# TESTIMONY OF
# PROFESSOR TODD J. ZYWICKI
# PROFESSOR OF LAW
# GEORGE MASON UNIVERSITY
# SCHOOL OF LAW

3301 N. Fairfax Dr.
Arlington, VA 22201
Phone: 703-993-9484
Fax: 703-993-8088

## Before the
## United States House of Representatives
## Committee on the Judiciary
## Subcommittee on Commercial and Administrative Law

## Hearing on
## "Working Families in Financial Crisis: Medical Debt and Bankruptcy"

Tuesday July 17, 2007

1:00 pm

Room 2141 Rayburn House Office Building

This testimony with all Figures and the academic articles referenced herein are available for download on my website at http://mason.gmu.edu/~tzywick2/.

TODD J. Zywicki is Professor of Law at George Mason University School of Law, Editor of the *Supreme Court Economic Review*, and Senior Fellow of the James Buchanan Center, Program on Politics, Philosophy, and Economics. From 2003-2004, Professor Zywicki served as the Director of the Office of Policy Planning at the Federal Trade Commission. He teaches in the area of Bankruptcy, Contracts, Commercial Law, Business Associations, Law & Economics, and Public Choice and the Law. He has also taught at Georgetown Law Center, Boston College Law School and Mississippi College School of Law and is a Fellow of the International Centre for Economic Research in Turin, Italy. He has lectured and consulted with government officials around the world, including Italy, Japan, and Guatemala. Professor Zywicki has testified several times before Congress on issues of consumer bankruptcy law and consumer credit. Professor Zywicki is a Member of the United States Department of Justice Study Group on "Identifying Fraud, Abuse and Errors in the United States Bankruptcy System." He is the author of the forthcoming books, *Bankruptcy and Personal Responsibility: Bankruptcy Law and Policy in the Twenty-First Century* (Yale University Press, Forthcoming 2007) and *Public Choice Concepts and Applications in Law* (West Publishing, Forthcoming 2008).

Professor Zywicki clerked for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit and worked as an associate at Alston & Bird in Atlanta, Georgia, where he practiced bankruptcy and commercial law. He received his J.D. from the University of Virginia, where he was executive editor of the Virginia Tax Review and John M. Olin Scholar in Law and Economics. Professor Zywicki also received an M.A. in Economics from Clemson University and an A.B. cum Laude with high honors in his major from Dartmouth College.

Professor Zywicki is the author of more than 50 articles in leading law reviews and peer-reviewed economics journals. He is one of the Top 50 Most Downloaded Law Authors at the Social Science Research Network, both All Time and during the Past 12 Months. He served as the Editor of the *Supreme Court Economic Review* from 2001-02. He is a frequent commentator on legal issues in the print and broadcast media, including the *Wall Street Journal*, *New York Times*, *Nightline*, *The Newshour with Jim Lehrer*, CNN, CNBC, Bloomberg News, BBC, *The Diane Rehm Show*, and *The Laura Ingraham Show*. He is a contributor to the popular legal weblog The Volokh Conspiracy. He is currently the Chair of the Academic Advisory Council for the following organizations: The Bill of Rights Institute, the film "We the People in IMAX," and the McCormick-Tribune Foundation's "Freedom Museum" in Chicago, Illinois. He was elected an Alumni Trustee of the Dartmouth College Board of Trustees.

Mr. Chairman and Distinguished Members:

It is a pleasure to testify here today on the subject of "Working Families in Financial Crisis: Medical Debt and Bankruptcy." Medical debt and medical problems are a source of concern for many American families today and sadly these problems sometimes land American families on the steps of America's bankruptcy courts. It is precisely to deal with these sorts of bad luck and temporary financial setbacks that we have our honored American tradition of the fresh start, to allow workers to get back on their feet.

On the other hand, these concerns have been long-recognized by this body in American bankruptcy law, and are systematically accommodated in current bankruptcy law, including the amendments enacted two years ago by this body with a bipartisan 70% majority in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). For every innocent debtor who has found himself down on his luck as the result of illness and injury, there are also innocent doctors, nurses, and health care professionals who have provided ameliorating and even life-saving care for the debtor. When some bankruptcy filers don't or can't pay their bills, those losses are passed along in the health care system through higher prices for insurers and other consumers or reduced medical services and quality. Every $100,000 discharged rather than paid in bankruptcy may be the difference between a hospital hiring a new nurse or the ability of a doctor to afford indigent care for another patient.

Current law strikes an appropriate balance of these competing concerns between doctors and patients. Under the means-testing provisions of BAPCPA, low-income debtors, including those who are unable to work because of health problems, are entitled

to file bankruptcy and discharge their unsecured debts, whether medical or otherwise. High-income debtors who can repay a substantial portion of their debts without significant hardship are required to enter a Chapter 13 plan and repay as much as they can of their unsecured debts as a condition for filing bankruptcy, whether 40%, 60%, or 80% of their outstanding unsecured debt. Moreover, in calculating the debtor's income available to repay debts in Chapter 13, the law permits a deduction for health insurance and other health expenses. Finally, a judge retains discretion to permit an otherwise-ineligible debtor to file in Chapter 7 if she can show special circumstances, such as "a serious medical condition."

In short, current law adequately accommodates the claims of those debtor laid low by medical problems and expenses and other innocent parties who are affected by bankruptcy including health care professionals and other consumers. Nor is there any evidence that medical bankruptcies are creating any sort of crisis for the bankruptcy system or that the percentage of medical bankruptcies has been rising over time. Current law balances these concerns well and it is not clear what reforms are necessary at the current time. If this Committee's true concern is not with medical bankruptcies but with the cost or quality of health care in America in general, an issue on which I express no opinion, it seems obvious to me that tinkering with the Bankruptcy Code is one of the least effective ways imaginable for dealing with those issues.

I have taught and written extensively on questions related to credit cards, consumer credit generally, and the relationship between consumer credit and consumer bankruptcies. See *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99

NORTHWESTERN L. REV. 1463 (2005)[1] and *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASHINGTON & LEE L. REV. 1071 (2005).[2] I am currently working on a book on consumer credit and consumer bankruptcy tentatively titled *Bankruptcy Law and Policy in the Twenty-First Century* to be published by the Yale University Press, from which portions of this testimony are drawn. I am honored to have the opportunity to share my research with you here today. From 2003-2004 I served as Director of the Office of Policy Planning of the Federal Trade Commission.

**HOW MANY BANKRUPTCIES ARE "MEDICAL BANKRUPTCIES"?**

Health problems theoretically can lead to a household filing bankruptcy in two ways, by reducing the ability to work and thus creating an unanticipated disruption to a family's income flow, or an unanticipated budget shock to expenses through high uninsured medical bills. In some cases medical problems can create both shocks simultaneously, creating a whipsaw effect of both an unexpected income loss and unexpected medical bills. In other cases the two effects may offset each other to some extent, if for instance, increased expenditures produces higher quality care which results in shortened convalescent periods or fuller recoveries, reducing the amount of missed income for a worker.

Thus, medical problems can in theory be a unique contributor to household bankruptcy and surely some bankruptcies are caused by this factor. On the other hand, it is not clear exactly how many consumer bankruptcies are attributable to this factor, nor is

[1] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=587901.
[2] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=681483.

there any evidence that the problem of medical bankruptcies is increasing over time. Consider each possible explanation in turn.

**There is No Evidence That There Has Been An Increase in the Frequency or Severity of Job Loss or Income Interruption as a Result of Health Problems**

The first way in which medical problems could lead to increased bankruptcies is by an increase in the frequency or severity of job loss or income interruption as the result of health problems.[3] Although this surely is the cause of some bankruptcies, there is no evidence that this is an important contributor to many bankruptcies. A study by Ian Domowitz and Robert Sartain, for instance, find little correlation of medical debt with other sources of financial distress, such as job loss or income interruption.[4] Fay, Hurst, and White find that health problems by the head of a household or spouse that cause missed work are *not* a statistically significant factor in bankruptcy filings.[5] Aparna Mathur similarly finds that poor health by the head of the household is not a statistically significant predictor of bankruptcy filings.[6] She also reports that only six percent of participants in the Panel Study of Income Dynamics survey self-reported that illness or injury caused their bankruptcy filing and statistical analysis found no significant correlation between bankruptcy filings and individuals in poor health.

These findings are not surprising. Extraordinary advances in medical technology have dramatically shortened the recovery time and reduced complications for virtually

[3] *See* Aparna Mathur, *Medical Bills and Bankruptcy Filings*, American Enterprise Institute (2005), *available in* http://www.aei.org/docLib/20060719_MedicalBillsAndBankruptcy.pdf (finding that losing work days due to illness significantly increases the likelihood of filing bankruptcy).
[4] Ian Domowitz & Robert L. Sartain, *Determinants of the Consumer Bankruptcy Decision*, 54 J. FIN. 403, 413 (1999).
[5] Scott Fay et al., *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706, 714 (2002).
[6] *See* Mathur, *Medical Bills and Bankruptcy Filings* (summarizing findings of PSID).

every medical procedure over the past few decades, thereby reducing the amount of missed work time and hastening a fuller recovery to previous levels of productivity. Thus, while some people are forced to file bankruptcy because of job loss or interruption as the result of illness or injury, it is doubtful that this number is growing over time.

Moreover, American households should be much more resilient to temporary income interruptions than in previous eras. The past two decades have seen record accumulations of household wealth (in stocks during the 1990s and in home values throughout the past two decades) and an increased ability to access that wealth in times of need (through the development of home equity lines of credit, for instance), that should cushion income interruptions. Moreover, the increasing number of two wage-earner families obviously has made families more resilient in the face of the loss of one income as the result of job interruptions from health problems or any other source. Thus, there is little reason to believe that during recent decades there could have been an increasing number of medical bankruptcies as a result of an increase in the frequency or severity of employment interruptions and consequent unexpected income loss. As noted, empirical studies do not identify this factor as an important one and, if anything, the contribution of this factor to the frequency of bankruptcies likely has declined over time.

**There is Little Evidence That Medical Debt Is a Major Causal Factor in Bankruptcy Filings**

Second, there is no evidence that there has been an increase in the number of bankruptcies caused by medical debt. Many empirical studies over the past several decades have tried to measure the number of bankruptcies attributable to medical

problems. Most studies of bankruptcy filers have failed to find a relationship between health debt and bankruptcy, although medical debt does play a role in some bankruptcy filings.[7] Most studies find no medical debt at all in about half of consumer bankruptcy filings and in the overwhelming number of cases where medical debt is listed it is relatively small in amount and unlikely to be a significant contributor to the bankruptcy filing.

A recent study of bankruptcy filers by the Department of Justice's Executive Office of the United States Trustee (USTP) is consistent with the findings of most studies. The USTP examined the records of 5,203 bankruptcy cases filed between 2000 and 2002, the most thorough study of the problem to date of those who actually filed bankruptcy. It reported that 54 percent of the cases in the sample listed no medical debt, meaning that the median amount of medical debt in the study was zero. Medical debt accounted for 5.5 percent of total general unsecured debt and 90.1 percent reported medical debts less than $5,000. There were a few cases where extremely high medical debt likely explained the subsequent filing—one percent of cases accounted for 36.5% of medical debt and less than 10 percent of all cases represented 80% of all reported medical

[7] *See* TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 168-69 (1989); Barry A. Gold & Elizabeth A. Donahue, *Health Care Costs and Personal Bankruptcy*, 7 J. HEALTH POL., POL'Y & L. 734 (1982) (finding that medical debts are not a major cause of bankruptcy); Philip Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States*, 88 COM. L.J. 288, 294–96 (1983) (finding medical debt scheduled in over half of bankruptcies and median medical debt of $567); Philip Shuchman, *New Jersey Debtors, 1982–83: An Empirical Study*, 15 SETON HALL L. REV. 541, 570–71 (1985) (finding average amount of medical bills as expressed as a percentage of total unsecured debt "was relatively small"—five percent of total unsecured debt); Larry Sitner et al., *Medical Expense as a Factor in Bankruptcy*, 52 NEB. ST. MED. J. 412 (1967) (finding medical debts not to be an important factor in most bankruptcies); *see also* Melissa B. Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 378 (2001) (noting that "[u]ntil the 1990s . . . most empirical studies of bankruptcy did not find illness, injury, or medical debt to be a major cause of bankruptcy"). *But see* Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 709–721 (1991) (finding large amounts of medical debt and medical debt present in many cases in her sample, but noting limited ability to generalize from her judgment-proof debtors to the larger population of Americans or bankruptcy filers).

debt. Of the minority of cases in the sample with medical debt, the average medical debt was $4,978 per case, 78.4 percent reported medical debts below $5,000 (an average of $1,212 for this group), and medical debts accounted for 13.0 percent of the total general unsecured debt for those reporting medical debt. Thus, even among those who reported medical debt, few reported medical debt levels sufficiently high to conclude that they were a primary cause of bankruptcy.

Aparna Mathur's study using data from the Panel Study of Income Dynamics from the 1990s similarly finds little support for the claim that medical debt is the leading cause of bankruptcy filings. Only 9 percent of respondents in the PSID claimed medical debt as the primary reason for filing and 7 percent claimed it as a secondary reason. Her statistical analysis found that medical debts substantially contributed to 27 percent of all bankruptcy filings at most, but that medical debts had an impact on bankruptcies primarily when *combined* with other high levels of consumer indebtedness such as credit card debts or automobile debt. Where households were not otherwise heavily indebted, the addition of medical debt alone had a minimal effect on the likelihood of filing bankruptcy. As Mathur concludes, "We find that households with medical debts, *in addition to other debts*, are the most likely to file, while those with *primarily* high medical debts explain relatively few bankruptcy filings." Thus, the contribution of medical debt alone to bankruptcy is difficult to determine.

Notwithstanding the longstanding consensus that relatively few bankruptcies can be reasonably said to be caused by health problems and health costs, a recent study nonetheless concludes that approximately half of consumer bankruptcies are caused by

medical problems, a twenty-three-fold increase over a twenty-year period.[8] Both conclusions are fundamentally unsupportable, however, and rest primarily on the way in which the researchers define and count what constitutes a medical bankruptcy rather than an actual increase in the number of bankruptcies caused by medical problems. The study's methodology and conclusions have been uniformly criticized by health scholars[9], economists[10], and law professors[11]. Indeed, I have been unable to locate any independent researcher unaffiliated with any of the authors of the study who has endorsed the methodology or findings of this study.

The problems with the study's methodology and conclusions are extensive but are not difficult to identify. As a result, I will simply provide a summary of the most glaring problems here and refer the Committee to sources cited elsewhere in this testimony for a more extensive discussion. As noted, the researchers' methodology has been roundly and uniformly criticized.

First, the finding that half of all bankruptcies are caused by medical problems is based on a fundamentally flawed and over-expansive definition of "medical

---

[8] *See* David U. Himmelstein et al., *Marketwatch: Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF., Feb. 2, 2005, at W5–63, *available at* http://www.content.healthaffairs.org/webexclusives.

[9] *See* David Dranove and Michael L. Millenson, *Medical Bankruptcy: Myth Versus Fact*, 25(2) HEALTH AFFAIRS 74 (2006); *see also* Kevin C. Fleming, *Author's Conclusions Not Supported by Study Results*, HEALTH AFFAIRS eLetters (Feb. 16, 2005); Jeff Lemieusx, *A Cautionary Note o the Number of Health-Related Bankruptcies*, HEALTH AFFAIRS eLetters (Apr. 13, 2005).

[10] Aparna Mathur, *Medical Bills and Bankruptcy Filings*, American Enterprise Institute (2005) (criticizing definition of medical bankruptcies as "too broad," noting absence of control group, and concluding that the actual number of medical bankruptcies is "much smaller" than reported in Himmelstein study).

[11] Gail L. Heriot, *Misdiagnosis: A Comment on* Illness and Injury as Contributors to Bankruptcy *and the Medial Publicity Surrounding It*, 10(1) TEX. REV. L. & POLITICS 229 (2005); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NORTHWESTERN L. REV. 1463, 1518-19 (2005); Todd J. Zywicki, *Health Problems and Bankruptcy: Are 50% of Bankruptcies Health Related?*, Volokh Conspiracy, *at* http://volokh.com/archives/archive_2005_02_13-2005_02_19.shtml#1108558247 (Feb. 16, 2005, 6:50 EST).

bankruptcies."[12] The researchers, for example, count as "medical bankruptcies" such events as gambling addiction, a death in the family, or the birth or adoption of a child, in addition to unexpected illness or injury. Many of these are open to question as to whether they are properly classified as medical bankruptcies. As Professor Gail Heriot notes, "Babies are a financial hardship even when hospitals given them away free" and it is hard to see how it is the medical bills that are to blame for a subsequent bankruptcy—and still less so when the even is an adoption. Moreover, although some substance abusers and gamblers are addicts, it is not clear why all those who gamble their way into bankruptcy should be assumed to be gambling addicts and thus classified victims of "medical bankruptcy"

Moreover, they count as a serious medical problem any accumulation of unpaid medical bills of over $1000 within two years of bankruptcy. This figure is obviously too low of a threshold to try to capture the phenomenon of "medical bankruptcies." To put this figure in perspective, in 2001 average per capita out of pocket health expenses were $683—meaning that during that period the average American spent about 30% more than this figure on unreimbursed medical expenses.[13]

The researchers also report the mean amount of medical debt, which could be skewed by a handful of high-debt filers and is irrelevant to the question as each person can only file bankruptcy once during the sample period.[14] They do not report any

[12] *See* Mathur ("their classification of a medical bankruptcy is too broad"): Fleming ("the very definition of 'medical bankruptcy' in this study is a poor one"); Lemieusx (calling definition of health care bankruptcies "very broad").

[13] . *See Health Accounts*, *at* http://www.cms.hhs.gov/statistics/nhe/default.asp. Overall, in 2001, average private medical expenditures were almost $2500 per person for total private medical expenditures (including payments on health insurance premiums). *Total* expenditures by individuals, employers, government, and philanthropy were over $5000 per person for 2001.

[14] They state elsewhere that their finding of out-of-pocket costs of $11,854 "indicates that most families had incurred far more than $1,000 in out-of=pocket costs." Himmelstein et al., *Bankruptcy and Health:*

evidence on how many filers had substantially more than $1000 in unpaid medical bills, the median amount of medical debt, nor the distribution of debt—even after Dranove and Millenstein specifically identified this methodological flaw.[15] In fact, as noted above the study by the United States Trustee found relatively few filers with substantial medical bills and a very small number of filers with very large medical debts. Himmelsein, et al., provides *no* reason to question this conclusion that the problem of large medical debts is limited to a relatively few number of filers.[16]

They also do not control nor even provide any evidence as to the size of the other obligations of the "medical bankruptcy" filers. Thus, for instance, a debtor with $1001 in unpaid medical bills and $50,000 in student loan debt or tax debt would classify as a medical bankruptcy under the authors' definition. It is not clear why this hypothetical situation would be classified as a medical bankruptcy.

Finally, they do not attempt to control for the possibility of strategic behavior as part of pre-bankruptcy planning, such as decisions by debtors to pay secured debts, such as mortgages or automobile loans, or nondischargeable unsecured debts, such as student loans, instead of medical debt, which is generally unsecured and dischargeable. Such strategic decisions would tend to inflate the amount of medical debt in bankruptcy relative to its actual proportion outside bankruptcy.

---

*The Authors Reply*, HEALTH AFFAIRS eLetters (June 8, 2005). But this inference obviously does not follow—a high *average* amount of health expenses could arise *either* from each filer having substantial medical debt or from a few filers who have extremely high medical debt that pulls up the average for all. The United States Trustee study indicates that the latter scenario is more plausible than the former. Again, the authors provide no evidence regarding the median or distribution of medical debt in their study so they have no basis for the inference that they claim is "indicated" by the data.

[15] Dranove and Millenstein at p. W77.

[16] The United States Trustee's office also examined almost three times as many petitions as the Himmelstein study.

Nor are the authors' conclusions supportable, even leaving aside the obvious methodological flaws in the study. Among their conclusions are that: "Medical problems contribute to about half of all bankruptcies"; "that the number of medical bankruptcies had increased twenty-threefold by 2001"; and , "since the number of bankruptcy filings rose 11 percent in the eighteen months after the completion of our data collection, the absolute number of medical bankruptcies almost surely continues to increase." All of these conclusions are open to question.

First, the finding that approximately half of all bankruptcies are caused by medical problems is unsupportable. Dranove and Millenson note that 28.3 percent of respondents in the study stated that illness or injury was a cause of bankruptcy, and that the remaining "medical bankruptcies" arose through the authors' classification of medical bankruptcies. As noted, the authors define this second category of bankruptcies unduly broadly. In fact, Dranove and Millenson a more reasonable interpretation of Himmelstein's data suggests that about 17 percent of their sample had medical expenditure bankruptcies and that even then it is not possible to conclude that medical spending was the most important cause of bankruptcy. In fact, this estimate of about 17% approximates the higher end of the range of findings of other studies of bankruptcy filers as to the contribution of medical expenses to bankruptcy. There also is no evidence that this figure has been growing over time. For instance, Mathur reports that in the PSID data she studied, 9 percent of those surveyed self-reported medical bills as the primary reason for filing and 7 percent claimed medical bills as a secondary reason, for a total of 16%.

Second, the finding of a twenty-three-fold increase in medical bankruptcies is equally unsupportable. This figure appears to be almost completely the result of a change in the way in which the researchers define medical bankruptcies. The baseline for the purported twenty-three-fold increase was a finding in the book *As We Forgive Our Debtors* that only eight percent of bankruptcies were medically-related.[17] It is not exactly clear what was considered to be a "medical bankruptcy" in the earlier study, but it appears that the definition was much narrower, and did not include such things as gambling addiction or the $1000 threshold. If the $1000 threshold was actually included in the earlier study, the authors of the current study do not appear to have adjusted it for inflation or growth in income.[18] In fact, *As We Forgive Our Debtors* seems to directly reject the more expansive definition of "medical bankruptcies" of the current study, stating:

> Our central finding is that crushing medical debt is not the widespread bankruptcy phenomenon that many have supposed. To the extent that the typical debtors in bankruptcy are painted as sympathetic characters because they are struggling with insurmountable medical debts, these data show that "typical" is the wrong adjective. *Only a few debtors find themselves in such extreme circumstances . . . . About half of all debtors carry some medical debt, and many carry substantial medical debt. Although these medical debts are not the obvious cause of the debtors' bankruptcies, they are part of their financial troubles.*[19]

The earlier study, like the most recent one, therefore, found medical debt *present* in about half of bankruptcy filings. By contrast, the earlier study concluded that relatively small amounts of medical debt were unlikely to be a significant cause of

---

[17] Himmelstein et al., *supra* note 8, at W5-71.

[18] Per capita income rose from $8476 to $22,851 per year from 1981 to 2001. *See* U.S. Census Bureau, *Historical Income Tables—People, Table P-1, at* http://www.census.gov/hhes/income/histinc/ p01ar.html (last visited Aug. 1, 2005). Mean household income rose from $22,787 to $58,208. U.S. Census Bureau, *Historical Income Tables—Households, Table H-9, at* http://www.census.gov/hhes/ www/income/histinc/h09ar.html (last visited Aug. 1, 2005).

[19] SULLIVAN ET AL., at 173 (emphasis added).

bankruptcy. The authors added, "The central finding is that medical debt is not an especially important burden for most debtors."[20] This earlier approach seems much more reasonable than that today.

Third, the authors also report that bankruptcy filings rose 11% in the period after the completion of their data collection, meaning that the "absolute number of medical bankruptcies almost surely continues to increase." Since BAPCPA went into effect about two years ago, however, bankruptcy filings have fallen approximately 50%-70%. If the authors were right about their earlier claim that a continued rise in the bankruptcy filing rate signaled an increase in the absolute number of medical bankruptcies, then it logically must follow that over the past two years the absolute number of medical bankruptcies has been cut in half. Alternatively, and more plausibly, the authors' conclusions about the number of medical bankruptcies were simply erroneous in the first place.

**Medical Insurance and Bankruptcy**

Lack of health insurance also can theoretically contribute to bankruptcy filings. If a family lacks health insurance, a catastrophic or long-term illness can deplete family savings and overwhelm the household with debt. As a result, a lack of health insurance may exacerbate the other difficulties created by health problems, such as increased debt and reduced income. In fact, however, there is no evidence that lack of medical insurance is a major causal factor in bankruptcy filings. Empirical research also finds little relationship between lack of health insurance and bankruptcy. Gross and Souleles found that a lack of health insurance was not a statistically significant predictor of

[20] *Id.* at 170.

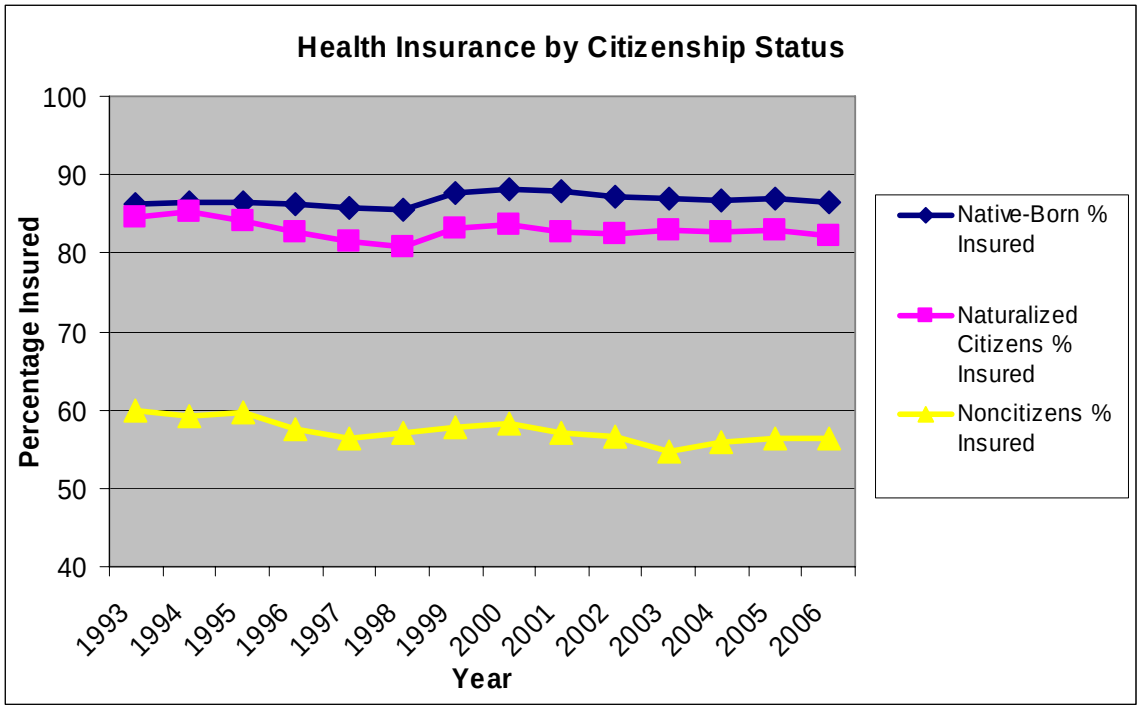
bankruptcy.[21] Economist Joanna Stavins similarly found "no notable difference" between the percentage of bankruptcy filers with health insurance and the percentage of the non-filers with health insurance.[22] Himmelstein et al., find that "medical debtors were no less likely than other debtors to have [health insurance] coverage at the time of filing."[23]

Moreover, there are no macroeconomic trends in health insurance coverage that would suggest that lack of health insurance could be a major contributing cause to bankruptcy filings. Although the percentage of Americans without health insurance has risen gradually over time, this decline in coverage is the result of declining rates of health-care coverage among immigrants. The percentage of native-born Americans with health insurance has actually *risen* slightly since the official records began in 1993. The percentage of immigrants with health insurance, by contrast, has fallen during this period, especially among noncitizens.

[21] David B. Gross & Nicholas S. Souleles, *An Empirical Analysis of Personal Bankruptcy and Delinquency*, 15 REV. FIN. STUD. 319, 334–35, tbl.2 (2002). Although they did not find lack of health insurance to be a predictor of bankruptcy, they did find it to be a predictor of credit card default.

[22] Joanna Stavins, *Credit Card Borrowing, Delinquency, and Personal Bankruptcy*, NEW ENG. ECON. REV., July/Aug. 2000, at 15, 22. In fact, Stavins found that those who filed bankruptcy in the past were *more* likely to have health insurance than those who did not, although they may have acquired health insurance after the filing. *Id.* at 25. Although it is unlikely that bankruptcy filers are more likely to be insured than non-filers, Stavins's findings certainly cast doubt on the claim that they are substantially more likely to lack insurance.

[23] Himmelstein et al., at W5-66.




*Source: Center for Medicare Studies.*

I have seen no reason to believe that the rise in medical bankruptcies has occurred only among immigrant groups and not among native-born Americans, suggesting that the absence of health insurance does not appear to be a substantial cause of medical bankruptcies. While this may raise other public policy concerns, it suggests that lack of health insurance is not likely to be causing a rise in medical bankruptcies.

## WHAT TO DO ABOUT MEDICAL BANKRUPTCIES?

Leaving aside the factual question regarding the number of "medical bankruptcies" there still remains the policy question of what should be done about it.

Medical problems and bankruptcy present a difficult policy decision in that those on both sides of the transaction are generally innocent parties. One can certainly sympathize with a bankruptcy debtor who has been forced to file bankruptcy because a

serious medical problem has either resulted in the loss of his job or major medical bills. And this is precisely the sort of person for whom bankruptcy is intended and for whom the fresh start is particularly important.

On the other hand, a doctor who performs the service of delivering a healthy baby or a surgeon who saves someone after a heart attack certainly seems entitled to be paid for his or her services. When a debtor discharges medical debt, those losses must be passed on somewhere in the system, either through higher costs for insurers and other patients or reduced medical services. $100,000 in discharged medical debt may make the difference as to whether a hospital can hire an additional nurse for a year or provide free care to indigent patients. It is wholly right and appropriate to allow an innocent debtor a fresh start to recover from medical problems and medical bills; nonetheless, we should recognize that there are also conscientious health providers and other patients who eventually have to foot the bill for this opportunity. For every innocent debtor there is also an innocent creditor who provided those services.

Current bankruptcy law strikes an appropriate balance between these competing claims of innocent debtors and innocent providers of health care services. Medical debt typically is unsecured debt. Under current bankruptcy law, any unsecured debt incurred prepetition is treated the same as any other unsecured debt. In particular, under BAPCPA, medical debts are subjected to means-testing as with other unsecured debts. Thus, for instance, if a debtor paid for some of his or her health care by incurring credit card debt, that too would be dischargeable and subject to means-testing.

Under the means-testing provisions of BAPCPA, a debtor who earns above the state median income is expected to pay what he or she can in a Chapter 13 plan as a

condition for filing bankruptcy. A debtor who earns below the state median income, such as a debtor who is incapacitated and unable to work because of health problems, can file chapter 7 bankruptcy and receive a discharge of her debts. By contrast a debtor who has fully recovered and is able to work, but nonetheless has substantial medical bills, is required to repay as much as she can, whether 40%, 60%, or 80% in a chapter 13 repayment plan.

As this body recognized two years ago in a bipartisan vote with 70% overall support, this is a perfectly appropriate and reasonable balancing of the claims of debtors in financial distress and the legitimate claims of doctors to be paid for the valuable, and even life-saving, services that they provide.

Moreover, post-petition medical expenses are given special treatment under the means-testing provisions of BAPCPA. In determining the debtor's monthly expenses for purposes of applying the means-testing provisions of §707(b), the Code specifically subtracts from the debtors income expenses "reasonably necessary" for health insurance, disability, insurance and health savings accounts expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. §707(b)(2)(A)(ii)(I). The debtor's monthly expenses may also include actual expenses paid by the debtor for reasonable and necessary expenses incurred for care and support of an elderly, chronically ill, or disabled household member of member of the debtor's immediate family. §707(b)(2)(A)(ii)(II). Finally, under §707(b)(2)(B), the debtor may rebut the means-test's presumption of abuse by demonstrating special circumstances such as a "serious medical condition" to the extent that such special circumstances justify additional expenses or adjustments of current monthly income.

On the other hand, given the efficacy of BAPCPA in weeding out fraud and abuse in the bankruptcy system, it could very well be that the percentage of bankruptcy cases today that are attributable to medical problems may be higher in the past. As noted, BAPCPA has cut bankruptcy filings in half, primarily by deterring fraudulent and abusive filings while preserving bankruptcy relief for those who need it, such as those with true medical hardship and overwhelming medical debt. If this deterrence of fraudulent filings has resulted in an increased percentage of medical bankruptcies as a statistical matter, then it would be expected that the percentage of injured and sick debtors would rise, but because of a reduction in the denominator (cases filed), not an increase in the numerator.

In short, the Bankruptcy Code today is well-equipped to deal with the challenges of medical bankruptcies. It strikes an appropriate balance between the needs of injured debtors and innocent creditors. Debtors today, including debtors with medical debts, are gaining the relief that they need while at the same time repaying what they can to doctors and medical providers who have offered them necessary and life-saving medical services.

## CONCLUSION

Perhaps some here think that medical care is too expensive these days. I express no opinion on whether that is the case or if so what should be done to address the problem. It does seem obvious however, that bankruptcy law is *not* the appropriate place to try to deal with the problem of an overly expensive health-care system. Bankruptcy law should be concerned with striking an appropriate balance between debtors and

creditors, including those in the health care system. Current law accommodates these concerns well and there is no need for further consideration at this time.