still see themselves as the debtor[,] and it will still be shameful to them to go to court

a provision in their state "mini"-FDCPA (Iowa, Massachusetts, and Texas), others do not (Nevada) or impose other limitations on the scope of their debt collection law that ultimately does not expand the scope of coverage beyond the FDCPA. *See* IOWA CODE § 527.7102 (2009); MASS. GEN. LAWS ANN. ch. 93, § 49 (West 2006); NEV. REV. STAT. § 649.020 (2009); TEX. FIN. CODE ANN. § 392.001 (Vernon 2009). Georgia's statute, for example, does not apply to banks, mortgage companies, pawnbrokers, and a host of other entities and only applies to loans of $3000 or less. GA. CODE ANN. §§ 7-3-4, -6 (2009). No state has a provision for a do-not-call system like the one that we suggest here.

170. 15 U.S.C. § 1692c(c).

171. 2007 CONSUMER BANKR. PROJECT, COURT RECORDS Tally Unsecured Creditors Sch. F (2007) (on file with Ronald J. Mann) (n = 2393). Even if a debtor undertakes that work, it can be difficult to know whether a request to a debt collector will result in the underlying creditor permanently ceasing communication. *See* Telephone Interview with Nev. Credit Counselor, *supra* note 62, at 9–10 (explaining that contacting one debt collector seeking a cessation of dunning calls is often ineffective because the absence of payments often leads to the debt being recycled to a different debt collector not aware of the previous request to stop calling).

172. *See* Interview with Iowa U.S. Trustee, *supra* note 63, at 18–19 ("[E]ven if the creditor had violated the FDCPA I did not focus on that. That was a small item. . . . You know, they are in so deep, they are under water already, so there is no sense in looking at that small violation if you are going to drown in the bigger picture."); Telephone Interview with Nev. Credit Counselor, *supra* note 62, at 9 (describing how the agency advises clients to send cease-and-desist letters but needs to "assure and reassure" debtors about that approach); Telephone Interview with Nev. Consumer Attorney Two, *supra* note 72, at 8 ("Debtors just want to get the pressure off their backs. FDCPA takes a while.").

> and admit they owed a debt they did not pay and then to have the gall to actually ask a judge to award them money for someone else's behavior. I think that is very hard for them to stomach.[173]

It is likely that at least some of this difficulty reflects the expertise of the interview subject: bankruptcy lawyers and those who they counsel are more likely to conclude that bankruptcy is the best remedy for their clients, while those who specialize in the FDCPA are more likely to have conversations in which the FDCPA seems the best remedy.[174] Yet, there does seem to be a difference between the debtors for whom the FDCPA standing alone can provide effective relief and those for whom bankruptcy provides more effective relief. Generally speaking, those who do FDCPA work think they can provide adequate relief for consumers whose problems are centered on one or a small number of abusive creditors. Consumers overwhelmed by a large number of creditors are unlikely to find the FDCPA optimal, even if they seek advice from an FDCPA specialist.[175]

The reluctance of debtors (and their attorneys) to use the FDCPA as a tool perhaps could be eroded by increasing the penalty for an FDCPA violation.[176] The $1,000 maximum for statutory damages was established over three decades ago.[177] Adjusting this amount for inflation is an obvious reform; it is more difficult to pinpoint the optimal damage award. Several attorneys emphasized, however, that the current cost-benefit balance deterred consumers from pursuing even egregious FDCPA violations:

> [E]ven if there are violations, I mean[,] what are your actual damages in most of these cases[,] and there really aren't any. . . . [C]lients don't ever really want to pursue those [FDCPA actions] if you actually explain to them that there [are] not really any damages at the end of the day. . . . [S]o why do they want to go through all that trouble if at the end of the day they do not get

173. Interview with Iowa Consumer Attorney One, *supra* note 60, at 10–11; *see also* Interview with Iowa Consumer Attorney Three, *supra* note 120, at 16. ("With the FDCPA, there is still [a] little bit of shame[,] and I think that that shame is enough to say that I just don't want to bother with it.").

174. Telephone Interview with Wis. FDCPA Attorney 3–4 (May 27, 2009).

175. Interview with Iowa U.S. Trustee, *supra* note 63, at 19–20. One interesting data point about the sophistication of the relevant consumer population is that the very general advertisements of the FDCPA specialist whom we interviewed (mentioning "harassing debt collectors" but not bankruptcy) for the most part produce clients who have only a small number of creditors; those with large numbers of creditors apparently respond to advertisements that include the word "bankruptcy." Telephone Interview with Wis. FDCPA Attorney, *supra* note 174, at 4–5.

176. One possibility would be that if the FDCPA provided more robust relief, firms specializing in providing bankruptcy relief might be more motivated than they presently are to add FDCPA specialists to their staff who could pursue statutory relief in cases in which it was appropriate, while pursuing bankruptcy relief at the same time. *See* Telephone Interview with Wis. FDCPA Attorney, *supra* note 174, at 4–5.

177. Pub. L. No. 95-109, § 813(a)(2)(A), 91 Stat. 874, 881 (1977) (codified at 15 U.S.C. § 1692k(a)(2)(A)).

> anything from it[,] and most of them say[,] "I don't want, you know, I don't want the hassle. I just want it to stop."[178]

A more innovative approach would be to offer consumers the equivalent of a single-portal, do-not-dun list for halting all debt collection efforts. Creditors would be obligated to honor such a request for a limited time, calibrated to the perceived length of time needed for consumers to assess whether their financial distress will be resolved. Drawing on the typical delay between contacting an attorney and filing bankruptcy that we identified in this project, we proffer six months as a suggested window of relief. The consumer would activate this protective mechanism through a toll-free phone call or by visiting an Internet site. As the above discussion of the limitations of the FDCPA suggests, low transaction costs to entry are essential to the success of a high-volume system aimed at ordinary consumers. Thus, we believe an administrative rather than judicial process is likely to be more effective. The success of the do-not-call telemarketing list suggests that consumers would participate in a do-not-dun system aimed at stemming fruitless collection activities.

To be sure, there is some chance that the termination of communication by the debtor might result in a precipitate collection action.[179] But the model discussed above suggests that litigation is not socially harmful, primarily because the action is sufficiently costly to creditors to limit its use to cases in which there is some reason to believe the debtor can pay. From this perspective, one virtue of the do-not-dun list would be that it would provide creditors a low-cost signal that there is no need to wait to collect further information to assess the debtor's willingness to pay. If creditors wish to invest the resources to proceed to litigation, our proposal would not hinder them in any way; it would, however, provide an easy and effective way to terminate dunning—immediately signaling the debtor will not pay voluntarily (at least for the time being).

Finally, if the previous discussion is concerned about forcing debtors into inappropriate bankruptcy filings because of dunning, the data suggest a parallel concern about excessive costs deterring socially valuable bankruptcy filings. The filing patterns presented in Part IV strongly suggest a group of debtors for whom the decision to file bankruptcy is deferred due to a lack of funds. If we think these debtors' decisions are likely to be too hasty, then we should approve

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178. Telephone Interview with Tex. Consumer Attorney One, *supra* note 64, at 12; *see also* Interview with Iowa Consumer Attorney Three, *supra* note 120, at 15 ("But they still think it is just too much of a hassle for them to sue. And you know if the debt is only a couple of thousand dollars, then for a lot of people they just don't see that it's worth the effort of some kind of a lawsuit. . . . I think raising the statutory damages would help a lot."); Telephone Interview with Nev. Consumer Attorney Two, *supra* note 72, at 8 (suggesting that typical recovery of $1000 is not adequate motivation to justify FDCPA lawsuits because "[d]ebtors just want to get the pressure off their backs" and FDCPA takes a while).

179. *See* Telephone Interview with National Collection Attorney, *supra* note 149, at 8–9 (collection attorney stating that he initiates litigation promptly after debtors ask for termination of communication).

of a barrier that withholds bankruptcy relief until (or unless) it is appropriate. Conversely, in cases in which bankruptcy relief is appropriate, the deferral of the bankruptcy discharge pending the ability of the household to save the funds necessary for a bankruptcy filing imposes social losses—both the loss of redeployed human capital for productive use during the deferral period and the social losses from a deeper and broader set of externalities due to the household's continued financial distress.[180] Within the framework of this Article—in which bankruptcy relief is a social response to mitigate the costs of financial distress—we might regard the filing fees for bankruptcy as the "co-pay" the debtors must pay to take advantage of the service. Analogizing to the design of health insurance, if society is suffering because the system is underused, we might think that the level of the co-pay is too high.[181] BAPCPA only worsened this problem because the higher attorney's fees extend the time necessary for a consumer to save up for bankruptcy.[182]

Current law does a poor job of policing whether bankruptcy filings are too hasty. Put another way, the law is largely unconcerned with excluding debtors whose distress is episodic. Neither the "abuse" standard nor the means test examines the underlying causes of financial distress and the likely trajectory of recovery for the would-be bankruptcy debtor.[183] The proper task is to identify and deter from bankruptcy those in episodic distress without imposing undue barriers to bankruptcy for those in irretrievable distress. Though it is beyond this project (and perhaps these authors) to operationalize such a system,[184] we hope that our effort to direct further consumer bankruptcy scholarship to this issue is itself a useful contribution.

The converse problem is that the current system appears to do a poor job of giving prompt access to bankruptcy relief for those in irretrievable distress.[185]

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180. Although the effects of severe financial distress have not been carefully documented, they might include harms to the debtor's children from household stress, postponement of preventative medical care, or withdrawal of funds from retirement accounts that leave the consumer dependent on public funds later in life. For example, a debtor's financial distress may impair her ability to concentrate on her job. *See* Telephone Interview with Tex. Consumer Attorney Three, *supra* note 63, at 10 ("And I have actually had a few employers actually pay our attorney fees on behalf of their employees just because of the interruption to productivity.").

181. We thank Ed Morrison for suggesting the analogy.

182. *See* Interview with Iowa Consumer Attorney Three, *supra* note 120, at 23–24.

183. Indeed, the means test is explicitly backward-looking, relying on the inanely named "current monthly income," an average of the six months of income before the bankruptcy, to determine going-forward ability to pay. 11 U.S.C. § 101(10A) (2007).

184. One possible system would provide an immediate discharge but then recapture excess income if such funds materialized. *See* Jean Braucher & 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., Feb. 2003, at 6.

185. The usefulness of nonbankruptcy alternatives disappears if people wait too long to seek help with their debts. *See* Telephone Interview with Nev. Credit Counselor, *supra* note 62, at 10 (estimating that because consumers "are waiting too long to find a solution to their problem[s]," less than a half dozen people among the several thousand who completed prebankruptcy credit counseling with the agency were viable candidates for debt management plans).

Using the simple framework of the discussion above, we might think, at least for those in irretrievable distress, that the appropriate response is a much simpler system that will have much lower costs (both private and public). As one of us has discussed elsewhere, the low-income, low-asset bankruptcy proposals that other countries are commonly adopting provide a useful model.[186] The basic idea is that the system should operate differently for people in irretrievable distress. With these debtors having so little income and few assets, the model should be a streamlined administrative proceeding with low fees for access and in which public expenses are focused on vigilant efforts to detect and punish fraud.

The goal should be a simple one-page form that debtors could complete without an attorney's assistance. Although working out the precise details is beyond the scope of this Article, a few preliminary thoughts should help to illuminate the idea. If the purpose is to identify those debtors for whom a streamlined administrative process is relevant, then it should include some information about both income (which should be quite low) and debt (which should be quite high as compared to income).[187] Although it is harder to operationalize for routine use, it also would be important to have some inquiries, perhaps with boxes to be checked, about the nature of the assets the debtor has. If the purpose of the form is to forgo any administration of the bankruptcy proceeding, it is important to be sure there is a low likelihood of assets for distribution to creditors.[188]

To counter the problem of attorney's fees as a deterrent to prompt bankruptcy filings, the system could adopt a sliding-fee scale for attorney's fees, with much lower charges for debtors who have low incomes and low assets, and consequently, are little affected by the means test or other complications.[189] The current bankruptcy system deters attorneys from offering such low-cost services because it requires significant paperwork and complex legal counseling for all cases, even those filed by debtors without assets. The need to promptly redeploy the human capital of those families is especially pressing in this time of economic turmoil. Collectively, society loses when people are trapped in financial distress, discouraged from productive economic enterprises and so burdened by debts that they cannot participate in the consumer economy.

186. *See* Ronald J. Mann, *A Comparative Analysis of Filing Rates and the Severity of Consumer Bankruptcy Law*, *in* CONSUMER CREDIT, OVER-INDEBTEDNESS AND BANKRUPTCY: NATIONAL AND INTERNATIONAL DIMENSIONS (J. Niemi-Kiesiläinen et al. eds., 2009).

187. Presumably the simplified proceeding would not be available to borrowers who wish to retain assets subject to secured debt, such as houses or cars.

188. Procedures for establishing eligibility for programs like Medicaid might provide a useful analogy.

189. Bankruptcy courts must approve the fees that debtors pay attorneys, making this proposal administratively feasible if the judges were persuaded it was a desirable reform.

CONCLUSION

We emphasize the preliminary nature of the inquiry. What is important to us about this Article is the questions we pose. Which institutions sort families in distress into those who do and those who do not resort to bankruptcy? How do those institutions affect which families use bankruptcy? And most importantly, how do we want those institutions to work? We hope that the information and analysis we present here demonstrate that those questions are important, intriguing, and unresolved.