

# The Failed Reform: Congressional Crackdown

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## Bankruptcy Filers

by

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### ABSTRACT

*After decades of lobbying to “get tough” on bankruptcy repeat filers, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The Bankruptcy Code now requires that the automatic stay, which prevents creditors from pursuing the property of bankruptcy debtors, expires after thirty days for petitioners who file for bankruptcy within one year of a previously failed petition. Debtors can file a motion to extend the stay, but there is a presumption of a bad faith filing, only overcome if a debtor can show there has been a “substantial change in his or her financial or personal affairs” that makes discharge likely. Despite the Congressional focus on repeat filers, there has been little scholarly study of them. This study uses a national random sample to analyze post-BAPCPA repeat filers. I find that even post-BAPCPA, there is a significant number of repeat filers. Indeed, 14.7% of all bankruptcy petitions filed in 2007 were repeaters, and of Chapter 13 repeat filers, 69% filed a new petition within a year after a previous petition’s failure. Further, the strict new Congressional rules for repeat filers have effected little practical change: 98% of petitions to extend the automatic stay are granted, even though the majority of repeat filers provide no evidence of changed circumstances. Based on these findings, interviews with bankruptcy judges, trustees, and lawyers, and analysis of relevant case law, I explain why BAPCPA’s crack-down on repeat filers has effected little practical change, and argue that effectively*

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*tackling the refiler problem will likely require very different tactics than those employed in BAPCPA.*

On February 1, 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),<sup>1</sup> a sweeping legislation that overhauled the nation's bankruptcy system.<sup>2</sup> At the heart of BAPCPA, as evidenced by its name, were changes meant to prevent "abuse" of the system, particularly by repeat bankruptcy filers.<sup>3</sup> Indeed, when President George W. Bush signed BAPCPA into law, he said, "In recent years, too many people have abused the bankruptcy laws . . . To make the system more fair, the new law will also make it more difficult for serial filers to abuse the most generous bankruptcy protections."<sup>4</sup>

Attacks against repeat bankruptcy filers, or "serial filers," are nothing new. As far back as the late-nineteenth century, when Congress established the first comprehensive American bankruptcy system in the 1898 Bankruptcy Law, creditors have alleged that most debtors are people who are actively and purposely manipulating and gaming the system for their own financial gain, rather than strapped families on their last straw of financial viability.<sup>5</sup> Indeed, within five years of Congress passing the 1898 Law, it was on the verge of appeal because of pressure from creditors who argued that debtors were filing for bankruptcy over and over again, using and abusing the system.<sup>6</sup> Instead of repealing the bankruptcy law entirely, Congress instituted a rule that no debtor could receive a bankruptcy discharge more than once every six years.<sup>7</sup>

While bankruptcy law has undergone significant changes since the late-nineteenth century, the problem of repeat filers has been raised many times since 1898. In the mid-1990s, Congress decided it would once again attempt to address the problem of repeat filers. Senators Reid and Brown proposed an amendment that would have limited a debtor's ability to file a Chapter 13

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<sup>1</sup>Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

<sup>2</sup>See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 485, 485 (2005) (noting that BAPCPA "represents one of the most comprehensive overhauls of the Bankruptcy Code in more than twenty-five years.").

<sup>3</sup>See Lance Miller and Michelle M. Miller, *Repeat Filers Under BAPCPA: A Legal and Economic Analysis*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 509, 518-26 (2008) (discussing several changes BAPCPA made to the bankruptcy code that were aimed at "abusive" filers).

<sup>4</sup>Press Release, White House Office Press Secretary, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005).

<sup>5</sup>See TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS* 191 (1999) (noting that creditors have long alleged that bankruptcy debtors abuse the system).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

bankruptcy petition to once every three years. Senator Reid said the amendment “would say to all debtors: You are now in the court of last resort, and because we are granting you the absolute, unquestioned protection of the automatic stay, you will be given one opportunity to reorganize your finances for at least every three years.”<sup>8</sup>

The proposed Brown/Reid amendment did not pass, but it was the catalyst for a renewed conversation in Congress about bankruptcy abusers that culminated in 2005 when Congress passed BAPCPA. The legislative history on BAPCPA is limited, but the history that is available points to a clear intent to curb serial refilers. Indeed, the Senate Judiciary Report on BAPCPA noted, “The heart of the bill’s consumer bankruptcy reforms. . . includes provisions intended to deter serial and abusive bankruptcy filings.”<sup>9</sup>

The key section of BAPCPA that focuses on second time repeat filers is 11 USC § 362(c)(3) (hereinafter § 362(c)(3)),<sup>10</sup> which states that the automatic stay that bankruptcy filers receive the moment they file for bankruptcy (which prevents creditors from pursuing debt collection) expires after thirty days if a debtor files a repeat Chapter 13 petition less than 365 days from the dismissal of a previous Chapter 13 filing.<sup>11</sup> In other words, if a petitioner files for bankruptcy within a year of a previously failed petition, the automatic stay, one of the key protections of bankruptcy, is set to expire after thirty days.

Debtors can file a motion to extend the stay, but § 362(c)(3) dictates that judges should evaluate these motions based on a presumption of a bad faith filing. A debtor can only overcome this presumption if she shows that “there has been a substantial change in her financial or personal affairs that will likely result in a fully performed plan.”<sup>12</sup>

This change in the law had the potential to fundamentally alter the bankruptcy system for second-time repeat filers. Unless debtors could overcome the presumption of bad faith, they would lose one of the fundamental protections of bankruptcy—protection from creditors—within thirty days. Despite the potential consequences of this change, there is no scholarly empirical analysis of how judges have applied this provision and in turn how it has affected debtors.

This Article takes on this task using a national random sample of bankruptcy filers from 2007, as well as thirty-five in-depth interviews with bankruptcy judges, trustees, and lawyers. Additionally, the Article examines case

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<sup>8</sup>REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, at 278 (1997).

<sup>9</sup>H.R. Rep. No. 31, 2, 109th Cong., 1st Sess. (2005).

<sup>10</sup>Section 362(c)(4) also addresses repeat filers, but a much smaller group—those who have filed two or more previous petitions in a 365 day period.

<sup>11</sup>Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, *supra* note 1 at § 362(c)(3).

<sup>12</sup>*Id.*

law on § 362(c)(3). The findings are surprising: When evaluating motions to extend the stay, judges granted 98% of the motions filed, even when the motions provided no evidence of a “substantial change in financial or personal affairs.”<sup>13</sup> The majority of motions filed do not attempt to provide such evidence. Further, a thorough examination of case law on § 362(c)(3) shows that over time, many districts focused on a technicality in the drafting of § 362(c)(3) and have found, based on the plain language of the statute,<sup>14</sup> that it applies only to the property of the debtor, and not to the property of the estate. In these districts, § 362(c)(3) is essentially useless to creditors.

Interviews with judges and trustees help to explain these findings and provide an interesting picture of law-in-action. Noting that no judge or trustee was asked to be part of the development or drafting of BAPCPA, bankruptcy judges and trustees believe that the BAPCPA requirements do not actually tackle the problem of serial filers and, in many cases, unfairly block access to the bankruptcy system’s automatic stay to second-time filers. They believe that the debtors who are filing for the second time are rarely the true abusers, but instead are people who experienced a financial shock (subsequently overcome) that made payment impossible at the time their case was dismissed, or people who initially filed *pro se* and not understand the complex administrative realities of Chapter 13. Additionally, judges note that creditors, the ones who § 362(c)(3) was meant to protect, rarely contest motions to extend the stay.

Thus, bankruptcy judges have found varying ways of handling motions to extend the stay under § 362(c)(3) with the same result—approving practically all of the motions, whether or not evidence of changed circumstances was presented, and in the majority of districts (that have addressed the issue), giving § 362(c)(3) little power by finding that it applies only to the property of the debtor, and not to the property of the estate.

This Article makes two important contributions to the study of repeat bankruptcy filers and the effect of BAPCPA’s crackdown on these filers. First, using a national random sample, it provides a picture of how common the perceived problem of repeat filers is, providing statistical data both about *all* repeat filers and, separately, those who were the target of BAPCPA—those who filed a second chapter 13 petition less than a year after the filing of a previously failed petition. Second, it provides an analysis of how BAPCPA’s change to the automatic stay for repeat filers has been applied by

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<sup>13</sup>*Id.*

<sup>14</sup>The plain language of 11 U.S.C. § 362(c)(3) reads, in part, “if a single or joint case is filed by or against a debtor who is an individual in a case . . . and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed . . . the stay . . . with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.”

judges, ultimately showing that BAPCPA's "crackdown" has had little practical impact on repeat filers. The Article also provides an analysis of the failure of repeat filers' first petitions. The data provide important indications of avenues for further research on repeat filers.

Finally, this Article contributes to the law-in-action literature by providing an interesting case study of the complex relationship between, and roles of, the legislature and the judiciary in creating and implementing the law. Based on analysis of the quantitative data, content analysis of motions to extend the stay, interviews with bankruptcy officials, and analysis of the case law on § 362(c)(3), the Article shows how Congressional action on repeat filers through BAPCPA may have jumped the gun, focusing on a "problem" that may not be a problem at all. Congressional action to push the legislation forward without consulting with experts in the field, or data about repeat filers, resulted, in practice, in what bankruptcy actors believe is an ineffective<sup>15</sup> and poorly drafted Section of the Code that meant additional administrative work for courts (both in processing motions to extend the stay and in trying to interpret the Section's confusing language),<sup>16</sup> and additional cost (in attorney fees) for debtors. Bankruptcy judges, who are intimately aware of the everyday operations of the bankruptcy system, responded to the missteps of Congress by applying the law in ways that they believed would allow the system to continue to function effectively, given their on-the-ground knowledge of the system.

This Article proceeds as follows: Part I describes existing knowledge about repeat filers. Part II explores the legislative history of BAPCPA as it relates to repeat filers and describes in more detail the new aspects of the Code intended to crack down on repeat filers. Part III explains the data and methodology of this study. Next, Part IV describes how judges have treated § 362(c)(3) motions to extend the stay, and why. Part V then discusses what the data from this study can tell us about repeat filers and directions for further research in order to design effective policy. Part VI provides further analysis of the role of judges in interpreting § 362(c)(3) and the law more generally, and finally, Part VII concludes.

## I. SCHOLARLY HISTORY OF REPEAT BANKRUPTCY FILERS

Despite the decades-long focus on repeat bankruptcy filers by Congress,

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<sup>15</sup>The Section of the Code is ineffective to the extent that it was designed to keep repeat filers who filed less than a year after a previously failed petition from benefitting from the automatic stay after 30 days. Contrary to the intention of the law, this study shows that 98% of filers in this situation continue to benefit from the automatic stay after 30 days from their second filing.

<sup>16</sup>See *infra* Section IV.B for a discussion of the administrative hassles of processing § 362(c)(3) motions to extend the stay and Section IV.C for a discussion of case law that has focused on interpreting the confusing language of § 362(c)(3).

academic study of repeat filers has been sparse. The few studies that do exist are almost all limited to one or a few judicial districts, and they offer only a local data point of the percentage of repeat filers. One of the earliest (and most complete) examinations of repeat filers was in the groundbreaking work of Sullivan, Warren, and Westbrook, which considered debtors from three states who filed for bankruptcy in 1981. The authors found that about 8% of debtors had filed for bankruptcy more than once.<sup>17</sup> Another one of the few nationwide studies of repeat filers found that, between 1993 and 2002, 16% of all bankruptcy filings were repeat filings,<sup>18</sup> and 8% of consumer debtors were repeat filers. The study further found that the incidence of repeat filings varied significantly among circuits and districts.<sup>19</sup> Indeed, studies of specific districts find varying rates of repeat filers. One study from 1990 in Manitoba and Iowa estimated that 14% of filers were repeat filers,<sup>20</sup> and another, focusing on filers in Utah in 1997, found that 37% of debtors had filed more than one time between 1985 and 2004. A study that focused on a small sample of Chapter 13 debtors from a Southern Mississippi district found that 39% had filed previously, but only 7% more than twice.<sup>21</sup>

Beyond studies that examine rates of refiling, Lance Miller and Michelle Miller have shed light on the post-BAPCPA repeat filers situation, but their study is restricted to one district, the Northern District of Texas. The authors randomly sampled 3,327 consumer bankruptcy cases from 2004, pre-BAPCPA, and 2,537 cases from 2006, post-BAPCPA. Miller and Miller were interested in comparing repeat filers before and after BAPCPA. They find that the overall rate of repeat filers (in the Northern District of Texas) did not change after BAPCPA, and also that the financial characteristics of repeat filers pre- and post-BAPCPA did not change. However, they did find that there was a change in the timing of filing repeat petitions, and that the average time between filings increased from 2.16 years before BAPCPA to 3.9 years after BAPCPA. They find that the number of repeat cases filed within a year of the initial petition decreased by nearly 40%. Thus, they argue, in 40% of repeat cases, debtors knew about BAPCPA's changes to the automatic stay and intentionally waited more than a year to file in order to avoid potentially losing the protections of the automatic stay after thirty days.<sup>22</sup>

The present study is the first to provide a post-BAPCPA analysis of a

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<sup>17</sup>SULLIVAN, WARREN & WESTBROOK, *supra* note 5, at 192.

<sup>18</sup>Golmant & Ulrich, *supra* note 20, at 169.

<sup>19</sup>*Id.*

<sup>20</sup>John Golmant & Tom Ulrich, *Bankruptcy Repeat Filers*, 14 ABI L. REV. 169, 170-71 (2006).

<sup>21</sup>Jean M. Lown & Bonny Llewellyn, *Repeat Bankruptcy Filers*, 19 Papers of the Western Family Economics Association 37, 37, 55 (2004).

<sup>22</sup>Miller & Miller, *supra* note 3, at 520-22.

national random sample of second-time repeat Chapter 13 bankruptcy filers. Additionally, no other study has investigated how the changes to § 362(c)(3) have been applied, and how, if at all, these changes have affected repeat filers and their ability to utilize the protection of the automatic stay.

## II. LEGISLATIVE HISTORY OF BAPCPA AND THE REPEAT FILERS PROVISION

The complete legislative story of BAPCPA has been ably told elsewhere.<sup>23</sup> However, a brief overview of the legislative history of BAPCPA is important in order to fully understand the findings from this study.

The roots of BAPCPA are often traced back to the 1994 appointment of a National Bankruptcy Review Commission by the House of Representatives.<sup>24</sup> The Commission's report featured a long dissent written by four Commission members that included the statement that "the Bankruptcy Code offers opportunities for unjustifiable debtor manipulation by various means, including abuses of the automatic stay to fend off eviction, repetitious filings, and over-generous exemptions."<sup>25</sup> These dissenters opposed the consumer bankruptcy-focused recommendations of the Commission, arguing, among other things, that the recommendations failed to "meaningfully restrict abusive refilings or misuse of the automatic stay to prevent evictions."<sup>26</sup>

While the dissenting Commission members believed that the Commission report's recommendations regarding refilers were not strict enough, all Commission members agreed that refiling was a problem. The main Commission report stated:

Some debtors file for Chapter 13 only to obtain access to the special tools offered in Chapter 13. . . . By filing, they get the benefit of the automatic stay, negotiate with that one creditor, and then dismiss the case. If the negotiated deal does not work, they file again to obtain another automatic stay to repeat the negotiation process.<sup>27</sup>

Policy makers were particularly concerned about debtors who filed repeatedly in order to avoid foreclosure. As the Commission report noted:

Others [debtors] file on the eve of a foreclosure or eviction for the sole purpose of delaying the state legal process. When the threat passes, they dismiss their case, only to file

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<sup>23</sup>See, e.g., *Id.*, at 510-512; Susan Jensen, *A Legislative History of the Bankruptcy Abuse and Prevention Consumer Protection Act of 2005*, 79 AM. BANKR. L. J. 485 (2005).

<sup>24</sup>Miller & Miller, *supra* note 3, at 510.

<sup>25</sup>REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, *supra* note 8, at ch. 5.

<sup>26</sup>*Id.* at 3-4.

<sup>27</sup>*Id.* at 278.

again when the mortgagee or landlord brings another legal action to seize control of the property. The ability to file repeatedly for Chapter 13 relief increases a debtor's leverage in negotiations with creditors. In regions where this problem is particularly acute, judges have devoted significant time and resources to developing tools to address this problem.<sup>28</sup>

Congress has repeatedly sought to address the perceived repeat filers problem. Since the Commission's report was released in 1997, a series of proposals was introduced largely reflecting the dissenting commissioners' views that harsher penalties for repeat filers than those suggested by the Commission are needed. Legislation for reform to crack down on abusive filers was proposed in 1997, in 1998, and in 2000. The Bankruptcy Reform Act of 2000<sup>29</sup> was even sent to President Clinton for enactment on December 7, 2000. Though the President pocket-vetoed the bill by failing to sign it into law within ten days, he made sure to note, "I firmly believe that Americans would benefit from bankruptcy reform legislation that would stem abuse of the bankruptcy system by, and encourage responsibility of, debtors and creditors alike."<sup>30</sup>

After years of attempts at bankruptcy reform legislation, BAPCPA was finally signed into law on April 20, 2005. The traditional legislative history of BAPCPA is scarce. Legislative history of a bill usually includes congressional reports appended to it, generated from portions of hearings or from other analysis generated by congressional members and staff. In the case of BAPCPA, however, there was no joint conference committee report and no Senate Judiciary Committee Report. Further, there were no floor statements from the floor managers and no Senate and House committee reports—there was only one brief House Judiciary Committee Report published with BAPCPA, and this report provides only a minimal explanation about the legislative intent of the law.<sup>31</sup>

The tone of the available House Judiciary Committee Report, however, is revealing: "Shoplifting is wrong; bankruptcy is also a moral act. Bankruptcy is a moral as well as an economic act. There is a conscious decision not to keep one's promises."<sup>32</sup> Further, as Miller & Miller discuss,<sup>33</sup> a few lawmakers made statements in support of BAPCPA, and their sentiments

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<sup>28</sup>*Id.*

<sup>29</sup>Bankruptcy Reform Act of 2000, H.R. 2415, 107th Cong. (2000).

<sup>30</sup>Press Release, White House Office of the Press Secretary, Memorandum of Disapproval by William J. Clinton, at 1 (Dec. 19, 2000).

<sup>31</sup>Miller & Miller, *supra* note 3, at 510.

<sup>32</sup>H.R. Rep. No.31, 109th Cong., 1st Sess. (2005).

<sup>33</sup>Miller & Miller, *supra* note 3, at 511.



echoed those of the House Judiciary Committee Report. Representative Todd Tiahrt (R-Kan), for example, stated: "The bill we are voting on today will help foster greater personal responsibility and make it more difficult for those who use bankruptcy as a tool for fraud to cheat their way out of debt."<sup>34</sup> He continued by arguing that too many people are able to file for bankruptcy. He said, "Bankruptcy filings have escalated in recent years, which have had negative consequences on our economy. . . . If this alarming trend continues, all Americans will pay the price in the form of higher costs for goods, services and credit."<sup>35</sup>

Indeed, most of the measures of BAPCPA are aimed at curbing consumer filer "abuse" through restricting access to the bankruptcy system, both by making it more difficult to file initially and by reducing access to some of the key protections of bankruptcy, including the automatic stay.

### III. DATA AND METHODOLOGY

This study reports data collected by the (2007) Consumer Bankruptcy Project ("CBP") study,<sup>36</sup> data collected from Public Access to Court Electronic Records (hereinafter "PACER") by the author, and qualitative data collected from thirty-five in-depth phone interviews the author conducted with bankruptcy judges, trustees and lawyers. Additionally, the study reports the content analysis of case law that interprets 362(c)(3).

#### A. CONSUMER BANKRUPTCY PROJECT

The 2007 CBP is a part of an iterative study on people who file bankruptcy. The first CBP was conducted in 1981, with subsequent studies conducted in 1991, 2001, and 2007. The principal investigators for the first CBP were Teresa A. Sullivan, Jay Lawrence Westbrook, and Elizabeth Warren.<sup>37</sup> Details on the 2007 CBP, including its funding and acknowledgements of assistance, are available in prior published work.<sup>38</sup>

The 2007 CBP is the first national random sample of households that filed for bankruptcy following the changes to the consumer bankruptcy law in 2005.<sup>39</sup> The sample for the 2007 CBP was drawn from a national random sample of bankruptcy filers using the Automated Access to Court Electronic Records (AACER) system.<sup>40</sup> The sample consists of Chapter 7 or Chapter

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<sup>34</sup>*Id.* at 511.

<sup>35</sup>*Id.* at 511.

<sup>36</sup>For a detailed account of the 2007 CBP research design, see Robert Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 391-98 (2008). The 2007 CBP database holds the first random national sample of consumer bankruptcies. *Id.* at 354.

<sup>37</sup>SULLIVAN, WARREN & WESTBROOK, *supra* note 5.

<sup>38</sup>See Lawless et al., *supra* note 36.

<sup>39</sup>Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, *supra* note 1.

<sup>40</sup>This is now part of EPIQ Systems. The 2007 national filing data were supplied through the gener-

13 bankruptcies filed in the United States (the 50 states and the District of Columbia).

Over a five-week period beginning in the last week of January 2007 through February 2007, 5,000 cases were randomly selected from all judicial districts in the United States. Investigators mailed a letter to each of the 5,000 households, which briefly described the study and told respondents to complete the survey they would be receiving in the mail if they wished to participate. One week after they received the introductory letter, potential participants received a questionnaire packet which included a cover letter, an eight-page questionnaire, a stamped return envelope, and two dollars in cash as a token of appreciation. Potential participants were sent a thank you/reminder letter one week after the initial questionnaire was sent and the research team contacted respondents via telephone (when the respondents' telephone numbers were available) to follow up with potential participants. A second reminder was sent one month after the initial questionnaire was mailed, with an additional two dollars as a token of appreciation encouraging them to participate. In July 2007, final letters were sent to respondents who had not yet completed the questionnaire.

Overall, about half of the respondents mailed in their surveys, yielding a total sample of 2,521. Investigators also analyzed court record data from non-respondents to test whether they were statistically distinguishable from respondents, and they were not.<sup>41</sup> Two-thirds (66%) of the sample were Chapter 7 bankruptcies, while the remaining 34% were Chapter 13 bankruptcies.<sup>42</sup> Approximately 70% of the returned questionnaires were single filings and 30% were joint filings (filings by married couples).<sup>43</sup>

The 2007 CBP collected data on consumer bankruptcy filers using information from the written questionnaire, court records, and telephone inter-

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ous assistance of Mike Bickford and his colleagues at Automated Access to Court Electronic Records ("AACER"), an Oklahoma City-based bankruptcy data and management company.

<sup>41</sup>Specifically, to test for response bias, CBP researchers coded and analyzed major financial variables from the court records of 100 non-respondent debtors (people who did not return questionnaires and therefore did not participate in the study). Income, debts, assets, monthly expenses, and prior bankruptcy status were some of the financial variables that were included in the analysis. These data were compared with those from the participants who constituted the core random sample. The analysis suggested that respondents and non-respondents shared similar characteristics on major financial variables and thus that there was no significant sample bias. Lawless et al. *supra* note 36, at 396.

<sup>42</sup>According to government data, out of all non-business bankruptcy filings, approximately 62.3% are Chapter 7, and the remaining 37.7% are Chapter 13. The Chapter 7 filings in this CBP sample seem somewhat overrepresented. To adjust for the inflation in Chapter 7 filings, the investigators weighted data by chapter to mirror the national population of debtors.

<sup>43</sup>The percentage of joint and single filers in the CBP sample is representative of the population of consumer bankruptcy filers. In 2007, approximately 29% of bankruptcy filers filed a joint petition and the remainder filed a single petition.

views (with a subset of 1000 of the sample families).<sup>44</sup> Court records for all debtors who responded to the written questionnaire were obtained using PACER. For every case, the docket sheet, petition, financial schedules, Statement of Financial Affairs, and Statement of Intention were downloaded from the public records. These forms were coded to obtain information on roughly 200 additional variables. These variables included financial information about the debtor and their household and about the case outcome.<sup>45</sup>

## B. PACER DATA COLLECTION AND CODING

The author created a sub-sample of refilers from the initial CBP data. This was a simple process because the initial CBP data was coded to distinguish refilers from first time filers.<sup>46</sup> Once this sample was created and statistics about the general refiler sample were obtained, a further subsample of refilers was created—those who had filed a Chapter 13 case in 2007 and whose most recent previous filing had been a Chapter 13 case.<sup>47</sup>

The author searched each case on PACER, looking not only for the previous filings noted on the bankruptcy petition, but also for any other previous filings that may not have been noted on the petition. The dates of all previous petitions were recorded. If any petition was filed within 365 days of the 2007 petition, the author coded the district in which the petition was filed; whether a motion to extend the automatic stay was filed; whether there were objections to the motion; the “evidence” of changed circumstances given in any motion, if any; and the ultimate disposition of the case and date, if available. Each motion to extend the stay was downloaded and the evidence the motion provided about the changed circumstances of the petitioner was recorded into an Excel spreadsheet. This evidence was later coded into three

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<sup>44</sup>For a complete description of the CBP methodology, see Lawless et al. *supra* note 36, at 349-406. The CBP phone interviews data was not used for this study.

<sup>45</sup>The court records were coded by law students who were trained by Jeff Paulsen. The training included reading a 38-page coding manual and a supervised practice coding session with one Chapter 7 and one Chapter 13 case. To test reliability, 10% of the court records were randomly selected a second time for recoding. These selected cases were compared to the original coding and checked for discrepancies and errors. An error rate of 0.8% was reported.

<sup>46</sup>The refiler status was obtained directly from the bankruptcy petitioner, which requires debtors to reveal past filings.

<sup>47</sup>This yielded a sample of 73 total cases. I focused on Chapter 13 repeat filers because policymakers and creditors have expressed the most concern about Chapter 13 repeat filers. The claim is that repeat filers are abusing the system by filing multiple times in order to benefit from the automatic stay and avoid foreclosure. See Miller & Miller, *supra* note 3, at 510. Indeed, the 1997 Commission Report focused specifically on the abuse of Chapter 13 repeat filers. See *supra* notes 27 & 28 and accompanying text. The majority of Chapter 7 bankruptcy petitions result in discharge, while the majority of Chapter 13 petitions are dismissed. Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEXAS L. REV. 103, 107, 111 (2011). These statistics suggest that Chapter 13 repeat filers are much more susceptible to BAPCPA's clampdown on those who file a petition less than a year after a previously failed petition.

distinct categories: "no evidence," "scarce evidence," and "detailed evidence."<sup>48</sup> Additionally, each type of reason for refile (when provided) was coded in one of four categories: employment, medical, technical mistake, or other.

### C. QUALITATIVE PHONE INTERVIEWS

In order to better understand the empirical findings from this study, the author interviewed bankruptcy judges (21), Chapter 13 trustees (7), and debtor's attorneys (7). After failed attempts at obtaining a random sample, several bankruptcy scholars put the author in touch with judges, trustees and debtor's attorneys, who in turn put the author in touch with additional respondents. There is no doubt that this sampling method created some bias, but the author did talk with respondents from a variety of different judicial districts, so at a minimum, they represent the views of bankruptcy key players from different areas of the country.

All of the respondents were promised anonymity. All but five interviews were recorded with a digital recording device, and after each interview, the author recorded notes about the conversation. For those interviews that were not recorded, the author took extensive notes both during and after the interviews.

### D. CASE LAW PERTAINING TO 362(c)(3)

After performing an extensive search of cases that pertained to § 362(c)(3), each case was coded as to whether the case found (or assumed) that the stay was to be terminated as to the property of the debtor, or both the debtor and the estate. The author then reviewed the content of these cases, focusing specifically on judges' written attitudes towards BAPCPA and the changes to the Code relevant to refilers.

## IV. FINDINGS

### A. EMPIRICAL FINDINGS FROM CBP AND PACER DATA

In 2007, 14.7% of all filers were repeat filers. Of all the 2007 repeat filers, 35% were Chapter 13 filers whose previous petition had been a Chapter 13 filing. The majority of this group, 69%, filed a second petition less than 365 days after the dismissal of their previous Chapter 13 case, and thus they were subject to § 362(c)(3). Much commentary has focused on the use of Chapter 13 to avoid foreclosure,<sup>49</sup> and, indeed, 77% of these debtors indi-

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<sup>48</sup>For examples of each category of evidence, see *infra* Section IV.A and accompanying text.

<sup>49</sup>See, e.g., *supra* note 47. For a detailed description of why debtors who dropped out of Chapter 13 filed for bankruptcy, see Porter, *supra* note 47, at 133-139 (finding several reasons Chapter 13 debtors whose cases had been dismissed filed for bankruptcy, the two most common being the goal of keeping their house (88.8%) and getting control of their finances (87.8%).

cated on the CBP survey that they filed in part (or fully) because they were at risk for foreclosure.

Of the Chapter 13 to Chapter 13 filers, 79% filed a motion to extend the stay.<sup>50</sup> Despite the presumption of a bad faith filing required in § 362(c)(3), judges granted all but one, or 98%, of the motions to extend that were filed.<sup>51</sup> Creditors objected to these motions in only 7% of the cases.

In 21% of the cases, absolutely no evidence was offered to show that there was a change in the financial situation, as required by § 362(c)(3). In 60% of cases, there was scarce evidence of a change in financial circumstances (usually one or two vague sentences). In 19% of the cases, there was detailed evidence that a change in financial circumstances had occurred between the previous filing and the 2007 filing, as the Code now requires.

Examples of no evidence motions include statements such as: "Petitioner's financial circumstances are improved since last bankruptcy filing"; "God wants me to be able to keep this house and I pray to you that you give me another chance. I will try to very hard"; and "Petitioner's financial circumstances have changed and she filed in good faith." Examples of scarce evidence motions include statements such as: "Income more stable because petitioner was a loan broker and times were bad but they are getting better"; and "I had extra family medical expenses and now I don't so I can pay." Examples of a detailed evidence petition includes: "I lost my job working as a home medical assistant so I had to stop making plan payments. Now, I have a new job at a hospital and my income is \$5,000 more per year than I was making previously. Thus, I will be able to pay."

The most important empirical finding this analysis provides is that the only actual effect § 362(c)(3) seems to present to Chapter 13 repeat filers is more paperwork and additional attorney fees associated with filing (and in some cases arguing) the motion. Though § 362(c)(3) was intended to make the automatic stay expire after thirty days for those who filed a second petition within 365 days of a previous petition, in reality, this rarely happens.

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<sup>50</sup>It is likely that no motion was filed in the other 21% of cases for a variety of reasons. First, some of the debtors may have lived in districts where judges have held that the stay does not expire, according to § 362(c)(3), as to "property of the estate." According to this view, the 30-day termination of the stay of actions against the debtor does not terminate the stay of actions as to the property of the estate. Since the entirety of the assets goes into the property of the estate at the moment the petitioner files for bankruptcy, under this interpretation no assets are at risk, even if the stay expires, because it only expires as to the property of the debtor. Thus, it is not necessary to file a motion to extend the stay. Since this data was collected, more districts have adopted this view. In other cases, not filing the motion may have been a mistake by a pro se filer or an attorney, or the case may have been dismissed for other reasons before the motion was filed.

<sup>51</sup>A creditor objected to the motion to extend the stay in the one case where the judge denied the motion. The judge did not deny the motion in its entirety, but ordered that the debtor would have to start making payments to the mortgage company immediately.

## B. INTERVIEW FINDINGS

Findings from interviews with bankruptcy court judges, Chapter 13 trustees, and lawyers indicate that § 362(c)(3) motion practice varies widely across the country, not just district to district, but also judge to judge. Judges (and trustees) varied on how they interpreted the statute. However, the consistent narrative was that, in the end, § 362(c)(3) resulted in significantly more paperwork both for debtors and the court, increased financial cost for debtors, and little practical change in the progression of repeat filer cases. Indeed, none of the respondents interviewed were surprised by the (numerical) findings of this study showing that the vast majority of motions were approved.

All of the judges and trustees that were interviewed said that they believed repeat filers were indeed a problem in the bankruptcy system, though they did not all agree on why the problem exists or on how to address it. Some judges believed that the real “problem repeat filers” are those who go to fraudulent bankruptcy mills, which file again and again on the behalf of the unaware debtor. Other judges said that there are real problems with debtors themselves abusing the system, but that it tends to be debtors who file more than twice in a 365-day period. Section 362(c)(3) focuses only on those who file twice in 365 days, while § 362(c)(4) addresses those who file more than twice, but as one judge said, “Bankruptcy is about second chances, and we believe that people should have two chances. It’s when they push it beyond that when there is a problem.” Another judge agreed with this sentiment noting that “(c)(3) was not needed. Now when there is a third filing, then I am likely to throw out any plea for the automatic stay. That usually means abuse. But those are rare. Most know better than to file a third time [in 365 days].”

One judge told an involved story about an abusive debtor who had once been before his court, pre-BAPCPA. The debtor had bought a house for \$450,000 and had not made even one payment on the house. The debtor filed for Chapter 13 bankruptcy repeatedly, with no intention to take the case to discharge or follow through on payments, but only in order to invoke the automatic stay and thus keep the bank from foreclosing on his house. The Judge said, “The abusers are clear. We can pick them out easily, it’s not people filing twice. There are a lot of reasons people have to file twice and it’s not usually abuse. But people like this guy, now that is abuse, and it does happen and is a problem.”

Just as the judges agreed that repeat filing is a problem, they also agreed that BAPCPA and § 362(c)(3) did “nothing” to help solve the problem. One judge, who considers herself pro-debtor said:

I'm all for debtors and debtors' rights, but we have a real problem with serial filers in our district. I was and am up in arms about it. I've been on panels, I have tried to make things clear and help other Judges figure out what to do about this. But BAPCPA? It's just more paperwork. They drafted it SO [emphasis added] poorly.

When the judge was asked why she thought BAPCPA ended up with such bad drafting, she said:

The statute has had no effect due to the drafting and the attitude of the judges toward the statute. You have the stakeholders, the judges, and they just wouldn't let anyone make a comment. We wanted reform, but they wouldn't let us tell them what was needed. A letter went around that I signed saying please, just let us show you a few things, but the answer was no, no, no. Once they reached a compromise, they weren't interested in feedback and didn't want to change a word. We gave up on trying to change the bias and correct the language of the statute, and the attitude of judges is that we've been hoist on our own petard, in a sense.

The judge went on to say, "What was done was not done in good faith. It was 100% political. It was a deal. Let Douglas Baird in there, let the Elizabeth Warrens. People from both sides, let them tell their point of view, and then let Congress decide. But at least listen. At least listen." Judge after judge echoed these beliefs. Another judge said:

There is no legislative history for BAPCPA. We know why. There was conflicting creditor interests, housing lender interests and government interests. Lobbyists had to get all the conflicting groups on board, and once they had these proposals set, the attitude was don't do anything that can cause any problems. . . . Even a legislative history could potentially upset one group or another. There was thus a very bland and largely meaningless report.

A trustee said:

I wanted the law to be tougher on refilers, but not in this way. Congress has no idea how bankruptcy works, except from what they hear from the Mortgage Banker's Association and credit card companies. They didn't go to trustees, judges, and other experts, and that was the big problem.

While there was much agreement among the judges about the problem of

repeat filers and the lack of effectiveness of § 362(c)(3) in addressing the problem, there was considerable variation in how judges implemented § 362(c)(3) after BAPCPA. About three quarters of the judges I interviewed do not require debtors to come in for hearings regarding the motions to extend the stay unless they are contested by a creditor or unless the trustee raises a ground for objection, which rarely happens.<sup>52</sup> These judges see themselves as being pro-debtor, and as doing the right thing for the bankruptcy system as a whole:

It's really abusive to the debtor to make them come in. Then they miss another day of work. They could get fired. And for what? I'm not going to deny the motion. They know it, and I know it. It's really just another expense for the debtor with no outcome. What might have changed? Child care? Work? An illness? Why should I make the debtor come in and talk about it? Our dockets are full as it is.

Similarly, another judge said:

It's pretty much a rubber stamp. I can interpret the code as not requiring a hearing, so that is what I do. It's an insult, and a waste of everyone's time, including mine. I'm too busy, and so are they. If the motion is contested, that is another story and a hearing must be held. But as I said, BAPCPA did nothing to address the serial refilers problem. Nothing effective.

On the other side, however, are judges who do indeed require every debtor who files a motion to extend the stay to attend a hearing on the matter. These judges do not see themselves as pro-creditor by any means, but as simply doing the work they are required to do. Indeed, some of them even suggested that requiring debtors to come in may in fact be pro-debtor and encourage them to follow through with their obligations. As one judge said:

I have to enforce the rules. . . . I enforce the scream or die rule. If none of the creditors object, than you should grant the motion. A lot of judges think it's beneath them to handle the consumer docket, so they don't want to deal with it. I'm supposed to deal with this, so my duty requires me to bring them in, take the oath, and tell me why they overcome

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<sup>52</sup>In the present study, creditors objected to the motion to extend the stay in only 7% of the cases. In each of these cases, the creditor that objected was the mortgage company. Judges, trustees, and lawyers who were interviewed confirmed that it was rare to see creditors object.



the presumption. . . . I usually grant the motion, but I read the debtor the riot act—it's your second time, I'm looking at you like a hawk. . . . They need to see me, I'm watching them and that I care about them. I give them a chance to ask questions, and I ask if they are satisfied with their attorney.

Another judge who similarly requires a hearing on each motion said: "Plenty of my colleagues just don't think it is worth the time, they can't stand the consumer bar and don't want to handle the crap. But it's not right. We have an obligation to do all of it."

Despite these differences in practice, the end result for all of the judges was the same. As one judge said, "I grant probably 95% of them, maybe more. If they are contested, which they rarely are, it makes me pause. But even then, I grant most of them." Another judge said, "I'd estimate 9/10, maybe 9.5 out of 10 are granted. It doesn't come up a lot that I would not grant one." The judges' assessments of how many motions they grant are consistent with the findings from the CBP and PACER data used in this study.

### C. INTERPRETING § 362(c)(3)

Criticism of § 362(c)(3) abounds in case law that considers it, and there is a split in how to interpret the language of the statute. As one court said, "In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out. . . . The language of the statute is susceptible to conflicting interpretations, and if read literally, would apply to virtually no cases at all. In sum, it's a puzzler."<sup>53</sup> Another court noted that § 362(c)(3) is "at best, particularly difficult to parse and, at worst, virtually incoherent."<sup>54</sup> A court that was when presented with a second § 362(c)(3) issue referred back to the experience of interpreting the statute the first time and wrote "[o]nce again, warily, and with pruning shears in hand, the court re-enters the briar patch that is § 362(c)(3)(A). Having been here before is of some help, in that at least the thorns and thickets have a certain familiarity."<sup>55</sup>

In relevant part, § 362(c)(3)(A) provides:

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, . . .

(A) the stay under subsection (a) with respect to any

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<sup>53</sup>*In re Paschal*, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006).

<sup>54</sup>*In re Charles*, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005).

<sup>55</sup>*In re Jones*, 339 B.R. 360, 363 (Bankr. E.D.N.C. 2006).

action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.

Subparts (B) and (C) of § 362(c)(3)(A) then provide the mechanism through which a debtor can seek an extension of the stay, as well as the required standards to prevail on such a motion to extend. The ambiguity, as courts see it, is whether the phrase “shall terminate with respect to the debtor” also terminates the stay with respect to the property of the estate, or whether it is limited to the property of the debtor only.

An exhaustive search of case law resulted in fifty-five cases that either addressed (either directly or indirectly) whether § 362(c)(3) applied only to the property of the debtor, or to the property of the debtor and the estate, or made assumptions about the application that were vital to the outcome of the case. Several of the cases were from the same district, and not all districts have addressed the issue. Out of the fifty-five cases found, thirteen found that under § 362(c)(3) the stay terminated as to the property of the debtor and the property of the estate, and forty-two found that the stay terminated only as to the property of the debtor.

The *In re Alvarez*<sup>56</sup> court provides a detailed summary of the two positions. The minority view is that the language of § 362(c)(3)(A) is ambiguous as to whether it also reaches the property of the estate, and thus it is necessary to look to legislative intent to make the determination.<sup>57</sup> The heart of the minority position is that the interpretation of § 362(c)(3)(A) as only terminating the stay as to the debtor “largely eviscerates the provision.”<sup>58</sup> The issue is that in the Chapter 13 context, where this becomes relevant, pursuant to § 1306, property of the estate encompasses nearly all of a debtor’s valuable assets. Further, under § 1306(b), debtors remain in possession of the property of the estate and have full use and enjoyment of it. Thus, in the vast majority of cases, it would not matter whether the stay expired if it expired only as to property of the debtor, and the provision would be almost entirely superfluous and of no use to creditors. Given these circumstances, as one court said:

It seems illogical that Congress would enact a provision which both requires moving parties to meet a high burden of proof and which requires the courts to hear these matters on an expedited basis, only to have both the process and the end

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<sup>56</sup>*In re Alvarez*, 432 B.R. 839, 840 (Bankr. S.D. Cal. 2010).

<sup>57</sup>*See, e.g., Jones, supra* note 55 at 363 (citing *In re Coleman*, 426 F.3d 719, 725 (4th Cir. 2005) (holding that the Court should construe the language used within the broader context of the statute as a whole)).

<sup>58</sup>*In re Alvarez, supra* note 56 at 841.

result meaningless and of no utility if property of the estate remains protected by the automatic stay, notwithstanding a termination of the automatic stay under § 362(c)(3)(A).<sup>59</sup>

Courts that have adopted this minority position also look to the legislative history to show that indeed, Congress meant for § 362(c)(3)(A) to have teeth. They point to the House Report on BAPCPA<sup>60</sup> and invoke Congress' words:

Discouraging Bad Faith Repeat Filings. Section 302 of the Act amends section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period.<sup>61</sup>

Courts also point to the statute itself. In 11 U.S.C. § 362(j), the Code states:

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

Why, courts ask, would Congress have included this "comfort order" if the stay was terminated only as to the debtor? It would be of almost no utility because it is almost "always creditors with claims secured by real property or personal property who seek comfort orders for assistance in obtaining title insurance, satisfying foreclosure trustees, or auctioneers."<sup>62</sup> If the stay was terminated only as to the debtor, however, the issue would be moot because creditors would not be able to obtain the real property or personal property because it is property of the estate.

Courts that have adopted the minority position have also pointed to the language of subpart (B) of § 362(c)(3), which provides that when a motion of a party in interest for continuation of the automatic stay is filed and "upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors . . . only if the part in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed." If the stay only terminates as to the debtor under § 362(c)(3)(A), "the stay extension mechanism of (B) could have been much more narrowly tailored than extending it 'to any or all creditors.'"<sup>63</sup>

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<sup>59</sup>*In re Jupiter*, 344 B.R. 754, 760 (Bankr. D.S.C. 2006).

<sup>60</sup>HR Rep. No. 31, 109 Cong., 1st Sess. (2005)

<sup>61</sup>See e.g., *In re Curry*, 362 B.R. 394, 401-02 (Bankr. N.D. II 2007).

<sup>62</sup>*In re Alvarez*, *supra* note 56 at 841.

<sup>63</sup>*Id.*

Finally, minority courts also point to the language § 362(c)(4), which addresses the stay as it applies to refilers where there were two or more cases pending and dismissed in the preceding year. In these cases, the Code dictates that “the stay under subsection (a) shall no go into effect upon the filing of the later case . . .” Courts argue that when one considers that termination of the stay as to a debtor-only in Chapter 13 is virtually no remedy at all, it makes little sense that there would be such a huge gap in remedy for those who file more than twice, in that they would receive no stay at all. This is true, courts argue, particularly in light of Congress’ “avowed purpose of discouraging repeat filings by terminating the stay after 30 days.”<sup>64</sup>

The majority of courts, however, conclude that their job is to interpret the plain language of the statute, and the plain language of § 362(c)(3)(A) is not ambiguous.<sup>65</sup> As one judge said:

Section 362(c)(3)(A) as a whole is not free from ambiguity, but the words, “with respect to the debtor” in that section are entirely plain; a plain reading of those words makes sense. . . . Section 362(c)(3)(A) provides that the stay terminates “with respect to the debtor.” How could that be any clearer?<sup>66</sup>

Thus, they conclude that § 362(c)(3) terminates the stay only as to collection activity directed against the debtor personally or property of the debtor, and even after termination of the stay under § 362(c)(3), property of the estate continues to be protected. As one court said, “Although such an interpretation may not provide much of a benefit to creditors . . . it is an appropriate one given the manner in which Congress chose to draft § 362(c)(3).”<sup>67</sup>

Courts that have adopted the majority opinion argue that not only is the language of § 362(c)(3) clear, but that Congress did in fact distinguish between property of the debtor and property of the estate in several other provisions of the Code. This indicates, they argue, that Congress did, in fact, intend for § 362(c)(3) to apply only to property of the debtor. For example, one court noted that if Congress intended for § 362(c)(3) to terminate all provisions of the automatic stay after thirty days, it could “easily have used language similar to that in § 362(c)(4)(A)(i), (‘the stay under subsection (a) shall not go into effect upon the filing of the later case’).”<sup>68</sup> The court goes on

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<sup>64</sup>*Id.* at 841.

<sup>65</sup>*See, e.g., In re Holcomb* 380 B.R. 813 (10th Cir. BAP 2008); *In re Stanford*, 373 B.R. 890 (Bankr. E.D. Ark. 2007); *In re Jumps*, 356 B.R. 789 (1st Cir. BAP 2006).

<sup>66</sup>*In re Alvarez*, *supra* note 56 at 841.

<sup>67</sup>*In re Harris*, 342 B.R. 274, 280 (Bankr. N.D. Ohio 2006).

<sup>68</sup>*In re Paschal*, *supra* note 53, at 279.

to say, "Congress instead chose to describe the termination of the stay quite differently."<sup>69</sup>

Several other provisions of the Code similarly distinguish between property of the estate and property of the debtor, including § 521(a)(6), which provides that the automatic stay is terminated "with respect to the personal property of the estate or of the debtor" if the debtor does not reaffirm or redeem property within 45 days after the first meeting of the creditors.<sup>70</sup> Courts also cite the notion that Congress' "use of a particular phrase in one statute but not in another 'merely highlights the fact that Congress knew how to include such a limitation when it wanted to.'"<sup>71</sup> Further, the Supreme Court has directed that "where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion of exclusion."<sup>72</sup>

## V. UNDERSTANDING SECOND TIME REPEAT FILERS AND DIRECTIONS FOR FUTURE STUDY

Section 362(c)(3) was Congress' attempt to address the "problem" of repeat filers. However, the data presented in this study show that § 362(c)(3) has created more problems than solutions. It has required court resources and time to attempt to interpret the confusing language of the statute—language that bankruptcy officials eschew because it was so clearly drafted without consulting those with direct knowledge of the day-to-day operations of the bankruptcy system. Indeed, if the statute is interpreted based on its plain language, it provides essentially no protection to creditors, yet it has created extra administrative hassle (and cost) for courts and debtors alike. Creditors do not contest motions to extend the stay, and judges, in turn, approve the vast majority of motions, even when there is no evidence of a changed circumstance. In many districts, districts where it has been determined that § 362(c)(3) applies only to the property of the debtor, § 362(c)(3) has essentially no value at all. In sum, the statute adds additional administrative burden to Chapter 13 bankruptcies, provides little protection to creditors, and does little to address the larger administrative problems that repeat filers present to the system.

The compelling question, then, is what should be done? Part of the story of § 362(c)(3) is that designing policy to solve a problem without knowing what exactly the problem is, and without involving relevant actors, makes

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<sup>69</sup>*Id.*

<sup>70</sup>See *In re Jones*, 339 B.R. at 364.

<sup>71</sup>*In re Paschal*, *supra* note 53 at 279, quoting *Coleman v. Cmty. Trust Bank (In re Coleman)*, 426 F.3d 719, 725 (4th Cir. Va. 2005).

<sup>72</sup>*Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

the policy likely to fail. Existing studies do not provide a clear picture of repeat filers—we need to know more, both about those filing for a second time in a year, and serial repeat filers, those filing more than two times in a year. Ultimately, in order to address the problem, we need to know what the problem is. Part of the problem with § 362(c)(3) is that it was drafted and implemented with little data to drive the law and policy.

As a start, we need to understand why people are repeat filing. Second time repeat filers should be examined separately from those filing more than two times in a year.<sup>73</sup> The present study can shed light on the circumstances surrounding the second time filing of debtors less than a year after a previously failed petition. The data analysis capitalized on the fact that debtors are directed to include, in their motions to extend the stay, evidence of “changed circumstances” between their first, failed, filing and their second filing. In the present study, 74% of debtors provided some kind of specific reason for their “changed circumstances” on their motion to extend the stay. Almost all of these reasons fell into three distinct categories—40% of the reasons were an employment problem (usually a job loss or reduction) that was resolved with a new job or increased hours by the second filing, 18% of the reasons were medical issues that were resolved by the second filing, and 33% of the reasons were technical mistakes from the first filing, often related to the debtor having been a *pro se* filer. Nine percent of the reasons fell into an “other” category, and most of the “other” reasons were some kind of financial shock that was not employment or medical related.

#### Reasons for Repeat Filing

Employment Problems	40%
First Filing Technical Mistakes	33%
Medical Issues	18%
Other	9%

These reasons for a second petition can be further grouped into two larger, distinct categories. The first category consists of people who experience a financial shock after they have filed for bankruptcy the first time (employment problems and medical problems are the most common), are no longer able to make their payments on their plan so their case is dismissed, and then resolve the shock in a relatively short amount of time. The second category are people who made some kind of technical mistake related to their

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<sup>73</sup>Of course some second time repeat filers may eventually file a third time and so on within a year.

first filing, resulting in case dismissal, but do indeed want to proceed with the bankruptcy.

It is not surprising that debtors experience financial shocks that make them unable to make payments on their plan. Indeed, the shocks that they indicate on their motions are in line with the most common reasons people give for filing for bankruptcy in the first place—medical and employment problems.<sup>74</sup> Examples of employment problems were situations such as the following: (a) The debtor had been laid off and could not make plan payments with no income, but had found a new, stable job at the time of filing the second petition and now felt he could fund the plan; or (b) The debtor was a loan broker and works on commission. He was in a rough period when the other case was dismissed, but now his income has picked up and is more stable.

Examples of medical problems were situations such as the following: (a) Debtor was hospitalized for fibroids. She got disability from one of her three jobs, but was not employed by the others long enough to qualify. The loss of income made her unable to keep up with her mortgage and plan payments, but now she is working full time again and in good health; or (b) Debtor's husband got bronchitis and was hospitalized, which caused her to have to pay \$2000 in medical bills.

Finally, examples of shocks that fell into the "other" category were as follows: (a) Debtor's son had been murdered and did not have life insurance, so she had to pay \$7000 in funeral costs. She had since received financial help from her daughter and her income situation was stable, so she thought she would be able to keep up with plan payments; or (b) Debtor was supposed to be receiving child support but was not receiving it. She since started receiving child support and thus believed she would be able to make plan payments.

Every time a debtor refiles for bankruptcy after a previously dismissed case, there is cost to both the debtor and the court—additional filing fees and attorneys fees for the debtor, and additional administrative time and processing for the court. The shock data from this study suggest that it may be beneficial for Chapter 13 to have a better mechanism to provide debtors with a pause of sorts that does not automatically mean dismissal when they experience a shock. The Code allows for plan modification when there is a change in financial circumstances, but plan modification involves extra cost to the debtor as it requires additional attorneys fees. Further study to learn more

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<sup>74</sup>See David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. OF MEDICINE 741 (2009) (finding that 62.1% of all bankruptcies in 2007 were medical); TERESA A. SULLIVAN, ET AL., *THE FRAGILE MIDDLE CLASS* (2001) (finding that employment problems were the biggest factor for consumers who filed for bankruptcy in the 1990s).

about how often plan modifications are requested (and granted/denied), how aware attorneys are of this option, and what obstacles might be in place that prevent debtors from requesting modifications would be useful to better design refiler policy. Another avenue to consider, after further research and development, is allowing debtors a one-time moratorium on plan payments for a set amount of time.

Finally, more research is needed on how much, if any, emergency cushion Chapter 13 plans incorporate. In 2011, the United States Supreme Court criticized built-in budgeting for emergencies in Chapter 13 plans.<sup>75</sup> The Court said that instead, debtors should seek plan modification when faced with changed circumstances:

In essence, [the debtor] seeks an emergency cushion for car owners. But nothing in the statute authorizes such a cushion, which all debtors presumably would like in the event some unexpected need arises. . . . The appropriate way to account for unanticipated expenses like a new vehicle purchase is not to distort the scope of a deduction, but to use the method that the Code provides for all Chapter 13 debtors (and their creditors): modification of the plan in light of changed circumstances.<sup>76</sup>

However, before this Supreme Court ruling, other courts had found that cushions are an appropriate part of Chapter 13 plans, and indeed, some have even found that cushions are required.<sup>77</sup> More research is needed to better understand what kind of cushions are usually incorporated into Chapter 13 plans, and how improvements may be made to allow debtors to truly smooth a financial shock without stopping plan payment and thus experience dismissal and potential repeat filing.

The other major category of issues that resulted in the first failed filing for debtors were technical issues related to the filing. Several debtors said that they had been *pro se* for their first filing, did not understand the paperwork and process, but now had a lawyer and would meet the deadlines. Other debtors made their meeting of the creditors for various reasons, or had not filed taxes. There is clearly a tension in the Chapter 13 system between allowing debtors some flexibility, particularly when they are *pro se*, to meet

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<sup>75</sup>Ransom v. FIA Card Services, N.A., 131 S. Ct. 716, 730 (2011).

<sup>76</sup>*Id.*

<sup>77</sup>See, e.g., *In re Lucas*, 3 B.R. 252 (Bankr. S.D. Cal. 1980) (cushion of \$2.00 inadequate when amount budgeted for medical expenses and clothing held not to satisfy § 1325(a)(6)); *In re Hockaday*, 3 B.R. 254 (Bankr. S.D. Cal. 1980) (cushion of \$10.00 per month inadequate when nothing budgeted for medical expenses and amounts budgeted for utilities and phone are unreasonably low); *In re Ballard*, 4 B.R. 271 (Bankr. E.D. Va. 1980) (§ 1325(a)(6) not satisfied when debtor's plan requires payments which cannot be made in view of debtor's cash flow).



deadlines and attend meetings, and the need for the system to run effectively and efficiently, and to not allow Chapter 13 to be a delay haven for those with no intention of making payments. However, data from this study suggests that particular attention should be paid to what the system might be able to do for *pro se* debtors to give them the best possible chance of avoiding dismissal based on a technicality.

## VI. JUDGES AND THE LAW

This Article provides a case study of law in action and the complex relationship between the legislature and judges in making, implementing, and interpreting bankruptcy law. Some of the earliest approaches to socio-legal studies were attempts to understand if and why there are differences between formal law (constitutional or statutory) and law in action (what people's actual experiences are with the area of law being studied). The essential question of such studies is whether the law works in the way in which it was intended, though few of these studies have focused on judges. These studies have found there are situations in which groups develop their own norms that are outside of (or contrary to) the law on the books: it is these norms, rather than formal law, that rule.<sup>78</sup>

There are a variety of explanations for the development and utilization of these ruling normative systems. In Macaulay's study of contractual relations among businessmen, Macaulay finds that businessmen frequently settle their disputes without regard to the original contract in place, or reference to potential legal sanctions, because they believe that they can settle disputes better than their lawyers. The businessmen said that lawyers often made things worse because they did not understand the give and take of business. Macaulay found that customs fill in the gap and that disputes are usually worked out because there are norms within business that serve as sanctions.<sup>79</sup>

This Article takes a different perspective, combining content analysis of legal cases (a common empirical method in legal scholarship) and interviews with judges (a much less common method). The Article attempts to better understand how the "formal" law of the legislature is applied by judges, and why. It shows how the process of interpreting and implementing the law, particularly when it is written with great ambiguities, sometimes results in less formal norms and practices among judges, which they believe are necessary to keep the legal system running soundly. I find that, similar to the businessmen in Macaulay's study who believed lawyers did not understand

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<sup>78</sup>See, e.g., ROBERT ELLICKSON *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Robert H. Mnookin, Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L. J. 950 (1979).

<sup>79</sup>Macaulay, *supra* note 78.

the give and take of business, bankruptcy judges believe that Congress does not understand the give and take of bankruptcy system and that the changes Congress made in 2005 regarding second-time repeat filers were ineffectual.

The major difference between the judges and the businessmen, however, is that the judges are men of the law, and they do indeed take this role seriously. Thus, as both the case law analysis and the interviews show, they work hard to justify their actions within the confines of § 362(c)(3), which is drafted so poorly that it is open to several interpretations. As one judge noted, there are pressures on judges to be impartial, and they are not investigators or prosecutors. Indeed, the data from this study shows that creditors rarely contest § 362(c)(3),<sup>80</sup> and thus, the only evidence judges are presented with, in most cases, is a motion and the affidavit. With no evidence of a bad faith filing (or not), they are able to uphold their role as men (or women) of the law, while also nudging the law in the direction they believe it should go in order to keep the system running smoothly and fairly.<sup>81</sup>

## VII. CONCLUSION

The judges, trustees, and lawyers interviewed for this study all agree on one thing—the bankruptcy system does not have an adequate means of addressing the repeat filer “problem.” However, there is less agreement about what that problem is and how we should solve it. Data from this study suggests that Chapter 13 filers who file a second petition less than 365 days from a previously failed petition are doing so either because they experienced a financial shock and could no longer make payments to their plan, but the shock since resolved, or because they made a technical error regarding the first petition at some point in the complex system of filing and supporting a Chapter 13 bankruptcy petition.

Key bankruptcy actors believe that Congress’ attempt to crack down on repeat filers does nothing to address these issues, the real root of the repeat filer problem. These actors believed, before they even began to apply § 362(c)(3), that it was flawed and would likely fail to address the problem. Indeed, the statute has had little practical effect on the system beyond increased administrative work, time, and money.

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<sup>80</sup>An important follow-up question from this study is why creditors are not contesting § 362(c)(3) motions at higher rates, particularly in districts where it is found to apply to the property of both the debtor and the estate.

<sup>81</sup>The fact that 98% of § 362(c)(3) motions are granted may lead some to believe that judges are overstepping, but in the case of § 362(c)(3), the drafting of the statute is so poor, and open to so many different interpretations, that it is unclear what the law on the books actually requires. Thus, judges operate considering the formal law, but also considering their knowledge of how the bankruptcy system works on the ground and the norms of the system—the state of the statute essentially requires that they utilize this knowledge.

This Article provides an important case study of what can and does happen when Congress passes laws without consulting hard data and those who actually work in and live the system every day—judges, trustees, lawyers, and even debtors. Before BAPCPA was passed, there were calls to “crack down” on abusive debtors who wasted time and resources of an already overburdened bankruptcy judiciary.<sup>82</sup> Ironically, the measure passed by Congress to address these abusive debtors resulted in the exact kind of waste that Congress sought to diminish—wasted time and resources of the judiciary.

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<sup>82</sup>See *supra* notes 4, 5, 8, 9 and accompanying text.

