

2012

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Recommended Citation

Gregory Scott Crespi, Misbehavior and Mistake in Bankruptcy Mortgage Claims: Some Caveats regarding the Porter Study, 45 Creighton L. Rev. 361 (2011)

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MISBEHAVIOR AND MISTAKE IN BANKRUPTCY MORTGAGE CLAIMS: SOME CAVEATS REGARDING THE PORTER STUDY

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ABSTRACT

This Article reviews the comprehensive empirical study of the bankruptcy mortgage foreclosure process conducted by Professor Katherine Porter and subsequently published in 2008 in the *Texas Law Review*. The results of her study, which analyzed 1,768 proof of claim submissions filed in a sample of 1,733 Chapter 7 bankruptcy proceedings, strongly suggest that there is a pervasive failure on the part of mortgage creditors to meet all of the formal documentation requirements for filing such bankruptcy claims. This documentation failure arguably impedes many mortgage debtors or bankruptcy trustees from reviewing these claims for their accuracy.

Porter's conclusion that the itemization statements included in even formally complete proof of claim filings are often confusing enough to prevent debtors and trustees from meaningfully evaluating their accuracy, however, is less well grounded. In addition, her data does not unambiguously support her conclusion that there is likely widespread and cumulatively significant overcharging of mortgage debtors being facilitated by these proof of claim documentation deficiencies. These data results are also consistent with more benign explanations of the pervasive discrepancies she identifies between creditors' and debtors' perceptions of the amounts owing. Porter's recommendations for reforms in the bankruptcy mortgage foreclosure process consequently cannot be properly assessed without further research establishing the extent of such creditor abuse.

† Professor of Law, Dedman School of Law, Southern Methodist University. J.D., Yale Law School, Ph.D., University of Iowa. I would like to thank the law firm of Barrett, Daffin, Frappier, Turner & Engel, LLP for the financial and research data support that it has provided to me to facilitate my writing of this Article. In the interests of full disclosure, I would like to note that this firm includes among their clients a number of large mortgage servicing corporations that have an interest in the issues addressed in this Article. I remain solely responsible, however, for all positions that I have taken in this Article, and any mistakes or omissions in this work are my responsibility alone.

I. INTRODUCTION

In 2008 Professor Katherine Porter published in the *Texas Law Review* a comprehensive empirical article regarding mortgage claims filed in Chapter 13 bankruptcy proceedings.¹ That article was made widely available to researchers on the Social Science Research Network electronic library several months prior to publication in the *Texas Law Review*.² Her work has influenced the public debate regarding the need for mortgage lending and foreclosure reform.³ While her findings are interesting and suggestive of the need for reforms, there are, however, limits to the conclusions that can be drawn as to the extent of mortgage servicer abuse of mortgage debtors. Moreover, while Porter is a careful scholar who candidly recognizes the various limitations of her analysis, there are indications that some people will misuse her work by overlooking those limitations in an attempt to use her study to justify calls for increased regulation of mortgage servicers.⁴

In this Article, I will point out some of the limitations of Porter's study and offer my thoughts on what one can fairly conclude from her findings as to the extent of mortgage servicer abuse. For the purposes

1. Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008). Katherine Porter is an Associate Professor at the University of Iowa College of Law. Porter's study was also funded by an external source, in this instance the National Conference of Bankruptcy Judges' Endowment for Education. *Id.* at 140-41 & n.123. Porter's co-principal investigator in this study was Tara Twomey, formerly a clinical instructor at Harvard Law School, and currently a Lecturer in Law at Stanford Law School and a consultant for the National Association of Consumer Bankruptcy Attorneys and for the National Law Center (neither of which had any involvement in this study). *Id.* at 140 & n.122.

2. The article has been available in draft form on the Social Sciences Research Network ("SSRN") electronic library website since November 7, 2007, and as of December 27, 2011, it had been downloaded from that site 2679 times. See Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, SSRN (Aug. 14, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027961 (showing the posted date of the article and statistical information on the number of times downloaded).

3. Porter has also given Senate hearing testimony regarding her results. *Policing Lenders and Protecting Homeowners: Is Misconduct in Bankruptcy Fueling the Foreclosure Crisis?: Hearing Before the Subcomm. Admin. Oversight and the Courts of the S. Committee on the Judiciary*, 110th Cong. 1 (2008) [hereinafter *Policing Lenders*] (statement of Katherine M. Porter, Associate Professor, University of Iowa College of Law). As a result of this testimony and of the widespread dissemination of her work, her study became influential even before its formal law journal publication. See, e.g., Steven Seidenberg, *Homing in on Foreclosure*, A.B.A. J., July 2008, at 54, 59 (citing to the Porter study regarding the extent to which bankruptcy petitions contain questionable mortgage fees).

4. Compare Seidenberg, *supra* note 3, at 59 (claiming Porter's findings had determined "more than half" of the bankruptcy petitions that she had reviewed contained "questionable" fees), with Porter, *supra* note 1, at 23 (finding "dozens and dozens" of "suspicious" fees in a sample of 1483 itemization statements, which may mean that as few as 3.2% of those itemization statements contained such suspicious fees, and of course, some of which fees may prove upon closer investigation to be fully justified).

of this Article, I will make a few simplifying assumptions. First, I will assume Porter's underlying assertions as to the formal requirements of mortgage foreclosure law and bankruptcy law are correct. In particular, I will assume her assertion is correct that under Federal Rules of Bankruptcy Procedure Section 3001 ("Section 3001") mortgage creditors who wish to receive a distribution from the bankruptcy estate must submit a proof of claim, which includes an itemized statement of the principle loan amount and any fees and charges imposed thereon, a copy of the underlying promissory note, and a copy of the mortgage agreement. In addition, I have not independently verified Porter's underlying empirical data. I have reviewed only the summary statistics, discussions of data collection procedures, and statistical methodology presented in her article. I will assume that her research was conducted in good faith and that the statistics she presents regarding the incompleteness of proof of claim filings and the discrepancies between debtor and creditor calculations of the amounts owed are accurate with regard to the sample of proof of claim submissions she has considered. My focus instead will be on whether these sample statistics, assuming that they are accurately calculated from her data, provide sufficient support to justify any conclusions as to the extent of mortgage servicer abuse.

In her article, Porter asserts two main claims, one that is explicit and one that is more implicit, and then presents a set of recommendations as to legislative, regulatory, and advisory committee action to address the problems she identifies. She explicitly claims her study reveals a rather striking degree of non-compliance with Section 3001 requirements by mortgage creditors in bankruptcy proceedings.⁵ She finds that many proof of claim submissions do not include a copy of the promissory note, a copy of the mortgage agreement, or an adequately detailed and transparent itemization of fees and charges. Some even fail altogether to include such an itemized statement, and some submissions evidenced more than one of these deficiencies. She argues that this non-compliance creates the *potential* for mortgage servicers to overcharge debtors without being held accountable for this overreaching given the difficulties that these deficient proof of claim submissions present for debtors and their attorneys and bankruptcy trustees who wish to mount effective challenges to such overcharges.⁶ I will henceforth refer to this claim made by Porter as the "pervasive proof of claim deficiencies" argument.

Porter also implicitly suggests that the increased potential for abuse allegedly made possible by the prevalence of incomplete or oth-

5. Porter, *supra* note 1, at 149.

6. *Id.* at 161.

erwise deficient proof of claim submissions has actually led to widespread abuse. This abuse, she argues, justifies legislative and/or regulatory efforts to encourage or even require mortgage creditors to provide more comprehensive and transparent proof of claim submissions. More comprehensive submissions, she asserts, will deter inequitable conduct by enabling debtors and their attorneys and bankruptcy trustees to more easily recognize and contest creditor overcharges. I will henceforth refer to Porter's second and more implicit claim as the "widespread mortgage creditor abuse" argument. Porter also offers some recommendations for legislative, regulatory, and advisory committee actions to address these alleged abuses.⁷ I will henceforth refer to these recommendations as the "Porter recommendations."

In this Article, I will assess each of her claims, focusing on whether her statistical study provides adequate support for her conclusions. I will then briefly discuss the merits of her recommendations and what further research is needed to properly evaluate them. First, however, I have summarized my overall conclusions as follows:

Porter's pervasive proof of claim deficiencies argument is reasonably persuasive. As I will discuss below, there are a number of specific criticisms that can be made of her data collection and statistical analysis methodology, and these criticisms collectively undercut, to some extent, her broad assertions about the pervasiveness of such proof of claim deficiencies in foreclosure and bankruptcy proceedings. Her conclusions as to the extent of the incompleteness of proof of claim submissions, however, are nevertheless striking and relatively robust. Even if those conclusions are appropriately discounted because of her study's various methodological shortcomings, she still presents a persuasive case for the proposition that the incompleteness of bankruptcy proof of claim submissions by mortgage creditors is widespread enough to at least create the *potential* for exploitation of mortgage debtors.

Porter's related arguments that even formally complete proof of claim filings often present a serious potential for abuse because of their inadequate or confusing itemization of fees and charges, however, are much more subjective, impressionistic, and lacking in solid statistical foundation. More importantly, Porter supports her argument that these proof of claim deficiencies not only create the potential for significant abuse of mortgage debtors, but are in fact facilitating a great deal of abuse, with only a very selective presentation of anecdotal cases and commentary. Her statistics that convincingly demonstrate the pervasive extent of proof of claim submission

7. See *id.* at 173-78 (making a series of recommendations for reform).

incompleteness, and that at least suggest that even formally complete submissions are often difficult to meaningfully review for accuracy, simply do *not* establish the extent to which such alleged abuses of debtors are actually occurring. In several places in her article Porter, to her credit, somewhat reluctantly but candidly concedes this point.

Porter's failure to establish the extent of such creditor abuse sharply undercuts her arguments for legislative and regulatory interventions to reduce proof of claim submission incompleteness and other deficiencies. It is not clear from her study how much creditor abuse is now taking place that would possibly be detected or deterred by such measures. It is, therefore, not possible to determine whether the additional administrative costs that her more stringent proof of claim requirements would impose on mortgage creditors and bankruptcy trustees would be a cost-justified means of improving the fairness of the bankruptcy process. Thus, the overall merits of her recommendations are unclear at this time. Before Porter's proposals can be properly evaluated, more research is needed to establish the extent and magnitude of such abuse, the extent to which such abuse could be detected or deterred by Porter's proposed reforms, and the costs of these reforms.

II. DETAILED ANALYSIS OF THE "PROOF OF CLAIM DEFICIENCIES" ARGUMENT

The heart of Porter's study is a summary of the degree of formal completeness shown by the 1,768 proof of claim submissions filed in a sample of 1,733 Chapter 13 bankruptcy proceedings initiated during April of 2006.⁸ She concluded that there is a strikingly high incidence of incompleteness: 41.1% of the proof of claim filings did not include a copy of the promissory note, 19.6% did not include a copy of the mortgage agreement, and 16.1% did not include an itemized statement of fees and charges.⁹ Overall, 52.77% of the proof of claim filings in her sample lacked one or more of these three documents that Section 3001 of the Federal Rules of Bankruptcy Procedure ("Section 3001") requires.¹⁰

There are a number of reasons why the samples' incompleteness percentages may overstate (or perhaps understate) the extent of proof of claim submission incompleteness in bankruptcy proceedings. First, the sample of 1,733 bankruptcy cases, from which she obtained the 1,768 proof of claim filings, came from only forty-four judicial districts

8. Porter, *supra* note 1, at 144-52. These findings are graphically summarized in Figure 1 on page 146 of Porter's article.

9. *Id.* at 146-48.

10. *Id.* at 146.

in twenty-four states and ignored bankruptcy filings from the other twenty-six states.¹¹ The sample thus omitted over half of the judicial districts in the United States, including some heavily populated and commercially important jurisdictions such as Florida, Illinois, New York, Pennsylvania, and Ohio.¹² Porter chose to include only bankruptcy filings from the twenty-four states that permit non-judicial foreclosure of a debtor's principal residences.¹³ Porter apparently believed sampling a broader population that included bankruptcy filings in judicial foreclosure states "may not produce different data."¹⁴ This, however, is only a conjecture, and it may in fact be the case that sampling a broader population would have produced different and perhaps less striking results as to the extent of incompleteness of proof of claim submissions. Porter even concedes this point in a brief footnote.¹⁵

Another limitation of Porter's study was that the sample of proof of claim submissions was drawn only from Chapter 13 bankruptcy filings and did not include any submissions made in Chapter 7 filings, even though mortgage creditors must make proof of claim submissions to obtain distributions in those proceedings as well.¹⁶ Porter justified this limitation on the basis that a higher proportion of Chapter 13 filings involve mortgage debts.¹⁷ She conceded, however, that 30% of Chapter 7 cases are filed by homeowners and thus often also involve proof of claim submissions.¹⁸ A broader sample of proof of claim submissions drawn from both Chapter 7 and Chapter 13 filings might yield different, and perhaps less striking, results regarding the overall extent of proof of claim incompleteness in all bankruptcy proceedings.

Furthermore, the sample of 1,733 bankruptcy cases drawn from this restricted subpopulation may not have been sufficiently randomized.¹⁹ While the subsequent data coding by investigators appears to have been carefully cross-checked to minimize (though admittedly not to eliminate) the number of data recording errors,²⁰ the sampled subpopulations interestingly only include bankruptcy cases filed during April 2006.²¹ This single month is a relatively small window of time that may not accurately reflect the true characteristics of the much

11. *Id.* at 141.

12. *Id.* at 141, 142 n.132.

13. *Id.* at 142.

14. *Id.* at 141.

15. *Id.* at 142 n.134.

16. *Id.* at 141-42.

17. *Id.* at 141.

18. *Id.* at 141 n.127.

19. "Every fifth case filed" in April of 2006 in which the debtor owned a home was selected for the sample, presumably selected on a randomized "every fifth file" basis once the cases were ordered in their chronological order of filing. *Id.* at 141.

20. *Id.* at 144.

21. *Id.* at 141.

larger collection of proof of claim submissions. In particular, the fact that a very small number of cases was drawn from a set of smaller judicial districts during only one month's time undercuts Porter's ancillary claim that her study shows "that the variations in claims documentation reveal systematic differences based on where a debtor files for bankruptcy."²² The choice of a different sampling period could obviously have altered rather dramatically the relative ranking of the sampled districts with regard to the extent of incompleteness of the proof of claim submissions, particularly for those smaller judicial districts with fewer filings for a given sampling period.

A potentially fairly serious shortcoming of Porter's study is that the proof of claim incompleteness percentage calculations are derived only from the proof of claim submissions originally filed in each sampled case and do not reflect any attachments that a mortgage creditor may have included if it later filed amended claims.²³ One would think that in response to either formal or informal objections made by debtors or their attorneys or bankruptcy trustees, mortgage creditors would often augment their proof of claim submissions to include additional documentation omitted in the initial filing. To the extent that such amendments were made after the original proof of claim submission, Porter's percentages would tend to overstate to some extent the actual degree of incompleteness facing debtors when their bankruptcy plans were actually formulated and judicially endorsed, perhaps significantly so. Porter even conceded that 9.7% of the proof of claim submissions in her sample were later amended.²⁴ One would think that at least some of these amendments would have addressed incompleteness in the original proof of claim submissions.

Finally, Porter sampled only proof of claim submissions made in bankruptcy proceedings and did not sample comparable claim documents filed by mortgage creditors in the larger number of foreclosure proceedings taking place outside of bankruptcy.²⁵ It is thus unclear whether her findings regarding the extent of incompleteness is applicable to non-bankruptcy foreclosure proceedings as well.

Each of the above shortcomings of Porter's sampling and data analysis procedures, particularly her failure to reflect amended proof of claim submissions in the data, serve to undercut somewhat the confidence that one might otherwise have that her results accurately reflect the extent of proof of claim incompleteness in foreclosure proceedings. Her results, however, are nevertheless rather striking.

22. *Id.* at 151.

23. *Id.* at 146 n.152.

24. *Id.* at 170.

25. *Id.* at 179. Roughly 80% of mortgage foreclosures take place outside of bankruptcy. *Id.* at 179 n.275.

Even if they are appropriately discounted to reflect any possible bias the deficiencies in her sampling or data analysis procedures might have introduced, they still strongly suggest that a surprisingly high proportion of proof of claim submissions filed in bankruptcy proceedings are formally incomplete in that they fail to provide all of the documentation called for by Section 3001. Such extensive incompleteness arguably increases the *potential* for mortgage creditors to overcharge debtors without being held accountable for doing so. As I will discuss in some detail below, however, this does not necessarily indicate that such abuses are in fact occurring.

Porter is, however, on far less solid statistical ground when she argues that even for those proof of claim submissions that are formally complete, in that they include all of the required documentation, the format of the itemization statements is not standardized and is often not helpful for debtors and their attorneys who wish to meaningfully evaluate the accuracy of mortgage creditor claims.²⁶ First, she defines twelve categories of fees and charges that she believes should be separately reflected in an itemized statement.²⁷ Then, she concludes that 43% of the approximately 1,483 itemized statements submitted²⁸ are deficient in that they either make reference to fees and charges that do not fit into this categorization or aggregate a number of these fees and charges in a way that defies separation,²⁹ or both. Thus, the statements do "not permit meaningful review of the accuracy or legality of the servicer's calculation of the debt."³⁰

Porter's conclusion regarding the proportion of inadequately detailed or inaccurate itemization statements can be criticized on two grounds. First of all, for the reasons set forth above, Porter's sample may not be representative of the entire population of mortgage foreclosures, and a broader sample may have found a lower percentage of deficient itemization statements even by her criteria of adequacy. Much more fundamental, however, is the criticism that the category disclosure format that she favors for itemization statements is not generally recognized in the mortgage industry as the definitive

26. See *id.* at 152-61 (outlining the ways in which the failure to standardize itemization of mortgage fees prohibits meaningful scrutiny).

27. *Id.* at 153. These categories include principal, interest, escrow, late charges, foreclosure fees or costs, non-sufficient funds charges, property inspection fees, broker price opinions or appraisals, corporate advances, post-petition fees, suspense fees, and a twelfth category covering all other charges labeled "other." *Id.* at 153 n.174.

28. *Id.* at 146. She claimed that 83.9% of the 1768 proof of claim submissions included an itemized statement for a total of approximately 1483 such itemized statements. *Id.*

29. *Id.* at 153.

30. *Id.*

itemization statement disclosure framework.³¹ Another observer might define the contours of an adequate itemization statement differently and could therefore reach a different conclusion regarding the proportion of proof of claim itemization submissions that are deficient. Unlike her statistical arguments that measure the incompleteness of proof of claim submissions by the legislatively-mandated yardstick of the Section 3001 requirements, Porter's arguments as to the inadequacy of itemization statements are ultimately predicated simply upon her own beliefs as to what form of itemization statement disclosure would adequately allow for meaningful debtor and trustee review. Such conclusions are, therefore, more like Porter's personal, subjective judgments as to the proper balancing of debtor and creditor interests in bankruptcy rather than "statistical" arguments based upon objective data.

Porter also reviews the fees and charges claimed in the itemization statements, which she classifies as "other" charges, in accordance with her twelve-category classification scheme. She identifies what she regards a significant number of claimed fees that appear to her to be "suspicious," i.e., those that were impermissible or at least called for more explanation.³² One could argue, however, that the number of instances of questionable fees that she identifies may actually be quite modest relative to the large size of her sample, perhaps even as low as 3.2%.³³ In addition, she defines these suspicious claims using her own preferred twelve-category itemization statement disclosure scheme for fees and charges. A different classification scheme could well have resulted in a different and perhaps smaller proportion of questionable claims.

31. *See id.* at 152 (claiming there is no standard form for itemizations). Porter claims, however, that this particular categorization framework is not merely her arbitrary creation but is based upon a model proof of claim itemization statement framework that was recently developed by a joint committee of mortgage servicers and Chapter 13 bankruptcy trustees. *Id.* at 153 n.175. She has a point here, although in my opinion she goes a bit too far in representing the product of one joint committee of Chapter 13 trustees and mortgage servicers that has not yet received formal federal legislative or administrative endorsement as constituting a definitive statement of "the servicing industry's own categories" by which the adequacy of itemization statements can properly be judged. *Id.* at 152-54.

32. *Id.* at 154.

33. Her specific claim is that she identified "dozens and dozens" of such fees. *Id.* at 154. It is unclear whether she meant this phrase literally, which would mean perhaps only as few as four dozen such instances of questionable charges, approximately 3.2% of the sample of 1,483 itemization statements, or whether she intended to use this phrase more figuratively to suggest that she found there to be more questionable charges than one might expect. One could perhaps argue that if only 3.2% of the itemization statements include any fees or charges that are suspicious enough on their face to call for more investigation before they are accepted by debtors, that this is in fact an indicia of reasonably good performance by mortgage creditors.

Finally, one must of course keep in mind that even if a fee charged to a defaulting debtor appears on its face to be “suspicious,” closer investigation may reveal that the charge is justified. Suspicious are not always well founded. For example, Steve Bailey, the former Chief Executive for Loan Administration of Countrywide Financial Corporation, a large mortgage servicing firm since it was acquired by the Bank of America, testified at a Senate Judiciary Committee hearing held on May 6, 2008, that his corporation’s internal reviews of bankruptcy proceedings in which it was involved indicated an error rate of “less than one percent for mistakes that adversely impact a borrower.”³⁴

III. DETAILED ANALYSIS OF THE “WIDESPREAD MORTGAGE CREDITOR ABUSE” ARGUMENT

In her article, Porter exhibits a fundamental ambivalence as to whether she is taking the position that her study indicates not only that there is pervasive proof of claim incompleteness, but that there is also widespread mortgage creditor abuse of debtors in bankruptcy proceedings facilitated by this incompleteness or (in her opinion) the misleading nature of many proof of claim submissions. Throughout her article Porter liberally sprinkles pejorative phrases that suggest she believes widespread exploitation is taking place.³⁵ Yet at several points in her article Porter candidly concedes that her data is simply not sufficient to establish that this is, in fact, the case.³⁶ While a care-

34. *Policing Lenders*, *supra* note 3 (statement of Steve Bailey, Chief Executive for Loan Administration, Countrywide Financial Corporation). “Bankruptcy servicing is a complex process As such, to some unavoidable extent, the servicing process requires manual input or by-hand processing of data unique to each borrower.” *Id.* Bailey continued, stating, “This type of processing can result in mistakes from time to time. However, those mistakes are few in number. Countrywide has completed a number of internal reviews that indicate an error rate of less than one percent for mistakes that adversely impact a borrower.” *Id.*

35. “This Article’s findings offer an empirical measure of . . . whether consumers can trust mortgage companies to adhere to applicable laws.” Porter, *supra* note 1, at abstract. “The data . . . raise the specter that many bankrupt families *may* be overcharged or may unfairly lose their homes. . . . [The] flawed system of mortgage servicing is a key contributor to the current crisis in the American home-mortgage market.” *Id.* at 124 (emphasis added). “The key point that can be substantiated by the itemization data is that . . . [t]he resulting situation *permits* servicers to overcharge debtors without fear of challenge. These problems *suggest* that the bankruptcy system *may* be harboring mortgage-servicing abuse” *Id.* at 160 (emphasis added). “Creditors’ claims *may* themselves be bloated and overstate the accurate amounts of debt.” *Id.* at 167 (emphasis added). “The data provide systematic evidence that mortgage servicers . . . *may* be engaged in overreaching” *Id.* at 41 (emphasis added).

36. “[It is] impossible to use the Mortgage Study data to apply systematic analyses to determine if servicers are actually charging illegal fees. The available bankruptcy court records simply do not provide the necessary information.” *Id.* at 154. “[T]he data admittedly do not permit concrete findings of servicer misconduct” *Id.* at 160.

ful reader of her article will note the critically important distinction between her statistically-grounded findings of pervasive proof of claim documentation deficiencies and her more anecdotal assessments of the extent of creditor abuse, a distinction Porter herself recognizes, I fear that more cursory reviewers (or those with an ax to grind) may overlook this distinction,³⁷ particularly given Porter's generally pejorative tone with regard to the conduct of mortgage servicers.

Porter bases her argument that mortgage creditors are overcharging debtors in bankruptcy proceedings largely upon a comparison between debtors' and creditors' separate calculations as to the amount of the mortgage debt owed.³⁸ She found that debtors and creditors, in their initial submissions, agreed on the exact amount due in only 4.4% of the bankruptcy proceedings.³⁹ In 70.4% of the proceedings, the mortgage creditor's proof of claim submission asserted that the mortgage debt was greater than the amount the debtor listed on his schedule of debts, and, interestingly, in 25.2% of the cases the debtor's scheduled amount of mortgage debt exceeded the mortgage creditor's claim.⁴⁰ In instances where the creditor's claim exceeded the debtor's scheduled amount, the average difference was \$6,039, with a relatively large standard deviation of \$9,143, indicating a wide dispersion in the size of the creditor-favoring discrepancies.⁴¹

Porter's statistical data effectively demonstrates the pervasiveness of misunderstandings between debtors and mortgage creditors in bankruptcy proceedings as to the amount owed. Additionally, her data shows that in most instances the creditor believes debtor owes more than the debtor thinks he does, at least with regard to the restricted subpopulation of Chapter 13 bankruptcy proceedings filed in certain districts during April 2006 from which her sample was drawn. In such cases, obviously at least one party has an incorrect belief as to the amount owed. Porter's discrepancy calculations, however, are unfortunately equally susceptible to either of two very different competing interpretations, and her study unfortunately does not provide a statistical basis for choosing between these different interpretations.

One interpretation of these discrepancy calculations, the one that Porter implicitly favors, is that these discrepancies largely reflect creditor overcharges, presumably facilitated by incomplete or misleading bankruptcy proof of claim submissions. But, another interpreta-

37. See, e.g., Seidenberg, *supra* note 3, at 59.

38. Porter, *supra* note 1, at 161-68.

39. *Id.* at 162.

40. *Id.*

41. *Id.* at 164 & n.223. Another 8.8% of the loans in her sample had mortgage claims that were more than 15% larger than the amounts debtors included on their schedules. See Porter, *supra* note 1, at 165.

tion of these discrepancies, one at least as plausible if not more so, is that the data reflects the simple fact that typical homeowner debtors are just not as good as typical mortgage creditors at keeping accurate records because they are not as familiar with unpaid interest charges, default charges, attorneys' fees, and numerous other sometimes substantial legitimate charges added to principal repayment obligations in real estate foreclosure proceedings. This latter interpretation, which grounds the discrepancy data primarily upon debtor misunderstandings rather than creditor overcharges, draws at least some support from Porter's observation that over 25% of debtors believed they actually owed *more* to the mortgage creditor than their creditor had calculated. One would think that this belief would rarely, if ever, be accurate. Such a widespread misunderstanding suggests that debtors are not particularly good at calculating their mortgage obligations for the purposes of bankruptcy filings. By finding a bankruptcy mortgage servicing rate for errors adverse to debtors of less than 1%, Countrywide Financial Corporation's internal reviews described above also lend support to this interpretation of the discrepancy.⁴²

Porter calculated an aggregate creditor-favoring net discrepancy of approximately \$6 million between debtor schedules and creditor proof of claim submissions for her entire sample of bankruptcy proceedings.⁴³ She then used this sample figure to extrapolate to a total creditor-favoring discrepancy of \$1 billion for the entire population of approximately 400,000 Chapter 13 bankruptcies filed by homeowners "in recent years."⁴⁴

On this basis she then forcefully declares, "If even a small fraction of this billion dollar aggregate sum represents creditor overreaching in their claims, the damage to the bankruptcy process is tremendous[,]"⁴⁵ and that "[i]f creditors are overreaching by even half of the amount suggested" by this extrapolation "they are imposing a hefty burden on debtors' disposable incomes . . ."⁴⁶ I have no argument there, but the critical question is to what extent does this discrepancy data reflect creditor overcharges, as opposed to debtor miscalculations? Broad statements regarding the financial significance of various postulated amounts of creditor overreaching obviously do not provide support for concluding that such debtor overcharges are in fact taking place at more than the *de minimis* rate identified by the

42. *Policing Lenders*, *supra* note 3 (statement of Steve Bailey, Chief Executive for Loan Administration, Countrywide Financial Corporation).

43. Porter, *supra* note 1, at 166.

44. *Id.* at 166.

45. *Id.* at 167.

46. *Id.* at 167.

Countrywide Financial Corporation internal reviews.⁴⁷ Porter's study identifies the pattern and extent of the discrepancies between debtor and creditor perceptions of the amounts owed for her sample, but unfortunately does not shed much, if any, light on the underlying causes of those discrepancies.

One further interesting piece of information that Porter repeatedly refers to in her article is that debtors objected to only about 4% of the proof of claim submissions in her sample.⁴⁸ This low percentage of formal objections is open to quite a number of possible interpretations. One interpretation favored by Porter is that the incomplete proof of claim submissions and misleading itemization statements together make it difficult or impossible for many debtors to challenge creditor overcharges. Another plausible, yet very different interpretation, is that the proof of claim submissions filed by mortgage creditors are generally accurate as to the amounts owed, and there simply are very few instances where a debtor who closely scrutinized the proof of claim submission would conclude he has a legitimate objection to the amount. Yet another plausible interpretation is that this low formal objection percentage is misleading because it fails to capture instances where the debtor has scrutinized the claim and then informally settles the dispute about the amount with the creditor.⁴⁹ Finally, it is possible that some disagreements as to the amounts claimed by creditors are addressed not by formal or informal objections but instead are handled through the process of judicial adoption of debtor plans that incorporate the lesser amount of the mortgage debt the debtor believes he owes, in the absence of creditor objections.⁵⁰ Porter's study unfortunately does not provide any basis for choosing among these alternative explanations for the low percentage of debtor objections.

IV. DISCUSSION OF PORTER'S RECOMMENDATIONS

Porter offers several recommendations designed to address the alleged widespread mortgage creditor overreaching in bankruptcy facilitated by incomplete or misleading creditor proof of claim submissions. First, she argues that Bankruptcy Code Section 502(b)⁵¹ should be

47. See *Policing Lenders*, *supra* note 3 (statement of Steve Bailey, Chief Executive for Loan Administration, Countrywide Financial Corporation).

48. See Porter, *supra* note 1, at 168 (claiming 67 objections were identified for the 1,768 sampled proof of claim submissions).

49. Porter recognizes this possibility, but then argues that this interpretation is "incongruent with the rare incidence of amended claims." *Id.* Porter's study indicates that creditors amend 9.7% of bankruptcy filings. *Id.* Not everyone would agree that amendments that occur in 9.7% of bankruptcy filings should be classified as "rare" events.

50. This possibility is acknowledged by Porter. *Id.* at 165 n.237.

51. 11 U.S.C. § 502(b) (2005).

amended to allow failure to provide the proof of claim documentation required by Federal Rules of Bankruptcy Procedure Section 3001 ("Section 3001") as a basis for claim disallowance.⁵² Second, she wants the United States Trustees Program to adopt informal measures to encourage bankruptcy trustees to more carefully review mortgage creditor claims.⁵³ Third, she favors the adoption of a standardized format for proof of claim itemization statements, and in particular, calls for the incorporation into official bankruptcy forms of a model proof of claim itemization form recently prepared by a joint committee of mortgage industry representatives and bankruptcy trustees.⁵⁴ Finally, she calls for the institution of programs to educate mortgage debtors' attorneys about the potential benefits of challenging mortgage creditor claims, including the collateral benefits of helping them identify other potential causes of action such as loan origination disclosure deficiencies or other abuses and recognize unfair or deceptive practices.⁵⁵

In order to properly assess the merits of Porter's recommendations, two kinds of information are needed. First, additional research is necessary to ascertain the extent and severity of mortgage creditor overreaching that would likely be detected or deterred by the proposed measures and to quantify the social benefits of such detection and deterrence. Second, it would be necessary to determine the amount of additional administrative costs that would be imposed upon mortgage servicers, bankruptcy trustees, and others by these more stringent proof of claim requirements. Further, we must determine the cost of Porter's recommended attorney education programs. One could then judge whether the economic and social benefits of these preventative measures justified their costs. Even if such measures would be successful in reducing creditor overcharging, they might not be the most cost-effective approach for dealing with the problem.

As discussed above, Porter's study persuasively demonstrates that many Chapter 13 proof of claim submissions are incomplete with regard to Section 3001 requirements. She argues somewhat less convincingly, however, that even formally complete proof of claim submissions are often so misleading as to preclude effective review. In addition, she does not offer statistical evidence to show these incomplete or misleading submissions actually have led to creditor abuse.⁵⁶ Her arguments that such abuse is both taking place and facilitated by

52. Porter, *supra* note 1, at 173-74.

53. *Id.* at 174.

54. *Id.* at 174-75.

55. *Id.* at 177-78.

56. Porter's study persuasively demonstrates that many Chapter 13 bankruptcy proof of claim submissions are incomplete with regard to the requirements of Section

the proof of claim documentation deficiencies are anecdotal rather than grounded in reliable statistical data. In addition, the only reference in her article germane to the question of the cost-effectiveness of her recommendations is her brief and rather casual statement that “[w]hile such reforms would modestly increase the administrative burdens, the benefits of increased reliability in mortgage claims justify these policy changes.”⁵⁷ Any serious consideration of her recommendations would obviously require more precise data regarding the benefits and costs involved.

V. CONCLUSION

Porter’s comprehensive empirical study, despite its limitations discussed above, breaks new ground in this important area. It provides a valuable resource for those who seek to better understand the bankruptcy mortgage foreclosure process and to determine what reforms may be needed. Her study strongly suggests that a surprisingly high proportion of proof of claim submissions by mortgage creditors in Chapter 7 bankruptcy proceedings are incomplete, and therefore the potential for creditor abuse exists. As I have noted, however, a number of limitations in her sampling methodology undercut the confidence that one might have that her conclusions can be generalized to all bankruptcies and all non-bankruptcy foreclosure proceedings. On the other hand, Porter’s data does not provide solid statistical support for her conclusion that the format of many itemization statements is not designed to allow debtors or trustees to meaningfully review creditor claims for accuracy. Her statistics also do not provide sufficient support for the far stronger claim that deficient proof of claim submissions have actually led to widespread mortgage creditor overreaching. For her sample, Porter identified a pervasive discrepancy between bankruptcy debtor and mortgage creditor calculations of the amount of debt owed. She found that the creditor usually claims the debtor owes more than the debtor thinks he does, but her empirical data does not support the conclusion that this discrepancy primarily reflects creditor overcharges rather than debtor calculation errors. Her data is consistent with either of these interpretations of this discrepancy.

In closing, Porter recommends legislative and/or regulatory reforms that would encourage (or even require) mortgage creditors to file more complete proof of claim submissions with what she regards as more accurate and transparent itemization statements. Without some solid statistical data showing how much creditor overcharging

3001 but argues somewhat less convincingly that even those formally complete proof of claim submissions are often so misleading as to preclude effective review.

57. Porter, *supra* note 1, at 175.

(presumably facilitated and sheltered by incomplete or misleading proof of claim submissions) is in fact taking place, however, it is impossible to determine whether her proposed reforms, which would perhaps impose substantial additional administrative costs upon mortgage creditors and bankruptcy trustees, are cost-justified.

Porter's work is good science because, even with its limitations, it provides useful guidance for other researchers who want to advance the analytical effort in this important area. She persuasively establishes the pervasiveness of mortgage creditor proof of claim deficiencies in bankruptcy proceedings. Her study, however, raises more questions than it answers. What are now clearly needed are further studies, similar to Countrywide Financial Corporation's internal review,⁵⁸ that focus more intensively upon smaller, but still representative, samples of incomplete or allegedly misleading proof of claim submissions to determine how often and to what extent such deficient filings are facilitating mortgage creditor overcharges. Do the "dozens and dozens" of fees that Porter found to be "suspicious" in her sample of 1,483 itemization statements⁵⁹ perhaps reflect only a less than 1% rate of inclusion of unjustified fees in those statements, as Countrywide Financial Corporation's internal reviews suggested,⁶⁰ or are the error rates much higher? How often do such suspicious fees and charges reflect actual creditor abuse through overcharges, as opposed to merely being poorly described but nevertheless legitimate foreclosure fees and charges? How effective would Porter's recommendations be in reducing the prevalence and size of such overcharges? And, finally, what would it cost to implement Porter's reforms to remedy proof of claim deficiencies and otherwise facilitate closer review of mortgage creditor claims? All of these questions need to be answered before reform proposals can be properly assessed.

58. See *Policing Lenders*, *supra* note 3 (statement of Steve Bailey, Chief Executive for Loan Administration, Countrywide Financial Corporation).

59. Which may actually only reflect as little as approximately 3.2% of all of the itemization forms in Porter's sample. See *supra* note 33 and accompanying text.

60. See *Policing Lenders*, *supra* note 3 (statement of Steve Bailey, Chief Executive for Loan Administration, Countrywide Financial Corporation).