**“No Money Down” Bankruptcy**

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**ABSTRACT**

This Article reports on a breakdown in access to justice in bankruptcy, a system from which one million Americans will seek help this year. A crucial decision for these consumers will be whether to file a chapter 7 or chapter 13 bankruptcy. Nearly every aspect of their bankruptcies—both the benefits and the burdens of debt relief—will be different in chapter 7 versus chapter 13. Almost all consumers will hire a bankruptcy attorney. Because they must pay their attorneys, many consumers will file chapter 13 to finance their access to the law, rather than because they prefer the law of chapter 13 over chapter 7.

Attorneys charge about $1,200 to file a chapter 7 bankruptcy; their debt-laden clients must pay this amount upfront. Attorneys charge about $3,200 to file a chapter 13 bankruptcy, but clients can pay attorney fees over time as part of their cases. Chapter 7 and 13 bankruptcies also differ in the relief achieved. Almost all chapter 7 cases end with the debtor receiving a discharge of debts. In contrast, only around one-third of chapter 13 cases end in discharge.

This Article exposes the increasingly prevalent phenomenon of debtors paying *nothing* in attorneys’ fees to file chapter 13. New data from the Consumer Bankruptcy Project, our original empirical national study, suggest that these “no money down” consumers are similar to those who use chapter 7. However, because they cannot afford to pay their attorneys up front, these “no money down” bankruptcy debtors suffer. They pay $2,000 more and have their cases dismissed at a rate 18 times higher than if they had filed chapter 7.

The two most significant predictors of whether a consumer files a “no money down” bankruptcy are a person’s place of residence and a person’s race. We could not identify legitimate ways that these factors correlate with

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debtors' needs for the substantive legal benefits of chapter 13. "No money down" bankruptcy can be a distortion in the delivery of legal help. We suggest reforms to how attorneys collect fees from consumer debtors that will reduce the potential conflict between clients' interests and attorneys' interests. The reforms will deliver access to justice and improve the functioning of the bankruptcy system.

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## I. INTRODUCTION

Across the legal system, attorneys serve as intermediaries, fostering or hindering access to justice. This relationship between attorneys and clients exists in consumer bankruptcy. Over a million people file bankruptcy every year,[1] and the overwhelming majority use an attorney.[2] Consumers' access to and success in bankruptcy is heavily dependent on their attorneys.

One of the most important decisions a person makes about bankruptcy is whether to file chapter 7 or chapter 13. These chapters are two distinct proceedings in substance and process. Chapter 7 results in a quick discharge, relieving people from their debts soon after filing, but people must give up any assets over certain limits.[3] Chapter 13 requires debtors to complete a three-to-five year repayment plan before receiving a discharge, but people may keep all property, such as homes and cars, as they continue to pay.[4] More than 95% of people who file under chapter 7 receive a discharge.[5] In contrast, a mere one-third of chapter 13 cases end in a completed repayment plan such that debtors receive a discharge.[6] Most chapter 13 bankruptcies end without debt forgiveness.

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[1] In 2015, there were 819,000 bankruptcy filings. Bob Lawless, "Bankruptcy Filings Drop 10% in 2015," *Credit Slips* (Jan. 7, 2016), http://www.creditslips.org/creditslips/2016/01/bankruptcy-filings-drop-10-in-2015.html. A husband and wife may file a joint petition. 11 U.S.C. § 302) Therefore, one bankruptcy petition will represent two persons in joint cases. In our data, 24.4% of the bankruptcy cases in 2015 were joint cases, meaning the 819,000 bankruptcy petitions in 2015 were filed by just over 1 million people.

[2] Consumer Bankruptcy Project (CBP) data from 2007 and 2013-15 show that only 8.2% of chapter 7s and 6.4% of chapter 13s are filed without an attorney (although some of these cases use a bankruptcy petition preparer). The CPB is a series of empirical studies conducted in the last three decades by interdisciplinary research teams. *See infra* Part III.A for a discussion of the CBP. *See also* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report* 63-64 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132913 (finding that in a sample of cases filed in 2007 and 2008, 5.8% of the chapter 7 cases and 2% of the chapter 13 cases were filed *pro se*). People who file *pro se* have worse outcomes than people who have an attorney. *Id.* at 64 (finding in the sample that 0.8% of chapter 13 cases filed *pro se* ended with a discharge and 28.2% of chapter 7 cases filed that ended in a dismissal were *pro se*); *see also* Angela K. Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WILLIAM & MARY L. REV. 1933, 1973 (2011) (reporting that in a sample of chapter 7 cases filed in 2007, 17.6% of *pro se* cases ended in dismissal versus 1.9% of the cases filed with the help of an attorney).

[3] People are allowed to keep some property to aid in their "fresh start," a phrase that comes from *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

[4] *See infra* Part II.A for a discussion of chapters 7 and 13.

[5] *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 107 (2011) (noting that the chapter 7 discharge rate exceeds 95%).

[6] *See* Sara S. Greene, Parina Patel, & Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Success*, 101 MINN L. REV. 1031, 1042 (2017) (finding that 36.5% of a sample of chapter 13 cases filed in 2007 ended in discharge after plan completion); *id.* at 107-08 (2011) (overviewing studies finding that only one-third of chapter 13 debtors receive a discharge)

Bankruptcy attorneys play an integral role in helping people understand the benefits and drawbacks of choosing either a chapter 7 or a chapter 13 bankruptcy. In some districts, most consumers file under chapter 7, while in other districts, most consumers file under chapter 13.[7] Research shows that this substantial variation across judicial districts stems, at least in significant part, from how bankruptcy attorneys counsel their clients. Chapter choice is often shaped by extra-legal factors and attorneys' best interests, rather than clients' needs.[8] Consider one example: even after controlling for judicial district, financial situation, and demographic characteristics, African Americans are far more likely than non-African Americans to file under chapter 13.[9]

This Article examines how money influences whether people file chapter 7 or 13. Our data analysis shows that chapter choice is powerfully shaped by when debtors must pay their attorneys and how attorneys can receive payments. These financial considerations have nothing to do with the substantive law that governs chapter 7 and chapter 13 bankruptcies, such as the different approaches to secured debts and eligibility to file.

Attorneys charge an average of $1,229 to file and represent a debtor in a chapter 7 case, and an average of $3,217 to file and represent a debtor in a chapter 13 case.[10] Because of the Bankruptcy Code's provisions regarding payment to professionals, attorneys require consumers in chapter 7 to pay all attorneys' fees prior to filing.[11] In contrast, the Bankruptcy Code allows chapter 13 debtors to stretch out attorney's fees over all or part of the repayment period. This strategy lets a consumer file a bankruptcy with the help of an attorney, with little or "no money down".

From this dichotomy emerges a money problem, both for bankruptcy attorneys and people seeking to file bankruptcy. Attorneys want to ensure that they are paid, but many people who want to file lack the money to pay the attorneys' fees at the

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[7] *See* Jean Braucher, Dov Cohen, & Robert M. Lawless, *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL L. STUDIES 393, 395-96 (2012) (overviewing the variations in incidences of chapter 13 proceedings as compared to chapter 7 proceedings across the United States).

[8] *See id.* at 396-97 (discussing studies finding that attorneys play a key role in chapter choice).

[9] *Id.* at 393-94 (finding that African Americans disproportionately file under chapter 13 and that consumer bankruptcy attorneys appear to be guiding African Americans into chapter 13).

[10] These figures are based on our data from 2007 and 2013-15, inflated to July 2015 dollars based on the Consumer Price Index. Because of how bankruptcy attorneys report their fees, we are unable to disaggregate attorneys' fees from bankruptcy petition filing fees. Most of the attorneys' fee data likely include the filing fee. The filing fee is $335 for a chapter 7 and $310 for a chapter 13. *See also* Lupica, *supra* note 2, at 37, 51 (reporting the mean attorneys' fee, in 2005 dollars, was $968 for a discharged chapter 7 no-asset case, $1,072 for a discharged chapter 7 asset case, and $2,564 for a discharged chapter 13 case).

[11] *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (discussing these provisions and holding that a chapter 7 debtor's attorney may not be compensated from bankruptcy estate funds unless the attorney is employed by the trustee under 11 U.S.C. § 327).

time they need a bankruptcy attorneys' help.[12] When people arrive in attorneys' offices, they have struggled for years to repay their debts, often calling on family and friends, taking out payday and other loans, and cutting back on necessary expenses.[13] They may believe immediate bankruptcy is their only refuge. Yet, chapter 7 requires immediate payment of the attorneys' fees.

The workaround, which we are the first to examine carefully, is for the consumer to pay *nothing* in attorneys' fees before filing chapter 13.[14] We term these "no money down" bankruptcies, as the consumer begins the process of purchasing legal help without an initial payment. Attorneys suggest that these people file a chapter 13 bankruptcy now and pay all attorneys' fees during the repayment plan. The attorneys ensure they have a client and the fee for chapter 13 is much steeper than if the client filed chapter 7. Conversely, the anxious and desperate debtors will be able to file bankruptcy immediately. From the debtor's perspective, an attorney offering a "no money down" chapter 13 case essentially is proposing to lend the funds necessary to file, seemingly interest-free, to the debtor.

On first glance, the "no money down" bankruptcy may seem like a winner all around. Attorneys get clients; debtors get immediate bankruptcy relief upon filing; and the system maintains the appearance of ready access for all. We offer a powerful critique of such an easy conclusion by making a careful analysis of the cases in our new empirical study.

Using data from the Consumer Bankruptcy Project in 2007 and 2013-15,[15] we document the "no money down" phenomenon that is reshaping the consumer bankruptcy system. We reveal that "no money down" bankruptcies increased significantly between 2007 and 2013-15.[16] Our analysis shows "no money down" cases disproportionally affect people based on where they live and on their race.

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[12] *See* Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEORGETOWN L. J. 289, 319-24 (2010) (investigating how tax refunds and paychecks influence bankruptcy filing patterns).

[13] *See infra* Part III.C.1 for a discussion of how long people report struggling with debts before filing.

[14] The disparity in timing of when attorneys' fees must be paid has led to what are termed "fee-only" chapter 13 plans. These are cases in which nothing is paid to creditors; the sole purpose of the chapter 13 being to provide for only for the payment of attorneys' fees over several months or years. As overviewed in Part II.B, the legality of "fee-only" plans has been discussed in prior work. Our Article looks at a related but distinct issue with chapter 13 cases. We focus not on the nil or de minimis amount of recovery to creditors, but on documenting the extent to which people are filing chapter 13 without paying any upfront attorneys' fees and how these debtors' financial problems are nearly identical to people who file chapter 7. Our rich analysis of the "no money down" cases provides a more complete and nuanced picture of an access to justice problem than the prior work limited to "fee-only" chapter 13 plans.

[15] *See infra* Part III.A for a description of the CBP.

[16] *See infra* Part III.B for details about the increasing incidence of "no money down" bankruptcy.

Debtors from judicial districts with high chapter 13 filing rates are more likely to file "no money down" chapter 13 cases. African Americans are more likely to file "no money down" chapter 13 cases than other similarly situated debtors. Both findings are statistically significant and robust.

A tight correlation exists between "no money down" bankruptcy and African Americans' higher likelihood of filing under chapter 13. We postulate the correlation is linked to how attorneys counsel debtors. The phenomenon of a "no money down" filing of chapter 13 bankruptcy cases may explain much of the racial disparity in chapter 13 filing rates.[17]

Cash-strapped debtors using a "no money down" chapter 13 can be problematic because the approach reduces the efficiency of bankruptcy law and produces unequal effects. The cost, duration, and low discharge rate of chapter 13 mean that the existence and growth of "no money down" bankruptcy may be harming some consumers and distorting the delivery of legal help.

Our data show that a distinct subset of debtors files "no money down" chapter 13 bankruptcy. Based on their finances, the "no money down" families look more like those who file under chapter 7 than those who file under chapter 13.[18] "No money down" debtors seem better suited to chapter 7 proceedings if they could find enough cash to pay attorneys' fees upfront. If they had filed chapter 7, based on 2007 Consumer Bankruptcy Project data, 97% of their cases would have ended in a discharge of their debts. Instead, only 45% of "no money down" chapter 13 cases in the 2007 sample ended in a discharge of debts. This means that 55% of "no money down" debtors exited bankruptcy without debt forgiveness, despite spending significant time and money seeking bankruptcy help.[19] Regardless of what drives people to file chapter 13 when a chapter 7 case may be legally preferable, a "no money down" bankruptcy is, at best, inefficient, and at worst, a grave social harm.

These findings suggest that access to a bankruptcy discharge—which is determined in large part by whether the case is a chapter 7 or a chapter 13 filing—varies depending on where a person lives and the person's race. Our data cannot reveal how attorneys discuss bankruptcy chapter options with their clients, or why debtors ultimately file a "no money down" bankruptcy, despite chapter 13 costing 250% more in attorneys' fees than chapter 7.[20] However, both bankruptcy attorneys and debtors in good faith might propose and accept the "no money down" option—

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[17] *See infra* Part III.C.2 for an analysis of the regional disparities and African Americans' use of "no money down" bankruptcy.

[18] *See infra* Part III.C.1 for additional ways in which "no money down" filers differ.

[19] *See infra* Part III.D for a full analysis of case outcomes from the 2007 and Current CBPs.

[20] *See infra* Part III.B, Figure 2.

it solves their money problems.[21] Our findings documenting the "no money down" phenomenon are a powerful challenge to the ideal of law being delivered based on clients' needs.

Part II of the Article describes the salient features of chapter 7 and chapter 13, with a focus on bankruptcy attorneys' fees. Part III uses our Consumer Bankruptcy Project data to document "no money down" bankruptcy, to investigate which people file "no money down" chapter 13 cases, and to assess these cases' outcomes. It also proffers some possible explanations for the increased prevalence of "no money down" bankruptcy despite its relative demerits. Part IV situates "no money down" bankruptcy within a broader social pattern of cash-constrained, lower-income individuals paying more for crucial legal services. We discuss the implications of "no money down" bankruptcies for access to justice and develop reforms to the payment of bankruptcy attorneys' fees that would equalize access to bankruptcy relief. Part V concludes.

## II. BANKRUPTCY CHAPTER CHOICE AND ATTORNEYS' FEES

### A. Chapter 7 versus Chapter 13

People who cannot repay their debts have essentially two options in bankruptcy: filing under chapter 7 or under chapter 13.[22] Each chapter provides for a particular "deal" between debtors and creditors. The usefulness of each deal depends on the debtor's financial circumstances and goals.

In chapter 7, the debtor receives a relatively quick discharge in exchange for turning over all non-exempt assets, which are sold for the benefit of creditors.[23] Most debtors own little property that is not exempt under the Bankruptcy Code. Exemptions allow the debtor to retain some necessities, such as clothing and household goods.[24] In addition, if the debtor has pledged an asset as collateral to secure a loan made by a creditor, that encumbered piece of property is not available

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[21] *See infra* Part III.E for a full discussion of why bankruptcy attorneys may offer and people may choose to file with "no money down."

[22] People also may file under chapter 11, which provides for reorganization of debts. However, the vast majority of consumers file under chapters 7 and 13. *See Caseload Statistics Data Tables*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited Aug. 11, 2016). The discussion thus focuses on chapters 7 and 13.

[23] *See* Porter, *Pretend Solution*, *supra* note 5, at 116 (describing chapter 7).

[24] *See* Braucher et al., *supra* note 7, at 394 (discussing exemptions). The exemptions available in bankruptcy are determined by state or federal law depending on the debtor's state of residence. The exemptions vary significantly in different states. *See* ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 80 (7th ed. 2014).

for liquidation.[25] In practice, more than 90% of consumer chapter 7 cases are "no-asset," meaning the debtor owns no property subject to liquidation.[26] More than 95% of people who file under chapter 7 receive a discharge, which they typically receive within four to six months of filing.[27]

Chapter 13, in contrast, is a long, complicated, and often a less successful proceeding.[28] Unlike in chapter 7, people who file under chapter 13 keep all their assets. In exchange, they must pay their "disposable income" to their creditors over a three- to five-year repayment plan approved by the bankruptcy judge.[29] As much income as possible goes to creditors, with very modest budgets imposed on debtors.[30] In most cases, only upon completion of this repayment plan is the debtor granted the discharge.[31] Because of the ability to retain property, chapter 13 is popular with people who want to save their homes from foreclosure.[32]

To receive a discharge, a chapter 13 debtor must journey from filing their bankruptcy paperwork, then through a judicial plan confirmation to make months of payments, and finally to complete all requirements under the repayment plan. This process may take over six years. Only one-third of chapter 13 cases make it to a discharge.[33] The remaining two-thirds of cases generally end with a dismissal, leaving the debtor without any forgiveness of debts.[34] A small fraction of incomplete cases is converted to chapter 7 for liquidation.[35]

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[25] *See id.* (noting the effect of secured credit).

[26] *See* Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 AM. BANKR. L.J. 795, 797 (2009) (finding that 93% of individual chapter 7 debtors who filed bankruptcy petitions in 2007 entered bankruptcy with no distributable assets); Ed Flynn et al., *Chapter 7 Asset Cases*, AM. BANKR. INST. J., Dec.-Jan. 2002, at 22, 22 (reporting that 96% of consumer chapter 7 cases filed in 2002 were closed without any funds distributed to creditors).

[27] *See* Braucher et al., *supra* note 7, at 394 (noting the timing of discharge in chapter 7); Porter, *Pretend Solution*, *supra* note 5, at 116 (same).

[28] What constitutes a "successful" consumer bankruptcy case is debatable. For purposes of this Article, "success" is defined as a discharge of debts. *See* Greene et al., *supra* note 6, at 1043-1044 (defining success in consumer bankruptcy in the same way).

[29] *See* Braucher et al., *supra* note 7, at 394 (describing chapter 13); Porter, *Pretend Solution*, *supra* note 5, at 116-17 (same).

[30] *See* Porter, *Pretend Solution*, *supra* note 5, at 117 (noting repayment plan requirements).

[31] *See* Braucher et al., *supra* note 7, at 394 (discussing the timing of discharge in chapter 13).

[32] *See id.* at 395 (discussing why the ability to save property in chapter 13); Porter, *Pretend Solution*, *supra* note 5, at 117-18 (detailing chapter 13's provisions covering home mortgage debt).

[33] *See supra* note 6.

[34] Greene et al., *supra* note 6, at 1042 (reporting dismissal rates of chapter 13 cases with uncompleted plans); Porter, *Pretend Solution*, *supra* note 5, at 118 (discussing the effect of discharge on a debtor's personal liability for debts).

[35] Greene et al., *supra* note 6, at 1043-44 (reporting conversion rates from chapter 13 to chapter 7).

Chapter 7 is more popular, accounting for two-thirds of consumer bankruptcy filings nationwide. This figure has remained steady despite reforms aimed at making chapter 13 more attractive or forcing debtors to file under chapter 13.[36] Given the apparent financial disadvantages, why would anyone file under chapter 13? One answer is chapter 13 provides tools that can help prevent a foreclosure or repossession, but chapter 7 also contains alternative options.[37]

Ironically, the one explanation that has little effect on who files under chapter 13 is the Bankruptcy Code's provisions mandating who must file chapter 13 rather than chapter 7. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[38] added a "means test" to the Code that sorts debtors into chapter 7 or chapter 13 based on their income.[39] If a debtor's monthly income is too high relative to debts owing and monthly expenses, as set by the Code, then the debtor must file under chapter 13.[40] The reality is that 90% of debtors who file under chapter 13 have so little income that they could file under chapter 7. The means test is irrelevant for most debtors.[41]

## B. Chapter Choice: Paying Creditors, Race, and Attorneys' Fees

There are three other major explanations for why a debtor may decide to file under chapter 13, each of which is relevant to this Article's findings. First, people may choose chapter 13 out of a genuine desire to pay their debts to the fullest extent possible. As shown through interviews with consumer debtors conducted by two of this Article's authors, most debtors want to repay their creditors.[42] We found that

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[36] *See* Porter, *Pretend Solution*, *supra* note 5, at 116, 119 (overviewing filing statistics); Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 363 (2008) (discussing how amendments to the Code enacted in 2005 did not affect the distribution of chapter 7 versus chapter 13 filings). In the 2013-14 CBP, 34.4% of the sampled cases were chapter 13.

[37] In chapter 7, the debtor and secured creditor may enter into a reaffirmation agreement that adjusts the debt secured by personal property, such as a car. 11 U.S.C. § 524. Also, if a debtor files under chapter 7, a secured creditor often will remain satisfied with the debtor keeping the collateral as long as the debtor continues to pay the debt. As such, filing under chapter 13 is not necessary to retain encumbered property if the debtor is current on payments and can remain so.

[38] Pub. L. No. 109-8, 119 Stat. 23 (2005). The law became effective on October 17, 2005.

[39] 11 U.S.C. § 707(b)(2).

[40] *See* Porter, *Pretend Solution*, *supra* note 5, at 119 (discussing the means test); Lawless et al., *supra* note 36, at 352-53 (same). Despite evidence to the contrary, Congress enacted the means test largely based on anecdotal reports and feelings that people were abusing the bankruptcy system by running up debts and then strategically filing to escape from those debts, which they had the means to repay. *See* Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1375-78 (2008) (overviewing the debates that led to BAPCPA's passage).

[41] WARREN ET AL., *supra* note 24, at 264.

[42] Mann & Porter, *supra* note 12, at 313-17 (describing how people come to terms with their

because chapter 13 will allow them to pay their creditors more, people may decide that filing under chapter 13 is moral and "the right thing" to do.[43]

Family, friends, and bankruptcy attorneys may also influence people's view of what is "the right thing" to do. There is substantial variation by judicial district in the rate at which chapter 13 cases are filed. In some districts, mostly in the South, more than three-fourths of debtors file under chapter 13. Yet in other districts, mainly in the North, more than three-fourths of debtors file under chapter 7. For example, in 2015, only 6.7% of the cases filed in the Northern District of Iowa were chapter 13 cases, as compared to 80.3% of the cases filed in the Western District of Louisiana.[44]

Qualitative studies of consumer bankruptcy attorneys show that some attorneys view filing under chapter 13 as evidencing good morals, and encourage their clients to do "the right thing," even if the "right thing" is not the best financial deal for their clients.[45] Scholars have linked the variations among judicial districts in the distribution of chapter 7 and chapter 13 filings with prevailing morals among attorneys and the legal culture in different areas of the country.[46] Additionally, studies show "social spillover" in consumer bankruptcy filings: the more people who file bankruptcy in a neighborhood, the more likely their neighbors are to file in the future.[47] What is "the right thing" seemingly differs district to district.

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inability to pay their debts); Porter, *Pretend Solution*, *supra* note 5, at 119 (noting that some debtors indicated that they decided to file under chapter 13 because they wanted to try to repay their debts); Deborah Thorne & Leon Anderson, *Managing the Stigma of Personal Bankruptcy*, 39 SOC. FOCUS 77, 83 (2006) (describing how people tried to pay off their debts before filing bankruptcy).

[43] *See* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971-72 (2010) (noting that people continue to pay their mortgages "even when they are hundreds of thousands of dollars underwater and have no reasonable prospect of recouping their losses"). The phrase "the right thing" is from Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 562 (1993). *See infra* note 45.

[44] We collect the chapter 13 rate for the judicial district from official statistics from the Administrative Office of U.S. Courts. *See Caseload Statistics Data Tables*, *supra* note 22. The chapter 13 rate is computed as a percentage of all bankruptcies in the district. These percentages have remained steady over time. *See* Braucher et al., *supra* note 7, at 396 (overviewing filing statistics).

[45] Braucher, *supra* note 43, at 562 (1993) (noting that attorneys who told clients to do "the right thing" emphasized "clients' need for self-esteem and desire to do what they consider morally right"). *See also generally* Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFFALO L. REV. 177 (1986) (describing how attorneys' beliefs influenced their discussions of chapter choice with clients).

[46] *See* Braucher et al., *supra* note 7, at 396-97 (discussing what is termed "local legal culture").

[47] The term "social spillover" refers to how the actions of others in people's neighborhoods can influence their decisions. Barry Scholnick, *Bankruptcy Spillovers Between Close Neighbors* 1 (Apr. 2013),http://professor.business.ualberta.ca/barryscholnick/~/media/business/FacultyAndStaff/MBELBarryScholnick/Documents/JournalArticles/BK_Neighbor_14Apr2013.pdf [http://perma.cc/NM7P-VX67]; *see also* Pamela Foohey, *When Faith Falls Short: Bankruptcy Decisions of Churches*, 76 OHIO ST. L.J. 1319, 1328-31 (2015) (overviewing studies about social spillover and the related concept of "social capital" in the

Second, African Americans are far more likely to file under chapter 13 than other similarly situated debtors, regardless of where they live.[48] To explore why African Americans disproportionately use a chapter of bankruptcy that requires greater repayment of debts, takes longer, and as detailed below, costs more, Jean Braucher, Dov Cohen, and one of this Article's authors, designed an experiment to ascertain how attorneys guide debtors to particular chapters of bankruptcy. They sent a random sample of consumer bankruptcy attorneys from across the country one of three versions of a vignette with details about a couple thinking of filing bankruptcy. The study requested that the attorneys recommend whether the couple file under chapter 7 or 13. Every vignette included the same facts, which set up a situation in which the attorney would feel equally comfortable recommending chapter 7 or chapter 13. The three versions varied the debtors' names and church affiliations to signal African American, white, or no racial information, and varied whether the debtors expressed a preference for filing under chapter 7 or chapter 13.[49]

Statistically, attorneys were significantly more likely to recommend chapter 13 for an African American couple than a white couple, and a couple with no racial information.[50] They also were more likely to recommend chapter 13 to their African American clients who expressed a preference for chapter 7, than to their white clients who expressed a preference for chapter 7.[51] In short, attorneys appeared to guide their hypothetical African American clients to chapter 13, sometimes despite their stated preferences. Separate from variations across districts, what is "the right thing" appears to depend on race.

The final reason that people may choose to file under chapter 13 has to do with money, and again reflects bankruptcy attorneys' influence over chapter choice. Bankruptcy attorneys charge much less to file and represent the debtor in a chapter 7 case—on average $1,229, than to file and represent the debtor in a chapter 13 case—on average, $3,217.[52] The difference in cost generally reflects the complexity and length of the two proceedings.[53] Bankruptcy attorneys also report losing money on chapter 7 cases.[54]

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context of consumer bankruptcy filings).

[48] Braucher et al., *supra* note 7, at 404-05.

[49] *Id.* at 408-09.

[50] *Id.* at 412.

[51] *Id.*

[52] *See supra* note 10 and accompanying text.

[53] *See* Lupica, *supra* note 2, at 109-110 (overviewing the time reported by attorneys that it takes them to prepare chapter 13 petitions and accompanying documents). Attorneys' fees also rose significantly with the enactment of BAPCPA, with mean costs increasing 24% to 48% depending on chapter and whether the debtor had any administrable assets or received a discharge. *Id.* at 36-37, 50-51.

[54] *Id.* at 92-93.

To put these costs in context, based on the 2013-15 CBP data, the attorney's fee for the median chapter 13 debtor was about exactly equal to one entire month's worth of income ($3,217). Although the median chapter 7 debtor had a lower monthly income ($2,493), that income was more than double the cost of the chapter 7 attorney's fee.

Despite its relative expense, people nonetheless decide to file under chapter 13 because of the timing of when bankruptcy attorneys require client to pay attorneys' fees. The Code allows people who file under chapter 13 to pay attorneys' fees during the repayment plan.[55] In contrast, almost all bankruptcy attorneys require people filing under chapter 7 to pay attorneys' fees in full before filing the case.[56] By the time people file bankruptcy, most have little to no money saved to pay attorneys' fees, potentially prompting them to choose chapter 13 over chapter 7.[57]

The reason that attorneys require debtors to pay their fees prior to filing in chapter 7 cases developed in part because of a 2004 Supreme Court decision. The Court held in *Lamie* that only an attorney employed by the trustee overseeing a chapter 7 case could be paid from bankruptcy estate funds.[58] If a debtor's attorney is not employed by the trustee, then any fees that the debtor owed the attorney at the time of the bankruptcy filing are considered pre-petition unsecured debts. This debt for attorneys' fees is subject to being discharged with little to no payment in chapter 7.[59] Chapter 7 debtors' attorneys are rarely employed by the trustee, and if their clients do not pay them in full prior to filing the case, they risk not being paid.

In response to *Lamie*, bankruptcy attorneys have devised several controversial strategies to help people who do not have funds to pay the full attorneys' fees up front. Certain of these strategies are more successful than others. Drawing on a practice that developed prior to *Lamie*, some attorneys accept postdated checks from their clients as payment of attorneys' fees. The attorneys deposit the checks weeks or months after filing their clients' chapter 7 cases.[60] Courts almost universally hold that

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[55] 11 U.S.C. § 330.

[56] *See* Lupica, *supra* note 2, at 93 (reporting that most surveyed bankruptcy attorneys stated that they require payment in full prior to filing a chapter 7 case).

[57] *See* Mann & Porter, *supra* note 12, at 319-24 (discussing how tax refunds and paychecks affect the timing of chapter 7 filings in particular).

[58] *Lamie v. United States Trustee*, 540 U.S. 526, 529 (2004). The chapter 7 trustee is a private attorney charged with administering the case. *See also* Michelle A. Cecil, *A Reappraisal of Attorneys' Fees in Bankruptcy*, 98 KY. L.J. 67, 83-86 (2010) (discussing *Lamie*).

[59] *See, e.g.*, *Rittenhouse v. Eisen*, 404 F.3d 395, 396 (6th Cir. 2005) (joining the Second, Seventh, and Ninth Circuits in concluding that unpaid pre-petition attorney fees are dischargeable); *In re Michel*, 509 B.R. 99, 106-07 (Bankr. E.D. Mich. 2014) (holding that a flat or fixed attorney's fee must be paid in full prior to the commencement of the debtor's case or the unpaid portion of the fee is discharged); *In re Mansfield*, 394 B.R. 783, 784 (Bankr. E.D. Pa. 2008) (same).

[60] *See U.S. Trustee for Region 21 v. Clark & Washington, P.C. (In re Walton)*, 454 B.R. 537, 539 (Bankr.

this practice creates prepetition claims because the postdated checks create a right to payment that arises before the chapter 7 petition date.[61] Depending on the timing of when attorneys deposit the postdated checks, they violate one of two main bankruptcy protections: the automatic stay that prohibits any act to collect on pre-petition claims, such as postdated checks,[62] or the discharge injunction that similarly prohibits any act to collect against the debtor on discharged debts.[63] The practice also creates a conflict of interest between the bankruptcy attorney's firm and its clients.[64]

Despite the legal and ethical issues of accepting postdated checks, bankruptcy attorneys still report engaging in this and similar practices, such as requiring chapter 7 debtors to pay half of the attorneys' fees prior to filing and to enter into a post-petition fee agreement for the remainder.[65] Because post-petition fee agreements are entered into prior to filing, they create dischargeable debts and are unenforceable.[66] When asked if they receive payment from debtors post-petition based on these agreements, attorneys generally respond, "sometimes I do, and sometimes I don't."[67] Although attorneys apparently continue to use these two strategies, in the 2007 and the more recent 2013-15 CBP data, the vast majority of debtors who filed under chapter 7 paid their attorneys in full in advance of the filing.

Instead of trying to devise a workaround of *Lamie*, some bankruptcy attorneys have looked to chapter 13 as a way to help people who do not have the means to pay attorneys' fees in full prior to filing. It is common practice for debtors to pay their attorneys' fees through the chapter 13 plan.[68] Materials published by bankruptcy

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M.D. Fla. 2011) (detailing this practice).

[61] *Id.*; *In re Lawson*, 437 B.R. 609 (Bankr. E.D. Tenn. 2010); *In re Lewis*, 309 B.R. 597 (Bankr. N.D. Okla. 2004). *But see Gordon v. Hines (In re Hines)*, 147 F.3d 1185, 1187 (9th Cir. 1998) (approving the use of postdated checks based on the "doctrine of necessity").

[62] 11 U.S.C. § 362(a)(6); *In re Walton*, 454 B.R. at 544-45. Some courts hold that presentment of a post-dated check for payment while a bankruptcy case is pending does not violate the automatic stay per § 362(b)(11), but attempts to collect payment on checks that have been returned unpaid due to insufficient funds do violate the stay. *In re Waldo*, 417 B.R. 854, 889-90 (Bankr. E.D. Tenn. 2009).

[63] 11 U.S.C. § 524(a)(2); *In re Walton*, 454 B.R. at 545.

[64] *In re Walton*, 454 B.R. at 545-46 (discussing the conflict of interest); *In re Lewis*, 309 B.R. at 609 (discussing the conflict of interest inherent in accepting postdated checks from chapter 7 debtors).

[65] *See* Lupica, *supra* note 2, at 93 (reporting that some attorneys admitted to entering into post-petition fee agreements); Jeff Kelly, *Why Do You Have To Pay All Of Your Chapter 7 Fees Before a Case Is Filed?*, National Bankruptcy Forum (Oct. 23, 2013), *available at* http://www.natlbankruptcy.com/why-do-you-have-to-pay-all-of-your-chapter-7-fees-before-a-case-is-filed/ (reporting that some attorneys in the Northern District of Georgia accept postdated checks); Email to National Association of Consumer Bankruptcy Attorneys Listserv (June 30, 2016) (on file with authors) (asking about the legality and ethics of post-petition fee agreements in chapter 7).

[66] *See* Lupica, *supra* note 2, at 93 (noting that pre-petition fee agreements are unenforceable).

[67] *Id.*

[68] *In re Banks*, 545 B.R. 241, 244 (Bankr. N.D. Ill. 2016) ("Paying attorney fees through a [chapter

courts, attorneys, and chapter 13 trustees generally seem to assume that debtors will pay at least a portion of attorneys' fees before the filing, even if most of the fees are paid through the plan.[69] To this end, bankruptcy courts have published standing orders that permit chapter 13 plans to pay attorneys' fees on a prescribed, often expedited schedule.[70]

Standing orders also often include a presumptive "no look" fee for routine chapter 13 cases.[71] "No look" fees give attorneys assurance that if they charge their chapter 13 clients no more than that amount, the bankruptcy court will approve their fees. This ensures payment of their fees, provided clients are able to keep up with plan payments. Thus, standing orders also may increase attorneys' incentives to suggest that clients file under chapter 13.

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13] plan is not only permitted, it is the norm."); *infra* Part III.B.

[69] K. Michael Fitzgerald & Jason Wilson-Aguilar, *Chapter 13 Trustee's Best Practices Manual* 19 (July 21, 2015), *available at* http://www.seattlech13.com/Documents/Best%20Practices%2007-21-15.pdf (discussing the payment of attorneys' fees through the chapter 13 plan); *see also Bankruptcy Basics: The ABCs of Filing Chapter 13*, OREGON STATE BAR 2-8 (June 15, 2012), *available at* http://www.osbar.org/cle/library/2012/BKB12_Handbook.pdf (providing an example of how to draft a chapter 13 plan that assumes the debtor paid a portion of attorneys' fees prior to filing); *Guidelines for Payment of Attorneys' Fees in Chapter 13 Cases*, United States Bankruptcy Court Eastern District of California 1 (Oct. 17, 2005), *available at* http://www.caeb.uscourts.gov/documents/forms/Guidelines/GL.Pmt_05.pdf ("Except for pre-petition retainers, all fees shall be paid through the plan unless otherwise ordered.").

[70] *See, e.g.*, *Standing Order No. 19 (Amended): Chapter 13 Attorneys Fees, Adequate Protection Payments, Annual Statements, Form Plan, and Tax Returns*, UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF FLORIDA (Sept. 30, 2014), *available at* http://www.flnb.uscourts.gov/sites/default/files/standing_orders/so19.pdf; *Standing Order: Payment of Attorney Fees in Chapter 13 Cases*, UNITED STATES BANKRUPTCY COURT NORTHERN AND SOUTHERN DISTRICTS OF MISSISSIPPI (Aug. 1, 2014), *available at* http://www.mssb.uscourts.gov/media/1052/2014-04-payment-atty-fee-ch-13-eff-08-01-2014.pdf; *Administrative Order Setting Procedures to be Followed in Chapter 13 Cases Filed On or After October 17, 2005*, United States Bankruptcy Court Western District of North Carolina (June 6, 2006), *available at* http://www.ncwb.uscourts.gov/sites/ncwb/files/ao688.pdf.

For instance, some of these orders permit "step-up payment plans" in which other creditors are paid less at the beginning in favor of paying attorneys' fees over several months to a year; once attorneys' fees are no longer owing, other creditors' monthly payments increase. *In re Erwin*, 376 B.R. 897, 901 (Bankr. C.D. Ill. 2007) (describing a step-up plan). The only statutory check on this practice seems to be a provision added to the Code by BAPCPA that requires amounts owing to creditors secured by the debtor's property to be paid in "equal monthly amounts" over the life of the chapter 13 plan. 11 U.S.C. § 1325(a)(5)(B)(iii). The handful of bankruptcy courts that have heard challenges to step-up plans are split as to whether the Code allows chapter 13 plans to pay debtor's attorneys on an expedited basis. *See In re Romero*, 539 B.R. 557, 558 (Bankr. E.D. Wis. 2015) (holding that attorneys' fees may not be paid on an expedited basis); *In re Sanchez*, 384 B.R. 574, 577-79 (Bankr. D. Or. 2008) (overviewing case law).

[71] Lupica, *supra* note 2, at 99-100 (discussing "no look" fees); Bruce M. Price, *"No Look" Attorneys' Fees and the Attorneys Who Are Looking: An Empirical Analysis of Presumptively Approved Attorneys' Fees in Ch. 13 Bankruptcies and a Proposal for Reform*, 20 AM. BANKR. INST. L. REV. 291, 321 (2012) (finding that 87% of bankruptcy courts have adopted a "no look" fee).

A small subset of chapter 13 cases in which bankruptcy attorneys allow their clients to pay all or a portion of fees through the plan demonstrates how sub-optimal chapter 13 may be for certain debtors. Some people who file under chapter 13 own so few unencumbered assets relative to the amount of debt outstanding that their chapter 13 plans effectively only pay attorneys' and other fees. Unsecured creditors receive no money through these "fee-only" plans.[72] If debtors who file fee-only plans had filed under chapter 7, their cases would have been categorized as "no asset,"[73] making these debtors almost certainly better suited to filing under chapter 7. This has led courts to comment that these cases are "veiled" chapter 7 cases,[74] and that "[i]t is difficult to understand how a Chapter 13 plan under these circumstances benefits anyone other than counsel,"[75] which likely comes "at the expense of debtors" and compromises attorneys' ethical standards.[76]

The concern that bankruptcy attorneys will put their financial interests ahead of their clients' interests is particularly salient in the context of fee-only plans. But attorneys may face a similar temptation with all debtors, cash-strapped or otherwise.[77] One recent study by Lars Lefgren, Frank McIntyre, and Michelle Miller shows that bankruptcy attorneys indeed do place their financial interests over those of their clients.[78] Using household data from California, Texas, and Utah, they found that bankruptcy attorneys played a pivotal role in whether debtors filed under

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[72] *Berliner v. Pappalardo (In re Puffer)*, 674 F.3d 78, 80-81 (1st Cir. 2012) (defining fee only plans). These plans provide for payment to unsecured creditors in the amount they would receive in chapter 7, but because unsecured creditors typically would receive nothing, the plan only pays the fees. *See In re Puffer*, 674 F.3d at 80 (describing a fee-only plan in which unsecured creditors were to receive 2% of their claims); *In re Doucet*, 2016 BL 140926, at *5 (Bankr. D. Kan. May 3, 2016) (discussing fee-only plans). The plans may provide for payment to secured creditors. *See In re Paley*, 390 B.R. 53, 55 (Bankr. N.D.N.Y. 2008) (describing a fee-only plan that provided for payment of attorneys' fees and a secured creditor).

[73] *See supra* note 26.

[74] *Ingram v. Burchard*, 482 B.R. 313, 319 (N.D. Cal. 2012).

[75] *In re Paley*, 390 B.R. at 60.

[76] *In re Banks*, 545 B.R. at 244. Because debtors must propose chapter 13 plans in "good faith," 11 U.S.C. § 1325(a)(3), the majority of courts that have heard challenges to fee-only plans approve them on a case by case review of the "totality of the circumstances." *In re Brown*, 742 F.3d 1309, 1319 (11th Cir. 2014); *In re Puffer*, 674 F.3d at 82-83; *Sikes v. Crager* (*In re Crager*), 691 F.3d 671, 675-76 (5th Cir. 2012). *But see In re Doucet*, 2016 BL 140926, at *9 (holding that fee-only plans are filed in good faith); *In re Molina*, 420 B.R. 825, 830-31 (Bankr. D. N.M. 2009) (same); *In re Paley*, 390 B.R. at 59-60 (refusing to confirm fee-only plans as per say bad faith filings); *In re Arlen*, 461 B.R. 550, 554 (Bankr. W.D. Mo. 2011) (same).

[77] *See In re Wark*, 542 B.R. 522, 527-28 (Bankr. D. Kan. 2015 (theorizing why a debtor may choose to file a chapter 13 case despite the significantly higher attorneys' fee).

[78] *See generally* Lars Lefgren et al., *Chapter 7 or 13: Are Client or Lawyer Interests Paramount?*, 10 B.E. J. ECON. ANAL. & POL'Y 1 (2010); *see also* Frank McIntyre et al., *Lawyers Steer Clients Toward Lucrative Filings: Evidence from Consumer Bankruptcies*, 17 AM. L. ECON. REV. 245, 245-46 (2015) (relying on zip code-level data on filing rates and data on attorney's fees from bankruptcy petitions to find that "increasing the Chapter 13 fee by 10% increases the fraction of bankruptcies filed under Chapter 13 filings by ~3%").

chapter 7 or chapter 13: "By far, the best observable predictor of a household's decision to file under Chapter 13 is the attorney they happen to consult."[79] The authors further found that attorneys maximized their profits by steering clients to chapter 13 even when chapter 7 better matched debtors' financial profiles.[80] Being pushed into chapter 13 not only cost debtors more in legal fees, but because these debtors were poorly suited to chapter 13, their cases were more likely to be dismissed, which decreased their likelihood of sustained debt relief.[81]

The mismatch between debtors' finances and what chapter their attorneys seem to guide them into is likely not what the Supreme Court envisioned or thought was taking place at the time of its decision in *Lamie*. During oral arguments, Justice Kennedy asked whether chapter 7 debtors were able to pay their attorneys' pre-petition flat fee, to which counsel for the United States Trustee responded, "absolutely."[82] Counsel later stated that chapter 7 debtors may use post-petition income "to pay . . . counsel to assist them in completing bankruptcy."[83] In *Lamie*, the Supreme Court noted that "[i]t appears to be routine for debtors to pay reasonable fees for legal services before filing for bankruptcy."[84]

Although the Supreme Court thought that people could and would continue to be able to afford to file under chapter 7, such does not seem to have occurred post-*Lamie*. Bankruptcy attorneys report that it often is difficult or forbidden to unbundle pre-petition and post-petition services in the way contemplated during the *Lamie* oral argument.[85] This ostensibly leaves attorneys facing cash-strapped debtors with chapter 13 as the best bet that they will be paid. The results presented in the next part demonstrate that people are increasingly filing under chapter 13, and are doing so without paying any attorneys' fees prior to filing. This practice necessarily raises questions about how attorneys are counseling debtors in light of both their and their clients' interests.

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[79] *Id.* at 36.

[80] *Id.* at 35-37.

[81] *Id.* at 37.

[82] *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004), Oral Argument Transcript, 2003 WL 22705280, at *31 (Nov. 10, 2003).

[83] *Id.* at *33.

[84] *Lamie,* 540 U.S at 537.

[85] *See In re Doucet*, 2016 BL 140926, at *4-5.

## III. "NO MONEY DOWN" BANKRUPTCY

### A. Methodology

The data in this Article come from the Consumer Bankruptcy Project (CBP). The CBP is a multi-researcher, long-term project designed to understand the people who file bankruptcy, why they file, and the consequences of their filings. To the best of our knowledge, the CBP has collected the only nationally representative and historical data about people who file bankruptcy that goes beyond court records. Past iterations of the CBP were episodic and occurred in 1981, 1991, 2001, and 2007.[86] Three of this Article's authors have been involved with the CBP since 2001. Because this Article analyzes data from the 2007 CBP and the latest iteration of the CBP, the 2013-15 CBP (Current CBP), this section confines its discussion to the methodologies for the 2007 and Current CBPs.

A detailed methodology for the 2007 CBP is available elsewhere.[87] In summary, 2007 CBP data are from a random, national sample of consumer bankruptcy cases filed under chapter 7 and chapter 13 in the fifty states and the District of Columbia beginning in the first week of February 2007 and continuing for the next four consecutive weeks. Written questionnaires were mailed to the debtors who had filed these cases.[88] These questionnaires collected demographic information not available from court records, as well as asked the debtors about their financial situations and coping mechanisms leading up to their bankruptcy filings.[89] In total, 2007 CBP data come from 2,438 bankruptcy filings and accompanying questionnaires completed by debtors.[90] Extensive telephone interviews were conducted with a randomly selected subset of over 1,000 of the debtors.[91]

We relaunched the CBP in 2013 as an ongoing data collection effort. Rather than taking a snapshot of consumer bankruptcy filings from a short period of time, the Current CBP collects data on a continuing basis, which allows for the creation of a database that incrementally builds and which will eventually allow for comparisons

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[86] *See* Katherine Porter, *Appendix: Methodology of the 2007 Consumer Bankruptcy Project*, 235, 235 *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (Katherine Porter, ed., 2012) (discussing the methodologies for the 1981, 1991, and 2001 CBPs).

[87] *Id.* at 236-244 (detailing the 2007 CBP methodology); Lawless et al., *supra* note 36, at 391-97 (same).

[88] Lawless et al., *supra* note 36, at 391 (describing the sample).

[89] *Id.* at 392 (describing the questionnaire).

[90] This figure includes cases in which the debtor returned an incomplete questionnaire. 2,314 questionnaires were returned complete. *Id.* at 392-94 (discussing questionnaire response rates).

[91] *Id.* at 396-97 (detailing the interviews). This Article does not rely on data from these telephone interviews.

over time. Like the 2007 CBP, the Current CBP is national and random. Beginning in February 2013 and every three months thereafter, a list of all individuals[92] who filed under either chapter 7 or chapter 13 in the fifty states and the District of Columbia is generated for three randomly selected business days in the two prior weeks. From this population, a sample of 200 cases is randomly selected. Approximately 100 variables on each debtor's financial characteristics, such as assets, debts, income, and expenses are coded from each debtor's bankruptcy court record. These variables include many of the same variables that were coded for the 2007 CBP, allowing for comparisons between the 2007 and Current CBP, and combination of the 2007 and Current CBP data.[93] The coding is conducted by trained law student research assistants working under the supervision of one of this Article's authors who extensively reviews the coding, including verifying individual data entries that a computer program has flagged as problematic (e.g., data outliers, logical inconsistencies). Data are generally entered exactly as listed on the court records unless there is an obvious error (e.g., an erroneous summation of individual entries).

The judicial status of each case is recorded at the time the bankruptcy files are collected. Because most cases are still pending at this time, the dispositions are recorded again at a later point approximately one year after initial data collection. Like the original coding, the dispositions data are double-checked for accuracy.

For each of the 200 randomly selected cases each quarter, we mail an introductory letter to each debtor to the address listed on the bankruptcy petition. The introductory letter explains that the debtor has been randomly selected into the project and that a written questionnaire will follow. A written questionnaire is mailed three to four business days later. Debtors may complete and return the questionnaire via mail or online. A reminder letter and replacement questionnaire are sent several weeks later if a debtor does not return the questionnaire. Subjects are offered a $50 gift card from Walmart or Amazon for completing the questionnaire.[94] The questionnaire collects demographic (including age and race) and household

[92] We exclude cases filed by debtors that are legal entities, such as corporations or partnerships. Cases filed by individuals are included regardless of whether the bankruptcy petition indicates that the case involves primarily business or consumer debts. *See* Robert Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 92 CAL. L. REV. 743, 764-68 (2005) (explaining how popular software leads bankruptcy attorneys to wrongly categorize cases as business or individual bankruptcies).

[93] Lawless et al., *supra* note 36, at 394-96.

[94] For the first round of 200 cases, a $2 acknowledgment of appreciation was included with all mailed questionnaires. To increase the response rate, for the second round of 200 cases, a $20 gift card from Walmart or Amazon was offered for completing the questionnaire. To further increase the response rate, for the third round and all subsequent rounds, the gift card amount was increased to $50. Each increase in the amount of the incentive increased response rates.

information, reasons for filing, financial management practices and hardships experienced prior to filing, emotional responses to bankruptcy, and similar information.

At this time, we have complete data from people who filed bankruptcy in 2013, 2014, and 2015. This Article uses data from that three-year period for its Current CBP. Because bankruptcy court records are public documents, we have data for the 2,400 total bankruptcy cases sampled during these three years. Of the 2,400 households sent questionnaires, a total of 670 questionnaires were returned for a 27.9% response rate. In comparison, the questionnaires sent to families as part of the 2007 CBP had an approximately 50% response rate.[95]

Using court records for the full sample of 2,400 cases, we assess response bias in the questionnaire. Although we cannot rule out response bias on unobserved variables, we did not find any significant differences on the principal financial variables between debtors who responded to the questionnaire and nonrespondents. We also compared the full sample of cases to the few financial variables for which the Administrative Office of the United States Courts reports national averages, such as percentage of cases filed under chapter 13, and confirmed that the sample was nationally representative.[96] The same was true for analyses of the 2007 CBP data.[97]

Before turning to the results, one note regarding the data. All dollar-denominated data, such as attorneys' fees, asset values, and debt amounts, are inflated to July 2015 dollars based on the Consumer Price Index.[98] This allows for comparison and combination of 2007 CBP and Current CBP data. In many instances, we combine data from the 2007 CBP with data from the Current CBP. We are careful to note when we are relying on 2007 CBP data alone, Current CBP data alone, or 2007 CBP and Current CBP data combined.

### B. The Incidence and Characteristics of "No Money Down" Bankruptcy

The vast majority of people who file bankruptcy hire an attorney. Combining data from the 2007 CBP and Current CBP, 91.7% of the debtors who filed under chapter 7 and 93.6% of the debtors who filed under chapter 13 used an attorney. The small difference is almost entirely made up of chapter 7 debtors who use bankruptcy

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[95] Lawless et al., *supra* note 36, at 393. We believe the primary difference in the response rates was the existence of research funding that allowed much greater efforts in 2007 to follow up with nonrespondents through telephone calls and other means.

[96] *See Caseload Statistics Data Tables*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited Aug. 11, 2016).

[97] Lawless et al., *supra* note 36, at 396 (detailing testing for response bias).

[98] *Consumer Price Index*, UNITED STATES DEPARTMENT OF LABOR, http://www.bls.gov/cpi/ (last visited Aug. 11, 2016).

petition preparers (non-attorneys who can assist in completing the forms). Debtors who go it entirely alone – using neither attorney nor bankruptcy petition preparer – account for 5.8% our chapter 7 cases as compared to the 5.6% of our chapter 13 cases. Attorneys mediate the experience that most debtors have with the bankruptcy system.

Besides complexity, a key difference between chapter 7 and chapter 13 is the timing of when debtors pay attorneys' fees. As noted, chapter 7 debtors generally must pay attorneys' fees prior to filing, while chapter 13 debtors may pay attorneys' fees through the repayment plan, though it is assumed that debtors will pay at least a portion of the fees prior to filing.[99]

This Article challenges this conventional notion about how debtors pay for chapter 13. Data from the 2007 and Current CBPs show that a sizable and growing portion of people who file under chapter 13 pay nothing in attorneys' fees before filing. Labeling these as "no money down" cases, we study how they differ from what we term "traditional" chapter 13. In a traditional chapter 13 filing, the debtor pays something, usually hundreds of dollars, in attorneys' fees *before* the case is filed. In both "no money down" and traditional chapter 13 cases, the plan provides for payment of the portion of attorneys' fees that remain due.

Table 1 reports the percentage of debtors represented by an attorney who filed under chapter 7, "no money down" chapter 13, and traditional chapter 13, distinguished by the 2007 CBP and Current CBP. Paying "no money down" before filing under chapter 13 not only is a prevalent approach, but one that appears to be gaining momentum. In the Current CBP, 40.3% of people who filed under chapter 13 paid "no money down," a 25% increase from the 2007 CBP. The percentage of debtors who pay their attorneys nothing before filing has increased substantially from 2007 and to the Current CBP.

[99] *See supra* Part II.B.

**Table 1. Incidence and Increase in "No Money Down" Chapter 13, 2007 and Current CBPs**

Table 1 shows the percentages of debtors represented by an attorney who filed under chapter 7 and chapter 13 for the 2007 and Current CBPs. Chapter 13 filings are distinguished based on whether the debtor paid "no money down" on attorney's fees or whether the debtor paid some or all of the attorney's fees before filing bankruptcy, as is "traditional." The increase in "no money down" chapter 13 filings from 10.5% to 14.2% is statistically significant (chi-square = 14.01, p = .001).

| | Chapter 7 | "No Money Down" Chapter 13 | Traditional Chapter 13 |
|---|---|---|---|
| 2007 | 67.1% | 10.5% | 22.4% |
| 2013-15 | 64.7% | 14.2% | 21.1% |

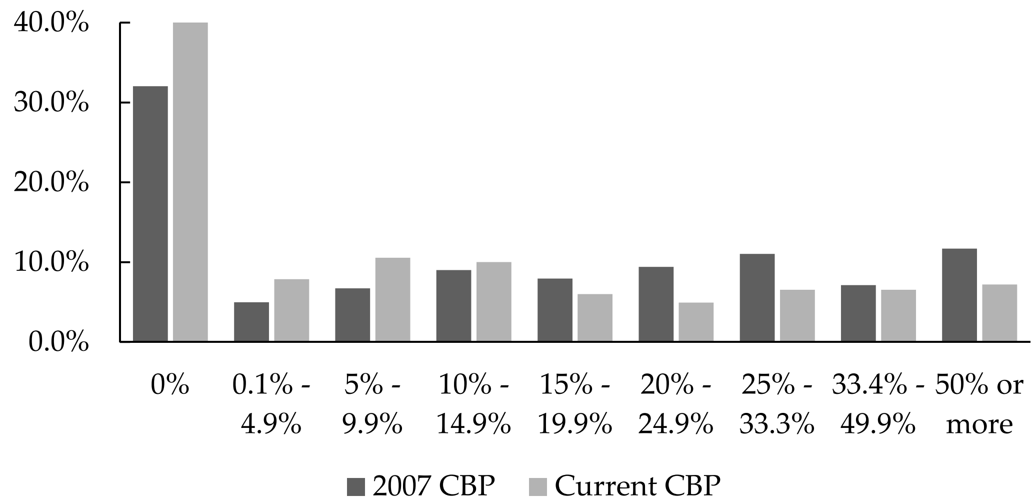
Although we term every chapter 13 case in which the attorney receives some money from the debtor in payment of attorneys' fees prior to filing as "traditional," the percentage of total attorneys' fees that these chapter 13 filers pay prior to filing is not monolithic. Of the debtors who paid their attorneys at least one dollar in fees before their bankruptcies were filed, few "prepaid" most of the fees. For example, in the Current CBP, less than half of chapter 13 debtors who prepaid some amount of the attorneys' fees paid more than 50% of the fees before the bankruptcy was filed. We ran analyses for other cutoffs that might be considered a "near no money down" chapter 13. Our conclusions are qualitatively the same even if we use cutoffs of 5%, 10%, or 15%. We decided to use zero payment upfront as our definition for a "no money down" case, as this is the most conservative assumption for statistical purposes. There is likely little difference between a 0%- and 1%-down case, but our analyses lump the 1%-down case with the 50%-down case thereby working against finding any differences in the data.

Figure 1 compares the percentage of attorneys' fees prepaid by debtors who filed under chapter 13 from the 2007 CBP and Current CBP. As the histogram shows, compared to debtors who filed under chapter 13 from the 2007 CBP, debtors who filed under chapter 13 from the Current CBP were more likely to pay less than 15% of attorneys' fees, at most about $500 prior to filing. Not only are more people who file under chapter 13 paying "no money down," more are paying a smaller percentage of attorneys' fees prior to filing.

**Figure 1. Percent of Chapter 13 Attorneys' Fees Prepaid, 2007 CBP vs. Current CBP**

Many debtors who paid attorneys' fees before filing bankruptcy, as is "traditional," paid only a portion of the attorneys' fees prior to filing. The mean percentage of attorneys' fees that debtors paid before filing ("prepaid") across all chapter 13 filings was 20.6% in 2007 and 14.4% in 2013-15. The decrease in the mean percentage prepaid is statistically significant ($t = 4.94$, $p < .001$).

Figure 1 compares the percentage of attorneys' fees prepaid by those debtors who filed under chapter 13 in the 2007 and Current CBPs.

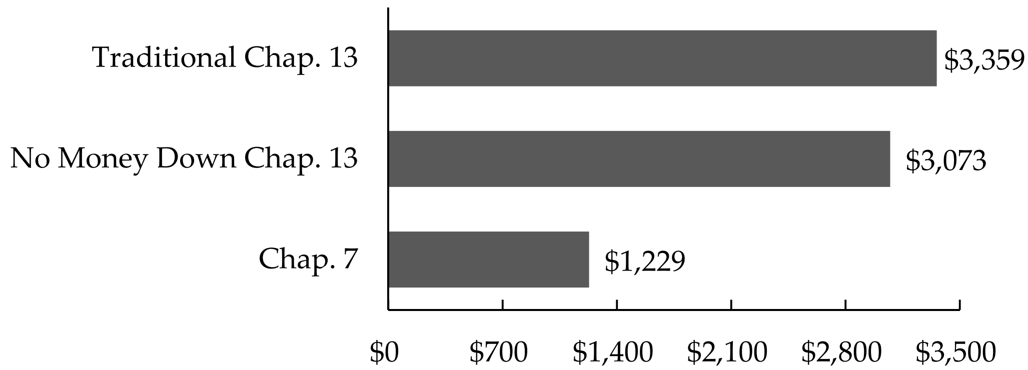



As consistent with prior research, in both the 2007 CBP and Current CBP, attorneys charged their clients more to file a chapter 13 case than a chapter 7 case.[100] But they charged their "no money down" chapter 13 clients on average $286 less than their traditional chapter 13 clients. Figure 2 reports the mean attorneys' fees paid by debtors from the 2007 and Current CBP combined.

[100] *See supra* note 10.

**Figure 2. Mean Attorneys' Fees**

Figure 2 shows the mean total attorneys' fees that debtors from the 2007 and Current CBPs combined paid for chapter 7, "no money down" chapter 13, and traditional chapter 13 filings. All data are inflated to July 2015 dollars based on the Consumer Price Index. These figures do not include amounts debtors paid to petition preparers. The difference in attorneys' fees, at the mean, between a chapter 7 filing and a "no money down" chapter 13 filing is $1,844. Attorneys charged, at the mean, $286 less for a "no money down" versus a traditional chapter 13 filing.




Although bankruptcy attorneys charge slightly less for a "no money down" than a traditional chapter 13, paying nothing upfront to file under chapter 13 is still vastly more expensive than paying all attorneys' fees prior to filing under chapter 7—250% more expensive. If debtors who pay "no money down" benefit from filing under chapter 13, the difference in attorneys' fees should not be worrisome. But harkening back to "fee-only" plans, which bankruptcy courts repeatedly condemn as veiled (and necessarily more expensive) chapter 7 proceedings,[101] it is worth asking whether "no money down" chapter 13 is costly to already cash-strapped and struggling debtors. The question thus becomes, who pays "no money down" for bankruptcy? As examined in the next section, people who pay nothing toward attorneys' fees before filing under chapter 13 are a distinct subset of bankruptcy filers.

C. Who Pays "No Money Down" for Bankruptcy?

1. Financial Characteristics

People who file with "no money down" enter bankruptcy with a financial profile that makes them look more like people who file under chapter 7 than those

[101] *See supra* notes 72-76 and accompanying text.

who file traditional chapter 13 cases. Table 2 reports key financial data for people represented by an attorney who filed chapter 7, "no money down" chapter 13, and traditional chapter 13 from the 2007 and Current CBPs combined.

**Table 2. Financial Characteristics of "No Money Down" Chapter 13 Filers as Compared to Chapter 7 and Traditional Chapter 13 Filers**

Table 2 compares the median financial characteristics of "no money down" chapter 13 debtors to chapter 7 debtors and to traditional chapter 13 debtors for cases in which an attorney represented the debtor. Data from the 2007 and Current CBPs are combined. All data are inflated to July 2015 dollars based on the Consumer Price Index. Because the means are heavily influenced by outliers, the medians generally are better indicators of central tendency, which is why medians are reported.

| | Chapter 7 | "No Money Down" Chapter 13 | Traditional Chapter 13 |
|---|---|---|---|
| Total assets | $29,876 | $57,792 | $134,889 |
| Secured debts | $16,699 | $39,902 | $133,478 |
| Unsecured debts | $42,846 | $19,159 | $30,751 |
| Total debts | $87,901 | $82,664 | $158,738 |
| Monthly income | $2,404 | $2,854 | $3,735 |
| Total debt-to-income ratio | 3.26 | 2.50 | 3.50 |
| % homeowners | 40.6% | 53.5% | 70.6% |

People who paid "no money down" to file under chapter 13 had assets worth far less than people who paid at least a portion of attorneys' fees before filing chapter 13, and owed their creditors less than those people who filed chapter 7. "No money down" households were less likely to be homeowners than debtors who filed traditional chapter 13. This fact explains much of the difference in asset and debt values.

Compared to 2007, the financial profiles of "no money down" debtors filing in the most recent years are more similar to the financial profiles of those in chapter 7. More recent "no money down" debtors had fewer assets, were less likely to be homeowners, and owed their creditors in total less than "no money down" debtors. In short, today's "no money down" chapter 13 debtors more closely resemble chapter 7 debtors on key financial measures than those in traditional chapter 13.

Traditional chapter 13 debtors also have different financial profiles varying with what percentage of attorneys' fees they prepaid. The smaller the percentage of attorneys' fees prepaid, the less likely these people were to own homes, and the more likely they were to look like the debtors who filed under chapter 7. Put another way, there is a relationship between prepayment of attorneys' fees and financial characteristics that would suggest a situation more suited to chapter 7. While we focus on those who pay nothing in attorneys' fees before bankruptcy, our discussion of the merits and drawbacks of "no money down" bankruptcy may also be applicable to the additional group of chapter 13 debtors who pay only a small amount in attorneys' fees.

Those who put "no money down" when filing a chapter 13 bankruptcy differ from other debtors in two other notable ways. First, in the 2007 CBP and Current CBP questionnaires, debtors reported how long they had seriously struggled with their debts before filing bankruptcy. Debtors could select from six categorical options that were converted into numerical equivalents at the mean of each category. On average, "no money down" chapter 13 debtors reported struggling for 2.5 years; this is nearly identical to the 2.4 years that those in a traditional chapter 13 reported struggling before filing. Both groups of chapter 13 cases (traditional and "no money down") struggle for a shorter period; chapter 7 debtors reported serious struggles for 2.7 years before bankruptcy. The shorter wait before bankruptcy for "no money down" debtors is also present in our comparison of the Current CBP with the 2007 CBP. "No money down" debtors from the Current CBP reported struggling for 4.5 fewer months before filing bankruptcy than the "no money down" debtors in 2007. The difference is not statistically significant ($t = 1.60$, $p = .11$) but is suggestive of the "no money down" technique being used to shorten wait times necessary for debtors to save up for bankruptcy.

Particularly given that "no money down" debtors seem to be increasingly likely to have financial situations that resemble chapter 7 debtors, the decrease in time they seriously struggle with their debts raises questions about how bankruptcy attorneys mediate people's decisions about the timing of a bankruptcy. The reason for the decrease is not clear. One hypothesis is that attorneys increasingly offer debtors who otherwise might wait to file under chapter 7 a "no money down" chapter 13 option. Given the "no money down" path, debtors decide to file immediately because they prefer not to pay any attorneys' fees up front. This hypothesis would suggest that "no money down" debtors should have debt-to-income ratios lower than those in chapter 7. The idea is that the longer people struggle before bankruptcy, the more time their debts have to grow. The data in Table 2 show such a relationship. The debt-to-income ratio of the typical "no money down" chapter 13 debtor was lower than the typical chapter 7 debtor and the traditional chapter 13 debtor.[102] People who paid nothing up

[102] That "no money down" chapter 13 filers' debt-to-income ratio is similar to traditional chapter 13 filers may reflect the fact that a sizable portion of traditional chapter 13 filers also may better suited

front to their attorneys owed their creditors less relative to their incomes at the time of bankruptcy, compared to other bankruptcy filers. Another hypothesis might be that "no money down" debtors do not need to save as much to file bankruptcy and therefore can file more quickly. Under this hypothesis, the debtors' financial conditions would be playing the causal role rather than the attorney.

The second way in which "no money down" debtors differ also involves bankruptcy attorneys. Those people who filed a "no money down" chapter 13 were more likely than other debtors to report that their attorneys did not help them choose between a chapter 7 bankruptcy and a chapter 13 bankruptcy. The Current CBP questionnaire asked debtors whether the debtor or the attorney had "more say" on the chapter choice decision. Answers were coded on a 1-4 scale.[103] "No money down" chapter 13 debtors were much less likely (32.1%) than traditional chapter 13 debtors (53.2%) to select responses on the scale that indicated that the attorney had more say in their bankruptcy chapter choice (chi-square = 5.71, p = .017). This finding is buttressed by the similarity of chapter 7 debtors' and "no money down" chapter 13 debtors' responses about the role of attorneys. Only 38.0% of chapter 7 filers selected limited attorney influence; the difference with "no money down" chapter 13 debtors (32.1%) is not statistically significant (chi-square = 0.68, p = .410).

These results add to our conclusion that "no money down" chapter 13 debtors are more similar to chapter 7 filers than they are to traditional chapter 13 debtors. The data can be interpreted consistently with debtors having a strong role when choosing chapter 7 or "no money down" chapter 13. The difficulty with this view, however, is that it does not explain why "no money down" chapter 13 debtors would prefer to pay a total attorney's fee that is about two and a half times what they would pay if they filed under chapter 7. Another explanation is that attorneys do not discuss chapter choice with people who indicate that they have—or the attorneys assume have—no (or little) money to pay attorneys' fees at the time of filing the bankruptcy. The "choice" that attorneys offer cash-strapped people is to file now under chapter 13 and pay all attorneys' fees through the plan or not to file bankruptcy. This question can be explored in further work, but it does seem that "no money down" debtors come to bankruptcy differently than those who file a traditional chapter 13.

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to waiting to file under chapter 7, or it simply may be a coincidence. The timing of the bankruptcy petitions of some chapter 13 filers who own homes is driven by state foreclosure laws, which may impact traditional chapter 13 filers' reports about how long they struggled with their debts prior to filing. *See* Mann & Porter, *supra* note 12, at 305-06 (discussing how foreclosure prompts chapter 13 filings).

[103] *Pro se* debtors (those without an attorney) were allowed to respond "not applicable" to this question.

### 2. Judicial Districts and Race

Two striking differences exist between people who file with "no money down" and other bankruptcy filers. First, the judicial district of the bankruptcy is strongly related to the likelihood of a "no money down" filing. Second, a debtor's race is correlated with a "no money down" bankruptcy.

There is substantial variation by judicial district in the rate at which chapter 13 bankruptcies are filed. As a matter of definition, debtors in high chapter 13 districts are more likely to file chapter 13 cases.[104] Our significant finding is that high chapter 13 districts also are high "no money down" loci. In judicial districts in which the chapter 13 rate is at or below the national median, only 15.6% of chapter 13 bankruptcies are "no money down." By comparison, in judicial districts in which the chapter 13 rate exceeds the national median, the "no money down" percentage jumps to 45.9% (chi-square = 130.80, $p < .001$).

On the 2007 and Current CBP questionnaires,[105] respondents were asked to select the racial and ethnic groups with which they identify. Respondents were allowed to choose more than one group. In our analyses, a family is considered to be a particular race if either head of household self-identified as that race on the questionnaire.

Figure 3 shows the breakdown of filing type by racial category. All races except African Americans had similar patterns of filing types. Although 23.7% of the households in our data were African American, almost half (48.9%) of those who filed "no money down" chapter 13 cases were African American,[106] a statistically significant difference (chi-square = 187.45, $p < .001$). Approximately one-quarter of African American households filed with "no money down," as compared to less than 8% of other households. Based on this finding, we collapse the race categories to a binary outcome, comparing African-Americans to debtors of all other races.

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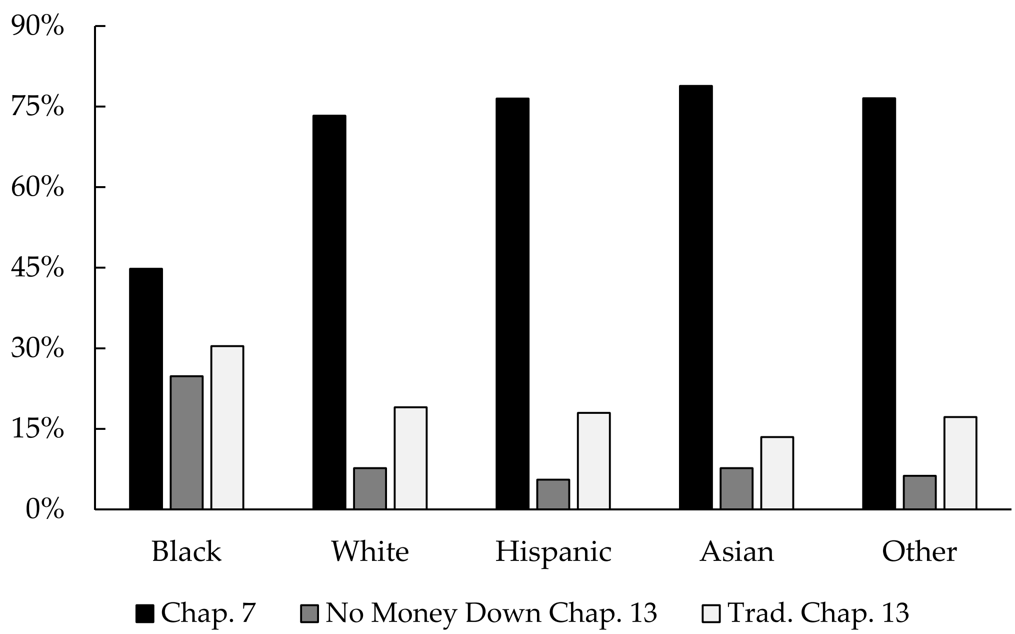
[104] In the CBP data, each observation is assigned the chapter 13 for the judicial district and year in which the case was filed. There is high year-to-year correlation in the chapter 13 district, even between 2007 and 2013-15. The correlation coefficients range from .991 to .999.

[105] There are slight differences in the wording for the racial categories from the 2007 questionnaire and the Current CBP questionnaire, which uses wording similar to the Census categories. Also, the Current CBP questionnaire has two racial categories that were not present in 2007: "American Indian or Alaska Native" and "Native Hawaiian or Other Pacific Islander." Only 2.8% of respondents select one of these two new categories.

[106] These figures combine data from the 2007 and Current CBPs.

**Figure 3. Race of "No Money Down" Chapter 13 Filers as Compared to Chapter 7 and Traditional Chapter 13 Filers**

Figure 3 reports the percentage at which each racial group is selected into a chapter 7, a "no money down" chapter 13, or a traditional chapter 13 by race. Data from the 2007 and Current CBPs are combined. A household is considered to be of a particular race if either head of household self-identified as that race on a questionnaire. Respondents could identify with more than one race.




Prior research has found that African Americans are statistically significantly more likely to file under chapter 13 than other similarly situated debtors,[107] a result which one of this Article's authors has linked to attitudes of bankruptcy attorneys.[108] This Article shows that African Americans are more likely to pay nothing towards attorneys' fees before bankruptcy, and are more likely to file under chapter 13. It could be that being African American just happens to correlate with other factors that make one less likely to be able to pay attorneys' fees upfront. For example, well-known wealth and income gaps for African Americans may mean they have fewer financial resources to afford the $1,200 median chapter 7 fee. Similar points may be made about the finding on judicial districts. It could be that these districts just happen

[107] *See supra* note 48 and accompanying text.
[108] *See supra* notes 49-51 and accompanying text.

to have people in them who possess characteristics (other than place of residence) that make them more likely to file a "no money down" case.

Statistically, regression analysis controls for the possibility of confounding variables.[109] Our analyses suggest confounding variables are not driving the results on judicial district and race. In the next paragraphs, we explain our regression models. Readers versed in statistical analysis may want to skip to the next subheading in this Article.

A regression statistically controls for other variables in the model such that we can interpret the outcome of the regression as the effect of any particular variable while holding all other variables in the model constant. If we include, for example, a variable for race – the status of identifying as African American – in a regression with variables that include assets and income, we can interpret the outcome as if we were looking at two debtors with identical assets and identical income who only differed on race. This interpretation is true for any variable in our regression model (e.g., two debtors of the same race and income but who only differed on assets).

Regression analysis has its limits. First, it only captures the effect of the variables in the model. Although we think we have identified every variable in our model that could have effect, we cannot prove that. Second, the regression will report the results that happen on average. The outcome of any particular case is not necessarily the same (and almost certainly not exactly the same) as the prediction of the regression. Third and related to the first point, regression is ultimately about correlation. We have no way to rule out the possibility of another variable that would reduce or eliminate the effects identified in our analyses.

The outcome of interest in our study is categorical. Either someone files a chapter 7, a "no money down" chapter 13, or a traditional chapter 13. Because of the mathematics of regression analysis, a logistic regression is appropriate for a categorical outcome.[110] In a logistic regression, we are essentially measuring the chance of observing our outcome of interest (chapter 7, "no money down" chapter 13, or traditional chapter 13) while controlling for the influence of explanatory

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[109] *See* ROBERT M. LAWLESS, ET AL., EMPIRICAL METHODS IN LAW 257-88 (2d. ed. 2016) (providing an overview of regression analysis).

[110] Another commonly used regression technique for categorical outcomes is a probit regression, which generally leads to very similar outcomes as a logistic regression. The principal difference between probit and logistic regressions is the mathematical function used to calculate the regression. *See* LAWLESS, ET AL. *supra* note 109, at 303-04. We ran a multinomial probit regression on our data and reached the same results (i.e., the same variables were statistically significant). We report the more easily interpreted results from the logistic regression.

variables. Because our study involves more than two categories, we need to conduct a multinomial logistic regression.[111]

In a multinomial logistic regression, the outcomes are measured against a base case. In our regressions, we used a chapter 7 filing as the base case. Thus, the regression results can be interpreted as the effect of a variable on a "no money down" chapter 13 or a traditional chapter 13 as compared to its effect on a chapter 7. We report relative risk ratios (see the Appendix for the full results) that are interpreted as the increase (or decrease) in relative risk that each particular variable has as compared to the base case. For example, if the relative risk ratio for owning a car is 1.2 for a "no money down" chapter 13, then someone who owns a car is 20% (1.2 times) more likely to file a "no money down" chapter 13 as compared to our base of a chapter 7. In traditional chapter 13 cases, assume this relative risk ratio moves to 1.5 times for persons owning a car. The interpretation is that persons owning a car are 50% more likely to file a traditional chapter 13 as compared to our base case of filing chapter 7. We also can conclude that owning a car has more of an effect on the decision to file a traditional chapter 13 as compared to our base category, a chapter 7. Relative risk ratios less than 1.0 are a reduction in risk. A relative risk ratio of 0.8 implies that the presence of the variable makes the outcome only 80% as likely to occur as without the variable.

With variables that are not "either/or" outcomes, the interpretation is somewhat more difficult. The relative risk ratio is the effect of a one-unit increase in the variable. If we saw a relative risk ratio for traditional chapter 13 of 1.2 on monthly income as measured in dollars, that would mean *each dollar* of monthly income made a debtor 20% more likely to file a traditional chapter 13. This would be a huge effect, needless to say, but the example is offered to explain how to interpret the data presented *infra*.

In our regressions, we use the natural logarithm of the financial variables rather than the numbers. We perform this transformation because the financial variables are highly skewed in our data as a result of a few debtors with extremely high incomes, assets, or debts, and using the natural logarithms minimizes the skew in the data.[112]

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[111] An assumption of multinomial logistic regression is the "irrelevance of independent alternatives," essentially that the subject's decision does not depend on which alternatives are actually in the regression model. As applied to this study, an example of this assumption is that a debtor would be just as likely to choose a traditional chapter 13 or a "no money down" chapter 13 regardless of whether chapter 7 was on the books. This assumption might be violated in this study if, for example, debtors actually decided first between chapter 7 and chapter 13 and then, conditioned on choosing chapter 13, decided whether they would pay anything up front. Post-regression statistical tests strongly suggested there was no violation of the assumption of the irrelevance of independent alternatives, and therefore a multinomial logistic regression was appropriate.

[112] Highly skewed variables in regressions generally bias results toward false positives. The insatiably curious about this statistical effect can consult LAWLESS, ET AL., *supra* note 109, at 290-97.

For financial variables, a one-unit increase is actually a one-unit increase in the natural logarithm rather than in the underlying variable.

a. Multinomial Logistic Regression, Measures Used

We start our regression analysis with the two variables of interest: race and the overall chapter 13 rate in the judicial district. We then introduce three sets of control variables to account for possible confounding effects.

The first are financial characteristics that might make chapter 13 a good choice as well as determine the urgency of the filing and whether the debtor has funds to pay for attorneys' fees. We include income, total assets, total debt, total priority debt, and secured debt as a percentage of total debt. To reduce skewness and minimize the effect of extreme outliers, income, asset, and debt measures are both Winsorized at 3.5 standard deviations[113] and log-transformed. Obviously, having more income and assets are good proxies for ability to afford an attorney's fee. High-income individuals also may file chapter 13 because of the means test. Chapter 13 likewise allows debtors to give priority in repayment to secured and priority debts, while chapter 7 is better suited to quickly discharging large amounts of unsecured debt.

We also include three binary variables: whether the debtor owned a house, reported a lender threatening foreclosure as a reason for filing, or had filed bankruptcy in the prior eight years.[114] Chapter 13 is widely regarded as the "save your home from foreclosure" chapter,[115] making homeownership an important control. The existence of foreclosure and home ownership also help to control for the urgency of a filing which may incline debtors more toward a "no money down" case. Because debtors may obtain a chapter 7 discharge only once every eight years, debtors who filed bankruptcy in the last eight years should be more likely to file under chapter 13.[116]

The second set of independent variables captures a debtor's non-bankruptcy efforts to address debt problems. We include three binary variables as self-reported by the debtor on the questionnaire and that measure pre-bankruptcy actions: (1)

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[113] In regression analysis, extreme outliers can influence the outcome and result in false positives, finding a result where there is no result. A few debtors had extreme amounts of assets, debts and income. A commonly used technique to deal with the outliers is Winsorization, where any outcome above a certain threshold is recoded at the threshold. In our calculations, we recoded any asset, debt, or income value that was more than 3.5 standard deviations from the mean as the value that equaled 3.5 standard deviations from the mean.

[114] All of the variables came from court records, with the exception of whether the debtor reported threatened foreclosure, which came from the CBP questionnaire.

[115] Melissa Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 ILL. L. REV. 323, 325-326.

[116] 11 U.S.C. § 727(a)(8).

whether the debtor attempted to negotiate or work with creditors, (2) whether the debtor attempted to refinance debt, or (3) whether the debtor borrowed from family and friends.[117] It is possible that African Americans file "no money down" chapter 13 more frequently than other debtors because they are less able to work with their creditors outside of the bankruptcy system or less likely to ask others for help. Access to friends and family with funds who can perhaps help pay for a bankruptcy lawyer may be a particularly important variable in determining who files "no money down" bankruptcies, especially in light of research showing African Americans are less likely to have such access.

Third, we include demographic characteristics that may determine whether the debtor has disposable income or the general wherewithal to come up with the funds to pay an attorney. Specifically, we control for the number of dependents in the household, whether a single female headed the household, whether the debtor was living with a spouse or partner, whether the debtor had a bachelor's degree, and the age of the debtor.[118] For two-person households, the existence of a bachelor's degree and age were averaged across both respondents.[119]

b. Multinomial Logistic Regression, Results

Table 3 presents an abbreviated version of the regression results with the full results appearing in the appendix. In summary, the results of the multinomial logistic regression show large effects both for high chapter 13 districts and African American households on the probability of filing with "no money down." In the initial models without controls (column 2) and as compared to a chapter 7, African-American households are 2.3 times as likely to file a traditional chapter 13 case and 3.3 times as likely to file a "no money down" chapter 13 case. A one percentage point increase in the chapter 13 rate for the district only slightly increases the probability of a traditional chapter 13 (by 6%) but vastly increases the probability of filing a "no money down" chapter 13. A one percentage point translates into a 3.5-fold increase in the probability of filing a "no money" down case as compared to a chapter 7.

These effects remain even after controlling for the possible confounding variables in the model. Of the eight financial control variables (column 3), all but homeownership had the expected effects in the model. Higher income, higher total

[117] We obtained all of these variables from the CBP questionnaire.

[118] These variables also all came from the CBP questionnaire.

[119] Because our regressions combine data from the 2007 CBP and the Current CBP, we ran separate regressions with control variables both (1) for the year of the data and (2) for whether the data were from the 2007 CBP or the Current CBP. These variables were not significant, and their inclusion did not change the regressions. The same variables remained significant and the size of the effects for race and judicial district were approximately the same.

assets, higher priority debt, higher secured-to-total debt, a previous bankruptcy filing, and a debtor's report that foreclosure prompted the filing all were associated with filing a "no money down" chapter 13 case. Also as expected, higher total debts had a negative association with filing with "no money down."

Homeownership did not have the expected positive association with "no money down" filings. However, this result largely is because homeownership correlated highly with other financial variables, such as total assets. If the total assets variable is omitted from the regression equation, homeownership becomes positively associated with "no money down" chapter 13 filings.[120]

Importantly, including these financial controls in the model lowers but does not eliminate the "no money down" effect with regard to African-American households. Because socio-economic realities produce financial variables that are correlated in one direction or another with African American households, it is not surprising these financial variables moderate the effect of race. Notably, race has a measurable effect above and beyond the financial variables in the model. Put another way, the race effect on "no money down" bankruptcies cannot be explained away by financial differences between African Americans and debtors of other races.

[120] The same was true with the prior study of African American's higher incidence of filing chapter 13 in general. Braucher et al., *supra* note 7, at 402-03 (reporting that homeownership became positively associated with filing under chapter 13 when total assets was omitted from the regression equation).

**Table 3. Multinomial Regression on Probability of Case Type**

The results of multinomial regressions on bankruptcy case type are presented below. The table reports relative risk ratios with the base outcome being a chapter 7 filing. Statistical significance at the 5% level is indicated by an asterisk. The presence of control variables is indicated, not necessarily whether those variables were significant. Full results and summary statistics appear in the appendix.

| | (1) | (2) | (3) | (4) | (5) |
|---|---|---|---|---|---|
| *Base outcome: chapter 7* | | | | | |
| *Traditional chapter 13* | | | | | |
| African-American household | 2.594* | 2.278* | 2.082* | 2.073* | 2.064* |
| Chapter 13 rate in district | | 6.710* | 10.917* | 10.734* | 12.246* |
| *"No money down" chapter 13* | | | | | |
| African-American household | 5.340* | 3.342* | 2.828* | 2.831* | 2.827* |
| Chapter 13 rate in district | | 349.529* | 406.385* | 419.140* | 574.304* |
| *Control variables included* | | | | | |
| Financial | | | yes | yes | yes |
| Prebankruptcy workouts | | | | yes | yes |
| Other demographics | | | | | yes |

Including debtors' attempts to deal with creditors and other, non-race demographics (columns 4 and 5) does not materially change the race effects, and actually increases the judicial district effects. The only control variable that had any effect was the presence of dependents under the age of 18. Children are associated with a lower probability of filing a traditional chapter 13 and an even still lower probability of filing a "no money down" case. In the full model (column 5), an African-American household is approximately twice as likely to file a traditional chapter 13 case and 2.8 times as likely to file a "no money down" chapter 13 case, both as compared to a chapter 7.[121]

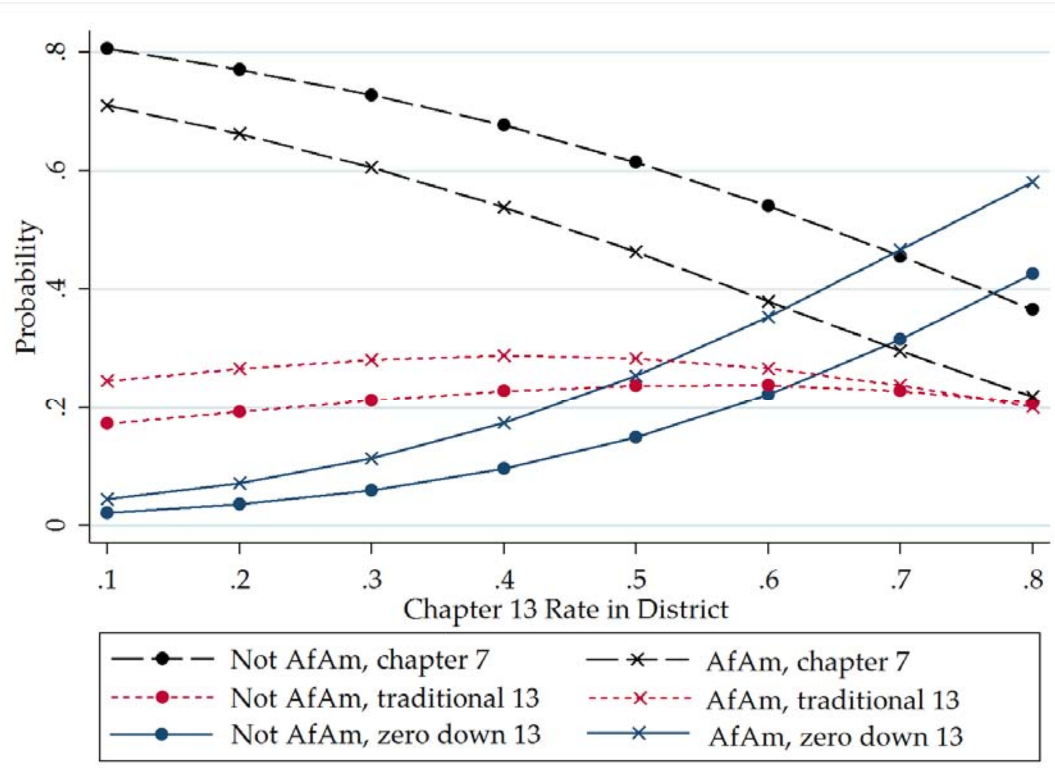
Judicial districts effects become even larger in the presence of controls. A one percentage point increase in the chapter 13 rate in the district makes a "no money down" bankruptcy 5.7 times as likely as a chapter 7. Figure 4 is a graphical depiction of these relationships. It uses the regression results to predict the probability of a

[121] This effect size is roughly similar to that reported in Braucher et al., *supra* note 7, at 400 (reporting African-American households about twice as likely to file chapter 13 than chapter 7 after controlling for possible confounding variables).

chapter 7, a traditional chapter 13, or a "no money down" chapter 13 filing, given particular characteristics of the debtor. We specify all variables to their mean (average) values and then examine the probability of filing the different types of cases based on (1) whether the debtor identifies as African American and (2) the cases in the judicial district that are chapter 13 cases in increments of 10 percentage points from 10% to 80% (mimicking the real-world distribution).

In all of the lines, probabilities associated with African Americans are marked with an "X" and those with all other debtors are marked with a circle. Using the points on the left-hand side of the graph as reference, (1) the top two lines on the graph are the probabilities that a household will file chapter 7, (2) the next two lines the probability that a household will file a traditional chapter 13, and (3) the bottom two lines the probability that a household will file a "no money down" chapter 13.

**Figure 4. Predictive Margins from Multinomial Regression on Probabilities of Filing Different Types of Cases**




In districts with lower percentages of chapter 13 versus chapter 7 filings, all debtors have low probabilities of filing chapter 13. But in low-percentage chapter 13 districts, African American households have a higher probability of filing chapter 13 than those of other races. This is shown in the difference between the top two lines on the left-hand side of Figure 4. This finding confirms prior research.[122]

Also, in low-percentage chapter 13 districts, traditional chapter 13 filings are more prevalent than "no money down" filings. This effect is true for both African-American households and those of other races. For example, in a district where chapter 13 proceedings are only 10% of the caseload, an African-American household has a 4.5% probability of filing a "no money down" case as compared to a 2.2% probability for all other households.

As one moves toward higher-percentage 13 districts, the race effect becomes even greater and all households' probabilities of filing a "no money down" versus a traditional chapter 13 case reverse. For districts where 80% of the cases are chapter 13 filings, an African-American household has a 58.1% probability of filing a "no money down" case as compared to a 42.3% probability for all other households. In high-percentage districts (60%+ of all cases), every household's probability of filing a traditional chapter 13 is lower than filing a "no money down" case. For the highest-percentage chapter 13 districts (80% of all cases are chapter 13), the lines converge for traditional chapter 13s. This suggests there is no race effect as to who files a traditional chapter 13 in these districts. The race effect in who files chapter 13 in these districts is driven by the "no money down" cases. Because these probabilities are computed from the full regression model, they represent the probabilities after controlling for the possibly confounding variables in the regression.

Figure 4 suggests an explanation for why some judicial districts exhibit high chapter 13 rates, especially combined with the findings regarding the similarities between chapter 7 and "no money down" chapter 13 cases. In districts with low overall chapter 13 filing rates, traditional chapter 13 accounts for much of the difference between African-American and other households' chapter 13 rates, though these differences are smaller. As the chapter 13 rate in a district increases, "no money down" chapter 13 proceedings account for a greater portion of the difference in households' chapter 13 rates. In districts in which 60% or more of consumer bankruptcy filings are under chapter 13, almost all of the difference in the chapter 13 rate between African-American households and non-African-Americans households is solely attributable to "no money down" chapter 13. In short, the higher chapter 13 rates in certain districts seem to result from cases moving from chapter 7 to "no money down" chapter 13. This phenomenon is then most prevalent among African-American households.

Though "no money down" bankruptcy is most prevalent among African-Americans, it should be noted that other individuals and families also file under

[122] Braucher et al., *supra* note 7, at 400-05.

chapter 13 with "no money down." Over half (51.1%) of "no money down" chapter 13 filings are those of non-African American households. And, as shown by Figure 4, in places where most consumers file chapter 7, people of all races use the "no money down" bankruptcy option at comparable rates. The concerns about a bankruptcy attorney's influence and the cost of filing chapter 13 should animate the discussion of the implications of "no money down" bankruptcy, regardless of the racial aspect of this phenomenon.

c. Robustness: Prepay Ratio

At this point in the Article, we have explored the categorical variable of whether someone files a chapter 7, a traditional chapter 13, or a "no money down" chapter 13. Another possibility is to assess the percentage of attorneys' fees paid prior to filing, which could range from 0% to 100%. This continuous variable should exhibit the same patterns reflected in our categorical variable.

One significant problem prevents such an analysis from being useful. For reasons explained in Part II, almost all debtors who file under chapter 7 pay 100% of attorneys' fees prior to filing. In our data, 81.1% of all chapter 7 debtors paid the entire attorneys' fee upfront. The mean prepayment in chapter 7 is 86.6%. If anything, it is unclear why these figures are not closer to 100%, a topic that merits further research. For our purposes, this means that the prepayment ratio is effectively a categorical variable. High prepayment ratios invariably signal a chapter 7 case.

We thus limit our focus to the prepayment ratio across chapter 13 filings. On average, African-American households in chapter 13 prepay 11.4% of their attorney fees as compared to 22.6% for all other debtors ($t = 6.68$, $p < .001$). In judicial districts above the median for chapter 13 rates, the prepayment ratio averages 11.3% as compared to 30.5% in below-median districts, a result that is again statistically significant ($t = 15.18$, $p < .001$). Both of these effects are in the same direction and confirm the results from the categorical outcome variables.

As with our analysis for the categorical outcome, we regressed against the prepayment ratio using the same control variables in Table 3. Across different regression specifications, judicial district remains a strong negative indicator of the prepayment ratio. Race is a strong negative predictor in the regressions, including those that control for possible differences in the regression modeling across judicial districts (namely, clustering standard errors at the district level). When the natural logarithm of the prepayment ratio is used to minimize problems in the regression model, race remains a negative predictor, although only significant at $p = .08$.

Our analysis of the prepayment ratio supports the findings from the categorical outcomes. Despite using fewer cases due to dropping chapter 7 cases from the analysis, and therefore having less statistical power, we still observe the same patterns of outcomes as with the categorical variables. Judicial district and race remain correlated with "no money down" bankruptcies.

D. Case Outcomes

Having determined that those who file "no money down" chapter 13 cases enter bankruptcy with finances more similar to chapter 7 debtors than traditional chapter 13 debtors, we move to examining case outcomes. We are interested in how debtors fare in bankruptcy in each of our three case categories. As previously noted, only approximately one in three chapter 13 cases end in a discharge,[123] while almost all chapter 7 cases end with a discharge.[124] If "no money down" cases are dismissed at rates similar to other chapter 13 cases, then this subset of people are paying more to access bankruptcy, yet are much less likely to receive bankruptcy's most significant benefit—forgiveness of debt.

Data from the Current CBP, at present, are limited in regard to case disposition because most chapter 13 repayment plans are three to five years in duration. As of this Article's writing, 74.1% of chapter 13 cases from the Current CBP remain pending, as shown in Table 4.[125]

**Table 4. Case Outcomes by Chapter, Current CBP**

Table 4 reports the disposition of cases from the Current CBP. For cases filed in 2013, 2014, and the first six months of 2015, case status is reported as of one year after the case was filed. For cases filed in the latter half of 2015, case status is reported as of one month after the case was filed.

| | Chapter 7 | "No Money Down" Chapter 13 | Traditional Chapter 13 |
|---|---|---|---|
| Dismissed | 4.4% | 23.8% | 19.5% |
| Discharged | 78.8% | 4.3% | 4.9% |
| Pending | 16.8% | 72.0% | 75.6% |

Although most chapter 13 cases from the Current CBP are pending, the percentage of "no money down" chapter 13 cases that already have been dismissed

[123] *See supra* notes 33-35 and accompanying text.

[124] *See supra* note 27 and accompanying text.

[125] For cases filed in 2013, 2014, and the first half of 2015, we report status as of approximately one year after the case was filed. For cases filed in the latter half of 2015, we report status as of approximately one month after the case was filed.

is more than five times higher than the percentage of chapter 7 cases that have been dismissed. If these "no money down" debtors had filed chapter 7, the chapter that may better suit their financial problems, most likely would have received a discharge of their debts. Instead, they spent time and at least some money (and maybe more than twice as much money as for chapter 7) only to have their bankruptcy cases dismissed and they exit bankruptcy without debt forgiveness.

Outcomes of cases from the 2007 CBP provide a fuller picture of how "no money down" bankruptcies fare. As of the writing of this Article, all but two (less than 0.1%) of the chapter 13 cases from the 2007 CBP have concluded. Table 5 reports the outcomes of cases from the 2007 CBP, distinguished by chapter.

**Table 5. Case Outcomes by Chapter, 2007 CBP**

Table 5 reports the disposition of cases from the 2007 CBP. Case status is reported as of July 2016. Two chapter 7 cases that remained pending as of July 2016 are excluded.

| | Chapter 7 | "No Money Down" Chapter 13 | Traditional Chapter 13 |
|---|---|---|---|
| Dismissed | 3.0% | 54.6% | 48.6% |
| Discharged | 97.0% | 45.4% | 51.4% |

Because we count chapter 13 cases converted to chapter 7 and then dismissed or discharged in the "no money down" and traditional chapter 13 outcomes, the discharge rate for chapter 13 cases is higher than prior findings, which only report discharges of chapter 13 filings after plan completion.[126] Although "no money down" chapter 13 cases were less likely to end in a discharge than traditional chapter 13 cases, the difference is not statistically significant (chi-square = 2.32, p = .128). Nonetheless, the dismissal rate for "no money down" chapter 13 cases is 18 times higher than chapter 7 cases. If "no money down" debtors had opted for chapter 7, almost all of their bankruptcy cases would have ended in a discharge of their debts. Instead, they paid more and received less in bankruptcy.

E. Understanding "No Money Down" Bankruptcy

Why would a debtor file under chapter 13 with "no money down" and pay almost $2,000 more in attorney's fees rather than wait the seven or eight months

[126] *See supra* note 6.

necessary to save enough to file under chapter 7 and pay attorney's fees up front?[127] Why would a bankruptcy attorney propose that a client file under chapter 13 with "no money down" when the client's finances suggest that chapter 7 is the better option, and when the majority of chapter 13 cases end in conversion to chapter 7 or dismissal? Our data cannot explain the development and growth of "no money down" bankruptcy, but we can offer some potential reasons based on prior research about how people behave when they are chronically financially distressed and about attorney-client relationships.

Put simply, the phenomenon of "no money down" bankruptcy seems to reflect concerns about money—for both debtors and bankruptcy attorneys. Each faces incentives to choose the more expensive and less successful chapter 13 over chapter 7. And the effects of these incentives appear to have increased since 2007, pushing more people to file under chapter 13 without paying any attorneys' fees upfront.

To understand why debtors may find "no money down" bankruptcy attractive, recall that by the time most people turn to bankruptcy, they have struggled for years to pay their debts. Many debtors have asked family and friends for help, have sold their possessions, or have taken out credit card, payday, and other loans.[128] They are broke and have been for some time. Research shows that living under such conditions of financial scarcity fundamentally changes how people think about money and expenses. Rather than plan for the future, they tunnel, focusing on the here and now, prioritizing present needs.[129] This tunneling on what is needed now diminishes people's capacity to make financially sound decisions.[130] Indeed, a lack of money can tax a person's decision-making ability more than being seriously sleep deprived.[131]

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[127] Chapter 13 plans typically provide for the payment of attorneys' fees on an expedited basis. *See supra* note 70 and accompanying text. Assuming that a debtor will pay the mean of approximately $3,200 in attorneys' fees over 18 months, a debtor will pay about $175 in attorneys' fees per month. If a debtor saved that much per month prior to filing bankruptcy, it would take a debtor about 7 months to save up the mean of $1,200 that attorneys charge to file a chapter 7 case.

[128] *See supra* Part III.C.1. Both the 2007 and Current CBP questionnaires asked respondents how they dealt with their debts prior to filing bankruptcy.

[129] SENDHIL MULLAINATHAN & ELDAR SHARIF, SCARCITY 1-16 (2013) (overviewing how the lack of a valuable resource—time, money, food—"captures the mind" and causes people to focus on that which is scarce to the exclusion of other, possibly important tasks).

[130] *Id.* at 35-38 (describing the "tunneling tax"); *see also* Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MARYLAND L. REV. 707, 767-69 (2006) (linking "abbreviated reasoning" with the emotional stress, limited cognitive capacity, and the desire to escape the stressful situation as quickly as possible that accompany a lack of money).

[131] MULLAINATHAN & SHARIF, *supra* note 129, at 49-52 (discussing the effect of scarcity on "fluid intelligence" and finding that money concerns reduce a person's IQ by the equivalent of 13 to 14 points). For another example of the effects of financial scarcity, *see* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 114-15 (2016) (discussing how tenants facing eviction often are not ready when the sheriff arrives and linking an inability "to accept or imagine" that the eviction will happen to

The result is that cash-strapped people often turn to expensive financial products, such as payday loans, to pay pressing expenses.[132] People who take out these loans do not necessarily lack the financial acumen to understand that these loans are costly.[133] It is the gravity of their situations that causes them to accept any assistance that presents itself, and put off dealing with the potential fallout for another day.[134] And even if they recognize that they may be adding to their financial woes, people have an optimism bias that leads them to think that their financial situations will improve in the future.[135]

By the time people decide to file bankruptcy, they also have been inundated with "buy now, pay later," "easy credit," and "cash back" offers for everything from rent-to-own furniture and cars to short-term and home loans. These offers frequently play on the stress caused by financial scarcity, as well as people's fears about their ability to obtain credit.[136] For example, predatory lenders have mailed homeowners "live checks"—instant loans with high interest rates that a consumer accepts by simply cashing the check—a form of "push marketing" that highlights immediate gains and short-term benefits and deemphasizes long-term costs.[137]

When attorneys offer their clients the ability to file bankruptcy now with "no money down," debtors not only are familiar with paying nothing up front for goods

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how scarcity causes people to "prioritize the now and lose sight of the future").

[132] *See* MULLAINATHAN & SHARIF, *supra* note 129, at 107-08 (linking the use of payday loans and other types of borrowing to financial scarcity).

[133] *See* MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 116-18 (2015) (noting that evidence suggests that people who use payday and similar loans "borrow with forethought and care").

[134] *See* Iain Ramsay, *The Alternative Consumer Credit Market and Financial Sector: Regulatory Issues and Approaches*, 35 CAN. BUS. L.J. 325, 369-71 (2001) (discussing research showing that people are willing to pay higher interest rates in order to receive cash within a short period of time).

[135] *See* Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1079 (2009) (discussing optimism bias in the context of mortgages); Jason Kilborn, *Behavioral Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions*, 22 EMORY BANKR. DEV. J. 13, 18-19 (2005) (discussing the "overconfidence bias" that causes people to systematically underestimate the probability that an adverse event will happen to them). The effects of scarcity and optimism are similar to the effects of people's tendency to overvalue present gratification, discount future costs, and skew the relative benefits and costs of future activities. *See* Kilborn, *supra*, at 21-22 (discussing "hyperbolic discounting" and "bounded willpower"); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1503-06 (1998) (overviewing decision making biases).

[136] *See* Willis, *supra* note 130, at 772-76 (overviewing how people with poor credit or who fear discrimination will respond to credit offers).

[137] *See id.* at 770, 816 (discussing predatory lending marketing tactics). These offers also allow people to avoid the potential ego threat of credit denial and discrimination by guaranteeing approval, which too may push them to accept loans without fully weighing benefits and costs. *See id.* at 772-76 (linking "ego threats" and marketing tactics).

and services, but they also are primed to want to accept such an offer. To debtors, "no money down" bankruptcy may be akin to a long line of other offers for instant credit. Plus, filing bankruptcy right now will lighten their financial pressures, at least in the short term, with the automatic stay going into place upon the bankruptcy filing. The short term is what cash-strapped individuals are focused on, most likely to the exclusion of considering whether they should save up to file bankruptcy in the future. That is, assuming that option even is presented to them. Who would reject what likely looks like an interest-free loan and the ability to file bankruptcy today, particularly when the alternative is enduring financial hardship for many more months?[138]

The professional context of attorney-client interactions also may lead debtors to expect that filing under chapter 13 right now is a good option, regardless of whether attorneys present chapter 7 as an alternative or only mention chapter 13. In other professional contexts, such as doctor-patient relationships and clinical trials, research has shown that patients believe that their doctors would not suggest that they participate in anything that is unsafe or not in their medical best interests. That is the belief, even if they have been told, as they must be by informed consent protocols, that the clinical trial may not help them.[139] More simply, interacting with professionals is stressful for many people. People may become anxious and feel inferior,[140] and may be more likely to defer to professionals' judgments. Being confronted with a large amount of new and complex information, such as what will be necessary to file bankruptcy and navigate the process, may heighten people's tendency to defer to a professional's judgment.[141] In the context of "no money down"

[138] "No money down" bankruptcy is not interest-free even though attorneys' fees are paid over the course of the chapter 13 plan with no interest added, which likely is the payment structure most salient to debtors. The correct comparison is to attorneys' fees in chapter 7.

[139] *See* Joshua Crites & Eric Kodish, *Unrealistic Optimism and the Ethics of Phase I Cancer Research*, 39 J. MED ETHICS 403, 403-04 (2013) (detailing examples in which patients believed the likelihood that they would benefit from a trial exceeded the likelihood that other patients would benefit from the same trial); S. Kenyon, et al., *Participating in a Trial in a Critical Situation: A Qualitative Study in Pregnancy*, 15 QUAL. SAF. HEALTH CARE 98, 100 (2006) (finding that in deciding to participate in a clinical trial people "relied on a generalized faith that both hospitals and health professionals will act in their interests and only suggest interventions that will be of benefit and carry minimal risks").

[140] For instance, Medicaid patients report feeling uncomfortable interacting with medical providers and their staff. Paul Alexander Clark, *Intensive Care Patients' Evaluations of the Informed Consent Process*, 26 Dimensions Critical Care Nursing 207, 212 (2007). In the context of attorney-client relationships, "social identity threat"—a person's concern that she will be devalued because of social group membership—has been shown to cause anxiety and to tax a person's cognitive capacity, resulting in less productive attorney-clients meetings because clients have trouble communicating with attorneys. Cheryl R. Kaiser & Victor D. Quintanilla, *Access to Counsel: Psychological Science Can Improve the Promise of Civil Rights Enforcement*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCI. 95, 97-98 (2014).

[141] *See* Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transactions Costs*, 47 WM. & MARY L. REV. 1635, 1678-79 (2006) (discussing how "information overload" can cause

bankruptcy, debtors essentially may be inclined to substitute what they think is their attorney's judgment for their own.

Bankruptcy attorneys may think that providing a way for overindebted and stressed people to file bankruptcy immediately is beneficial, and they may offer "no money down" chapter 13 to help clients deal with their money problems. At the same time, attorneys must be cognizant of their own financial needs. Bankruptcy attorneys make their living representing debtors. Securing clients now is surely, all things equal, better than telling potential clients to come back when they have saved enough cash. At least some portion of debtors will likely not return. Saving money is difficult, particularly over a long period of time during which new expenses may arise unexpectedly. Debtors' circumstances may change such that they no longer need or want to file bankruptcy. And debtors may find another bankruptcy attorney.

Based solely on their finances and cash flow, attorneys also may prefer that their clients file under chapter 13, even if some debtors are unable to pay attorneys' fees prior to filing. Attorneys spend more time on chapter 13 cases than chapter 7 cases, which allows them to remain productive and to charge their clients more. The chapter 13 plan also puts their clients on a budget that forces them to set aside money to pay attorneys' fees. Even better, chapter 13 trustees oversee debtors' compliance with plans, often collecting money from debtors and forwarding it to attorneys. Not only does "no money down" bankruptcy assure attorneys that they have clients, attorneys also guarantee themselves a certain number of billable hours and a relatively reliable future income stream. "No money down" chapter 13 simply is good business.

Although offering debtors the option to file under chapter 13 with "no money down" may be good business, attorneys owe a duty of professional responsibility to their clients. Attorneys should inform clients of their legal rights and options, and also go further, striving to ensure that their clients understand those rights and options.[142] In the context of consumer bankruptcy, fulfilling this duty means presenting the financial and other benefits and drawbacks of filing under chapter 7 and chapter 13.[143] Based on our data, there are indications that attorneys increasingly may be placing their business interests above their clients' financial interests.

That bankruptcy attorneys might prioritize their financial interests above their clients' interests is consistent with prior studies of the consumer bankruptcy system.[144] It also is consistent with research regarding the difficulties faced by lower

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people to disregard relevant information).

[142] Preamble & Scope, ¶ 2, Model Rules of Professional Conduct, American Bar Association.

[143] Rule 2.1: Advisor, Model Rules of Professional Conduct, American Bar Association ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation").

[144] *See supra* notes 78-81 and accompanying text.

income individuals in finding attorneys to represent them in a variety of legal contexts,[145] and how a flat-rate fee structure may lead attorneys not to zealously advocate for clients,[146] all of which raise concerns about access to justice. That attorneys may put their interests ahead of their clients' such that African Americans in particular file with "no money down" further aligns with a recent study finding that African Americans are more likely to file employment discrimination claims without the assistance of an attorney, which resulted in an increased likelihood that their cases would be dismissed or that they would lose on summary judgment.[147]

When it comes to possible conflicts between their interests and the clients' interests, there is no reason to think attorneys should be different from other professionals. From investment advisors and hedge fund directors to real estate agents, funeral directors, and physicians, research has shown that professionals sacrifice their clients' interests to increase their own profits.[148] These studies also demonstrate that professionals can take advantage of a wide range of people and not only low-income or minority clients. Investment advisors cater to a wealthy clientele, yet still successfully play on these clients' anxiety, relative lack of knowledge, and

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[145] *See, e.g.*, Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 LEG. & PUB. POL'Y 705, 712 (2012) (noting that "studies generally find that low income plaintiffs are less likely to have lawyers"); Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 655 (2005) (discussing how tort reform changed how attorneys screened clients and cases, leading attorneys to reject cases with limited recovery prospects, including those of low wage earners); Michelle S. Jacobs, *Full Legal Representation of the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOWARD L.J. 257, 261-62 (2001) (linking research regarding the "moral worthiness" of the poor with a lack of zealous representation of low income clients' interests).

[146] Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1973-74 (2002).

[147] *See generally* Myrick et al., *supra* note 146.

[148] *See* Steven D. Levitt & Chad Syverson, *Market Distortions When Agents are Better Informed: The Value of Information in Real Estate Transactions*, 90 REV. ECON. & STATS. 599 (2008) (finding that real estate agents price their clients' houses for less than their own); David E. Harrington & Kathy J. Krynski, *The Effect of State Regulations on Cremation Rates: Testing for Demand Inducement in Funeral Markets*, 45 J. L. & ECON. 199 (2002) (finding that state funeral regulations affect whether funeral directors induce consumers to choose burial over cremation); Judith Chevalier & Glenn Ellison, *Risk Taking by Mutual Funds as a Response to Incentives*, 114 J. POLITICAL ECON. 389 (1997) (finding that mutual fund managers set the risk of portfolios to maximize fund inflows rather than risk-adjusted returns); Jonathan Gruber & Maria Owings, *Physician Financial Incentives and Cesarean Section Delivery*, 27 RAND J. ECON. 99 (1996) (finding that physicians were more likely to recommend expensive cesarean sections when demand for this procedure was low); Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law From Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627, 648-58 (1996) (discussing how investment advisors convince clients to make riskier investments because it is in the advisors' economic interests).

optimism and other biases to increase their profits.[149] For instance, investment advisors use an "act now" or lose out on the opportunity pitch to close sales, a technique akin to file bankruptcy now with "no money down."[150] Regardless of the mechanisms behind the increasing incidence of "no money down" bankruptcy, our data strongly suggest that these debtors are paying significantly more to receive significantly less from the bankruptcy system than other similar debtors.

## IV. IMPLICATIONS AND SOLUTIONS

### A. The Poor Pay More

"No money down" bankruptcy fits within an increasingly visible pattern of lower-income or cash-strapped individuals paying more for goods and services, and ultimately receiving less. They pay more in rent for lower quality housing.[151] They pay more for home goods and electronics through rent-to-own loans, while facing the distinct possibility of losing that merchandise to repossession.[152] They pay higher fees and interest rates on their credit cards, while higher-income individuals pay less and rack up travel miles and other benefits from their credit card use.[153] Lower-income individuals otherwise pay more to borrow money, taking out loans described as "debt traps."[154] They even pay more to use their own money, spending up to 10% of their income to cash checks, pay recurring bills, and send money to their families.[155]

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[149] *See* Langevoort, *supra* note 148, at 651-58 (overviewing stockbrokers' sale tactics).

[150] *Id.* at 652-53.

[151] *See* DESMOND, *supra* note 131, at 75, 307-08 (discussing how landlords make large profits off of providing housing to low-income individuals, including how they do not lower rents to meet demand, but, rather, charge tenants more in rent, neglect to fix problems with the properties, and evict tenants when they cannot keep up with rent payments).

[152] *See* Jim Hawkins, *Renting The Good Life*, 49 WILL. & MARY L. REV. 2041, 2044 (2008) (noting that the overall cost of merchandise purchased through rent-to-own is twice to three times what someone would pay if they purchased the merchandise outright); *id.* at 90 (linking the low-income rental market with rent-to-own companies and noting "[t]here [is] a business model at the bottom of every market").

[153] *See* Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 153-54 (describing how the credit card industry operates "a subprime market"). As investigated by one of this Article's authors, credit card issuers also target people who recently received a discharge in bankruptcy, charging them higher interest rates. *See generally* Porter, *Bankrupt Profits*, *supra* note 40.

[154] *See* Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 577 (2010) (describing why payday loans are a "debt trap"); BARADARAN, *supra* note 133, at 122-26 (detailing how low-to-moderate income individuals have little access to mainstream banks and credit unions and thus turn to fringe lending, and how expensive these loans are for consumers and how profitable they are for fringe lenders).

[155] *See* BARADARAN, *supra* note 133, at 1 (noting further that for low-income individuals, "the total price of simply financial services each month is more than they spend on food").

African Americans in particular pay more for goods and services, a result linked with predatory practices.[156] In many of these scenarios, lenders make use of the "buy now, pay later" marketing tactic that plays on financially insecure people's tendency to focus on fulfilling present needs without fully considering the long-term costs of borrowing and spending.[157] And the cash-strapped increasingly go to jail when they cannot pay their bills, only to find they do not have enough money to post bail, and to further find that they owe even more in court fees when they exit the justice system.[158]

Now we also know that cash-strapped individuals pay more in attorneys' fees to file bankruptcy, particularly if they are African American, only to spend more time in bankruptcy and have their cases dismissed at rates markedly higher than other people who enter bankruptcy in similar financial situations.[159] Like other types of lending to cash-strapped individuals, "no money down" bankruptcy effectively is a "buy now, pay later" scheme. Not only is it economically inefficient, it also affects people's access to justice and ability to use a key part of America's social safety net, seemingly solely because they do not have money.

The phenomenon of "no money down" bankruptcy also suggests a breakdown in attorney-client communications. "No money down" filers may think that chapter

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[156] *See* Pamela Foohey, *Lender Discrimination, Black Churches, and Bankruptcy*, 50 HOUS. L. REV. __, __ (forthcoming 2017) (overviewing studies which establish that African Americans pay more for consumer goods, cars, car loans, home loans, peer-to-peer loans, and small business loans and which connect these results to predatory practices); Ronald H. Silverman, *Toward Curing Predatory Lending*, 122 BANKING L.J. 483, 486-91 (2005) (overviewing "financial strategies" used to "victimiz[e] lower and moderate income persons," and noting that "second-tier" or fringe financial services often are used by African Americans).

[157] *See supra* notes 136-137 and accompanying text.

[158] People are put in jail when they fail to appear for debt collection hearings, resulting in the issuance of a warrant for their arrest. *See* Jessica Silver-Greenberg, *Welcome to Debtors' Prison, 2011 Edition*, WALL STREET J. (Mar. 17, 2011), http://www.wsj.com/articles/SB10001424052748704396504576204553811636610; Chris Serres & Glenn Howatt, *In Jail For Being In Debt*, Star Tribune (June 9, 2010), *available at* http://www.startribune.com/in-jail-for-being-in-debt/95692619/. Similarly, lower-income and cash-strapped individuals also have trouble meeting bail when they are arrested for misdemeanors and felonies, which results in them pleading guilty and accepting punitive plea deals, and in them incurring additional court fees. *See generally* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (May 2, 2016), *available at* http://ssrn.com/abstract=2777615. In the context of access to bankruptcy, the existence of chronically cash-strapped individuals presents a separate but related question of how to deal with those people who simply are too poor to file bankruptcy regardless of the timing of payment of attorneys' fees. *See generally* Stephanie Ben-Ishai & Saul Schwartz, *Bankruptcy for the Poor?*, CLPE Research Paper No. 2/2007 (Feb. 2007), *available at* https://ssrn.com/abstract=974779 (discussing whether the Canadian bankruptcy system should be more accessible to debtors in the lower-income deciles).

[159] Cases from the Current CBP show that most chapter 13 cases remain pending one year after filing, while most chapter 7 cases have concluded one year after filing. *See supra* Part III.D, Table 4.

13 is their only option because attorneys only mention chapter 13. They may assume that chapter 7 and chapter 13 are equally expensive. Or they otherwise may have difficulties understanding and thus balancing the benefits of essentially taking a loan from their attorneys against the benefits of waiting to save up or borrow enough cash to pay attorneys' fees and file under a bankruptcy chapter with a vastly high discharge rate. That African Americans in particular are more likely to file with "no money down" further suggests that these filers are not making fully informed decisions. A possible explanation, which our data cannot completely rule out, is that African Americans are much less able to borrow or save money for attorneys' fees. Under this assumption, a "no money down" bankruptcy may be their best option. Such an explanation, however, would further require a theory about why this effect varies across different judicial districts with different chapter 13 rates.[160] We cannot offer one.

Similarly, "no money down" chapter 13 debtors appear to be making financially imprudent decisions. We do not know whether they would be better off waiting to file chapter 7 until they are able to save, or alternatively borrowing money to pay attorneys' fees. If they wait, they may never file. This outcome, on average, may lead to worse financial outcomes than paying more to file under chapter 13, staying in bankruptcy longer, and likely having their cases dismissed. Indeed, the months or years that "no money down" debtors spend in chapter 13 bankruptcy, free from creditors' calls and benefiting from this breathing room, may have been direly needed at the time they sought bankruptcy attorneys' assistance. "No money down" debtors also may prefer to file under chapter 13, despite its significantly higher cost, because it is more oriented to creditor repayment.[161] Even if these debtors knew how much their attorneys were charging them to file bankruptcy, they still might accept the "buy bankruptcy now, pay later" offer. Then again, studies of people who take out payday loans show that they often are so desperate for cash to pay expenses now that they

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[160] In the CBP questionnaires, we asked respondents whether they borrowed from family or friends as a tactic to deal with their debts prior to filing bankruptcy. African Americans were no less likely than other respondents to indicate that they turned to family and friends, which may suggest that they are able to borrow from family and friends at similar rates and amounts as other debtors. In addition, one study of low-income tenants and their struggles with eviction found that these individuals, including African Americans, are able to borrow from family and friends, but that they only asked for help in times of what they consider true emergencies. DESMOND, *supra* note 131, at 121 ("People were careful not to overdraw their account because when family members with money grew exhausted by repeated requests, they sometimes withheld support for long periods of time, pegging their relatives' misfortunes to individual failings."). Filing bankruptcy may be one such true emergency.

[161] *See supra* notes 42-43 and accompanying text.

are willing to borrow at any rate, which leads to exploitation of the financially vulnerable that states and the federal government are unwilling to tolerate.[162]

Regardless of whether debtors would accept this "no money down" option with full knowledge of its benefits and costs, and regardless of whether bankruptcy attorneys offer this option because they think it will help their struggling clients,[163] "no money down" bankruptcy is a suboptimal solution to debtors' financial problems. One salient difference between "no money down" bankruptcy and other transactions in which cash-strapped individuals pay more is that attorneys facilitate their clients' access to justice. Attorneys have a duty to act based on their clients' best interests. The consumer bankruptcy system is one of the largest social safety institutions in our society. As gatekeepers, attorneys have a heightened duty to ensure that debtors make the most productive use of bankruptcy.

"No money down" chapter 13 creates a fundamental tension between attorneys' and debtors' interests. A subset of people are not accessing part of our social safety net—chapter 7 bankruptcy—that best fits with their financial needs. As a result, African Americans specifically, and cash-strapped individuals from all racial backgrounds generally, are penalized for their inability to pay. Given that attorneys facilitate "no money down" bankruptcy, the best way to ensure that all debtors have equal access to bankruptcy is to cabin attorneys' incentives and role in chapter choice, while still allowing debtors access to this filing option if they so choose.

### B. Reforming Bankruptcy Attorneys' Fees

One solution to combat the effects of the "no money down" bankruptcy is to allow debtors to pay bankruptcy attorneys' fees in installments during their chapter 7 cases. If debtors paid about $210 per month for the six months it typically takes for a chapter 7 case to conclude, upon discharge they will have paid the approximately $1,250 attorneys' fee.[164] The $210 likely is very close to the amount that "no money down" debtors pay each month to their attorneys through their plans.[165] Eliminating the differential treatment in chapter 7 and chapter 13 on the timing of payment of

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[162] *See* BARADARAN, *supra* note 133, at 124-28 (discussing states' regulations of payday loans); *Consumer Financial Protection Bureau Proposes Rule to End Payday Debt Traps* (June 2, 2016), *available at* http://files.consumerfinance.gov/f/documents/CFPB_Proposes_Rule_End_Payday_Debt_Traps.pdf (outlining the Consumer Financial Protection Bureau's proposed rules to regulate payday lenders).

[163] Bankruptcy attorneys also may think that debtors want to pay back their creditors as much as possible, and, out of a paternalistic benevolence, suggest "no money down" chapter 13 as a way for them to do so. This would align with some bankruptcy attorneys' prior comments about the morality of filing under chapter 13 rather than chapter 7. *See supra* notes 45-46 and accompanying text.

[164] *See supra* note 27.

[165] *See supra* note 127.

attorneys' fees should allow debtors to make the chapter choice decision based on their needs.

This solution would require amending the Bankruptcy Code, in light of the decision of the Supreme Court in *Lamie*. The change would address the longstanding complaint that a statutory drafting oversight, rather than meaningful policy concerns, is the reason that the law clearly permits the payment of attorneys' fees over time in chapter 13, but not in chapter 7[166] Bankruptcy attorneys, particularly those whose practice includes some chapter 7 filing, should support the change. Their volume of business should increase. Attorneys whose clients mostly or solely file under chapter 13 may worry that they will need to adapt their practices to accommodate debtors who want to file under chapter 7. However, these attorneys likely practice in high chapter 13 districts where "no money down" cases are particularly prevalent. People living in these areas may benefit most from increasing the accessibility of chapter 7.

Given the long history of regional disparities in the distribution of chapter 7 and chapter 13 filings,[167] merely changing how attorneys' fees may be paid may not markedly shift the percentage of debtors filing under chapter 7 versus chapter 13, particularly in high chapter 13 districts. Simply because attorneys can offer their clients a "no money down" chapter 7 option does not mean they will do so. As such, we offer two other solutions that look to chapter 13.

The first solution focuses on how bankruptcy judges assess attorneys' fees in chapter 13. The Code requires that judges confirm that the attorney's compensation reflects beneficial and necessary services to the debtor.[168] As discussed, almost all bankruptcy courts have issued standing orders that set a "no look" attorneys' fee for chapter 13 cases. Courts further provide guidance about how chapter 13 plans should structure the payment of attorneys' fees.[169] Attorneys rely on these orders to set their fees, knowing that if they charge no more than the set amount, the judge almost certainly will approve their fees. Taking away that certainty may change how attorneys discuss chapter choice with their clients.

Revisions to standing orders should center on identifying debtors more likely to benefit from chapter 7 who nonetheless have filed under chapter 13. For instance, standing orders could provide that only if the debtor has paid 25% (or some other percentage) or more in attorneys' fees prior to filing will the "no look" fee apply.

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[166] *Lamie v. U.S. Trustee*, 540 U.S. 526, 529 (2004) (noting that a deletion of five words in the Code section dealing with the payment professionals' fees in chapter 7 "created apparent legislative drafting error"). *See also* Cecil, *supra* note 58, at 98-99 (proposing that attorneys' fees be given administrative priority status in chapter 7).

[167] *See supra* note 36.

[168] 11 U.S.C. § 330(a)(4).

[169] *See supra* note 70 and accompanying text.

Otherwise, the judge will consider whether the attorneys' fee is appropriate in light of the services provided to the debtor. If the debtor would benefit equally or more from filing under chapter 7, the attorney risks the judge finding that the attorneys' fees were not appropriate. More attorneys thus may recommend that debtors with finances more suited to chapter 7 file under chapter 7 in the first instance.

Alternatively, standing orders could provide that the "no look" fee only applies in cases in which the chapter 13 plan contemplates substantial repayment to creditors. This requirement would reflect the policy behind chapter 13—to require debtors who can pay creditors some money to do so—while specifically targeting "fee-only" and similar plans for judicial scrutiny.[170] This scrutiny also may cause attorneys to recommend chapter 7 to debtors more suited to chapter 7 in the first instance.

Coupling either of these revisions with changes to the Code to allow debtors to pay attorneys' fees in installments during their chapter 7 cases may decrease the incidence of "no money down" chapter 13 bankruptcy. A benefit of revising standing orders in this way is that debtors still will be able to file under chapter 13 and pay "no money down" or near "no money down" even if their finances suggest they are more suited to chapter 7. Attorneys will know that they will be required to explain to the court why their clients elected to file under chapter 13. This requirement may in turn incentivize them to carefully discuss chapter choice with their clients.

Rather than focusing on revising standing orders to shift attorneys' incentives, a similar solution would be to revise the requirements for confirmation of chapter 13 plans to include a condition that the plan must contemplate making a substantial repayment to creditors.[171] Under this proposal, bankruptcy judges could set a standard for "substantial" that takes into account the debtor's circumstances. The "substantial" requirement, however, necessarily will preclude confirmation of "fee-only" plans. Given the low incomes and high debts of "no money down" debtors, many of these chapter 13 plans would not be confirmable under a "substantial" repayment standard. These debtors' remaining options would be to file under chapter 7 or have no bankruptcy option at all. This leads us to conclude that reforming the timing of when debtors pay attorneys' fees in chapter 7 is a superior approach. That reform is narrowly tailored to ensuring people are not denied access to bankruptcy solely because they do not have money to pay an attorney in full prior to filing.

Lastly, all of the above solutions assume that people will file bankruptcy with the assistance of an attorney. Yet, it is the tension between attorneys' and debtors' interests that seems to have led to the increasing incidence of "no money down"

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[170] Recall that "fee-only" plans provide for payment of attorneys' fees and nothing else. *See supra* notes 72-76 and accompanying text.

[171] The current confirmation requirements are in 11 U.S.C. § 1325.

bankruptcy. A final solution thus removes attorneys from the equation. A handful of *pro se* debtors are already able to navigate chapter 7 successfully, but the process as it stands is too complicated and technical for most laypeople.[172] Making chapter 7 more accessible will allow all people struggling with debts to use the bankruptcy system irrespective of their income, savings, or ability to borrow money.

## V. CONCLUSION

The consumer bankruptcy system is one of the largest social safety institutions. Because attorneys serve as its gatekeepers, they have the opportunity to advance or impede people's access to justice. The existence and increasing use of "no money down" bankruptcy suggests that some people are receiving less from the bankruptcy system despite paying more in attorneys' fees. These debtors are more likely to come from districts with high chapter 13 rates and are more likely to be African American. This is not equal access to justice. Rather, these two characteristics align with prior research about bankruptcy attorneys' role in creating regional and racial disparities in debtors' chapter choice, further suggesting that attorneys play a very important, though likely unintentional, role in facilitating people's use of bankruptcy.

The CBP data can confirm the existence and extent of the "no money down" bankruptcy phenomenon but cannot fully explain it. We could determine that African Americans are much more likely to file under chapter 13 with "no money down" than other similar debtors only because we collected demographic and other information by sending a questionnaire to directly to debtors. As one of this Article's authors has called for, collecting demographic information at the time people file, such as on the bankruptcy petition, will allow for a full census of bankruptcy cases.[173] Although we think that a full census will show a racial gap both in chapter 13 cases generally and in "no money down" chapter 13 cases, a new analysis could produce different result or additional insights. Until then, "no money down" bankruptcy exists as yet another instance in which cash-strapped, lower-income, and minority individuals pay more and receive less. The consumer bankruptcy system not only is one of the largest social safety institutions, it also is one of the most used parts of the judicial system. We must continue to examine the extent of the regional and racial disparities in filings, and if confirmed, reform this integral part of our legal system.

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[172] Littwin, *supra* note 2, at 1973.

[173] Braucher et al., *supra* note 7, at 424.

**APPENDIX**

*1. Multinomial Logistic Regression Results*

Table 3 reports results from a multinomial logistic regression on case type. For space reasons, abbreviated results appear in the body of the paper with the full results shown below. The results show relative risk ratios with standard errors in parentheses below. The base outcome is a chapter 7 filing. Statistical significance at the 5% level is shown by an asterisk.

| | (1) | (2) | (3) | (4) | (5) |
|---|---|---|---|---|---|
| *Base Outcome: chapter 7* | | | | | |
| *Outcome: traditional chapter 13* | | | | | |
| African-American household | 2.594* | 2.278* | 2.082* | 2.073* | 2.064* |
| | (0.288) | (0.259) | (0.294) | (0.293) | (0.305) |
| Chapter 13 rate in district | | 6.710* | 10.917* | 10.734* | 12.246* |
| | | (2.039) | (3.977) | (3.937) | (4.653) |
| Prior bankruptcy | | | 4.974* | 4.914* | 4.515* |
| | | | (0.874) | (0.866) | (0.812) |
| Foreclosure as reason for bkcy. | | | 3.802* | 3.973* | 4.046* |
| | | | (0.533) | (0.567) | (0.599) |
| Homeowner | | | 0.973 | 0.994 | 0.994 |
| | | | (0.198) | (0.204) | (0.211) |
| Monthly income (ln) | | | 3.649* | 3.749* | 4.663* |
| | | | (0.487) | (0.567) | (0.722) |
| Total assets (ln) | | | 0.943 | 0.944 | 0.963 |
| | | | (0.063) | (0.064) | (0.068) |
| Priority debts (ln) | | | 1.093* | 1.094* | 1.091* |
| | | | (0.017) | (0.017) | (0.017) |
| Secured debt/total debt (ln) | | | 8.920* | 9.193* | 7.468* |
| | | | (3.737) | (3.856) | 3.267 |
| Attempted to "work with" creditors | | | | 0.880 | 0.926 |
| | | | | (0.110) | (0.120) |
| Attempted to refinance debt | | | | 0.829 | 0.775 |
| | | | | (0.114) | (0.110) |
| Borrowed from family/friends | | | | 0.903 | 0.990 |
| | | | | (0.169) | (0.133) |
| Bachelors' degree or higher | | | | | 0.740 |
| | | | | | (0.145) |
| Dependents under 18 | | | | | 0.889* |
| | | | | | (0.050) |
| Lived with spouse or partner | | | | | 0.853 |
| | | | | | (0.165) |

| | (1) | (2) | (3) | (4) | (5) |
|---|---|---|---|---|---|
| Female head of household | | | | | 1.065 |
| | | | | | (0.212) |
| Age in years | | | | | 1.006 |
| | | | | | (0.006) |
| Intercept | 0.262* | 0.147* | 0.000* | 0.000* | 0.000* |
| | (0.015) | (0.016) | (0.000) | (0.000) | (0.000) |
| *Outcome: "no money down" chapter 13* | | | | | |
| African-American household | 5.340* | 3.342* | 2.828* | 2.831* | 2.827* |
| | (0.705) | (0.483) | (0.461) | (0.463) | (0.486) |
| Chapter 13 rate in district | | 349.529* | 406.385* | 419.140* | 574.304* |
| | | (131.242) | (170.984) | (177.632) | (255.068) |
| Prior bankruptcy | | | 6.497* | 6.409* | 5.817* |
| | | | (1.284) | (1.270) | (1.207) |
| Foreclosure as reason for bkcy. | | | 2.820* | 2.954* | 3.311* |
| | | | (0.535) | (0.571) | (0.663) |
| Homeowner | | | 0.734 | 0.720 | 0.717 |
| | | | (0.184) | (0.182) | (0.188) |
| Monthly income (ln) | | | 2.350* | 2.424* | 3.001* |
| | | | (0.387) | (0.404) | (0.564) |
| Total assets (ln) | | | 0.920 | 0.917 | 0.917 |
| | | | (0.079) | (0.078) | (0.080) |
| Priority debts (ln) | | | 1.037 | 1.038* | 1.042 |
| | | | (0.021) | (0.021) | (0.022) |
| Secured debt/total debt (ln) | | | 8.702* | 9.068* | 7.869* |
| | | | (4.440) | (4.633) | (4.169) |
| Attempted to "work with" creditors | | | | 0.776 | 0.773 |
| | | | | (0.124) | (0.128) |
| Attempted to refinance debt | | | | 0.969 | 0.951 |
| | | | | (0.176) | (0.179) |
| Borrowed from family/friends | | | | 1.090 | 1.186 |
| | | | | (0.180) | (0.207) |
| Bachelors' degree or higher | | | | | 0.830 |
| | | | | | (0.214) |
| Dependents under 18 | | | | | 0.735* |
| | | | | | (0.055) |
| Lived with spouse or partner | | | | | 1.290 |
| | | | | | (0.327) |
| Female head of household | | | | | 1.396 |
| | | | | | (0.353) |
| Age in years | | | | | 0.998 |
| | | | | | (0.007) |
| Intercept | 0.104* | 0.013* | 0.000* | 0.000* | 0.000* |
| | (0.009) | (0.002) | (0.000) | (0.000) | (0.000) |

| | (1) | (2) | (3) | (4) | (5) |
|---|---|---|---|---|---|
| *Model statistics* | | | | | |
| N | 2,660 | 2,660 | 2,604 | 2,604 | 2,487 |
| Pseudo R-squared | 0.042 | 0.101 | 0.282 | 0.283 | 0.289 |
| Likelihood ratio chi-square | 187.80* | 457.42* | 1,250.91* | 1,256.44* | 1,219,90* |

*2. Summary statistics for full multinomial logistic regression model*

Summary statistics for the fully specified multinomial logistic regression model appear below.

| *Variable* | *Mean* | *Std. Dev.* | *Min* | *Max* |
|---|---|---|---|---|
| African-American household | 0.226 | 0.419 | 0 | 1 |
| Chapter 13 rate in district | 0.328 | 0.171 | 0.056 | 0.803 |
| Prior bankruptcy | 0.136 | 0.343 | 0 | 1 |
| Foreclosure as reason for bkcy. | 0.196 | 0.397 | 0 | 1 |
| Homeowner | 0.501 | 0.5 | 0 | 1 |
| Monthly income (ln) | 7.698 | 1.271 | 0 | 9.285 |
| Total assets (ln) | 10.592 | 1.779 | 0 | 13.622 |
| Priority debts (ln) | 2.049 | 3.598 | 0 | 11.488 |
| Secured debt/total debt (ln) | 0.336 | 0.255 | 0 | 0.693 |
| Attempted to "work with" creditors | 0.588 | 0.492 | 0 | 1 |
| Attempted to refinance debt | 0.256 | 0.436 | 0 | 1 |
| Borrowed from family/friends | 0.666 | 0.472 | 0 | 1 |
| Bachelors' degree or higher | 0.152 | 0.319 | 0 | 1 |
| Dependents under 18 | 0.957 | 1.228 | 0 | 8 |
| Lived with spouse or partner | 0.524 | 0.500 | 0 | 1 |
| Female head of household | 0.331 | 0.471 | 0 | 1 |
| Age in years | 45.123 | 13.189 | 20 | 90 |