2005

Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform

Melissa B. Jacoby

University of North Carolina School of Law, mjacoby@email.unc.edu

Follow this and additional works at: http://scholarship.law.unc.edu/faculty_publications

Part of the Law Commons
Publication: The American Bankruptcy Law Journal
Change is in the air in the bankruptcy system. An omnibus bankruptcy bill has substantially amended titles 11 and 28 of the United States Code, and the professionals involved with bankruptcy are working hard to prepare for the quickly approaching effective date. They are writing and revising books, developing new rules of procedure and forms, updating and expanding case software, starting or re-tooling credit counseling and financial education programs, and holding workshops and conferences around the country. All of this activity suggests that something big is happening.

But will bankruptcy really be so different a year from now, two years from now, five years from now? And how will these changes affect people who are candidates for personal bankruptcy? I argue in this Article that one must look beyond the statutory revisions to answer these questions.

Legal and sociological research suggests that the bill’s impact will be filtered through the influences of day-to-day actors in the bankruptcy sys-

---

*Associate Professor of Law, University of North Carolina at Chapel Hill. Thanks to Adam Feibelman and Mark Weidemaier for helpful comments on a very short deadline, to Lisa Stifler for research assistance, to the University of North Carolina School of Law for financial and research support, and to Don Clifford, Marjorie Girth, and Ted Janger for useful conversations that shaped the ultimate direction of this article. Prior versions of parts I and II were presented at the Eastern Bankruptcy Institute and an early version of part III was presented at the Harvard-University of Texas Conference on Commercial Law Realities, and thus this article also benefited from the insights of participants in these conferences.

1See S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [hereinafter BAPCPA], Pub. L. No. 109-8, 119 Stat. 23 (2005). [Most future references will be to the codified provision, i.e. 11 U.S.C. § ___ (2005).] This bill as enrolled has fifteen titles and over two hundred sections, many of which make multiple changes to title 11, title 28, and other parts of the United States Code. Id.

2Most of the bill is effective on October 17, 2005, 180 days after President Bush signed the legislation. See S. 256, 109th Cong. § 1501 (2005). Certain portions have a different effective date. See S. 256 §§ 324, 325(d), 434(b), 601(c), 603(c), 1001(a)(2), 1003(c), 1223(c), 1234(b), 1301(b)(2), 1302(c)(2), 1303(b)(2), 1304(b)(2), 1305(b)(2), 1306(b)(2), 1404(b), 1406, 1501(b).

tem. As in the past, this filtering may mute or magnify certain statutory changes and may produce variation around the country. Assessments of the impact of formal law changes are incomplete without taking this filtering into account.

Notwithstanding this filtering, it is reasonable to predict that the changes will make bankruptcy more complicated and expensive for bankruptcy filers to some extent. Even so, the real life impact of the changes is unclear. Researchers know little about filers after bankruptcy or about how their recovery compares with that of insolvent individuals who avoid bankruptcy. If studies were to find that many filers confront serious financial trouble again two or three years after bankruptcy, then they might call into question the effectiveness of bankruptcy. Similarly, if studies were to find that non-filers with similar profiles recover equally well through non-bankruptcy means, then statutory changes that make bankruptcy more difficult may not be as consequential as they seem. Ultimately, therefore, it is difficult to characterize the impact of these changes on financially distressed individuals without knowing more about the effectiveness of bankruptcy in an absolute and comparative sense.

Part I offers an overview of the statutory changes. Part II explores how the day-to-day influences of the bankruptcy system might affect the statutory changes. Part III describes the limits of research on personal bankruptcy filers and explains how this affects predictions of the impact of reform.

I. STATUTORY BANKRUPTCY REFORM

After almost eight years of intermittent consideration, the omnibus bankruptcy bill officially has become part of the formal law. As the biggest set of statutory amendments to bankruptcy law in a generation, the bill has added hundreds of provisions, exceptions, qualifications, and requirements to the Bankruptcy Code and other portions of the United States Code along with a

5See infra text associated with notes 45-80.
7See generally infra text associated with notes 92, 94, and 105.
8See infra text associated with notes 82-113.
host of uncodified duties and pronouncements. Many, although not all, of the provisions are relevant to personal bankruptcy.

Most of the attention has been showered on a provision requiring that chapter 7 cases be screened solely on the basis of ability to repay debts. At least in some locations, this new statutory means test—presumably designed to encourage more chapter 13 repayment plans or to deter filings altogether—may be less important than many other changes. First, although chapter 13 filings are about 30% of personal bankruptcy filings overall, much higher proportions of debtors in some districts already are choosing chapter 13 over chapter 7. Second, although the means test imposes paperwork requirements on nearly all individual chapter 7 bankruptcy filers with primarily consumer debts, most filers have too little income for their cases to be the subject of motions to dismiss or convert on the basis of the means test. Third, at least in some districts, trustees already have been screening chapter 7 cases for ability to pay and other factors. In recent years, the Executive Office for United States Trustees has required that trustees screen chapter 7 cases for ability to pay. Even before the EOUST took this step, an empirical study

---


11 Many Bankruptcy Code provisions have grown in length considerably due to the omnibus bill. See, e.g., 11 U.S.C. § 362 (2005) (automatic stay); id. § 521 (debtor’s duties); id. § 523 (exceptions to discharge); id. § 524 (discharge and reaffirmation agreements); id. § 704 (trustee duties); id. § 707 (dismissal or conversion). In addition, the bill added many new provisions, some of which are pertinent to personal bankruptcy. See, e.g., id. § 111 (credit counseling and financial management regulation); id. § 112 (disclosure of name of minor children); id. §§ 526-528 (debt relief agencies); id. § 1115 (property of estate in case of individual chapter 11 debtor); id. § 1308 (tax returns).

12 See Jacoby, supra note 9, at 1127 n.176. See also sources cited in note 42.


14 See, e.g., Ed Flynn & Gordon Berman, Pre-planning Limits Means Test Impact, Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors, AM. BANKR. INST. J., Feb. 2000, at 22 (reporting that under 16% of their nationally representative sample had incomes above state median). For the income-related safe harbor, see 11 U.S.C. § 707(b)(7) (2005). All individual chapter 7 filers with primarily consumer debts must complete some paperwork under section 707(b)(2)(C) unless they are disabled veterans who meet the requirements of section 707(b)(2)(D). See id. § 707(b)(2).

found that all United States trustee office respondents reported some method of screening chapter 7 cases, with 30% screening exclusively on the basis of ability to pay and the rest considering a variety of factors. The possibility that cases already were being screened is consistent with studies estimating that a statutory means test applied to today’s filers would not produce a lot of presumptively abusive cases. Fourth, debtors who otherwise might have presumptively abusive cases can alter the outcome of the means test by incurring more secured debt or making charitable contributions, leaving the United States trustee or creditors to seek dismissal of their cases on generic grounds similar to those that existed under prior formal law.

Of course, the means test consumes only a tiny fraction of the long omnibus bill and of the revisions to the Code. Those who have refrained from studying the bill until final passage are likely to be surprised by the range and apparent magnitude of changes that they find. At least in theory, provisions that directly alter the cost of a bankruptcy filing could have a more significant impact in engineering debtors’ choices. Although revisions to the Judicial Code permit courts to waive filing and related fees for the lowest-income chapter 7 filers, other revisions significantly raise the basic filing fee for chapter 7 from $155 to $220 while they lower the basic chapter 13 fee from $155 to $150. The revised Bankruptcy Code permits providers of mandatory credit counseling and financial education courses to charge bank-


17 See sources cited infra notes 84-85.

18 See 11 U.S.C. § 707(b)(1) (2005) (prohibiting courts from taking into account charitable contributions when determining whether case is abusive under any portion of section 707(b)); id. § 707(b)(2)(iii) (permitting deduction for secured debt payments owed within sixty months following the date of the petition for purpose of presumed abuse determination); id. § 707(b)(3) (providing grounds that court shall consider under section 707(b)(1), including totality of circumstances).

19 See 28 U.S.C. § 1930(f) (2005) (permitting court to waive chapter 7 filing fee, and additional fees, if the court finds that the individual has income less than 150% of the “official poverty line” and is unable to pay the fee in installments). See generally Ed Flynn & Gordon Bermant, The Impact of the Coming Fee-waiver Provision, AM. BANKR. INST. INST. J., July/Aug. 2001 (using sample of no-asset chapter 7 cases filed between 1998 and 2000, finding that “29.7 percent of individual chapter 7 debtors have incomes that are less than 150 percent of the applicable poverty line”).

ruptcy filers a “reasonable fee.” In addition, the revisions to the Bankruptcy Code may lead debtors’ lawyers to raise their own fees considerably, assuming they continue to represent debtors at all.

The revised Bankruptcy Code also offers less debt relief across the board, even to chapter 7 filers who do not have presumptively abusive cases under the means test and to chapter 13 filers who manage to complete repayment plans. The revisions to the Code make a broader range of debts presumptively or absolutely non-dischargeable, including for-profit student loans, credit card debts, credit card cash advances, and property settlements not in the nature of support. Debtors who finish chapter 13 repayment plans no longer will have earned a substantially broader “superdischarge” than chapter 7 debtors.

The formal rules for keeping property subject to security interests also have changed. According to the revised Bankruptcy Code, lien avoidance is

---

21 An individual’s eligibility for bankruptcy is conditioned on receipt of a nonprofit credit counseling briefing within 180 days before filing. See 11 U.S.C. § 109(h) (2005). The requirement does not apply if the United States trustee or bankruptcy administrator determines that available services are inadequate, id. §§ 109(h)(2) & 111, if a debtor satisfies the requirements for a temporary exemption, id. § 109(h)(3), or if a debtor satisfies the requirement for one of the “status” exceptions. Id. § 109(h)(4) (rendering eligibility requirement inapplicable if the debtor is on active military duty in a military combat zone or is unable to complete the requirements because she fits statutory definition of incapacity or disability). The service providing the briefing may charge a reasonable fee but must provide the briefing “without regard to ability to pay the fee.” Id. § 111(c)(1)(B). Completion of a financial management course is a condition of a chapter 7 and chapter 13 discharge, subject to exceptions similar to those for credit counseling. Id. § 727(a)(11); id. § 1328(g); id. § 111. For a discussion of the implications of these provisions, see infra text associated with notes 70-80.


23 See, e.g., 11 U.S.C. § 523(a)(2)(C) (2005) (presumptive fraud of credit card debts and cash advances); id. § 523(a)(8)(B) (for-profit student loans); id. § 523(a)(14)(A) (debts incurred to pay state or local taxes); id. § 523(a)(14)(B) (fines or penalties imposed under Federal election law); id. § 523(a)(15) (property settlements nondischargeable without affirmative defense or balancing test); id. § 523(a)(18) (loans to pension plans). See generally Hon. William Houston Brown, Taking Exception to a Debtor’s Discharge: The 2005 Bankruptcy Act Makes it Easier, 79 Am. Bankr. L. J. 419 (2005).


25 See id. § 727(a)(8) (extending time between receipt of discharges to eight years); id. § 1328(f) (new restrictions on granting discharge in chapter 13 based on receipt of discharge in prior case).
available for only a limited list of household items, the price to redeem property has increased, non-consensual “ride-through” for personal property is prohibited, and new procedures for reaffirmation agreements are in place. The revised Code also appears to increase the price of keeping property in chapter 13 in numerous respects.

Other revisions increase protection of debtors’ assets but only to the extent they hold their wealth in particular forms. For example, the revised Bankruptcy Code insulates qualified retirement and educational funds from the reach of creditors. And, for the small handful of filers with major assets, the revised Code preserves the use of generous state law property exemptions in many instances.

Finally, the revisions to the Bankruptcy Code alter the substance and procedure throughout the cases of individual bankruptcy filers. The matters affected by these changes include document production, personal property

26See id. § 522(f)(4) (exclusive list of what constitutes “household goods” for purposes of lien avoidance).

27See id. § 506(a)(2) (imposing standard of replacement value, without deductions for costs of sale or marketing, for personal property subject to security interest for debtor in chapters 7 or 13). See also id. § 722 (clarifying that debt must be paid in full at time of redemption).

28See id. § 521(a)(6) (setting forth exclusive list of options for property subject to security interests and consequences of failing to act on intention); id. § 365(b) (providing automatic stay-related implications for failure to file statement of intention or to act on statement of intention).

29See id. §§ 524(k) - (m).

30Most significantly, several revisions to the Bankruptcy Code further limit the ability of a chapter 13 plan to modify undersecured claims over the objection of the lender. Modification refers to the ability to limit the secured claim to the value of the collateral and to pay 100% of that claim, and to treat the remainder of the debt as unsecured and entitled to a pro rata share of the debtor’s disposable income. See generally CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 900, 920-924 (1997). The revised Code disallows modification of purchase money obligations secured by cars if the debt was incurred within 910 days prior to the bankruptcy filing, and disallows modification of obligations secured by “any other thing of value” if the debt was incurred within one year before the bankruptcy filing. See 11 U.S.C. § 1325(a) (2005). The revised Code also clarifies that debts secured by mobile homes and incidental property fall within the general prohibition of modifying debts secured by a debtor’s principal residence. See id. § 101(13A) (defining “debtor’s principal residence”); id. § 101(27B) (defining incidental property). For the general prohibition on modifying loans secured by the debtor’s principal residence, see TABB, at 920-924. For secured loans still subject to modification in chapter 13, the revised Code dictates the use of the replacement value standard, without deductions for the costs of sale or marketing. See 11 U.S.C. § 506(a)(2) (2005). Compare Associates Commercial Corp. v. Rash, 520 U.S. 953, 965 n.6 (1997) (providing that replacement value was standard, but “creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning”).

31See, e.g., 11 U.S.C. § 522(b)(3)(C) (2005) (retirement savings exemption for debtors in opt-out states); id. § 522(d)(12) (new provision for debtors using federal exemptions), id. § 522(n) (limitation for IRAs); id. § 541(b)(5) (exclusion from property of estate for qualified education accounts). The bill furthers this insulation of retirement assets by protecting a debtor’s ability to repay a loan to her pension plan. See id. § 362(b)(19) (exception to automatic stay for withholding of wages for pension loan repayment), § 523(a)(18) (exception to discharge for debt to pension plan).

32See id. § 522(o)-(q) (imposing limitations in the delineated circumstances).

33See id. § 521(a) – (j).
leases, chapter 13 “adequate protection” payments, disposable income calculations, the entry of discharges in chapter 13, the maintenance of the automatic stay in a second (or third) bankruptcy case, and significant aspects of chapter 11.

While the omnibus bill producing these changes was pending in Congress, supporters and others offered various assessments of the impact of these changes. Academics and bankruptcy professionals critical of the bill regularly predicted a major, and usually negative, impact on the personal bankruptcy system and the filers themselves. Presumably believing that the chapter 7 means test was the key change, Congressional supporters sometimes stated that the bill would not alter bankruptcy other than for a small number of high-income filers. Other supporters pronounced that the revisions would

34 See id. § 362(h); id. § 521(d).
35 See id. § 362(b)(22)-(23); id. § 362(l)-(m).
36 See id. § 1326(a)(G).
37 See id. § 1325(b)(2)-(3).
38 See id. § 1328(h) (requiring hearing on whether section 522(q) is implicated). The rules of construction of the Bankruptcy Code suggest that the hearing may not be required if notice is properly provided. See 11 U.S.C. § 102(1) (2000) (explaining meaning of notice and hearing).
40 See, e.g., id. § 1115 (new provision making all postpetition earnings property of the estate); id. § 1123(a)(8) (new condition of confirmation involving payment of all future earnings); id. § 1129(a)(15) (new condition of confirmation linked to satisfaction of chapter 13 requirements).
bring a big shift in bankruptcy, or at least a big cost savings for non-bankrupt American families.43 The Executive Office For United States Trustees’ website reports that enactment of the bill “opens a new era in the history of bankruptcy law and practice.”44

Most, although not all, of these positions could find some support in the Code revisions. Yet, the extent to which these various predictions actually come to fruition depends on many factors, discussed in Part II.

II. STATUTORY BANKRUPTCY REFORM AND REAL PEOPLE: THE DAY-TO-DAY SYSTEM ACTORS

Local legal culture is not just dust in the national legal machine. In fact, it may be a significant element of the legal landscape. Failure to account for it causes policy debates as well as legal reforms to fall wide of their marks.45 Thus, it is never the case that the legal system of any country is uniform, unified, and able to cover the whole country.
Complex written law can produce a determinate system, but cannot control what it will be.\(^{47}\)

Informed by a variety of bankruptcy and non-bankruptcy studies, many academics share the belief that the bankruptcy system is not simply imposed on judges, trustees, lawyers, and other repeat players; instead, these parties make the system what it is today.\(^{48}\) Bankruptcy may be especially susceptible to shaping by the day-to-day actors because the vast majority of cases yield no formal litigation, let alone appeals.\(^{49}\) Whether one prefers a precise model of local legal culture or a more generalized recognition of the role of real people, this inevitable shaping and filtering complicate statute-centered assessments of the future of bankruptcy. Indeed, as is discussed later in this section, the latest revisions may invite system players to shape the system much more than Congress anticipated.


\(^{48}\)See, e.g., Rafael Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 Emory Bankr. Dev. J. 351, 352-53 (2004) ("Law and society scholars attribute some of the disparity between the formal laws and the laws in actions [sic.], as well as the substantial local variations in the implementation of the laws, to the influence of legal culture. . . . Researchers sometimes use legal culture to explain apparent disparities between formal laws and the actual implementation of the laws on the ground."); LoPucki, *Law in Lawyers' Heads*, supra note 3, at 1508 ("The examples I present here are only a small sample from a large body of empirical studies showing deviation of the law in action from the law on the books. I refrain from presenting more only because the existence of substantial deviations is not in dispute."); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 Wash. & Lee L. Rev. 931, 1003 (2004) (explaining that "most bankruptcy lawyers and bankruptcy judges use, apply, argue, and shape bankruptcy law primarily as actors 'on the ground.' It is in the bankruptcy courts, and within negotiations in the courts' shadows, where bankruptcy law is made and shaped by a particular legal culture. Bankruptcy law in a given bankruptcy court also is a function of the attitudes of bankruptcy judges, who have substantial control over the fate of a case."); David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 Am. Bankr. Inst. L. Rev. 43, 56 (2004) (explaining that use of chapter 13 has been determined more by local legal culture than by other factors); Trujillo, *supra* note 4, at 509-515; Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 Am. Bankr. Inst. L. Rev. 25, 26-27 (1998).

\(^{49}\)For example, in the year ending September 30, 2003, parties filed fewer than 100,000 adversary proceedings in bankruptcy cases - and even this was a significant increase compared to prior years—notwithstanding a total bankruptcy caseload of over 1.5 million. See Judicial Business of the Federal Courts, The Third Branch, Mar. 2004, *available at* http://www.uscourts.gov/trib/mar04trib/substantial/ ("For the year ending September 30, filings of adversary proceedings jumped 31 percent in 2003 to 96,809, the highest number reported in 20 years."). In fiscal year 2004, parties filed fewer than 3,000 bankruptcy appeals with the United States district courts, again notwithstanding the overall filing statistics. See United States District Court, Civil Cases Filed By Nature of Suit, tbl. 2.2, *available at* http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf In the five circuits that have Bankruptcy Appellate Panels, parties filed around 1,000 appeals annually in 2003 and 2004. See Judicial Business of the United States Courts 2004, 122 tbl. B-10, *available at* http://www.uscourts.gov/judbus2004/contents.html. See generally Elizabeth Warren, *Vanishing Trials: The Bankruptcy Experience*, 1 J. Empirical Legal St. 913 (2004).
Well before Congress started considering the omnibus bankruptcy bill, researchers were observing significant local variation in and deviations from formal bankruptcy law.\textsuperscript{50} For example, a researcher reported that chapter 13 plans in one city in the early 1980s lasted for seven, eight or nine years even though the Bankruptcy Code said then (and now) that courts may not approve plans for longer than five.\textsuperscript{51} Several researchers have found judges and trustees who impose on chapter 13 plans an unsecured debt repayment requirement – 10% in some places, 100% in others – that appears to be entirely extra-statutory.\textsuperscript{52} Examples of existing deviations of this nature could fill this entire journal symposium.

Congress did not outlaw local culture when it passed the 2005 omnibus bankruptcy bill. Even with its hundreds of amendments, the bill changed neither the overarching structure of the system nor the fundamental roles of the day-to-day actors, although it adds a few actors to the mix, such as credit counselors and financial management course providers. Two implications flow from this. First, in the absence of very explicit resolution, existing variations and deviations of the nature noted above likely will persist.\textsuperscript{53}

Second, the revisions themselves may look quite different once filtered through the influences of the day-to-day actors. In some instances, financial constraints may dictate a different result than that anticipated by the revisions. For example, the Bankruptcy Code revisions change the way that chapter 13 plans deal with car loans.\textsuperscript{54} Under former law, a plan could be confirmed over a car lender’s objection if the debtor promised to pay 100% of the value of the car with interest and to pay a pro rata share of any remainder...
out of disposable income. The revised Code no longer supports this approach for purchase money car loans securing debts incurred within 910 days prior to the bankruptcy filing. If a chapter 13 filer wishes to keep the car over the lender’s objection, the filer must pay the debt in full, plus interest, regardless of the worth of the car.

Perhaps those who sought these changes assumed debtors will pay whatever it takes to keep their cars. Maybe they will be right. But maybe chapter 13 filers will propose to surrender their cars in chapter 13, or simply allow lenders to repossess and liquidate their collateral because they can neither get a plan confirmed nor complete it. Lenders may not want to deal with all of these used cars. If that is the case, lenders and debtors may make deals resembling the old formal law of chapter 13: the debtor will retain the car and pay something less than the full value over time with interest. If this happens, chapter 13 will not be the same as before—the statutory change has reduced debtors’ leverage—but it will not be as different as the revised statutory language suggests.

Similarly, the revised Bankruptcy Code requires that chapter 13 filers make adequate protection payments directly to secured creditors but provide detailed evidence of these payments to the trustee so they can deduct these amounts from later plan distributions. When put into practice, this could present accounting difficulties and confusion that hampers payments to the very creditors the provision was designed to assist. At least in some districts, secured creditors may decide they are better off if adequate protection payments are funneled through the trustee’s office. Demanding direct receipt, as the revised Code entitles them to do, may or may not be in creditors’ best interest, and their best interest probably will dictate whether substantive and procedural changes in the Code produce big changes in real life.

In other circumstances, the revisions to Bankruptcy Code may not be sufficiently absolute to overcome deep-seated beliefs among the day-to-day players. For example, the statute restricts application of the automatic stay to repeat filers. Under this provision, if a debtor files a second case within

---


56See 11 U.S.C. § 1325(a) (2005) (providing exception to general approach to valuation of secured claims). The language was added to the very end of subsection (a), after clause (9).

57See id.

58Surrender of the property without the consent of a lender is a method of obtaining confirmation of a chapter 13 plan. See id. § 1325(a)(5)(C).


61See id. § 362(c)(3). This supplements an existing, and rather weak, statutory restriction on eligibility for subsequent chapter 13 filings in a narrow set of cases, id. § 109(g), although courts had devised other
one year of the time a prior case was pending, the automatic stay goes into effect for only thirty days.62 A party in interest can ask the court to extend the automatic stay, but must prove that the filing is in good faith, which in some cases requires overcoming a contrary presumption with clear and convincing evidence.63 The circumstances that produce this presumption include routine occurrences, such as missing a deadline or a payment in a prior case.64 Although the provision’s application is not limited to chapter 13, these details suggest that its intended effect probably is geared toward that chapter.65

At first blush, these revisions appear to deter repeat filings for at least a year; overcoming this presumption looks difficult and debtors with inflexible jobs may find it difficult to attend such hearings.66 However, in some locations, the belief in second (and third) chances in chapter 13 is probably quite strong, especially if system actors think that chapter 13 promotes values like repayment and fulfilling commitments.67 These beliefs presumably are what motivate courts and trustees to impose the extra-statutory unsecured debt repayment requirements mentioned earlier.68 and to permit cases to go on for much longer than the statutory limit.69 Unless a secured creditor is convinced that debtors have no chance of success and is willing to spend money to enforce the provision rigorously, local beliefs about the utility of chapter 13 probably will shape whether the new rules on repeat filings have a deterrent effect or whether they serve as a slight hindrance to business as usual.

In other instances, the drafters wrote revisions to the statute that are destined for variable application on rather significant matters. For example, as noted earlier, the revised Code requires a credit counseling briefing as a


62See 11 U.S.C. § 362(c)(3)(A) (2005). A third case within the year produces no automatic stay at all, subject to the debtor successfully requesting that a stay be imposed. See id. § 362(c)(4). The bill contains a separate exception to the automatic stay to protect secured creditors from filings that repeatedly are designed only to prevent foreclosure with no intent to cure the default on the loan. See id. § 362(d)(4).

63See id. § 362(c)(3)(B), (C).

64See id.

65For data on chapter 13 repeat filings, see, e.g., sources cited infra note 110.

66With the belief that the changes would be potent deterrents, some commentators who believe repeat filings generally are legitimate have expressed concern about these provisions. See, e.g., DeJarnatt, supra note 61, at 467-468. On the other hand, deterrence of repeat filings would seem like a positive development to those who believe that the system over-uses dismissal with the expectation of a subsequent, troubled repayment plans should be modified rather than dismissed, or that some districts’ high chapter 13 counts are inflated by the same families filing multiple times. See, e.g., Commission Report, supra note 52, at 276-279.

67Courts routinely dismiss chapter 13 cases for a variety of reasons, including failure to comply with administrative requirements or the incurrence of new debt, with the anticipation that the debtor will file another petition in the near future. See, e.g., Commission Report, supra note 52, at 276-279.

68See supra text associated with note 52.

69See supra text associated with note 51.
condition of bankruptcy eligibility and completion of a financial management course as a condition of discharge, both of which may impose an unspecified “reasonable fee” on debtors. Providers are not supposed to refuse services based on debtors’ inability to pay this fee, but they face no impediment to charging and billing the debtors once they have provided the services. These eligibility and discharge requirements do not apply at all if the United States trustee for that district determines services are insufficient. The United States trustees are expected to regulate these providers amidst a huge array of other new responsibilities. Credit counselors need to be nonprofit to be on the approved list for bankruptcy, but providers of financial management courses do not.

Whether or not sound policy justifications explain these details, they make the impact of these two new requirements quite uncertain and dependent on how the day-to-day actors put them into place. The willingness of private nonprofit credit counselors to provide these services at all may depend on how many of their clients file for bankruptcy and discharge the counseling fee. If offering these services to potential bankruptcy filers becomes undesirable, counselors may abandon the enterprise or charge an impossibly high fee to deter usage. United States trustees may have little choice but to declare services insufficient in certain districts, which, according to the statute, makes the eligibility requirement ineffective. On the other hand, debtor’s lawyers may decide to become nonprofit credit counselors, offer inexpensive briefing services over the Internet or telephone, and ensure pay-

---

70See sources cited supra note 21.
72See id. § 109(h)(2)(A) (making briefing requirement inapplicable to debtors who reside in a district for which a U.S. Trustee or bankruptcy administrator determines that approved providers “are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies”); id. § 727(a)(11) (providing similar exception for financial management course requirement); id. § 1328(g)(2) (providing similar exception).
74All references in new section 111 to budget and counseling agencies include the term “nonprofit” See 11 U.S.C. § 111(a)-(g) (2005). See also id. § 109(h) (also referring to “nonprofit”).
75Unlike the references to credit counseling, the financial management course references do not include the term “nonprofit.” See id. § 111(d); id. § 727(a)(11); id. § 1328(g). Of course, nonprofit status by itself offers few assurances. See, e.g., Christopher Conkey, Family Finance: Deterrent to Bankruptcy: Counseling Congress’s Overhaul of Code Would Require Sessions Before and After a Filing, WALL. ST. J., Apr. 6, 2005, at D2 (“The mandate for counseling comes amid a wave of scandals within the rapidly growing, largely nonprofit debt-services industry.”).
ment before the case is filed through collaborating with their former debtor counsel colleagues. In this instance, the provision will be nominally operative, but may not have the tempering effect on the bankruptcy decision that Congress intended.

The personal financial management course requirement has some different details that also are susceptible to variable implementation. Congress could have imposed better controls on the consequences had it first instituted its intended pilot program. The drafters apparently chose otherwise and have implemented the nationwide requirement concurrent with the pilot program. The statute sets the stage for financial management courses to be more lucrative than credit counseling because, as noted above, the providers of financial management courses do not need to have nonprofit status, and they also are less likely to face a discharge of their fees, which are incurred after the filing of the case. This may produce a range of financial management courses in various locations, with a range of associated fees that debtors must pay to emerge from bankruptcy with a discharge.

Like a package dropped from the top of a tall building, a statutory package dropped from Congress onto the bankruptcy system is unlikely to land intact. Even as bankruptcy professionals and judges work to implement the statutory changes faithfully and literally, the nature of legal systems and the details of these particular statutory changes practically dictate variable and divergent application. Whether the omnibus bankruptcy bill results in a ripple or a revolution for the personal bankruptcy system will depend on how the Bankruptcy Code revisions are filtered through the influences of the day-to-day actors trying to make the system work.

III. STATUTORY BANKRUPTCY REFORM AND REAL PEOPLE: PERSONAL BANKRUPTCY CANDIDATES

Perceptions of bankruptcy filers and perceptions of the omnibus bill often are linked. Those who believe filers have modest means and legitimate circumstances tend to doubt the desirability of the statutory revisions. The

78Section 105 of S. 256 implements a six-district, 18-month pilot program for financial management courses under the guidance of the Director of the Executive Office for United States trustees. See BAPCPA, supra note 1, § 105. See generally Jonathan Fox, Suzanne Bartholomae, & Jinjook Lee, Building the Case for Financial Education, 39 J. CONS. AFF. 195, 199 (2005) (“The common challenge facing organizations offering financial education is the need to show that their programs make a difference.”); id. at 208 (“Currently, financial education programs often omit evaluation as a component of their program design.”).

79See BAPCPA, supra note 1, § 106.


81See, e.g., Charles J. Tabb, Of Contractarians and Bankruptcy Reform: A Skeptical View, 12 AM. BANKR. INST. L. REV. 259, 262 (2004) (arguing that the case for means testing and other restrictions have not been made, partly due to modest profiles of existing filers). By contrast, those who believe that the legislation will have a positive effect tend to believe that the profiles do not explain the filing trends and
existing studies of bankruptcy filers do call into question the need for major restrictions in bankruptcy relief. Yet, it is possible to believe that filers have modest means and legitimate circumstances but to reserve judgment on whether the legislation will have a negative impact. The reason for reserving judgment is that the effectiveness of bankruptcy currently does not enjoy a wealth of empirical support.82

Whether intentionally or accidentally, proponents of means testing and related proposals have narrowed the empirical research agenda involving personal bankruptcy filers.83 They repeatedly have emphasized that some chapter 7 filers could repay their debts if required to do so and have commissioned various studies to support this assertion.84 Academic and government researchers have, in turn, invested time, energy, and available financial resources in evaluating the methodology of these “can they pay” studies and in producing and analyzing other datasets focused on the circumstances of bankruptcy filers.85 The ongoing scramble to respond to repeated allegations of

prefer to use other criteria in judging the utility of the reforms. See, e.g., Zywicki, supra note 41 (arguing that commonly cited circumstances leading to bankruptcy cannot explain filing trends).

82Systematic empirical research on how the bankruptcy system works has made great strides but the studies still are too few and far between. Compare Jay Lawrence Westbrook, Empirical Research in Consumer Bankruptcy, 80 Tex. L. Rev. 2123, 2124 (2003) [hereinafter Empirical Research] (“Bankruptcy is a field in which there has been a relatively substantial amount of empirical work, especially in the last twenty years.”) with Lynn M. LoPucki, The Politics of Research Access to Federal Court Data, 80 Tex. L. Rev. 2161 (2002) [hereinafter Politics of Research Access] (arguing that there have been too few studies of bankruptcy, that court system hinders magnitude and content of research, and that Sullivan, Warren, and Westbrook “have completely dominated the field during [the last twenty years], producing what I estimate to be more than ninety percent of the work”). See generally Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, The Use of Empirical Data in Formulating Bankruptcy Policy, 50 Law & Contemp. Probs. 195 (1987) (noting limits of reliance on episodic studies).

83See Westbrook, Empirical Research, supra note 82, at 2136 (“The agenda for empirical research in consumer bankruptcy over the last twenty years has been largely set by the opponents of the allegedly pro-debtor structure created by the 1978 Bankruptcy Code.”); id. at 2140 (making similar assertion).

84See, e.g., Credit Research Center, Krannert Graduate School of Management, Purdue University, Consumer Bankruptcy Study (1982); Tom Neubig et al., Ernst & Young, LLP, Chapter 7 Bankruptcy Petitioners’ Ability to Repay: Additional Evidence from Bankruptcy Petition Files (Feb. 1998); WEFA Group Planning Servs., The Financial Costs of Personal Bankruptcy (Feb. 1998); John M. Barron & Michael E. Staten, Credit Research Center, Georgetown Sch. of Bus., Personal Bankruptcy: A Report on Petitioners’ Ability To Pay (1997).

chapter 7 debtors’ ability to pay has left little resources for other projects, especially given the difficulties involved in collecting data relating to the bankruptcy system. 86

The “can they pay” focus of the research has resulted in significant developments in our understanding of bankruptcy filers’ situations at the time of filing. 87 Sullivan, Warren, Westbrook and other collaborators have found personal bankruptcy filers with very low incomes, significant indebtedness, and seemingly legitimate problems that fueled their financial distress. 88 Other studies offer less information about the debtors’ circumstances, but reveal similar information about their financial profiles. 89 The findings of these studies make some lawmakers’ characterizations of bankruptcy filers seem incongruous. 90


86See infra sources cited in note 111.

87Indeed, Sullivan, Warren and Westbrook may never have gotten together had they not felt the need to respond to and critique the methodology of a “can they pay” study. See Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991, 68 AM. BANKR. L. J. 121, 122 n.5 (1994) [hereinafter Consumer Debtors Ten Years Later].


89For example, having studied the petitions and schedules of a nationally representative sample of personal bankruptcy filers in the late 1990s and early 2000s, Bermant and Flynn have found debtors of very modest incomes, significant indebtedness, and limited ability to repay. See, e.g., Ed Flynn & Gordon Bermant, How Fresh is the Fresh Start?, AM. BANKR. INST. J., Jan. 2001, at 20; Ed Flynn & Gordon Bermant, Pre-planning Limits Means Test Impact, Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors, AM. BANKR. INST. J., Feb. 2000, at 22; Ed Flynn & Gordon Bermant, Demographics of Chapter 7 Debtors, AM. BANKR. INST. J., Sept. 1999, at 24. Culhane & White’s sample of debtors also was a modest and burdened group. See, e.g., Marianne B. Culhane & Michaela M. White, Debt After Discharge, An Empirical Study of Reaffirmation, 73 AM. BANKR. L. J. 709, 762 (1999) [hereinafter Debt After Discharge]; Culhane & White, Test Drive, supra note 85.

90See, e.g., News Release, Opening Statement of Sen. Chuck Grassley at the Bankruptcy Reform Hearing, Feb. 10, 2005, available at http://grassley.senate.gov/index.cfm?FuseAction=pressReleasesDetail&PressRelease_id=4878&M=0&Month=2&Year=2005 ("When I started working on this issue, it was considered a scandal that bankruptcies might reach 1.4 million. Guess what? In 2004, there were 1.6 million. Congress has wasted time and we still have a bankruptcy crisis on our hands. . . . Most people think it should be more difficult for people to file for bankruptcy. Americans have had enough; they are
The observation that personal bankruptcy filers are legitimate users of the system is responsive to some important policy questions but not others. First, it does not directly speak to the question of whether bankruptcy maximizes social welfare generally. Second, and more the focus of this discussion, it does not directly speak to the question of whether bankruptcy helps the people who actually file in the long term.

Evaluating whether bankruptcy helps filers in the long term has a comparative component. If bankruptcy filers are a subset of financially distressed households in the working and middle classes, as some researchers believe, then many individuals with similar profiles to bankruptcy filers are dealing with their problems through other methods. Although economic analyses have considered the effect of legal changes on the aggregate filing rate, it remains unclear why some financially distressed people file and others do not, and what happens to the latter group. Some researchers have argued that other laws, whether in a current or modified form, could perform a similar function to bankruptcy and might be effective for individuals with certain kinds of problems. If this were true, the revisions to the Bankruptcy Code would be less consequential. Even researchers who seem to believe that filers are honest and in need of help have expressed the concern that some debtors' lawyers may be too quick to put their clients into bankruptcy rather than...
attempting to negotiate with creditors and exploring alternatives.  

Because filers’ financial problems do not exist in a vacuum, it is especially important for both researchers and lawyers to compare bankruptcy with alternatives. Consider, for example, filers who have medical-related financial distress. In a recent study, chronic medical conditions were reported by more than half of the debtors who indicated that a medical issue was a “significant reason” for their bankruptcies. In addition to the possibility of continued high personal liability for direct medical costs, the chronic conditions they face may produce repeated income interruption and diminish the inability to save sufficiently for retirement and future emergencies. The tools of bankruptcy can offer short term financial help but have obvious limits here. On its face, bankruptcy seems inferior to other possible social insurance approaches for debtors with health problems that have long-term financial implications.

Comparative analyses should not overlook the wide array of bankruptcy’s costs. Although the basic economic measurements of financial benefit and cost sometimes are stated to be the value of debt discharged and assets forfeited, one also should consider issues such as a large outlay for an attorney’s fee and related access fees, an increase in the cost of credit, the possibility that parties such as medical providers and insurers will discriminate against them, and the sense of failure associated with a bankruptcy filing.

96See, e.g., Braucher, Counseling Consumer Debtors, supra note 52, at 172-173, 179 (noting that bankruptcy may not be right approach for debtors even if they have debts they cannot pay, and that lawyers should attempt more negotiation with creditors before filing bankruptcy cases for clients); Kovac, supra note 94, at 678. See generally David S. Kennedy, R. Spencer Clift III, & Shauna Fuller Veach, Professionalism in the Legal Profession; The Bankruptcy Attorney as a True Professional, 33 U. MEM. L. REV. 1, 17-21 (2002).

97See, e.g., Feibelman, supra note 91.


99See, e.g., id. at W5-70 (reporting average out of pocket cost of nearly $12,000 among those who participated in the medical-specific component of the first telephone survey in Phase III of the Consumer Bankruptcy Project, with much higher averages among certain subsets of patients).


101See Jacoby & Warren, supra note 101.

102See Fay, Hurst & White, supra note 93, at 707.

103See generally Feibelman, supra note 91; Tahira K. Hira, Causes and Effects of Consumer Bankruptcies: a Cross-Cultural Comparison, 16 J. CONSUMER STUD. & HOME ECON. 229, 229 (1992) [hereinafter Cross-Cultural Comparison] (“Bankruptcy has both personal and societal costs. Personal costs may include
The effectiveness of bankruptcy has an absolute component as well. Indeed, it is difficult to embark on comparative questions without having a sense of how individuals fare after bankruptcy. A forthcoming study by Professors Katherine Porter and Deborah Thorne evaluates in-depth post-bankruptcy interviews from the 2001 Consumer Bankruptcy Project, and has the potential to make a substantial contribution to the literature on these questions. In the meantime, existing studies using more limited court data or debtor interviews present mixed results. Some have reported that debtors tend to have improved financial conditions right after bankruptcy, although the method of measurement of financial condition varies. By contrast, fo-

stress and depression, employment harassment, difficulty in morally accepting bankruptcy, loss of assets, social disapproval, court costs and legal fees.); Kovac, supra note 94, at 679, 681, 756; Ausubel and Dawson, supra note 93.

See, e.g., Jean Braucher, Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?, 44 SANTA CLARA L. REV. 1065, 1070 (2004); Hira, Cross-Cultural Comparison, supra note 104, at 230 (“few studies have focused on exploring the impact of bankruptcy on debtors’ social and economic situations”); Power, Hira, & Murphy, supra note 95, at 82-83 (“A review of bankruptcy literature shows that none of the studies have reported the long-term personal and financial consequences of filing bankruptcy”); Philip Shuchman, An Attempt at a “Philosophy of Bankruptcy,” 21 U.C.L.A. L. REV. 403 (1973) (noting limited information on rehabilitative consequences of personal bankruptcy); Westbrook, Empirical Research, supra note 82, at 2147 (“We know very little about consumer bankrupts after they leave the bankruptcy court, except that they rarely file again. We also know that nowadays they are offered credit again quite quickly, often on an unsecured basis. Indeed, some bankruptcy attorneys have reported receiving applications from credit-card companies asking that they be passed along to their bankrupt clients. But the rest is silence.”); Marianne B. Culhane & Michaela White, Debtors After Discharge: Fresh Start or Still Deep in Debt?, 2-4 (June 29, 2001) (unpublished manuscript on file with author) (noting that most bankruptcy research has been focused on the front end and stating that “[k]nowledge of the immediate and long-term post-discharge financial picture of debtors is essential in order to design efficient and humane bankruptcy systems addressing the worldwide problem of consumer overindebtedness” ). See also Larry H. Filer II & Jonathan Fisher, The Consumption Effects Associated With Personal Bankruptcy, 71 S. ECON. J. 837 (2005) (“Surprisingly little work has been done on the direct benefits to filing for bankruptcy. This is in contrast with the growing literature on the costs of bankruptcy.”).


Bermant and Flynn found most debtors in their sample of no-asset chapter 7 cases closed in 2000 had a positive net worth after discharge. Ed Flynn & Gordon Bermant, How Fresh is the Fresh Start?, supra note 89. In a small study, Hira found that most debtors reported an improved financial situation immediately after bankruptcy. See Hira, Cross-Cultural Comparison, supra note 104, at 238 (67% reporting they were better off financially, n.108). Hira and Kostelecky conducted a small pilot study involving post-bankruptcy contact, but did not report the debtors’ postbankruptcy experiences in detail. See Tahira K. Hira & Kyle L. Kostelecky, Methods of Data Collection from Debtors in Bankruptcy After Discharge: A Pilot Study, J. FAMILY ECON. & RESOURCE MGMT. BIENNIAL 101 (1995). VISA U.S.A. has interviewed debtors after bankruptcy about their life after bankruptcy, but has limited its publicly available results. See, e.g., Visa U.S.A., Executive Summary, Bankruptcy Qualitative Research, April 1997, available at http://www.abiworld.org/Content/NavigationMenu/News_Room/Research_Center/Bankruptcy_Reports_Research_and_Testimony1/General1/Bankruptcy_Qualitative_Research.htm; Rafael Efrat, Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy, 10 GEO. J. ON POVERTY L. & POL’Y 205, 235 n. 173 (2003) (citing VISA U.S.A. INC., 2000 Life After Bankruptcy Study (2000)).
cusing on debtors who had reaffirmed debts, Culhane and White uncovered a grim picture of this subset of chapter 7 filers:

The debtor-by-debtor results were as dismal as the district aggregates. Fully 52% of the reaffirming debtors had either zero income or a monthly deficit after reaffirmation payments, and for 16% of the reaffirming debtors, the monthly deficit exceeded $500. . . . Fewer than half of the reaffirming debtors had any income remaining after expenses and reaffirmation payments, and only a third had more than $100 per month left. . . . More than one in five (22%) signed reaffirmations totaling more than 40% of annual income.108

The level of indebtedness also may remain high for the many debtors who drop out of chapter 13 repayment plans prior to completing them.109 Some data suggest that a notable number of people in bankruptcy file more than one time—probably without having received a discharge the first time—which may signal, among other things, a lack of effectiveness or responsiveness of bankruptcy to their problems.110

108Culhane & White, Debt After Discharge, supra note 89, at 762. See also Kovac, supra note 94 (surveying debtors after bankruptcy); Power, Hira & Murphy, supra note 105, at 96-99 (conducting longitudinal case study of one individual debtor, who was unsatisfied with how bankruptcy affected him); Marc Rudow, A Statistical Analysis of Debtor Status in Chapter 7 Petitions in the Western District of North Carolina, Disclosure Statement (North Carolina Bar Association), Oct. 2004, at 3, 5 (finding on basis of analysis of chapter 7 filers in Western North Carolina that “only 17 percent of debtors are able to live within their means after filing. The vast majority of debtors are spending or need to spend more than they earn . . . . it still looks like many debtors have fallen short of putting their financial affairs in order and will continue to incur debt in excess of their ability to pay.”).


110See, e.g., Commission Report, supra note 52, at 276 (compiling statistics); Hira, Cross-cultural Comparison, supra note 104, at 230 (11% repeat filers in small sample); Jean M. Lown & Barbara R. Rowe, A Profile of Consumer Bankruptcy Petitioners, 5 J. L. & Fam. Stud. 113, 125-126 (2003) (studying sample of 1997 cases in Utah, and finding “more than 20% of the Chapter 13 cases reported a previous bankruptcy filing (only those within the previous six years were recorded), and almost 90% failed to complete their plans”); Kathleen March and Jennifer Hildebrand, Is Bankruptcy a Solution or a Way of Life: When Are Multiple Bankruptcies Permitted, When Are Multiple Bankruptcies Prohibited?, 25 Cal. Bankr. J. 104, 110 (1999) (asserting that “[i]n the Central District of California a significant percentage of Chapter 13 debtors file more than one Chapter 13 cases [sic.]”). Repeat filings were on the radar screen even before the Bankruptcy Reform Act of 1978. See David T. Stanley and Marjorie Girth, Bankruptcy: Problem, Process, Reform 59 (1971) (finding 22% repeat filing rate among chapter XIII filers, and noting that this likely understated repeat filings because it excluded previous filings in other states). However, because of some data limitations, we currently do not have as much information on chapter 13 repeat
Although the results will come too late to inform current predictions, passage of the omnibus bill may promote study of the effectiveness of bankruptcy in the long run. First, revisions to Title 28 of the United States Code require that courts and trustees change their data collection and reporting practices in ways that may facilitate a wider range of research projects for lower cost. These changes will not lead seamlessly to a better understanding of bankruptcy. Some issues are inherently hard (and expensive) to evaluate even with better access to case file information. Also, the data collection provisions are far from perfect, and have the potential to produce misleading impressions of how the system is working. Nonetheless, due to these changes, the court system now has a statutory obligation to collect financial information about bankruptcy cases.

In addition, passage of the omnibus bill may diminish the heavy research emphasis on chapter 7 access and ability to pay, at least in the short term. Presumably, the proponents of bankruptcy reform will move onto other challenges. If debates are not framed in terms of ability to pay, researchers may find themselves freer to explore a wider range of empirical projects.

As noted, this slight spark of promise for later generations of research does not help with the current dilemma, namely the assessment of the revised Code’s effects on candidates for personal bankruptcy. The existing research on personal bankruptcy filers may call into question the need for restrictions filings as we should. See, e.g., LoPucki, Politics of Research Access, supra note 82, at 2169; Commission Report, supra note 52, at 106 (attributing lack of good information on repeat filings to lack of national database).

The bill adds provisions to title 28 that impose new obligations on both the court system and on the Attorney General that will promote the collection and analysis of important information about the bankruptcy system. See 28 U.S.C. §§ 159, 589b (2005). In the past, the court system’s method for storing records has not facilitated analysis. Commission Report, supra note 52, at 921-939. This has increased the expense and difficulty of studying even the most basic questions about how the system works. LoPucki, Politics of Research Access, supra note 82, at 2171 (“By offering selective access to data, the courts have controlled legal scholars’ research agendas, encouraging research that focused on the social and economic implications of litigation and discouraging research that focused on the actions of judges and the impact of those actions on both litigants and the public.”). Other kinds of studies, such as the effects of aggregate bankruptcy filings on credit supply, are not affected by these limitations. For a description and review of some studies exploring this issue, see Congressional Budget Office, supra note 85, at 31-37. The alternative available datasets, such as the chapter 13 trustees’ recordkeeping systems, were designed for accounting and not research purposes and thus would require considerable tweaking to facilitate in-depth longitudinal analysis. Braucher, Empirical Study of Debtor Education, supra note 109, at 590-591.

See sources cited supra note 84. Culhane and White have explained that “[q]ualitative studies estimating life enrichment and financial rehabilitation are difficult because former bankrupts are often difficult to locate and reluctant to answer questions about their past and present lives.” Marianne B. Culhane & Michaela White, Fresh Start or Still Deep in Debt, supra note 105, at 2-4. See also Westbrook, Empirical Research, supra note 82, at 2147 (noting difficulties of studying filers after bankruptcy).

See, e.g., 28 U.S.C. § 159 (c)(3)(C) (2005) (requiring that the aggregate amount of debt discharged be calculated by subtracting categories of “predominantly nondischargeable” debt from “all scheduled debt and obligations”). If interpreted literally, this calculation has the potential to produce an erroneous calculation of discharged debts in bankruptcy.
in bankruptcy law, but does not predict the outcome of implementing those restrictions.

CONCLUSION

The revisions to the Bankruptcy Code preserve the structure of the former system but embellish and alter the details to a great extent. The provisions are complex, difficult to decipher, and a challenge to implement. This challenge in the short term, however, does not signify the impact of the statutory revisions in the long term.

This Article has explored the role of the day-to-day system players in shaping the actual impact of statutory revisions. I recently noted in this journal the practical impossibility of Congress’s intent to exclude bankruptcy experts from system reform. This Article reaffirms that position not at all as a sign of rebellion against the revisions to the statute, but as a description of law-making that researchers have observed time and time again. The drafting and the details of the omnibus bill may amplify the importance of these other factors. Once the statutory changes are filtered through other influences, the impact of the revisions is likely to vary in substance and magnitude, both geographically and as compared with a literal reading of the revised Code. With the correct inquiries and tools, researchers probably could predict the variations and deviations with reasonable certainty. The key is to recognize that factors other than the statute matter greatly in determining whether the omnibus bankruptcy bill brings about major or minor changes.

However the bankruptcy system processes Congress’s statutory changes, real live human beings will continue to face serious financial trouble, often precipitated by events out of their control. Depending on how the details play out, bankruptcy will be less beneficial to filers by at least a little, and maybe a lot. This Article has highlighted the difficulties of assessing the impact of this change. Reserving judgment about the impact of the bill should not be perceived as inconsistent with concerns about the well-being of these individuals and families. The implications of statutory bankruptcy reform simply remain murky without better information about the effectiveness of bankruptcy.


115 See, e.g., LoPucki, Law in Lawyers’ Heads, supra note 3, at 1503, 1555.