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Adapting to BAPCPA

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ADAPTING TO BAPCPA

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*"From the perspective of consumer law in general, the most striking feature of consumer bankruptcy practice is that it exists. It not only exists--it is a booming practice area, one of the few where middle to lower-middle class consumers are not only served, but are the mainstay of the practice."*¹

Consumer bankruptcy and its practice still exist, despite the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA),² which could have been a catastrophe for the system. Although the legislation's proponents argued that the statute was necessary to prevent abusive "can pay" debtors from obtaining the easy discharge of their debts,³ many commentators understood from the beginning that the real risks to consumer bankruptcy were the statute's side effects: that it would raise costs, reduce access across the income spectrum, and generally make the system unworkable.⁴

As I have argued elsewhere, this contradiction between BAPCPA's stated goal and its likely effects was not a coincidence but rather the result of a strategy used in the long-term contraction of the United States safety net.⁵ The fear of abuse by non-needy individuals is endemic to U.S. safety net *184 programs, which enables policymakers who oppose the safety net to use heightened abuse screening as a way of implementing procedural barriers that make the system less accessible to all--a technique known as "bureaucratic disentanglement."⁶

At the time of BAPCPA's passage, many feared that it would, in fact, effectively dismantle the consumer bankruptcy system. I recently interviewed fifty-three consumer bankruptcy attorneys about BAPCPA, and a significant minority of them described fearing the worst. As one put it, "My fear when it passed is that bankruptcy was going to go away."⁷ Another attorney more colorfully stated that "It was panic times."⁸ Others described thinking that "Chapter 7 would nearly disappear as an option"⁹ or that "[T]he middle class wasn't going to be able to file."¹⁰ A related fear was that "[I]t would make the ability to practice consumer bankruptcy law virtually impossible,"¹¹ "devastate the debtor practice,"¹² or "be so draconian" that practitioners' jobs would become infeasible.¹³

These anxieties were reasonable because a number of BAPCPA provisions appeared likely to impair the consumer bankruptcy system's ability to function. The means test¹⁴ at the "heart"¹⁵ of the legislation was expected to be over-inclusive, sweeping up struggling debtors as well as abusers;¹⁶ generate litigation that would "burden the courts for decades to come";¹⁷ mire *185 debtors in overwhelming paperwork; and drive up costs.¹⁸ Similarly, the credit-counseling requirement¹⁹ presented concerns that it would cause delays,²⁰ raise costs,²¹ humiliate debtors,²² and push

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them into the hands of an exploitive industry that would “poach” potential clients by luring them into debt management plans.²³

Another set of fears concerned the “reasonable inquiry” certification,²⁴ potential sanctions,²⁵ attorney liability,²⁶ and audits of case files²⁷ that collectively threatened to punish attorneys for not conducting a level of investigation that would make practicing consumer bankruptcy law prohibitively expensive.²⁸ BAPCPA also targeted attorneys with the “debt relief agency” provisions²⁹ that seemed likely to confuse consumers with inaccurate information,³⁰ blur the distinction between lawyers and bankruptcy petition preparers,³¹ interfere with attorney consultations,³² increase attorney costs, and “shame” consumer bankruptcy law firms out of practice.³³ There were, of course, many other provisions with the potential to make the consumer bankruptcy system less functional. Examples include the limited automatic stay for repeat filers,³⁴ the ability of creditors to designate an address for bankruptcy correspondence,³⁵ and the elimination of ride through.³⁶

Some of these scenarios materialized, but many did not. In fact, with a few exceptions, the harm that remains a decade later boils down to the increased costs of filing³⁷ and related ways that BAPCPA made consumer bankruptcy less accessible. In other words, it was BAPCPA's indirect effects rather than its direct ones that are still relevant, a trend that applies not only to the means test but also to credit counseling, the limited stay for repeat filers, the audits, and the “debt relief agency” provisions.³⁸

Even taking indirect effects into account, the sky did not fall on bankrupt consumers or their attorneys.³⁹ Filings are down,⁴⁰ and BAPCPA may be partially responsible,⁴¹ but the system has not become dysfunctional as it has for other safety net programs that experienced bureaucratic disenfranchisement.⁴² For example, there is no evidence suggesting that debtors now face excruciatingly long waits as the consumer bankruptcy system processes their cases,⁴³ a problem that has befallen other programs.⁴⁴ And consumer bankruptcy attorneys have not fled.⁴⁵ As one interviewee stated, “BAPCPA was a significant change but I am still here.”⁴⁶ More generally, one of my interview questions was whether participants knew attorneys who had left the practice because of BAPCPA. Among the attorneys who responded affirmatively, most mentioned only “dabblers” and those who were already near retirement.⁴⁷ Attorneys are also still representing the overwhelming majority of consumer bankruptcy filers. The rate of *pro se* filings appears to have decreased post-BAPCPA.⁴⁸

My goal for this article was to begin answering the question of how consumer bankruptcy survived. I have previously argued that the reason is its location in the judicial system, and that attorneys, judges and other system actors play a protective role.⁴⁹ In other programs targeted by bureaucratic disenfranchisement, potential beneficiaries become mired in seemingly endless paperwork, documentation requirements, and appeals.⁵⁰ I had some evidence that consumer attorneys helped prevent these negative scenarios; post-BAPCPA *pro se* filers had worse outcomes than both their pre-BAPCPA counterparts and post-BAPCPA represented debtors.⁵¹ So it made sense to begin this project by seeking to understand how consumer bankruptcy practice adapted to BAPCPA.

I interviewed fifty-three consumer bankruptcy attorneys through a snow ball sample, meaning that I began with a few interviewees I already knew, who referred me to other potential candidates.⁵² The next rounds of interviewees provided additional referrals until I reached the point at which I was not learning new information from the most recent interviews.

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