

David R. Jones
Candidate for Master of Judicial Studies
Duke University Law School
Durham, North Carolina
March 2018 Thesis Submission

Savings—the Missing Element in Chapter 13 Bankruptcy Cases?

Abstract

This paper examines the effects of debtor savings on the viability of chapter 13 bankruptcy plans. The paper further examines the impact of lawyer culture, debtor participation in the bankruptcy process and judicial activism on the use of the savings program by chapter 13 debtors. Using a data set of randomly selected chapter 13 bankruptcy cases filed in the Southern District of Texas, the analysis demonstrates that while savings has a direct positive impact on the success of chapter 13 plans, the degree of that success is significantly influenced by the views held by debtors' lawyers, chapter 13 trustees and judges.

Introduction

Conceptually, the notion of savings is simple. Spend less than what you make and put a little away each month for an economic “rainy day.” For those unprepared to weather the storm, bankruptcy is often the only option. In 2005, Congress sought to reform the national bankruptcy law with the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Under BAPCPA, individuals are required to submit to a “means test” to determine their bankruptcy alternatives.¹

¹ These alternatives generally include chapter 7, chapter 11 and chapter 13. Chapter 9 applies solely to municipalities; chapter 12 to family farmers and fisherman; and chapter 15 to

One of the primary goals of BAPCPA is to force individual debtors toward chapter 13 and away from chapter 7.² The underlying premise behind this policy is that debtors should pay as much as they can in exchange for a discharge of their debts.³ Under chapter 13, debtors are required to devote their “projected disposable income” for five years⁴ toward repayment of their creditors under a debt repayment plan. If a monthly plan payment is missed, debtors are subject to having their cases dismissed and left with few protections from creditors other than to file another bankruptcy case.⁵ For the few debtors that successfully complete their chapter 13 plan, they are rewarded with a discharge of all debts⁶ that existed at the time of the

international bankruptcy proceedings. As explained below, chapter 7 and chapter 13 are the only practical alternatives for most individual debtors.

² For an analysis of chapter 7 versus chapter 13 filings pre-BAPCPA and post-BAPCPA, *see* Stephen Sather, *The Great Bankruptcy Rush of 2005 and its Aftermath: The View from Texas*, AM. BANKR. INST. J. 34 (Sept. 25, 2006); *see also* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 227. (Spring 2007) (asserting that BAPCPA has had no effect on the availability of chapter 7 to high income debtors).

³ *See infra* Statement of President Bush at note 31.

⁴ Under limited circumstances, a below-median debtor may be required to make payments of projected disposable income for as little as three years. As this situation does not often occur, and to avoid unnecessarily complicating matters, all plan terms are assumed to be five years.

⁵ *See* Tony Mecia, *Beyond Bankruptcy: What Happens When You Fail Chapter 13*, Credit Card News (October 29, 2015) (available at www.creditcards.com) (noting the importance of an individual’s credit score and that it may be impossible to repair a credit score if a bankruptcy case is dismissed).

⁶ This statement is an overgeneralization for the sake of simplicity. The scope of the discharge that a debtor receives in chapter 13 is limited by statute. *See* 11 U.S.C. § 1328.

bankruptcy filing. These debtors, however, are too often returned to the *status quo ante* of a paycheck-to-paycheck existence with another mortgage payment due within thirty days.⁷ It is not surprising that approximately 38% of all chapter 13 cases filed in 2016 were filed by debtors that had filed at least one chapter 13 case in the previous eight years.⁸

Inherent in the “projected disposable income” approach⁹ implemented under BAPCPA is the premise that debtors live in a static financial environment for the entirety of a five-year plan term. Common sense suggests otherwise. Over time, a debtor’s income will vary for a variety of reasons, including reduced hours, unpaid leave to care for children, medical emergencies and temporary job loss. On the expense side, unanticipated events such as car and home repairs, uninsured medical treatment and natural disasters¹⁰ routinely occur. The impact of these events is heightened for those debtors who are required to pay all of their disposable income

⁷ Due to the practicalities of the process, it is not uncommon for several months to pass between the plan completion date and the closure date of a chapter 13 case. Orders requiring debtors to resume making monthly mortgage payments directly to lenders often come 45-60 days after the date the first post-plan completion mortgage payment is due.

⁸ 2016 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (available at www.uscourts.gov/statistics-reports/bapcpa-report-2016).

⁹ See *infra* note 55.

¹⁰ For instance, the damage caused by Hurricane Katrina was estimated to be \$108 billion with at least \$41 billion uninsured. See Richard Knabb et al., HURRICANE KATRINA: AUGUST 23 – 30, 2005, TROPICAL CYCLONE REPORT, United States National Oceanic and Atmospheric Administration’s National Weather Service. (December 20, 2005).

to the chapter 13 trustee based on a historical calculation that does not anticipate or allow for these unforeseen events.

In an effort to increase the feasibility and ultimate success¹¹ of chapter 13 plans under BAPCPA, the bankruptcy court for the Southern District of Texas implemented a voluntary savings program in 2015 to provide a vehicle for debtors to weather the unexpected negative financial events that occur during the term of a chapter 13 plan. Under this program, debtors may devote a small portion of their monthly plan payments to a savings account maintained by the chapter 13 trustee. There are no set minimum or maximum deposit amounts. The deposit amounts may vary from month to month. The program was designed to provide debtors with maximum flexibility to craft a plan suited to enhance their particular circumstances. The appropriateness of a proposed savings plan is reviewed on a case-by-case basis. Accumulated savings are available for withdrawal by debtors during the plan term to address unanticipated emergency situations. One important feature of the

¹¹ At this point, it would not be unfair to question why anyone other than the debtor would care about the success of a consumer bankruptcy case. The potential financial impact of a change in the aggregate success of consumer bankruptcy cases, however, is huge. For consumer bankruptcy cases filed in 2016, debtors reported aggregated assets of \$72 billion and liabilities of \$191 billion. *See* 2016 Report of Statistics Required by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (available at www.uscourts.gov/statistics-reports/bapcpa-report-2016). At any point in time, five years' worth of cases are pending. The financial impact is unmistakable whether measured in terms of market interest rate sensitivity, consumer debt portfolio pricing or actual recoverable distributions.

program is that any funds remaining in the savings account at the conclusion of the chapter 13 case are returned to the debtors.

This paper examines the impact of the savings program on chapter 13 bankruptcy cases filed in the Southern District of Texas since the program's implementation. Included in this examination are the effects of debtors' counsel, chapter 13 trustees and judges on the utilization of the savings program by chapter 13 debtors. Part I of this paper will provide a historical context for the passage of BAPCPA. Part II will examine the legal basis for the creation of the savings program and the specific text of the relevant provisions of the Southern District of Texas form chapter 13 plan. Part III will analyze the results of an empirical study of a sample of chapter 13 bankruptcy cases filed in the Southern District of Texas since the implementation of the savings plan provision. Part IV will discuss the impact of debtors' counsel, chapter 13 trustees and judges on debtors' use of the savings program. Part V concludes the paper with a discussion of potential changes to the program and recommendations to increase use of the program.

Part I – Historical Framework

The authority of Congress to promulgate a system of national bankruptcy laws rests in the Constitution itself.¹² Over a decade later in response to the Depression

¹² U.S. CONST. art.1, § 8, cl. 4. (“The Congress shall have the Power to establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.”).

of 1793, Congress passed the first national bankruptcy law, The Bankruptcy Act of 1800.¹³ This initial attempt at a national bankruptcy law closely followed 16th century English law and provided only for involuntary bankruptcy proceedings against merchant debtors.¹⁴ Treatment of debtors was harsh and likened debtors to criminals.¹⁵ In response to numerous complaints, the 1800 Act was repealed in 1803 with the enactment of bankruptcy laws being left to the discretion of the states.¹⁶ An inconsistent scheme of patchwork laws and practices subsequently developed that provided little relief to debtors.¹⁷

¹³ See Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. For historical perspective, see David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, Faculty Scholarship. Paper 720 (1999) (available at http://scholarship.law.upenn.edu/faculty_scholarship/720).

¹⁴ David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, Faculty Scholarship. Paper 720 (1999) (available at http://scholarship.law.upenn.edu/faculty_scholarship/720).

¹⁵ *Id.* See also Lauren Sylvester, *Redefining Disposable Income in Chapter 13 Plans: Moving Forward into a “New Era in the History of Bankruptcy Law”*, 42 J. MARSHALL L. REV. 1107, 1108-09 (2009). Mercifully, the death penalty was omitted in favor of prison terms from one to ten years. See Act of Apr. 4, 1800, ch. 18, 2 Stat. 26-27.

¹⁶ See Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. In 1819, the Supreme Court barred states from granting discharges of claims held by citizens of other states. *McMillan v. McNeill*, 17 U.S. 209 (1819).

¹⁷ See Charles Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 15-16 (1995).

After the financial crisis of 1837, Congress tried again to implement a national bankruptcy law with The Bankruptcy Act of 1841.¹⁸ For the first time, individual debtors were allowed to file voluntary bankruptcy petitions and receive a discharge of their debts.¹⁹ Treatment of debtors, however, remained harsh.²⁰ Even so, creditors reacted negatively, arguing that the new law was too permissive and costly.²¹ In response, and with the pending financial crisis averted, Congress repealed the 1841 Act in 1843.²²

Subsequent to the financial hardships brought about by the Civil War, Congress tried for a third time in 1867 with the passage of The Bankruptcy Act of 1867.²³ The 1867 Act fared no better than its predecessors and was repealed in 1878 in the face of similar criticisms.²⁴

¹⁸ See Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

¹⁹ See David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, *Faculty Scholarship*. Paper 720 (1999) (available at http://scholarship.law.upenn.edu/faculty_scholarship/720).

²⁰ *Id.*

²¹ See David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, *Faculty Scholarship*. Paper 720 (1999) (available at http://scholarship.law.upenn.edu/faculty_scholarship/720).

²² See Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

²³ See Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

²⁴ See Act of June 7, 1878, ch. 160, 20 Stat. 99. Historians suggest that the ebb and flow of national bankruptcy laws was primarily due to political sentiment. In response to financial downturns, the public demanded national bankruptcy policy and statutes were passed. Once the crisis subsided, federal intervention was no longer needed and the statutes were repealed with

In July, 1898, Congress passed The National Bankruptcy Act of 1898.²⁵ Although subsequently amended on numerous occasions, the 1898 Act is the foundation for modern bankruptcy law as we know it.²⁶ The Bankruptcy Code was created by one of those amendments, the Bankruptcy Reform Act of 1978.²⁷

The 1898 Act reversed the prior harsh views of debtors and recognized bankruptcy as an unfortunate outcome of commercial misfortune for which a degree of compassion was appropriate.²⁸ Even the Supreme Court recognized this policy in the 1934 case of *Local Loan Co. v. Hunt* in which Justice Sutherland penned the

control being left to the individual states. See David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, Faculty Scholarship. Paper 720 (1999) (available at http://scholarship.law.upenn.edu/faculty_scholarship/720). A particular problem suffered by the 1867 Act was the perceived view by many southerners of “carpet bagging” federal judges responsible for administering the law. *Id.*; See also Charles Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 18-19 (1995).

²⁵ The National Bankruptcy Act of July 1, 1898, chap. 541, 30 Stat. 544.

²⁶ See David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, Faculty Scholarship. Paper 720 (1999) (available at http://scholarship.law.upenn.edu/faculty_scholarship/720); Charles Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23-26 (1995).

²⁷ The Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (November 6, 1978). The 1978 Act also created the modern version of the bankruptcy court, although full implementation did not occur until 1984 due to the Supreme Court’s decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) and the passage of reactive legislation by Congress in the Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 336 (July 10, 1984). Prior to the enactment of the 1978 Act, administrators of the bankruptcy process were referred to as referees and possessed little authority.

²⁸ *Id.* at 1109, n.12.

following oft-quoted passage that is generally regarded as the genesis of the notion that bankruptcy provides a “fresh start” to debtors:

[The] purpose of the [Bankruptcy] act has been again and again emphasized by the courts as being of public and private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of the bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.²⁹

This national pro-debtor policy continued until April 20, 2005 when BAPCPA was signed into law by President George W. Bush.³⁰ In noting the intent and wide ranging effects of BAPCPA, President Bush stated, in part, that:

[B]ankruptcy should always be a last resort in our legal system. If someone does not pay his or her debts, the rest of society ends up paying them. In recent years, too many people have abused the bankruptcy laws. They’ve walked away from debts even when they had the ability to repay them. . . . The bill I sign today helps address this problem. Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts. . . . This practical reform will help ensure that debtors make a good-faith effort to repay as much as they can afford.³¹

In its debate about the need for bankruptcy reform, the House Judiciary Committee was more direct—

²⁹ David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 224 (Spring 2007), quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

³⁰ Pub. L. No. 109-8, 119 Stat. 23 (2005). The majority of the law’s provisions took effect on October 17, 2005. See S. 256, 109th Cong. § 1501 (2005).

³¹ <https://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050420-5.html>.

Shoplifting is wrong; . . . Bankruptcy is a moral as well as an economic act. There is a conscious decision not to keep one's promises. It is a decision not to reciprocate a benefit received, a good deed done on the promise that you will reciprocate. Promise-keeping and reciprocity are the foundation of an economy and healthy civil society.³²

Under modern bankruptcy law, an individual debtor generally has two practical options—chapter 7 or chapter 13.³³ Under chapter 7, a debtor surrenders her non-exempt property to an independent trustee.³⁴ The trustee then liquidates the property and distributes the proceeds to creditors in accordance with a statutory distribution scheme.³⁵ The trustee is paid sixty dollars from the statutory filing fee plus a commission from any liquidation proceeds as compensation.³⁶ Absent a formal objection, the debtor is entitled to a discharge of her debts³⁷ sixty days after

³² H.R. Rep. No. 31, 109th Cong., 1st Sess. (2005); *see also* Sara Sternberg Greene, *The Failed Reform; Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241 (Spring 2015).

³³ An individual debtor is also entitled to file chapter 11. 11 U.S.C. § 109(d). An individual chapter 11 case is problematic, however, for many reasons including cost of the process and controlling precedent regarding application of the absolute priority rule. *See Dill Oil Co. v. Stephens (In re Stephens)*, 704 F. 3d 1279 (10th Cir. 2013); *In re Lively*, 717 F. 3d 406 (5th Cir. 2013); *Maharaj v. Stubbs & Perdue, P.A (In re Maharaj)*, 681 F.3d 558 (4th Cir. 2012).

³⁴ *See* 11 U.S.C. §§ 541, 704.

³⁵ *See* 11 U.S.C. § 726.

³⁶ *See* 11 U.S.C. §§ 326 (commission) and 330(b) (\$60 fee).

³⁷ The discharge covers all debts that arose before the date the bankruptcy case was filed as well as certain debts that arise after the filing but which the Bankruptcy Code deems to have arisen prior to the filing date. 11 U.S.C. § 727(b). Certain categories of debts, however, are excluded. 11 U.S.C. § 523.

the first scheduled date for the meeting of creditors under 11 U.S.C § 341 even though the case may last significantly longer.³⁸ Subject to a few limited exceptions, any property received by the debtor after the case is filed is retained by the debtor free of any claim of the chapter 7 trustee or pre-bankruptcy creditors.³⁹

Under BAPCPA, an individual debtor filing chapter 13 is required to make monthly payments of her projected disposable income⁴⁰ over a term of 60 months⁴¹ pursuant to a written plan.⁴² The debtor retains all of her property and receives a discharge only upon completion of all payments required under her plan.⁴³ The chapter 13 trustee is paid a statutory commission of no more than 10% of the distributions made under the debtor's plan.⁴⁴ One primary difference between

³⁸ 11 U.S.C. § 727; FED. R. BANKR. P. 4004.

³⁹ See 11 U.S.C. § 541(a). By way of example, a debtor that buys a winning lottery ticket on her way to the courthouse to file a chapter 7 bankruptcy case would be required to turn the winning lottery ticket over to the trustee while the debtor that buys the same winning ticket on her way home from the courthouse after the case is filed would get to keep the winnings free of any claims of creditors or the bankruptcy trustee, assuming of course, that the dollar that purchased the winning ticket was not in her pocket on her way to the courthouse.

⁴⁰ See 11 U.S.C. § 1325(b).

⁴¹ As previously mentioned in note 4, *supra*, under certain circumstances, the plan term can be less than 60 months but never longer. See 11 U.S.C. § 1322(d).

⁴² 11 U.S.C. § 1321.

⁴³ 11 U.S.C. § 1328.

⁴⁴ 11 U.S.C. § 330; 28 U.S.C. § 586(e). The calculation is fairly complex but in general, the fee is an allocation of the total costs of a chapter 13 trustee's operation subject to a 10% ceiling. See Laughlin, Kathleen A., *The Standing Chapter 13 Trustee's Percentage Fee: Solving an Algebraic Equation*, 24 CREIGHTON L. REV. 823 (1991). This approach can result in debtors in smaller or

chapter 7 and chapter 13 in the fee calculation is that in chapter 13, the debtor generally bears the cost of the trustee's commission.⁴⁵

Prior to 1984, a debtor's selection of chapter 7 versus chapter 13 was a strategic decision tailored to the needs of the individual debtor. This choice was limited in 1984 when Congress enacted 11 U.S.C. § 707(b) which provided for either dismissal or conversion to chapter 13 of a chapter 7 case that constitutes an "abuse of the provisions of this chapter [7]."⁴⁶ The determination of whether abuse existed has generally focused on the debtor's ability to repay a portion of her debts from future income.⁴⁷ A presumption of abuse exists if the debtor's current monthly income less allowable expenses multiplied by sixty is not less than the lesser of (i) twenty-five percent of the debtor's nonpriority unsecured debts or \$7,475, whichever is greater; or (ii) \$12,475.⁴⁸

less efficiently run jurisdictions paying more than debtors in larger or more efficiently run jurisdictions.

⁴⁵ There are certain situations when the amount of the debtor's monthly plan payment required by applicable law would not be affected by the chapter 13 trustee's statutory fee. In such a case, one can legitimately argue that general unsecured creditors bear the cost of the fee as in a chapter 7 case. These situations do not often occur but they do exist.

⁴⁶ For a discussion of the implementation of § 707(b), see David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 225-27. (Spring 2007).

⁴⁷ See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 492-93 (Summer 2005).

⁴⁸ 11 U.S.C. § 707(b)(2).

The language of § 707(b) formalized a judge's discretion to dismiss or convert a chapter 7 case based on the circumstances of the particular case.⁴⁹ With the passage of BAPCPA, however, the discretion available to a judge under § 707(b) yielded to the mechanical application of the means test.

The means test is set forth in current versions of 11 U.S.C. §§ 707 and 1325. The process begins with the requirement that a debtor file certain financial information with the Court.⁵⁰ Bankruptcy Rule 1007(b)(6) requires that

[a] debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, a calculation of disposable income made in accordance with §1325(b)(3), prepared as prescribed by the appropriate Official Form.

FED. R. BANKR. P. 1007. Current monthly income under BAPCPA is defined as the average of all income earned by a debtor in the six-month period preceding the bankruptcy filing.⁵¹ Disposable income is defined as a debtor's current monthly

⁴⁹ While a certain amount of discretion is appropriate, the dangers of leaving total discretion to the judge to determine "what is too much" are obvious. The intersection of a particular judge's ideological makeup and a debtor's lifestyle choice is destined to produce unpredictability, a lack of transparency and inconsistent results. By way of example, does a judge who is married, devotedly religious and a career government servant view an unmarried exotic dancer with two children seeking to retain two \$35,000 vehicles differently than an unmarried judge with significant net worth and a long history in private practice prior to taking the bench? Theoretically, both learned judges should reach consistent, but perhaps not exact, conclusions. Common sense suggests to the contrary.

⁵⁰ The failure to timely file all of the information required by 11 U.S.C. § 521 results in the automatic dismissal of the case. *See* 11 U.S.C. § 521(i).

⁵¹ 11 U.S.C. § 101(10A).

income, not including child support, foster care and disability payments, less reasonable living expenses.⁵² The process then starts to get complicated as debtors are treated differently based on whether their income is above or below the median family income for a comparably-sized family in their resident state.⁵³

Section 1325(b) requires the commitment of all of a debtor's *projected* disposable income during the plan period.⁵⁴ BAPCPA provides no statutory definition or guidance on the impact of the word "projected." As currently developed, projected disposable income is accepted as a forward looking requirement based on a six-month historical average of a debtor's income.⁵⁵ This

⁵² 11 U.S.C. § 1325(b)(2).

⁵³ The calculations contained in Official Form B22C are complex. An attorney representing a debtor would never attempt to complete the form without the use of a computer program specifically designed to perform the calculations. *Pro se* debtors are at a significant disadvantage because the available software is expensive and good alternatives that produce correct results are extremely rare.

⁵⁴ 11 U.S.C. § 1325(b)(1).

⁵⁵ For a discussion of these concepts, see Chelsey Tulis, *Get Real: Reframing the Debate Over How to Calculate Projected Disposable Income in § 1325(B)*, 83 AM. BANKR. L.J. 345 (2009). Also, courts have struggled with the meaning of the term "projected." Some courts applied a mechanical approach with no variance for future considerations. Other courts applied a more forward-thinking approach to account for known future changes. In 2010, the Supreme Court adopted the forward-looking approach and held that projected disposable income is calculated by starting with the historical calculation and making adjustments for **known** future changes. See *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010). The issue of unforeseeable events remains unaddressed.

process differs from past practice when the metric was just disposable income measured by the difference between Schedules I and J.⁵⁶

The current structure under BAPCPA leaves the individual chapter 13 debtor in the position of being able to succeed in a chapter 13 plan only if (i) the debtor's income is steady or rising; and (ii) the debtor encounters no significant unanticipated financial events during the plan term; or worse, the debtor creates a cushion by ignoring the oath attached to the official forms and inappropriately manipulates monthly expense numbers. Rather than leave debtors exposed to these risks, the bankruptcy court for the Southern District of Texas decided on an innovative approach designed to implement debtor savings as part of the chapter 13 process.

Part II – The Savings Plan

For the twelve month period ending March 31, 2017, the Administrative Office of the U.S. Courts reported that 298,348 new chapter 13 cases were filed.⁵⁷ It is estimated that approximately two-thirds of these cases will fail.⁵⁸ The primary

⁵⁶ Schedule I reflects a debtor's income while Schedule J reflects a debtor's expenses at the time of the bankruptcy filing. See Official Form B106I (Schedule I) (<http://www.uscourts.gov/forms/individual-debtors/schedule-i-your-income-individuals>) and Official Form B106J (Schedule J) (<http://www.uscourts.gov/forms/individual-debtors/schedule-j-your-expenses-individuals>).

⁵⁷ See *U.S. Bankruptcy Courts - Business and Nonbusiness Cases Filed, by Chapter of the Bankruptcy Code Table*, Administrative Office of the U.S. Courts, Table F-2 (available at uscourts.gov).

⁵⁸ Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. LAW REV. 103, 113 (November 2011).

reason for failure is nonpayment of the monthly plan payments.⁵⁹ In recognition of this reality, the bankruptcy court for the Southern District of Texas undertook an coordinated effort to find a solution consistent with the Bankruptcy Code that would increase the success of chapter 13 plans.

Beginning in 2012, the court began to study the underlying reasons why chapter 13 cases fail and to examine potential solutions. Initially, alternatives were suggested by the court and incorporated into individual plans on an *ad hoc* basis with receptive attorneys. The impact of the chosen alternative was then informally observed and incorporated into subsequent cases.

During this process, the court identified a number of criteria that any solution must address. First, the solution had to provide an economic buffer to allow debtors to survive unexpected financial distress. Second, the solution had to provide the individual debtor with a demonstrative and immediate benefit to entice participation. Third, the debtor's bar had to be receptive to the solution. Inherent in the court's

⁵⁹ In 2016, the failure to make plan payments accounted for approximately 53% of all dismissals of chapter 13 cases. *See BAPCPA Report – 2016, Table 6, U.S. Bankruptcy Courts – Chapter 13 individual Debtor Cases with Primarily Consumer Debts closed by Dismissal or Plan Completion During 12-Month Period Ending December 31, 2016*, Administrative Office of the U.S. Courts (available at uscourts.gov). Personal experience suggests that the percentage is significantly higher for post-confirmation dismissals.

analysis was the assumption that chapter 13 trustees would uniformly support the provision and its implementation.⁶⁰

These considerations led to the court's adoption in 2014 of a savings program to be incorporated into its prescribed chapter 13 form plan.⁶¹ Participation in the program is voluntary and is invoked simply by inserting an amount to be allocated to savings in the relevant paragraph using the "check the box" methodology. The amount allocated to savings does not have to be consistent and can even be a single event structured to capture unique occurrences such as the receipt of a tax refund.

The current savings provision reads as follows:⁶²

21. Emergency Savings Fund. Line 21 of Schedule J (the Debtor(s)' expense budget) includes a provision for an emergency savings fund by the Debtor(s). Deposits into the Emergency Savings Fund will be made to the Trustee. Withdrawals from the Emergency Savings Fund may be made by application to the Court, utilizing the form application from the Court's website. Withdrawals should be requested only in an emergency. The form application need only be served electronically, and only to persons subscribing to the Court's CM/ECF electronic noticing system. An application will be deemed granted on the 15th day after filing unless (i) an objection has been filed; or (ii) the Court has set a hearing on the application. The Debtor(s) may request emergency consideration of any

⁶⁰ As set forth in detail in Part III below, this assumption was incorrect. The views held by chapter 13 trustees vary and have a significant impact on the use of the savings program by chapter 13 debtors.

⁶¹ The form plan incorporating the savings provision took effect January 1, 2015.

⁶² Uniform Plan and Motion for Valuation of Collateral (Local Form available at <http://www.txs.uscourts.gov/sites/txs/files/1115plansavingsmods.pdf>). The court has recently supplemented the language of the provision to reflect experience and to integrate other new features into the form plan such as escrows for non-escrowed *ad valorem* taxes, homeowner association assessments and self-employment taxes that have resulted from the perceived success of the savings program. The current language has not substantively changed the nature of the savings provisions from the original version. The new version will take effect December 1, 2017.

be a self-effectuating and a cost-effective procedure using a very simple form that does not require an attorney's involvement. In essence, the debtor is required only to specify the amount requested to be withdrawn and the reason for the withdrawal. The form is currently being integrated into the court's electronic filing system so that no paper form will be required, thereby further decreasing any associated cost.

The legal basis for the savings provision is relatively simple. For below-median⁶⁴ debtors, disposable income is based on a debtor's forecasted income and expenses as of the filing date, including "the full amount for 'maintenance or support.'"⁶⁵ The current Official Form B106J (Schedule J) is intended to reflect a debtor's expenses. The form includes expense categories which necessarily require monthly estimates such as property taxes (line 4a), insurance (line 4b), property repairs, maintenance and upkeep (line 4c), car repairs and maintenance (line 12) and medical and dental expenses (line 11) even though these types of expenses typically occur as single events. Line 21 provides a space for "Other." In reality, debtors do

⁶⁴ Use of the savings plan becomes slightly more problematic with an above-median debtor due to the expense provisions of § 1325(b) even though the identical expenses are allowed. The general effect of these provisions is that use of the savings provision may cause the monthly plan payment of the above-median debtor to increase. Other factors such as the amount of secured debt and the best-interest test may also limit the use of the savings provision. Notwithstanding the foregoing, above-median debtors often need a mechanism for disciplined savings to a greater extent than below-median debtors. Based on the results of the data collected in the study discussed in Part III below, above-median debtors do not participate in the savings program.

⁶⁵ *Hamilton v. Lanning*, 560 U.S. 505, 510 (2010).

not save for these events. These numbers typically operate only as plugs in an unrealistic budget used primarily for the purpose of obtaining the chapter 13 trustee's support for confirmation of the plan.⁶⁶

Official Form B106I (Schedule I) reflects a debtor's forecasted income and includes provisions for voluntary contributions to savings vehicles such as retirement plans.⁶⁷ It logically follows that by utilizing the savings provision and inserting a real and measurable number into Line 21 that is administered by the chapter 13 trustee and overseen by the court, a debtor's ability to meet a future economic shock event with accumulated savings becomes real.

Once the language of the savings provision was approved, the court recognized the need for interaction with the bar to discuss the provision and its implementation if the program was to succeed. The court prepared and engaged in a series of presentations that were designed to provide a forum for education and discussion. To encourage participation, (i) continuing legal education credit was offered to all participants; (ii) multiple judges participated in each presentation; and

⁶⁶ It is not unusual to see manipulation of budget numbers to "create" feasibility in tight cases. For instance, a debtor might reduce a food budget to an unrealistic number to create enough income to satisfy the statutory tests. These types of manipulation generally work only in the short run and can have negative consequences for both debtors and their counsel if noticed and upon inquiry, the debtor answers that she knows the number is wrong but her lawyer told her that she had to use the number so that the court would approve the plan.

⁶⁷ See *In re Miner*, 2017 WL 1011419 (W.D. La., March 14, 2017) (allowing a 3% of income contribution to a 401(k) plan under a chapter 13 plan).

(iii) the presentations were offered during the noon hour on days when a large number of consumer bankruptcy practitioners were expected to be in the courthouse.

The savings program took effect on January 1, 2015. As of approximately June 1, 2017, the sum of \$756,167 was on deposit in the savings program with the two chapter 13 trustees that were included in the study described in Part III below.

Part III – An Empirical Study

To test the effectiveness of the savings program, this paper presents the results of an empirical study of chapter 13 cases filed after the program's implementation. In order to determine the impact of the savings program, it is first necessary to define the measure of success. This definition is complicated by the unavoidable fact that the natural measure of success would be a comparison of plan completion rates of similarly-situated debtors utilizing the savings provision to those debtors that chose not to use the provision. As the savings program was not formally implemented until January 1, 2015, a meaningful data set for such a comparison does not yet exist. The available data is, however, sufficient to highlight the benefits of the savings concept and promote a discussion among both courts and commentators. Subsequent studies will examine the savings program's long-term effects and recommend improvements to improve plan feasibility. An increase in feasible plans means more debtors will complete their plans and receive their discharges. An increase in plan completion rates also means that secured creditors receive more

payments on their debts and that unsecured creditors receive more meaningful distributions.

Accordingly, for purposes of the study reflected in this paper, success is defined as an increase in plan feasibility. Plan feasibility is measured based on the length of time between the filing of the bankruptcy case and a dismissal. Obviously, cases that remained pending as of the date of the study will cause this measure to be understated. The study attempts to compensate for this fact by separately examining the differences between plans utilizing the savings provision and those that don't on a number of different bases, including pre and post-confirmation dismissal rates, in order to view variations from multiple perspectives.

The dataset for the study consists of a random selection of 350 chapter 13 cases filed in the Southern District of Texas since the implementation of the savings program.⁶⁸ The data was selected and coded from January - March, 2017. Although subject to a level of imprecision, the term, "the date of the study" is defined as December 31, 2016.

The only limiting criteria imposed in the selection of cases was that the cases had to be assigned to one of two particular judges in the Houston, Victoria or Laredo

⁶⁸ The random selection of cases began with cases having a petition date of July 1, 2015, or after to allow 180 days for debtors and their lawyers to become better educated and properly evaluate the merits of the savings program. This may or may not have been a sufficient amount of time as change generally comes slowly to large institutions.

divisions of the Southern District of Texas. This limitation was required for several reasons. First, all of the cases filed in these divisions are administered by one of two chapter 13 trustees. These two trustees are at the forefront of national chapter 13 bankruptcy policy and are generally recognized as two of the finest chapter 13 trustees in the country. Historically, these two trustees exhibit general similarity in their administration of chapter 13 cases. It was believed that any chapter 13 trustee bias in the analysis would therefore be minimized or, at worst, consistent.⁶⁹

Second, the two judges that were selected were the two most active proponents of the savings program, with one being its creator and both being the provision's drafters. The Southern District of Texas has six bankruptcy judgeships. Although the savings program was unanimously adopted by the court, the judges expressed differing views about the utility of the savings program at the time of its approval. The two selected judges have formal education and prior work experience in the area of finance prior to taking the bench. Both judges had active debtor practices prior to taking the bench. The two selected judges also hold similar views on the importance of savings in creating debtor financial responsibility. Again, the intent of the limitation was to minimize judge bias, or, at least to achieve a consistent level of bias. It was believed that, at worst, consistent bias would not be

⁶⁹ As discussed below, this belief was incorrect.

substantively reflected in the relative measure of the life span of chapter 13 plans between debtors who utilize the savings program and those who elected not to use the provision. Moreover, at the time of the study, the two chapter 13 trustees both appeared before the two selected judges, although not with equal frequency. Trustee 1 appeared only before Judge 2 while Trustee 2 appeared before both Judge 1 and Judge 2.⁷⁰

From the 350 selected cases, 11 cases were deleted from the data sample as containing conditions that could not be adequately accounted for and had a tendency to skew the data for inapplicable reasons. These conditions included: (i) the death of a debtor during the case; (ii) the filing of a divorce proceeding by a debtor;⁷¹ (iii) the approval of a home loan modification that required (or resulted in) the dismissal of the bankruptcy case; and (iv) a significant medical event or injury that required the debtor's hospitalization for an extended period of time and that resulted in the dismissal of the case. Of the remaining 339 cases, the study first looked at the overall use of the savings provision. Table 1 below reflects the results.

⁷⁰ Based on recent changes in division assignments of judges, both trustees now appear before both judges.

⁷¹ Cases involving a divorce are often filed for strategic litigation reasons with a subsequent dismissal being contemplated at the initiation of the case. While a divorce could certainly be considered to be an unforeseen financial shock event, there are simply too many variables and the removal of cases involving a divorce did not significantly affect the sample size as the total subset of all 11 deleted cases accounted for only 3.14% of the data sample.

Table 1

	Cases	Cases pending at time of study
Plans using the savings provision	94	55
Plans not using the savings provision	245	124
% using the savings provision	27.73%	
% not using savings provision	72.27%	
% of plans w/ savings pending		58.51%
% of plans w/o savings pending		50.61%

Most strikingly, the use of the savings provision occurred in only 27.73% of the cases. This figure is surprising. The economic and social cost to a debtor of invoking the savings provision is zero. The amount of the monthly plan payment is unaffected. There are no additional fees incurred or requirements for additional court appearances. No stigma is attached. To the contrary, both Judge 1 and Judge 2 routinely compliment the “wisdom” of debtors that choose to participate in the program. With no additional cost, it seems logical that one would always prefer to settle one’s debts for less and keep the difference than pay more for the identical result.

The data also reflects that at the time of the study, 58.51% of the plans invoking the savings provisions remained pending versus 50.61% of plans that did not utilize the savings provision. While arguably significant, this result is easily affected by a number of factors, including the timing of the bankruptcy filing itself

in relation to the study. In order to reach a reasoned conclusion on the meaning of the difference, several other measures require examination, including the possible effects of potential bias exhibited by the chapter 13 trustee and the presiding judge.

In order to test the effects of potential judge and trustee bias, the study first looked that the distribution of cases by trustee as well as the number of cases that utilized the savings provision. Second, the study examined the distribution of cases by judge on the same basis. The findings are represented by the following tables:

Table 2

	Trustee 1	Trustee 2
Cases	118	221
Cases w/Savings	23	71
% Cases w/Savings	19.49%	32.13%

$$\text{Chi}^2 = 6.115^{72}$$

$$P = .0134$$

Table 3

	Judge 1	Judge 2
Cases	159	180
Cases w/Savings	56	38
% Cases w/Savings	35.22%	21.11%

$$\text{Chi}^2 = 8.363$$

$$P = .0038$$

⁷² All statistical tests were performed using the Medcalc statistical software calculator available at <https://www.medcalc.org>.

The distribution of total cases between trustees is not surprising. Trustee 2 appears before both Judge 1 and Judge 2 while Trustee 1 appears only before Judge 2. The distribution of cases between judges is likewise not surprising. The division of work between all bankruptcy judges in the Southern District of Texas is governed by a work order. The case assignment percentages in the work order is adjusted throughout the year as required. Both judges in the study are assigned cases in multiple divisions within the Southern District of Texas. The assignment percentages are based on several factors including overall workload, travel requirements and divisional caseloads. It is noted that all chapter 13 cases assigned to Judge 2 involve either Trustee 1 or Trustee 2. Judge 1, however, receives case assignments from Trustee 2 as well as the District's third trustee that was not included in the study. After a comprehensive review of these factors, there appear to be no abnormalities in the distribution of cases.

The statistics regarding plans using the savings provision reflect that, on a percentage basis, significantly more cases administered by Trustee 2 invoke the savings provision than those cases administered by Trustee 1. This result suggests that the assumption that Trustee 1 and Trustee 2 hold similar views about the savings provision may be incorrect. To test the assumption, an informal survey with a cross-section of the 48 firms noted below was performed during a series of educational seminars which yielded an interesting trend. The attorneys surveyed stated that

Trustee 1 consistently conveyed a resistance to utilization of the savings provision on anything more than a minimal basis. This resistance conveyed a sense to the attorneys that the savings program should not be used. This unwritten policy appears to have resulted in some practitioners abandoning use of the savings provision altogether in cases administered by Trustee 1 in order to avoid perceived conflicts with Trustee 1.⁷³

Support for this trustee policy was noted by examining the results of Table 2 reflecting the distribution by judge of plans employing the savings provisions. As noted, 35.22% of the cases filed before Judge 1 utilized the savings provision while only 21.11% of the plans filed before Judge 2 invoked the provision. Recall that Trustee 1 appears only before Judge 2. The conclusion regarding the negative influence of Trustee 1 on use of the savings program is supported although it does not fully explain the differences between the two judges.

Although not anticipated, these initial inquiries suggest that a chapter 13 trustee's views on the savings provision have an impact on its use by debtors. The results also suggest that debtors' counsel have substantial influence on the debtor's

⁷³ This phenomenon exists in the debtor attorneys' bar and routinely surfaces as a motivating factor in decision making by attorneys. At a given time, most practitioners will have multiple cases being administered by the same chapter 13 trustee. Many attorneys worry that by taking an adverse position in one case, a spillover effect will occur affecting the success or failure of other cases and generally making practice before that trustee more difficult. The impact of this concern is more fully discussed in Part IV.

decision to utilize the savings provision. Further examination of the impact these institutions have on the savings program will be made in Part IV.

Because two ideologically similar judges produced such different results, the study informally examined the practices employed by both judges with respect to the savings program. As a result of that inquiry, a major practice difference was noted. Both Judge 1 and Judge 2 believe that special emphasis on the use of the savings program is appropriate under certain circumstances such as repeat bankruptcy filings. Judge 1, however, strongly recommends and occasionally mandates the use of the savings provision in these circumstances while Judge 2 only ensures that debtors are personally aware of the savings program and its benefits but does not require its use as a condition to proceeding in a subsequent case.

To test the impact of judicial encouragement on the use of the savings provision, the study examined cases pending at the time of the study by judge.⁷⁴ The results are represented in Table 4.

Table 4

⁷⁴ To be clear, this data focuses only cases that remained pending at the time of the study regardless of the date the case was filed.

	Judge 1	Judge 2
Pending Cases	84	95
Pending Cases w/Savings	34	21
% Cases w/Savings	40.48%	22.11%

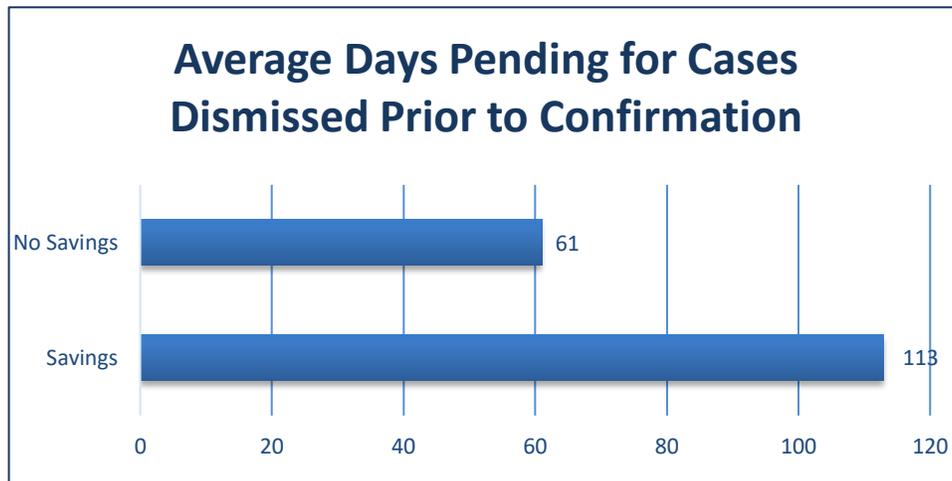
$$\text{Chi}^2 = 7.028$$

$$P = .0080$$

The foregoing data, when compared to results set forth in Table 3 of plans originally filed using the savings plans suggests that strongly encouraging or even mandating that a debtor invoke the savings provision has no apparent negative impact on plan feasibility. To the contrary, the data suggests that once the savings provision is invoked and the chapter 13 plan confirmed, debtors that were required or strongly encouraged to use the savings provision perform better than debtors that voluntarily chose to participate. The data further suggests that debtor education about the program and subsequent “debtor vesting” in the completion of the chapter 13 plan play a significant role in the outcome—an unanticipated upshot that will be further examined below.

The study next looked at the average time periods between the filing date and date of disposition for chapter 13 cases that were not pending at the time of the study. The cases were divided into two categories—cases that were dismissed prior to confirmation of the chapter 13 plan and cases that were dismissed after confirmation of a plan. The basis for this division is that cases dismissed prior to confirmation are presumed to have other statutory or practical problems that would skew the data for plans that are approved as complying with applicable law. The results of the analysis regarding cases that are dismissed prior to confirmation are set forth in the following chart.

Chart 1

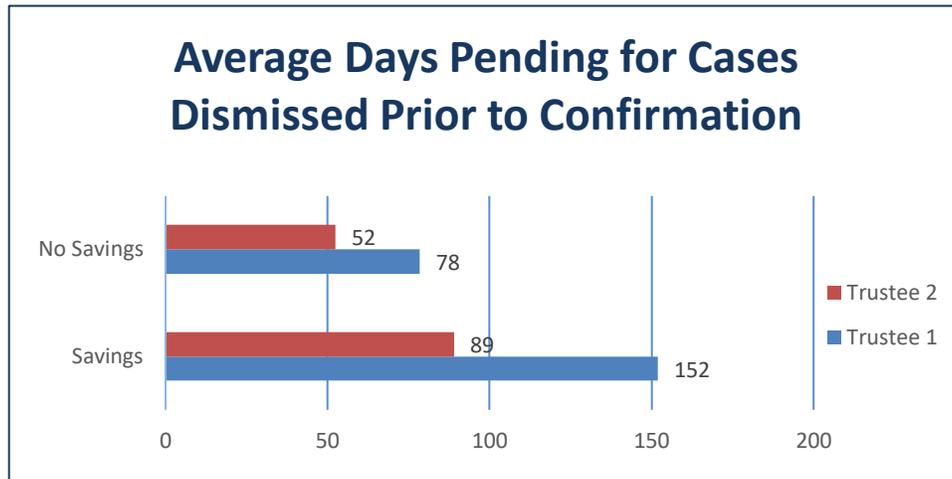


The foregoing reflects a 52-day increase in the length of cases that are dismissed prior to confirmation and that utilize the savings provision. A comparison of the calculated averages reveals a T-value of 3.233 and a P-value of .0016. Conventional wisdom suggests that this result may actually be undesirable as cases that cannot

ultimately be confirmed should be promptly dismissed. Alternatively, it may be that the savings program is allowing debtors to explore all possible alternatives prior to dismissal. Given BAPCPA's stated purpose of curbing repeat filers, perhaps this is indeed the desired result. The increase could also be attributable to better educated counsel whose skill set and knowledge of the law allow them to keep a case alive longer than those less skilled. The possibilities are endless.

Based on the initial results of the effects of the selection of chapter 13 trustee as well as the particular judge presiding over the case, the study next parsed the above results based on trustee and judge selection. The findings by trustee assignment are represented by Chart 2.

Chart 2

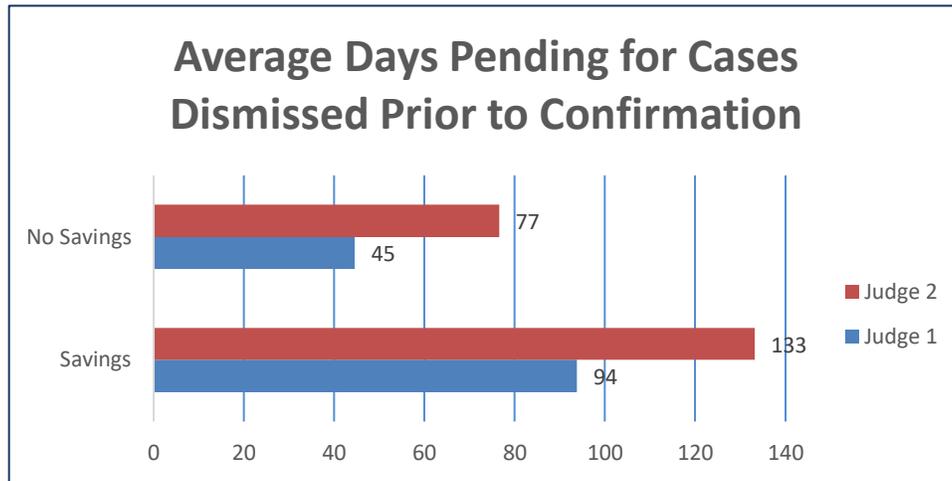


This analysis reflects that all cases regardless of the use of the savings provision remain pending longer if administered by Trustee 1 than if administered by Trustee 2. Recall, Trustee 2 appears before both Judge 1 and Judge 2 while Trustee 1 only appears before Judge 2. A statistical comparison of the averages yields the following information:

No Savings	T _{value} : 1.911	P _{value} : .0592	N _{T1} =33	N _{T2} =58
Savings	T _{value} : 1.956	P _{value} : .0682	N _{T1} =7	N _{T2} =11

To fully understand the conclusions suggested by Chart 2, the results must be considered concurrently with the data grouped by judge as set forth in Chart 3.

Chart 3



The foregoing comparison suggests a bias between the two judges in their administration of chapter 13 plans. Interestingly, although cases remain pending longer before Judge 2, the relative difference between cases invoking the savings provision and those that did not are similar—49 days for Judge 1 and 56 days for Judge 2. A statistical comparison of the averages yields the following:

No Savings	T _{value} : -2.471	P _{value} : .0154	N _{J1} =42	N _{J2} =49
Savings	T _{value} : -1.163	P _{value} : .2619	N _{J1} =9	N _{J2} =9

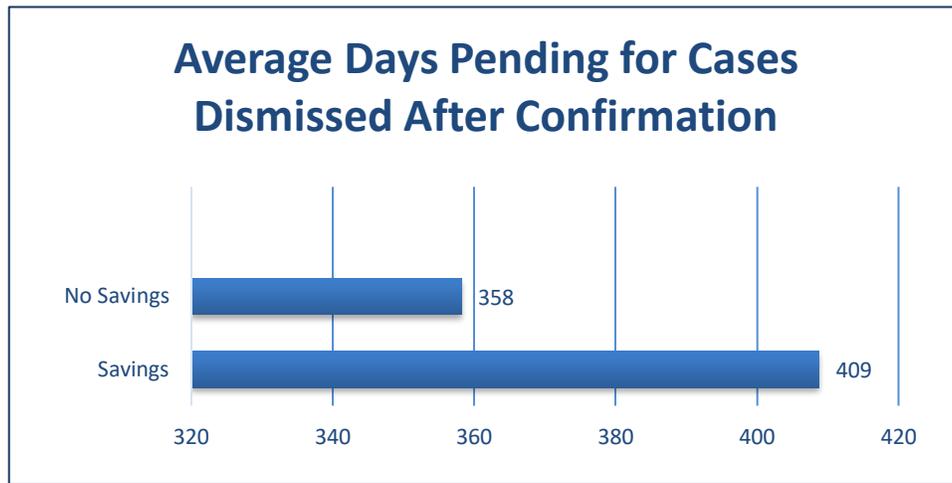
The foregoing suggests another influence at work. Based on informal discussions between the two judges, a substantive difference was noted regarding the use of “catch-up” payments⁷⁵ to cure payment deficiencies. Judge 1 is more stringent in

⁷⁵ The “catch-up” payment program is a device created and implemented by Judge 1 and Judge 2 that may be applied in chapter 13 cases where the proposed plan meets the statutory requirements for confirmation but the debtor is behind in her required monthly payments. Both Judge 1 and Judge 2 will require a debtor to appear monthly before the court and make a regular payment plus some amount toward the deficiency amount until the debtor is current. Judge 1 and Judge 2 differ, however, in the requirements for being eligible to participate in the catch-up program as well as

the use of this mechanism than Judge 2. To understand whether the increased flexibility incorporated by Judge 2 in the application of “catch-up” payments has a significant impact on the success of chapter 13 cases, a future study would need to examine plan completion rates using this distinction.

The identical analysis was applied to cases that were dismissed after confirmation. The results of the analysis are set forth in Charts 4, 5 and 6.

Chart 4



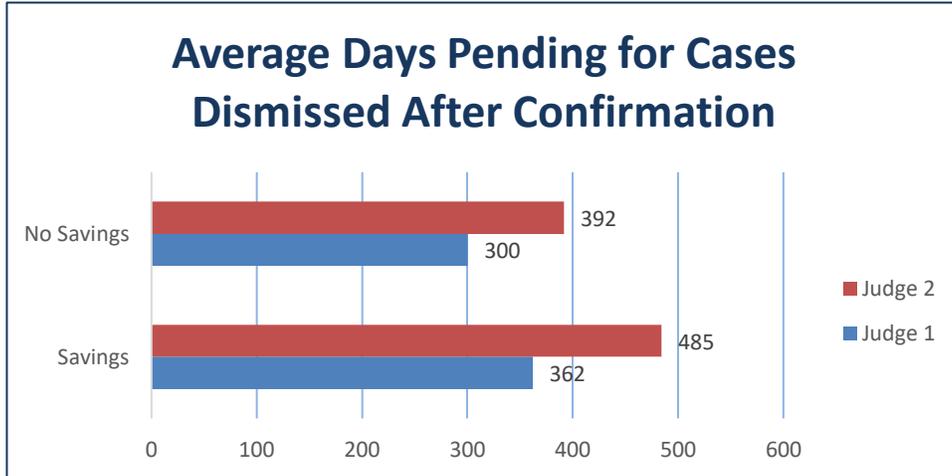
$T_{\text{value}}: 1.394$ $P_{\text{value}}: .1697$ $N_{\text{savings}}=21$ $N_{\text{no savings}}=30$

The data reflects a 51-day increase in the length of chapter 13 plans that are dismissed after confirmation that utilize the savings provision versus those plans that do not use the provision. This is the expected result based on the underlying premise

the number of months in which they will allow a deficiency to be cured and the extent to which they will consider reasons for noncompliance.

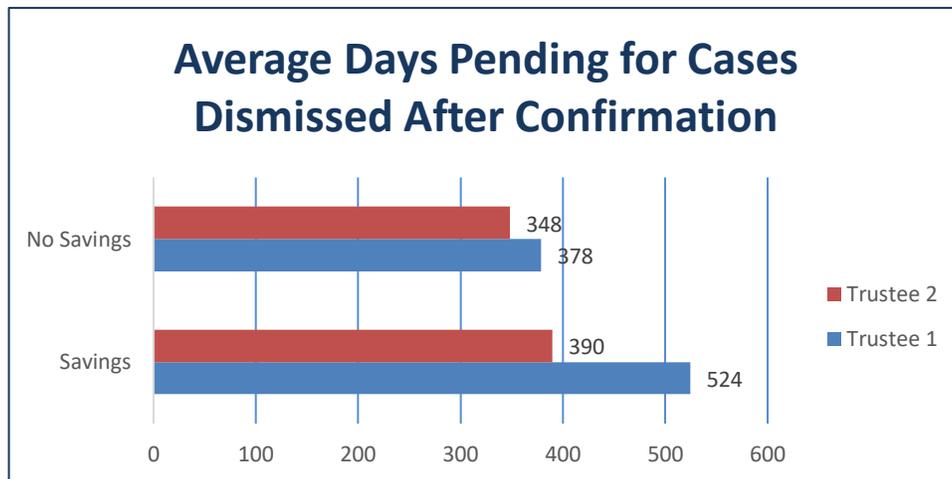
that the savings provision is beneficial. To understand the impact of any potential bias, the study again looked at these results by trustee assignment as well as by judge.

Chart 5



No Savings	T _{value} : -2.026	P _{value} : .0524	N _{J1} =11	N _{J2} =19
Savings	T _{value} : -2.270	P _{value} : .0350	N _{J1} =13	N _{J2} =8

Chart 6



No Savings	T _{value} : 0.608	P _{value} : .5479	N _{T1} =10	N _{T2} =20
Savings	T _{value} : 1.700	P _{value} : .1055	N _{T1} =3	N _{T2} =18

The foregoing analysis supports the prior notion that a judge bias exists in the administration of chapter 13 plans. Again, the measurement of the relative difference between the two dates appears to have a netting effect (62 days – Judge 1, 93 days – Judge 2) although not as much as existed in the pre-confirmation dismissal data. This comparison suggests that Judge 2 disproportionately rewards debtors that confirm a plan using the savings provision.

Moreover, looking at the absolute differences in the measures yields an interesting result. The absolute time differentials between dismissed plans that utilize the savings provisions and those that do not are 51 days for post-confirmation dismissals and 54 days for pre-confirmation dismissals. When one accounts for the fact that dismissal dockets in the Southern District of Texas generally occur on a monthly basis, the data reflects that plans that invoke the savings provisions last, on average, an extra two months during which debtors have an opportunity to work through their difficulties although the variation between judges becomes much more pronounced in the post-confirmation period than in the pre-confirmation period.

The above analysis establishes that the savings program has a positive effect of the success of chapter 13 plans. An average increase of two months in the average length of dismissed cases is an extremely encouraging result, especially in view of the fact that plans which remained pending are not accounted for in the study. The analysis suggests, however, that the ultimate success of the savings program is

affected both by chapter 13 trustees and judges. Extrapolating the study data to a five-year term which would encompass the “pending cases” would result in significantly more plans reaching their term—a conclusion that, alone, would be satisfactory.

In reviewing the cases that were the subject of the study, however, a very interesting fact surfaced. In none of the dismissed cases did the debtor ever seek to withdraw the accumulated savings. Of all 94 cases in the data sample that utilized the savings provision, only seven requests for withdrawals were made—all in cases that remained pending as of the date of this study. This discovery reflects that: (i) debtors are successfully using the savings program to manage unanticipated financial shocks to keep their cases pending; and (ii) the savings program is providing an unanticipated benefit termed an increase in “debtor feasibility.”

The data suggests that when invoking the savings provision and receiving positive feedback, debtors are becoming more vested in the bankruptcy process and are devoting more effort to making their plans work. This is debtor feasibility. Five years is a long time to sacrifice for a past financial difficulty that becomes more distant with each passing month. Although anecdotal, in multiple cases after the court personally explained the savings provision and told the debtors that the court wanted them to succeed, the debtors responded by stating that they would not let the court down and that they appreciated the statement of confidence. Multiple debtors

have made these comments through tears. The data suggests that these promises were not simply hollow gestures. It is further noted that on several occasions in which cases failed, the debtors insisted on appearing and apologizing for their failure. Perhaps this is the type of financial responsibility that BAPCPA was intended to generate.

Part IV – Institutional Impact

Debtors’ Attorneys

If, as the data suggests, debtors’ attorneys have a major impact on whether debtors elect to participate in the savings program, an understanding is needed as to why lawyers (i) recommend that debtors participate in the program; (ii) recommend that debtors not participate in the program; (iii) make no recommendation; or (iv) do not advise their clients about the program. To begin to answer this question and understand the low utilization of the savings provision, the study next examined which lawyers had clients that elected to participate in the savings program. Within the dataset of 339 cases, sixty-seven “firms”⁷⁶ were identified that had filed at least one chapter 13 case on behalf of a client. After examining the firms, two groups were created. Group 1 consists of those firms that regularly send at least one attorney

⁷⁶ A firm is defined as a solo practitioner or a group of attorneys practicing under a common firm name regardless of structure. The only exception is that a single firm was created into which all *pro se* filers were placed in order to minimize the effects of these filings.

to a weekly in-court bankruptcy class⁷⁷ or otherwise actively participate in local educational programs involving the judiciary.⁷⁸ The remaining firms were placed in Group 2. The composition of the groups is set forth in Table 5 below.

Table 5

	Group 1	Group 2
Firms	13	54
Cases filed	115	224
Cases filed w/savings provision	76	18

Table 6 is even more illustrative.

⁷⁷ For several years, Judge 2 has taught a weekly class in his courtroom that is sponsored by the Houston Young Lawyers' Association. The purpose of the class is to teach courtroom techniques although the structure is largely driven by the participants. Although attendance is voluntary, participation is required and the discussions are quite frank. In recent classes, the group has focused on areas such as how to apply and understand basic financial ratios, how to construct a workable budget, how to negotiate a fee arrangement, etc. Judge 2 also uses the class to talk about things he finds of particular importance such as the savings program. Judge 2 continues to regularly refer to the savings program as a reminder to encourage continued use. This study results confirm the suspicion that those young lawyers who regularly attend the class become better lawyers through the development of "good" habits.

⁷⁸ In the Southern District of Texas, there are "brown bag" educational programs that are given at least monthly. The programs are held in a courtroom during the lunch hour with the typical format consisting of one or two judges talking about a specific subject. The ensuing discussions are generally lively.

Table 6

	Group 1	Group 2
% of firms in group	19.40%	80.60%
% of cases filed	33.92%	66.08%
% of cases filed that use savings	66.09%	8.04%
% of total saving cases filed	80.85%	19.15%

For cases that use the savings program:

$$\text{Chi}^2 = 127.39$$

$$P < .0001$$

Two conclusions are readily evident. First, the choice of counsel plays almost a controlling role in whether the savings provision is utilized. This is consistent with the notion that chapter 13 is a complex process and debtors generally accept their counsel's recommendation without question.⁷⁹ Second, and more important, the level of an attorney's knowledge of and familiarity with the savings program directly dictates the debtors' decisions regarding use of the savings provision.

Attorneys in Group 1 utilized the savings provisions in over two-thirds of their cases—a percentage that seems logical⁸⁰—versus approximately eight percent for

⁷⁹ See National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* 79 (1997), available at <http://govinfo.library.unt.edu/nbrc/report/05acons.pdf> (stating that “[n]o area of bankruptcy law is more complex than consumer bankruptcy.”); Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV.17, 30 (Spring 2012) (noting 100% failure rate in study of chapter 13 cases filed without an experienced attorney).

⁸⁰ In theory, the savings provision should be used in all chapter 13 cases filed by below-median debtors and a significant percentage of cases filed by above-median debtors. In reality, the amount

Group 2. It is significant that over eighty percent of the cases that use the savings provisions are filed by a smaller group of firms that are repeatedly exposed to an actively engaged judge that explains and answers questions about the savings program and how it works on a frequent basis.

In a completely unscientific and anecdotal experiment, multiple debtors were informally questioned in court proceedings (not their counsel) about their decision not to use the savings program. The results were remarkably consistent with the collected data. Debtors represented by attorneys in Group 2 were generally not aware of the savings provision and did not understand how it worked or the benefits provided. Debtors in Group 1 that had elected not to use the savings provision (i) had specific recollection of conversations with their counsel about the savings program; (ii) generally understood its existence and how the program worked; and (iii) had specific reasons for not electing the provision. These debtors also generally had a better understanding of the overall chapter 13 process and their goals in the case. In this sense, attorney education is debtor education.

The Chapter 13 Trustee

In defining the original scope of the study, two specific chapter 13 trustees were chosen. These two trustees are nationally recognized and prior experience

of a debtor's secured and priority unsecured debt along with confirmation criteria such as the best interest test may limit the ability to utilize the savings program. *See* 11 U.S.C. § 1325 and *supra* note 64.

suggested that the two were ideologically similar in their administration of chapter 13 cases. Logic would suggest that any device which increases the feasibility of chapter 13 plans would be accepted, if not embraced, by a learned chapter 13 trustee. Moreover, basic economic principals suggest that a chapter 13 trustee would be, at worst, neutral toward the savings program. As set forth above in Part II, a chapter 13 trustee is paid a percentage fee based on disbursements made in the case. The longer a case lasts, the more money that is received and the more disbursements that are made. The data suggests that these beliefs are incorrect. To the contrary, a chapter 13 trustee's personal views on the underlying issue of allowing a debtor to save money are incorporated into public expressions of policy which are acted upon by debtors' attorneys.

The impact of a policy statement by a chapter 13 trustee can shape the behavior of a local bar due to basic economic forces. In the Southern District of Texas, a majority of chapter 13 cases are handled on a "no-look" fee basis.⁸¹ As previously mentioned, the requirements on counsel under BAPCPA are significant.

⁸¹ This is a process employed by many bankruptcy courts across the country. Ordinarily, debtor's counsel must file a written fee application with the court in order to receive compensation. The fee application contains a detailed accounting of time spent and fees charged. In the Southern District, attorneys are required to keep their time in one-tenth of an hour increments. The cost of the fee application process is compensable and is not insignificant. As chapter 13 cases involve relatively nominal fees, courts have implemented no-look fees. A no-look fee is a fixed amount which an attorney will be paid for a chapter 13 case without the necessity of a fee application. The fee is the same regardless of the amount time spent on the case. In the Southern District, the no-look fee is currently approximately \$4,000.

It is relatively easy for an attorney to get into a loss position on a particular case. Moreover, an average chapter 13 practitioner has multiple cases pending at any given point in time. Larger operations may file 15-20 cases or more per month. Each of those cases has a potential life span of five years. The numbers quickly get large and profit/loss margins are magnified. Attorneys pay close attention to the reactions of chapter 13 trustees to all new case authorities, rule changes and practices. Repeated reactions become trends which then quickly become standard practices. Further, attorneys justifiably worry that the consequences of actions taken in one case will have a spillover effect into unrelated cases.⁸² Attorneys adjust their behavior to incorporate these practices in order to guide their clients through the bankruptcy process with a minimum of friction. Finally, few debtors have the resources to fund an appeal to test the validity of a trustee's policy.

Consequently, when a chapter 13 trustee expresses a view on the savings program, that view has an immediate impact on the attorney's decision making. In the study, a perceived negative statement by Trustee 1 regarding the use of the savings program had a measurable effect on its use. Even though Trustee 1 apparently has no objection to minimal use of the savings program, it appears that

⁸² This is not to suggest that any attorney sacrifices the interests of one client for another. Disputes between debtors and chapter 13 trustees routinely occur. Thoughtful attorneys, however, always consider the consequences of their actions.

some attorneys have erred on the side of caution and simply avoided its use altogether.

The Court

The notion that judicial support of a particular practice has an impact on the success of that practice is unsurprising. The degree and method of support utilized by the judges in the study did yield a number of unexpected consequences. First, the savings program was designed as an “opt-in” program. To participate, a debtor must insert an amount into the box in paragraph 21 of the chapter 13 form plan. At the time of the program’s design, it was believed that attempting to force debtors to utilize the savings provision would negatively impact its success. The study showed, however, that Judge 1’s required or “strongly-encouraged” use of the savings program had no negative effect on its success once implemented. To the contrary, the data suggests that these debtors performed better than those that voluntarily participated. This suggests that mandatory participation in the savings program under certain circumstances such as in motions to extend or impose the automatic stay under § 362(d)(3) or (4) for repeat filers might be appropriate.

Second, personal interaction with the debtor by the court has an impact on the debtor’s view not only of the savings program, but of the bankruptcy process itself. Most debtors come to bankruptcy as failures in one form or another. To have a judge encourage their success and to offer in plain English something that has an easy-to-

understand monetary benefit provides self-motivation and a project/reward scenario that must be completed.

Finally, the frequency with which the court expresses its support of a practice impacts practitioners' willingness to adopt that practice as normal behavior. As discussed, once the savings program was approved, significant consideration was given to the manner in which it was presented to the bar. While the continuing legal educational seminar were a start, the data reflects they were insufficient to achieve the desired goal. Those attorneys that routinely interacted with a judge totally immersed in the concept more readily accepted and utilized the savings program versus those attorneys that were exposed to the program only once or twice in a formal setting.

Part V- Conclusion

The savings program implemented in the Southern District of Texas is a viable tool for increasing the viability of chapter 13 plans. From an economic perspective, it provides a legal means of assisting debtors in dealing with financial shocks that inevitably occur during the term of a chapter 13 plan. I look forward with anticipation examining a future dataset containing a full five years' worth of cases. In the interim, I find solace in the occasional debtor for whom I informally implemented plan in prior years obtaining a discharge and expressing gratitude for the assistance.

As demonstrated by the above study, the program's effects are not limited to providing an economic buffer. To the contrary, if properly implemented, the program serves as an incentive not only to debtors but to creditor constituents as well. A chapter 13 plan that runs its term is a positive impact on society. A debtor receives a discharge and goes on to immerse herself in the commercial world while creditors minimize their losses with meaningful distributions.

A proper implementation of the savings program is dependent upon sufficient and repeated exposure of debtors' counsel to the program and its benefits. This necessarily educational programs that involve interaction with the judiciary. Second, chapter 13 trustees must embrace the program and encourage its use. Finally, all members of the judiciary must be knowledgeable about the savings program and actively promote its use.

As for the Southern District of Texas, we will refocus our efforts on education not only of our bar but of current and future members of the bench. For the lawyers that regularly attend my class, I return on Thursday, a little less sure of who is teaching who.