Implementing and Evaluating the Chapter 7 Filing Fee Waiver Program

Report to the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States

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Executive Summary

In the appropriation act funding the judiciary for fiscal 1994, Congress directed the Judicial Conference of the United States to implement and study in up to six districts the effect of waiving the $175 filing fee for individual Chapter 7 debtors who are unable to pay the fee in installments (H.R. 2519, cited as the "Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1994," Pub. L. No. 103–121, 107 Stat. 1153). In *United States v. Kras*, 401 U.S. 371 (1971), the Court held that the right to file a bankruptcy petition was not a fundamental right requiring access to court for all citizens, thus upholding a required filing fee. The Judicial Conference charged its Committee on the Administration of the Bankruptcy System with overseeing the implementation and evaluation of the pilot fee-waiver program, and the Federal Judicial Center conducted the evaluation for the Committee. The pilot program was operative from October 1, 1994, through September 30, 1997, in the following six districts: the Southern District of Illinois, the District of Montana, the Eastern District of New York, the Eastern District of Pennsylvania, the Western District of Tennessee, and the District of Utah.

Below we summarize the evaluation and its findings under three major headings: (1) Description of the Pilot Program; (2) Projections for a National Program: Number of Applications and Waivers and the Cost; and (3) Issues for Subsequent Legislation or Rules if the Program Is Implemented Nationwide.

Description of the Pilot Program

How many fee-waiver applications were filed and granted in the pilot districts? What factors account for interdistrict variation in fee-waiver activity?

Across years and districts, an application for waiver of the filing fee was filed in 3.4% of all non-business Chapter 7 cases, and the fee was actually waived in 2.9% of all such cases. Over the course of the pilot program, 4,518 applications were filed and 3,867 (85.6%) were granted. The number of fee-waiver applications and actual waivers rose from 1,300 and 1,035 in fiscal 1995 to 1,634 and 1,441 in fiscal 1997. The increase in the number of applications appears to be the result of an increase in the number of non-business Chapter 7 cases. The increase in the number of actual waivers is due in part to an increase in the number of Chapter 7 cases. It also reflects an increase, particularly early in the program, in the likelihood that an application would be granted.

For the three-year period, the percentages of non-business cases involving fee-waiver activity varied across the districts. The percentage of non-business Chapter 7 cases in which an application was filed ranged from 0.3% in the Western District of Tennessee to 8.3% in the Eastern District of Pennsylvania. The percentage of non-business Chapter 7 cases in which the filing fee was actually waived ranged from

0.2% in the Western District of Tennessee to 7.8% in the Eastern District of Pennsylvania.

The higher rate of applications in the Eastern District of Pennsylvania appears due to the availability of legal services and pro bono representation to Chapter 7 debtors. Eighty-six percent of the applicants in the Eastern District of Pennsylvania were represented by a pro bono or legal services attorney, but only 21% of the applicants across the other districts were so represented.

For what reasons were applications denied and how did petitioners meet the fee obligation, if at all, subsequent to the denial?

The most commonly given reason for denying an application was that the debtor's income, expenses, and assets indicated an ability to pay the required filing fee, at least in installments. Other reasons for denying applications were that an attorney or non-attorney had been paid (at all or at an inappropriately high fee) and that the debtor provided insufficient/ambiguous information and failed to supplement it. In a few cases, the application was denied because the debtor had a history of repetitive filing or because bankruptcy was an inadequate solution to the problem the debtor was trying to solve (e.g., the only debt to be discharged was non-dischargeable; the debtor was attempting to protect property belonging to a third party).

When the request for a fee waiver was denied, the debtor paid the filing fee approximately 73% of the time. The fee was paid in a lump sum about 44% of the time and in installments 56% of the time.

For how many applications were objections filed, hearings held, and rulings modified?

Across the pilot districts, the U.S. trustee offices filed objections to less than 1% of the applications. The U.S. trustee office in the Eastern District of Pennsylvania played a more active role than did the U.S. trustee offices in the other pilot districts, providing a statement of review, comment, or objection on every application. That office provided comment, short of objection, in about 12% of the fee-waiver cases in that district.

Hearings were scheduled on 300 (8%) of the 3,732 applications in the case-closing sample and actually held on 267 (7%). Most of the hearings (90%) were set sua sponte (although the U.S. trustee had entered comments in some cases), and most were held before the court's initial ruling on the application (92%) and before the section 341 meeting (84%).

The initial ruling on about 2% of the applications was vacated, rescinded, or otherwise modified by the court. Only two orders were appealed. In one case, the

bankruptcy court was affirmed on the merits, and in the other the appeal was dismissed because it was not timely filed.

Who used the program?

The report contains paragraph-length descriptions of 200 applicants that were represented by the Consumer Bankruptcy Assistance Project in Philadelphia. The paragraphs describe the applicants' circumstances at the time of filing bankruptcy, the consequences of filing bankruptcy for the applicants, and why paying the filing fee in installments was not possible.

To provide other information about the users of the program, we compared the type of unsecured debt they listed on schedule F (and amendments thereto) to that listed by other Chapter 7 petitioners. We made this comparison in the Eastern District of New York and the Eastern District of Pennsylvania because that is where the bulk of the applications were filed.

The average number of unsecured debts held by *in forma pauperis* (IFP) petitioners did not differ from the number held by non-IFP petitioners, nor did the number of debts held by petitioners in the Eastern District of Pennsylvania differ from the number held by petitioners in the Eastern District of New York. However, the amount of total debt did differ between IFP and non-IFP petitioners and between petitioners in the two districts. Across the districts, the debt of IFP petitioners was less than that of non-IFP petitioners. Regardless of IFP status, debtors from the Eastern District of New York had greater debt than those from the Eastern District of Pennsylvania.

The nature of debt also differed between IFP and non-IFP petitioners and between districts. In the Eastern District of Pennsylvania substantially more IFP petitioners, compared to non-IFP petitioners, had debts related to basic subsistence—to education, health, utility services, and housing. A large percentage (63%) of the housing-related debts of IFP petitioners were owed to public housing authorities (the creditor for only one of the non-IFP housing debts was a public housing authority). Fewer IFP petitioners had unsecured debts stemming from bank credit cards, major department store credit cards, individual store charges and credit cards, and bank loans. Only 22% of the total unsecured debt held by IFP debtors was credit card debt—a greater percentage (27%) of the debt was health-related. The analogous percentages for non-IFP debtors were credit card, 48%, and health, 11%.

In the Eastern District of New York, most of the petitioners—both IFP and non-IFP—had bank credit card debt, which accounted for almost two-thirds of the total debt. Compared to non-IFP petitioners, somewhat more IFP petitioners had debt related to health and utility services, but the total debt for these categories was only a small fraction of the credit card debt. In addition, four IFP petitioners, but no non-IFP petitioners, had debt stemming from Social Security Administration or welfare overpayments.

The distinction between credit card debt and debt related to basic subsistence may of course be illusory. Debtors may have high credit card debt because they used their cards to cover basic needs. Still, debtors who possess lines of credit arguably are better able to meet the filing-fee obligation. In commenting on the program, the Executive Office for U.S. Trustees noted that to the extent fee-waiver applicants are seeking to discharge credit card debt, they evidently possess sufficient assets to secure lines of credit and should be able to pay the requisite filing fee in installments. This, of course, assumes credit card eligibility equates to financial competence (a current point of debate).

Did the program increase access to the bankruptcy courts?

Responses to two questions in the survey of fee-waiver applicants indicate that the fee-waiver program may make the bankruptcy courts more accessible to low-income debtors. Almost 11% of the successful applicants said they would not have filed bankruptcy had there been no waiver program, and a little less than a third said they would have filed anyway, but at a later date. Among those who received a waiver, 10% said they would not have continued with their case absent the waiver. Half said they would have continued, but a third did not know.

The Committee on Bankruptcy Issues of the Third Circuit Task Force on Equal Treatment in the Courts found a higher single-female filing rate and markedly fewer joint filings for IFP cases than non-IFP cases in the Eastern District of Pennsylvania. That committee concluded that the fee-waiver program may have enhanced access to the bankruptcy system for indigent single women. A working committee of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts reached the same basic conclusion in its draft report to the Second Circuit Task Force.

Did users of the program obtain a discharge of their debts, and did they reaffirm debts?

Debtors whose fee-waiver applications were granted were more likely to obtain a discharge compared to debtors whose applications were denied (95.4% versus 72.4%). This pattern was found for each district separately, except for the Southern District of Illinois, where the rates for the two groups did not significantly differ, and was more pronounced in the Eastern District of Pennsylvania.

Overall and in each district, the discharge rate for debtors whose fee was waived was similar to that for all other Chapter 7 debtors in the pilot districts (95.4% versus 95.9%). Where we were able to obtain relevant information, we found estimates of the discharge rates for cases in which an installment application was filed to be lower than the discharge rates for cases in which the fee was waived.

Across the pilot districts, reaffirmation agreements were filed in between 1.4% and 25% of cases in which the filing fee was waived (Southern Illinois, 24%;

Montana,12.3%; Eastern Pennsylvania, 1.4%; Eastern New York, 4.5%; Western Tennessee, 25%; and Utah, 15.5%).

Did the program encourage people to file bankruptcy with no intention of following through to discharge?

Of cases in which a fee-waiver application was filed, the petition was filed complete with the mailing matrix, all schedules, and the statement of financial affairs about 80% of the time. Another 6% of the cases were missing just one document, which was most often the mailing matrix (83%). This suggests that the petitioner's goal in filing bankruptcy went beyond just obtaining relief from the stay.

What were the less tangible benefits of filing bankruptcy for the users of the program?

Responses to four questions in the applicant survey suggest some of the less tangible benefits filing bankruptcy may have had for users of the fee-waiver program.

Of the respondents whose fees were waived, about three-quarters said collection agencies were calling and writing their household attempting to collect money; over half said they or their spouse were very worried or emotionally upset because of debt problems; and almost half of the applicants said they had recently lost their job or become unable to work for other reasons. About a third said they were behind in paying a utility bill so that the company had shut off or threatened to shut off service, and at least 20% said they were behind in paying rent and that they or someone they support had recently had serious medical problems and big medical bills.

Compared to debtors whose fee-waiver request was denied, debtors whose fee waiver was granted were more likely to report they were trying to obtain public housing, behind in paying rent, facing eviction, and behind in paying a utility bill, and less likely to report that someone to whom they owed money was taking their wages or had threatened to take their wages.

Debtors whose fees were waived were more likely to report that filing bankruptcy made it easier to keep or get housing (29.4% compared to 13.8% for those whose fee-waiver request was denied). They were also more likely to say that filing bankruptcy reduced the tension or stress in their household (85.6% versus 65.3%). This pattern held for most districts, but in Utah, those whose applications were denied more frequently said filing bankruptcy had increased household stress (47.1% versus 24.5% overall), and less frequently said it reduced stress (29.4% versus 65.3% overall). And in Eastern Pennsylvania, among the unsuccessful applicants, filing increased stress 31.6% of the time (versus 24.5% overall) and decreased it only 52.6% of the time (versus 65.3% overall).

Most applicants, whether their fee was waived or not, said filing bankruptcy had no effect on their employment situation. Of those whose fee was waived, only about

8.7% said filing bankruptcy made it easier to work at their job or to obtain a job, and only about 3.8% said filing bankruptcy made it harder.

In sum, it does appear that many IFP debtors benefited from filing bankruptcy. However, some of them might have benefited more from a lesser remedy (e.g., referral to consumer credit counseling or social services to work-out agreements with quasi-public utility services or public housing). Such remedies would not restrict the debtors' ability to obtain bankruptcy relief when they might need it more. For example, we know that at least 89 of the Eastern Pennsylvania applicants were assisted by tenant organizations, and presumably were filing bankruptcy to discharge public housing debt so they could keep or obtain such housing. The Consumer Bankruptcy Assistance Project's summaries also indicate some of its clients filed for this purpose. A change in non-bankruptcy law or policy might provide these very poor debtors more straightforward solutions to their problems.

Did the program increase Chapter 7 filings?

From 1994 to 1997, yearly consumer filings in each of the pilot courts rose dramatically, and in all pilot districts but New York the change was due to both an increase in the number of Chapter 7 and in Chapter 13 filings. This pattern of change mirrors that found nationwide and complicates determining whether the fee-waiver program resulted in a shift of filings from Chapter 13 to Chapter 7, or in an increase in filings overall. It is clear, however, that only a small fraction of the increased filings are due to the program. The percentage increase in Chapter 7 filings and total consumer filings is basically the same in all pilot courts, including and excluding the fee-waiver cases.

Did the fee-waiver program encourage debtors to file under Chapter 7 even when Chapter 13 was more appropriate?

The Western District of Tennessee was included in the study in part because it has a high number of Chapter 13 cases relative to Chapter 7 cases and so was a good place to examine the issue. There is no indication that debtors in this district filed in Chapter 7 rather than Chapter 13 merely to obtain benefit of the fee-waiver program. The proportion of consumer cases filed under Chapter 7 is the same, even if one assumes that all cases in which an application was filed would have been filed under Chapter 13 in the absence of the pilot program.

In only one of the other five pilot districts (the Eastern District of Pennsylvania) did the percentage of consumer cases filed as Chapter 7 seem to increase during the pilot program. But because only a small fraction of the increased filings in this district could be due to the fee-waiver program, the change in the percentage must be only partially, if at all, due to the fee-waiver program.

Did the program increase the number of bankruptcy petitions by inmates?

The Southern District of Illinois was selected as a pilot district partly because it has three federal and eleven state correctional institutions and thus would provide a good test of whether the program would increase the number of bankruptcy petitions, including frivolous ones, by inmates. During the first two and a half years of the program, only seven inmates in this district asked that their filing fee be waived. Six inmates received a waiver of the filing fee and six received a general discharge of their debts.

Across all the pilot districts during the first two and a half years of the program, 27 inmates asked that their filing fee be waived; 17 of the requests were granted, 8 were denied, and 2 were not decided before the case was dismissed. Nineteen of the 27 inmates received a discharge.

These prisoner cases presented no extraordinary issues to the courts, with the exception of one case in the Southern District of Illinois. See *In re Merritt*, 186 B.R. 924 (Bankr. S.D. Ill. 1995), in which an IFP debtor appealed the bankruptcy court's decision regarding the dischargeability of a penalty imposed for damaging prison property.

Did the program bring more pro se debtors into the bankruptcy courts?

Another concern about the program was that it would indirectly increase the workload of the clerk's office and judge's staff because the program would bring more pro se debtors into court. Overall, 38% of the fee-waiver applicants appeared pro se. The percentage ranged across the districts from 10.8% in Eastern Pennsylvania to 78.5% in Eastern New York. In New York, legal services attorneys assisted with the preparation of petitions without entering a court appearance in 354 cases—if these debtors are considered to be represented, the percentage of pro se debtors in the district drops to 50.3%.

It appears that the percentage of fee-waiver applicants that appear pro se is disproportionately high compared to other Chapter 7 debtors—more or less so depending on the availability of pro bono legal services and the judicial inclination to waive the fee when an attorney has been paid. Thus, these filings may be disproportionately burdensome to the clerk's office, judges, trustees, and other parties.

Did the program exacerbate problems associated with petition preparers?

Of the 3,732 cases filed under the program in its first two and a half years, an application was filed in 224 cases in which a non-attorney had been paid, and the application was granted in 165 cases. Most of these cases were filed in the Long Island offices of the Eastern District of New York by petition preparers, with a notable number also being filed by petition preparers in the District of Utah. Most of

the New York applications (80%), but only about a third of those in Utah (38%), were granted. Not surprisingly, the number of such applications appears to be declining because action has been taken against petition preparers who have filed fee-waiver applications in both Eastern New York and Utah.

Projections for a National Program: Number of Applications and Waivers and the Cost

How many applications would be filed if the program were implemented nationwide?

Table S-1 shows the projected number of applications and waivers assuming, alternatively:

- the same percentage as the overall percentage in the pilot courts (row 1);
- the same percentage as the overall percentage in the pilot courts, excluding those cases in which an attorney had been paid in connection with the case (row 2);
- the same as the overall percentage in the pilot courts, excluding those cases in which a non-attorney had been paid in connection with the case (row 3);
- the same as the overall percentage in the pilot courts, excluding those cases in which an attorney or non-attorney had been paid (row 4);
- the percentage of Chapter 7 debtors with income below the poverty line (row 5);
- the percentage of Chapter 7 debtors represented pro bono (row 6); and
- the percentage of Chapter 7 debtors represented pro bono, adjusted upward according to the percentage of applicants in the pilot districts proceeding pro se (row 7).

These projections are based on the number of non-business Chapter 7 cases filed in fiscal 1997 (926,183) and are subject to increase if the number of filings increases. The number of non-business Chapter 7 cases rose by 26% from fiscal 1996 to fiscal 1997 and the Administrative Office expects filings to continue to rise through fiscal 1998 and then remain steady in fiscal 1999.

Table S-1: Projected Number of Applications and Waiver Applying Alternative Assumptions

Alternative Standard or Assumption	Estimated Number of Applications Based on FY 97 Filings	Estimated Number of Waivers Based on FY 97 Filings
1. Totality of circumstances	31,490	26,859
2. Totality of circumstances, prohibiting waivers when an attorney had been paid	29,638	25,933
3. Totality of circumstances, prohibiting waivers when a non-attorney had been paid	31,490	25,933
4. Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid	29,638	25,007
5. Income below the poverty line	300,083	300,083
6. Number of Chapter 7 debtors represented pro bono	19,841	19,841
7. Number of Chapter 7 debtors represented pro bono, plus pro se debtors	36,075	32,406

Not all those eligible under the "income below the poverty line" standard requested a waiver of the filing fee in the pilot program (e.g., only 8.3% of consumer Chapter 7 debtors requested a fee waiver in the Eastern District of Pennsylvania but 38.5% are thought to have income below the poverty line). Thus, if the courts waived the filing fee for all debtors with income below the poverty line, whether or not the debtor requested a waiver, the number of waivers would likely increase greatly.

Some judges in the pilot courts used the poverty guidelines as informal criteria to guide their decisions. This suggests that even if the poverty guidelines are not published as the eligibility standard, the number of waivers may increase as the program becomes better known and determinations become more routine. This is especially true if waivers are allowed when attorneys are paid because attorneys would nearly always suggest non-payment of the fee to clients who qualified. Thus, the percentage of debtors falling below the poverty line can be taken as an estimate of the upper limit of the percentage of debtors that would receive a waiver.

Before the start-up of the fee-waiver program, the bankruptcy court in the Central District of California expressed an interest in participating in the pilot program because of its significant problem with petition preparers filing bankruptcy petitions to temporarily stay an eviction or foreclosure with no intention of the debtor appearing at the section 341 meeting or even filing schedules (so-called, unlawful detainer cases). Given the petition preparers' sophistication, it was thought that they would attempt to avoid paying the filing fee if a national program were

implemented. The Bankruptcy Committee did not identity the district as a pilot, but has met with the representatives from the district about the probable impact of a national program.

To avoid improper waivers of the filing fee, the district representatives believe it is essential for their judges to have clear authority to review and rule on fee-waiver applications before the automatic stay goes into effect, and to deny the waiver if a case is being filed for an improper purpose. This type of review would necessitate the debtor filing complete schedules and statements along with the petition and fee-waiver application. The district representatives think existing statutory authority under 11 U.S.C. § 707(a) and (b) for dismissing a case for cause or substantial abuse is inadequate for dealing with the unlawful detainer cases because once the automatic stay is in effect, the petitioners in these cases have gotten what they want and do not care whether the case is dismissed.

What would a national fee-waiver program cost?

In Table S-2 we show the lost revenue and personnel costs associated with each of the scenarios listed in Table S-1. The lost revenue due to a national program falls within a comparatively narrow range ($3.5 million to $5.8 million) assuming all the alternative eligibility standards, except one. If "below the poverty line" is adopted as a "bright-line" standard, the estimated lost revenue is much more ($53 million). The cost for additional clerk's office personnel also falls within a comparatively narrow range (from about $1 million to about $1.9 million) for all the alternative standards, except "below the poverty line." Our formula results in a much more significant cost for the "below the poverty line" standard. This is likely an overestimate because application of this standard would require minimal review and discretion, and the formula is based on the time required to review applications under a discretionary standard.

Judges spent little time on the program, and thus a national program should not necessitate additional judgeships, assuming the number of applications remains at the current level. Looking to the Eastern District of Pennsylvania (the district with the highest number of applications), bankruptcy judges spent approximately 298 hours on the program across all three years, or about 99 hours per year, excluding time related to the study and publicizing the pilot program. This is about 60 hours per judge for the three years, combined or 20 hours per judge per year. Judges spent approximately 45% of the time devoted to the program reviewing fee-waiver applications and meeting with IFP clerks about specific applications; 6% of the time presiding at hearings related to the applications; 29% of the time preparing/signing related memoranda and orders; 13% of the time on administrative and other routine matters related to the program; and 6% of the time on miscellaneous matters related to the program.

Table S-2: Projected Number of Applications that Would Be Granted and Lost Fees, Given Alternative Eligibility Standards and Assumptions

Alternative Standard or Assumption	Lost Filing Fee ($175 per case)	Lost Miscellaneous Fees ($2.76 per case)	Personnel Cost for Additional Clerk's Office Personnel (see note 1)
1. Totality of circumstances	$4,700,325	$74,131	$1,695,408 $1,495,551
2. Totality of circumstances, prohibiting waivers when an attorney had been paid	$4,538,275	$71,575	$1,596,003 $1,407,864
3. Totality of circumstances, prohibiting waivers when a non-attorney had been paid	$4,538,275	$71,575	$1,695,408 $1,495,551
4. Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid	$4,376,225	$69,019	$1,596,003 $1,407,864
5. Income below the poverty guidelines	$52,514,525	$828,229	$16,169,880 $14,263,752 (see note 2)
6. Number of Chapter 7 debtors represented pro bono	$3,472,175	$54,761	$1,071,365 $945,071 (see note 2)
7. Number of Chapter 7 debtors represented pro bono, plus pro se debtors	$5,671,050	$89,441	$1,943,920 $1,714,768

Note:

1. Top entry in each cell for the column "Personnel Costs" is first-year cost; bottom entry is subsequent year cost.
2. Our formula for estimating personnel costs most likely overestimates the time required to process applications if income below the poverty line is adopted as a "bright-line" standard (row 5 of the table) or if the filing fee is waived for all debtors represented by legal services or organized pro bono groups (row 6). Application of these standards would require minimal review and discretion.

Another factor contributing to the cost of the program is the extent to which it produces additional bankruptcy filings. Our findings suggest that although the pilot program increased access to the courts for certain debtors, the net increase in the number of filings was small. Use of eligibility standards other than some variant of the totality of the circumstances (e.g., the poverty line) might result in a larger increase of filings.

The work and lost revenue associated with waivers of the filing fee should be offset by some of that associated with paying the fee in installments. Presumably,

some debtors who request a waiver of the filing fee would attempt to pay the filing fee in installments in the absence of a fee-waiver program. Clerk's office and judge time would be required to process and determine motions for nonpayment of fees and to hold related hearings. Moreover, some, if not all, of the filing fee would be left unpaid. The Administrative Office does not routinely maintain a record of the number of installment applications and the amount of the filing fee actually paid pursuant to them. We are attempting to obtain the information on a district-by-district basis.

Issues for Subsequent Legislation or Rules if the Program Is Implemented Nationwide

We provide information relevant to a number of issues to be considered if a national program is implemented, including:

- How should the cost of a national program be offset?
- What procedures should be used to process the applications and what eligibility criteria should be applied?
- What role should the U.S. trustee and the Chapter 7 trustees play?
- Should waiver of the filing fee constitute waiver of all miscellaneous fees?
- Should the fee-waiver program be extended to Chapter 13?
- Can the installment program be modified to eliminate the need for a fee-waiver program?

Here we summarize the first of these issues.

How should the cost of a national program be offset?

In discussing ways to offset the costs of a national program, we assume the rate of waivers will mirror that in the pilot courts, but the rate could vary greatly according to the several factors: eligibility standard employed; the public's and bar's awareness of the program; the degree of scrutiny given applications; and the overall rate of Chapter 7 filings.

Assuming applications will be filed and granted at the rate found in the pilot districts, a national fee-waiver program would result in approximately $4,700,325 in lost filings fees, approximately $74,131 in waived miscellaneous fees for IFP debtors, and approximately $1,495,551 in salary for additional clerk's office personnel, for a total of approximately $6,270,007. The Bankruptcy Committee endorsed the recommendation of its IFP subcommittee that the most straightforward way to fund

a national program would be for Congress to increase the judiciary's appropriation by this amount, which represents 2/10 of 1% of the judiciary's total fiscal 1997 appropriation.

If monies are not directly appropriated to cover the costs of the program, the subcommittee suggested and the committee secondarily endorsed requesting authorization for application of the U.S. Treasury share of the filing fee to cover the cost of the program. Currently, the general fund of the U.S. Treasury receives $15 from the filing fee for each Chapter 7 case. In fiscal 1997 alone, the general fund received approximately $13,892,745 from Chapter 7 bankruptcy filings. Thus, lost revenue due to waived fees would be recovered if the judiciary could retain this portion of the fee for all non-IFP cases in a special fund designated as "no year" money. From the fund, $160 would be allocated for each IFP case among the entities who would have benefited from the filing fee (e.g., the judiciary would receive $70, the U.S. trustee system would receive $30 dollars, and the case trustee would receive $60). The drawback to this approach is that the fund may be insufficient to cover the costs of the program in subsequent years if the ratio of IFP to non-IFP cases dramatically increases. Designating the fund's receipts as "no year," however, would enable the judiciary to better respond to moderate filing fluctuations.

I. Action to Implement the Program by the Congress and the Committee on the Administration of the Bankruptcy System

In the appropriation act funding the judiciary for FY94, enacted October 14, 1993, Congress directed the Judicial Conference of the United States to study two variations on the system of filing fees in bankruptcy courts. For Chapter 7 cases, the Conference was to implement and study in up to six districts the effect of waiving the filing fee for individual debtors who are unable to pay the fee in installments. For chapter 11 and 13 cases, the Conference was instructed to study, but not implement, a graduated fee system based on assets, liabilities, or both.[1] The Judicial Conference's report to Congress, which is to be submitted by March 31, 1998, must include:

- an estimate of the costs and benefits that would result from waiving bankruptcy fees payable by debtors who are individuals;
- recommendations regarding various revenue sources to offset the net costs of waiving such fees;
- an evaluation of the effects that would result in cases under chapters 11 and 13 of title 11, U.S. Code, from using a graduated bankruptcy fee system based on the debtor's assets, liabilities, or both; and
- recommendations regarding various methods to implement such a graduated bankruptcy fee system.

Anticipating the congressional directive on bankruptcy fees, in December 1992, the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) appointed a subcommittee on *in forma pauperis*.[2] Working with staff of the Federal Judicial Center, the subcommittee explored options for evaluating the potential effects of waiving the filing fee in consumer bankruptcy cases and concluded that a pilot study was the only reliable way to determine (1) the effect of a fee-waiver provision on the workloads of clerks' offices and judges, including an assessment of the time needed to process fee-waiver applications and to meet the needs of additional pro se debtors; (2) the number of applications and additional filings that would be generated by a nationwide fee-waiver provision; and (3) the costs associated with a fee-waiver provision. In June 1993, the Bankruptcy Committee approved the Subcommittee's recommendation that the Judicial Conference

1. H.R. 2519, cited as the "Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1994," Pub. L. No. 103–121, 107 Stat. 1153. In *United States v. Kras*, 401 U.S. 371 (1971), the Court held that the right to file a bankruptcy petition was not a fundamental right requiring access to court for all citizens, thus upholding a required filing fee.

2. Original members of the subcommittee were Bankruptcy Judge W. Homer Drake and District Judge Donald E. Walter (chair). Judge Drake is no longer a member of the Bankruptcy Committee and has been replaced on the subcommittee by Bankruptcy Judge Michael J. Kaplan. Michael W. Dobbins, clerk liaison to the Bankruptcy Committee during two years of the pilot program, also worked with the subcommittee.

- recommend that Congress fund a pilot study to assess accurately the full impact of an *in forma pauperis* provision on the bankruptcy courts, with the understanding that no pilot project can be undertaken unless the Congress will provide additional and adequate funding to defray the costs of the study (including the need for additional support staff in the pilot districts) and the loss of revenue to the system resulting from the waiver of filing fees; and

- express its concern about the implementation of an *in forma pauperis* provision in bankruptcy but defer taking a formal position pending completion of the pilot study or empirical survey.

The Judicial Conference adopted these recommendations.[3]

When the 1993 legislation mandating the pilot program was passed, the Judicial Conference charged its Bankruptcy Committee (and in turn, the Bankruptcy Committee charged its IFP subcommittee) with overseeing the program's implementation and evaluation, including its budget. The legislation did not provide additional funding to cover the costs of the program, as recommended by the Judicial Conference. Instead, Congress assumed, in its report on the legislation, that the judiciary would not incur a cost of more than $1,500,000 to comply, of which not more than $100,000 could be spent on the analyses associated with the report.[4] The Federal Judicial Center agreed to assume the primary responsibility for evaluating the pilot fee-waiver program and the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts agreed to assume the primary responsibility for evaluating the effects of a graduated fee system for chapter 11 and 13 cases.[5]

Before the pilot program began, the subcommittee recommended that

- the following districts be selected for the study based on a number of statistical, geographical, and other factors: Southern District of Illinois, District of Montana, Eastern District of New York, Eastern District of Pennsylvania, Western District of Tennessee, and District of Utah;[6]

- the determination of *in forma pauperis* status should be in the judge's discretion based on consideration of the circumstances of individual cases, rather than based on a set standard (e.g., income below the federal poverty guidelines);

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3. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Agenda Item F-4 (September 1993); Report of the Proceedings of the Judicial Conference of the United States 41 (September 1993).

4. Conference Report on H.R. 2519.

5. Memorandum of Understanding between the Federal Judicial Center and the Administrative Office dated April 12, 1994. The study of graduated fees will be forwarded to Congress together with this report.

6. *See* section II.A, *infra*.

- a standard fee-waiver application developed by the subcommittee be used in all pilot districts and that applicants certify that the information provided is accurate and that they are unable to pay the filing fee in installments;

- the U.S. trustee be given notice of and an opportunity to object to each application; and

- the Judicial Conference authorize the creation of temporary positions to assist the pilot courts with processing the applications.

These recommendations were approved by the Bankruptcy Committee and the Judicial Conference.[7]

In addition, the subcommittee developed a set of guidelines for processing fee-waiver applications and the underlying Chapter 7 cases and worked with the pilot courts to develop the specific procedures to be used in processing the applications. To underscore its commitment to the fee-waiver program and to ensure the participating courts knew it stood ready to help make the program a success, the subcommittee met with the chief bankruptcy judges and clerks of court for the pilot districts in Washington, D.C., in May 1994, and traveled to each court during the fall of 1994. The subcommittee has worked with the pilot courts throughout the project to assess personnel and other resource needs and to develop and monitor the related budgets.

7. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Agenda Item F-4 (March 1994); Report of the Proceedings of the Judicial Conference of the United States 11–12 (March 1994).

II. Implementation of the Pilot Program

A. Selection of the Pilot Districts

To help select the pilot districts, the Center developed a descriptive profile for each district. The profiles were based on information concerning the following factors:

- the proportion of non-business Chapter 7 cases, filed in 1992, in which fees were paid in installments;
- the proportion of these cases that were dismissed within 120 days;
- the proportion of these cases in which the debtor was pro se; and
- the forecasted change in Chapter 7 filings from 1992 to 1993.[8]

We surveyed bankruptcy clerks to obtain information about the first three factors; we received responses from all but eight districts. Information needed to forecast the change in filings was obtained from the Administrative Office.

We ranked the districts according to information obtained about these four factors. For example, the proportion of non-business Chapter 7 cases in which fees were paid in installments was highest in the Eastern District of Tennessee, so this district was ranked first; the proportion was lowest in Rhode Island, so this district was ranked 83rd. (Information concerning this factor was missing for some districts.)

In selecting the pilot districts, the subcommittee attempted to obtain variation along these rankings, as well as the following other factors:

- the number of 1992 non-business Chapter 7 filings;
- the ratio of 1992 Chapter 13 filings to 1992 non-business Chapter 7 filings;
- the ratio of 1992 non-business Chapter 7 filings to all 1992 bankruptcy filings;
- geographic location of the district;
- whether the district was urban or rural;
- size of the court; and
- the availability of legal service or pro bono legal assistance.

In addition, the subcommittee considered whether (1) there was a district that matched the potential pilot district fairly closely on the relevant factors for comparative purposes; (2) the district was currently understaffed in relation to its weighted caseload; and (3) characteristics of a court's operation might facilitate/hamper a successful study (for example, a change of clerks immediately before or during the study period).

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8. The forecasts were based on both business and non-business Chapter 7 filings for two reasons: first, from a theoretical perspective the distinction between business and non-business Chapter 7 cases is sometimes ill-defined; and second, as a practical matter we did not have a data set that distinguished between these two classes of Chapter 7 cases at the time the forecasts were produced.

B. Procedures for Processing the Applications

The *in forma pauperis* subcommittee developed guidelines for processing fee-waiver applications and the underlying Chapter 7 cases (see Appendix A). The purpose of the guidelines was to advise the courts in developing the specific procedures for their districts, while recognizing that the courts might revisit and resolve some issues differently over time. A summary of the procedures adopted by the districts is in Appendix B; copies of the standing orders implementing the fee-waiver program in the pilot districts and setting forth the related procedures are on file with the Center. The application form developed by the subcommittee for use in all the pilot courts is in Appendix C.

C. IFP Clerk Positions

At the outset of the pilot program, the workload implications were unclear but were expected to be substantial. Thus, on the recommendation of the Bankruptcy Committee and its IFP subcommittee, the Judicial Conference approved the authorization of nine temporary law clerks.[9] The interim standards for the IFP clerk set the top grade for this position at JSP-10. The position description is included in Appendix D.

During the first year of the program, each district except Montana employed at least one IFP clerk; the Eastern District of New York employed three IFP clerks and the Eastern District of Pennsylvania employed two. In Montana, much of the substantive work performed by the IFP clerks in the other pilot districts was performed by the judge's law clerk. This law clerk's term expired in August 1995; the Bankruptcy Committee authorized expending IFP funds to provide for a two-month employment overlap between that clerk and a new one so the new clerk could receive instruction regarding the fee-waiver program. A separate position description was developed for this clerk to reflect these other responsibilities (see Appendix D).

Since the first year, the number of positions changed as follows:

- Because very few applications were filed in the Western District of Tennessee, the Bankruptcy Committee did not reauthorize its IFP clerk position for fiscal 1996 and fiscal 1997.

- Because the number of applications was low in the Southern District of Illinois and the hours expended by the IFP clerk on the program were minimal during the first two years, the Bankruptcy Committee did not re-

9. In March 1994, the Judicial Conference approved eight positions. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System, Agenda Item F-4 (March 1994); Report of the Proceedings of the Judicial Conference of the United States 12 (March 1994). On August 8, 1994, the Executive Committee of the Judicial Conference approved nine rather than eight positions.

authorize its IFP clerk position for fiscal 1997. In addition, the Bankruptcy Committee did not reauthorize the third position for the Eastern District of New York for fiscal 1997.[10]

D. Publicity of the Fee-Waiver Program

The subcommittee worked with the pilot districts to ensure that the bar and the public received adequate notice of the program. All pilot courts engaged in a vigorous campaign to notify newspapers, professional journals and newsletters, law schools, bar associations, social services agencies, community organizations, and pro bono and legal services attorneys of the program. In addition, information about the program was posted in the courthouse and made available at the intake counter. IFP clerks and bankruptcy judges also spoke about the program at seminars and bar meetings. Appendix E describes the publicity efforts of each pilot court.

Responses to one question on the survey of fee-waiver applicants (see section III.C, *infra*) show how applicants learned of the program. Table 1 shows that a notable percentage of applicants heard of the program from the court, but in no district was the court the most frequent source of information. For all but one district (S.D. Ill.), the most common source of initial information was an unpaid attorney, with this percentage being much higher in Eastern Pennsylvania than elsewhere. In the Southern District of Illinois, applicants were somewhat more likely to hear of the program from a paid attorney than from an unpaid attorney. Only in the Eastern District of New York did a notable number of applicants say they heard of the program from a paid non-attorney.

In sum, the IFP subcommittee and the pilot districts made substantial and concerted efforts to help the pilot program run smoothly and effectively.

10. Actually, the Eastern District of New York operated with two clerks for part of fiscal 1996 as well because one of the IFP clerks resigned and was not replaced due to the Bankruptcy Committee's decision regarding fiscal 1997. In addition, another of the IFP clerks resigned in fiscal 1997 and the duties were assumed by existing clerk's office staff.

Table 1: Applicant Survey
How did you find out that you might be allowed to file bankruptcy withoutpaying a filing fee? (Please check all that apply.)

	S.D. Ill.	D. Mont.	E.D.N.Y.	E.D. Pa.	W.D. Tenn.	D. Utah
Newspaper	4 5.5%	1 4.2%	8 2.2%	12 2.1%	0 0.0%	4 5.0%
T.V. or radio	0 0.0%	0 0.0%	6 1.7%	7 1.2%	0 0.0%	0 0.0%
The court	7 9.6%	2 8.3%	79 21.9%	21 3.7%	3 25.0%	24 3.0%
An attorney I paid, or another person in that attorney's office	32 43.8%	3 12.5%	11 3.0%	19 3.3%	2 16.7%	7 8.8%
An attorney I did not pay, or another person in that attorney's office	24 32.9%	12 50.0%	148 41.0%	429 74.9%	5 41.7%	27 33.8%
A person I paid to help me complete the bankruptcy petition, other than an attorney or person who works for an attorney	1 1.4%	1 4.2%	60 16.6%	9 1.6%	0 0.0%	3 3.8%
Another person who had filed bankruptcy	0 0.0%	0 0.0%	22 6.1%	28 4.9%	0 0.0%	2 2.5%
A family member or friend	9 12.3%	2 8.3%	43 11.9%	66 11.5%	1 8.3%	9 11.3%
Other (see note)	5 6.8%	4 16.7%	13 3.6%	23 4.0%	1 8.3%	13 16.3%
Total (see note)	73	24	361	573	12	80

Note: Percentages are of column totals; percentages within a column do not sum to 100 because some applicants checked more than one response. Twenty of the 1,143 applicants who returned the questionnaire did not answer this question. Those people who checked the "other" category gave social services, library books, bankruptcy kits, and, in a few cases, creditors and prison inmates as their sources of information on the fee-waiver program.

III. Evaluation of the Pilot Program

A. Potential Drawbacks and Benefits of the Program

In a 1993 Center survey, an overwhelming majority of bankruptcy judges reported that they either moderately or strongly opposed allowing eligible individuals to proceed *in forma pauperis* in Chapter 7 and in Chapter 13 (see Table 2).[11]

Table 2
1993 Survey of Bankruptcy Judges
Please indicate the extent to which you support or oppose allowing eligible individuals to proceed *in forma pauperis* in Chapter 7 and in Chapter 13. (Percentages are of the total, excluding the category of "no response/ambiguous response.")

	Chapter 7		Chapter 13	
	n	*%*	***n***	*%*
Strongly support	19	8.9	12	5.7
Moderately support	10	4.7	8	3.8
Have mixed feelings	20	9.3	12	5.7
Moderately oppose	32	15.0	18	8.5
Strongly oppose	127	59.3	157	74.1
No opinion	6	2.8	5	2.4
No response/ambiguous response	11		13	
TOTAL	225		225	

Judges' opposition to *in forma pauperis* for Chapter 7 debtors appeared to stem from the following interrelated perceptions:

- A fee-waiver program would encourage people to file bankruptcy even when there was no benefit in doing so. Debtors who cannot afford the filing fee probably do not benefit from filing bankruptcy because they are judgment-proof, or because their principal problem may be solved by a lesser remedy (e.g., referral to consumer credit counseling or social services) that would not restrict their ability to obtain bankruptcy relief when they may need it more.

- Nearly everyone who files a Chapter 7 case will request the filing fee to be waived. Adequate screening of the applications will be time-consuming and thus costly. Such screening is necessary, however, to avoid excessive loss of revenue to the judiciary and to ensure adequate revenue to pay the Chapter 7 trustees.

11. The 1993 survey was conducted to help the Center plan its research on the bankruptcy system. Responses were received from 225 bankruptcy judges (77%).

- A fee-waiver program would increase the number of people who file to benefit from the automatic stay with no intention of following through to a discharge (e.g., people will file to temporarily avoid eviction).

- The program would encourage inappropriate filings from certain groups of people (tax protesters and prison inmates).

- Allowing debtors to proceed *in forma pauperis* in Chapter 7 cases but not Chapter 13 cases would encourage debtors to file in Chapter 7 even when Chapter 13 was more appropriate.

- A fee-waiver program would increase "bankruptcy mill" activity. Petitions filed by petition preparers, on the whole, would be ill-conceived and badly prepared.

- A fee-waiver program would indirectly increase the workload of the clerk's office and judge's staff because the program would bring more pro se debtors into court. Large amounts of clerk and court time would be required to clean up incomplete and faulty pleadings, and trustees would be required to spend time determining facts omitted from the pleadings.

More generally, opponents of allowing debtors to proceed *in forma pauperis* argued that the filing-fee requirement denies individuals access to the bankruptcy courts only in rare circumstances. Most debtors, they argued, enjoy access because they maintain an income despite their liabilities and as a result are able to pay the filing fee. Moreover, Fed. R. Bankr. P. 1006 allows individuals with limited resources to pay the filing fee in installments over a 120-day period, which can be extended by the court to 180 days. In addition, some judges have suggested that alternatives other than a fee waiver may increase access to the courts without producing as many negative side effects. For example, debtors could be allowed to pay the filing fee over time by means of a wage-deduction order or debtors could be allowed to pay a reduced fee based on the level of scheduled assets and liabilities.

On the other hand, proponents of allowing eligible debtors to proceed *in forma pauperis* argue first and foremost that poor people should not be denied access to bankruptcy simply because they cannot pay the filing fee.[12] In addition, they argue that:

- Even so-called "judgment proof" debtors may benefit from filing bankruptcy. They may file, for example, to prevent utility shutoff or a repossession of essential property; to protect or restore a driver's license under a state financial responsibility law due to an unpaid judgment; to discharge a debt that is an impediment to participating in a government program such as

12. Henry J. Sommer, *In Forma Pauperis in Bankruptcy: The Time Has Long Since Come*, 2 Am. Bankr. Inst. L. Rev. 93 (Spring 1994).

public housing; to prevent garnishment of wages (which is allowed in some states even when the debtor's income is below the poverty line); and to end repeated, and perhaps harassing, calls from creditors and collection agencies.

- The number of debtors qualifying for waiver of the filing fee should not be overwhelming because eligibility would turn primarily on income, not on an imbalance between assets and liabilities.

- The work required to process fee-waiver applications will not greatly increase the workload of the bankruptcy judges and clerks' offices. The work may simply replace or reduce that needed to process and monitor an application to pay the fee in installments.

- Some people who would benefit from filing bankruptcy cannot afford to pay even the first installment of the filing fee in an emergency situation (such as to avoid a utility shutoff or sheriff's sale).

- A fee-waiver program would not exacerbate problems associated with "bankruptcy mills"; these mills are already sophisticated enough to know how to file a bankruptcy petition at little or no cost. In any event, the solution to abuse by petition mills is not to restrict access to the system for all indigent persons but rather to curtail it with criminal prosecutions.[13]

B. Scope of this Report

In this report, we provide information related to questions falling into three major categories: (1) Description of the Pilot Program; (2) Projections for a National Program; and (3) Issues for Legislation or Rule if the Program Is Implemented Nationwide. In describing the pilot program, we answer the following questions:

- How many fee-waiver applications were filed and granted in the pilot districts?
- What factors account for interdistrict variation in fee-waiver activity?
- For what reasons were applications denied and how did petitioners meet the fee obligation, if at all, subsequent to the denial?
- For how many applications were objections filed, hearings held, and rulings modified?
- Who used the program?
- Did the program increase access to the bankruptcy courts?
- Did users of the program obtain a discharge of their debts, and did they reaffirm debts?

13. For further discussion of these arguments, see Sommer, *supra* note 12, and Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting on and Beyond* United States v. Kras, 2 Am. Bankr. Inst. L. Rev. 57 (Spring 1994).

- Did the program encourage people to file bankruptcy with no intention of following through to discharge?
- What were the less tangible benefits of filing bankruptcy for the users of the program?
- Did the program increase Chapter 7 filings?
- Did the fee-waiver program encourage debtors to file under Chapter 7 even when Chapter 13 was more appropriate?
- Did the program increase the number of bankruptcy petitions by inmates?
- Did the program bring more pro se debtors into the bankruptcy courts?
- Did the program exacerbate problems associated with petition preparers?

In projecting the cost of a national program, we estimate the number of applications that would be filed nationwide, assuming alternative eligibility criteria. We then project the cost of a national program, including lost revenue and additional personnel, based on the alternative estimates.

In concluding, we discuss several issues for subsequent legislation or rules if the program is implemented nationwide.

- How should the cost of a national program be offset?
- What procedures should be used to process the applications and what eligibility criteria should be applied?
- What roles should the U.S. trustee and the Chapter 7 trustees play?
- Should waiver of the filing fee constitute waiver of all miscellaneous fees?
- Should the fee-waiver program be extended to Chapter 13?
- Can the installment program be modified to eliminate the need for a fee-waiver program?

C. Information Used in Evaluating the Program

In this section, we describe the primary information sources on which we rely for this report.

Case-Closing Reports. The IFP clerk completed a case-closing report for each case in which a fee-waiver application was filed, whether or not it was granted. The form was completed at the time a discharge was granted or, if an objection to the discharge was filed, when the case was ready to be closed. The clerk sent the form to the Center along with a copy of the docket sheet, the fee-waiver application, and any documents related to the fee-waiver application (e.g., order setting hearing, order granting or denying).

The form requested information about the processing of the fee-waiver application (e.g., whether an objection was filed or a hearing held and whether the application was granted or denied); about the debtor (e.g., whether the debtor appeared pro se throughout the pendency of the case and, if not, whether the debtor was represented by a paid, pro bono, or legal services attorney, and whether the

debtor was a prisoner); and about the administration of the case in general (e.g., whether schedules were filed, whether an objection to the discharge was made, and whether miscellaneous fees were waived). The form is in Appendix F.

In this report, we present information from case-closing forms for the 3,733 fiscal 1995, fiscal 1996, and first-half fiscal 1997 cases in which a fee-waiver application was filed, with the exception of one case.[14] Eleven of the 1,299 fiscal 1995, 20 of the 1,584 fiscal 1996, and 32 of the 849 fiscal 1997 cases were pending at the time we compiled the final database, so only partial information is available for these cases.[15]

Activity Logs Completed by the Bankruptcy Judges and Other Court Employees. Since the second month of the program, bankruptcy judges and IFP clerks or persons who perform the duties of an IFP clerk reported the time they spent on the program and the nature of the work performed. One log was designed for use by bankruptcy judges; another was designed for use by IFP clerks or persons who performed the duties of an IFP clerk while the IFP clerk was on annual, sick, or other leave, or for other reasons such as to help the IFP clerk complete "backlogged" work. If the court did not hire an IFP clerk, the second form was completed by the persons in the clerk's office or chambers who were given these duties. It was also used by bankruptcy judges' law clerks if they helped review or otherwise process the applications. The activity logs and the instructions are in Appendix G. All districts returned information during the first two years of the program and some districts continued reporting until the end of the third year.

Interviews of Participants in the Program. During the fall of 1995, Center staff traveled to the pilot districts to interview people involved with the program. In each district, staff interviewed the bankruptcy judges, bankruptcy clerk, IFP clerks, systems administrator or manager, financial administrator, U.S. trustee or assistant U.S. trustee, representative Chapter 7 trustees and Chapter 7 debtors' attorneys, and representatives from legal services and pro bono groups who provide assistance to Chapter 7 debtors. Standard interview protocols were used across districts, although they were slightly modified to include district-specific questions. An example protocol, that used in the Eastern District of Pennsylvania, is in Appendix H.

The chair of the IFP subcommittee and Center and AO staff traveled to the pilot courts during the summer of 1997 to re-interview bankruptcy judges and bankruptcy clerks. In addition, they traveled to the Central District of California and met with representatives from the bankruptcy court, U.S. trustee's office, and U.S attorney's office to discuss the effect of a fee-waiver program in that district.

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14. We did not discover this case, which had been inadvertently left off the district's list, until our final database had been compiled.

15. The pending cases were distributed across the districts as follows: Southern District of Illinois, 1 of 142 cases; District of Montana, 0 of 103 cases; Eastern District of New York, 39 of 1,253 cases; Eastern District of Pennsylvania, 18 of 1,954 cases; Western District of Tennessee, 0 of 37 cases; and District of Utah, 5 of 243 cases.

Survey of Fee-Waiver Applicants. At case closing, applicants for a fee waiver were asked to complete a questionnaire about (1) the process of applying for a waiver of the filing fee; (2) whether the filing fee was waived and, if not, whether and how the fee was paid; (3) the petitioner's circumstances when he or she decided to file for bankruptcy; (4) how he or she went about filing for bankruptcy; (5) the outcome of the bankruptcy case; (6) how filing bankruptcy affected the petitioner and his or her family; and (7) demographic information. The questionnaire is in Appendix I. Since the beginning of the program, the pilot courts have sent the questionnaire at case closing to every person who applied for a fee waiver.

As of October 28, 1997, we had received 1,143 questionnaires, reflecting a response from approximately 25% of all those who requested a waiver.[16] The sample appears relatively representative of all fee-waiver applicants: 90.6% of the survey respondents received a waiver compared to 85.6% of all applicants,[17] and the percentage of respondents from each district is similar to the percentage of applicants from each district overall.[18] However, the discharge rate reported by those who were denied a waiver is higher in this sample (91.7%) than in the case closing sample (72.4%).[19]

Survey of Attorneys. In August 1997, we surveyed 483 attorneys in the pilot courts who had been identified by the courts as having served as paid or pro bono counsel to one or more debtors who requested a filing fee waiver. In the Eastern District of New York, we surveyed all attorneys who had requested a fee waiver on behalf of a client for whom we had received a case-closing report by mid-July 1997. In the other pilot districts, we surveyed all attorneys who had requested a fee waiver on behalf of a client as of July or August 1997, whether or not the case was closed. The questionnaire is in Appendix J.

Overall, 226 (47%) attorneys returned the survey (five respondents who said they had no experience with the program were excluded from further analyses).[20] About

16. Because survey responses were anonymous and the courts sent out the questionnaires, it is difficult to calculate the actual response rate. It would be somewhat higher than 25% since applicants whose cases closed after our cut-off date for compiling the dataset would be excluded from the denominator.

17. Although the difference between these two percentages is significantly different ($z = 4.31$, $p < .01$), it appears to be of little practical significance. Of the survey respondents, 968 (90.6%) said their application was granted and 101 (9.4%) said their application was denied (74 respondents either did not provide this information or gave an ambiguous response).

18. The percentage of survey respondents from each district compared to the percentage of fee-waiver applicants from each district is as follows: Southern District of Illinois, 6.5% of respondents compared to 4% of all applicants; District of Montana, 2% compared to 3%; Eastern District of New York, 32% compared to 33%; Eastern District of Pennsylvania, 51% compared to 53%; the Western District of Tennessee, 1% compared to 1%; and District of Utah, 7% compared to 6%.

19. $z = 4.01$, $p < .01$.

20. Returning the questionnaire were 18 of 37 (49%) attorneys in Southern Illinois; 9 of 29 (31%) attorneys in the District of Montana; 34 of 78 (44%) attorneys in the Eastern District of New York; 125

half of the attorneys served as counsel for fewer than three debtors requesting a fee waiver and half served as counsel for more than three such debtors. Attorneys reported that they served pro bono in about 89% of the cases and that about 83% of the fee-waiver requests were granted.

Survey of Panel Trustees. In August 1997, we surveyed the 70 Chapter 7 trustees in the 6 pilot districts. (A copy of the questionnaire is in Appendix K.) Overall, 36 trustees (51%) returned the questionnaire.[21] Not surprisingly, the responding trustees reported serving in widely divergent numbers of cases. Trustees from Western Tennessee reported serving in an average of 2 cases, whereas those from the Eastern District of Pennsylvania reported serving in about 23 cases each, and those from the Eastern District of New York in about 30 cases each. The trustees in the other pilot courts reported serving in an average of 10 to 15 cases each. Overall, the number of cases in which a trustee reported serving ranged from 0 to 75; about half of the trustees reported serving in 19 or fewer cases and half reported serving in more than 19 cases.

Information about Applicants from the Consumer Bankruptcy Assistance Project. The Consumer Bankruptcy Assistance Project (CBAP) in Philadelphia provided descriptions of approximately 200 fee-waiver cases they handled. The descriptions include information about the circumstances leading up to bankruptcy, the availability of funds to pay the filing fee, and the positive and negative consequences that filing bankruptcy had for the debtor. See Appendix L.

Information about Applicants Compiled by Second and Third Circuit Task Forces. Some aspects of the pilot program are touched on in the draft report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts and the report of the Third Circuit Task Force on Equal Treatment in the Courts. Relevant information is included in the present report. See Appendix M.

Information about the Nature of the Debtors' Unsecured Debt. Chief Bankruptcy Judge Conrad Duberstein of the Eastern District of New York analyzed a sample of fee-waiver cases to ascertain the nature of the unsecured debt held by IFP debtors. His analysis is presented in Appendix N of this report. We collected similar information about a random sample of fee-waiver and non-fee-waiver cases filed in the Eastern District of New York and in the Eastern District of Pennsylvania between April 1, 1996, and September 30, 1996. Included in our analyses were 75 fee-waiver cases and 76 non-fee-waiver cases from the Eastern District of New York,

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of 249 (50%) attorneys in the Eastern District of Pennsylvania; 12 of 19 (63%) attorneys in the Western District of Tennessee; and 28 of 71 (39%) attorneys in Utah.

21. The number of trustees who returned questionnaires in each district is as follows: 4 of 6 trustees in Southern Illinois; 5 of 8 in Montana; 12 of 26 in Eastern New York; 3 of 10 in Eastern Pennsylvania; 6 of 10 in Western Tennessee; and 5 of 10 in Utah. The district of one respondent could not be determined.

and 75 fee-waiver and 72 non-fee-waiver cases from the Eastern District of Pennsylvania.[22]

District Survey. We asked all 94 districts about the availability of pro bono representation for Chapter 7 debtors and the operation of the installment payment program. We obtained more in-depth information about the installment payment program in the pilot courts.

Accounting of Costs and Lost Revenues Associated with the Program. The pilot districts were asked to regularly send a status-of-funds report specific to the fee-waiver program budget to the Center and to the Bankruptcy Judges Division of the Administrative Office. The pilot courts were also asked to send a report tracking revenues lost by the judiciary, U.S. trustee system fund, and general fund of the U.S. Treasury, including payments to the case trustees and waivers of miscellaneous fees. This information has been summarized by the Bankruptcy Judges Division of the Administrative Office (the summary is in Appendix O).

22. We excluded from our analyses 13 cases in the random samples for which schedule F information was missing. The excluded cases were about equally distributed between the two districts and between fee-waiver and non-fee-waiver cases. Because the sample was drawn from a six-month period, rather than across a year, it may be subject to some seasonal bias.

IV. The Number of Applications Filed and Their Disposition

A. Overall Filing and Case-Processing Information

Number of Applications and Waivers. Tables 3a and 3b show information about the number of applications for waiver of the filing fee that were filed and granted in each of the pilot districts during the entire study period; Table 3c shows the information for the first two and a half years of the program. The cases in the latter table are those for which we received completed case-closing forms and on which many of the counts and percentages that follow are based. The tables in Appendix Q show the information separately for each fiscal year.

Across years and districts, an application for waiver of the filing fee was filed in 3.4% of all non-business Chapter 7 cases, and the fee was actually waived in 2.9% of all such cases. Over the course of the pilot program, 4,518 applications were filed and 3,867 (85.6%) were granted. The number of fee-waiver applications and actual waivers rose from 1,300 and 1,035 in fiscal 1995 to 1,634 and 1,441 in fiscal 1997.

The increase in the number of applications appears to be due to an increase in the number of non-business Chapter 7 cases. From fiscal 1995 to fiscal 1996 the number of applications and the number of non-business Chapter 7 cases in the pilot districts rose by similar percentages (22% and 24%, respectively), but after the first year, the increase in Chapter 7 filings outstripped waiver application growth: from fiscal 1996 to fiscal 1997 applications increased only 3%, but Chapter 7 filings increased by 28%. Over the entire period, applications increased 26% while filings increased 59%.

The increase in the number of actual waivers is due in part to an increase in the number of Chapter 7 cases filed. It also reflects an increase, particularly early in the program, in the likelihood that an application would be granted. The percentage of applications granted rose from 79.6% in fiscal 1995 to 87.8% in fiscal 1996, but only slightly in the next year to 88.2%. Such an increase and apparent stabilization was expected, and indeed was predicted by some bankruptcy judges, as the standard for waiving the fee became more settled and better known.

Reasons for Denying Applications. The most commonly given reason for denying an application was that the debtor's income, expenses, and assets indicated an ability to pay the required filing fee, at least in installments. Many orders specifically identified assets that could be tapped (e.g., a bank account or tax refund) or discretionary expenditures that could be reduced (e.g., recreation, donations to charity, hair care, dry cleaning, long-distance telephone, support of emancipated child, and high food expenses for individuals without dependents) to permit the debtor to pay the filing fee. Other common reasons for denying applications were that an attorney or non-attorney had been paid (at all, or at an inappropriately high fee) and that the debtor provided

Table 3a: Applications for Waiver of the Chapter 7 Filing Fee and Their Disposition, October 1, 1994, Through September 30, 1997

	Applications Filed 10/1/94 Through 9/30/97	Applications Granted	Applications Denied	Other
Southern District of Illinois	181	150 82.9%	29 16.0%	2 1.1%
District of Montana	137	67 48.9%	67 48.9%	3 2.2%
Eastern District of New York	1,494	1,218 81.5%	265 17.7%	11 0.7%
Eastern District of Pennsylvania	2,388	2,220 93.0%	97 4.1%	71 3.0%
Western District of Tennessee	46	32 69.6%	10 21.7%	4 8.7%
District of Utah	272	180 66.2%	89 32.7%	3 1.1%
Total	4,518	3,867 85.6%	557 12.3%	94 2.1%
Note: "Other" included incidents with these frequencies: application withdrawn, 53 cases; case dismissed before application ruled on, 22 cases; case converted to Chapter 13 and waiver vacated, 12 cases; assets uncovered and fee paid after waiver, 3 cases; waiver denied as moot, 1 case; pending, 3 cases.				

Table 3b: Percentage of Non-Business Chapter 7 Cases in Which a Fee-Waiver Application Was Filed and Granted, October 1, 1994, Through September 30, 1997

	Applications Filed 10/1/94 Through 9/30/97	Applications Granted	Non-Business Chapter 7 Cases Filed 10/1/94 Through 9/30/97
Southern District of Illinois	181 1.7%	150 1.4%	10,758
District of Montana	137 2.2%	67 1.1%	6,142
Eastern District of New York	1,494 2.6%	1,218 2.1%	57,129
Eastern District of Pennsylvania	2,388 8.3%	2,220 7.8%	28,600
Western District of Tennessee	46 0.3%	32 0.2%	13,489
District of Utah	272 1.8%	180 1.2%	15,417
Total	4,518 3.4%	3,867 2.9%	131,535

Table 3c: Case Closing Sample: Applications for Waiver of the Chapter 7 Filing Fee and Their Disposition, October 1, 1994 through March 31, 1997

	Applications Filed 10/1/94 Through 3/31/97	Applications Granted	Applications Denied	Other
Southern District of Illinois	142	111 78.2%	29 20.4%	2 1.4%
District of Montana	103	56 54.4%	45 43.7%	2 1.9%
Eastern District of New York	1,253	1,003 80.0%	239 19.1%	11 0.9%
Eastern District of Pennsylvania	1,954	1,818 93.0%	77 3.9%	59 3.0%
Western District of Tennessee	37	26 70.3%	7 18.9%	4 10.8%
District of Utah	243	161 66.3%	79 32.5%	3 1.2%
Total	3,732	3,175 85.1%	476 12.8%	81 2.2%
Note: The count for the Eastern District of Pennsylvania does not include one case filed during the time period for which we inadvertently did not obtain a case-closing report.				

insufficient/ambiguous information and failed to supplement it. In a few cases, the application was denied because the debtor had a history of repetitive filing or because bankruptcy was an inadequate solution to the problem the debtor was trying to solve (e.g., the only debt to be discharged was non-dischargeable; the debtor was attempting to protect property belonging to a third party).

Payment of the Filing Fee After a Denial of the Application. When the request for a fee waiver was denied, the debtor paid the filing fee approximately 73% of the time. The fee was paid in a lump sum about 44% of the time and in installments 56% of the time.[23]

Hearings. Hearings were scheduled on 300 (8%) of the 3,732 applications in the case-closing sample and actually held on 267 (7%). Most of the hearings (90%) were set sua sponte (although the U.S. trustee had entered comments in some cases), and most were held before the court's initial ruling on the application (92%) and before the section 341 meeting (84%).[24]

Objections by the U.S. Trustees and Case Trustees. Of the 3,732 applications in the case-closing sample, the U.S. trustee offices objected to 26 applications and case trustees objected to only one, although case trustees did uncover assets and pay the filing fee in a few other cases (see note to Table 3a). Hearings were set in 17 of the 27

23. Percentages calculated from the case-closing sample.

24. The number of hearings set/held in each district was as follows: Southern Illinois, 14/12; Montana, 1/1; Eastern Pennsylvania, 204/184; Eastern New York, 36/29; Western Tennessee, 22/20; and Utah, 23/21.

cases in which an objection was filed and held in 15. The application was granted in 12 cases, denied in 9, and withdrawn in 6 cases.

The U.S. trustee office in the Eastern District of Pennsylvania played a more active role than did the U.S. trustee offices in the other pilot districts, providing a statement of review, comment, or objection on every application.[25] That office provided comment, short of objection, in 228 instances in the case-closing sample. The issues raised in the comments are summarized in Table 4.[26] Hearings were set in 72 of the cases and held in 62. The application was granted in 173 cases, denied in 35, withdrawn in 16, vacated in 2 cases that converted to Chapter 13, and not ruled on in 2 cases that were dismissed.

Table 4: Case-Closing Sample: Issues Raised in the U.S. Trustee Comments in the Eastern District of Pennsylvania

	Number of Cases	Percentage of 228 Cases
Fee-Waiver Application Is Ambiguous or Incomplete	47	20.6%
Fee-Waiver Application Is Inconsistent with Schedules	33	14.5%
An Attorney or Non-Attorney Was Paid	36	15.8%
Debtor's Income Is Above the Poverty Line	34	14.9%
Debtor Lists Questionable Expenses or Has Disposable Income/Assets from Which the Fee Could Be Paid	101	44.3%
Schedules and Statements Are Not Attached to the Application	98	43.0%
Other	18	7.9%
Total Cases in Which an Objection Was Filed	228	
Note: Percentages do not sum to 100 because comments sometimes covered more than one issue.		

Modified orders. The initial ruling on 59 applications (2%) was vacated, rescinded, or otherwise modified by the court.[27] Only 2 orders were appealed. In one

25. See section VIII.D for a description of the procedures followed by each U.S. trustee office.

26. Based on our interviews, we know that case trustees filed comments in a few other instances, but the case-closing form did not systematically capture this information.

27. The following are the number of modified rulings in each district: Southern Illinois, 6; Montana, 6; Eastern Pennsylvania, 21; Eastern New York, 15; Western Tennessee, 1; and Utah, 10. The number of cases and type of modification is as follows:

- 36 cases: an order denying the fee waiver was rescinded and an order waiving the fee was entered;
- 2 cases: an order granting the waiver was reissued to place a condition on the waiver;
- 2 cases: order granting the waiver was vacated and a denial order entered;

case, the bankruptcy court decision was affirmed on the merits and in the other, the appeal was dismissed because it was not timely filed.

Schedules and Statements. The petitions in 2,972 (79.6%) of the 3,732 cases in the case-closing sample were filed complete with the mailing matrix, all schedules, and the statement of financial affairs. Another 230 cases (6.2%) were missing just one document, which was most often the mailing matrix (83%). The fee-waiver applications of debtors who were missing no more than one document at filing were slightly more likely to be granted than the applications of debtors missing two or more documents.[28]

In sum, the pilot program did not result in an overwhelming number of *in forma pauperis* filings, although the number of such filings in the Eastern District of Pennsylvania was substantial. Most applicants filed petitions complete with schedules, suggesting that the applicants intended to proceed with their cases to discharge. Although the number of hearings and objections related to the applications was low, it appears that the courts and the U.S. trustee offices, particularly the office in Eastern Pennsylvania, gave the applications careful review.

B. Interdistrict Variation in the Number of Applications

For the three-year period, the percentages of non-business cases involving fee-waiver activity varied across the districts. The percentage of non-business Chapter 7 cases in which an application was filed ranged from 0.3% in the Western District of Tennessee to 8.3% in the Eastern District of Pennsylvania, and the percentage of non-business Chapter 7 cases in which the filing fee was actually waived ranged from 0.2% in the Western District of Tennessee to 7.8% in the Eastern District of Pennsylvania.

The higher rate of applications in the Eastern District of Pennsylvania appears due to the availability of legal services and pro bono representation for Chapter 7 debtors. Eighty-six percent of the applicants in the Eastern District of Pennsylvania were represented by a pro bono or legal services attorney, but only 21% of the applicants across the other districts were so represented (see Table 7, *infra*).

Several explanations for the low rate of applications (0.3%) in the Western District of Tennessee were offered by judges, trustees, and attorneys in the district:

- It is easy to file an installment application. The debtor does not have to make an initial payment at the time of filing and the district has a liberal policy of

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- 9 cases: an order granting the waiver was vacated because the case was converted to Chapter 13;
- 3 cases: an order granting the waiver was vacated when assets were uncovered;
- 2 cases: an order granting the waiver was vacated when the debtor withdrew the application;
- 1 case: an order granting the waiver was vacated when the debtor filed a motion to dismiss; and
- 4 cases: an order was reissued to correct errors in form.

28. 87% versus 83%, chi square, 1 $df = 5.56$, $p < .05$.

extending the time to make payments. (Our analyses did not support this explanation; see section IV.C.)

- There is a lack of pro bono representation for Chapter 7 debtors in the district. Although informed, legal services was not involved in the program. (This explanation is questionable, however, because the court prepared a packet of material about filing bankruptcy and the fee-waiver program for distribution by legal services and the bar association lawyer referral services. In addition, the court has a list of about seven attorneys who are willing to take cases on a pro bono basis, and the Memphis bar and court are taking steps to help establish a formal pro bono panel.)

- The need for the program is minimal in this district because debtors who might qualify for waiver of the filing fee generally file Chapter 13 rather than Chapter 7.

  > Attorneys will file a Chapter 13 case with no money down from the debtor because the attorney's fee and filing fee are paid through the plan. By contrast, in Chapter 7 cases, attorneys generally require payment of the filing fee and a partial retainer before filing the case.
  >
  > Chapter 7 debtors in the district generally have very large credit card or medical debts and a regular income, and they reaffirm everything except the big debt. A number of Chapter 7 cases also evolve from domestic situations, with people wanting to discharge debt after divorce. Chapter 13 debtors are more likely to be the chronically poor (e.g., no regular income except public assistance, ongoing medical problems, financed car, house on the edge of foreclosure). They are filing to maintain the status quo and retain the few assets they have.

- Creditors in the district do not "chase" people who are unemployed or who are judgment proof, so these people, who would be candidates for waiver of the filing fee, do not file bankruptcy.

C. Filing in Chapter 13 Versus Chapter 7

One issue of interest was whether allowing debtors to proceed *in forma pauperis* in Chapter 7 cases but not in Chapter 13 cases would encourage debtors to file in Chapter 7 even when Chapter 13 is more appropriate. The Western District of Tennessee was included in the study in part because it has a high number of Chapter 13 cases relative to Chapter 7 cases and so was a good place to examine the issue. There is no indication that debtors in this district filed in Chapter 7 rather than Chapter 13 merely to obtain benefit of the fee-waiver program. The proportion of consumer cases filed under Chapter 7 remains the same, even if one assumes that all

cases in which a fee-waiver application was filed would have been filed under Chapter 13 in the absence of the pilot program.

From 1994 to 1997, yearly consumer filings in each of the pilot courts rose dramatically, and in all pilot districts but New York the change was due to an increase in both Chapter 7 and Chapter 13 filings (see Table 5). This pattern of change mirrors that found nationwide and complicates determining whether the fee-waiver program prompted a shift of filings from Chapter 13 to Chapter 7, or led to an increase in filings overall.[29]

It is clear, however, that only a small fraction of the increased filings are due to the program. Table 5 shows that the percentage increase in Chapter 7 filings and total consumer filings is basically the same in all pilot courts, including and excluding the fee-waiver cases.

In addition, Table 6 shows for each pilot district the percentage of consumer cases filed under Chapter 7 for FY92 through fiscal 1997. In Montana and Utah, the percentage of consumer cases filed as Chapter 7 continued a downward trend, which began before the onset of the pilot program. In Southern Illinois, the Eastern District of New York, and the Western District of Tennessee, the percentage of consumer cases filed under Chapter 7 and the yearly fluctuations in that percentage were within the range seen in the years immediately before the onset of the pilot. Only in the Eastern District of Pennsylvania did the percentage of consumer cases filed as Chapter 7 seem to increase during the pilot program. But because only a small fraction of the increased filings in this district could be due to the fee-waiver program, the change in the percentage must be only partially, if at all, due to the fee-waiver program.

29. Appendix R shows the number of consumer filings for fiscal 92–fiscal 1997, broken down by chapter, for each pilot district and the nation.

Table 5: Percentage Increase in Consumer Bankruptcy Filings from 1994–1997 for the Nation and the Fee-Waiver Pilot Courts

	Percentage Change in Filings from 1994 Through 1997					
	Including Fee-Waiver Cases			Excluding Fee-Waiver Cases		
	Chpt. 7	Chpt. 13	All Consumer	Chpt. 7	Chpt. 13 (see note)	All Consumer
Nation	42	38	40			
Nation Excluding Pilot Courts				42	38	41
Southern Illinois	54	47	52	53	47	51
Montana	41	58	44	39	58	43
Eastern Pennsylvania	58	38	51	55	38	48
Eastern New York	33	1	27	32	1	26
Western Tennessee	43	29	32	43	29	32
Utah	28	60	42	28	60	42

Note: Numbers in this column are the same as the "Chapter 13 column including fee-waiver cases" since all fee-waiver cases are Chapter 7. This table is based on Table F-2 in the fiscal 94–fiscal 1996 Reports of the Director of the Administrative Office of the U.S. Courts, and a pre-publication copy of Table F-2 for fiscal 1997.

Table 6: Percentage of Consumer Cases Filed Under Chapter 7 in Fee-Waiver Pilot Districts

	FY 92	**FY 93**	**FY 94**	**FY 95**	**FY 96**	**FY 97**
Southern Illinois	73	74	72	70	71	74
Montana	90	87	84	85	81	79
Eastern New York	80	78	75	74	78	82
Eastern Pennsylvania	57	56	54	57	61	63
Western Tennessee	24	22	20	20	22	23
Utah	74	73	70	63	67	56

D. Applications by Inmates

The Southern District of Illinois was selected as a pilot district partly because it has three federal and eleven state correctional institutions and thus would provide a good test of whether the program would increase the number of bankruptcy petitions, including frivolous ones, by inmates. During the first two and a half years of the program, only seven inmates in this district asked that their filing fee be waived. Six inmates received a waiver of the filing fee and six received a general discharge of their debts.

Across all the pilot districts during the first two and a half years of the program, 27 inmates asked that their filing fee be waived; 17 of the requests were granted, 8 were denied,[30] and 2 were not decided before the case was dismissed. Nineteen of the 27 inmates received a discharge.

These prisoner cases presented no extraordinary issues to the courts with the exception of one case in the Southern District of Illinois. See *In re Merritt*, 186 B.R. 924 (Bankr. S.D. Ill. 1995), in which an IFP debtor appealed the bankruptcy court's decision regarding the dischargeability of a penalty imposed for damaging prison property.

E. Applications by Pro Se Petitioners

Another concern about the program was that it would indirectly increase the workload of the clerk's office and judge's staff because the program would bring more pro se debtors into court. Table 7 shows the number of fee-waiver applicants who appeared pro se and the number who were represented by pro bono or paid attorneys during the first two and a half years of the program. Overall, 38% of the fee-waiver applicants appeared pro se. The percentage ranged across the districts from 10.8% in Eastern Pennsylvania to 78.5% in Eastern New York. In New York, legal services attorneys assisted with the preparation of petitions without entering a court appearance in 354 cases—if these debtors are considered to be represented, the percentage of pro se debtors in the district drops to 50.3%.

The percentage of fee-waiver applicants who appeared pro se was higher than the percentage for all cases filed in fiscal 1997 for each district. The percentage of fiscal 1997 applicants appearing pro se and the percentage of all fiscal 1997 Chapter 7 petitioners appearing pro se for each district is the following: Southern Illinois, 12.8% versus 1.2%; Montana, 66.7% versus 7.4%; Eastern New York, 79.6% versus 12.9%; Eastern Pennsylvania, 8.2% versus 2.2%; Western Tennessee, 25% versus 0.8%; and Utah, 60.0% versus 5.4%.[31]

It appears that the percentage of fee-waiver applicants that appear pro se is disproportionately high compared to other cases—more or less so depending on the availability of pro bono legal services and the judicial inclination to waive the fee when an attorney has been paid. Thus, these filings may be disproportionately burdensome to the clerk's office, judges, trustees, and other parties.

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30. In one Utah case, the inmate applicant listed no assets and only one creditor who held a claim for restitution. Because there appeared to be no reason for the debtor to file bankruptcy other than to attempt to discharge the restitution claim that was most likely non-dischargeable under *Kelly v. Robinson*, 479 U.S. 36 (1986), the court denied the application for waiver of the filing fee. *See* Utah Bankruptcy Case 96-24156.

31. For Eastern Pennsylvania, the second percentage is based on fiscal 1997 Chapter 7 cases excluding the fee-waiver cases. In all the other districts, the second percentage is based on all fiscal 1997 Chapter 7 cases; the percentage excluding fee-waiver cases would be somewhat lower.

Table 7: Case-Closing Information: Attorney Representation of the Applicants for a Waiver of the Filing Fee

	S.D. Ill.		D. Mont.		E.D.N.Y.		E.D. Pa.		W.D. Tenn.		D. Utah	
	n	%	*n*	%	*n*	%	*n*	%	*n*	%	*n*	%
1. Pro se	23	16.2	60	58.3	984	78.5	211	10.8	14	37.8	127	52.3
2. Represented by attorney	118	83.1	41	39.8	261	20.8	1,742	89.2	23	62.2	114	46.9
2a. Represented by legal services or pro bono attorney	42	35.6	24	58.5	202	77.4	1,673	96.0	14	60.9	95	83.3
2b. Represented by paid attorney	76	64.4	15	36.6	55	21.1	67	3.8	9	39.1	17	14.9
2c. Could not determine whether attorney was paid or unpaid	0	0.0	2	4.9	4	1.5	2	0.1	0	0.0	2	1.8
3. Unknown whether represented or not	1	0.7	2	1.9	8	0.6	1	0.1	0	0.0	2	0.8
4. Total	142		103		1,253		1,954		37		243	

Note: The percentage of applicants represented by a pro bono or legal services attorney for the Eastern District of New York is an underestimate because legal services attorneys assisted with the preparation of petitions without entering a court appearance in 354 cases. If debtors in these cases are considered to be represented, the pro se rate drops to 50.3% and the represented rate increases to 49.1%. Percentages in rows 1, 2, and 3 are of the totals in row 4. Percentages in rows 2a, 2b, and 2c are of the numbers in row 2.

V. Benefits of the Program to its Users

A. Who Used the Fee-Waiver Program?

Appendix L contains paragraph-length descriptions of 200 applicants that were represented by the Consumer Bankruptcy Assistance Project in Philadelphia. The paragraphs describe the applicant's circumstances at the time of filing bankruptcy, the consequences of filing bankruptcy for the applicant, and why paying the filing fee in installments was not possible.

To provide other information about the users of the program, we compared the type of unsecured debt they listed on Schedule F (and amendments thereto) to that listed by other Chapter 7 petitioners. We made this comparison in the Eastern District of New York and the Eastern District of Pennsylvania because that is where the bulk of the applications were filed. This analysis is best viewed as providing information on debtors' personal circumstances at the time they filed bankruptcy. It does not represent the type of debt that was actually discharged because we did not collect information on reaffirmation agreements or dischargeability actions, nor have we subdivided our sample according to whether a general discharge was received by the petitioner.[32]

The average number of unsecured debts held by IFP petitioners did not differ from the number held by non-IFP petitioners, nor did the number of debts held by petitioners in the Eastern District of Pennsylvania differ from the number held by petitioners in the Eastern District of New York (see Table 8).

As seen in Table 9, however, the amount of total debt did differ between IFP and non-IFP petitioners and between petitioners in the two districts. In both districts, the debt of IFP petitioners was less than that of non-IFP petitioners. Regardless of IFP status, debtors from the Eastern District of New York had greater debt than those from the Eastern District of Pennsylvania.[33]

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32. We fashioned our analysis after an earlier one by Judge Duberstein in the Eastern District of New York. The table in Appendix N shows how he classified the claims in a sample of that district's fiscal 1995 fee-waiver cases. In that sample, approximately half of the total debt in dollars was credit card debt; approximately 90% of the debtors listed one such claim. A substantial number of debtors also listed claims related to health (45%), utility services (37%), goods (33%), and bank loans (31%), but the total debt in dollars for these categories together was only about half of the credit card debt.

33. These conclusions are supported by regression analyses in which the total number of debts and the total amount of debt were predicted by district, IFP status, and the interaction of the two. The model for total number of debts was insignificant ($F_{3,294} = 0.501$, n.s.). The model for total amount of debt was initially tested using all observations. This analysis revealed one observation to be an extreme outlier which had likely biased the results. The outlier was excluded and the model re-tested. With this analysis, the model for total amount of debt was significant ($F_{3,293} = 12.401$, $p < .01$). Both district ($t = 2.15$, $p < .05$) and IFP status ($t = 3.55$, $p < .01$) were significant predictors of total amount of debt. For 22 petitioners, we had nearly complete information but the amount of one or more claims was missing. We re-ran the analysis excluding these petitioners as well as the outlier described above and obtained substantially similar results.

Table 8: Number of Unsecured Debts as Represented on Schedule F for IFP and Non-IFP Debtors in Two Pilot Districts

	IFP Debtors	Non-IFP Debtors	IFP and Non-IFP Debtors Combined
Eastern District of New York			
n	75	76	151
mean (std. dev.)	10.35 (6.97)	10.77 (6.26)	10.56 (6.60)
median	9	9.5	9
Eastern District of Pennsylvania			
n	75	72	147
mean (std. dev.)	10.6 (8.90)	11.74 (6.93)	11.16 (7.98)
median	9	10.5	10
Two Districts Combined			
n	150	148	298
mean (std. dev.)	10.47 (7.96)	11.24 (6.59)	10.86 (7.31)
median	9	10	10

Table 9: Amount of Unsecured Debts as Represented on Schedule F for IFP and Non-IFP Debtors in Two Pilot Districts

	IFP Debtors	Non-IFP Debtors	IFP and Non-IFP Debtors Combined
Eastern District of New York			
n	75	76	151
mean (std. dev.)	22,604 (19,802)	39,705 (35,123)	31,211 (29,730)
median	17,764	26,309	20,529
Eastern District of Pennsylvania			
n	75	72	147
mean (std. dev.)	15,473 (18,492)	33,592 (36,135)	24,348 (29,848)
median	10,051	25,524*	16,825
Two Districts Combined			
n	150	148	298
mean (std. dev.)	19,039 (19,426)	36,731 (35,629)	27,825 (29,936)
median	13,694	25,524	19,245

* After excluding the extreme outlier identified in the regression analyses, this mean and standard deviation drops to 30,598 and 25,878, respectively.

The nature of debt also differed between IFP and non-IFP petitioners and between the two districts (see Tables 10 and 11). Considering first the Eastern District of Pennsylvania, we find substantially more IFP petitioners, compared to non-IFP petitioners, had debts related to basic subsistence: to education, health, utility services, and housing. A large percentage (63%) of the housing-related debts of IFP petitioners were owed to public housing authorities (by comparison, the creditor for only one of the non-IFP housing debts was a public housing authority). Fewer IFP petitioners had unsecured debts stemming from bank credit cards, major department store credit cards, individual store charges and credit cards, and bank loans. Only 22% of the total unsecured debt held by IFP debtors was credit card

debt; a greater percentage (27%) of the debt was health-related. The analogous percentages for non-IFP debtors are as follows: credit card, 48%; and health, 11%.

In the Eastern District of New York most of the petitioners—both IFP and non-IFP—had bank credit card debt, which accounted for almost two-thirds of the total debt. Compared to non-IFP petitioners, somewhat more IFP petitioners had debt related to health and utility services, but the total debt for these categories was only a small fraction of the credit card debt. In addition, four IFP petitioners, but no non-IFP petitioners, had debt stemming from Social Security Administration or welfare overpayments.

The distinction between credit card debt and debt related to basic subsistence may of course be illusory. Debtors may have high credit card debt because they used their cards to cover basic needs. Still, whether debtors possess lines of credit has an implication for how they could meet the filing fee obligation. In commenting on the program, the Executive Office for U.S. Trustees noted that to the extent fee-waiver applicants are seeking to discharge credit card debt, they evidently possess sufficient assets to secure lines of credit and should be able to pay the requisite filing fee in installments.[34] This, of course, assumes credit card eligibility equates to financial competence (a current point of debate).

B. Did the Fee-Waiver Program Increase Access to the Bankruptcy Courts?

In this section we present information about whether the program provided access to the courts to debtors who would otherwise be unable to file.

Applicant Survey. Responses to two questions in the applicant survey indicate that the fee-waiver program may make the bankruptcy courts more accessible to low-income debtors. Almost 11% of the successful applicants said they would not have filed bankruptcy had there been no waiver program, and a little less than a third said they would have filed anyway, but at a later date. Table 12 shows a somewhat different pattern for unsuccessful applicants; a majority of them (71%) said they would have filed their cases at the same time as they did under the program.[35] Table 13 shows that among those who received a waiver, 10% said they would not have continued with their case absent the waiver. Half said they would have continued, but a third did not know.

34. Letter from Joseph Patchan, director, Executive Office for U.S. Trustees, to Elizabeth C. Wiggins, Federal Judicial Center (December 19, 1997) (on file with the Federal Judicial Center, Research Division).

35. Chi-square with three degrees of freedom = 63.2, $p < .01$.

Table 12: Applicant Survey
If you could not have applied for waiver of the filing fee would you have filed your bankruptcy case anyway? (Please check one.)

	Waiver Granted		Waiver Denied	
	n	%	*n*	%
Yes, I would have filed my case at the same time that I did.	300	31.5	71	71.0
Yes, but I would have filed my case at a later date.	312	32.7	18	18.0
No	102	10.7	3	3.0
I don't know	240	25.2	8	8.0
Missing or ambiguous response	14		1	
Total	968		101	

Note: The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.

Table 13: Applicant Survey
Answer this question only if your filing fee was waived: Would you have continued with your bankruptcy case if the court had not waived the filing fee? (Please check one.)

	n	%
Yes	532	55.0
No	100	10.3
I don't know	315	32.5
Missing or ambiguous response	21	
Total	968	

Task Force Reports. The Committee on Bankruptcy Issues of the Third Circuit Task Force on Equal Treatment in the Courts found a higher single-female filing rate and markedly fewer joint filings for IFP cases than non-IFP cases in the Eastern District of Pennsylvania. That committee concluded that the fee-waiver program may have enhanced access to the bankruptcy system for indigent single women.[36] A working committee of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts reached the same basic conclusion in its draft report to the Second Circuit Task Force.[37]

36. Report of the Committee on Bankruptcy Issues to the Third Circuit Task Force on Equal Treatment in the Courts 192–211 (available from the Third Circuit Office of the Circuit Executive). See Appendix M for the relevant part of the committee report.

37. Draft Report of the Working Committees to the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts, Appendix A to the preliminary draft of the Task Force's report (June 5, 1997). See Appendix M to this report for the relevant part of that report.

C. Did the Users of the Program Obtain Discharges of Their Debts?

One indication of the program's benefit is whether the debts of its users are discharged. One concern is that the program will encourage people to file merely to benefit from the automatic stay and with no intention of following through to a discharge. (To obtain a discharge, a debtor must file all required documents, appear for examination under oath, cooperate fully with the case trustee, obey all lawful orders of the court, and sometimes meet other obligations.)

As seen in Table 14, debtors whose fee-waiver applications were granted were more likely to obtain a discharge compared to debtors whose applications were denied (95.4% versus 72.4%).[38] This pattern was found for each district separately, except for the Southern District of Illinois, where the rates for the two groups did not significantly differ.[39] It was most pronounced in the Eastern District of Pennsylvania.

Overall and in each district, the discharge rate for debtors whose fee was waived is similar to that for all other Chapter 7 debtors in the pilot districts (95.4% versus 95.9%).[40] Where we were able to obtain relevant information, we found estimates of the discharge rates for cases in which an installment application was filed generally to be lower than the discharge rates for cases in which the fee was waived.[41]

Across the pilot districts, reaffirmation agreements were filed in between 1.4% and 25% of cases in which the filing fee was waived (Southern Illinois, 24%; Montana, 12.3%; Eastern Pennsylvania, 1.4%; Eastern New York, 4.5%; Western Tennessee, 25%; and Utah, 15.5%).[42]

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38. Chi square, 1 $df = 299.66$, $p < .01$.

39. The discharge rates for debtors whose fee-waiver applications were granted and for those whose applications were denied in each of the pilot districts were: Southern Illinois, 95.5/89.3; Montana, 100/84.4; Eastern Pennsylvania, 93.9/54.8; Eastern New York, 97.7/74.8; Western Tennessee, 96.2/71.4; and Utah, 94.9/69.3.

40. Discharge rates for debtors whose fees were waived versus that for all other Chapter 7 debtors in each district were: Southern Illinois: 95.5/98.4; Montana 100/97.2; Eastern Pennsylvania: 93.9/95.4; Eastern New York: 97.8/97.0; Western Tennessee, 96.1/93.8; and Utah, 94.9/93.2.

41. Estimates of the discharge rates for installment cases were Southern Illinois, 86.6% for fiscal 1995–fiscal 1997 combined; Montana, 83.9% for fiscal 1995, fiscal 1996, and the first half of fiscal 1997 combined; Eastern New York: 82.3% for fiscal 1996; Western Tennessee: 80.8% for fiscal 1995 and fiscal 1996 combined; and Utah 81% for fiscal 1995–1997 combined. In each of these districts, the percentage of installment cases in which the debtor received a discharge is statistically different from the percentage of fee-waiver cases in which the debtor received a discharge. The information was unavailable in the Eastern District of Pennsylvania because of the manner in which the district's electronic database had been archived.

42. In Eastern Pennsylvania and Eastern New York this percentage is based on a 20% sample of cases in which the fee was waived. In all other districts, the percentage is based on all such cases filed during a specified time period (Southern Illinois, all years of program; Montana, 10/1/94–6/30/97; Western Tennessee, all years of program; Utah, first 2.5 years of program).

Table 14: Case-Closing Sample: Disposition Cases in Which a Fee-Waiver Application Was Filed

	Fee-waiver application was granted	Fee-waiver application was denied	Total
Debtor obtained a discharge	2,979 (95.4%)	331 (72.4%)	3,310 (92.4%)
Debtor did not obtain discharge	145 (4.6%)	126 (27.6%)	271 (7.6%)
Note: This table does not include pending cases, cases converted to Chapter 13, or cases in which the disposition of the application fell into the other category.			

D. What Were the Less Tangible Benefits of Filing Bankruptcy for the Users of the Program?

Responses to four questions in the applicant survey suggest some of the less tangible benefits filing bankruptcy may have for users of the fee-waiver program. Table 15 shows the responses to a question in which applicants were asked to check every statement that described their circumstances at the time they decided to file bankruptcy. Of the respondents whose fees were waived, about three-quarters said collection agencies were calling and writing their household attempting to collect money; over half said they or their spouse were very worried or emotionally upset because of debt problems; and almost half of the applicants said they had recently lost their job or become unable to work for other reasons. About a third said they were behind in paying a utility bill and the company had shut off or threatened to shut off service, and at least 20% said they were behind in paying rent and that they or someone they support had recently had serious medical problems and big medical bills.[43]

Compared to debtors whose fee-waiver request was denied, debtors whose fee waiver was granted were more likely to report they were trying to obtain public housing,[44] behind in paying rent,[45] facing eviction,[46] and behind in paying a utility bill,[47] and less likely to report that someone to whom they owed money was taking their wages or had threatened to take their wages.[48]

43. The pattern of responses differed somewhat between the pilot districts. Fewer respondents in the Southern District of Illinois, the District of Montana, and the Western District of Tennessee said they were behind in paying their rent, and a much higher percentage of respondents from the District of Montana and Utah reported that that they or someone they support had recently had serious medical problems and big medical bills.

44. $z = 1.57$, $p < .06$ (one-tailed).

45. $z = 2.18$, $p < .05$ (one-tailed).

46. $z = 1.71$, $p < .05$ (one-tailed).

47. $z = 1.51$, $p < .07$ (one-tailed).

48. $z = -2.60$, $p < .01$ (two-tailed).

Table 15: Applicant Survey
Please check every statement below that describes your circumstances at the time you decided to file bankruptcy (check all that apply).

	Fee Waiver Was Granted		Fee Waiver Was Denied	
	n	%	*n*	%
I was trying to obtain public housing.	68	7.1	3	3.0
I was behind in paying rent for where I live.	225	23.4	14	13.9
I was facing eviction from where I live because I was behind in paying rent.	136	14.1	8	8.0
I was behind in making mortgage payments on my home.	86	8.9	8	8.0
I was facing foreclosure on the mortgage of my home.	67	7.0	4	4.0
I had recently lost my job or become unable to work for other reasons.	450	46.8	44	43.6
My spouse had lost his or her job or become unable to work for other reasons.	83	8.6	14	13.9
I was behind in paying a utility bill (like gas, electricity, oil, or water), and the company had shut off or was threatening to shut off the utility.	339	35.2	28	27.7
I, my spouse, or someone else I support was having or recently had had serious medical problems.	262	27.2	33	32.7
I, my spouse, or someone else I support had big medical bills.	190	19.8	24	23.8
I had lost or was in danger of losing my driver's license due to a debt arising from an accident.	28	2.9	1	1.0
Collection agencies or other debt collectors were calling my household, attempting to collect money.	745	77.4	77	76.2
Collection agencies or other debt collectors were writing my household, attempting to collect money (that is, they had been sending letters other than the regular bills).	733	76.2	73	72.3
Someone to whom I owed money was taking my wages or had threatened to take my wages.	136	14.1	24	23.8
I or my spouse was very worried or emotionally upset because of my debt problems.	583	60.6	63	62.4
There were other circumstances leading to financial difficulty. (see note)	407	42.3	49	48.5
Total (# of the 1,063 respondents who answered this question)	962		101	

Note: Percentages are column percentages. The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table. Six respondents who provided disposition information did not answer this question. Other circumstances that were described include: separation and divorce, death of a spouse, birth of a child, lack of child support, being a victim of a crime, being imprisoned, being a student and having student loans, being a welfare recipient, and spending too much on credit cards.

Table 16 shows that debtors whose fees were waived were more likely to report that filing bankruptcy made it easier to keep or get housing (29.4% compared to 13.8% for those whose fee-waiver request was denied).[49] They were also more likely to say that filing bankruptcy reduced the tension or stress in their household (85.6% versus 65.3%) (see Table 18).[50] This pattern held for most districts, but in Utah, those whose applications were denied more frequently said filing bankruptcy had increased household stress (47.1% versus 24.5% overall) and less frequently said it reduced stress (29.4% versus 65.3% overall). And in Eastern Pennsylvania, among the unsuccessful applicants, stress was increased by filing 31.6% of the time (versus 24.5% overall) and decreased only 52.6% of the time (versus 65.3% overall).

Most applicants, whether their fee was waived or not, said filing bankruptcy had no effect on their employment situation (see Table 17). Of those whose fee was waived, only about 8.7% said filing bankruptcy made it easier to work at their job or to obtain a job, and only about 3.8% said filing bankruptcy made it harder.

Table 16: Applicant Survey
Did filing bankruptcy make it easier or harder for you to keep or get housing? (Please check one.)

	Waiver Granted		Waiver Denied	
	n	%	*n*	%
Filing bankruptcy made it easier for me to keep or get housing.	255	29.4	13	13.8
Filing bankruptcy had no effect on my housing situation.	544	62.7	67	71.3
Filing bankruptcy made it harder for me to keep or get housing.	69	8.0	14	14.9
Missing or ambiguous response	100		7	
Total	968		101	

Note: The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.

49. Chi square with 2 *df* = 13.09, $p < .01$. This effect was most pronounced in the Eastern District of Pennsylvania where 35.9% of successful applicants said filing bankruptcy made it easier for them to keep or get housing and 9.4% said it was harder.

50. Chi square with 2 *df* = 32.03, $p < .01$.

Table 17: Applicant Survey
Did filing bankruptcy make it easier or harder for you to work at your job or to obtain a job? (Please check one.)

	Waiver Granted		Waiver Denied	
	n	%	*n*	%
Filing bankruptcy made it easier for me to work at my job or to obtain a job.	73	8.7	8	8.5
Filing bankruptcy had no effect on my employment situation.	736	87.5	79	84.0
Filing bankruptcy made it harder for me to work at my job or to obtain a job.	32	3.8	7	7.5
Missing or ambiguous response	127		7	
Total	968		101	
Note: The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.				

Table 18: Applicant Survey
Did filing bankruptcy reduce or increase the tension or stress in your household? (Please check one.)

	Waiver Granted		Waiver Denied	
	n	%	*n*	%
Filing bankruptcy reduced the tension or stress in my household.	805	85.6	64	65.3
Filing bankruptcy had no effect on the tension or stress in my household.	62	6.6	10	10.2
Filing bankruptcy increased the tension or stress in my household.	74	7.9	24	24.5
Missing or ambiguous response	27		3	
Total	968		101	
Note: The responses of 74 respondents who provided no or ambiguous information about the disposition of their fee-waiver applications are excluded from the table.				

In sum, it does appear that many IFP debtors benefit from filing bankruptcy. However, some of them might benefit more from a lesser remedy (e.g., referral to consumer credit counseling or social services to work-out agreements with quasi-public utility services or public housing). Such remedies would not restrict the debtors' ability to obtain bankruptcy relief when they might need it more. For example, we know that at least 89 of the Eastern Pennsylvania applicants were assisted by tenant organizations and presumably were filing bankruptcy to discharge public housing debt so they could keep or obtain such housing. The CBAP summaries also indicate some of its clients filed for this purpose. A change in non-

bankruptcy law or policy might provide these very poor debtors more straightforward solutions to their problems.

VI. Forecasting the Number of Applications Under a National Program

The cost of a national program will be driven almost exclusively by the number of applications that are filed and granted. One way to forecast the number of applications that would be filed and granted if the program were implemented nationwide is to multiply the across-district percentages presented in Table 3b by the number of non-business cases filed within the last year. Using this method, one would predict that had the program been operative nationally, an application for waiver of the filing fee would have been filed in 31,490 of the 926,183 non-business cases filed in fiscal 1997, and the filing fee would have actually been waived in 26,859 of the cases.[51]

The above approach is justified only if one assumes that (1) the factors influencing the number of applications to be filed and granted are represented fairly by the pilot districts; (2) the number of non-business Chapter 7 cases filed last year represents the number to be filed next year; and (3) a national program would employ procedures and an eligibility standard similar to that used in the pilot districts. Below we explore the possible effect of a national program if these assumptions do not hold true.

A. Effect of an Increase in the Number of Non-Business Chapter 7 Cases

Any forecast regarding the cost of the program will have to make assumptions about the expected increase/decrease in the number of non-business Chapter 7 filings. The number of non-business Chapter 7 cases rose by 26% from fiscal 1996 to fiscal 1997 and the Administrative Office expects filings to rise through FY98 and then remain steady in 1999.[52]

B. Effect of a Change in the Eligibility Standard

A change in the eligibility standard can greatly affect the number of applications that are granted.[53] Although a totality of the circumstances standard was followed in the pilot districts during the pilot study, we can estimate the impact of alternative standards by assessing how many debtors in the pilot districts would qualify for waiver of the filing fee if those alternative standards were in place nationally.

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51. Table F-2 of the *Judicial Business of the Courts: 1996 Report of the Director of the Administrative Office of the United States Courts* lists the number of non-business Chapter 7 filings for fiscal 1996 as 731,363. A pre-publication copy of the same table for fiscal 1997 lists the number of non-business Chapter 7 cases as 926,183.

52. Memorandum from John R. Golmant through Steven J. Schlesinger to Gregory D. Cummings, chief, Budget Division (June 30, 1996) (bankruptcy forecasts to fiscal 1999).

53. For example, in August 1995, the Southern District of Illinois court determined that payment to an attorney did not bar waiver of the filing fee, reversing the standard the court had applied during the first year and a half of the program. During the week following the change, the number of applications for waiver equaled the number made the previous nine months.

Based on responses to the 1993 FJC survey of bankruptcy judges[54] and interviews of persons in the pilot courts, we decided to examine the following alternative standards: (1) Totality of the Circumstances Standard But No Waiver if an Attorney or Other Entity Has Been Paid in Connection with the Case; (2) Income Below the Poverty Line; and (3) Qualification for Legal Services**.**

Totality of the Circumstances Standard But No Waiver if an Attorney or Other Entity Has Been Paid in Connection with the Case

Fed. R. Bankr. P. 1006 prohibits payment to an attorney or any person rendering service in connection with a bankruptcy case before the filing fee has been paid to the court in full. Thus, a debtor may not pay the fee in installments if he or she has paid an attorney. In the pilot districts, the filing fee was waived for some people who would not qualify to pay the fee in installments because they had paid an attorney or other entity in connection with the case.

Payments to Attorneys. Of the 3,732 cases in the case-closing sample, an application for waiver of the fee was filed in 239 cases in which an attorney had been paid and the application was granted in 128 of those cases. As seen below, applications were filed by paid counsel in every district, with varying rates of success (from 0% granted in Montana to 70% granted in Southern Illinois).

- **Southern Illinois:** 76 applications [53 (70%) granted, 22 denied, and 1 withdrawn] (53 of the applications were filed by one attorney).

- **Montana:** 15 applications [14 denied and 1 withdrawn].

- **New York**: 55 applications [28 (51%) granted, 25 denied, 1 withdrawn, and 1 vacated when assets were uncovered].

- **Eastern Pennsylvania:** 67 applications [40 (60%) granted, 18 denied, 6 withdrawn, 1 not ruled on before case was dismissed, 2 vacated when case converted to Chapter 13].

- **Western Tennessee:** 9 applications [3 (33%) granted, 4 denied, 1 withdrawn, and 1 denied as moot].

- **Utah:** 17 cases [4 (24%) granted, 13 denied; all those granted were early in the program].

Applications were filed by paid counsel in about equal numbers across the fiscal years, but were more likely to be granted in fiscal 1996 and the first half of fiscal 1997.

54. See note 11, *supra*.

- **Fiscal 1995:** 99 applications [35 (35%) granted; 58 denied, 4 withdrawn, 1 denied as moot, and 1 not ruled on].
- **Fiscal 1996:** 88 applications [55 (63%) granted; 25 denied, 5 withdrawn, 2 vacated when case converted to Chapter 13, 1 vacated when assets were uncovered].
- **First half of fiscal 1997**: 52 applications [38 (73%) granted, 13 denied, and 1 withdrawn].

If none of these applications had been filed[55] and none of the waivers had been granted, the percentage of Chapter 7 cases in which an application was filed and a waiver was granted would drop to 3.2% (from 3.4%) and 2.8% (from 2.9%), respectively. Based on these percentages, one would predict that had the program been operative nationally, applications would have been filed in 29,638 (instead of 31,490) of the 926,183 non-business cases filed in fiscal 1997, and granted in 25,933 (instead of 26,859).

Payments to Non-Attorneys. Of the 3,732 cases in the case-closing sample, an application for waiver of the fee was filed in 224 cases in which a non-attorney had been paid and the application was granted in 165 cases. Most of these cases were filed in the Long Island offices of the Eastern District of New York by petition preparers, with a notable number also being filed by petition preparers in the District of Utah.[56] Most of the New York applications (80%) but only about a third of those in Utah (38%) were granted. Not surprisingly, as shown below, the number of such applications appears to be declining because action has been taken against petition preparers who have filed fee-waiver applications in both Utah and Eastern New York.

- **Fiscal 1995:** 115 applications [82 (71%) granted; 33 denied].
- **Fiscal 1996:** 84 applications [67 (80%) granted; 16 denied, 1 vacated when assets were uncovered].
- **First half of fiscal 1997**: 25 applications [16 (64%) granted, 9 denied].

It is unclear how many of these applications would have been filed if waiver of the fee were prohibited by statute or rule, but it is likely that some would have been filed due to the debtors' ignorance of the standard or petition preparers' abuse of the program. Assuming all of the applications would have been filed (i.e., the worst-case scenario) and none of the waivers would have been granted, the percentage of Chapter 7 cases in which an application was filed would remain the same and the percentage of cases in which a waiver was granted would drop to 2.8% from 2.9%.

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55. Presumably few retained attorneys would file fee-waiver applications if the prohibition against waivers when an attorney had been paid were adopted by statute or rule.

56. In New York, applications were filed in 191 cases in which a non-attorney had been paid. They were granted in 152 cases, denied in 38, and the waiver was vacated when assets were uncovered in 1 case. In Utah, applications were filed in 21 such cases and granted in 8. The number filed and granted for the other districts are: Southern Illinois, 1/0; Montana, 5/0; Eastern Pennsylvania, 6/5; and Western Tennessee, 0/0.

Based on these percentages, one would predict that had the program been operative nationally, applications would have been filed in 31,490 of the 926,183 non-business cases filed in fiscal 1997, and granted in 25,933 (instead of 26,859).

Payments to Attorneys and Non-Attorneys. Assuming none of the applications would have been filed when an attorney had been paid and none of the waivers would have been granted when either an attorney or non-attorney had been paid, the percentage of Chapter 7 cases in which an application was filed and a waiver was granted would drop to 3.2% and 2.7%. Based on these percentages, one would predict that had the program been operative nationally, applications would have been filed in 29,638 of the 926,183 non-business cases filed in fiscal 1997, and granted in 25,007.

Income Below the Poverty Line

The most commonly suggested eligibility standard is income below the federal poverty line. Recent estimates suggest that approximately 32.4% of Chapter 7 bankruptcy debtors have incomes below the federal poverty line.[57] Based on this percentage, approximately 300,083 of the 926,183 individuals who filed under Chapter 7 in fiscal 1997 would fall below the poverty guideline, and approximately a third of the non-business Chapter 7 filing fees ($52,514,525 of $162,082,025) would have been paid by those individuals. If the courts had granted a waiver to all such persons (i.e., there was a "bright-line" standard that said all were qualified and a relatively easy way to determine those beneath the line) the number of fee waivers would have resulted in a significant loss of revenue.

Not all those eligible under this standard requested a waiver of the filing fee in the pilot program (e.g., only 8.3% of consumer Chapter 7 debtors requested a fee waiver in the Eastern District of Pennsylvania but 38.5% are thought to have income below the poverty line).[58] Thus, if the courts waived the filing fee for all debtors with income below the poverty line, whether or not the debtor requested a waiver, the number of waivers would likely increase greatly.

Some judges in the pilot courts used the poverty guidelines as informal criteria to guide their decisions. This suggests that even if the poverty guidelines are not published as the eligibility standard, the number of waivers may increase as the program becomes better known and determinations become more routine. This is especially true if waivers are allowed when attorneys are paid because attorneys

57. Teresa A. Sullivan et al., Consumer Bankruptcy Project Phase Two, Special Computer Run (12/9/97) (on file at the Federal Judicial Center, Research Division). This estimate is based on samples drawn from the Eastern District of Pennsylvania, the Northern District of Illinois, the Western District of Texas, the Middle District of Tennessee, and the Central District of California. Earlier work put the figure at about 25%. Teresa A. Sullivan et al., As We Forgive Our Debtors: Bankruptcy And Consumer Credit In America 63–83 (1989); Philip Shuchman, *The Average Bankrupt: A Description and Analysis of 753 Bankruptcy Filings in Nine States*, 88 Com. L.J. 288, 289–91 (1983).

58. See Table 3b, *supra*, and Sullivan et al. (12/9/97), *supra* note 57.

would nearly always suggest nonpayment of the fee to clients who qualified. Thus, the percentage of debtors falling below the poverty line can be taken as an estimate of the upper limit of the percentage of debtors that would receive a waiver.[59]

Qualification for Legal Services

In some state courts, people are automatically eligible to proceed *in forma pauperis* if they qualify for legal services. Under these systems, the attorney certifies to the need for *in forma pauperis* status and attaches supporting financial information.

Use of such a system could decrease the amount of time needed to review fee-waiver applications, at least in some districts. However, it is feasible only to the extent legal services and organized pro bono groups adopt eligibility standards similar to that of the court. Moreover, the debtors' attorneys are advocates and arguably may not be the best judges of how to use the court's limited resources.

The pilot program experience indicates that *in forma pauperis* standards used by the courts and legal services are similar, but not identical. Across all years, only 38 of 1,674 applications (2.3%) filed by legal services or pro bono attorneys in the Eastern District of Pennsylvania (where the pro bono bar is quite organized) were denied.[60] However, the percentage denied was somewhat higher in the first two years of the program (2.6%) compared to the last year (1.4%), although not significantly so, suggesting that legal services and CBAP may have adjusted their internal standards for requesting a waiver to respond to the court's standard.

One way to approximate the number of applications that would be filed under this standard is to assume an application would be filed in every case in which the debtor was represented by a legal services or pro bono attorney. In our fall 1997 district survey, we asked clerks to estimate the percentage of the Chapter 7 debtors in their district who received free legal services, providing them the response categories shown in Table 19.

59. Presumably, some of the debtors eligible under this standard would have paid an attorney. If for this reason they are ineligible for a waiver, the percentage would be lower. On the other hand, any set standard would include a provision to allow the court to waive the fee for good cause shown even if the standard were not met.

60. The percentages of denials for the other districts, in ascending order, are as follows: the Western District of Tennessee, 6.7%; the Southern District of Illinois, 7.1%; the Eastern District of New York, 7.4%; the District of Montana, 12.5%; and the District of Utah, 16.8%.

Table 19: District Survey
Approximately what portion of the Chapter 7 debtors in your district receive free legal services?

1. Response	2. Number of Districts	3. Aggregate FY97 Filings	4. Aggregate FY 97 Filings, Distributing Filings for "Can't Say" Districts (see note)	5. Rate of Applications (see note)	6. Number of Applications
Virtually none	39	404,240	533,891	.5%	2,670
1–5%	26	236,838	312,796	3%	9,384
6–10%	3	45,781	60,464	8%	4,837
11–20%	3	14,408	19,029	15.5%	2,950
Over 20%	0	0	0		
Can't say	23	224,916			
Total	94	926,183	926,183		19,841 (2.1% of total filings)

Note: The responses of the pilot districts were as follows: Southern Illinois, Montana, and Western Tennessee, virtually none; Utah, 1–5%; Eastern New York, 6–10%; and Eastern Pennsylvania, 11–20%. In column 4, the filings for "can't say" districts were distributed across the other categories proportionate to their size. We assumed the application rate to be .5% for the "virtually none" category and to be the mid-point of the response option for the other categories (column 5).

Columns 1–3 of Table 19 show the number of districts providing each response, along with the districts' aggregate fiscal 1997 filings. To estimate the number of applications, we redistributed the Chapter 7 filings for districts who were unable to say what portion of their Chapter 7 debtors received free legal service across the other response categories proportionately (column 4), and assumed the application rate to be .5% for the "virtually none" category and to be the mid-point of the response option for the other categories (column 5). Based on these assumptions, it appears that applications would be filed (and presumably granted) in 2.1% (19,841) of all Chapter 7 cases.

We know from the pilot courts that only 55% of all fee-waiver applications were filed by debtors represented by pro bono or legal services attorneys (see Table 7), suggesting that the current estimate might better reflect the national number of applications if it were adjusted upward to account for waivers granted to pro se debtors. With this adjustment, the number of applications would increase by 16,234

to 36,075, or to 3.9% of all filings.[61] In the pilot courts, approximately 77.4% of applications filed by pro se debtors were granted. Applying this percentage, we would expect 12,565 of the additional 16,234 applications to be granted.

Thus, if all debtors who receive free legal service file an application that is granted, and the number of applications filed by and granted for pro se debtors is similar to that found in the pilot courts, the number of applications that would have been filed nationwide in fiscal 1997 is 36,075 (instead of 31,490, or 3.9% of Chapter 7 cases instead of 3.4%), and the number of actual waivers is 32,406 (instead of 26,859, or 3.5% instead of 2.9%).

C. District-Specific Characteristics that May Affect the Number of Applications

Procedures for Installment Applications. One explanation given for the low level of fee-waiver applications in the Western District of Tennessee is that a Chapter 7 debtor does not have to make an initial payment at the time an application to pay the fee in installments is filed. Our data do not support this explanation. This is the practice in Southern Illinois where the rate of applications is low (1.7% of non-business Chapter 7 cases), but it is also the practice in Eastern Pennsylvania where the rate is high (8.3% of non-business Chapter 7 cases). This suggests that not requiring a first installment payment when petitioners choose to pay in installments would not necessarily depress applications for waiver of the fee.

Central District of California. Before the start-up of the fee-waiver program, the Central District of California expressed an interest in being selected as a pilot district for two primary reasons: (1) because that district's filings account for approximately 10% of all filings nationwide, the effect of a fee-waiver program depends heavily on what happens there; and (2) the effect of the program in the Central District of California might differ from other districts because of the prevalence of non-attorney petition mills. More specifically, it has been argued that as many as 50% of the consumer petitions in the district are filed pro se, with a substantial portion of them prepared by non-attorney petition mills on behalf of tenants to delay eviction (i.e., are "unlawful detainer" cases), and that a fee-waiver program might exacerbate this problem.[62]

The Bankruptcy Committee declined to include the Central District of California in the pilot program for two reasons: first, Central California may not be representative of what happens in other parts of the country; and second, to include it in the study would have been prohibitively expensive, given the legislative assumption that the cost of the pilot program and study would be limited to $1.5 million. In implementing and studying the program, however, the subcommittee and Center staff considered the district's views about *in forma pauperis*, as expressed

61. Total applications = 19,841/.55.

62. Testimony of Bankruptcy Judge Lisa Hill Fenning before the Advisory Committee on Bankruptcy Rules (February 28, 1992). *See also* Sommer, *supra* note 12.

in an April 1994 document from the court,[63] and met with representatives from the bankruptcy court, the U.S. trustee's office, and the U.S. attorney's office in August of 1997.[64]

At that meeting, the district representatives reported a significant problem with "mills" filing bankruptcy petitions to temporarily stay an eviction or foreclosure, with no intention of the debtor appearing at the section 341 meeting or even filing schedules. The apparent goal of such filings is to obtain the benefit of the automatic stay for a month or two. The mills sometimes try to save on filing fees by combining one or more names as "aka's" (even though there is no relationship between the different people named in the caption), or they transfer numerous properties into the name of one person whom they have paid to file bankruptcy. Given the mills' sophistication, it was thought that the mills would attempt to avoid paying the filing fee if a national program were implemented.

The district representatives strongly urged that any national fee-waiver program be sufficiently flexible that bankruptcy courts could address local problems. They believe it would be essential for the judges in their district to have clear authority to review and rule on fee-waiver applications before the automatic stay went into effect and to deny the waiver if a case was being filed for an improper purpose.[65] This type

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63. In Forma Pauperis: Key Issues for Developing and Implementing Standards, United States Bankruptcy Court for the Central District of California (April 1994).

64. Interview of Hon. Geraldine Mund (chief bankruptcy judge), Hon. Vincent P. Zurzolo (bankruptcy judge), Mr. Jon D. Cerretto (bankruptcy clerk of court), Ms. Marcy Tiffany (then U.S. trustee), and Ms. Maureen A. Tighe (assistant U.S. attorney, deputy chief, major frauds section) by Hon. Donald E. Walter (chair, IFP subcommittee), Mr. Francis F. Szczebak (Bankruptcy Judges Division, Administrative Office of the U.S. Courts), and Ms. Elizabeth C. Wiggins (Research Division, Federal Judicial Center) (interview notes on file at the Federal Judicial Center, Research Center). In addition, see the follow-up letter sent to Elizabeth C. Wiggins by Majorie Lakin Erickson (Assistant U.S. Trustee) and Maureen A. Tighe (on file at the Center).

65. The pilot courts set some precedent for basing the IFP determination partially on the merits of the case in extraordinary circumstances. See *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Penn. 1997) (the frivolous nature of debtor's bankruptcy filing fee warranted denial of fee-waiver application, although merit generally is not an issue in determining a fee-waiver request). This case held that even if the debtor qualified economically for *in forma pauperis* relief, her application for waiver of the Chapter 7 filing fee pursuant to the pilot program would be denied on grounds that the bankruptcy filing was frivolous within the meaning of 28 U.S.C. § 1915(e)(2)(B)(i). The primary objective of debtor's bankruptcy was to protect property belonging to nondebtor family members from being sold at a sheriff's sale, but bankruptcy was an ineffective remedy for this problem. Under Pennsylvania law, however, the debtor could defeat the sheriff's sale by spending $30 to file a property claim and claim of exemptions. Under the circumstances, a reasonable person who had been informed of the options would not have filed bankruptcy if she had to pay the $175 fee. See also *In re Merritt*, 186 B.R. 924 (Bankr. S.D. Ill. 1995). In this case, the court denied a request to waive the fee and costs for filing an appeal of a dischargeability judgment by a debtor whose bankruptcy filing fee had been waived. The court concluded that legal merit must be demonstrated in order to secure such relief and that the standard to determine legal merit was more rigorous when economic rather than liberty interests are at stake. At issue was a $47.25 dischargeability judgment, which the court found de minimis when compared to the $105 appeal fee and the costs of the transcript. The court noted in its ruling that legal merit was not an issue in determining the fee-waiver request for filing a bankruptcy petition itself

of review would necessitate the debtor filing complete schedules and statements along with the petition and fee-waiver application.[66] The district representatives think existing statutory authority under 11 U.S.C. § 707(a) and (b) for dismissing a case for cause or substantial abuse was inadequate for dealing with the unlawful detainer cases; once the automatic stay is in effect, the petitioners in these cases have gotten what they want and do not care whether the case is dismissed.

A statutory or rule change probably would be needed to ensure that judges had the desired authority. Under the current code and rules, the clerk would arguably be obligated to accept a petition accompanied by a fee-waiver application (but with or without the schedules and statements) for filing before the application was determined, thus setting in motion the automatic stay. Under section 362 of the Bankruptcy Code, the filing of a petition under Chapter 7 automatically stays (i.e., stays without any court action by operation of law) most actions against the debtor or the debtor's property. And Fed. R. Bankr. P. 5005(a)(1) was amended in 1993 to eliminate any discretion by the clerk in accepting the filing of a petition.[67] Moreover, Fed. R. Bankr. P. 1007 generally permits a Chapter 7 debtor to file required schedules and statements within 15 days of the petition, if the petition is accompanied by a list of the names and addresses of the debtor's creditors.

Currently, the judges in the Central District of California review and determine applications to pay the filing fee in installments before providing a debtor with documentation that an automatic stay is in effect.[68] When a petition is filed with an installment application, the clerk's office commences the case but does not give the debtor a case number until the installment application is granted or the fee is paid. Staff from the clerk's office accompany the debtor to a same-day hearing on the application. If the application is denied and the debtor does not pay the filing fee in full, the cover sheet is marked to indicate that the stay is not in effect. This procedure has kept the percentage of Chapter 7 cases with an installment application to about .4%. The court thinks a similar procedure with fee-waiver applications would keep the number of such applications at a manageable level.

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since the legal eligibility requirements for filing a case are set by statute. Also see note 29, *supra*, describing a Utah case in which waiver of the fee was denied because the debtor's debts were non-dischargeable.

66. The chief bankruptcy judge predicted that the total judge time needed to process fee-waiver applications would be two to five hours per day, assuming the rate of fee-waiver applications in the pilot courts and procedures like the district's installment procedures were used.

67. The relevant part of Fed. R. Bankr. P. 5005(a)(1) provides that "[t]he clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or local rules or practices."

68. These procedures were fully implemented in 1993. In 1992, the debtor typically had a 10-day wait prior to hearing. From 1992 to 1993, the percentage of L.A. Chapter 7 cases with an installment application dropped from .9% to .4%, and has remained fairly constant since then. Since 1993, the percentage of requests granted has increased from 31.4% to 54.5%.

VII. Forecasting the Cost of a National Program[69]

In this section, we estimate for a national fee-waiver program the lost revenue from waived filing and miscellaneous fees and from additional personnel costs, assuming various eligibility standards are applied. We also discuss the extent to which work and lost revenue associated with installment applications offsets that associated with fee-waiver applications.

A. Lost Revenue

In this section, we use the fee-waiver projections set out in the previous section to estimate the amount of lost revenues and expenditures that could be expected if the fee-waiver program were national.

Currently, each $175 filing fee is distributed as follows: (1) $70 to the judiciary (this includes the $30 noticing fee); (2) $60 to the case trustee; (3) $30 to the U.S. Trustee System Fund (administered by the Department of Justice); and (4) $15 to the general fund of the U.S. Treasury.[70] Using the simplest estimate of waivers (the number of non-business Chapter 7 filings multiplied by 2.9%, the percentage of Chapter 7 cases in which the fee was waived in the pilot courts), one would have expected 26,859 fee waivers if the program had been implemented nationally in fiscal 1997. This translates into $4,700,325 in lost filing fees. Table 20 shows how this loss is divided among the different funds.[71]

In addition, judges sometimes waived miscellaneous fees in cases where the filing fee was waived (see discussion in section VIII.E, *infra*). The amount waived per fee-waiver case was approximately $2.76.[72] Accordingly, the expected dollar amount associated with waived miscellaneous fees for the fiscal 1997 cases is $74,131, bringing the total lost revenue to $4,774,456.

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69. Costs associated with the pilot program are summarized in Appendix O, provided by the Bankruptcy Judges Division of the Administrative Office of the U.S. Courts.

70. The filing fee during part of the pilot program (before October 22, 1995) was $160; trustees serving in cases that closed before this date received $45 rather than $60. 28 U.S.C. § 330(b) as amended by section 117 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, October 22, 1994.

71. The actual noticing costs associated with the fee-waiver cases are likely to be less than the standard $30 noticing fee that is charged. Based on the cost of noticing in the non-pending fee-waiver cases, the cost of noticing would be $23.49 per case. This amount represents the sum of the average number of notices sent out by the clerk's office in a fee-waiver case multiplied by .44 and the average number of notices sent out by the Bankruptcy Noticing Center multiplied by .37. Information regarding the cost of noticing was obtained from the Bankruptcy Court Administration Division of the Administrative Office.

72. We did not include in this average any waiver of fees for filing a complaint because these fees are generally waived in all no-asset cases and therefore should not be considered a cost of the fee-waiver program.

Table 20: Costs Assuming IFP Status Is Granted in 2.9% of 1997 Non-Business Chapter 7 Cases

Number of 1997 Non-Business Chapter 7 Filings	926,183
Projected Number of Fee Waivers (filings multiplied by 2.9%)	26,859
Lost Filing Fee ($175 per case)	$4,700,325
Loss of Noticing Fee to Judiciary ($30)	$805,770
Other Loss to Judiciary ($40 per case)	$1,074,360
Payments to Trustees ($60 per case)	$1,611,540
Loss to the U.S. Trustee System Fund ($30 per case)	$805,770
Loss to the General Fund of the U.S. Treasury ($15 per case)	$402,885

In Table 21, we show the lost filing and miscellaneous fees that would result if the various alternative standards were applied nationally. The estimates in the table assume, alternatively, that the percentage of Chapter 7 cases in which the fee would be waived would be:

- the same percentage as the overall percentage in the pilot courts (row 1; this is the same information as in Table 20);
- the same percentage as the overall percentage in the pilot courts, excluding those cases in which an attorney had been paid in connection with the case (row 2);
- the same as the overall percentage in the pilot courts, excluding those cases in which either a non-attorney had been paid in connection with the case (row 3);
- the same as the overall percentage in the pilot courts, excluding those cases in which an attorney or non-attorney had been paid (row 4);
- the percentage of Chapter 7 debtors with income below the poverty line (row 5);
- the percentage of Chapter 7 debtors represented pro bono (row 6); and
- the percentage of Chapter 7 debtors represented pro bono, adjusted upward according to the percentage of applicants in the pilot districts proceeding pro se (row 7).

All but one of the cost estimates fall within a comparatively narrow range, from approximately $3.5 million to $5.8 million. If "below the poverty line" is adopted as

a "bright-line" eligibility criteria and all debtors meeting the criteria are granted a waiver, the estimated lost revenue increases to over $53 million.

Table 21: Projected Number of Applications that Would Be Granted and Lost Fees, Given Alternative Eligibility Standards and Assumptions

Alternative Standard or Assumption	Estimated Waivers in FY 97	Lost Filing Fee ($175 per case)	Lost Miscellaneous Fees ($2.76 per case)	Total Lost Revenue
1. Totality of circumstances	26,859	$4,700,325	$74,131	$4,774,456
2. Totality of circumstances, prohibiting waivers when an attorney had been paid	25,933	$4,538,275	$71,575	$4,609,850
3. Totality of circumstances, prohibiting waivers when a non-attorney had been paid	25,933	$4,538,275	$71,575	$4,609,850
4. Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid	25,007	$4,376,225	$69,019	$4,445,244
5. Income below the poverty guidelines	300,083	$52,514,525	$828,229	$53,342,754
6. Number of Chapter 7 debtors represented pro bono	19,841	$3,472,175	$54,761	$3,526,936
7. Number of Chapter 7 debtors represented pro bono, plus pro se debtors	32,406	$5,671,050	$89,441	$5,760,491

B. Additional Work Associated with the Fee-Waiver Program

A second cost that must be estimated is that for additional personnel needed to process the applications. We first look at the cost for additional clerk's office personnel (e.g., for IFP clerks) and then for bankruptcy judges.

IFP Clerks. The IFP clerks, judges, and clerks of court thought the IFP clerk's position description fairly reflected the work of the IFP clerks. IFP clerks generally reviewed the fee-waiver applications, made recommendations to the assigned judge, and handled many administrative aspects (other than budget and accounting) of the program. In the District of Montana and the Western District of Tennessee, the IFP clerks' responsibilities were shared by the judges' law clerks and clerk's office personnel.

Time records submitted by the IFP clerks since near the beginning of the program are summarized in Appendix P. Based on these records, few districts would need a stand-alone IFP clerk if the program were implemented nationwide and the number of applications mirrored that found in the pilot program. In the Eastern District of Pennsylvania, where the highest number of applications were filed, the IFP clerks together spent approximately 2,191 hours on the program during all three years, excluding time spent preparing/transmitting information for study purposes, publicizing the fee-waiver program, and docketing case events. This is approximately 731 hours a year.

Below we describe the four steps we followed to estimate the cost of personnel that would be needed on a national level. We developed the approach in consultation with the Bankruptcy Court Administration Division, Bankruptcy Judges Division, Budget Division, and Analytical Services Office of the Administrative Office.[73] In our description, we assume the percentage of Chapter 7 debtors who file a fee-waiver application would be about 3.4% (i.e., the percentage found across all pilot courts during the pilot program). We then project the cost, assuming various eligibility standards (see Table 23).

Step 1: Average amount of time needed to process a fee-waiver application

We estimate the average amount of time needed to process a fee-waiver application using the time reports that IFP clerks (or persons who have performed the duties of an IFP clerk) have submitted since the second month of the program. We exclude time spent preparing/transmitting information for study purposes and publicizing the fee-waiver program because these activities would not be required if the program became permanent. We also exclude time spent docketing case events on the assumption that the Administrative Office has already allocated resources to the clerks' offices for this activity. Then we divided the amount of time reported by the IFP clerks by the number of applications.

Table 22 shows the results of this calculation by fiscal year and district and identifies the best estimate of the time needed to process a fee-waiver application for each district.

73. See also memorandum from David Cook, chief, Administrative Office Analytical Services Office, to Francis F. Szczebak, chief, Administrative Office Bankruptcy Judges Division (November 2, 1994) (on file at the Federal Judicial Center, Research Division).

Table 22: Average Time Spent (in Hours) per Application by Fiscal Year and District

	FY 95	FY 96	FY 97	Three Years Combined	FY 95 & FY 96 Combined	FY 96 & FY 97 Combined	Best Estimate
Southern Illinois (see note 1)	8:05	1:52	1:41	3:11	--	--	3:11
Montana (see note 2)	1:11 1:52	2:01 2:34	0:28 0:41	1:08 1:35	--	--	1:35
Eastern New York (see note 3)	1:18	0:59	--	--	1:08	--	1:08
Eastern Penn.	1:05	1:07	0:36	0:55	--	--	0:55
Western Tenn. (see note 4)	9:31 9:33	2:45 2:58	2:07 2:16	5:01 5:29	--	2:27 2:38	2:38
Utah (see note 5)	0:53	0:51	1:00	0:53	--	--	0:53
Average of district averages							1:43

Note: Entries are in hours and minutes. Entries exclude time spent preparing/transmitting information for study purposes and publicizing the fee-waiver program because these activities would not be required if the program was permanent. Still included is time spent providing assistance to individual debtors and attorneys who have filed or who are interested in filing fee-waiver applications. Time spent docketing case events is also excluded on the assumption that courts are already receiving staff for this activity.

1. Fiscal 1995 time is higher than in the other years due to time spent on *In re Merritt*(see section IV.D, *supra*).

2. The first entry in each column is the time spent by clerk's office personnel; the second entry includes law clerk time. Because law clerks had a primary role in processing the applications in this district, the second entry is generally the best estimate of the time needed to process an application.

3. Clerk's office personnel in the Brooklyn office did not return time forms for fiscal 1997.

4. The amount of time spent on the program in fiscal 1995 is much higher than that spent in the second two years, probably because the district had a dedicated law clerk that year but few filings. The average time spent across the second two years of the program is probably a better estimate of the work requirements. Like Montana, the first entry in each column is the time spent by clerk's office personnel; the second entry includes law clerk time. Because law clerks had a primary role in processing the applications in this district, particularly in fiscal 1996 and fiscal 1997, the second entry is generally the best estimate of the time needed to process an application.

5. The fiscal 1997 average is based on cases filed and time spent from October 1, 1996, to May 30, 1997.

The best estimate of the time needed to process a fee-waiver application varied across the districts, from just about an hour for three districts with high and mid-range levels of applications to about three hours for a district with a mid-range level of applications, but which handled an extremely time-consuming prisoner case. We use the average of the best estimates (1:43) as the estimate of time that would be spent per application on a national basis. This average is less likely than other possible estimates to underrepresent the overhead time of smaller districts.

Step 2: Amount of time that would be needed to process all fee-waiver applications filed nationally

We estimate the amount of time that would be needed to process all fee-waiver applications filed nationally. This is done by multiplying the average amount of time needed to process a fee-waiver application (1 hour and 43 minutes) by the number of applications expected nationally. The simplest national estimate for 1997 was 31,490 applications; the estimated time for processing them would be 54,163 hours.

Step 3: The number of positions that would be needed nationwide

Third, the number of positions that would be needed nationwide is calculated by dividing the amount of time that would be needed to process all fee-waiver applications (54,163 hours) by 1763.04. The Analytical Services Office uses 1763.04 hours in its work measurement formula. The result is 30.7 positions.

Step 4: The cost of the positions in the first year and subsequent years of the program

Finally, the cost of the positions in the first year is obtained by multiplying the number of positions by $55,225; the cost for subsequent years is obtained by multiplying the number by $48,715. (The Administrative Office uses these numbers to cost out new FY98 positions in the bankruptcy clerks' offices.) Thus, the cost for 30.7 positions in the first year of a national program would be $1,695,408 and the cost in subsequent years would be $1,495,551.

Table 23 shows the personnel costs, given the number of applications expected under the alternative eligibility standards and assumptions set out in Table 21. Our formula most likely overestimates the time required to process applications if income below the poverty line is adopted as a "bright-line" standard (row 5 of the table) or if the filing fee is waived for all debtors represented by legal services or organized pro bono groups (row 6). Application of these standards would require minimal review and discretion, and the formula is based on the time required to review applications under a discretionary standard.

Table 23: Personnel Costs Given Alternative Eligibility Standards and Assumptions

Alternative Standard or Assumption	Number of Applications	Number of Positions	Cost (see note 1)
1. Totality of circumstances	31,490	30.7	$1,695,408 $1,495,551
2. Totality of circumstances, prohibiting waivers when an attorney had been paid	29,638	28.9	$1,596,003 $1,407,864
3. Totality of circumstances, prohibiting waivers when a non-attorney had been paid	31,490	30.7	$1,695,408 $1,495,551
4. Totality of circumstances, prohibiting waivers when an attorney or non-attorney had been paid	29,638	28.9	$1,596,003 $1,407,864
5. Income below the poverty guidelines	300,083	292.8	$16,169,880 $14,263,752 (see note 2)
6. Number of Chapter 7 debtors represented pro bono	19,841	19.4	$1,071,365 $945,071 (see note 2)
7. Number of Chapter 7 debtors represented pro bono, plus pro se debtors	36,075	35.2	$1,943,920 $1,714,768

Note:

1. Top entry in each cell is first-year cost; bottom entry is subsequent-year cost.

2. Our formula most likely overestimates the time required to process applications if income below the poverty line is adopted as a "bright-line" standard (row 5 of the table) or if the filing fee is waived for all debtors represented by legal services or organized pro bono groups (row 6). Application of these standards would require minimal review and discretion.

Bankruptcy Judges. Judges spent little time on the program, and thus, a national program should not necessitate additional judgeships, assuming the number of applications remains at the current level. Looking to the Eastern District of Pennsylvania, the district with the highest number of applications, bankruptcy judges spent approximately 298 hours on the program across all three years or about 99 hours per year, excluding time related to the study and publicizing the pilot program. This is about 60 hours per judge for the three years combined or 20 hours per judge per year. Judges spent approximately 45% of the time devoted to the program reviewing fee-waiver applications and meeting with IFP clerks about

specific applications; 6% of the time presiding at hearings related to the applications; 29% of the time preparing/signing related memoranda and orders; 13% of the time on administrative and other routine matters related to the program; and 6% of the time on miscellaneous matters related to the program. The time expended by the bankruptcy judges on the program is summarized by district in Appendix P.

C. Increased Number of Chapter 7 Filings Due to the Fee-Waiver Program

Another factor contributing to the cost of the program is the extent to which it produces additional bankruptcy filings. See sections IV.C and V.B, suggesting that although the program increased access to the courts for certain debtors, the net increase in the number of filings was small. Use of eligibility standards other than some variant of the totality of the circumstances (e.g., the poverty line) might result in a larger increase of filings.

D. Work and Lost Revenue Associated with Installment Payments Versus Fee Waivers

The work and lost revenue associated with waivers of the filing fee should be offset by some of the work and lost revenue associated with paying the fee in installments. Presumably, some debtors who request a waiver of the filing fee would attempt to pay the filing fee in installments, in the absence of a fee-waiver program. Clerk's office and judge time would be required to process and determine motions for nonpayment of fees and to hold related hearings. Moreover, some, if not all, of the filing fee would be left unpaid.[74]

E. Summary

The lost revenue due to a national program falls within a comparatively narrow range ($3.5 million to $5.8 million) assuming all the alternative eligibility standards, except one. If "below the poverty line" is adopted as a "bright-line" standard and the fee is waived for all debtors meeting that standard, the amount of lost revenue would be much more ($53 million). The cost for additional clerk's office personnel also falls within a comparatively narrow range (from about $1 million to about $1.9 million) for all the alternative standards, except "below the poverty line." Our formula results in a much more significant cost for the "below the poverty line" standard, but this is likely an overestimate because application of this standard would require minimal review.

74. The Administrative Office does not routinely maintain a record of the number of installment applications and the amount of the filing fee actually paid pursuant to them. We are attempting to obtain the information on a district-by-district basis, and if successful, will forward it to Congress.

VIII. Issues for Subsequent Legislation or Rules if the Program Is Implemented Nationwide

In this section we describe several issues that need to be resolved administratively, by rule, or by legislation, and provide cross-references to related parts of the report.

A. How Should the Cost of a National Fee-Waiver Program Be Offset?

In discussing ways to offset the costs of a national program, we assume the rate of waivers will mirror that in the pilot courts, but the rate could vary greatly according to the eligibility standard employed, the public's and bar's awareness of the program, the degree of scrutiny given applications, and the overall rate of Chapter 7 filings.

Assuming applications will be filed and granted at the rate found in the pilot districts, a national fee-waiver program would result in approximately $4,700,325 in lost filing fees, approximately $74,131 in waived miscellaneous fees for IFP debtors, and approximately $1,495,551 in salary for additional clerk's office personnel, for a total of approximately $6,270,007.[75] The Bankruptcy Committee endorsed the recommendation of its IFP subcommittee that the most straightforward way to fund a national program would be for Congress to increase the judiciary's appropriation by this amount, which represents approximately 2/10 of 1% of the judiciary's total fiscal 1997 appropriation.

If monies are not directly appropriated to cover the costs of the program, the subcommittee suggested and the committee secondarily endorsed requesting authorization for application of the United States Treasury share of the filing fee to cover the cost of the program. Currently, the general fund of the U.S. Treasury receives $15 from the filing fee for each Chapter 7 case. In fiscal 1997 alone, the general fund received approximately $13,892,745 from Chapter 7 bankruptcy filings. Thus, lost revenue due to waived fees would be recovered if the judiciary could retain this portion of the fee for all non-IFP cases in a special fund designated as "no year" money.[76] From the fund, $160 would be allocated for each IFP case among the entities who would have benefited from the filing fee (e.g., the judiciary would receive $70, the U.S. trustee system would receive $30 dollars, the case trustee would receive $60). The drawback to this approach is that the fund may be insufficient to cover the costs of the program in subsequent years if the ratio of IFP to non-IFP cases dramatically increases. Designating the fund's receipts as "no year," however, would enable the judiciary to better respond to moderate filing fluctuations.

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75. First-year personnel costs would be approximately $1,695,408. The costs for subsequent years would be less because they would not include non-recurring costs (the second-year expense would be approximately $1,495,551). The $6.3 million does not include any money that the EOUST might request to offset the cost of any additional work occasioned by the program.

76. By definition, these funds are already used to offset other governmental expenditures but the subcommittee believes they would be more appropriately used to offset the costs of the IFP program.

B. What Procedures Should Be Adopted to Process the Applications, and What Type of Application Form and Eligibility Criteria Should Be Used?

Views of Judges, Attorneys, U.S. Trustees, and Case Trustees

Procedures for Processing the Applications. All persons in the pilot courts interviewed during the fall of 1995 and the summer of 1997 thought the procedures for processing the applications and underlying Chapter 7 cases were working well. In addition, 90% percent of the attorneys responding to the August 1997 survey reported that they were very or somewhat satisfied with the process used by the courts to waive filing fees. Trustees responding to the August 1997 survey were similarly positive about process, with 92% reporting that they were very or somewhat satisfied.[77]

We nevertheless received a number of suggestions for improving the process, which should be taken into account in developing the procedures for any national program. The suggestions include the following:

- Shortening the application form, at least for debtors who file completed statements and schedules with their petition or for debtors who meet the eligibility criteria set by legal services and pro bono programs. (Some others thought the length of the form deterred ineligible debtors from applying for fee waivers and highlighted the worth of the benefit to be conferred, without unduly burdening those qualified for the waiver.)

- Clarifying or expanding questions on the application form. Specific suggestions include revising the form to do the following: request net rather than gross pay; provide examples of types of "other assets" that should be reported; request more specific information about the type of public assistance received and the direct beneficiary of that assistance; request a list of exempt and non-exempt property; ask debtors how much of their cash on hand or in the bank will be spent on the current month's legitimate expenses; indicate whether pre-bankruptcy expenses as opposed to anticipated post-bankruptcy expenses should be reported; and limit the information about past employment for unemployed applicants to about two years.

- Changing the deadline for the U.S. trustee or case trustee to object to the fee-waiver application to shortly after the section 341 hearing; this would allow the case trustees to review the application in the ordinary course.

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77. When asked whether they were satisfied with the process the court used to determine whether to waive the filing fee, 22 (92%) of the 24 trustees who answered the question reported that they were very or somewhat satisfied with the process, whereas only 2 (8%) were somewhat or very dissatisfied (12 trustees skipped this question or responded "can't say"). Only those trustees who had been appointed in at least one fee-waiver case were included in the analysis. The trustee responses did not differ substantially according to amount of experience. Trustees with 21 or more cases responded in the same general fashion as did trustees with three or fewer.

- Requiring the debtor to submit Schedules I and J, rather than provide expense and income information in a slightly different way on the application form.

- To the extent possible, avoiding hearings on the applications. Some hearings on the applications could have been avoided by just a phone call and an amended application; telephonic hearings might be another alternative.

- Informing the debtor of the basis of any challenge to the waiver prior to hearing.

- Requiring the attorney to sign the application.

- Ensuring that judges have the necessary authority to avoid improper waivers of the filing fee by reviewing and ruling on applications before the automatic stay goes into effect, and denying the waiver if a case is being filed for an improper purpose.

Eligibility Criteria—Totality of the Circumstances, Presumptive, or "Bright-Line" Criteria. Based on our summer 1997 interviews, there is some support among bankruptcy judges in the pilot courts for each type of eligibility standard: totality of the circumstances, presumptive, or "bright-line," with greater support for either a totality of the circumstances or presumptive standard. Some judges think presumptive or bright-line criteria would ensure that debtors deserving of a waiver receive it,[78] that the bar and public understand the eligibility requirements, and that the work associated with processing the applications would be less burdensome. Other judges think it is impractical if not impossible to develop nationwide criteria and that presumptive or "bright-line" criteria might lead to "rubber-stamping" of applications. Judges supporting presumptive criteria generally wanted an "escape clause" to deal with the exceptional case, which might generate as much work as a totality of the circumstances criteria. Judges supporting a totality of the circumstances standard often expressed some explicit criteria they would follow (e.g., no waiver if an attorney had been paid, the debtor intended to reaffirm debts, or the debtor was attempting to discharge non-dischargeable debts).

Attorneys seem to favor the totality of the circumstances standard, although some proposed alternatives. Of the attorneys responding to the August 1997 survey, 82% preferred the totality of the circumstances criteria over presumptive or "bright-line" criteria, and 74% reported that they had sufficient guidance about the eligibility criteria for a fee waiver.

Similarly, trustees responding to the Center's survey favored the totality of the circumstances standard; 94% preferred the totality of the circumstances criteria over

78. Most notably, Chief Bankruptcy Judge Scholl of the Eastern District of Pennsylvania believes that all debtors with income below the poverty line should be eligible and that this criteria should be stated in the national rule.

presumptive or "bright line" criteria and 90% reported that they had sufficient guidance about the eligibility criteria for a fee waiver.

Eligibility Criteria—Payments to Attorneys and Non-Attorneys in Connection with the Case. Bankruptcy judges even within the same pilot district were divided over whether waiver of the filing fee should be prohibited when the debtor has paid an attorney. The following are some illustrative opinions:[79]

- The standard for waiving the fee should be at least as stringent as that for paying the fee in installments. Because Fed. R. Bankr. P. 1006 disallows paying the fee in installments when an attorney has been paid, the fee should not be waived when an attorney has been paid.

- Fed. R. Bankr. P. 1006 does not preclude a debtor from paying an attorney; it only defers such payment until the filing fee has been paid. Applying Rule 1006 to the fee-waiver situation would preclude indigent individuals from ever retaining counsel in the case. Moreover, it is not traditional in other areas of the law to deny IFP status merely because the applicant has paid an attorney.

- The court should consider applications on a case-by-case basis, looking to the source and amount of the payment and other circumstances; there should not be a blanket rule against waiver if an attorney has been paid or has been paid above a particular amount.

    - Payment of a reduced fee to cover the attorney's expenses should not bar waiver of the filing fee.

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79. Culled from notes from fall 1993 interviews of bankruptcy judges by Center staff. Judges in the pilot courts also published a number of opinions on the issue. *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997) (payment of attorney fees by a family member did not automatically bar IFP status; Rule 1006(b)(3) "suspended" for pilot districts); *In re Koren*, 176 B.R. 740 (Bankr. E.D. Pa. 1995) (payment of attorney fee by debtor's son did not automatically bar IFP status; Rule 1006(b)(3) not applicable to IFP applications); *In re Caldwell*, 203 B.R. 666 (Bankr. W.D. Tenn. 1997) (Rule 1006(b)(3) must yield to IFP statute); *In re Shannon*, 180 B.R. 189 (Bankr. W.D. Tenn. 1995) (granting IFP status after debtor was unable to pay fee in installments even though debtor had promised to pay an attorney $100, and stating that compensation to attorney was only one factor to consider in determining whether fee should be waived); *In re Dotson*, 179 B.R. 85 (Bankr. W.D. Tenn. 1995) (granting IFP status despite debtor's promise to pay attorney, where debtor appeared unable to pay and attorney had agreed to remain on case whether or not he was paid); *In re Beecham*, 181 B.R. 335 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, and further finding that Rule 1006(b)(3) strictly barred court from waiving filing fee where debtor had paid attorney $500 via a loan from sister); *In re Thompson*, 177 B.R. 890 (Bankr. W.D. Tenn. 1994) (denying IFP status for failure to show inability to pay in installments, where debtor exhibited financial ability to pay attorney $500 via funds from spouse); *In re Takeshorse,* 177 B.R. 99 (Bankr. D. Mont. 1994) (denying IFP status; finding ability to pay filing fee when debtor had paid attorney $450; Rule 1006(b)(3) applied). See also *In re Clark,* 173 B.R. 142 (Bankr. W.D. Tenn. 1994) (stating that the court will consider a totality of the pre- and postpetition facts and circumstances in determining whether or not to waive the filing fee).

- Although the determination should be made on a case-by-case basis, generally if debtors can find the money to pay an attorney, they can find the money to pay the filing fee.

- The court has to weigh the cost of waiving the fee against the increased burden to the court of handling a pro se case.

- Although the determination should be made on a case-by-case basis, a waiver of the filing fee when an attorney has been paid should be granted only in the exceptional case.

- It is important to consider whether pro bono representation is available in the district.

- A uniform approach regarding payments to attorneys is needed; perhaps a rule could set a presumptive limit (e.g., $500) but leave final determination to the judge for both installment payment and fee-waiver applications.

The bankruptcy judges we interviewed were also divided on whether the filing fee should be waived when the debtor has paid a petition preparer. Some judges view the payment as an absolute or presumptive bar to waiver of the filing fee. Others are more receptive to waiver of the filing fee because they think (1) debtors should not be penalized for using a petition preparer doing a competent job (without engaging in the unauthorized practice of law) because such preparers offer a valuable commodity to debtors at the only price the debtors can afford; and (2) debtors should not be penalized if they have been "victimized" by an incompetent, unethical, or illegal petition preparer.

Attorneys also have mixed views about waiver of the filing fee when an attorney or non-attorney had been paid. In the August 1997 survey of attorneys in the pilot districts, we asked whether fees should be waived if the debtor or a third-party had paid an attorney or non-attorney in full or in part in connection with the case.[80] At one extreme, 30% of the respondents said that the fee should never be waived if the debtor has paid an attorney, and 49% said that the fee should never be waived if the debtor has paid a non-attorney. At the other extreme, 28% of the respondents said that the fee should be waived under certain circumstances even if the debtor has paid the attorney's customary fee, and 26% said that the fee should be waived under

80. The question regarding payments to attorneys read: "If the debtor had paid an attorney, when should the filing fee be waived? (check all that apply) (1) should never be paid if the debtor has paid an attorney; (2) should be waived if the debtor paid the attorney a reduced fee and is otherwise eligible for waiver of the fee; (3) should be waived if a third party (e.g., friend or family member), rather than the debtor, paid the attorney a reduced fee and the debtor is otherwise eligible for waiver of the fee; (4) should be waived if a third party (e.g., friend or family member), rather than the debtor, paid the attorney's customary fee and the debtor is otherwise eligible for waiver of the fee; (5) should be waived under certain circumstances even if the debtor has paid the debtor's customary fee." The question regarding payments to non-attorneys was parallel to the above.

certain circumstances even if the debtor has paid the non-attorney's customary fee. In between, 33% of the respondents said that the fee should be waived if a third party such as a friend or relative paid the attorney's customary fee and 26% said that the fee should be waived if a third party paid the non-attorney's customary fee. These latter two percentages increased to 46% and 30%, respectively, if the third party paid a reduced fee, and to 47% and 30%, respectively, if the debtor paid the reduced fee.[81]

From the survey of trustees in the pilot courts, we found trustees to be more opposed than attorneys to waiver of the filing fee when an attorney or non-attorney had been paid.[82] Seventy percent of the trustees said that the fee should never be waived if the debtor has paid an attorney, and 72% said that the fee should never be waived if the debtor has paid a non-attorney.[83]

Views of Fee-Waiver Applicants. One measure of the success of the program is the degree to which those who use it are satisfied with its procedures. Approximately 92% of the respondents to the applicant survey were somewhat or very satisfied with the process the court used to determine whether to waive the fee—only 8% were somewhat or very dissatisfied with the process. To a large extent, the level of satisfaction or dissatisfaction is attributable to whether the filing fee was waived. As seen in Table 24, most of those whose applications were denied were either somewhat or very dissatisfied with the process, and nearly all of those whose applications were granted were either somewhat or very satisfied. Most of those

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81. Because respondents were asked to check all circumstances in which the fee should be waived, the percentages do not sum to 100. In addition, some of the circumstances are mutually exclusive and, in a very small number of cases, inconsistent multiple responses were recoded to only the most restrictive circumstances. For example, if a respondent indicated that the fee should never be waived if the debtor has paid an attorney and that it should be waived if the debtor paid a reduced fee, only the first circumstance was coded.

Attorney responses did vary somewhat across districts, but, for the most part, the differences were small and did not appear to be systematic. In other words, attorneys in one district were no more or less likely to report different circumstances under which filing fees should be waived. However, attorneys with the most experience (11 or more fee-waiver requests) were far less likely to say that fees should never be waived if an attorney was paid and more likely to say that fees should be waived under the less restrictive circumstances. This pattern was not repeated with respect to payments to non-attorneys.

82. The questions posed to the trustees parallel those asked of the attorneys. Again, because respondents were asked to check all circumstances in which the fee should be waived, the percentages do not sum to 100.

83. At the other extreme, 10% of the respondents said that the fee should be waived under certain circumstances even if the debtor has paid the attorney's customary fee, and 10% said that the fee should be waived under certain circumstances even if the debtor has paid the non-attorney's customary fee. In between, 10% of the respondents said that the fee should be waived if a third party such as a friend or relative paid the attorney's customary fee, and 10% said that the fee should be waived if a third party paid the non-attorney's customary fee. These percentages increased slightly to 13% and 14%, respectively, if the third party paid a reduced fee, and to 13% and 17%, respectively, if the debtor paid the reduced fee. Only the responses of trustees who had been appointed in at least one fee-waiver case are reported here.

who were unable to say whether their applications were granted or denied were also satisfied with the program.

What factors other than the outcome might explain the dissatisfaction of persons whose applications are denied? Most (78%) understood what they needed to do to avoid dismissal of their case—either they could pay the fee in a lump sum or they could pay the fee in installments—but a smaller percentage (60%) reported that they understood the reason for the denial. Perhaps it is this lack of understanding that led to their dissatisfaction.

We asked several other questions that help explain applicants' degree of satisfaction with the procedures.

The majority of survey respondents (63.0%) reported that the application form was either somewhat or very easy to complete, but 13.6% found the application somewhat or very difficult to complete. (Another 20.6% said they did not know and 2.7% failed to answer the question.)

Also, most of those who had requested help from the clerk's office reported that the employees were either very helpful (80%) or somewhat helpful (14%), although about half of the respondents had not requested such help.

Table 24: Applicant Survey
How satisfied were you with the process the court used to decide whether or not to waive the filing fee in your case? (Please check one.)

	Filing Fee Was Waived	Filing Fee Was Not Waived	Missing or Ambiguous Information about Fee Waiver	All Applicants
Very satisfied	830 89.4%	7 7.1%	55 80.9%	892 81.5%
Somewhat satisfied	87 9.4%	21 21.4%	6 8.8%	114 10.4%
Somewhat dissatisfied	5 0.5%	29 29.6%	4 5.9%	38 3.5%
Very dissatisfied	6 0.7%	41 41.8%	5 4.4%	50 4.6%
Missing or ambiguous response	40	3	6	49
Total	968	101	74	1,143

Note: Percentages are of column totals excluding missing and ambiguous responses.

Finally, applicants are likely to be more satisfied to the extent they received help completing the application. Ninety-three percent of applicants who received help were somewhat or very satisfied with the procedures, compared to 88% of those who did not receive help. In all districts, at least half of all applicants received help

in completing the application; of these, most received help from an attorney (see Table 25).

Table 25: Applicant Survey
Who, if anyone, helped you fill out the application for waiver of the filing fee?
(Please check all that apply.)

	S.D. Ill.	D. Mont.	E.D.N.Y.	E.D. Pa.	W.D. Tenn.	D. Utah
1. No one helped me fill out the application	14 19.2%	11 45.8%	134 37.4%	74 13.1%	5 41.7%	32 40.0%
2. Received help	59 80.8%	13 54.2%	224 62.6%	491 86.9%	7 58.3%	48 60.0%
Distribution of sources of help, where applicant had help filling out application						
2a. An employee of the court	1 1.7%	0 0.0%	56 25.0%	15 3.1%	0 0.0%	3 6.3%
2b. An attorney I paid, or another person in that attorney's office	30 50.8%	2 15.4%	13 5.8%	16 3.3%	1 14.3%	7 14.6%
2c. An attorney I did not pay, or another person in that attorney's office	20 33.9%	7 53.9%	129 57.6%	426 86.8%	4 57.1%	26 54.2%
2d. A person I paid to help me complete the bankruptcy petition, other than an attorney or person who works for an attorney	3 5.1%	0 0.0%	3 1.3%	9 1.8%	0 0.0%	2 4.2%
2e. A family member or friend	5 8.5%	3 23.1%	31 13.8%	32 6.5%	1 14.3%	7 14.6%
2f. Other	1 1.7%	1 7.7%	2 0.9%	7 1.4%	1 14.3%	4 8.3%
TOTAL	73	24	358	565	12	80

Note: Percentages in rows 1 and 2 are of the column totals. Percentages in rows 2a–2f are of the number in row 2. Thirty-one of the 1,143 applicants who returned the questionnaire did not answer this question. Respondents who checked the "other" category said they received help from social services and other miscellaneous sources.

Although most applicants were satisfied with the program's procedures, a number of debtors offered suggestions for its improvement, including the following:

- **Wider Publicity:** A few applicants from each of the pilot court districts commented that there should be more information about the availability of

the program to the public. This might be accomplished through private attorneys, credit counselors, and clerks' offices.

- **Defining Eligibility Criteria:** More comments addressed eligibility criteria than any other issue, stating that the criteria for waiving the fee should be more objective and clearly stated on the application form. Some commented specifically that waiver of the fee should be more "automatic" for low income people (e.g., below the poverty line) or that the court should use a sliding fee scale depending on income and number of dependents.
- **Simplifying Application Forms:** Suggestions for improving the application centered on simplifying the form and consolidating it with the petition and schedules to avoid duplication. Some noted that the clerk's office was unable to provide enough help in filling out the form; when asked for assistance, clerk's office personnel say they cannot give legal advice. A pamphlet explaining the system would have helped applicants complete the form, and it might be useful to hold classes or group sessions at the court to explain the process and forms.
- **Streamlining Court Procedures:** Some respondents commented that improvements to the application form would help to streamline the approval/denial process. Several said that telephonic hearings could replace courtroom hearings, thereby reducing the need for travel and absence from work. And, if the fee-waiver application is denied, debtors would like more time to pay the filing fee or more time to pay in installments.

C. What Court Personnel Are Needed to Process Applications for Waiver of the Filing Fee?

See section VII.B above.

D. What Role Should the U.S. Trustees and Chapter 7 Trustees Have in Monitoring Applications for Waiver of the Filing Fee?

According to the Executive Office for United States Trustees (EOUST), the pilot program did not impose significant additional workload requirements on the U.S. trustees offices, except perhaps in Philadelphia, where office staff reviewed and/or commented on all fee-waiver applications, nor did it otherwise adversely affect U.S. trustees operations. The bankruptcy courts appear to have taken the lead in evaluating the applications under standards of strict scrutiny, which the EOUST believes is the appropriate course of action if the program is expanded to nationwide status. In those circumstances where more information is desired, the U.S. Trustee may, of course, be requested to comment, and the case trustees may, as a matter of course, inquire into IFP eligibility at the section 341 meeting and whenever any relevant financial data come to light.[84]

84. Letter from Joseph Patchan, director, Executive Office for United States Trustees, to Elizabeth C. Wiggins, Research Division, Federal Judicial Center (December 19, 1997) (on file at the Federal Judicial Center, Research Division).

Below we describe the procedures followed by the U.S. trustee offices, as described to us by them in the fall of 1995.

Notice to the U.S. Trustee. The guidelines for processing fee-waiver applications that were developed by the IFP Subcommittee of the Bankruptcy Committee state that the pilot districts may differ as to when the U.S. trustee is notified of the fee-waiver application. Some districts, for example, provide the U.S. trustee with an opportunity to review a fee-waiver application before the court determines whether to grant or deny it. Other districts notify the U.S. trustee only after the court has granted or denied the application or set a hearing. When we interviewed them in the fall of 1995, the U.S. trustee offices were satisfied with whatever procedures were followed in their respective districts. Being notified after the court has issued a provisional ruling or set a hearing reportedly reduces the effort required by the U.S. trustee office. Moreover, the benefit of a second review before the court rules may not be worth the delay it entails.

Review by the U.S. Trustee Office. In four districts, the U.S. trustee office reviewed all applications. In two of these districts, the U.S. trustee office reportedly filed some response to every application (i.e., a "statement of review" if there were no questions or concerns; a "comment" if there were points of information to bring to the court's attention; or an objection and a request for a hearing). In the two other districts, the court assumed that if no response was filed, the U.S. trustee had no additional information to provide and did not object.

In the fifth district, the U.S. trustee office regularly received a copy of the applications and related orders and notices, but did not regularly review them. The court and assistant U.S. trustee reported that the U.S. trustee was understaffed. The assistant U.S. trustee randomly reviewed about a third of the applications and brought unusual circumstances to the assigned case trustee's attention.

Finally, in the sixth district, the U.S. trustee office received copies of the orders, but not the applications, and so provided only minimal review.

Attendance at Hearings by U.S. Trustee Office. The policy of the U.S. trustee office regarding attendance at hearings differed somewhat from district to district, as set forth below.

> First District—Attendance at all hearings is impractical due to travel demands; hearings are attended if someone from the office is at the courthouse at the time, if the judge so requests, or a contested issue is involved.
>
> Second District—The assistant U.S. trustee said he would attend any hearing set on an application, at least those involving novel issues.

Third District—A representative from the U.S. trustee office probably would not regularly attend hearings on the applications, even if the office were fully staffed, but would attend if the court so requested or a contested issue were involved.

Fourth District—Someone from the office attends all hearings on fee-waiver applications.

Fifth District—If the U.S. trustee has filed "no objection" to an application and the judge sua sponte sets a hearing, no one from the U.S. trustee office attends the hearing without being specifically asked by the judge to do so. If the court wants personnel from the office to attend hearings regularly, U.S. trustee office staff would do so, but would request the court to schedule hearings in the divisional office on the days someone from the office was already there.

Sixth District—The office receives notice of and monitors or participates in hearings.

Involvement of the Case Trustees. Some of the case trustees we interviewed in the fall of 1995 were somewhat confused as to their role in the fee-waiver program and how to bring issues regarding eligibility before the court. However, 89% of the trustees responding to the Center's August 1997 survey said they had sufficient information about the fee-waiver program and their role with respect to it. [85]

Trustees were asked in the survey about the range of responsibilities panel trustees could be given as part of a national program, including reviewing each IFP application before judicial action; commenting on and, if appropriate, objecting to the appropriateness of each application before judicial action; attending some or all hearings; and monitoring the fee waiver and reporting to the court any discovery of assets. Given their general lack of support for a national program (55% somewhat or strongly disapproved of a national program, and 28% expressed neither approval or disapproval), it is not surprising that trustees identified few responsibilities. Approximately a quarter of the trustees said trustees should have none of the responsibilities listed above. The most frequently endorsed responsibility, by 43% of the trustees, was monitoring the fee waiver and reporting new assets. Both survey and objective information about the processing of the fee-waiver cases in the pilot courts support the trustees having such a monitoring role, but little else.[86]

85. Only those trustees who had been appointed in at least one fee-waiver case were included in these analyses and those reported in the remainder of this subsection.

86. As stated in section IV.A, case trustees rarely objected to fee-waiver applications. Seventeen percent (5) of the trustees responding to the survey reported uncovering assets from which the filing fee could be paid in at least one case, but as noted in section IV.A, the number of cases in which this occurred appears to be low.

E. Should Waiver of the Filing Fee Constitute a Waiver of All Miscellaneous Fees?

The subcommittee guidelines note that individuals whose fee-waiver applications have been granted by the court may subsequently seek the waiver of fees scheduled by the Judicial Conference pursuant to 28 U.S.C. § 1930(b) and (c). The guidelines suggest that because of their close relationship to the initial petition, fees associated with filing amended schedules and lists of creditors and with bifurcating jointly filed cases would seem to be covered by the legislation authorizing waiver of the filing fee in the pilot courts. Thus, they ought to be waived for debtors who have qualified for waiver of the filing fee, except perhaps in situations involving repeated amendments.

The guidelines further provide that if the debtor files a notice of appeal arising out of an order denying the fee-waiver application and also files a request to proceed with the appeal without prepayment of the $105.00 fee (see Items 9 & 16 of the Judicial Conference Bankruptcy Court Miscellaneous Fee Schedule), such requests should be treated and administered like similar requests under 28 U.S.C. § 1915, bearing in mind the importance of providing applicants with the opportunity to appeal the denial of a fee-waiver application in appropriate circumstances.[87] Because courts disagree as to whether bankruptcy courts have the authority to waive fees and costs associated with bankruptcy matters that have been scheduled by the Judicial Conference under the authority of 28 U.S.C. § 1930(b), the decision to grant or deny such a request may lie with the bankruptcy court or the district court.

Finally, the guidelines note that requests for the waiver of all other scheduled fees may be granted or denied in the discretion of the bankruptcy or district court as long as debtors whose fee-waiver applications have been granted are treated no more harshly than other debtors.

Resolution of this issue resides at the policy level, but we note here that the pilot courts generally did waive the miscellaneous fees, and the estimated lost revenue from doing so in a national program does not add a substantial cost (except assuming a "below the poverty line" bright-line standard).

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87. Courts disagree as to whether bankruptcy courts have the authority to waive fees and costs associated with bankruptcy matters that have been scheduled by the Judicial Conference under the authority of 28 U.S.C. § 1930(b), such as the fee to appeal. Compare *In re Perroton*, 958 F.2d 889 (9th Cir. 1992) (holding that the bankruptcy court is not a "court of the United States" and does not have the authority to waive fees under 28 U.S.C. § 1915, and that such relief must be sought from the district court) with *In re Shumate*, 91 B.R. 23 (Bankr. W.D. Va. 1988); *In re Fontaine*, 10 B.R. 175 (Bankr. D. R.I. 1981); *In re Palestino*, 4 B.R. 721 (Bankr. M.D. Fla. 1980); and *In re Gurda Farms, Inc.*, 10 B.R. 479 (S.D.N.Y. 1980) (all holding that bankruptcy courts do have the authority to waive fees other than the fee for filing the petition). The reasoning of the latter courts is either that the bankruptcy courts are "courts of the United States" and therefore have the authority to waive fees under § 1915, that the bankruptcy courts have the authority to waive fees by way of the general order of reference entered pursuant to 28 U.S.C. § 157(a), or that the Congress intended the absolute requirement that fees be paid to apply only to the fee for filing a petition, as set forth in 28 U.S.C § 1930(a).

F. Should the Fee-Waiver Program be Extended to Chapter 13 Debtors?[88]

As seen earlier in Table 2, bankruptcy judges in 1993 were more strongly opposed to allowing debtors to proceed *in forma pauperis* in Chapter 13 than in Chapter 7. Arguably, if a person is unable to pay the filing fee installments, he or she will be unable to consummate a plan. More generally, opponents argue, fee waivers are inconsistent with the goal of Chapter 13 as a repayment chapter.

Others think that although very few Chapter 13 debtors would be expected to need the fee-waiver program, the program should be chapter-neutral.[89] For example, the program might be the only road to filing for a low-income Chapter 13 debtor with a home of modest value who is struggling to pay mortgage arrearages in order to avoid foreclosure.

A workable alternative to waiver of the fee in Chapter 13 might be to allow debtors to pay the filing fee through the Chapter 13 trustee, as part of the plan. In the spring of 1994, the Advisory Committee on Bankruptcy Rules considered a proposed amendment to Fed. R. Bankr. P. 1006 that would have explicitly allowed this practice.

The Center surveyed the clerks of the bankruptcy courts to obtain information to inform the committee's discussion. We asked several questions about current and past practices with respect to this procedure and inquired about its advantages and disadvantages.[90] Of the 73 districts that responded to the survey,

- 45 (61.6 %) of the districts did not currently permit Chapter 13 debtors to pay filing fee installments to the Chapter 13 trustee for transmission to the clerk;

- 9 (12.3%) of the districts reported that Chapter 13 debtors were permitted to pay filing fee installments to the Chapter 13 trustee for transmission to the clerk *in an occasional case* (in one of these districts, the practice was permitted in only one of two divisions); and

- 19 (26.0%) of the districts reported that Chapter 13 debtors were permitted to pay filing fee installments to the Chapter 13 trustee for transmission to the clerk *on a routine basis*. (In one of the 18 districts, the practice was permitted on a routine basis in only one of the district's five divisions. It was permitted in an occasional case in another division, but was not permitted at all in the three remaining divisions. In another of the eighteen districts, the practice

88. See the Judicial Conference report on the use of graduated fees in Chapter 13 bankruptcy cases, which is being submitted to Congress in conjunction with this report.

89. See Sommer, *supra* note 12, for further discussion.

90. The survey results are summarized in a memorandum from Beth Wiggins, Federal Judicial Center, to Alan Resnick, reporter to the Advisory Committee on Bankruptcy Rules (February 21, 1994) (on file at the Federal Judicial Center, Research Division).

also was permitted in only one of the district's divisions; no information was provided about practices elsewhere in the district.)

According to the clerks, the procedure might help the debtor complete the installment payments because he or she would only have to remit one check a month. It also might enable debtors to file in emergency situations when money to pay the first installment might be hard to find. On the other hand, the procedure might lead to duplication of work between the clerk's office and the Chapter 13 trustee's office, increase the difficulty of tracking payments, and cause delays in responding to missed payments. Some clerks noted that transfer of the administrative process might disadvantage debtors and creditors if the filing fee were counted in calculating the trustee's compensation, and that, in any event, it would require a statutory change to relocate this function away from the clerk's office.

The Rules Committee declined to take action.

G. Could the Installment Payment Program Under Fed. R. Bankr. P. 1006(b) Be Modified to Eliminate the Need for a Chapter 7 Fee-Waiver Program?

In the August 1997 survey, 38% (12) of the responding trustees reported that the installment payment program contained in Bankruptcy Rule 1006(b) could be modified to eliminate the need for a fee-waiver program. (Thirty-one percent said the installment program could not be modified to such effect and another 31% said that there was no need for a fee-waiver program.)

Only 13% of the attorneys responding to the August 1997 survey thought the installment payment program could be modified to eliminate the need for a fee-waiver program. (Eighty-two percent of the attorneys stated that the program could not be so modified and 5% said there was no need for a fee-waiver program.)

The attorneys, trustees, and bankruptcy judges in the pilot courts offered the following suggestions for modifying the installment program:

- Allow the debtors to make a small payment up front and similar size payments until the fee is paid. Debtors would receive a discharge within the statutory period but it could be revoked if the payments are not completed.

- Give the courts the discretion to extend the period in which the debtor has to pay the fee, and if the time period extends beyond the discharge, the discharge would be conditional on full payment.

- Extend the time to complete payment of the filing fee, holding up dischargeability until the fee is paid—up to a year if necessary.

- In no asset cases, extend the payment period to the dischargeability deadline; in asset cases, permit payment as an administrative claim.

- Allow the debtor to pay in installments if an attorney has been paid a reduced fee.

- Provide an option for waiver of the remaining fee if the debtor becomes unable to make installment payments.

- Implement a sliding fee based on ability to pay.[91]

91. See *supra* note 88.