

A COMPARISON OF THE EFFECTS OF THE 1978 AND 2005 BANKRUPTCY REFORM LEGISLATION ON BANKRUPTCY FILING RATES[†]

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INTRODUCTION

Bankruptcy legislation in the United States has represented an amalgam of politics, economic pragmatism, and the prevailing attitude toward debt and debtors at the time of passage. The rationale offered to support bankruptcy laws has varied: early bankruptcy legislation was designed, among other things, to aid businesses; subsequent legislation was intended, largely, to assist consumers burdened with debt; and the latest incarnation of bankruptcy law was crafted to curtail alleged consumer abuses arising from the previous quarter century of bankruptcy reform. It is clear that bankruptcy has evolved in the United States from a means used mostly by creditors to collect debts owed them by businesses to an instrument used overwhelmingly by individual, noncommercial debtors.

After briefly recapping the history of bankruptcy legislation, this paper describes and contrasts the outcomes of the two most recent and important pieces of bankruptcy reform, the Bankruptcy Reform Act of 1978¹ and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

[†] A draft of this paper was presented at the 2nd Annual Conference on Empirical Legal Studies under the title *A Comparison of the Effects of the 1978 and 2005 Bankruptcy Reform Legislation*.

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The views expressed in this paper are those of the authors and are not the official position of the Administrative Office of the U.S. Courts.

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¹ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

(BAPCPA).² The course of bankruptcy filings since passage of the former is part of the historical record, while the nearly two years of monthly data since the effective date of BAPCPA provides a basis for making a preliminary assessment of this act and for forecasting its future implications.

I. EARLY BANKRUPTCY LEGISLATION

Congress used its constitutional power to establish uniform laws concerning bankruptcy³ when it passed temporary bankruptcy statutes in 1800, 1841, and 1867. Each of these statutes was repealed within a few years of its enactment.⁴ It was not until the end of the nineteenth century that Congress passed permanent uniform bankruptcy legislation. Despite its credit industry origins, the Bankruptcy Act of 1898 was a debtor-friendly law.⁵ This law allowed debtors to discharge debts and removed most barriers contained in previous United States bankruptcy laws; thus, it clearly established a policy of debt forgiveness.⁶ In prior laws, discharge had been allowed only when a particular percentage of creditors consented, or failed to object, to the discharge. This condition was not part of the 1898 Act. The Act also removed the requirement of a minimum payment to creditors.⁷ There were no federal exemptions allowed under the 1898 Act. Only state exemptions could be claimed by the debtor.⁸ Grounds for denial of discharge were significantly restricted, and, under the 1898 Act, very few debts were not dischargeable.⁹

The 1898 Act allowed debtors, except corporations,¹⁰ to file for bankruptcy protection voluntarily. It also allowed creditors to file petitions for involuntary bankruptcy against businesses, but not against farmers or wage earners.¹¹ A

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

³ U.S. CONST. art. I, § 8, cl. 4.

⁴ Lawrence A. Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON 419, 422 (1984); Bradley A. Hansen & Mary Eschelbach Hansen, *The Transformation of Bankruptcy in the United States 3-4* (Sept. 2003) (unpublished manuscript, on file with Princeton University).

⁵ Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 24 (1995).

⁶ Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509, 512 (2002).

⁷ Shepard, *supra* note 4, at 422.

⁸ Tabb, *supra* note 5, at 24.

⁹ *Id.*

¹⁰ Corporations were allowed to elect voluntary bankruptcy in 1910. See Act of June 25, 1910, ch. 412, § 3, 36 Stat. 839.

¹¹ Hansen & Hansen, *supra* note 4, at 6.

composition in lieu of liquidation was included in the Act, whereby, with the concurrence of a majority of creditors in both number and value, and the court, partial payment of the corporation's debt would discharge the entire debt.¹² The 1898 Act established the system of bankruptcy referees, who performed most of the judicial and administrative work and were appointed by the district courts.¹³

Although the Bankruptcy Act of 1898 was amended in minor ways over the next 40 years, Congress overhauled bankruptcy law in 1938 with the passage of the Chandler Act.¹⁴ It attempted to improve bankruptcy administration, but most importantly, it reworked the reorganization provisions into distinct chapters—chapter X for corporate reorganizations; chapter XI for arrangements; chapter XII for real property arrangements; and chapter XIII for wage earners' plans.¹⁵

II. BANKRUPTCY REFORM ACT OF 1978

Figure 1 below presents a graph of total bankruptcy filings from 1940 through 1980.¹⁶ As Figure 1 depicts, bankruptcy filings rose steadily following World War II, growing from 10,196 filings in 1946¹⁷ to 100,000 filings for the first time in 1959. By 1970, bankruptcy filings were hovering around 200,000.¹⁸ That year, Congress established a committee to study the

¹² Tabb, *supra* note 5, at 26.

¹³ *Id.* at 25.

¹⁴ Chandler Act, ch. 575, 52 Stat. 840 (1938).

¹⁵ Tabb, *supra* note 5, at 29. The various types of bankruptcy cases have traditionally been given the names of the chapters (within the Bankruptcy Code) that describe them. Under the Bankruptcy Act of 1898, the chapters were written using Roman numerals. Under the Bankruptcy Reform Act of 1978, the chapters were written as Arabic numbers, a practice that continues today. Shepard, *supra* note 4, at 423.

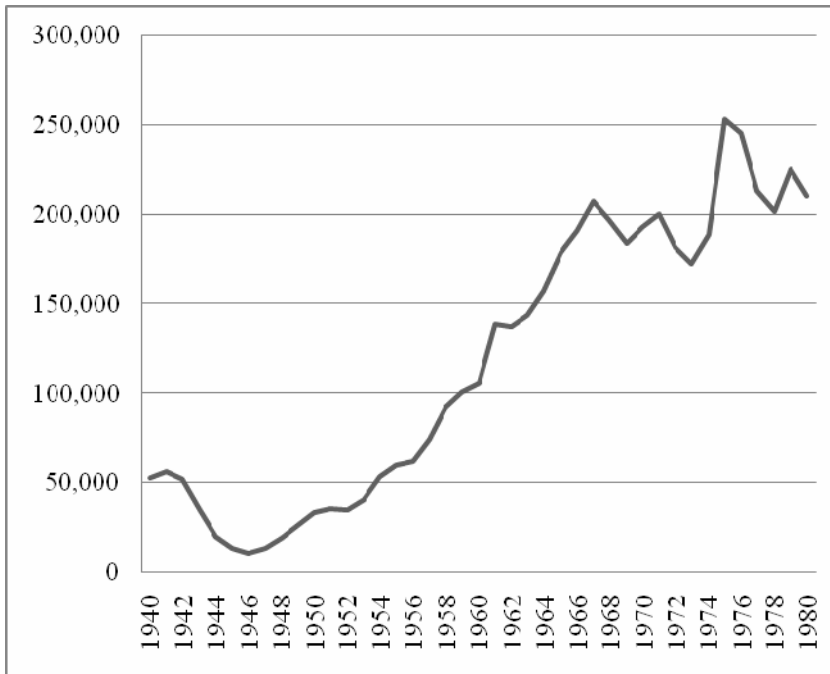
¹⁶ Unless otherwise noted, the data cited in this paper are from statistical collections maintained by the Administrative Office of the United States Courts (AO). All data cited for the years 1940 through 1945 came from the bankruptcy tables found in the *Annual Report of the Director of the Administrative Office of the U.S. Courts* (1940 through 1945). Data cited for the years 1946 through 1993 come from the F-series of tables available in the annual publication, *Report of the Judicial Conference—Report of the Administrative Office of the U.S. Courts* (1940 to 1993), Washington D.C.: U.S. Government Printing Office. Data cited for the years 1994 through 2007 came from the F-series of tables available in the annual publication, *Administrative Office of the U.S. Courts, Report of the Director: Judicial Business of the U.S. Courts*. The year cited indicates the federal government's fiscal year. The government's current fiscal year is October 1 through September 30. Prior to 1992, the government's fiscal year was July 1 through June 30. The data in Figure 1 are from July 1 through June 30.

¹⁷ This was the lowest annual total since 1900, when the federal government began collecting bankruptcy data.

¹⁸ Filings remained at about this level through the 1970s.

bankruptcy system and to address the fairness of the bankruptcy statutes.¹⁹ In response to the Committee's report,²⁰ Congress passed the Bankruptcy Reform Act of 1978, more commonly known as the Bankruptcy Code, which was the first major legislation addressing bankruptcy since 1938. In a 1983 report, the General Accounting Office stated that Congress intended for the 1978 Code both to consolidate bankruptcy procedures and to treat different classes of creditors fairly and equally.²¹

FIGURE 1: BANKRUPTCY FILINGS, 1940–1980



One of the major purposes of the 1978 Code was to create a court structure to handle bankruptcy and to deal with the status of bankruptcy judges.²² It

¹⁹ Shepard, *supra* note 4, at 423.

²⁰ H.R. DOC. NO. 93-137, pt. 1 (1973).

²¹ U.S. COMPTROLLER GENERAL, U.S. GEN. ACCT. OFF., BANKRUPTCY REFORM ACT OF 1978—A BEFORE AND AFTER LOOK, at i (1983).

²² Tabb, *supra* note 5, at 34.

enlarged the jurisdiction of bankruptcy judges so that they could hear almost anything having to do with bankruptcy cases.²³ This became a source of controversy because some wanted to keep the bankruptcy judges as non-Article III adjuncts to the federal district court judges. This would be problematic because of concern over non-Article III judges exercising the judicial power of the United States. To mitigate this, some argued for making bankruptcy judges Article III judges, appointed by the President and confirmed by the Senate, with the constitutional guarantees of an Article III judge: life tenure and protection against salary reduction.²⁴ The 1978 Code incorporated the first alternative: the bankruptcy judges would not become Article III judges, but would have jurisdiction over everything related to bankruptcy cases. In 1982, the Supreme Court declared such broad power unconstitutional, holding that Article III powers could not be given to non-Article III judges.²⁵ This holding was addressed later in the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA).²⁶

Through the 1978 Code, Congress removed caps on the fees that could be charged by attorneys and other professionals that had been in effect since the 1898 Act, reasoning that competition was needed to attract the best professionals.²⁷

The 1978 Code combined chapters X and XI into chapter 11, a single corporate reorganization chapter. It also encouraged debtors to file under chapter 13, in the hope that creditors would get more than if the debtor filed under chapter 7 and that the debtor would emerge from bankruptcy with better credit.²⁸ The superdischarge, allowing discharge of some debts that were not dischargeable under chapter 7, was added as an inducement to file under chapter 13.²⁹

The 1978 Code revisited the exemption provision. Under the Code, debtors could choose between state or federal exemptions unless the state “opted out” of the federal exemptions for debtors residing in their state. About three-

²³ *Id.*

²⁴ *Id.*

²⁵ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 51 (1982).

²⁶ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

²⁷ Tabb, *supra* note 5, at 35.

²⁸ *Id.*

²⁹ *Id.*

quarters of the states have done this, limiting their citizens to their state's bankruptcy exemptions.³⁰

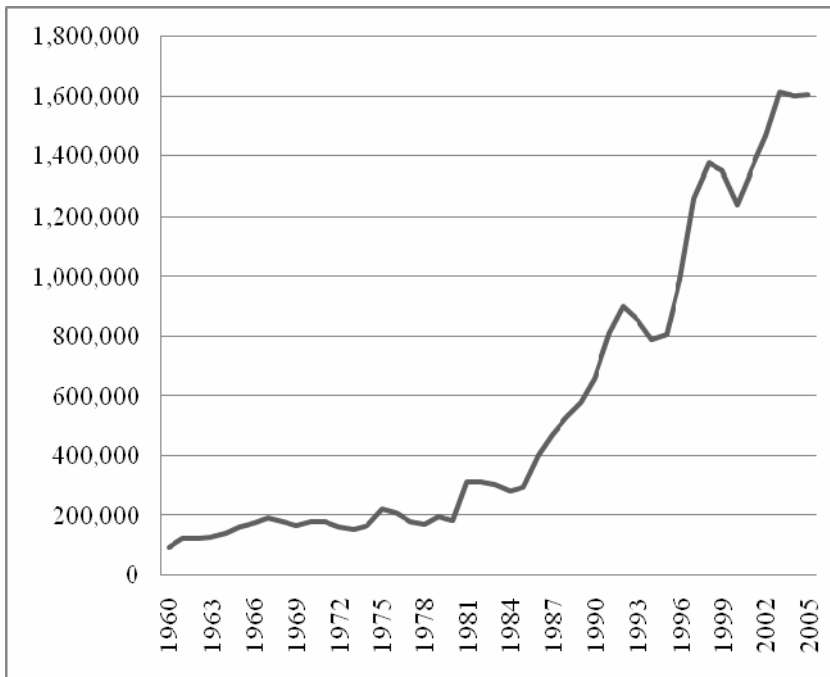
This legislation so fundamentally changed bankruptcy law that most research in this area distinguishes bankruptcy filings as pre-1978 Code and post-1978 Code. Following the implementation of the Code in 1979, personal bankruptcy filings³¹ increased dramatically. Figure 2 below presents a graph of personal bankruptcy filings from 1960 through 2005.³² As Figure 2 demonstrates, personal bankruptcy filings roughly doubled between 1960 and 1979, then tripled by 1989, then increased by a multiple of more than two and three-quarters by 2003 to reach 1,613,097, a total 17 times greater than the 94,114 filed in 1960.

³⁰ *Id.* at 36.

³¹ For the purposes of this paper, the phrases “personal bankruptcy,” “nonbusiness bankruptcy,” and “consumer bankruptcy” are used interchangeably. More formally, a nonbusiness bankruptcy is a bankruptcy filed by a debtor whose predominant nature of debt is nonbusiness, i.e., debt as that incurred by an individual primarily for a personal, family, or household purpose.

³² The data cited for the years 1960 through 1991 come from the F-series of tables available in the U.S. Government Printing Office's annual publication, *Report of the Judicial Conference—Report of the Administrative Office of the U.S. Courts*. The data cited for the years 1992 through 2005 come from the F-series of tables available in the U.S. Government Printing Office's annual publication, *Statistical Tables for the Federal Judiciary*.

FIGURE 2: PERSONAL BANKRUPTCY FILINGS, 1960–2005



III. RESEARCH ON THE EFFECTS OF THE 1978 CODE

Much research using economic, legal, and social science methodologies has explored and advanced reasons for the significant increase in personal bankruptcy filings following the passage of the 1978 Code. Such reasons include the greater availability of consumer credit (e.g., credit cards and home equity lines of credit), the downturn in the economy (e.g., high levels of unemployment, inflation, and high interest rates), an increase in advertising by attorneys and the entry of new lawyers into the field of bankruptcy law, increased public awareness of bankruptcy as a means to a fresh start, and a decline in the social stigma attached to a debtor declaring bankruptcy.

From 1946 to 1978, bankruptcy filings increased an average of about 7,600 per year.³³ After Congress enacted the Code in 1978, however, bankruptcy

³³ H.R. Doc. No. 93-137, pt. 2, at 2 (1973).

filings rose at an even greater rate, averaging 50,600 per year through 2005.³⁴ A legitimate question remains unanswered as to whether it was the 1978 Code itself that spurred the jump in filings or whether a combination of these factors contributed to the large increase in the number of filings.

The evidence is mixed. Some scholars attribute the increase to one or more variables; some cite other causes. Almost all studies, however, find some support for the hypothesis that the 1978 Act itself affected the number of bankruptcy filings. Different studies examine this issue from different perspectives. While almost all use aggregate data, some use econometric models;³⁵ some use time-series models;³⁶ some use annual data;³⁷ and still others use monthly data.³⁸ Additionally, although some use national data,³⁹ others use county-level data⁴⁰ or data sampled from a particular federal jurisdiction.⁴¹ Finally, some studies operationalize variables quite differently from others.⁴² Nevertheless, all the studies show that something happened during the period following implementation of the 1978 Code that pushed the rate of filings up much faster than ever before.

Many of the variables named above operated over roughly the same period, so separating the effects of these variables on the increase in bankruptcy filings is challenging. Moreover, difficulties in quantifying some of these independent variables (e.g., changing standards of legal practice and changes in the social stigma associated with filing bankruptcy) leave analysts little hope of measuring their actual individual effects. Yet despite the diversity of findings, the preponderance of the evidence indicates that the 1978 Code had a clear effect on personal bankruptcy filings, as did other factors cited above. The relative weight to assign to the 1978 Code remains a subject of debate.

³⁴ See *supra* note 16.

³⁵ Jagdeep Bhandari & Lawrence A. Weiss, *The Increasing Bankruptcy Filing Rate: An Historical Analysis*, 67 AM. BANKR. L.J. 1 (1993); Ian Domowitz & Thomas L. Eovaldi, *The Impact of the Bankruptcy Reform Act of 1978 on Consumer Bankruptcy*, 36 J.L. & ECON. 803 (1993); Shepard, *supra* note 4; Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1 (1987).

³⁶ William J. Boyes & Roger L. Faith, *Some Effects of the Bankruptcy Reform Act of 1978*, 29 J.L. & ECON. 139, 139–49 (1986); Jon P. Nelson, *Consumer Bankruptcies and the Bankruptcy Reform Act: A Time-Series Intervention Analysis, 1960–1997*, 17 J. FIN. SERV. RES. 181 (2000).

³⁷ Bhandari & Weiss, *supra* note 35; Shepard, *supra* note 4.

³⁸ Boyes & Faith, *supra* note 36.

³⁹ Bhandari & Weiss, *supra* note 35; Domowitz & Eovaldi, *supra* note 35; Shepard, *supra* note 4.

⁴⁰ White, *supra* note 35.

⁴¹ Boyes & Faith, *supra* note 36.

⁴² Bhandari & Weiss, *supra* note 35, at 4.

IV. AMENDMENTS TO 1978 CODE

In *Marathon*,⁴³ the Supreme Court held that the 1978 Code gave too much of the “judicial power” of the United States to non-Article III judges, and because the unconstitutional jurisdictional provisions of the Code could not be separated from the otherwise constitutional provisions, the entire bankruptcy court system was invalid. Congress would have to reorganize the entire bankruptcy court system.⁴⁴ The Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA)⁴⁵ addressed this restructuring of the bankruptcy court system, and established the bankruptcy courts as delegates of the district court, but did not establish bankruptcy judges as Article III judges.⁴⁶ Bankruptcy matters could be referred to bankruptcy court under Title 28 of the United States Code § 157(a), which was added by the 1984 law.⁴⁷ BAFJA also created additional bankruptcy judgeships.

In BAFJA, Congress also addressed the increase in bankruptcy filings as well as some of the complaints of abuse of bankruptcy laws by debtors that were raised by creditors. The Consumer Credit Amendments⁴⁸ included dismissal of the case for substantial abuse, restrictions on subsequent filings, a requirement that disclosures be given to the debtor, and other provisions to make filing bankruptcy less attractive for consumer debtors.⁴⁹ During the 1970s, the personal bankruptcy filing rate was about one per 1,000 people. That rate increased to 1.26 in 1980 and to 1.37 in 1981; thereafter it stabilized until 1984, when it rose from 1.20 to 3.52 in 1992.⁵⁰ Some analysts examining the tripling of bankruptcy filing rates from 1985–1991 argued that this was not a consequence of legal changes because the increase occurred despite the 1984 Consumer Credit Amendments that were designed to reduce filing rates by allowing the courts to reject “opportunistic petitions.”⁵¹ An increase might

⁴³ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 50–51 (1982).

⁴⁴ Tabb, *supra* note 5, at 38.

⁴⁵ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

⁴⁶ Tabb, *supra* note 5, at 39.

⁴⁷ “Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising or related to a case under title 11 shall be referred to the bankruptcy judges for the district.” Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 157(a), 98 Stat. 333 (1984).

⁴⁸ Bankruptcy Amendments and Federal Judgeship Act of 1984 § 707.

⁴⁹ *Id.* See also Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59 (1986).

⁵⁰ F. H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 189 (1998).

⁵¹ *Id.* at 187.

also be expected with a shift to policies favoring debtors. However, according to Buckley and Brinig, the 1984 amendments increased the difficulty of filing for bankruptcy. The increased difficulties in filing were expected to result in a decline in filing rates, but following passage of the 1984 revisions, filing rates actually increased more than at any time since World War II.⁵²

One study indicates that consumer filing rates from 1980 to 1991 could not be explained by either legal variables or economic variables.⁵³ This study found that social predictors measuring the differences in social norms and institutions proved to be the best predictors of consumer filing rates.⁵⁴ Changes in social norms could best account for the rapid growth in bankruptcy filings.⁵⁵

The Bankruptcy Reform Act of 1994⁵⁶ was a significant piece of legislation. Through it, Congress established a second National Bankruptcy Review commission⁵⁷ to study the Bankruptcy Code and to provide suggestions for further reforms that could improve and update the Code without fundamentally changing it.⁵⁸ The 1994 reform was also important because of the many provisions containing substantive amendments to the Bankruptcy Code.⁵⁹ The law placed an emphasis on improving bankruptcy administration. It also increased federal personal property exemption levels, allowing filers to keep more of their assets.⁶⁰

V. BANKRUPTCY FILINGS AFTER 1994

The changes made to the 1978 Code by the 1994 Bankruptcy Code revision did not seem to affect the upward march of filings (see Figure 3 below). During the first four years following passage of these revisions, filings continued to grow, reached a plateau, and then resumed their growth.⁶¹ It was

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 189.

⁵⁵ *Id.*

⁵⁶ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

⁵⁷ First established in 1970, this commission produced a report in 1973. *See* H.R. DOC. NO. 93-137 (1973).

⁵⁸ Tabb, *supra* note 5, at 42.

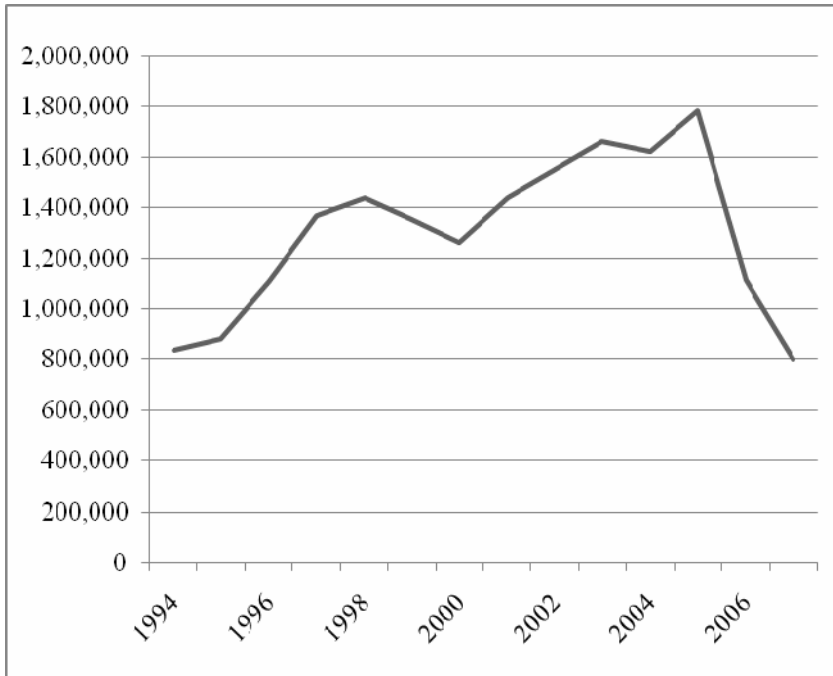
⁵⁹ *Id.*

⁶⁰ Thomas A. Garrett, *The Rise in Personal Bankruptcies: The Eighth Federal Reserve District and Beyond*, 89 FED. RES. BANK ST. LOUIS REV. 15, 22 (2007).

⁶¹ Filings per capita seem to have remained fairly stationary after 2001. *See supra* note 16.

during this time that filings broke through and stayed above the one million filings threshold, which, in turn, increased pressure for a new round of bankruptcy reform.⁶²

FIGURE 3: TOTAL BANKRUPTCY FILINGS, 1994–2007



The credit card industry started lobbying for a new bankruptcy bill in 1998.⁶³ As unsecured creditors, that industry was bearing the brunt of losses

⁶² “We [the members of the Bankruptcy Review Commission] were all shocked to learn about the 1.4 million new bankruptcies filed in 1997, which were piled onto the more than one million filings in 1996; thus giving us a kind of agitation that was not reflected in the work of the Bankruptcy Commission itself.” *Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the H. Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary*, 105th Cong. 2 (1998) (statement of Chairman George W. Gekas).

⁶³ In 1998, the American Financial Services Association, a trade group representing credit card companies, joined the American Bankers Association to form the National Bankruptcy Coalition which lobbied for bankruptcy law revision. Kathleen M. Howley, *Bankruptcy Overhaul Backfires*, INT’L HERALD TRIB., Nov. 9, 2007, at 15.

from the discharge of debts under chapter 7⁶⁴ even though the industry itself continued to remain quite profitable.⁶⁵ During this time span, the offered bankruptcy reform legislation came close to passage on several occasions, but a variety of events—President Clinton’s veto in 2000,⁶⁶ the terrorist attacks on the World Trade Center and the Pentagon,⁶⁷ and an abortion-related amendment added to the bankruptcy measure⁶⁸—kept a revised bill from becoming law. However, the banking and credit card industries eventually persuaded Congress to pass BAPCPA, which was signed into law by President Bush on April 20, 2005.⁶⁹

VI. FILINGS SINCE BAPCPA

With the passage of the 1978 Code, filing for bankruptcy was made easier and the dollar amount of property that could be shielded was effectively increased.⁷⁰ This led to the perception that the law was chiefly responsible for the rapid increase in consumer bankruptcies following its passage, as ordinary Americans who had amassed debts due to job loss, unexpected medical expenses, and the like made increasing use of it.⁷¹ BAPCPA was seen by its

⁶⁴ Adam B. Ashcraft, Astrid A. Dick & Donald P. Morgan, *The Bankruptcy Abuse and Consumer Protection Act: Means Testing or Mean Spirited?*, (Fed. Res. Bank N.Y., Staff Report no. 279, 2007). From 1994 to 2000, unsecured creditors received nothing in ninety-six percent of chapter 7 bankruptcy filings. Michelle J. White, *Abuse or Protection: Economics of Bankruptcy Reform under BAPCPA*, (Am. L. & Econ. Assoc. Ann. Meetings, Paper 10 at 9, 2006) (citing Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Chapter 7 Asset Cases*, 21 AM. BANKR. INST. J. 22, 22 (2003); Ed Flynn & Gordon Bermant, *What is “Success” in Chapter 13? Why Should We Care?*, 23 AM. BANKR. INST. J. 20 (2004)).

⁶⁵ The return on assets for the credit card industry stood at 3.9 percent in 1994, and after dipping slightly in the late 90s to 2.5 and 2.6 percent, recovered to a healthy 4.4 percent in 2003. CardTrak.com, Banner Year: From the February 2004 Issue of CardTrak, <http://www.cardweb.com/cardtrak/pastissues/feb04.html>.

⁶⁶ Associated Press, *Clinton Vetoes Bankruptcy Bill*, CNN.com, Dec. 20, 2000, <http://archives.cnn.com/2000/ALLPOLITICS/stories/12/20/clinton.bankruptcy.ap/index.html>.

⁶⁷ Dennis Law, *Bankruptcy Filings May Rise on Ripple Effects of Recession and 9/11*, THE BUS. REV. (ALBANY), Apr. 19, 2002, available at <http://albany.bizjournals.com/albany/stories/2002/02/22/focus1.html>.

⁶⁸ *Bankruptcy Bill on Fast Track*, CREDIT CARD MGMT., Apr. 1, 2005, available at 2005 WLNR 5104698 (Westlaw); Doney & Associates, *Bankruptcy Reform Act—Summary*, <http://doney.net/bra/index.htm>, (last visited Sept. 23, 2008).

⁶⁹ Campaign contribution from the National Consumer Bankruptcy Coalition totaled more than \$8.2 million during the 2004 election. Howley, *supra* note 63, at 15.

⁷⁰ Bhandari & Weiss, *supra* note 35, at 8.

⁷¹ Bhandari and Weiss argue that the changes to the Bankruptcy Code did not have a significant effect upon the rate of consumer bankruptcy filings, but rather the growth in the debt-to-income ratio drove the number of bankruptcy filings up. They feel that their inclusion of measures of debt serving capacity and other financial variables makes their conclusions superior to the earlier work of Michelle J. White and William J. Boyes and Roger L. Faith, who attributed to the 1978 law a portion of the increase in consumer bankruptcy filings. *Id.* at 2, 4. See White, *supra* note 35, at 2. See also Boyes & Faith, *supra* note 36, at 139.

sponsors as a corrective. They argued that a new law was needed to combat a growing tendency to see bankruptcy as a means to abuse the law and escape bills that debtors were capable of paying.⁷² The sponsors sought to force more persons seeking debt relief to file under chapter 13, and thereby to make at least partial repayment of their debts. A means test was established to determine which petitioners would be directed into chapter 13.⁷³ Despite a number of studies by opponents of the bankruptcy reform, purportedly demonstrating that the potential number of individuals in this category would not exceed fifteen percent of all filers, the means test provisions were enacted.⁷⁴

Although reform efforts focused on nonbusiness bankruptcies, significant changes also were made to chapter 11 bankruptcies, ninety percent of which are business filings. However, the pattern of chapter 11 filings, pre- and post-BAPCPA, showed little of the drama associated with chapter 7 filings. Monthly chapter 11 filings did double in October 2005 to 1080, but after falling to 322 in November 2005, they rebounded to 553 in December 2005, a figure that was within fifty filings of the monthly average for the first nine months of the year.⁷⁵ Filers and the courts seemingly have learned to work within the provisions of the new law.⁷⁶

As BAPCPA was signed, various predictions were made about what would happen in both the long term and the short term. Because this act restricted eligibility for consumer debt relief under chapter 7, most experts anticipated a

⁷² Alexander Gordon, IV, *Changing Philosophy of Bankruptcy*, MD. B.J., May–June 2007, at 12, 13.

⁷³ A debtor's income for the previous six months prior to filing is averaged and compared to the median income for a comparably sized household in the debtor's state. Then expenses derived from national standards for food, clothing, personal care, etc., as well as housing (based on county figures) and transportation expenses, are deducted. This calculation is further reduced by 1/60 of all secured debt that is or will become due in the five years following the bankruptcy filing, and 1/60 of all priority unsecured debt such as domestic support obligations including child care and alimony, chapter 13 administrative expenses, and recent unpaid taxes. A debtor must file under chapter 13 if the result of these calculations exceeds \$100.00 or \$166.67, depending upon the amount of unsecured debt, providing they do not exceed chapter 13 secured and unsecured debt limits. Richard S. Stolker, *Debtor's Perspective: BAPCPA Issues*, MD. B.J., May–June 2007, at 22, 24.

⁷⁴ *Id.* at 23.

⁷⁵ Chapter 11 filings have not exhibited the same behavior as chapter 7 filings over the 25 year period from 1980 to 2005. Though they went from just under 7,000 in 1980 to almost 25,000 in 1986 and again in 1991, by the end of the 1990s they were hovering around 10,000, and by 2005, they were again under 7,000, where they have remained. See *supra* note 16; Admin. Office of the U.S. Courts, Table F-2 by Filing Month Business and Nonbusiness Bankruptcy Cases Commenced (Dec. 31, 2005), <http://www.uscourts.gov/bkrpctystats/2005bymonth.pdf>.

⁷⁶ Michael P. Richman & Lori V. Vaughan, *Business Reorganizations After One Year of BAPCPA*, COM. LENDING REV., Mar./Apr. 2007, at 13, 13.

surge in chapter 7 filings before the law took effect on October 17, 2005, although no one guessed what the magnitude of the filing surge would be.⁷⁷ In September and October 2005, bankruptcy filings hit record levels. In October 2005, an astounding 630,443 petitions were filed, which was 389,678 more than in the next-closest month, September 2005.⁷⁸ Bankruptcy courts and staff were inundated, and most individuals involved in the bankruptcy system worked long hours to process mountains of paperwork.⁷⁹

Then came the major reduction in filings. Seemingly, every person considering bankruptcy under chapter 7 rushed to file under the old law,⁸⁰ and the reservoir of filers was virtually emptied.⁸¹ Although October 2005 was a record month for filings, November 2005 set a record, of sorts, for lack of filings with only 14,305.⁸² The number of petitioners seeking protection in bankruptcy court had not been this low in more than twenty-five years.⁸³ In the months immediately following November 2005, the rate of increase in filings was impressive (filings jumped 58 percent to 22,584 in December 2005, and then grew another twenty-five percent to 28,174 in January 2006).⁸⁴

⁷⁷ “‘In the few weeks leading up to October 17, the filings in our court were astronomical,’ said Bankruptcy Judge A. Thomas Small. . . . ‘None of us anticipated this level of activity,’ said Northern District of Illinois Bankruptcy Clerk of Court Ken Gardner. ‘We had 3,613 cases filed on Friday, 1,500 of those over the counter. Chambers and court staff helped us out. On Friday, the last pro se case was filed just before midnight, then staff came back to work on Saturday and Sunday to enter creditors and open all the cases dropped off by attorneys on Friday.’” *New Law Creates Rush to File in Federal Courts*, THE THIRD BRANCH, (Admin. Off. U.S. Cts.) (Nov. 2005), available at <http://www.uscourts.gov/ttb/nov05ttb/newlawrush/index.html>.

⁷⁸ See *supra* note 16; Admin. Office of the U.S. Courts, Table F-2 by Filing Month Business and Nonbusiness Bankruptcy Cases Commenced (Dec. 31, 2005), <http://www.uscourts.gov/bnkrpctystats/2005bymonth.pdf>.

⁷⁹ Richman & Vaughan, *supra* note 76.

⁸⁰ Terence O’Hara, *A Rush to Beat Bankruptcy Deadline*, WASH. POST, Oct. 15, 2005, at D1.

⁸¹ Largely as a result of the BAPCPA, dramatic decreases in filings were seen during the months of November and December 2005 as the combined filings of 36,934 for those two months represented just 1.78 percent of the total twelve-month period ending December 31, and six percent for the fourth quarter 2005. John Hartgen, *Total Bankruptcies Eclipse the 2 Million Mark in 2005 as Consumers File in Record Numbers Prior to Implementation of New Bankruptcy Law*, Mar. 24, 2006, <http://www.abiworld.org/AM/Template.cfm?Section=Home&CONTENTID=42631&TEMPLATE=/CM/ContentDisplay.cfm>.

⁸² See *supra* note 16.

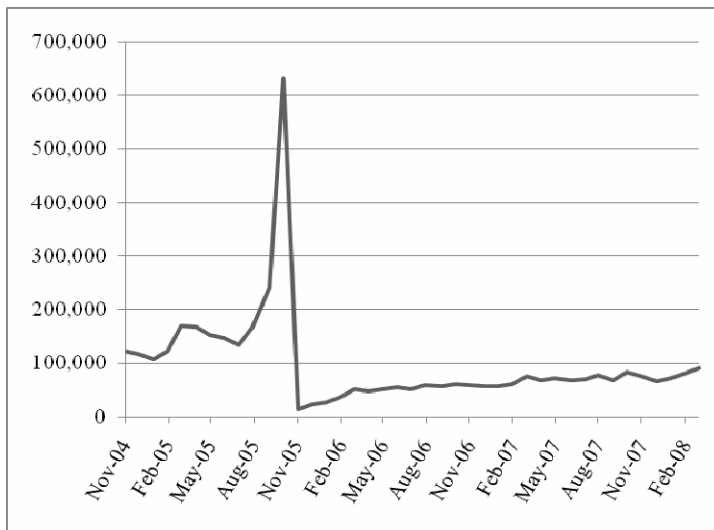
⁸³ See *supra* note 16.

⁸⁴ See Douglas W. Kassebaum, *BAPCPA’s Effects on Consumer Bankruptcy Filings*, NW. FIN. REV., June 15, 2007, available at 2007 WLNR 12561807 (Westlaw). Kassebaum states that many commentators conjectured that the decrease in consumer filings was the natural result of the rush to the courthouse prior to BAPCPA. But the data for the second half of 2006 shows that the low filing trend is more durable than the commentators expected. *Id.* at 1. In an article appearing in September 2006, Eugene S. Melchionne, state chairman (Connecticut) for the National Association of Consumer Bankruptcy Attorneys (NACBA) is quoted as saying that “I expect by January [2007] we’ll be back to where we were in 2004” Douglas S. Malan,

Because this growth was from an extremely low level, opinions were split within the bankruptcy community as to whether this rebound was a portent of a fast return to previous levels or merely reflective of a natural pattern given the low level of bankruptcy filings in the aftermath of BAPCPA.⁸⁵

As can be seen from Figure 4 below, which shows total monthly filings from the year preceding implementation of bankruptcy reform up to September 2007, there has been a modest recovery from the very low levels of filings in late 2005 and early 2006. The figure for filings in September 2007 was 69,077, about half of the number that one would see for the month of September in the years immediately preceding BAPCPA. The total number of filings for the 2007 fiscal year, which ended September 30, was 801,269—half of where total filings stood during the peak pre-BAPCPA years of 2003 and 2004.⁸⁶

FIGURE 4: TOTAL BANKRUPTCY FILINGS BY MONTH



Bankruptcy Filings in Lean Cycle, CONN. L. TRIB., Sept. 18, 2006, at 1, available at 9/18/2006 CTLAWTRIB 3 (Westlaw).

⁸⁵ *Id.*

⁸⁶ See *supra* note 16. Yearly and quarterly filings can be found at the Administrative Office of the United States Courts website: <http://www.uscourts.gov/bnkrpctystats/statistics>. Specific yearly data are available at <http://www.uscourts.gov/bnkrpctystats/sept2007/f2table.xls> and http://www.uscourts.gov/Press_Releases/bankrupt_f_sep2004.xls.

What accounts for this level of filings twenty-four months after BAPCPA's implementation? A number of explanations have been proffered, ranging from the theory that debtors have a false belief that the new law functionally prohibits consumer bankruptcies to the notion that a stronger economy has resulted in fewer people considering bankruptcy.⁸⁷ While lack of knowledge of the new law on the part of both attorneys and consumers may partly explain the low filing rates during the first twelve months after BAPCPA went into effect, it is not likely that substantial numbers of debtors would remain ignorant of the new law in 2007. The same sources informing potential filers of the new law would also alert them of their continuing ability to file for bankruptcy. News reports citing bankruptcy statistics are common; bankruptcy attorneys advertise, and friends, neighbors, and colleagues may discuss the cost and benefits of filing with someone who is in financial distress. Nor does the economic rationale ring true. Economic indicators in 2007, while good, were not out of line with past periods of prosperity when bankruptcy filing rates were two to three times higher than they are now.⁸⁸

A third factor that has been advanced as an explanation relates to attorneys dropping bankruptcy law from their practices because of the complexity of the new procedures or because of concerns over liability issues.⁸⁹ Yet more than two years after BAPCPA was enacted, there has been only anecdotal evidence that rural and small town attorneys who offer bankruptcy counsel as part of an ensemble of services may have dropped bankruptcy because of liability concerns. None of these anecdotes mention large firms specializing in bankruptcy. No statistical proof has surfaced, and a search of Westlaw and Google databases of news articles failed to turn up any pieces that dealt with this topic, despite a wealth of stories that addressed the effects of BAPCPA.⁹⁰

⁸⁷ Malan, *supra* note 84, at 12.

⁸⁸ The Gross Domestic Product (GDP) growth rate in constant 2000 dollars was 2.00 percent in 2007. In 2003, it was 2.51 percent; in 2004, 3.64 percent; in 2005, 3.06 percent; and in 2006, 2.88 percent. U.S. Dept. of Agric. Econ. Research Serv., Real Historical Gross Domestic Product (GDP) and Growth Rates of GDP for Baseline Countries/Regions 1969–2007 (Mar. 10, 2008), <http://www.ers.usda.gov/Data/Macroeconomics/Data/HistoricalRealGDPValues.xls>. Filings in calendar year 2003 stood at 1,660,245 and in 2004 at 1,597,462. *See supra* note 86.

⁸⁹ Alan D. Eisler, *The BAPCPA's Chilling Effect on Debtor's Counsel*, 55 AM. U. L. REV. 1333, 1334 (2006). Eisler states that BAPCPA holds attorneys responsible for the accuracy and truthfulness of the information contained in clients' bankruptcy schedules and statements, and imposes sanctions and civil penalties if a consumer bankruptcy case is dismissed by the court. *Id.* at 1333. He then predicts that these provisions will likely drive qualified practitioners away from bankruptcy practice. *Id.* at 1334.

⁹⁰ Jon Chavez, *Filings Down But Why?: A Year After Reforms Higher Fees and Income Tests Cited as Causes for Drop in Cases*, THE BLADE (Toledo, Ohio), Oct. 15, 2006, available at 2006 WLNR 17880938 (Westlaw).

Those who supported BAPCPA say that the most plausible explanation for the low filings is that the law has worked as intended.⁹¹ They argue that the higher filing fees, higher attorneys' fees, the change in the length and nature of automatic stays, and means tests have suppressed the number of individuals who are willing to use the bankruptcy system to escape their debts. Those who are no longer filing, they argue, are those who were previously abusing the system.⁹²

BAPCPA's defenders also may point to the increased role that chapter 13 has played in the new environment. Filings under chapter 13 in the first three months of 2007 averaged approximately 25,000.⁹³ Before BAPCPA was implemented, the three-month filings average for January 2005 through March 2005 was about 35,000.⁹⁴ The similar figure for the first three months of 2006, not long after BAPCPA went into effect, was 16,600.⁹⁵ Chapter 13 filings thus did not decline as precipitously as chapter 7 filings, and are not nearly as distant from pre-BAPCPA levels as are chapter 7 filings. As a result of these two trends, chapter 13 filings now account for a larger percentage (almost forty percent) of total bankruptcy filings than they did before the reform legislation, when they constituted about one quarter of total filings.⁹⁶

Will the post-BAPCPA filing rates of the past two years persist in the long run? That question will be addressed in the following section.

⁹¹ Shanon D. Murray, *No Challenge Seen for Bankruptcy Law*, DAILY DEAL, Dec. 8, 2006, available at 2006 WLNR 21194526 (Westlaw) (quoting fellow panelist Todd Zywicki of the George Mason University School of Law in Virginia who agreed with the notion that Congress would not review the law saying: "About 40% of Democrats supported the law. By and large, the law is working as planned.").

⁹² *Families Bankrupted By Medical Debt: Hearing Before the H. Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Todd J. Zywicki, Professor, George Mason School of Law). Most of those who have the resources to pay off at least some of their debt must have decided not to file, as through March 2007 only about 7.9 percent of consumer filers had incomes above the state median so as to be a candidate for means-testing. Samuel J. Gerdano, *BAPCPA's Early Returns: Statistics, Key Issues to Date*, June 2007, <http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48041>.

⁹³ See *supra* note 86.

⁹⁴ See *supra* note 86.

⁹⁵ See *supra* note 86.

⁹⁶ For example, in fiscal year 2007, total filings reached 801,269, and chapter 13 filings reached 310,802. Hence, chapter 13 filings accounted for thirty-nine percent of total filings. In fiscal year 2004, the total number of filings was 1,618,987, and the number of chapter 13 filings was 454,412 or twenty-eight percent of the total. See *supra* note 86.

VII. PROJECTIONS OF BANKRUPTCY FILINGS

Given the volatility exhibited by bankruptcy filings during the months following the passage of BAPCPA, forecasting bankruptcy filings would seem to be nearly an impossible task. As stated previously, no one had predicted that monthly filings would exceed 600,000 just prior to the implementation date of BAPCPA, or that filings would fall so precipitously following the implementation date. Not only was the level of filings drastically affected, but the normal monthly filing patterns (seasonality) were severely disrupted.

However, normal monthly filing patterns have begun to return. For example, as Figure 5 demonstrates below, the seasonal patterns evident before the passage and implementation of BAPCPA are largely apparent in 2007.⁹⁷ That is, the high-water marks typically occur in March and April, and the low-water marks typically occur in January, November, and December. The return of normal seasonal patterns, combined with a slow but steady rise in filing levels, has made the task of projecting future levels of filings somewhat easier.⁹⁸ The addition of new, more current data available following BAPCPA's implementation has made the projections more robust.

⁹⁷ The seasonal factors were computed using the seasonal adjustment program, X-12-ARIMA, developed by the U.S. Department of Commerce, Bureau of the Census. Seasonal factors can be used to gauge the relative expected size of each month's filings.

⁹⁸ Every year, the AO's Statistics Division (SD) issues projections of appellate court filings, bankruptcy filings, district court filings, and other caseload-related activities. The AO uses these projections to determine future resource requirements and, in turn, to develop the Judiciary's budget submission to Congress, among other purposes.

FIGURE 5: PREDICTED SEASONAL FACTORS FOR 1999, 2000, 2001, AND 2007

	1999	2000	2001	2007
January	85.2	85.1	85.2	84.6
February	103.6	103.1	102.6	99.3
March	111.4	112.8	113.7	113.3
April	111.1	111.5	111.8	108.1
May	101.5	102.2	102.9	101.8
June	104.2	103.7	103.3	104.2
July	95.9	95.2	94.9	97.8
August	100.1	100.8	101.6	102.3
September	99.3	99.4	99.4	101.5
October	103.9	102.9	102.1	103.1
November	95.2	95.5	95.5	96.5
December	87.8	87	86.2	88.2

Statistical time series models⁹⁹ are used to forecast future bankruptcy filings. Bankruptcy filings are influenced by legislative actions and economic factors, so the models may change as the nature of the economy changes or as new legislative initiatives are implemented. The specific modeling technique used by the Administrative Office of the U.S. Courts (AO) for forecasting future bankruptcy filings is dynamic regression.¹⁰⁰ Dynamic regression

⁹⁹ Statistical time series models refer to a general class of data-driven mathematical models, which assume that the past can be used to predict the future. For more information on time series models, see, for example, GEORGE E.P. BOX & GWILYM M. JENKIN, *TIME SERIES ANALYSIS: FORECASTING AND CONTROL* (1970).

¹⁰⁰ A dynamic regression model is a particular type of statistical time series model sometimes referred to as a transfer function model. In its simplest form, the dynamic regression model is an autoregressive integrated moving average model with a regression component, and this is the type of statistical model the AO uses to forecast bankruptcy filings.

The general form of this type of dynamic regression model is:

$$\Phi(B)(Y_t - \beta_1 X_{1t} - \beta_2 X_{2t} - \dots - \beta_n X_{nt}) = \theta(B)\epsilon_t$$

where:

Y_t is the dependant variable (i.e., the variable of interest) at time t ;

$X_{1t}, X_{2t}, \dots, X_{nt}$ are values of independent variables at time t ;

models can account for linear and nonlinear trends, seasonality, and outliers. In addition, leading indicators can be incorporated into the models.

The AO issues separate forecasts for the three main types of bankruptcy filings: chapter 7, chapter 11, and chapter 13.¹⁰¹ These three chapters account

ε_t is the amount of white noise at time t ;

$\Phi(B)$ is short-hand notation for autoregressive parameters (to be estimated);

$\beta_1, \beta_2, \dots, \beta_n$ are regression parameters (to be estimated);

$\theta(B)$ is short-hand notation for moving average parameters (to be estimated); and

B is a backwards difference operator.

An alternative representation is as follows:

$$Y_t = \beta_1 X_{1t} + \beta_2 X_{2t} + \dots + \beta_n X_{nt} + N_t$$

where $N_t = [\theta(B)/\Phi(B)]\varepsilon_t$.

Thus, this model is sometimes referred to as a regression model with ARIMA errors.

A particular dynamic regression model is developed for a particular set of data based on an iterative process. The best model is deemed the model that “fits” the data better than any other model. Some of the diagnostic tools available to determine the best fit include: the Akaike’s Information Criterion, the Mean Square Error, the Mean Absolute Percent Error, the Autocorrelation Function, and the Partial Autocorrelation Function. At the AO, the software X-12-ARIMA is used to identify, estimate, and compute forecasts. The method of estimation is iterative generalized least squares.

¹⁰¹ Below are the dynamic regression models that were developed for the most recent set of forecasts.

Chapter 7 filings:

$$\begin{aligned} (1 - B)(1 - B^{12})(\ln(F_t) - \beta_1 TD_t - \beta_2 E_t - \beta_3 T_t - \beta_4 O_t - \beta_5 D_{t-18}) \\ = (1 - \Theta_1 B)(1 - \Theta_{12} B^{12}) \varepsilon_t \end{aligned}$$

Chapter 11 filings:

$$\begin{aligned} (1 - B)(1 - \varphi_{12} B^{12})(F_t - \beta_1 TD_t - \beta_2 O_t - \beta_3 R_{t-12}) \\ = (1 - \Theta_1 B) \varepsilon_t \end{aligned}$$

Chapter 13 filings:

$$\begin{aligned} (1 - B)(1 - \varphi_{12} B^{12})(\ln(F_t) - \text{Constant} - \beta_1 S_t - \beta_2 TD_t - \beta_3 O_t) \\ = (1 - \Theta_1 B - \Theta_3 B^3) \varepsilon_t \end{aligned}$$

Where:

F_t is the number of filings for the respective chapters at time t ;

\ln is the natural log function, which is used to induce stationarity of variance;

TD_t is the trading day effect (including length of month and leap year) at time t ;

E_t is the Easter day effect at time t ;

T_t is the Thanksgiving day effect at time t ;

O_t is a regressor variable used to adjust the bankruptcy series for additive, level shift, temporary change, and ramp outliers;

D_{t-18} is the debt service-to-personal income ratio lagged eighteen months;

R_{t-12} is the BBB corporate loan bond rate lagged twelve months;

S_t is the fixed seasonal effect at time t ;

ε_t is the amount of white noise at time t ,

φ_1 is an autoregressive parameter (to be estimated),

Θ_1 and Θ_{12} are moving average parameters (to be estimated),

$\beta_1, \beta_2, \beta_3, \beta_4,$ and β_5 are regression parameters (to be estimated), and

B is a backward difference operator.

for nearly all filings. Figures 6 through 8 below present actual chapter 7 filings, chapter 11 filings, and chapter 13 filings, respectively, from January 2003 through September 2007, as well as forecasts for filings from October 2007 through June 2010. Forecasts were prepared before BAPCPA was signed into law, and these are included to give the reader a sense of where filings might have been absent BAPCPA.

For brevity, we have included the abridged form for many of the regressor variables. In practice, the models have a separate variable for each day of the week for the trading day variable and a separate variable for each outlier identified by the user or by the software. In practice, the designation for the debt service-to-personal income model is a distributed lag model with twelve lags beginning with lag $t-7$ and ending with lag $t-18$; and, in practice, the corporate loan bond rate model is a distributed lag model with twelve lags beginning with lag $t-1$ and ending with $t-12$. The distributed lag models were included to control for the cyclical nature of bankruptcy filings.

The SD prepares new sets of forecasts about three times a year, and the models' parameterizations may change to reflect the addition of more current data.

FIGURE 6: CHAPTER 7 FILINGS

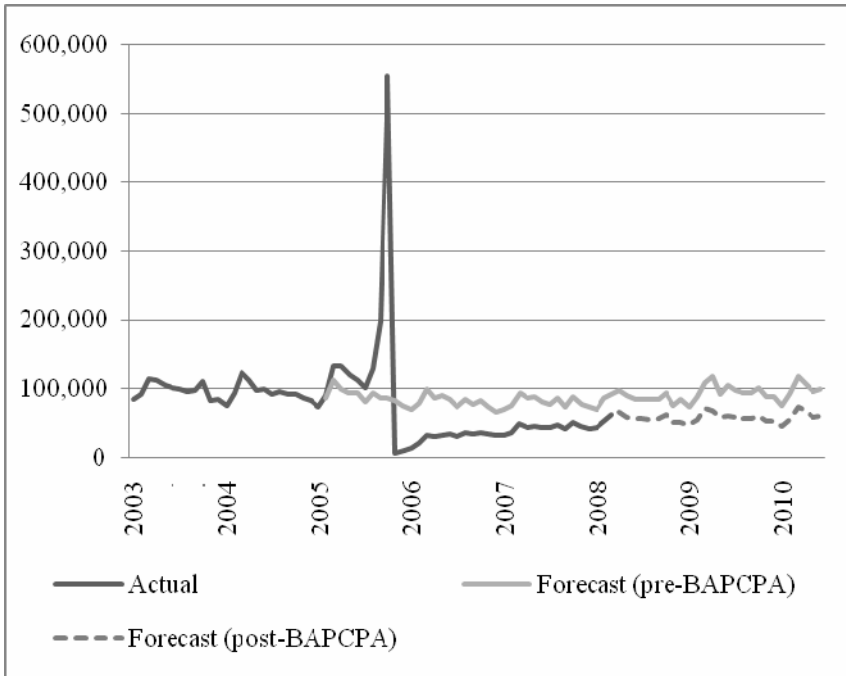


FIGURE 7: CHAPTER 11 FILINGS

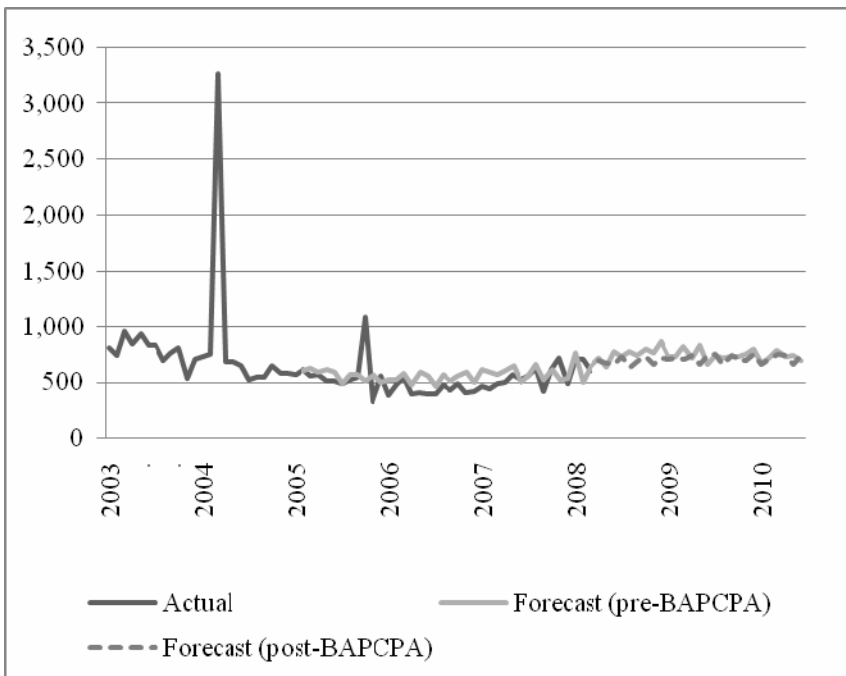
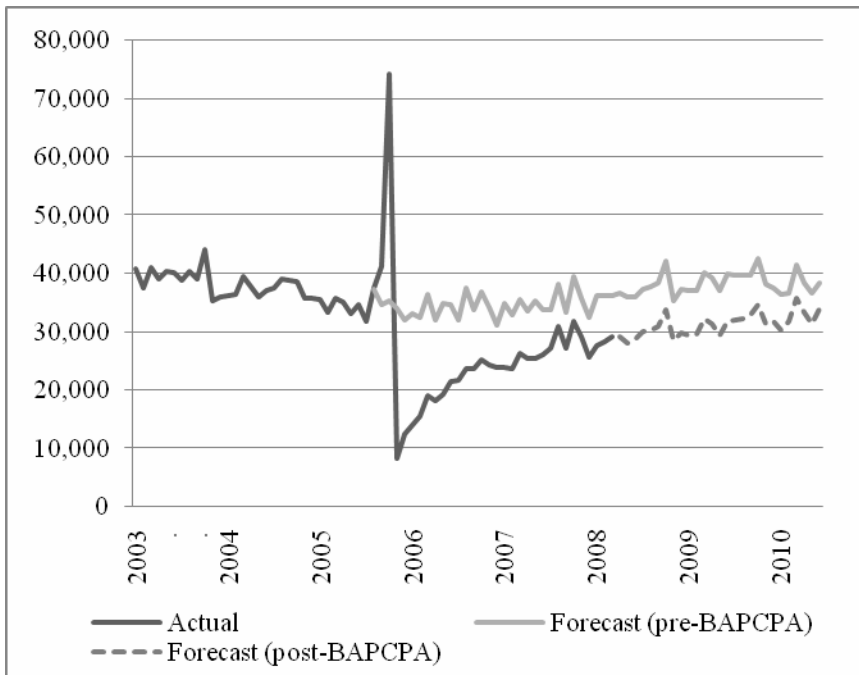


FIGURE 8: CHAPTER 13 FILINGS



As Figure 6 indicates, the AO expected chapter 7 filings to decline slightly in forecasts made before the enactment of BAPCPA. However, chapter 7 filings began increasing (faster than the forecasting models predicted) following the passage of BAPCPA in March 2005. Filing rates then exploded just prior to the implementation of BAPCPA. To a lesser extent, the same pattern occurred for chapter 11 (see Figure 7) and chapter 13 (see Figure 8) filings. The huge spike in chapter 7 filings just prior to the implementation date (October 17, 2005) of BAPCPA and the subsequent plunge in filings suggest that, irrespective of the direct impact of BAPCPA, it would take some time for filing levels to return to pre-BAPCPA levels. Given that the post-BAPCPA forecasts are significantly lower than the pre-BAPCPA forecasts, it appears that BAPCPA has had a greater impact on chapter 7 filing levels than was anticipated. The chapter 7 forecasts in Figure 6 show a sustained level shift downward (from the expected pre-BAPCPA levels), whereas the chapter 13 forecasts in Figure 8 show a gradual return to (the expected) pre-BAPCPA levels. Chapter 11 filing levels in Figure 7 appear to be largely unaffected by

BAPCPA, apart from the spike in filings during October 2005. In fact, the large number of chapter 11 petitions (mostly relating to a retail footwear company) filed in March 2004 overshadows the number that were filed in October 2005.

Our models indicate that the impact of BAPCPA is significant. Further, as a direct result of BAPCPA, chapter 7 filing levels may take longer to return to pre-BAPCPA levels because, under BAPCPA, a chapter 7 petition has become much more expensive and time-consuming. Before BAPCPA, individual debtors filed most petitions under chapter 7. BAPCPA was designed to encourage debtors to file chapter 13, so one would expect chapter 13 filing levels to recover more quickly, and the current data reflect this.

Filings under all three chapters are projected to rise over the next two years with chapter 13 filings rising the fastest followed by chapter 7. Several factors support this prediction. Despite the limitations imposed by BAPCPA, bankruptcy protection was not eliminated, and, arguably, the underlying drivers of bankruptcy remain.¹⁰² As Figure 9 indicates below, consumer debt (as measured by the total consumer installment credit as a percentage of income or the debt service ratio)¹⁰³ remains at or near record levels, suggesting

¹⁰² Before the passage of BAPCPA, much debate centered around the root causes of bankruptcy, with some social scientists arguing that high debt levels, poor financial literacy, and inadequate health coverage were important drivers, and some economists arguing that economic opportunism contributed to the rising numbers of bankruptcy filings. See, e.g., Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the "Misguided Reform" of the Bankruptcy Law*, 84 TEX. L. REV. 1481 (2006).

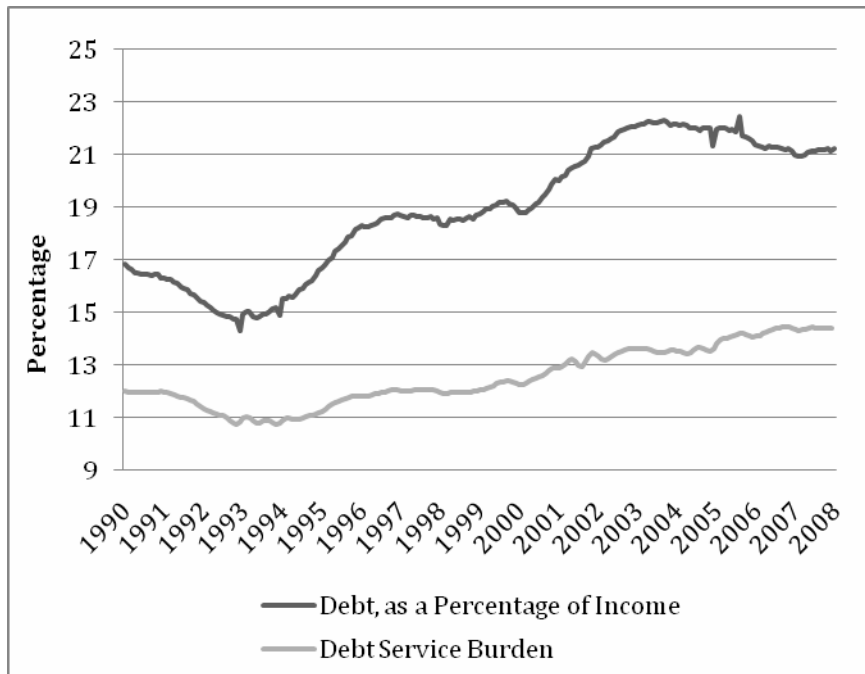
¹⁰³ The data used to develop the debt measures came from a number of sources. The consumer installment debt as percentage of income series synthesizes two sources: the consumer installment debt series and the personal income series. The consumer installment debt series came from the U.S. Board of Governors of the Federal Reserve System's "Consumer Installment Credit B G19," showing percent of disposable income devoted to interest and principal payments from January 1990 through January 2008, and is available at http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.txt. The personal income series came from U.S. Department of Commerce Bureau of Economic Analysis's "Table 2.6. Personal Income and Its Disposition, Monthly" for January 1990 through January 2008 and is available at <http://www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=75&Freq=Month&FirstYear=2008&LastYear=2008>.

The debt service ratio series came from the U.S. Board of Governors of the Federal Reserve System's "Household debt service payments and financial obligations as a percentage of disposable personal income; seasonally adjusted" for the first quarter of 1990 through the first quarter of 2008. These quarterly data are available at <http://www.federalreserve.gov/releases/housedebt/default.htm>. These data series are updated periodically, and previously published monthly or quarterly data also may be revised. The links offered here provide the latest available data, so the data itself may vary slightly from the data that were used to create Figure 8.

The data used here came from [Freelunch.com](http://freelunch.com), a free source of data provided by Moody's Economy.com. After registering and logging in with [Freelunch.com](http://freelunch.com), users can access the consumer installment debt series through http://www.economy.com/freelunch/fl_dictionary.asp?m=34174038-A1EF-

that many consumers are living on the edge of financial insolvency.¹⁰⁴ The plethora of subprime mortgage loans, the rising rate of foreclosure, and the number of mortgages that will be affected by adjustable rate mortgage resets increase the likelihood that many consumers are facing challenging financial conditions.¹⁰⁵

FIGURE 9: CONSUMER DEBT



4C70-9374-59144B50A3F5&h=H00200004 and choosing “Total Consumer Credit—Seasonally Adjusted.” The personal income series can be accessed through http://www.economy.com/freelunch/fl_dictionary.asp?m=34174038-A1EF-4C70-9374-59144B50A3F5&h=H00140004&f=0&c=undefined and choosing “Total personal income.” The (monthly) debt service ratio series can be accessed through http://www.economy.com/freelunch/fl_dictionary.asp?m=34174038-A1EF-4C70-9374-59144B50A3F5&h=H00040012&f=0&c=undefined and choosing “Debt Service Ratio (debt service burden).”

¹⁰⁴ Consumer debt is consistent with bankruptcy filings. For example, see the Bankruptcy Statistics section of the American Bankruptcy Institute website: http://www.abiworld.org/Content/NavigationMenu/NewsRoom/BankruptcyStatistics/Bankruptcy_Filings_1.htm.

¹⁰⁵ See, e.g., *Monetary Policy and the State of the Economy: Hearing Before the H. Fin. Serv. Comm.*, 110th Cong. (2007) (statement of Ben S. Bernanke, Chairman of the Board of Governors, U.S. Federal Reserve Bank).

Many bankruptcy attorneys saw their business plummet after the implementation of BAPCPA, in part because many debtors filed petitions just before the implementation date of BAPCPA, and in part because of increases in the cost and time now required to file a typical bankruptcy petition. As bankruptcy attorneys and debtors become more familiar with the new restrictions imposed by the Act, they will likely adjust and consider the process of filing a bankruptcy petition more acceptable.¹⁰⁶ A resumption in business by attorneys that formerly handled bankruptcy cases (but dropped that portion of their business in response to BAPCPA) could be the result, and this could lead to a rise in overall filings.

The recent study *Aging and Bankruptcy* points to growing debt problems among the elderly, particularly the aging baby boomers.¹⁰⁷ This study, which examined the nation across all age categories, indicates that the elderly are increasingly likely to file for bankruptcy, and that the problem may not be short lived.¹⁰⁸ Growing credit card debt, mortgage debt, and health care costs at a time when real incomes are declining make financial insolvency a real possibility.¹⁰⁹ A rise in bankruptcies throughout the foreseeable future could be the result. Although the long-term impact of BAPCPA remains unclear, one may reasonably assume that bankruptcy filings one day will reach pre-BAPCPA levels. Precisely when this will happen is open to debate.¹¹⁰

¹⁰⁶ See Brett Weiss, "Not Dead Yet:" *Bankruptcy After BAPCPA*, MD. B. J., May/June 2007, at 17.

¹⁰⁷ John Golmant & Thomas Ulrich, *Aging and Bankruptcy*, AM. BANKR. INST. J., May 2007, at 26, 26.

¹⁰⁸ *Id.* at 54.

¹⁰⁹ *Id.*

¹¹⁰ While the forecasting models developed by SD have a good track record, SD expects the error rates associated with the most recent set of forecasts to deviate from the historical norm because of the many uncertainties associated with BAPCPA. The particular forecasting models presented in this paper were used to produce monthly estimates, and the monthly estimates were then aggregated to provide the twelve-month period estimates that conform to the Judiciary's budget process. For example, in developing the 2009 budget submission to Congress, the models are used to compute monthly estimates through June 2010. The monthly estimates were then aggregated to obtain estimates for the twelve-month period ending June 30, 2008, the twelve-month period ending June 30, 2009, and the twelve-month period ending June 30, 2010. The aggregate estimate for the twelve-month period ending June 30, 2009 will be used for the actual budget submission to Congress. Every year (about three times a year), SD computes three sets of forecasts: the current year forecast (three to six months in length); the budget submission forecast (nine to eighteen months in length); and the third year forecast (twenty-one to thirty months in length). Generally, longer forecast estimates are less accurate.

The credibility of each forecast is assessed annually. SD computes the most recent error rate and compares it to the historical error rate. The mean absolute percent error (MAPE) is used to measure the historical error rate. The MAPE is the arithmetic average of all error rates for the past twenty-two years. The current MAPE table appears as follows:

CONCLUSION

Bankruptcy legislation has historically been a vehicle to assist business and the economy. The Bankruptcy Reform Act of 1978 represented a change in emphasis, as many of its provisions were directed toward the nonbusiness debtor. In the following decades, increasingly large numbers of Americans availed themselves of the opportunity to get out from under their debts. Few would argue that the reform legislation passed in 1978 was solely responsible for the growth in bankruptcy filings to the 1.5 million level in the first years of the new millennium, but in conjunction with other factors—such as a great expansion in consumer credit—the law was seen by many as having contributed to the large number of filings.¹¹¹ While the degree to which the law was culpable is a subject of debate,¹¹² the great expansion in filings in the years following its enactment provided ammunition for advocates of a new round of reform.¹¹³

With the passage of BAPCPA, bankruptcy legislation returned to a more traditional business orientation as Congress responded to demands by the banking and credit card industries to make the U.S. Bankruptcy Code less favorable to nonbusiness bankruptcy filers. The early results show that this effort is succeeding, with bankruptcy filings remaining at only half their pre-BAPCPA level for the almost two years after the law took effect, with projections indicating only a slow return to pre-BAPCPA levels. Its supporters have even asserted that its effects on the disadvantaged have been minimal.¹¹⁴

Current Year	Budget Submission Year	Third Year
1.5	6.3	14.1

This table suggests that, for the budget submission year estimates, SD has been within 6.3 percent of the actual number. The forecasting error rates have improved almost every year since SD has been keeping track of the error rates (implying that the MAPEs have gotten smaller each year).

¹¹¹ “[William] Wessler [a Gulfport, Miss. bankruptcy attorney] explained that in 1979, a change in federal law made it easier to file bankruptcy, so the number grew dramatically each year. Then in 2005, the [new] law put a halt to that.” Karen Nelson, *Coast Bankruptcy Numbers Down*, SUN HERALD, Apr. 21, 2008, at A-1.

¹¹² Bhandari & Weiss, *supra* note 35, at 1–4.

¹¹³ See Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071 (2005).

¹¹⁴ See, e.g., *Second Anniversary of the Enactment of the Bankruptcy Abuse Prevention And Consumer Protection Act of 2005: Are Consumers Really Being Protected Under the Act?: Before the H. Subcomm. on Commercial and Admin. Law, H. Comm. on the Judiciary*, 110th Cong. (2007) (statements by the American Bankers Association, America’s Community Bankers, Consumer Bankers Association, Independent Community Bankers of America, the Financial Services Roundtable, Mortgage Bankers Association, and the U.S. Chamber of Commerce).

The outcomes of BAPCPA for the courts are less clear. The drop in filings has been accompanied by a dramatic increase in the amount of work per bankruptcy petition, not only for the bankruptcy attorney, but also for the bankruptcy court. It has been estimated that the number of motions per case has increased fifty-nine percent, that orders filed per case have grown thirty-five percent, and that notices sent by the Judiciary's Bankruptcy Noticing Center have jumped forty-one percent. See Alan Wechsler, *Complex Cases Snarling Court*, ALBANY TIMES UNION, June 30, 2007, at B10. The estimates were constructed from statistics collected from ten courts, and the survey compared periods before and after BAPCPA. Thus, although the actual number of filings has gone down, the actual time required per case has gone up substantially. Jacob Barron, *Work Per Case Jumps in Bankruptcy Courts*, CMA DAILY NEWS, June 19, 2007, http://cmabcs.typepad.com/cmadaailynews/2007/06/work_per_case_j.html.

We do not know if this is a permanent phenomenon. As the number of bankruptcy cases slowly increases, it remains to be seen whether efficiency of processing post-BAPCPA filings will approach that of the pre-BAPCPA era.