

MEDICAL DEBT AS A CAUSE OF CONSUMER BANKRUPTCY

By

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INTRODUCTION

In his 2009 State of the Union Address, President Obama pleaded with Americans to support healthcare reform, stating “[t]his is a cost that now causes a bankruptcy in America every thirty seconds.”¹ That jaw-dropping statistic was based on a study co-authored by Elizabeth Warren (then a professor at Harvard Law School) which concluded that 62.1% of consumer bankruptcies are medical bankruptcies.² The figure has been widely cited by lawmakers, academics, and the media in support of expanded government healthcare.³ Recently, Senator Warren (D. MA) co-sponsored legislation to create a new category of “medically distressed debtor” that would be exempt from stringent bankruptcy filing requirements.⁴ On the other side, commentators and lawmakers who oppose greater government involvement in healthcare dispute

¹ President Barack Obama, State of the Union Address (Feb. 24, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress

² See *infra* note 49 and accompanying text.

³ See *infra* note 52.

⁴ See *infra* notes 93, 94 and accompanying text.

the Warren findings.⁵ The issue of medical bankruptcies continues to be a focal point in the healthcare debate.⁶

Several other studies have examined medical debt in bankruptcy. Using a variety of methods, these studies have alternatively sought to support the Warren study, refute it, or replace it as the authoritative source about medical bankruptcies. However, these studies utilize data from a single year or a single geographic region, or data constructed from debtors' recollection of detailed financial information from prior years. Not surprisingly, the different studies produce a wide range of estimates for medical debt, which feeds opposite positions in the debate over healthcare policy. This study helps to close that gap by drawing upon medical debt and other data from consumer bankruptcy cases filed between 2005 and 2013, and debtor responses to a nationwide survey. The data adduced in this study shows that medical bills are the single largest cause of consumer bankruptcy—but not nearly to the degree that Warren and others have asserted. As of 2013, the *minimum* percentage of medical bankruptcies is 18%, and the *maximum* percentage is 25%. However, in Massachusetts, where health care insurance is mandatory, medical debt is far lower than in any other state, with a minimum rate of 3% and a maximum rate of 9%. Overall, medical debt is a modest but rising component of debt in consumer bankruptcy.

This study is important for several reasons. First, it provides a new picture of medical bankruptcies. It avoids methodological pitfalls of some studies, and narrow data constraints of the others. Thus, it will better inform debate and discussion regarding healthcare policy. Second, the study shows that medical debt is a significant element of consumer bankruptcy. There is no other multiyear study tracking the levels of medical debt in consumer bankruptcy. Researchers and policymakers who focus on consumer bankruptcy will be able to utilize this data in their research and analysis. Finally, it will help settle political debate. Members of Congress no longer need to stand on widely divergent estimates over medical bankruptcy as they consider health care policy and bankruptcy policy issues.

This article will proceed as follows. Part I gives an overview of consumer bankruptcy and its causes, and introduces the issue of medical bankruptcy. Part I also reviews previous studies on medical bankruptcy, and shows why no studies to date offer a sound analysis of the role of medical debt in bankruptcy. The part concludes by introducing a coherent definition of the term “medical bankruptcy.” Part II discusses the sources of data and methodology used in this study, while also explaining caveats and types of data excluded from the study. Part III presents the findings, including analysis and comparisons of medical bankruptcy data from 2005 to 2013. The article concludes that medical debt is a substantial and growing element of consumer bankruptcy, but that it has a much lower casual impact on bankruptcy in Massachusetts, where health care insurance is mandatory.

I. BANKRUPTCY AND MEDICAL BANKRUPTCIES

⁵ See *infra* notes 53 – 57 and accompanying text.

⁶ See, e.g., Erika Gonzalez, *Patients go bankrupt as medical costs soar*, Colorado Public News, June 22, 2012, available at <http://www.cpt12.org/news/index.php/author/erikagonzalez/>.

The term “medical bankruptcy” is used in bankruptcy and healthcare policy dialogue to connote a consumer bankruptcy filing in which medical debts were the predominant casual factor. The term does not exist in the Bankruptcy Code, and what qualifies as a medical bankruptcy has generally depended on the perspective of the person(s) using the term. This part gives an overview of consumer bankruptcy in general, and then focuses on medical bankruptcy. I conclude the part with a coherent definition of medical bankruptcy.

A. *Consumer Bankruptcy: Overview and Causes*

1. *Overview of Consumer Bankruptcy*

The purpose of consumer bankruptcy is to provide “the honest but unfortunate debtor” with a financial “fresh start” by discharging debt that the debtor has no reasonable prospect of paying.⁷ A personal bankruptcy is commenced by filing a bankruptcy petition,⁸ schedules of assets, liabilities, income, expenses, and other forms.⁹ Once the bankruptcy is filed, actions to enforce obligations against the debtor are automatically stayed.¹⁰

There are primarily two types of consumer bankruptcy: chapter 7 bankruptcy¹¹ and chapter 13.¹² In a chapter 7 case, the debtor surrenders her non-exempt assets to the trustee, who sells the assets to pay unsecured creditors pro rata. The remaining debts are discharged and the case is closed, usually within a few months. The Code exempts certain assets from the reach of the trustee, and these are sufficiently generous to allow most debtors to keep all of their property.¹³ In contrast, in a chapter 13 case the debtor must pay her monthly “projected disposable income” to a Chapter 13 Trustee under a plan of reorganization that can last from three to five years.¹⁴ The trustee in turn pays unsecured creditors a pro rata portion of their

⁷ *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

⁸ 11 U.S.C. §301.

⁹ *Id.* § 521(a)(1)-(2).

¹⁰ *Id.* § 362(a).

¹¹ *Id.* § 701 *et seq.*

¹² *Id.* § 1301 *et seq.* Individuals may also file for bankruptcy under chapter 11 (§1101 *et seq.*), but individual chapter 11 cases are rare.

¹³ *Id.* § 522(b)(1) – (3).

¹⁴ *Id.* § 1322(a)(4) and §1325(b)(4)(a)

unsecured claims.¹⁵ If the debtor completes all payments under the plan, the remaining debts are discharged.¹⁶

Except for secured debts such as home mortgages and car loans, most consumer debt is nonpriority unsecured debt¹⁷ and typically includes claims such as credit cards, medical bills, utility bills, personal loans, legal claims, and student loans. These types of debt are generally dischargeable in consumer bankruptcy, with certain exceptions.¹⁸ Nonpriority unsecured debt is reported by debtors on bankruptcy Schedule F.¹⁹

Chapter 7 debtors must pass a “means test” to determine if the debtor qualifies for chapter 7 relief. Simply put, if the debtor’s gross income is above the state median income, the debtor will be presumed to have abused the bankruptcy process if he files a chapter 7 bankruptcy.²⁰ The debtor must rebut the presumption,²¹ move to dismiss the chapter 7,²² or

¹⁵ *Id.* §§ 1302(b)(5) and 1326(a)(2).

¹⁶ *Id.* § 1328(a).

¹⁷ In consumer bankruptcy there are two types of unsecured debt: priority and nonpriority. Priority debts are described § 507(a) and include domestic support obligations, certain taxes, etc. As provided under § 523(a), priority debts are generally not discharged in bankruptcy and are paid before nonpriority unsecured debts. § 726(a)(1). All other unsecured debts are nonpriority unsecured debts and are paid after priority debts. § 726(a)(2).

¹⁸ 11 U.S.C. § 523(a). Student loans are excepted from discharge unless the debtor proves that paying the loans would result in “undue hardship.” *Id.* § 523(a)(8). *See gen.*, Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 372-396 (2013) (discussing strict case law standards for discharge of student loan debt).

¹⁹ *Id.* § 521(a)(1)(B)(i) provides that the debtor must file a schedule of assets and liabilities. Fed. Bankr. R. 1007(b)(1)(A) specifies that debtors must use “the appropriate Official Forms.” Schedule F is the official form for nonpriority unsecured debts. The official bankruptcy forms are online at <http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx>.

²⁰ *Id.* § 707(b)(1). Debtors with primarily business debts are not subject to means testing.

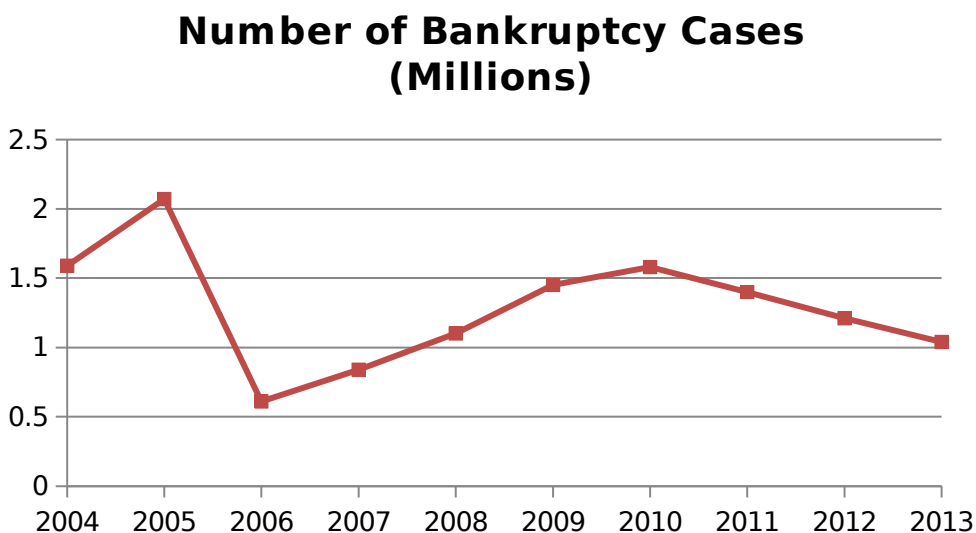
²¹ *Id.* § 707(b)(2)(B).

²² A debtor may motion the court to dismiss the case, however, dismissal must be granted by the court. 11 U.S.C. § 707(a).

convert the case to chapter 13 case.²³ A similar test is used in chapter 13 bankruptcy to determine the amount of “projected disposable income” that must be paid each month to fund the plan.²⁴

The number of bankruptcy cases fluctuates from year to year. A record 2.01 million consumer bankruptcy petitions were filed in 2005, as debtors rushed to file before the BAPCPA amendments took effect. Bankruptcy filings plunged to just over 600,000 in 2006, as shown in Figure 1. They steadily rose through 2010, until gradually declining again each year thereafter.

FIGURE 1: NUMBER OF CONSUMER BANKRUPTCY CASES ANNUALLY FROM 2005 TO 2013



Source: Administrative Office of United States Courts.²⁵

It is important to remember that even though this and other studies analyze bankruptcy and medical debt in terms of *percentages*, the actual *number* of bankruptcies is not constant and varies from year to year.

2. *Causes of Consumer Bankruptcy*

²³ *Id.* § 707(b)(1).

²⁴ *Id.* § 1325(b)(2) – (3).

²⁵The Administrative Office of United States Courts maintains bankruptcy filing statistics. Reports for the years listed here are found at <http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx>.

Numerous studies have looked at the causes of consumer bankruptcy, but overall there are three main theories: sudden financial shocks, chronic poor use of resources, and deliberate action on the part of debtors.

Researchers who see sudden financial shocks as the cause of bankruptcy point to specific events such as income loss, marital or family problems, and medical expenses.²⁶ These theorists reject overuse of credit as the main culprit.²⁷ In contrast, other commentators assert that long-term consumption patterns contribute more to personal bankruptcy than sudden adverse events.²⁸ Related to the overuse of credit, some authors attribute collection pressures, not debt levels *per se*, as a primary element in bankruptcy filing.²⁹ Several authors assert that a combination of high amounts of consumer credit, coupled with an “unexpected insolvency event” causes most bankruptcies.³⁰ For example, a 2008 survey of bankruptcy debtors in Utah listed (in order) employment problems (loss of job, cut in pay, etc.), overuse of credit cards, poor money management, illness and injury, aggressive debt collection, and divorce or family problems as the

26 Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT*, Yale University Press (2000) at 16.

27 Darryl E. Gutter, *Contributing to the Delinquency of Borrowers*, 37 J. CONSUMER AFF. 86, 99-100 (2003).

28 Ning Zhu, *Household Consumption and Personal Bankruptcy*, 40 J. LEGAL STUD. 1, 18-19 (2011) (concluding that medical conditions and unemployment rates are only slightly more adverse for bankruptcy households than non-bankrupt ones). *See also*, Amy Traub, *The Debt Disparity: What Drives Credit Card Debt in America*, Dēmos (May 2014) at 22, available at http://www.demos.org/sites/default/files/publications/DebtDisparity_1.pdf. (noting that unemployment and lack of health care correspond with higher credit card debt).

29 Herbert Jacob, *DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES* at 56-57 (1969). Ronald Mann and Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L. J. 289 (2010). Mann and Porter reject the model of sudden financial shocks as a trigger for bankruptcy. Instead, they postulate that as debt pressures accumulate over time, debtors “save up” emotional and financial wherewithal to file bankruptcy. *Id.* at 313-316, 319-321.

30 *See, e.g.*, Thomas A. Garrett, *The Rise in Personal Bankruptcy: Causes, Comparisons, Correctives*, Federal Reserve Bank of St. Louis (2006) at 7 and sources cited therein, available at http://www.stlouisfed.org/community_development/assets/pdf/bankruptcy.pdf. Insolvency events listed by Garrett include divorce, death of spouse, loss of job, and medical expenses. *See also*, Congressional Budget Office, *Personal Bankruptcy: A Literature Review* (2000) at x, available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/24xx/doc2421/bankruptcy.pdf> (researchers conclude that an individual is more likely to file when confronted with adverse economic and personal issues such as sudden medical debt following accident or illness, divorce, loss of income, and poor debt management).

main factors for filing bankruptcy.³¹ On the other end of the debate, an oft-cited article concludes that consumer bankruptcy is a rationally strategic decision, finding that the rate of filing is directly proportional to the financial benefit the debtor will gain through bankruptcy.³²

Consumer practitioners that I have polled point to interruption of income stream (including unemployment, underemployment, small business failure) as the leading cause of bankruptcy, followed by major personal/family changes such as divorce, death of spouse, new child, or loss of support from family members.³³ Divorce or separation can be a problem when debtor(s) go from one household to two,³⁴ or when an adult child returns to live with a parent.³⁵ Other causes cited by bankruptcy attorneys include medical debt, heavy use of credit cards and other consumer credit (particularly by elderly or unsophisticated borrowers), high mortgage debt (decreasing as a factor in bankruptcy) and high student loan debt (increasing as a factor in bankruptcy).³⁶ Practitioners note that some debtors use credit cards just to get by.³⁷ In

31 Jean M. Lown, *Consumer Bankruptcy in Utah (USA): Who files and why?* 32 INT'L. J. CONSUMER STUD. 233, 237 (2008).

32 Scott Fay, Erik Hurst, and Michelle J. White, *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706 (2002)(an increase of \$1,000 in household financial benefit would result in a 7 percent increase in the number of bankruptcy filings). Another way that bankruptcy can be said to be a rational calculation is when the debtor files as a means to avoid home foreclosure. For example, in chapter 13 bankruptcy, a debtor who is behind on her home mortgage may cure the default in incremental payments over time. 11 U.S.C. § 1322(b)(5). However, this is a tool used in bankruptcy, and does not relate to why the debtor is financially distressed.

33 Email from attorney Richard Pearson (Oct. 30, 2012), copy in my possession; email from attorney Robin De Leo (Oct. 1, 2013), copy in my possession; Richard Pearson points out that although student loans are generally not dischargeable in bankruptcy, the effect of massive student loans on household budgets causes many debtors to file bankruptcy in order to get rid of dischargeable claims so that they can afford to pay their student loans.

34 Email from attorney Susan Grossberg (Feb. 5, 2014), copy in my possession.

35 Email from Bankruptcy trustee Marge Burks (Feb. 10, 2014), copy in my possession.

36 Burks, *id*; Grossberg, *supra* note 34. A poll of consumer bankruptcy lawyers conducted in 2012 found student loan debt to be the fastest growing element of consumer debt. *Student Loan Debt Crises Survey*, National Association of Consumer Bankruptcy Attorneys, Feb. 12, 2012, available at <http://nacba.org/Portals/0/Documents/Student%20Loan%20Debt/020712%20NACBA%20student%20loan%20survey.pdf>.

37 Email from attorney Dai Rosenblum (Feb. 6, 2014), copy in my possession.

Massachusetts, where medical claims are much lower for debtors, loss of income (including loss due to a catastrophic medical event) is viewed as a leading cause of consumer bankruptcy.³⁸

B. Medical Bankruptcy

A handful of studies have looked at medical debt as a causal factor in consumer bankruptcy. The one that has received the lion's share of attention is David Himmelstein *et al.*, *Medical Bankruptcy in the United States, 2007: Results of a National Study* (Himmelstein 2009).³⁹ Second to that is David Himmelstein *et al.*, *Illness and injury as contributing factors to bankruptcy* (Himmelstein 2005).⁴⁰ Elizabeth Warren was a co-author of both articles.

In Himmelstein 2009, researchers mailed surveys to 5251 randomly-selected debtors who filed for bankruptcy in 2007.⁴¹ The seven-page questionnaire contained 24 primary questions, with numerous sub-parts.⁴² The questions ranged from basic demographics to detailed work-history information.⁴³ One full page was devoted to the debtor's and dependents' health and health insurance.⁴⁴ Survey recipients were asked to participate in follow-up phone interviews. In conducting telephone interviews, law student assistants used a computer program with thousands of potential questions on a wide variety of subjects.⁴⁵ Respondents received financial compensation to participate.⁴⁶ The researchers received 2314 completed questionnaires and conducted 1032 phone interviews.⁴⁷ The answers were used to determine whether a given case was a medical bankruptcy, which the authors define broadly to include when the debtors cite illness or medical bills for filing bankruptcy, mortgaged a home to pay medical bills, or if the

38 Email from attorney Joanna Allison (Feb. 2014), copy in my possession.

39 David U. Himmelstein, Deborah Thorne, Elizabeth Warren, and Steffie Woolhandler, *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. (2009).

40 David U. Himmelstein, Elizabeth Warren, Deborah Thorne, and Steffie Woolhandler, *Illness and injury as contributing factors to bankruptcy*, Health Aff (Millwood), Feb. 5, 2005 [Web exclusive], available at <http://content.healthaffairs.org/cgi/reprint/hlthaff.w5.63v1>.

41 Himmelstein 2009, *supra* note 39 at 2.

42 Himmelstein 2009 questionnaire, copy in my possession.

43 *Id.*

44 *Id.*

45 Email from David Himmelstein (Jan. 15, 2014) copy in my possession.

debtor had medical bills greater than \$1,000 or lost two weeks or more of work due to illness or injury in the two years prior to filing.⁴⁸

Himmelstein 2009 concluded that “62.1% of all bankruptcies have a medical cause.”⁴⁹ The authors compared this percentage to the results of Himmelstein 2005, a study of debtors who filed bankruptcy in 2001, in which they asserted that 46.2% of debtors had filed because of medical costs.⁵⁰ Thus, Himmelstein 2009 postulated that the odds that a bankruptcy had a medical cause was 2.39 times higher in 2007 than in 2001.⁵¹ The Himmelstein studies have been widely cited in Congress and elsewhere.⁵²

Released on April 12, 2009, Himmelstein 2009 was viewed by some as having been purposefully designed to support enactment of the Affordable Care Act,⁵³ and both studies have received their share of criticism.⁵⁴ One of the main complaints is that the definition of medical bankruptcy used in the studies is overly broad. For example, David Dranove and Michael L. Millenson fault Himmelstein, *et al.*'s inclusion of debtors with more \$1,000 in medical debt, noting that non-debtor households with average income comparable to those in the Himmelstein studies typically spend more than twice that amount on medical care per year.⁵⁵ At most, according to Dranove and Millenson, Himmelstein 2005 supports a finding of no more than 17% as medical bankruptcies.⁵⁶ A 2011 article by Tal Gross and Matthew Notowidigbo likewise found the Himmelstein numbers too high, concluding that out-of-pocket medical costs accounted for approximately 26% of bankruptcies, although their study looked only at low income debtors.⁵⁷

The ambitious scope of the Himmelstein studies is commendable. As a practical matter, it is not possible to record the income and expenditures details of bankruptcy debtors *before* they file. Among other reasons, no one, not even the future bankruptcy debtors themselves, knows who will file bankruptcy in the years before they actually do so. Himmelstein *et al.* designed their surveys as an alternative method to obtain that information—but they could only do so once

46 In Himmelstein 2009, recipients were first mailed a letter introducing the survey. The questionnaire and \$2 were mailed a few days later. Nonrespondents received another questionnaire and an additional \$2. Finally, anyone who still had not responded was offered \$50 to complete the questionnaire. Himmelstein 2009 at 2.

47 Himmelstein, *et al.* do not disclose what number of debtors responded only after additional mailings and payment.

48 Himmelstein 2009, *supra* note 39 at 2.

49 *Id.*

50 Himmelstein 2005, *supra* note 40.

51 Himmelstein 2009, *supra* note 39 at 1.

their subjects actually became bankruptcy debtors. The Himmelstein studies' detailed financial questions are answered years after the fact by memory during phone interviews, without the benefit of contemporaneous records or memoranda. These are people undergoing severe financial distress who likely never expected to be asked such questions when they incurred the expenses in the years prior to bankruptcy. This raises concerns about the reliability of the data used in the Himmelstein studies.⁵⁸ This is particularly so since the economic stress resulting from medical debt would have been a highly negative experience.⁵⁹ The fact that Himmelstein 2005 and 2009 rely so heavily on this type of data may, in part, account for why so many other researchers dispute their findings.

Following publication of Himmelstein 2005, Iowa Republican Senator Charles Grassley requested that the U.S. Department of Justice, through the Executive Office of the United States

52 See, e.g., Testimony of Hon. Cecelia G. Morris to House Judiciary Committee, Subcommittee on Commercial and Administrative Law, July 15, 2010, 29-AUG Am. Bankr. Inst. J. 10 (“It is well documented that around half of all bankruptcies are the result of a serious medical problem,” citing Himmelstein 2009); *Sen. Max Baucus Holds a Markup on Health Care Reform*, CQ CAP TRANSCRIPTS, Sept. 29, 2009, available at 2009 WNNR 19277273 (“I saw figures someplace, every 30 seconds, someone in America goes into bankruptcy due to medical care costs or at least it’s medical cost related.”); Sen. Edward M. Kennedy, *Health Care as a Basic Human Right: Moving from Lip Service to Reality*, 22 HARV. HUM. RTS. J., 165, 166 (2009) (“Every 30 seconds in the United States, a family is forced into bankruptcy because of unexpected medical expenses.”); Teresa Tampkins, *Medical bills prompt more than 60 percent of U.S. bankruptcies*, CNN Health.com, June 5, 2009, available at <http://www.cnn.com/2009/HEALTH/06/05/bankruptcy.medical.bills/>; Annie Underwood, *Insured, but Bankrupted Anyway*, NEW YORK TIMES, Sept. 7, 2009, available at <http://prescriptions.blogs.nytimes.com/2009/09/07/insured-but-bankrupted-anyway/>; Christina LaMontagne, *NerdWallet Health finds Medical Bankruptcy accounts for a majority of personal bankruptcies*, nerdwallet health, June 19, 2013, available at <http://www.nerdwallet.com/blog/health/2013/06/19/nerdwallet-health-study-estimates-56-million-americans-65-struggle-medical-bills-2013/> (“We relied on a widely cited Harvard published in 2009.”)

53 Todd Zywicki, *In Elizabeth Warren We Trust*, WALL ST. J., Sept. 30, 2010, available at <http://online.wsj.com/news/articles/SB10001424052748704523604575512060220672440> (asserting that the release of the Himmelstein study was “timed to promote President Obama’s health-care reform law”).

54 See, e.g., Zywicki, *id*; Megan McArdle, *Why Warren’s New Bankruptcy Study is So Bad*, THE ATLANTIC, June 5, 2009, available at <http://www.theatlantic.com/business/archive/2009/06/why-warrens-new-bankruptcy-study-is-so-bad/18834/> (asserting that the absolute number of medical bankruptcies has decreased).

55 David Dranove and Michael L. Millenson, *Medical Bankruptcy: Myth Versus Fact*, 25 HEALTH AFF. W74, W77 (2006), available at <http://content.healthaffairs.org/content/25/2/w74.long>. This paper was in response to Himmelstein 2005, but Himmelstein 2009 uses the same \$1,000 threshold as its definition of a medical debtor.

Trustee, assess the Himmelstein findings.⁶⁰ In response, the DOJ reviewed 5203 bankruptcy cases filed during the same period as those in the Himmelstein study. The DOJ reported that 54% of debtors listed no medical debt.⁶¹ Of those with medical debt, 78.4% listed medical debt under \$5,000 (average of \$1,212 for this group), and medical debt accounted for only 13% of total unsecured debt.⁶² Thus, the letter concludes, “[t]he conclusion that 50 percent of consumer bankruptcies are “medical related...is not substantiated by the official documents filed by debtors.”⁶³

Even though the DOJ letter did not expressly refute the Himmelstein findings, the letter has been viewed as such by some commentators. An article published by the American Enterprise Institute faults Himmelstein *et al.* for failing to explain or reconcile the much lower rates of medical debts reported in the DOJ letter.⁶⁴ In addition, the AEI article asserts that Himmelstein 2009 does not compare household characteristics of non-filers (which have similar levels of medical debt), overlooks alternative explanations for bankruptcy filing, and uses an overly broad definition of “medical bankruptcies.”⁶⁵

56 *Id.* at W78.

57 Tal Gross, Matthew J. Notowidigdo, *Health Insurance and the consumer bankruptcy decision: Evidence from expansions of Medicaid*, 95 J. PUB. EC. 767, 776 (July 2011), available at http://ac.els-cdn.com/S0047272711000168/1-s2.0-S0047272711000168-main.pdf?_tid=f0e281fc-807f-11e3-9385-00000aab0f27&acdnat=1390077454_6457539a31e24d67572468c6629adde1. The authors also assert that increasing Medicaid eligibility by 10% would decrease bankruptcies by about 8%. *Id.* at 776.

58 Memory of specific details drops exponentially with the passage of time, if the event was not of particular significance, replacement by subsequent events and information, self-distortions, unreal memories, confidence of the witness, malleability of memory, inability to retrieve memories, and other factors. *See gen.*, Elizabeth Loftus, James M. Doyle, and Jennifer E. Dysart, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* (Fifth Edition, 2013), pp. 50-69. In addition, the method of questioning, the wording of questions and the witness’s perceptions of the person asking the questions can dramatically shape how a witness “remembers” events. *Id.* at 66-67.

59 *Id.* at 27-32, 54-55 (noting that memory is usually worse for stressful events).

60 U.S. JUSTICE DEPT., Letter regarding study in Health Affairs Journal, Feb. 10, 2005, available at http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=12734.

61 *Id.*

62 *Id.*

63 *Id.*

Melissa B. Jacoby and Mirya Holman conducted an analysis of debtors who participated in a 2007 study known as the Consumer Bankruptcy Project (“CBP”).⁶⁶ The purpose of their study was to show that bankruptcy schedules can underreport medical debt, and therefore are not sufficient alone for determining the percentage of medical bankruptcies.⁶⁷ The study compared the medical debt reported by CBP participants on their bankruptcy schedules with answers they provided as part of the CBP.⁶⁸ Among other things, Jacoby and Holman report that while 48% of debtors listed no medical bills on Schedule F, only 22% of CBP respondents claimed to have incurred no medical expenses in the two years prior to filing bankruptcy.⁶⁹ Additionally, only 13% of debtors show medical debt over \$5,000 on bankruptcy schedules, but 19% of CBP respondents claim to have incurred those sums prior to filing.⁷⁰ This disparity could result because some debtors paid medical bills before filing or omitted them from their bankruptcy schedules.⁷¹ Nevertheless, these medical expenses could have contributed to the financial distress of the debtors, but would not be disclosed on bankruptcy schedules.⁷² The study suggests that the DOJ letter might have undercounted the number of medical bankruptcies.

A report by the Commonwealth Fund (CF Report) purported to find a high correlation between medical debt and bankruptcy.⁷³ The authors of the study conducted telephone surveys of adults between April and August 2012.⁷⁴ They asked about the respondents’ medical costs, health insurance, and related issues during the preceding two-year period.⁷⁵ The authors determined that 34% of respondents, representing 58 million U.S. adults, had “medical debt

64 Arpana Mathur, Thomas B. Miller, *Clarifying Research on Medical Bankruptcy*, American Enterprise Institute, Apr. 27, 2011, available at <http://www.aei.org/article/economics/retirement/clarifying-the-research-on-medical-bankruptcy/>.

65 *Id.*

66 Melissa Jacoby & Mirya Holman, *Managing Medical Bills on the Brink of Bankruptcy*, 10 YALE J. HEALTH POL’Y L. & ETHICS 239, 242 (2010).

67 *Id.* at 243. Jacoby & Holman do not attempt to calculate the percentage of medical bankruptcy.

68 The authors wanted to combine the bankruptcy schedule method used in the DOJ letter with the questionnaire method used in the Himmelstein studies. *Id.* at 242.

69 *Id.* at 268.

70 *Id.*

71 *Id.* at 271-272.

72 *Id.* at 273.

problems.”⁷⁶ Of these, 6% (representing 4 million adults) told CF interviewers that they filed bankruptcy in the previous two years because of medical debt.⁷⁷ The problem with this number is that it significantly exceeds the total number of bankruptcies filed during this period for *all reasons combined*. According to official Department of Justice statistics, there were 1.5 million bankruptcies filed in 2010,⁷⁸ 1.3 million in 2011,⁷⁹ and 1.1 million in 2012.⁸⁰ This means that the number of bankruptcies filed during any two-year the period covered by the CF Report could be as high as three million, but is more likely closer to 2.6 million. Thus, it is not possible that 6% of all U.S. adults (i.e., four million people) could have filed bankruptcy because of medical reasons, as the CF Report claims. Accordingly, the CF Report does not provide a credible picture of medical bankruptcy.

Several studies have looked broadly at the correlation between illness or injury and bankruptcy. In a 1991 survey, 19.3% of debtors claimed they filed bankruptcy because of a medical problem, including loss of job due to injury or illness to themselves or a family member. However, only 5.7% claimed to have filed specifically because of medical bills.⁸¹ In another study, economists using data from bankruptcies filed in 1996 concluded there was no direct

73 Sara Collins, Ruth Robertson, Tracy Garber, and Michelle M. Doty, *Insuring the Future: Current Trends in Health Coverage and the Effects of Implementing the Affordable Care Act*, COMMONWEALTH FUND, April 2013 (hereafter, *Commonwealth Fund Survey*), available at http://www.commonwealthfund.org/~media/Files/Publications/Fund%20Report/2013/Apr/1681_Collins_insuring_future_biennial_survey_2012_FINAL.pdf.

74 *Id.*

75 *Id.* at 1-3.

76 *Id.* at 7.

77 *Id.* at 9.

78 ADMINISTRATIVE OFFICE OF U.S. COURTS (AO) 2011 REPORT, available at <http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2011/BAPCPA-report.pdf>.

79 *Id.*

80 ADMINISTRATIVE OFFICE OF U.S. COURTS 2012 REPORT, available at <http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BAPCPA/2012/BAPCPA-report.pdf>.

81 Teresa A. Sullivan, Elizabeth Warren, Jay Lawrence Westbrook, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT*, Yale University Press (2000) at 145.

connection between sudden health shocks and bankruptcy.⁸² Both studies are dated and both look at data from only one year.

A recent study by Edward R. Morrison, *et al.* examined adverse health shocks as triggers of bankruptcy filings by looking at Utah drivers involved in auto accidents (including drivers who were determined to be not at fault for their accidents).⁸³ This group of drivers was treated as representative of consumers in general who experience “health shocks.”⁸⁴ The study reported that the bankruptcy rate for drivers who were admitted to an emergency room after a crash (“EDA Admit”) was 45% higher than the rate among drivers who did not seek medical care (“Not EDA Admit”).⁸⁵ Although this may show a correlation, the authors found that it did not establish causation because bankruptcy rates were “thirty to fifty percent” higher for among EDA Admit drivers in *every* pre-crash year.⁸⁶ Thus, the authors conclude that households whose financial characteristics make them more likely to file for bankruptcy are also more likely to have severe auto accidents, but that health shocks (as represented by auto accidents) are not a casual factor on bankruptcy filing rates.⁸⁷

The Morrison study is interesting, but far from conclusive, for several reasons. First, Utah has one of the highest rates of personal bankruptcy, so it is more probable in Utah than in other states that an auto accident victim may also have filed bankruptcy.⁸⁸ Second, auto accidents are not necessarily representative of adverse health shocks in general, particularly illness or on-the-job injury. And, as Morrison admits, persistent financial distress might be the cause of risky personal behavior, and not the other way around.⁸⁹ Third, while the authors note that Utah has “distinctive socioeconomic characteristics,”⁹⁰ they do not explore the fact that 60% of the residents of Utah are members of the Church of Jesus Christ of Latter-day Saints

82 Scott Fay, Erik Hurst, and Michelle J. White, *The Household Bankruptcy Decision*, 92 AMERICAN ECONOMIC REVIEW 706, 712-714 (June 2002), available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/00028280260136327>.

83 Edward R. Morrison, Arpit Gupta, Lenora M. Olson, Lawrence J. Cook, and Heather Keenan, *Health and Financial Fragility: Evidence from Car Crashes and Consumer Bankruptcy*, COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 655 (2D SERIES), October 2013.

84 *Id.* at 3. The authors state that auto accidents are a valid gauge of consumer health shocks in general because they are “one of the most commonly observed health shocks.”

85 *Id.* at 11.

86 *Id.*

87 *Id.* at 24.

88 Lown, *supra* note 31 at 233.

(Mormons), which prohibits the use of alcohol.⁹¹ Since active members of the church do not drink alcohol and 31% of auto accident deaths are alcohol-related,⁹² the author's data could also suggest that less-religious people are more likely to file bankruptcy. Although the Morrison study suggests an intersection between persistent risky behavior and bankruptcy, it does not disprove the theory that health shocks are a significant cause of bankruptcy.

In June 2014, Senators Sheldon Whitehouse (D. RI) and Elizabeth Warren introduced the Medical Bankruptcy Fairness Act which would exempt “medically distressed debtors” from the onerous means testing requirement now required of most consumer chapter 7 debtors.⁹³ The bill defines a medically distressed debtor as, *inter alia*, one who, in the three years prior to filing, incurred or paid for out-of-pocket medical expenses for themselves, family members or dependents, the lessor of 10% of adjusted gross income in each year or \$10,000.⁹⁴ Although the act does not overtly equate a “medically distressed debtor” with a “medical bankruptcy,” it achieves the functional equivalent, since debtors who qualify under the act would not have to meet the strict “means testing” criteria now required all other debtors. In fact, most debtors would readily qualify as a medically distressed debtor, even if they did not file bankruptcy specifically because of medical debt. First, just over 30% of debtors already owe more than \$10,000 in medical bills when they file bankruptcy.⁹⁵ Second, U.S. households currently spend on average \$3,301 in out-of-pocket medical expenses.⁹⁶ Since the average consumer debtor in 2013 had approximately \$8,594 in medical debt when he filed,⁹⁷ it would be relatively easy for most debtors to demonstrate at least \$10,000 in medical expenses in the three years prior to

89 *Id.* at 24-25.

90 *Id.* p. 24.

91 Matt Canham, *Census: Share of Utah's Mormon residents holds steady*, SALT LAKE TRIBUNE, April 17, 2012, available at <http://www.sltrib.com/sltrib/home3/53909710-200/population-lds-county-utah.html.csp>

92 NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, ALCOHOL IMPAIRED DRIVING (2012), available at <http://www-nrd.nhtsa.dot.gov/Pubs/811870.pdf>.

93 Medical Bankruptcy Fairness Act of 2014, S. 2471. Parallel legislation was introduced in the House as H.R. 4971. A similar bill was also introduced in 2008 as HR 5138, but was not reported out of committee.

94 *Id.* § 2(a) (1). The definition would also include persons who did not receive domestic support obligation payments in excess of \$10,000 because of medical problems experienced by a payor, or who experienced a change in employment or work status that resulted in a decrease in wages due to a medical condition, as well as the spouse of any such persons. *Id.*

95 *See infra*, Table 6.

filing. Accordingly, the definition of a “medically distressed debtor” under the act is far too broad to serve as the meaningful gauge of medical bankruptcy.⁹⁸

C. Coherent definition of “medical bankruptcy”

Part of the reason that the previous studies do not provide a consistent picture of medical bankruptcy is that there is no settled definition of the term. Establishing a coherent definition would better enable the term to be used as a metric of consumer bankruptcy, and provide precise terminology for communicating about bankruptcy and healthcare policy. The definition used in this article is as follows:

A medical bankruptcy is a bankruptcy filed primarily because of medical debts for which the debtor is or was responsible.

As used in this definition, “primarily” means more than all other debts or causes. This study adopts two ways to determine whether a bankruptcy was filed “primarily” because of medical debt.

First, a debtor is assumed to have filed bankruptcy primarily because of medical debt if the amount of medical debt is greater than 50% of the debtor’s total unsecured debt or 50% of the debtor’s annual income. A quantity of more than half satisfies the criteria of “primarily,” and means that medical debt eclipsed all other claims in the debtor’s total debt profile. I do not use secured debt in determining medical bankruptcy because medical bills are overwhelmingly unsecured debt and there is no discernible correlation between secured debt and medical debt. Annual income is a standard yardstick of income, and equates to the debtor’s ability to pay medical and other debts.

⁹⁶ Amy E. Buttal, *Paying out-of-pocket health care costs*, available at <http://www.bankrate.com/finance/insurance/coping-with-out-of-pocket-health-care-cost-1.aspx>.

⁹⁷ See *infra*, Table 5.

⁹⁸ The broad scope of the Medical Bankruptcy Fairness Act could also have far reaching consequences unrelated to medical debt. Section § 6 of the Medical Bankruptcy Fairness Act allows a debtor with student loans to receive a discharge of the loans without having to prove “undue hardship” otherwise required under 11 U.S.C. § 523(a)(8). This is a very strict standard under current case law. See *supra*, note 18. At present, approximately 22% of debtors list student loan debt on their bankruptcy schedules, but fewer than one in 300 attempt to discharge the debt. Daniel A. Austin, *Student Loan Debt: An Empirical Assessment*, SUFFOLK U. L. REV. (forthcoming) at 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442312. If the act became law, it would be much easier for student loan debtors to meet the criteria of a medically distressed debtor than it would be to prove “undue hardship,” and it is likely that many more student loans would be discharged than under present law.

Second, a bankruptcy filing is assumed to have been primarily caused by medical debts if the debtor says it was.⁹⁹ Filing bankruptcy is a voluntary act. Before filing, debtors typically wrestle for a protracted period about the debts they owe, how the debts will be repaid, possibly reducing expenses or increasing income, negative effects on future credit, debt negotiation or consolidation, and all other concerns that argue for or against filing bankruptcy. By the time the deliberation process reaches its conclusion, a debtor has almost certainly formed overall impressions as to why she is filing bankruptcy, even if the debtor cannot recall the financial minutiae that cause her circumstances. This may be a subjective conclusion, but it leads to an objective result—filing bankruptcy. Accordingly, if a debtor states that she filed bankruptcy because of medical debt, then the bankruptcy is a medical bankruptcy.

My definition of medical bankruptcy is intended for use on a macro level. On a micro level, it may certainly be possible to show that a given case is or is not a medical bankruptcy by a detailed review of the debtor’s past financial and health history, family circumstances, external resources, personal traits and attitudes, etc. But it is not feasible to do this type of analysis on a large scale. What we can do is to access verifiable data, and interpret the same based on logical assumptions and reasoned analysis. The definition and methods I use in this study are intended to accomplish this objective.

To summarize, a medical bankruptcy is a bankruptcy in which the debtor’s medical debt exceeds 50% of the debtor’s total unsecured debt or the debtor’s annual income, or one in which the debtor asserts that she filed bankruptcy because of medical debts.

II. SOURCES OF DATA AND METHODOLOGY

This study primarily uses two sources of data: (1) debt and income amounts reported by debtors on bankruptcy schedules; and (2) debtor responses to a survey. Bankruptcy data is accessible and verifiable, and provides an objective percentage of medical bankruptcy. Because survey data is based on the debtor’s perceptions, it represents a subjective percentage of medical bankruptcy. To the extent that these percentages vary, they provide *minimum* and *maximum* ranges of medical bankruptcy.

I obtained bankruptcy data from schedules filed by debtors in a “basket” of ten jurisdictions representative of debtors nationwide,¹⁰⁰ and survey data from a nationwide survey.

⁹⁹ This assumes the debtor is being truthful and is not unduly influenced by the questioner.

¹⁰⁰ The jurisdictions are Eastern District of Arkansas, District of Arizona, Southern District of California, Middle District of Georgia, Southern District of Indiana, Northern District of New York, District of Oregon, Northern District of Oklahoma, Western District of Pennsylvania, and Eastern District of Wisconsin. These jurisdictions had a combined medical insurance coverage rate of 84.825% as of 2012. This is only slightly more than the national average of 84.2% of Americans covered by health insurance. U.S. CENSUS BUREAU, INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, *available at* <http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2012/tables.html>.

I separately analyzed bankruptcy and survey data from Massachusetts to assess the impact of higher insurance rates.¹⁰¹

A. *Bankruptcy schedules*

The first types of data are the amounts of medical debt, total unsecured debt, and monthly income reported by debtors on their bankruptcy schedules. Using these numbers, I calculated medical debt as a percentage of total unsecured debt and as a percentage of annual income.

Financial information provided by debtors on bankruptcy schedules has a high degree of credibility. The information is relatively current, the debtor is legally obligated to be truthful,¹⁰² and it is in the debtor's own interest to provide complete and accurate information in order to have as much debt as possible discharged in bankruptcy.¹⁰³ In addition, the data is publically available, making it relatively accessible for researchers.¹⁰⁴

For each jurisdiction, I randomly selected 30 chapter 7 cases and 20 chapter 13 cases for each year from 2005 to 2013.¹⁰⁵ This amounts to 500 cases per year for nine years from the "basket" of jurisdictions. For Massachusetts, I used 60 chapter 7 and 40 chapter 13 cases per year (100 cases per year).

Medical bills are typically considered "nonpriority" unsecured debt. Debtors report nonpriority unsecured debt on Schedule F,¹⁰⁶ and list monthly income on Schedule I. There are three columns on Schedule F for the debtor to enter information. The first column is for the name and address of the creditor, the second is for the date and consideration for the claim, and the third column is for the amount. As long as the creditor name and address is correctly identified, the debt can be discharged even if the consideration or amount is unclear or even incorrect.

To obtain the amount of medical debt, I or my student researcher assistants would look in Schedule F column 1 for names that indicated a medical service provider or medical goods, such

¹⁰¹ Massachusetts the highest medical insured percentage at 96.1%. *Id.*

¹⁰² 11 U.S.C. § 727(a)(4) provides that the debtor shall not be granted a discharge if the debtor knowingly makes a "false oath or account" with respect to the case. Under § 727(a)(7), the debtor can be denied discharge for any fraudulent conduct in connection with the bankruptcy for one year prior to the petition date.

¹⁰³ Pursuant to § 523(a)(3), the Code excepts from discharge any debt "neither listed nor scheduled... with the name, if known to the debtor, of the creditor to whom such debt is owed..."

¹⁰⁴ Bankruptcy petitions and related materials are filed electronically, and are accessible through the Public Access to Electronic Court Records (PACER) at <http://www.pacer.gov/>.

¹⁰⁵ 2005 was the first year that electronic records were available for all of the courts in the "basket."

as a physician, medical practice group, hospital, lab, ambulance, dentist, eyeglass center, etc. We also looked for medical services lenders or medical credit card issuers,¹⁰⁷ and for collection agencies representing medical claims. In addition, we reviewed the description of the consideration in column 2. If the creditor name was a clearly medical provider, or if the description of the consideration was clearly a medical purpose, we included the claim as a medical debt. I capped medical debt at a maximum of \$200,000,¹⁰⁸ and put a maximum cap on other unsecured debt of \$100,000 for years 2005 to 2009, and \$150,000 for years 2010 to 2013.¹⁰⁹

The numbers on Schedule F alone do not always disclose the full amount of medical debt because medical debt is underreported in some bankruptcies. But, with appropriate adjustments, medical debt on schedule F represents a baseline for medical debt in bankruptcy. As an example of how Schedule F can underreport medical debt, suppose a debtor paid for medical expenses with a credit card, and subsequently filed bankruptcy with the charge outstanding. The card issuer (not the medical service provider) would be listed as the creditor in column 1 on Schedule F. With credit card claims, there is usually only a summary description in column 2 such as “consumer purchases” or “credit card charge.” This is especially likely if the debtor’s attorney used proprietary software to create the bankruptcy petition and schedules.¹¹⁰ Most software applications allow the attorney to electronically import a debtor’s credit report and then use it to automatically populate Schedule F, but with credit card bills, the software does not list each individual expenditure. For individual medical expenses to be shown, the debtor would have to inform his attorney of the medical reason for each charge, and the attorney would then have to open the credit card claim entry in the software program and manually enter a description of the expense.¹¹¹ Because a precise description of the claim is not required for the debt to be discharged, debtors and their attorneys are unlikely to do these extra steps.¹¹²

106 This is true in the vast majority of cases, but there can be exceptions. First, if a medical bill was litigated to judgment and a lien attached, then the debt would potentially be a secured debt. Second, if a medical debt was listed in a state family court order as an obligation of the debtor owed to a spouse, then the debt would be priority debt. *See supra*, note 13. These are highly exceptional circumstances and are not relevant for purposes of this study.

107 Medical credit cards are growing in use, but some lenders are under fire for allegedly deceptive practices. *See, e.g.*, Ann Carrns, *A Medical Credit Card Has Surprising Costs*, N.Y. TIMES, Dec. 10, 2013, available at http://www.nytimes.com/2013/12/11/your-money/a-medical-credit-card-has-surprising-costs.html?_r=0.

108Himmelstein *et al.* discarded cases with medical debt over \$100,000. *Supra*, note 35.

109 The reason for putting a cap on unsecured debt is because a relatively small number of home mortgages in default would disproportionately skew the average level of unsecured debt. This was particularly true for Arizona and California from 2009 onward.

To account for medical debt that may be hidden in a credit card claim on Schedule F, we must construct a multiplier factor. One way would be to include a set percentage of each credit card bill as medical debt. Unfortunately, there are no official figures for the percentage of healthcare costs that patients charge to credit cards. However, a report by McKinsey & Co. in 2007 stated that it was \$45 billion.¹¹³ That same year, Americans charged \$1.9 trillion to the four major credit cards.¹¹⁴ Thus, in 2007 approximately 2.3% of all credit card charges were for medical expenses. In 2012, approximately 15% of unsecured debt in bankruptcy was credit card debt,¹¹⁵ so if 2.3% of that debt was medical debt, we could assume that roughly .34% of unsecured debt was for medical bills charged to credit cards.¹¹⁶ On the other hand, a 2011 report determined that 31% of unsecured debt on bankruptcy schedules is credit card debt,¹¹⁷ which would mean that 0.71% of unsecured debt could be presumed to be additional medical debt

110 All federal bankruptcy courts require documents to be filed electronically, unless the debtor is pro se. This is far easier to do with bankruptcy software, which submits the data instantaneously in a single digital file. The alternative is to digitally convert each page of a petition and schedules, and then manually upload them on the court's e-filing site. Bankruptcy software automatically calculates exemptions and performs the laborious "means testing" calculations. Although all responsible consumer bankruptcy attorneys will individually review and modify petitions and schedules as necessary before filing, creating and filing the documents using a proprietary software package is highly efficient, and nearly all attorneys who regularly represent consumer debtors use them.

111 Some types of medical debt are seldom even reported to credit agencies. Hospitals, doctors, and medical providers rarely report payment information to credit bureaus unless they become delinquent and go into collection, and overall account for only about .07% of credit agency data. Connie Prater, *15 Tips for Paying High Medical Bills*, CreditCards.com (June 3, 2013), available at <http://www.creditcards.com/credit-card-news/medical-bill-payment-tips-1266.php>.

112 To be clear, conscientious bankruptcy counsel will not simply rely on a credit report, but review the schedules with clients before filing. Competent counsel will ensure that their clients have separately provided necessary debt information that is missing from the credit report.

113 Nick A. LeCuyer & Shubham Singhal, *Overhauling the US Health Care Payment System*, THE MCKINSEY QUARTERLY, June 2007, p. 11, available at <https://www.tipaaa.com/pdf/Overhauling%20the%20US%20Health%20Care%20Payment%20System-McKinsey%20Report.pdf>.

114A spreadsheet showing the volume of U.S. credit card charges (Visa, MasterCard, American Express, and Discover) in 2007 is at Payments Source, <http://www.paymentsource.com/statistics/>.

115 This is based on my analysis of 120 randomly-selected bankruptcy cases filed in 2012.

116 $15\% \times 2.3\% = 0.345\%$.

charged to credit cards.¹¹⁸ Using either number, medical expenses charged to credit cards would be a minimal component of medical debt.

Jacoby and Holman state that debtors who reported medical debt were roughly 20% more likely to pay for medical bills with credit cards than those who report no medical debt.¹¹⁹ This figure refers only to the *frequency* of credit card use to pay medical expenses--not the amount, but the additional usage is 100% medical debt. To account for higher use of credit cards to pay medical bills by people reporting medical debt, I assume that 31% of all unsecured debt is credit card debt,¹²⁰ and that 20% of that amount is entirely medical expenses. Therefore, I add to the medical debt amount an amount equal to 6.2% of total unsecured debt. The sum of these numbers is the debtor's revised medical debt, and represents, on average, the actual amount of medical debt that a debtor owes on the date of filing.

There is an element of medical debt that I do not include in calculating the debtor's medical debt. Schedule F is a snapshot of debtor's assets and liabilities as of the petition date. It does not look backward to report the debtor's prebankruptcy spending if such spending is not a debt owed as of the date of filing. If a debtor had been spending a substantially disproportionate amount on certain types of debts, and as a result was not paying other kinds of debt, a researcher looking only at the bankruptcy schedules might conclude that the debts list on the schedules caused the bankruptcy, rather than the pre-bankruptcy spending.

Jacoby and Holman assert that medical debt in bankruptcy is underreported in this way. For example, they argue that the medical profession is highly effective in getting patients to pay, so debtors may be more likely to owe non-medical bills when they file.¹²¹ In addition, cash-

117 Marina Vornovytzky, Alfred Gottschalck, and Adam Smith, U.S. CENSUS BUREAU, HOUSEHOLD DEBT IN THE U.S.: 2000 TO 2011, available at <http://www.census.gov/people/wealth/files/Debt%20Highlights%202011.pdf>.

118 $31\% \times 2.3\% = .71\%$.

119 Jacoby & Holman, *supra* note 66 at 274.

120 Here I am using the 31% as cited in Vornovytzky *et al.*, *supra* note 115, not the 15% that I found to be the average in 2012, which would lower the result significantly. This will better ensure that medical debt is not undercounted based on data from Schedule F.

121 Jacoby & Holman, *supra* note 66 at 249-252. In addition, a CFPB report finds that consumers with more medical than non-medical collections tend to have slightly higher credit scores than those with primarily non-medical collections. This suggests that consumers may give their medical debt somewhat higher payment priority than non-medical debt. Kenneth P. Brevoort and Michelle Kambara, Data point: Medical Debt and credit scores, Consumer Financial Protection Bureau (May 20, 2014), at 5-6, available at http://files.consumerfinance.gov/f/201405_cfpb_report_data-point_medical-debt-credit-scores.pdf. On the other hand, a 2009 study asserted that medical businesses are not particularly efficient at collecting out-of-pocket medical debts, with collection rates of 50 to 70% for "small dollar liabilities" for insured patients, but only 5 to 10% of self-insured patients. Patrick Finn, Thomas Pellathy, Subham Singhai, *US healthcare payments: Remedies for an ailing*

strapped patients may feel compelled to maintain a good relationship with their doctor, and leave other creditors unpaid.¹²² Plus, CBP participants report having paid more in pre-bankruptcy medical expenses than they listed on Schedule F.¹²³ Thus, pre-bankruptcy medical expenses would not appear on a schedule of creditors but could be a contributing factor in the bankruptcy.¹²⁴

While Jacoby and Holman demonstrate how medical debt can be underreported on bankruptcy schedules, their study does not try to determine the actual percentage of medical bankruptcies. Thus, they do not compare medical industry billing practices to billing and collection practices for other types of consumer debt. Nor do they contrast pre-bankruptcy spending on medical expenses with spending on other types of expenses. Jacoby and Holman note that 80% of CBP participants spent \$5,000 or less in medical expenses during the two years prior to bankruptcy.¹²⁵ However, average out-of-pocket medical spending for all U.S. households in 2007 was \$2,613.¹²⁶ Multiplied by two years, medical spending for average U.S. households was slightly more than for most of the CBP debtors, yet most households do not file bankruptcy. In short, no objective data exists that allows us to determine the extent to which pre-bankruptcy medical expenses compel consumers to file bankruptcy. Therefore, I do not include it in my bankruptcy schedule calculations. To the extent that pre-bankruptcy medical expenses figured in the debtor's decision to file bankruptcy, it is reflected in the survey results.

system, MCKINSEY ON PAYMENTS (April 2009) at 42, available at http://www.mckinsey.com/App_Media/Reports/Financial_Services/US_healthcare_payments_Remedies_for_an_ailing_system.pdf. According to Finn *et al*, bad debt in the medical industry was 13% in 2009, and rising rapidly.

122 Jacoby & Holman, *supra* note 66 at 272, 279. Although Jacoby & Holman do not cite any authority, this does happen. In a recent case that I reviewed, debtors were an elderly couple and the husband was being treated for cancer. At the time they filed bankruptcy, they owed \$25,000 in credit card payments. About two-thirds of this amount was for charges for food and other essentials that had been shifted to their credit card so that they could pay their on-going medical bills. The debtors feared being “cut off” by their medical providers if they fell into arrears. Notes regarding this case are in my possession. But this is an anecdotal example, and there is no data to show that this is common. Just as patients might feel personally compelled to pay their doctor, medical professionals may equally feel motivated to reduce or waive payments from patients who cannot afford to pay.

123 *Id.* at 268.

124 *Id.* at 272.

125 *Id.* at 268.

126 Total out-of-pocket expenditures in 2007 were \$293,647,000,000. There were 112,377,977 households, so the average is \$2,613 per household. All data is from the National Health Expenditure Accounts estimates, available at <http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html>.

I do not include bankruptcies filed as a result of loss of wages due to illness or accident in the scope of medical bankruptcies. To be sure, many academics and practitioners correlate injuries and long-term sickness with bankruptcy.¹²⁷ But debts that might lead a person to file bankruptcy after loss of income may or may not be related to medical expenses. Additionally, a key purpose of this study is to enable the term medical bankruptcy to be used more precisely in dialogue about healthcare policy. The Affordable Care Act does not cover loss of income¹²⁸ and there is no serious political effort at this time to expand its coverage. Thus, loss of income as a result of an accident or medical condition is excluded from the scope of medical bankruptcy.

Some debtors take out home equity loans to pay medical bills. There is no source that regularly tracks the use of home equity loans following disbursement, but the fact that lenders often advertise home equity loans as a means to pay medical bills shows that the industry views medical bills as a market driver.¹²⁹ Jacoby and Holman report that 30% of debtors in the CBP survey cited medical debt as the reason they filed bankruptcy.¹³⁰ Of those, 11% claimed they obtained a home equity loan to pay medical bills,¹³¹ which equals just over 3% of all debtors.¹³² But this number does not reveal the amount of home loan debt incurred, medical expenses paid, or any other use of the loans. Since we cannot objectively measure this variable, I exclude it from the medical bankruptcy calculation. To the extent that debtors perceive medical expenses

127 See, e.g., Alena Allen, *State Mandated Disability Insurance as a Salve to the Consumer Bankruptcy Imbroglia*, 2011 B.Y.U. L. REV. 1327, 1338-1341 (2011) (noting disability as a cause of consumer financial problems); Scott Ramsey, et al., *Washington State Cancer Patients Found To Be At Greater Risk for Bankruptcy Than People Without A Cancer Diagnosis*, HEALTH AFFAIRS at 1 (May 2013), available at <http://content.healthaffairs.org/content/early/2013/05/14/hlthaff.2012.1263.full> (cancer patients in the Western District of Washington during the period of 1995 to 2009 were 2.65 times more likely to file for bankruptcy than people without cancer); Email from attorney Dai Rosenblum, *supra* note 37 (asserting that “missing work or having to retire due to illness” is a significant contributor to bankruptcy).

128 The ACA contains provisions on the type of benefits that an insurance plan must provide under the act, and loss of income due to injury or illness is not are covered. Pub.L. 111-148, Title I, § 1302, 124 Stat. 163, 896. The Healthcare.Gov website which describes coverage under the ACA also does not list these types of losses. See, <https://www.healthcare.gov/why-should-i-have-health-coverage/>.

129 See, e.g., Broderick Perkins, *4 Great Uses for Home Equity Loans*, Realtor.com, available at <http://www.realtor.com/home-finance/home-equity/4-great-uses-of-home-equity-loan.aspx> (“Home equity loans are also a godsend if you are hit with big medical bills or some other emergency”). Home equity loans are also used for credit consolidation, consumer purchases, investments, education, vacations, second homes, cars, boats, recreational vehicles, and the sundry other “big ticket items you’ve always wanted.” *Id.*

130 Jacoby & Holman, *supra* note 66 at 273.

131 *Id.* at 274.

are the cause of bankruptcy, this will be reflected in the survey responses, including debtors who took out home loans to pay for medical bills.

To summarize, in order to determine the objective minimum number of medical bankruptcies, I determine the amount of medical debt listed on Schedule F, and the amount of total unsecured debt. I add an amount equal to 6.2% of the total unsecured debt to the medical debt amount in order to account for medical debt charged to credit cards. That sum is the debtor's revised medical debt. I then determine the percentage of debtors with medical debt over 50% of total unsecured debt or the percentage with medical debt over 50% of annual income. That result is the *minimum* percentage of medical bankruptcies.

B. Surveys

In order to gauge a debtor's subjective determination as to why she filed bankruptcy, I distributed a survey that asks the debtor a simple question: what caused you to file bankruptcy? The survey consisted of a single page, with the statement at the top: "I filed bankruptcy because," followed by six potential reasons. The first three reasons were "loss of job," "medical bills," and "divorce or marital problems."¹³³ The remaining three were "accident or illness to me or a family member," "too much spending," and "reason not listed here." I used the Likert Scale for debtor responses. The survey also included a line for debtors to circle the year they filed bankruptcy and a box to write any additional comments. Approximately 90% of the respondents indicated that they filed bankruptcy in 2013, and about 10% provided written comments. The survey was anonymous, and, except for the optional comments, would ordinarily take less than two minutes to complete. Since the survey was anonymous, responses did not correlate to specific bankruptcy cases.

I distributed the survey in several ways. I mailed a copy of the survey along with a stamped return envelope to 480 randomly selected debtors from "basket" jurisdictions. Of these, fifty-seven were returned as undeliverable. There were fifty-six completed responses, for a response rate 13% from valid addresses.¹³⁴ I also emailed a copy of the survey to bar associations and bankruptcy professionals throughout the U.S., asking practitioners to invite clients to complete the survey. From that, I received 167 completed surveys. Finally, I created

¹³² Jacoby & Holman correlate the incidence of home equity loans to higher out-of-pocket medical expenses in the two years preceding the bankruptcy, but do not establish a specific dollar amount for this. *Id.* at 276.

¹³³ These elements have been repeatedly identified by academics and practitioners as some of the major causes of bankruptcy. *See, e.g.,* Jay L. Zagorsky and Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh Start?* 16 AM. BANKR. INST. L. REV. 283, 295 (2008) (financial distress and debt is typically associated with "divorce, sickness-related expenses [and] job loss"); A. Mechele Dickerson, *Consumer Over-Indebtedness: A U.S. Perspective*, 43 TEX. INT'L. L. J. 135, 146 (2008) (primary causes of bankruptcy are "medical debts, a divorce, or a job interruption"); Joanna Allison email, *supra* note 34 ("most of our folks [are people] whose income has crashed").

an online version and publicized the link.¹³⁵ I received forty-five responses online, for a total of 268 responses.

For Massachusetts, I used the same methods, mailing surveys to 310 debtors, of which 10 were undeliverable and 63 were completed and returned, for a response rate of 21%. In addition, debtors completed twenty-six online surveys and fourteen pdf copies, for a total of 103 surveys.

III. FINDINGS

This section will discuss the findings of this study. I first list the findings, and then explain them in greater detail below. Note that Tables 1 – 6 do not include any data from Massachusetts.

Main findings:

1. Medical bills are the largest single cause of consumer bankruptcy.
2. For 2013, the maximum percentage of medical bankruptcy is 25%.
3. For 2013, the minimum percentage of medical bankruptcy is 18%.

Secondary findings:

4. More than half of debtors from the “basket” report medical debt.
5. Average medical debt per debtor is moderate, but rising.
6. Massachusetts debtors have significantly lower medical debt.

Main Findings

1. Medical debt is the single largest cause of consumer bankruptcy

Medical debt is the single largest cause of consumer bankruptcy, as shown by debtor responses to the survey. Debtors chose medical bills as the reason they filed more than any other specific reason. Second was loss of job, followed by excessive spending. The category “Other” covered all other reasons not listed, and individual debtor comments described these as taxes,

¹³⁴ This is a higher response rate than some surveys, but lower than others. Compare Christopher Robertson, *et al*, *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, HEALTH MATRIX 65 (2008) at 81 (6.2% response rate) with Himmelstein 2009, *supra* note 39 at 2 (46.5% response rate). In Himmelstein 2009, recipients were first mailed a letter introducing the survey, then the questionnaire and \$2 were mailed a few days later. All those who did not respond received another questionnaire and another \$2. Finally, anyone who still had not responded was offered \$50 to complete the questionnaire. *Id*. It appears that the persistence and money offered in Himmelstein 2009 affected the response rate.

¹³⁵ The link to the online survey is:

https://docs.google.com/forms/d/1LE6lRnOrRdvNH2hmaHCTa4DfG8_yNFQPOxdZ9c3-azw/viewform

helping family members, gambling, drug use, bad investments, business debts, judgments, unpaid loans, etc. Table 1 presents the results.

TABLE 1: SURVEY ANSWERS

	Strongly agree	Somewhat agree & strongly agree
Lost job	54 (17%)	91 (16%)
Medical bills	70 (22%)	138 (25%)
Divorce or marital problems	39 (13%)	56 (10%)
Illness or injury	46 (14%)	77 (13%)
Too much spending	40 (12%)	107 (19%)
Other	69 (22%)	93 (17%)
Totals	318	562

2. The maximum percentage of medical bankruptcy is 25%

Table 2 condenses Table 1 into just two survey answers: medical bills and all other reasons combined.

TABLE 2: MEDICAL BILLS COMPARED TO ALL OTHER REASONS

	Strongly agree	Somewhat & strongly agree
Medical bills	70 (22%)	138 (25%)
All other reasons	248 (78%)	424 (75%)

As the table shows, 25% of the survey responses were “somewhat and strongly agree” for medical bills as their reason for filing bankruptcy. A more conservative approach would be to use only “strongly agree” as the reason for filing, which would give a result of 22% of bankruptcies are medical bankruptcies. Debtors were not limited to just one response, meaning they could choose “somewhat agree” or “strongly agree” to any of the other five reasons. Therefore, 25% represents the broadest possible interpretation of the survey data, and hence is the highest possible percentage of medical bankruptcies.

3. The minimum percentage of medical bankruptcy is 18%

The minimum percentage of medical bankruptcy is 18.42% as of 2013, which I round down to 18%. This is based on medical expense debts listed by debtors on Schedule F, increased by an amount equal to 6.2% of the debtor’s total unsecured debt. (Massachusetts is analyzed separately below.) The revised amount accounts for medical expenses charged to credit cards. I then calculate this number as a percentage of each debtor’s total unsecured debt as well as a percentage debtor’s annual income. Any case in which medical debt is greater than 50% of total unsecured debt or annual income is a medical bankruptcy. These numbers are based on information provided by debtors on their bankruptcy schedules, and represent the lowest possible percentage of medical bankruptcies. The results are shown in Table 3.

TABLE 3: MINIMUM PERCENTAGE OF MEDICAL BANKRUPTCIES 2005 TO 2013

	2005	2006	2007	2008	2009	2010	2011	2012	2013
% of cases with medical debt > 50% of unsecured debt or annual income	12%	10%	10%	9%	9%	9%	10%	12%	18%

As the table shows, for six years between 2006 and 2011, the minimum percentage of medical bankruptcies hovered between 9 and 10%. By 2013, the percentage had jumped to 18%. While is a huge increase from prior years, it is still modest compared to studies such as Himmelstein 2009.

Secondary Findings

4. More than half of debtors in the “basket” report medical debt on Schedule F, but the number is much less in Massachusetts

Over half of debtors in the “basket” of jurisdictions report medical debt on the Schedule F, and the percentage has gradually increased since 2005. Table 4 shows the average number of debtors reporting medical debt each year from 2005 to 2013 from the “basket” of ten jurisdictions, as well as from Massachusetts. Substantially fewer Massachusetts debtors report medical debt than debtors from the “basket” jurisdictions, but percentage that do is rising more rapidly than the “basket” jurisdiction debtors.

TABLE 4: PERCENTAGE OF DEBTORS REPORTING MEDICAL DEBT ON SCHEDULE F

	2005	2006	2007	2008	2009	2010	2011	2012	2013
“basket” jurisdictions	55%	49%	51%	51%	51%	51%	54%	59%	61%
Massachusetts	32%	28%	38%	24%	31%	32%	28%	39%	46%

5. Average medical debt on Schedule F is modest, but gradually rising

The highest medical debt that I found on a Schedule F in this study was \$1.6 million.¹³⁶ The two next highest were \$541,201 and \$297,986, respectively. The vast majority of cases, however, reported far less medical debt. Table 5 shows the average medical debt for each year for all cases in the “basket” of jurisdictions.

TABLE 5: AVERAGE MEDICAL DEBT FOR “BASKET” JURISDICTION DEBTORS

¹³⁶ This was in a 2006 case. Bankruptcy schedules are public records, but I do not give the case number here in order to respect the debtor’s privacy.

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Average unsecured debt	\$28,170	\$30,023	\$32,218	\$34,020	\$38,412	\$43,912	\$40,213	\$38,192	\$42,856
Average medical debt	\$3,930	\$3,812	\$3,897	\$3,928	\$5,248	\$4,931	\$5,186	\$5,722	\$8,594
% medical debt	14%	13%	12%	12%	14%	12%	13%	15%	20%

As the above table shows, medical debt as reported on Schedule F, while still a moderate percentage of total unsecured debt, has increased significantly in recent years. If we look only at debtors reporting medical debt, the numbers are much higher, as shown in Table 6:

TABLE 6: AVERAGE MEDICAL DEBT FOR DEBTORS WITH MEDICAL DEBT ON SCHEDULE F

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Average unsecured debt	\$29,033	\$30,057	\$33,985	\$35,307	\$38,382	\$46,550	\$42,205	\$44,302	\$45,325
Average medical debt	\$7,220	\$7,812	\$7,647	\$7,708	\$10,346	\$9,689	\$9,562	\$9,782	\$14,228
% medical debt	25%	26%	23%	22%	27%	21%	23%	22%	31%

Comparing Tables 5 and 6 shows that debtors who report medical debt have slightly higher overall unsecured debt, but medical debt is a fairly significant financial burden. The tables also suggest that debtors with medical debt spend less on non-medical expenses than other debtors. For example, in 2013, the average “medical debt” debtor shown on Table 6 had \$31,097 in non-medical debt (\$45,325 - \$14,228 = \$31,097), whereas a non-medical debtor shown on Table 5 had \$34,237 in non-medical debt (\$42,856 - \$8,619 = \$34,237).

6. Massachusetts debtors report substantially lower medical debt.

In 2006, Massachusetts enacted the Act Providing Access to Affordable, Quality, Accountable Health Care (“Act”).¹³⁷ Among other provisions, the Act required all individuals to obtain health insurance, created the Commonwealth Health Insurance Connector to assist individuals having difficulty obtaining healthcare, and provided subsidies for low-income purchasers.¹³⁸ The Act has supporters¹³⁹ and critics,¹⁴⁰ but survey results show that Massachusetts has much lowest incidence of medical debt in bankruptcy than the “basket jurisdictions.” Perhaps most significant, as set forth in Table 7, only 9% of Massachusetts survey respondents listed medical bills as the reason for filing (8% of we combine “somewhat agree” and “strongly agree”), compared to 25% for the “basket” of jurisdictions.¹⁴¹

TABLE 7: MASSACHUSETTS SURVEY RESULTS

¹³⁷ An Act Providing Access to Affordable, Quality, Accountable Health Care, c. 58, 2006 Mass. Acts.

	Strongly agree	Somewhat agree & strongly agree
Lost job	25 (23%)	42 (25%)
Medical bills	10 (9%)	14 (8%)
Divorce or marital problems	12 (10%)	15 (9%)
Illness or injury	14 (13%)	20 (12%)
Too much spending	19 (17%)	39 (23%)
Other	30 (27%)	38 (23%)
Totals	110	168

Table 7 shows that only about 9% of Massachusetts debtors felt their bankruptcy filing was a result of medical bills. This compares to 25% for debtors from “basket” jurisdictions as shown in Tables 1 and 2.

TABLE 8: MASSACHUSETTS MEDICAL AND TOTAL UNSECURED DEBT

Year	2005	2006	2007	2008	2009	2010	2011	2012	2013
Average total unsecured debt	\$31,279	\$32,169	\$29,091	\$36,152	\$41,898	\$56,857	\$48,238	\$40,279	\$50,249
Average medical debt	\$1,385	\$1,720	\$1,805	\$1,297	\$2,945	\$1,603	\$1,326	\$1,762	\$3,041
Medical	4%	5%	6%	4%	7%	3%	3%	4%	6%

138 A comprehensive overview of the provisions of the 2006 Massachusetts health care reform law is found at Matthew Kanter, *Healthy Start: A Policy and Legal Analysis of Health Care Reform in Massachusetts*, 2 MCGILL JOURNAL OF LAW AND HEALTH 65 (2008). For a recent treatment on the practical implementation of the law, see Amanda Gengler, *The Massachusetts (health care) Experiment*, CNN MONEY, June 4, 2013, available at <http://money.cnn.com/2013/06/01/pf/massachusetts-health-care.money/mag/> (noting that Massachusetts healthcare spending is the highest in the U.S., but that a 2012 law is aggressively tackling growth in costs).

139 Kenneth Ripoza, *If ObamaCare Is So Bad, How Does Romneycare Survive?* FORBES, Jan. 20, 2012, available at <http://www.forbes.com/sites/kenrapoza/2012/01/20/romney-care-massachusetts-healthcare-reform/>.

140 Joseph Rago, *The Massachusetts Health-care “Train Wreck,”* WALL STREET JOURNAL, July 7, 2010, available at <http://online.wsj.com/news/articles/SB10001424052748704324304575306861120760580>.

141 To obtain the 25% number for the basket of jurisdictions, I used the higher percentage of “somewhat agree” plus “strongly agree,” as shown in Tables 1 and 2. To ensure that I do not undercount medical bankruptcies, I use the higher number of “strongly agree” from the Massachusetts responses, notwithstanding the inconsistency.

debt as % total unsecured debt									
% of cases w/ medical debt > 50% unsecured debt or annual income	2%	4%	2%	>1%	4%	>1%	>1%	4%	3%

Table 8 further shows that medical bills are much less of a financial burden for Massachusetts debtors. If we compare Table 8 with Table 5, we see that even though Massachusetts debtors on average owe substantially more in total unsecured debt than debtors elsewhere, the average medical debt in Massachusetts in 2013 was relatively low at just \$3,041 (6% of total unsecured debt) compared to \$8,594 (20% of total unsecured debt) in basket jurisdictions. And, only 3% of debtors in Massachusetts in 2013 reported medical debt in excess of 50% of total unsecured debt or annual income, whereas 18% of debtors in basket jurisdictions did so, as shown on Table 3.

Based on the survey results and debt numbers reported on Schedule F, medical bankruptcy in Massachusetts is somewhere between 3% and 9% of consumer bankruptcies. This compares to a range for 18% to 25% for the “basket” jurisdictions. The significantly lower rate of medical bankruptcies may be a result of the Massachusetts health care law.

Some observers are skeptical that health care reform has reduced medical debt as a factor in consumer bankruptcy in Massachusetts. In a 2011 article, none other than David Himmelstein *et al.* concludes that “Massachusetts health care reform has not decreased the number of medical bankruptcies,” which they claim was 52.9% in 2009.¹⁴² For that article, Himmelstein *et al.* use the same broad definition of medical bankruptcy in this article as in their 2005 and 2009 studies, including, *inter alia*, any debtor or spouse who at any time in the two year preceding the bankruptcy lost two or more weeks of income because of illness or injury, or in order to care for a sick family member, or had unpaid medical bills of at least \$5,000.¹⁴³ But the Massachusetts health care act does not cover loss of income due to illness or injury, so filing bankruptcy for that reason says nothing about the success or failure of Massachusetts healthcare reform. And, the typical U.S. household spent *more* than this amount over the period of time covered by the Himmelstein study.¹⁴⁴ Himmelstein, *et al.*’s medical bankruptcy definition is too broad to

142 David U. Himmelstein, Deborah Thorne, Steffie Woolhandler, *Medical Bankruptcy in Massachusetts: Has Health Reform Made a Difference?* AM. J. MED. at 224, March 8, 2011, available at <http://www.ncbi.nlm.nih.gov/pubmed/21396505>.

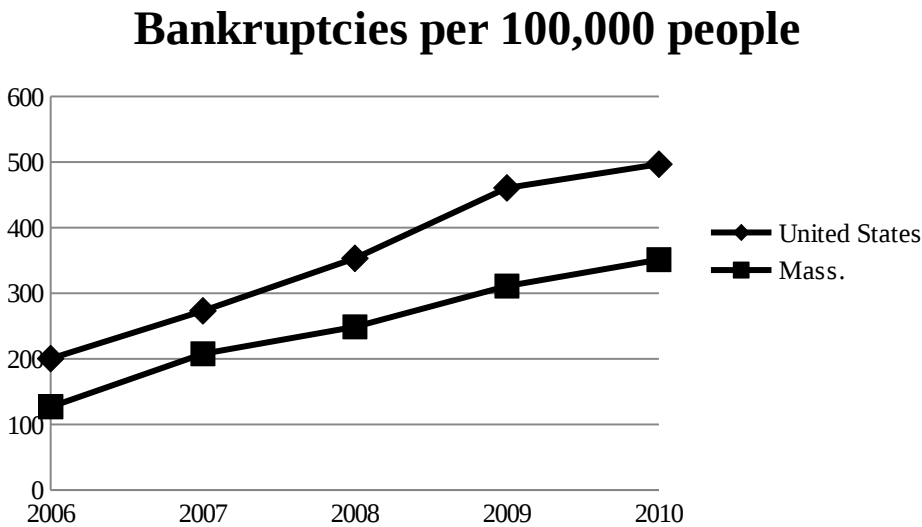
143 *Id.* at 225.

144 *Supra*, note 124.

accurately gauge the difference between healthcare costs as a factor in Massachusetts bankruptcies, and those of other states.

While Himmelstein and his co-authors assert that health care reform did not lower medical bankruptcy in Massachusetts, a 2012 study by Kayla Badding *et al.* claims that bankruptcy filings actually *increased* because of the 2006 health care law.¹⁴⁵ According to their study, health care reform was associated with a .21% increase in Massachusetts bankruptcy filings from 2006 to 2010.¹⁴⁶ The problem with this finding is that the authors overlooked the fact that bankruptcy filings increased nationwide during that time. Figure 2 compares bankruptcies per 100,000 in Massachusetts to the national rate from 2006 to 2010.

FIGURE 2: COMPARISON OF BANKRUPTCY RATES PER 100,000 IN MASSACHUSETTS AND THE U.S.



Source: U.S. Census Bureau.¹⁴⁷

As Figure 2 demonstrates, Massachusetts bankruptcy rates were not just lower than other states, but grew at a slower rate than the national average during the years covered by the

145 Kayla D. Badding, E. Frank Stephenson & Melissa M. Yeoh (2012) *Health-care reform and bankruptcy: evidence from Massachusetts*, APPLIED ECONOMICS LETTERS, 19:17, 1741, 1742, available at <http://www.tandfonline.com/doi/pdf/10.1080/13504851.2012.657346>.

146 *Id.*

147 U.S. CENSUS BUREAU, POPULATION ESTIMATES, STATE INTERCENSAL 2000 - 2010, available at <http://www.census.gov/popest/data/intercensal/state/state2010.html>.

Badding *et al.* study. Thus, objective data suggests that Massachusetts health care reform correlates to lower bankruptcy rates.

CONCLUSION

There is no doubt that many Americans struggle with medical bills.¹⁴⁸ The data presented in this study shows that medical bills are a substantial component of consumer debt in bankruptcy. But labeling a bankruptcy as a medical bankruptcy means more than just that the debtor's medical expenses were vexatious. It means that medical expenses were the predominant reason that the debtor filed bankruptcy.

This article has discussed the practical difficulties of trying to reconstruct a debtor's past financial history in order to determine whether a bankruptcy is a medical bankruptcy. In the alternative, by objectively analyzing what debtors report on their bankruptcy schedules, while accounting for potential underreporting of medical debt, we can arrive at a minimum percentage of medical bankruptcies. Thus, if we define medical bankruptcy as one in which medical bills make up over 50% of the debtor's total unsecured debt or 50% of the debtor's annual income, then medical bankruptcies constitute at minimum 18% of all bankruptcies as a national average. In Massachusetts, which has had a mandatory health insurance law since 2005, the minimum rate is much lower at 3%.

Because bankruptcy schedules may not reflect elements such as the debtor's pre-bankruptcy expenditures, individual or family health background, alternative resources, or personal decision process, we need an additional method to determine the maximum range of medical bankruptcies. As a general rule, we can expect debtors to have weighed considerations and formed conclusions about their financial circumstances and the reasons for filing bankruptcy, even if they cannot recall costs and expenditures with specificity. Accordingly, debtor surveys as to why they filed capture this subjective element of bankruptcy. Based on survey data, no more than 25% of debtors filed bankruptcy because of medical bills as a national average. This is the maximum range of medical bankruptcies, and there is no evidence to support a higher percentage. The maximum range in Massachusetts is much lower 9%, which again, may be a result of the Massachusetts health care law.

Academics, lawmakers, and media will continue to differ on the incidence of medical bankruptcies. But they will improve the dialogue if they use a coherent definition of the term, and work within a plausible range of percentages.

148 Pamela Yip, *Millions Struggling with Medical Debt*, Dallas Morning News, May 12, 2013, available at <http://www.dallasnews.com/business/columnists/pamela-yip/20130512-medical-debt-still-burdens-consumers.ece> (41% of adults paying medical bills late or over time); Robin A. Cohen, *et al.*, *Problems Paying Medical Bills: Early Release of Estimates from the National Health Interview Survey, June 2011- June 2012*, Center for Disease Control, June 2013, available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/problems_paying_medical_bills_january_2011-june_2012.pdf (one in five households struggle to pay medical bills).