

National Study of Individual Chapter 11 Bankruptcies**

Professor Richard Hynes, Principal Investigator
John Allan Love Professor of Law
University of Virginia School of Law

Professor Anne Lawton, Associate Investigator
Professor of Law
Michigan State University

Professor Margaret Howard, Reporter
Law Alumni Association Professor of Law
Washington and Lee University School of Law

Abstract

Individuals account for more than a quarter of chapter 11 bankruptcy filings, and this share has grown over time. For individuals, chapter 11 is more expensive and complicated than the much more common chapter 13 because the applicable rules are a hybrid of those that apply in chapter 13 and those that apply to entities in chapter 11. Some debtors may be forced into chapter 11 by chapter 13's debt limits, but many debtors who are eligible for chapter 13 choose chapter 11. Perhaps the hybrid nature of individual chapter 11 cases is justified because the individuals who use chapter 11 look like a blend of the typical chapter 13 debtor and a small business: they have much greater assets, debts, income and expenses, and the overwhelming majority are operating some type of business. Real estate also plays a significant role in chapter 11. We find that more than a third of individual chapter 11 debtors confirm a plan and avoid dismissal or conversion for at least 881 days, and that this rate is higher for jointly filed cases, cases filed by experienced attorneys and cases with substantial real estate. The rate is lower in cases filed pro se and cases in which the debtor does not expect to distribute assets to general creditors. We further find that involuntary chapter 11 cases are almost non-existent; the fear of involuntary servitude through bankruptcy is more of a theoretical than an empirical problem.

Index

- I. Introduction
- II. PACER Case Report Data
 - A. Some Basic Facts about Individuals in Chapter 11
 - 1. *Chapter 11 Debtor Type*
 - 2. *Conversions*
 - 3. *Where are the Debtors Filing?*
 - 4. *Primary Nature of Debt and Small Business Status*
 - 5. *Are Assets Available for Distribution?*
 - B. Attorneys
 - C. Involuntary Chapter 11 Cases
- III. Coding Individual Cases
 - A. Do Individuals in Chapter 11 Look Like Those in Chapter 13?
 - 1. *Demographic Information*
 - 2. *Business Operations*
 - 3. *Prior and Subsequent Bankruptcy Filings*
 - 4. *Size and Complexity*
 - B. The Debtor's Financial Condition
 - 1. *Occupation, Income and Expenses*
 - 2. *Debt*
 - 3. *Assets*
- IV. Is Chapter 11 Succeeding?
 - A. Debtor Success—The PACER Data
 - 1. *Defining Success*
 - 2. *Predicting Success*
 - B. Debtor Success—The Random Sample Data
 - 1. *Defining Success*
 - 2. *Predicting Success*
 - 3. *Direct Evidence of the Impact of the Absolute Priority Rule*
 - C. Timely Disposition of Cases
 - 1. *PACER Case Report Data*
 - 2. *The Random Sample Data*
- V. Conclusions and Next Steps

Tables

Table 1: Debtor Type for Chapter 11 Cases

Table 2: Conversion Between Chapters for Individual Bankruptcy—2010

Table 3: Conversion Between Chapters for Individual Bankruptcy—2013

Table 4: Top 5 and Bottom 5 Districts for Individual Chapter 11 Filings

Table 5: Primary Nature of Debt

Table 6: Small Business Debtors

Table 7: Assets Available for General Creditors—PACER Data
Table 8: Attorneys
Table 9: Household Size and Marital Status
Table 10: Joint Filers and Sex of Debtor
Table 11: Engaged in Business
Table 12: Related Bankruptcy Cases
Table 13: Guaranties or Co-Debtors
Table 14: Small Business Debtors—2010 and 2013
Table 15: Objections by Unsecured Creditors
Table 16: Appointment of Chapter 11 Trustee or Examiner
Table 17: Prior Bankruptcies Based on Debtor Disclosure
Table 18: Prior and Later Bankruptcies—2010
Table 19: Other Filings 2010 and § 362(c)(3)
Table 20: Estimated Number of Creditors
Table 21: Estimated Assets and Liabilities
Table 22: Assets Available for General Creditors—Random Sample
Table 23: Occupation
Table 24: Employment Duration in Years
Table 25: Debtors’ Monthly Income
Table 26: Debtors’ Monthly Expenses
Table 27: Medical Expenses
Table 28: Attorney Compensation
Table 29: Distribution of Indebtedness—Liabilities from Summary of Schedules
Table 30: Impact of Chapter 13 Actual and Hypothetical Debt Limits
Table 31: Debt-to-Income Ratios
Table 32: Types of Priority Debt
Table 33: Amount of Priority Debt by Category
Table 34: Assets from Summary of Schedules
Table 35: Home Ownership
Table 36: Other Real Property
Table 37: Number of Parcels
Table 38: Debtor Equity in Real Property
Table 39: Outcomes of Individual Chapter 11 Cases
Table 40: Chapter 13 Outcomes
Table 41: Outcomes Measured at 545 Days
Table 42: Predictors of Success
Table 43: Success by Attorney Representation
Table 44: Success and Interpretation of the APR Exception—PACER Data
Table 45: Regressions of Survival Rate—PACER Data
Table 46: Random Sample Data Success Rates
Table 47: Success Comparisons
Table 48: Marginal Effects for Non-Dichotomous Variables
Table 49: Success and Interpretation of the APR Exception—Random Sample
Table 50: Regressions of Success Rates—Random Sample
Table 51: APR Objections
Table 52: Days to Conversion or Dismissal for “Failed” Cases in 2010—PACER Data

Table 53: Filing of Schedules—Time in Days

Table 54: Plan Proposed by Non-Debtor

Table 55: Plan Timing

Table 56: Small Business Debtors and Time to First Plan Proposal

Table 57: Time in Days to Conversion or Dismissal—Random Sample

Figures

Figure 1: Individual Chapter 11 Cases in Harvard’s Bankruptcy Data Project

Figure 2: Number of Other Bankruptcy Filings by 2010 Debtors

Appendix A: Individual Chapter 11 Filings by District

Table 58: Individual Chapter 11 Filings by District

Appendix B: Impact of APR on Chapter Choice

Table 59: Impact of APR on Chapter Choice

Table 60: Percentage of Non-Business Cases in Chapter 11

Appendix C: Court Decisions Interpreting the APR Exception

I. Introduction

Prior empirical research has taught us a great deal about individuals¹ who file under chapters 7 and 13 of the Bankruptcy Code² and corporations that file under chapter 11,³ but we know relatively little about individuals who file under chapter 11.⁴

**Our thanks to the Anthony H.N. Schnelling Endowment Fund of the American Bankruptcy Institute, which provided funding for this research project, and to the chief bankruptcy judges of the 78 judicial districts who granted waivers that allowed us to conduct this research. We also want to thank our research assistants: Ashley Angelotti, Carolyn Brodbeck, Elliott Harding, Michael Hollowell, Mia Howard, Steve Simmons, Alexander Starr, Kiara Swinton, Clint Westbrook and Gaochuan Xie.

¹ Section 109, which sets out the requirements for who may be a debtor in bankruptcy, provides that “a person that may be a debtor under chapter 7 . . . may be a debtor under chapter 11.” 11 U.S.C. § 109(d) (2012). (Other entities are specifically excluded from eligibility to file chapter 7 or chapter 11, but those details are irrelevant to our study.) Since “person is broadly defined to include “individual, partnership, and corporation,” *id.* § 101(41), it would seem self-evident that individuals are eligible for Chapter 11. Nevertheless, it required a decision from the United States Supreme Court—*Toibb v. Radloff*, 501 U.S. 157 (1991)—to make that proposition clear.

² See, e.g., D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* 94 (1971); TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS* (1989) [hereinafter “AS WE FORGIVE”]; TERESA SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000) [hereinafter “FRAGILE MIDDLE CLASS”]; Robert Lawless, et al, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349 (2008) [hereinafter “*Did Bankruptcy Reform Fail?*”]; Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473 (2006); Scott F. Norberg, *Consumer Bankruptcy’s New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415. See Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743 (2005) [hereinafter “*Disappearing Business Bankruptcy*”].

³ Arturo Bris, et al., *The Costs of Bankruptcy: Chapter 7 Liquidation versus Chapter 11 Reorganization*, 61 J. FIN. 1253 (2006); LYNN LOPUCKI, *COURTING FAILURE* (2006). See, e.g., Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small-Business Bankruptcies*, 50 J.L & ECON. 381 (2007) [hereinafter, “*Bankruptcy Decision Making*”]; Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. LEGAL STUD. 255 (2009) [hereinafter, “*Small Business Workouts*”]; Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603 (2009) [hereinafter “*Success of Chapter 11*”].

⁴ Professors Warren and Westbrook had reported some facts about individuals in Chapter 11 in two of their prior studies, but their focus was on business bankruptcy more generally. See *Success of Chapter 11*, *supra* note 3; Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L. J. 499 (1999) [hereinafter “*Financial Characteristics*”]. After we began our project, Professor Lawton completed two studies based on random samples that she drew from all Chapter 11 cases filed in 2004 and 2007. See Anne Lawton, *Musings on BAPCPA and the Individual Chapter 11 Debtor*, 90 AM. BANKR. L.J. 307 (2016) [hereinafter “*Musings*”]; Anne Lawton, *The Individual Chapter 11 Debtor Pre- and Post-BAPCPA*, 89 AM. BANKR. L.J. 455 (2015) [hereinafter “*Individual Chapter 11 Debtors*”].

Individuals file around 30% of all chapter 11 filings,⁵ and so this study is designed to fill this gap in our knowledge.

The rules governing an individual chapter 11 case are a blend of those applicable to more standard consumer and business bankruptcy cases. Individual chapter 11s look much like cases under chapter 13—the more common individual reorganization chapter—in several respects. In particular, chapter 11, like chapter 13, insists that individuals comply with a projected disposable income test,⁶ and both chapters withhold a discharge until individuals complete their plan payments.⁷ A corporation, by contrast, obtains a discharge upon confirmation of its chapter 11 plan.⁸ In other respects, however, the application of chapter 11's usual rules makes cases involving individual debtors quite unlike cases under chapter 13. First, debtors in chapter 13 face more rigid requirements (for example, the debtor must propose a plan within fourteen days of filing,⁹ and plan payments—which cannot extend past five years¹⁰—must begin quickly)¹¹ and active oversight by a bankruptcy trustee.¹² Chapter 11 provides flexibility rather than rigidity, and relies on the initiative of the debtor-in-possession and the participation of creditors. Second, the absolute priority rule, as most courts interpret it, applies equally to individual and corporate chapter 11 debtors.¹³ Chapter 13, by contrast, has no absolute priority rule.

Our empirical analysis of individuals in chapter 11 informs the normative debate over the proper structure of bankruptcy law. One might believe that chapter 13, or a

⁵ See *infra* Table 1, and accompanying text.

⁶ 11 U.S.C. §§ 1129(a)(15), 1325(b) (2012).

⁷ *Id.* at §§ 1141(d)(5)(A), 1328(a) (2012).

⁸ *Id.* at § 1141(d)(1) (2012).

⁹ FED. R. BANKR. PROC. 3015(b).

¹⁰ 11 U.S.C. § 1322(d) (2012).

¹¹ The debtor must begin making payments within 30 days of filing. *Id.* at § 1326.

¹² *Id.* at § 1302.

¹³ For a discussion of the absolute priority rule, see *infra* Part IV.B.3.

version thereof, may be more appropriate for nearly all individuals who want to reorganize, or that a separate fast-track adaptation of chapter 11 is preferable. Under another view, an entirely different resolution mechanism might be preferable.¹⁴ Regardless of the merits of the various arguments, it makes little sense to apply very different rules if individuals in chapter 11 have the same characteristics, but slightly larger debts, as those in chapter 13.

In some ways, individuals in chapter 11 are very different from those in chapter 13. Chapter 11 debtors are much more likely to operate a business,¹⁵ and they have dramatically higher debt-to-income ratios than other consumer debtors; in our sample, the median ratio was 16 in 2010 and 8 in 2013.¹⁶ As expected, chapter 11 debtors have much higher household incomes than individuals in chapters 7 or 13, but their expenses also are quite large.¹⁷ Real estate debt plays a particularly prominent role; unsurprisingly this is especially true of the filings made in 2010. The typical individual filing for relief under chapter 11 is male; women account for a much smaller proportion of chapter 11 than chapter 13 filings.¹⁸ Many individuals in chapter 11, like other bankrupt debtors, are frequent users of the bankruptcy courts.¹⁹

One should not overstate the differences, however, as individual chapter 11 cases generally are not that complex. The vast majority of debtors have a small number of creditors.²⁰ Half have liabilities that fall below the liability threshold for small business

¹⁴ See, e.g., Jean Braucher & Charles W. Mooney, *Means Measurement Rather than Means Testing: Using the Tax System to Collect from Can-pay Consumer Debtors after Bankruptcy*, AM. BANKR. INST. J., Feb. 22, 2003, at 6.

¹⁵ See *infra* Table 11, and accompanying text.

¹⁶ See *infra* Table 31, and accompanying text.

¹⁷ See *infra* Tables 25 and 26, and accompanying text.

¹⁸ See *infra* Table 10, and accompanying text.

¹⁹ See *infra* Section III.A.3.

²⁰ See *infra* Table 20, and accompanying text.

debtors, and assets and liabilities that fall far below the \$10 million cutoff that the American Bankruptcy Commission recently recommended for small and medium sized enterprises.²¹ Moreover, few individuals enter chapter 11 with affiliated debtors, and procedural consolidation is rare.²²

One striking finding is that a large number of individual debtors chose to file for relief under chapter 11 even though they qualified for chapter 13²³ and even though a chapter 11 case costs substantially more. The median amount that chapter 11 debtors paid to their attorneys at the outset of the case was at least \$7,500²⁴—many times higher than the roughly \$2,500 national average for total fees in chapter 13.²⁵ While we cannot determine the reason why debtors eligible for chapter 13 might nonetheless choose chapter 11, the greater relative flexibility of the latter over the former may have played a role.

Much of the prior empirical literature asks whether bankruptcy's reorganization chapters successfully serve the interests of debtors and creditors. The most common definition of success focuses on the goals of the debtor and asks whether individuals receive a discharge.²⁶ That definition is not appropriate for our undertaking given that individuals, unlike corporations, do not receive their discharge until their plan is completed,²⁷ and few individual debtors will complete their plans during the three-to-six-

²¹ See *infra* Tables 29 and 34, and accompanying text. For the Commission's recommendations for small and medium sized enterprises, see Final Report and Recommendations, American Bankruptcy Institute Commission to Study the Reform of Chapter 11 275-302 (2014) [hereinafter ABI Commission Report].

²² See *infra* Table 12, and accompanying text.

²³ See *infra* Table 30, and accompanying text.

²⁴ See *infra* Table 28.

²⁵ See Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17 (2012).

²⁶ See, e.g., Norberg & Velkey, *supra* note 2; *Success of Chapter 11*, *supra* note 3.

²⁷ 11 U.S.C. § 1141(d)(5)(A) (2012).

year window in which we observed the cases.²⁸ Instead, we started the analysis with a broad definition of success that included any case in which the debtor received a discharge or avoided conversion or dismissal for four years. Based on this definition, we found a success rate of roughly one-third or about the same success rate found in the chapter 13 literature.²⁹ If we define success more narrowly as plan confirmation, however, individual debtors perform less well in chapter 11 than in chapter 13. Approximately 39% of our debtors confirmed plans,³⁰ while recent national data puts chapter 13 confirmation rates at about 70%.³¹ We found that joint filing and ownership of significant real property predict success and that no-asset cases, pro se cases, and cases handled by attorneys with little chapter 11 experience are more likely to fail.³² We also found evidence suggesting that the absolute priority rule, which does not exist in chapter 13, affects success rates. Chapter 11 cases filed in jurisdictions with debtor-friendly interpretations of the exception to the absolute priority rule were more likely to succeed than cases in jurisdictions with less debtor-friendly absolute priority rule decisions.³³

Using discharge or confirmation as measures of success, however, fails to take account of system goals. Many debtors do not belong in a reorganization chapter; in an

²⁸ Many of the plans that our random sample debtors proposed are scheduled to last 30 years. *See infra* note 239 and accompanying text.

²⁹ *See, e.g.*, AS WE FORGIVE, *supra* note 2, at 339; Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13 Dispositions* graph 1 (Admin. Office of the U.S. Courts, Working Paper No. 2, 1994); Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, AM. BANKR. INST. J., July-Aug. 2000, at 22, 22; Henry E. Hildebrand III, *Administering Chapter 13- At What Price?*, AM. BANKR. INST. J., July-Aug. 1994, at 16; Norberg & Velkey, *supra* note 2, at 505; Hulya Eraslan, *et al.*, *The Anatomy of U.S. Personal Bankruptcy Under Chapter 13*, Working Paper 07-31 (September 2007).

³⁰ *See infra* Table 46, and accompanying text.

³¹ *See* Ed Flynn, *Chapter 13 Case Outcomes by State*, ABI Journal, Aug. 2014, at 41.

³² *See infra* Tables 42, 43, 45-48 and 50 and accompanying text.

³³ *See infra* Tables 44 and 49 and accompanying text.

efficient system, bankruptcy courts should quickly dismiss or convert these cases.³⁴ If we measure success, as scholars have done in prior studies, by how long it takes bankruptcy courts to dispose of the “failed” reorganizations,³⁵ then individual chapter 11 cases fare worse than chapter 13 cases. More specifically, we found that courts take longer to dispose of the “obvious” individual chapter 11 failures compared with the obvious chapter 13 failures.³⁶

Our findings provide answers to many questions about the characteristics and performance of individuals in chapter 11. Like any good empirical study, however, questions for further study remain. Nonetheless, our findings lay the groundwork for exploring changes to chapter 11 or 13 that may increase the odds of individual success in bankruptcy.

We begin our analysis in Section II with data derived from PACER case reports (“PACER data”) for all bankruptcy cases filed in 2010 and 2013. The PACER data provides information about debtor and system characteristics, such as debtor type, the rate of conversions between bankruptcy chapters, and the availability of assets for distribution to general unsecured creditors. We also provide data about the experience level of attorneys representing individual chapter 11 debtors and find that few attorneys specialize in individual chapter 11 cases. We wrap up Section II with an examination of involuntary filings and conclude that involuntary individual chapter 11 cases are exceedingly rare.

³⁴ See, e.g., *Bankruptcy Decision Making*, *supra* note 3; *Small Business Workouts*, *supra* note 3; *Success of Chapter 11*, *supra* note 3.

³⁵ See, e.g., *Bankruptcy Decision Making*, *supra* note 3; *Success of Chapter 11*, *supra* note 3.

³⁶ See *infra* Table 52, and notes 296-298 and accompanying text.

Section III examines and analyzes the results of our coding of a random sample of the larger PACER case sample (“random sample data”). These hand-coded cases provide much richer, more detailed data about the individuals who file for relief under chapter 11, including information about business operations, prior and subsequent bankruptcy filings, income, expenses, assets and liabilities.

In Section IV, we address the central question of success, and whether chapter 11 serves the needs of individual debtors. We use regression analysis to determine which case characteristics predict success, and also discuss the impact of the absolute priority rule on debtor success. The analysis moves through various definitions of success—from a debtor-centric definition focused on survival and discharge to a system-wide definition focused on the expeditious handling of chapter 11 cases.

Finally, in Section V, we provide a summary of the study’s key findings. We conclude that the normative case for an individual reorganization chapter, separate from chapter 13, remains unclear.

II. PACER Case Report Data

We began our empirical analysis with data derived from PACER case reports (“PACER data”) for all bankruptcy cases filed in 2010 and 2013.³⁷ We collected PACER case reports for all bankruptcy cases filed in 78 of the 94 judicial districts in the United States.³⁸ According to the Administrative Office of the U.S. Courts (the “AO”), these

³⁷ PACER provides a link to present reports in spreadsheet form. We began by downloading all bankruptcy cases filed in each jurisdiction of our study during 2010 and 2013. Because this data set was so massive, we dropped cases in which neither the current nor previous chapter was chapter 11 or 13.

³⁸ We did not receive waivers from the following jurisdictions: (1) Southern District of Alabama; (2) Connecticut (waiver for only 2010); (3) District of Columbia; (4) Guam; (5) Hawaii; (6) Southern District of Illinois; (7) Northern District of Indiana; (8) Maine; (9) Eastern District of Missouri; (10) Western District of New York; (11) Northern Mariana Islands; (12) Western District of Oklahoma; (13) Southern District of Texas; (14) the Virgin Islands; (15) Southern District of West Virginia; and (16) Eastern District of Wisconsin.

jurisdictions accounted for 91% of all United States bankruptcy filings, and approximately 93% of all chapter 11 filings in the United States in 2010 and 2013.³⁹ We are confident that our failure to obtain waivers from the remaining jurisdictions did not materially affect our results.⁴⁰

Deciding on the period to study involved a difficult trade-off. We wanted to choose a set of cases filed sufficiently long ago that the debtors had time to receive plan approval and then make payments for a number of years. Unlike chapter 13 plans,⁴¹ however, chapter 11 plans can, and do, extend well beyond five years.⁴² Thus, we expected that few of our debtors would have completed a plan of reorganization unless we examined cases filed far in the past. If we drew a sample of cases filed too long ago, on the other hand, our results would be skewed by the financial crisis and possibly even by the amendments to the Bankruptcy Code enacted in 2005.⁴³

We settled on 2010 and 2013. The financial crisis and the real estate collapse played a significant role in individual chapter 11 cases filed in 2010. To ensure that our results were not simply an artifact of the period studied, we expanded our study to include cases filed in 2013, as well.

This section of the report is largely descriptive. We begin in Section A with some basic information, gleaned from the PACER case reports, about the individual chapter 11

³⁹ See Table F-2, December 31, 2010, available at <http://www.uscourts.gov/statistics/table/f-2/statistical-tables-federal-judiciary/2010/12/31>; Table F-2, December 31, 2013, available at <http://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2013/12/31>.

⁴⁰ Harvard's Bankruptcy Data Project provided an independent estimate of the number of individual chapter 11s, and these jurisdictions collectively accounted for less than 5% of the total in 2010. The Harvard Bankruptcy Data Project never had data available for 2013; the 2010 data source is now archived: <https://web.archive.org/web/20150905052318/http://bdp.law.harvard.edu/>.

⁴¹ 11 U.S.C. § 1322(d) (2012).

⁴² See *infra* note 239, and accompanying text.

⁴³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (2005).

cases filed in 2010 and 2013. We provide data on debtor type, conversions between chapters, filings by district, the nature of debtors' liabilities, and the infrequency of involuntary chapter 11 filings. Where applicable, we compare the individual chapter 11 findings with PACER case report data on chapter 13 and corporate chapter 11 cases. In Section B, we look at the experience levels of the attorneys representing the individual debtors who filed for relief in 2010 and 2013, and find that few specialize in individual chapter 11 cases. Finally, in Section C, we discuss the handful of involuntary individual chapter 11 cases filed in 2010 and 2013, and conclude, as a practical matter, that there is no thirteenth amendment involuntary servitude problem for individual debtors in chapter 11.

A. Some Basic Facts about Individuals in Chapter 11

1. Chapter 11 Debtor Type

PACER case reports include a field that lists the bankruptcy chapter the case is in at the time that the case is pulled, regardless of whether the case is open or closed. For converted cases, the case reports also include a field that lists the pre-conversion bankruptcy chapter. Using these two fields, we identified any case that had been in chapter 11.⁴⁴ We then narrowed the cases to those filed by an individual.

Table 1 lists the type of debtor for these PACER case reports for 2010 and 2013. In both years, corporate chapter 11 cases predominated in the PACER data sample, with the debtor checking the "corporation" box on the voluntary petition in 64-65% of the cases. *See* Columns A & B, Row (2) of Table 1. Surprisingly, individual debtors

⁴⁴ This approach may miss some cases that were once in chapter 11, if they were later converted to two other chapters. For example, we would miss a case that was filed in chapter 11, converted to chapter 13 and then converted to chapter 7. We suspect that such cases are extremely rare.

comprised a sizable portion of the PACER data sample: in both 2010 and 2013, at least 30% of chapter 11 debtors indicated on the petition that they were individuals. *See* Columns (A) & (B), Row (1) of Table 1. Another 3% to 5% of debtors checked the “partnership” or “other” boxes on the petition. *See* Columns (A) & (B), Rows (3) & (4) of Table 1.

Chapter 11 cases, however, do not account for a significant share of all individual filings, regardless of chapter. In both 2010 and 2013, individual chapter 11 filings accounted for less than 0.3% of all individual bankruptcy cases in our sample.

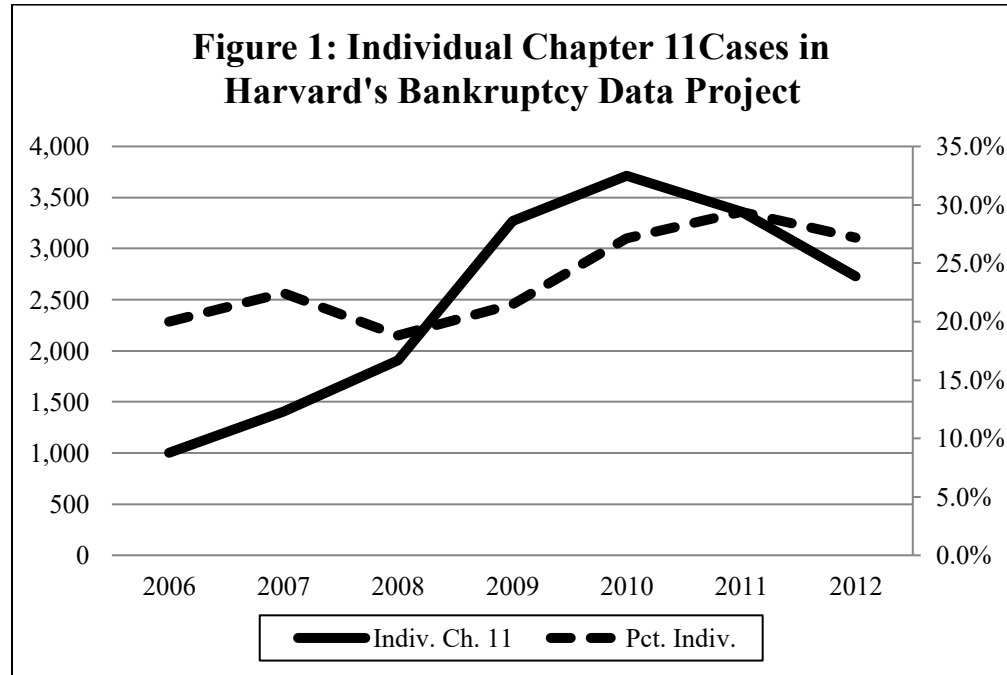
Table 1: Debtor Type for Chapter 11 Cases

	(A) 2010		(B) 2013	
	Number	Percentage	Number	Percentage
(1) Individual	4,049	30.3%	2,617	31.2%
(2) Corporation	8,617	64.5%	5,487	65.4%
(3) Partnership	466	3.5%	179	2.13%
(4) Other	227	1.7%	105	1.25%
Total	13,359		8,388	

Our estimate of individual chapter 11 cases is a little higher than that found by Harvard’s Bankruptcy Data Project for 2010.⁴⁵ (The Project did not gather data for 2013). The solid bold line in Figure 1 shows the Project’s estimate of the number of individual chapter 11 cases across time while the dashed bold line shows the percentage of chapter 11 cases filed by individuals. The difference between our estimate of chapter 11 filings and that of the Project likely results from the fact that we included a case as an individual

⁴⁵ Coincidentally, Sullivan, Warren and Westbrook also found that 31% of the chapter 11 cases in their 1994 sample were filed by individuals. *See Financial Characteristics, supra* note 4, at 534. Lawton found a smaller percentage in her study of individual chapter 11s in 2004 (23%) and 2007 (27%). *See Individual Chapter 11 Debtors, supra* note 4, at 466, Table 1.

chapter 11 if either its current or previous chapter was chapter 11. Harvard’s Bankruptcy Data Project looked only at the initial chapter, thereby missing individual cases that converted to chapter 11 from either chapter 7 or 13.



2. Conversions

Cases are often converted from one chapter to another,⁴⁶ but the rules differ depending upon whether conversion is sought by the debtor or by another party, and upon the chapters involved. A debtor may convert into chapter 11 from either chapter 7⁴⁷ or

⁴⁶ The Code requires that the debtor be eligible under the destination chapter. *See* 11 U.S.C. §§ 706(d), 1112(f), 1307(g) (2012).

⁴⁷ 11 U.S.C. § 706(a) (2012). Although this right appears to be absolute, it is subject to two exceptions, one statutory and the other judicial. The statutory exception is that conversion is unavailable if the case was previously converted into chapter 7. The judicially-created exception, applicable when bad faith is involved, derives from the Supreme Court’s decision in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007). In *Marrama*, the chapter 7 debtor attempted to hide assets from the trustee. When the trustee discovered those assets, the debtor sought to prevent their loss by converting from chapter 7 to chapter 13. The Court denied conversion on the basis of the debtor’s bad faith.

chapter 13.⁴⁸ Interestingly, no statutory provision permits conversion from chapter 12 to chapter 11,⁴⁹ but most courts permit such a conversion under appropriate circumstances.⁵⁰

A debtor may also convert out of chapter 11 into either chapter 7, 12 or 13.⁵¹ The right to convert to chapter 7 is absolute if the case was filed voluntarily and no trustee has been appointed.⁵² Upon the request of a party in interest, the court may convert a chapter 11 case to chapter 7 for cause, unless appointment of a trustee or examiner would better serve the best interests of creditors.⁵³ Conversion is not permitted if it does not serve the best interests of creditors and the debtor or another party in interest establishes, first, that a plan is likely to be confirmed within designated time frames and, second, that the reason for conversion includes an act or omission by the debtor that was reasonably justified and can be cured.⁵⁴

⁴⁸ Section 1307(d) provides that before confirmation of a plan a party in interest or the United States Trustee may request and the court may convert the case. 11 U.S.C. § 1307(d) (2012). Thus, involuntary conversions are possible, but subsection (d) is subject to subsection (f). It, in turn, requires that a chapter 13 case may not be converted to any other chapter, in the absence of a request by the debtor, if the debtor is a farmer. *Id.* § 1307(f).

⁴⁹ Section 1208(a) permits conversion from chapter 12 to chapter 7 upon the debtor's request and subsection (d) permits conversion to chapter 7, at the request of a party in interest, upon a showing that the debtor "committed fraud in connection with the case." 11 U.S.C. § 1208(d) (2012).

⁵⁰ *In re Lawless*, 79 B.R. 850 (W.D. Mo. 1987) (holding that whether to permit conversion of chapter 12 case to chapter 11 is within sound discretion of bankruptcy court; affirming bankruptcy judge's denial of motion to convert when debtors failed to meet deadline for filing chapter 12 plan and did not meet statutory qualifications for chapter 12); *In re Miller*, 177 B.R. 551 (Bankr. N.D. Ohio 1994) (permitting conversion because debtor filed chapter 12 in good faith, creditors were not prejudiced, and conversion was equitable; to dismiss instead and force debtor to refile would change the petition date to prejudice of pre- and post-petition creditors); *In re Bird*, 80 B.R. 861 (Bankr. W.D. Mich.1987) (holding conversion from chapter 12 to chapter 11 permissible, within sound discretion of court; permitting conversion despite debtors' failure to follow court orders, given reasons to support good faith); *In re Orr*, 71 B.R. 639 (Bankr. E.D.N.C. 1987) (permitting conversion because debtors filed chapter 12 in good faith, unaware that they exceeded its debt limits, creditors would not be prejudiced, and conversion would not be inequitable).

⁵¹ 11 U.S.C. § 1112(a) & (d) (2012).

⁵² *Id.* § 1112(a).

⁵³ *Id.* § 1112(b)(1).

⁵⁴ *Id.* § 1112(b)(2).

Conversion from chapter 11 to chapter 13 is governed by different rules. The debtor must request conversion before discharge⁵⁵—a provision with less bite since 2005 because individual chapter 11 debtors do not receive a discharge upon confirmation of the plan.⁵⁶

The data in Table 2 include converted cases—cases begun in chapter 11 and then converted to chapter 7 or 13, and cases begun in chapter 7 or 13 and converted to chapter 11.⁵⁷ To identify these cases we used PACER case report fields that reveal the current chapter (or the chapter in which the case closed) as well as the immediately preceding chapter, if any. Notably, these fields contain one important limitation. If, for example, a case was filed under chapter 11, converted to chapter 13 and then later converted to chapter 7, we would only see that the case ended in chapter 7 and was previously in chapter 13. Subject to this limitation, Tables 2 and 3 provide information about between-chapter conversions for individuals in the PACER data sample who filed for relief under the Bankruptcy Code in 2010 and 2013. Note that we dropped all cases that had never been in chapter 11 or 13 and indicated the omission in both Tables 2 and 3 with the designation “n/a.”

⁵⁵ *Id.* § 1112(d).

⁵⁶ For a more complete discussion of the timing of discharge, *see infra* note 243, and accompanying text.

⁵⁷ We frequently compare chapter 11 to chapter 13, and so we constructed a similar set of all cases that are currently or have been in chapter 13.

Table 2: Conversion Between Chapters for Individual Bankruptcy—2010

	Initial Chapter				
		7	11	12	13
Converted Chapter	7	n/a	937	n/a	42,293
	11	90	n/a	7	310
	12	n/a	1	n/a	17
	13	5,486	48	8	n/a
	No Conversion	n/a	2,656	n/a	358,333

Table 3: Conversion Between Chapters for Individual Bankruptcy—2013

	Initial Chapter				
		7	11	12	13
Converted Chapter	7	n/a	379	n/a	20,124
	11	55	n/a	7	255
	12	n/a	1	n/a	5
	13	3,339	30	8	n/a
	No Conversion	n/a	1,890	n/a	274,490

The data in Tables 2 and 3 reveal that debtors sometimes convert from chapter 11 to chapter 13 and vice versa, but conversion from either chapter to chapter 7 is far more common. Of the 3,642 cases initially filed in chapter 11 in 2010,⁵⁸ just 48 (1.3%) were converted to chapter 13 while 937 (25.7%) were converted to chapter 7. Similarly, of the 400,953 cases initially filed in chapter 13, only 310 (0.08%) were converted to chapter 11 while 42,293 (10.55%) were converted to chapter 7. This means that chapter 11 cases are converted to chapter 7 at more than twice the rate that chapter 13 cases are converted to chapter 7. We return to this fact when we discuss the “success” rate in Section IV below.

⁵⁸ We counted a case as initially filed in chapter 11 if the previous chapter was listed as chapter 11 or if the previous chapter was blank and the chapter was listed as chapter 11. For 2010, we had 3,642 cases “initiated” in chapter 11. If we add the 407 cases converted into chapter 11 (90 from chapter 7, 7 from chapter 12, and 310 from chapter 13), this gives us the 4,049 cases disclosed in (A)(1) of Table 1.

3. *Where Are the Debtors Filing?*

As the data in Table 4 show, there is wide variation among districts in terms of individual chapter 11 filings. Table 4 provides data from the five districts with the highest and lowest number of individual chapter 11 filings in 2010 and 2013. For data on all 78 judicial districts, *see* Appendix A, Table 58. Both Tables 4 and 58 provide four pieces of information: (1) the jurisdiction in which the case was filed; (2) the number of cases in that jurisdiction; (3) that jurisdiction’s share of our PACER total sample; and (4) the percentage of individual chapter 11 cases in that jurisdiction.

Table 4: Top 5 and Bottom 5 Districts for Individual Chapter 11 Filings

Top Five Districts						
	2010			2013		
District	Individual Ch. 11	% Whole Sample	% Individual of District Ch. 11	Individual Ch. 11	% Whole Sample	% Individual of District Ch. 11
CACD	581	14%	47%	349	13%	47%
CAND	312	8%	65%	127	5%	61%
AZ	294	7%	42%	117	4%	41%
FLMD	232	6%	29%	146	6%	35%
NV	200	5%	40%	125	5%	47%
Bottom Five Districts						
	2010			2013		
District	Individual Ch. 11	% Whole Sample	% Individual of District Ch. 11	Individual Ch. 11	% Whole Sample	% Individual of District Ch. 11
LAMD	1	0%	6%	1	0%	10%
IAND	3	0%	43%	0	0%	0%
ND	3	0%	38%	0	0%	0%
OKND	2	0%	8%	1	0%	17%
VT	3	0%	33%	0	0%	0%

As the data in Tables 4 and 58 demonstrate, the number of individual chapter 11 filings varies greatly by district: from a low of one case each in 2010 and 2013, respectively, for

the Middle District of Louisiana to a high of 581 and 349 for 2010 and 2013, respectively, for the Central District of California. While four western districts (the Central District of California, the Northern District of California, the District of Nevada, and the District of Arizona) account for 34% and 27% of our sample in 2010 and 2013, respectively, there are significant numbers of individual chapter 11 filings in other areas of the country, such as the Middle District of Florida. There also is dramatic variation in the percentage of chapter 11 cases in each district that are filed by individuals, from a low of less than 1% in Delaware (see Table 58) to more than 60% in the Northern District of California.⁵⁹

4. *Primary Nature of Debt and Small Business Status*

The voluntary petition asks debtors to disclose whether their debts are “primarily business debts” or “primarily consumer debts,” and the AO reports bankruptcy statistics by the debtor’s choice. According to the AO, about 86% of all chapter 11 cases filed in 2010 (11,774 of 13,713) were business filings, while less than 1% of chapter 13 filings (4,174 of 438,913) were business filings.⁶⁰ These commonly-reported statistics lead most people to think of chapter 11 as business bankruptcy and chapter 13 as consumer or non-business bankruptcy.⁶¹ The AO’s statistics are for all chapter 11 filings, however, not just those made by individuals.

Roughly 45% of the individuals in our PACER data sample reported that their debts were primarily business-related. *See* Table 5. While this 45% figure is less than the

⁵⁹ The existence of substantial variation is consistent with the findings of *Success of Chapter 11*, *supra* note 3, at 573.

⁶⁰ Table F-2, December 31, 2010, *available at* <http://www.uscourts.gov/statistics/table/f-2/statistical-tables-federal-judiciary/2010/12/31>.

⁶¹ Although the official statistics substantially understate the importance of business debt in personal bankruptcy, *see Disappearing Business Bankruptcy*, *supra* note 2, most of the debt in personal bankruptcy was incurred for personal or household purposes.

overall proportion of business filings in chapter 11, it is still dramatically higher than the percentage of chapter 13 filers who claim that their debts are primarily business-related; the AO reports this figure as less than 1% and our findings are similar, as the data in Table 5 show. It is worth noting that the proportion of debtors claiming that their debts are primarily business-related is remarkably stable between 2010 and 2013, despite the fairly dramatic drop in the total number of individual chapter 11 cases filed during that period.⁶²

Table 5: Primary Nature of Debt

	Individual Chapter 11		Chapter 13	
	2010	2013	2010	2013
Business	45%	46%	1%	1%
Consumer/Non-business	55%	54%	99%	99%
Total Number	4,409	2,617	406,407	298,191

Prior research has shown that consumers check the box claiming primarily non-business debts with little or no thought, and that almost 20% of chapter 13 filings may be business-related, using a broad definition.⁶³ Even if we adopt this higher estimate for chapter 13 and make no adjustments to the self-reporting of chapter 11 debt,⁶⁴ however, it is still true that an individual chapter 11 case is more than twice as likely to be business-related than is a chapter 13 case. Because there are so many more chapter 13 filings than chapter 11 filings, however, there are still significantly more business chapter 13 filings, in absolute numbers, than business individual chapter 11 filings.

⁶² The difference is not statistically significant (p-value of 0.40). The business/non-business divide may not have always been so stable. In her prior study, Lawton found 41.8% business individual chapter 11s in 2004 and 55.9% in 2007. See *Individual Chapter 11 Debtors*, *supra* note 4. Her data, however, is drawn from a period of massive disruption in bankruptcy law caused by BAPCPA.

⁶³ See *Disappearing Business Bankruptcy*, *supra* note 2.

⁶⁴ Although most individual chapter 11 debtors checked the petition box indicating that their debts were primarily consumer in nature, the overwhelming majority operated a business. See *infra* Section III.A.2.

Chapter 11 provides special procedural rules applicable to a small business debtor,⁶⁵ which the Code defines as someone engaged in business who owes less than roughly \$2.5 million in non-contingent liquidated debts.⁶⁶ The supervisory role of the United States Trustee is enhanced in a small business case, both at the beginning of the case and during its pendency.⁶⁷ The small business debtor may use a simplified standard form for its disclosure statement, and the bankruptcy court may combine the hearing on plan confirmation with the hearing on approval of the disclosure statement.⁶⁸ The Code also provides plan-proposal and plan-confirmation deadlines for small business debtors.⁶⁹

The voluntary petition contains a box indicating whether the debtor is a small business debtor,⁷⁰ and the PACER case reports record the debtor's answer. Table 6 presents the small business findings broken down by debtor type. A small percentage of the debtors in our data sample—about 7% to 8%—stated that they were small businesses. The more striking fact, however, is that PACER did not report responses for more than 60% of the individuals who filed for relief under chapter 11.⁷¹ See Column (A)(3) of Table 6.

⁶⁵ See, e.g., 11 U.S.C. § 362(n) (2012) (curtailing serial filings by small business debtors by preventing automatic stay from taking effect when, for example, debtor is involved in a pending small business bankruptcy case, unless second filing was involuntary or debtor shows it resulted from unforeseeable circumstances and it is more likely than not that the court will confirm a plan of reorganization within a reasonable time period); *id.* § 1121(e) (2012) (providing exclusivity period and filing deadlines for small business cases).

⁶⁶ 11 U.S.C. § 101(51D) (2012). The current dollar limit, which re-set on April 1, 2016, is \$2,566,050. See *infra* note 119.

⁶⁷ See 28 U.S.C. §§ 586(a)(3)(H) & 1116 (2012).

⁶⁸ 11 U.S.C. § 1125(f) (2012).

⁶⁹ See *id.* at § 1121(e)(2), 1129(e) (2012); see also *infra* note 306 and accompanying text.

⁷⁰ The voluntary petition requires chapter 11 debtors to check that they either are or are not a small business debtor as defined at § 101(51D) of the Code.

⁷¹ Given the number of blank entries in the PACER sample, we will spend more time discussing small business filings in Section III.A.2 of this Report, which addresses the very different results in the small random sample. See *infra* note 114, and accompanying text.

Table 6: Small Business Debtors

	(A) Individual		(B) Corporation		(C) All	
	2010	2013	2010	2013	2010	2013
(1) Small Business	7%	9%	21%	23%	17%	19%
(2) Not Small Business	28%	30%	53%	64%	54%	54%
(3) Blank	65%	61%	14%	13%	30%	27%
Total Number	4,049	2,617	8,617	5,487	13,359	18,388

5. *Are Assets Available for Distribution?*

The PACER case reports contain an “assets” field, marked “yes” or “no,” that seems to correspond with whether the debtor checked a box on the bankruptcy petition indicating an expectation that “after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.”⁷² The AO records such filings as “No Asset” cases, and prior studies have found that more than 90% of chapter 7 filings fall into this category.⁷³ By comparison, both individual chapter 11 debtors and chapter 13 debtors are very optimistic about their ability to pay at least something to unsecured creditors, and their optimism seems to be growing. In 2010, about 86% of individual chapter 11 debtors and 90% of chapter 13 debtors indicated that there would be assets available for general unsecured creditors. In 2013, these numbers rose to 92% and 94%, respectively.⁷⁴ Whether this optimism was warranted is something

⁷² Voluntary Petition for Individuals Filing for Bankruptcy, Official Form 101 *available at* <http://www.uscourts.gov/forms/individual-debtors/voluntary-petition-individuals-filing-bankruptcy>

⁷³ Ed Flynn, *Chapter 7 Asset Cases and Trustee Compensation*, ABI Journal, June 2014.

⁷⁴ We found a lower estimate in our random sample, which is likely due to differences in coding. Nonetheless, we still found a fairly high percentage of cases in which debtors expected that assets would be available for general unsecured creditors. *See infra* Table 22, and accompanying text.

we cannot tell from this data, but there are good reasons to be skeptical. At least two prior studies have found that most chapter 13 debtors pay nothing to unsecured creditors.⁷⁵

Table 7: Assets Available for General Creditors—PACER Data

	Chapter 11		Chapter 13	
	2010	2013	2010	2013
No Asset	13%	8%	10%	6%
Assets	86%	92%	90%	93%
Unknown or blank	.6%	.05%	.05%	.03%
Total Number	4,049	2,617	406,495	298,521

B. Attorneys

PACER case reports contain a field that identifies the attorney for the debtor. We used this field to try to answer two questions: 1) do attorneys who file individual chapter 11 cases specialize in this work? and 2) how often do individuals file chapter 11 pro se? Unfortunately, this field often contains multiple pieces of information, such as the attorney of the debtor, the attorney for a co-debtor, and (occasionally) an attorney for a bankruptcy administrator.⁷⁶

To identify the attorneys who file individual chapter 11 cases, we used our statistical package to identify the names that followed the phrases “attorney for debtor,” “attorney for debtor in possession,” “attorney for joint debtor,” or “attorney for alleged debtor.” We then used the statistical package to tabulate the number of petitions in our

⁷⁵ See Eraslan, *supra* note 29 (studying chapter 13 cases filed in Delaware); Norberg & Velkey, *supra* note 2, at 543.

⁷⁶ See Anne Lawton, *An Argument for Simplifying the Code’s “Small Business Debtor” Definition*, 21 ABI L. REV. 55, 89 (2013) [hereinafter *Simple Definition*] (stating that “the United States Trustee does not operate in the six federal judicial districts in Alabama and North Carolina” and that “the Bankruptcy Administrator handles cases in those districts”). See also Trustees and Administrators, available at <http://www.uscourts.gov/services-forms/bankruptcy/trustees-and-administrators>

combined sample (both 2010 and 2013) for each attorney name. Finally, we asked a research assistant to read through the table to identify names that were likely duplicates, such as Richard M. Hynes, Rich M. Hynes, and Richard M. Hynes, disbarred. Table 8 presents the results. Column (A) indicates the number of attorneys who have handled a given number of individual chapter 11 cases, while Column (B) shows this number as a percentage of all attorneys in our sample. Column (C) shows the number of individual chapter 11 cases handled by attorneys with a given level of experience, and Column (D) presents that number as a percentage of all individual chapter 11 cases in our sample, other than those filed pro se.

Table 8: Attorneys

Petitions Filed	Attorney Experience		Cases by Attorney Experience	
	(A) Number	(B) % of Total	(C) Number	(D) % of Total
(1) 21+	17	0.7%	609	10.4%
(2) 16 to 20	10	0.4%	181	3.1%
(3) 11 to 15	35	1.4%	453	7.7%
(4) 6 to 10	135	5.5%	998	17.0%
(5) 3 to 5	352	14.3%	1304	22.2%
(6) 2	422	17.1%	844	14.3%
(7) 1	1493	60.6%	1493	25.4%

The data in Table 8 suggest that few attorneys specialize in individual chapter 11 cases. Only sixty-two attorneys handled eleven or more individual chapter 11 cases over the two years covered by the data. *See* Column (A) of Table 8. Over 60% of the individual chapter 11 cases in our PACER data sample were filed by attorneys who had filed five or fewer petitions in 2010 and 2013 combined. *See* Column (D), Rows (5)-(7) of Table 8. By contrast, only around 21% of our cases were handled by attorneys who

worked on eleven or more cases in 2010 and 2013 combined. *See* Column (D), Rows (1)-(3) of Table 8.

We used two methods to identify pro se filings. First, we looked for the text “pro se” following “debtor” or “possession.” Using the first method, we estimated that in our combined sample of 2010 and 2013 filings, about 8.2% (546 petitions of 6,666) of the filings were made pro se. Second, we looked for cases in which we could not identify an attorney name using the technique we described for obtaining the data in Table 8. This second method suggests that about 8.1% (537 of 6,666) of the filings were made pro se. The two measures give the same answer in almost all cases.

C. Involuntary Chapter 11 Cases

Bankruptcy courts are like hospitals in that nearly everyone who uses their services would rather that their health (financial or otherwise) made these services unnecessary. Our focus in this section is not on those debtors who wish that they had a better alternative than chapter 11, but rather on those individuals who were in some sense involuntarily committed to chapter 11’s care. Debtors may arrive in chapter 11 against their will if creditors file an involuntary petition.⁷⁷ By contrast, creditors cannot commence an involuntary chapter 13 case.⁷⁸ The standard justification for this limitation

⁷⁷ Section 303(a) provides that involuntary cases “may be commenced only under chapter 7 or 11.” 11 U.S.C. § 303(a) (2012).

⁷⁸ *Id.* Congress considered the possibility of permitting involuntary chapter 13 cases while the current statute was under consideration, but the Report of the House Judiciary Committee foresaw constitutional problems under the thirteenth amendment:

As under current law, chapter 13 is completely voluntary. This Committee firmly rejected the idea of mandatory or involuntary chapter XIII in the 90th Congress. The thirteenth amendment prohibits involuntary servitude. Though it has never been tested in the wage earner plan context, it has been suggested that a mandatory chapter 13, by forcing an individual to work for creditors would violate this prohibition.

H.R. REP. No. 95-595, at 120 (1977) (footnotes omitted), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6080-81 (1977). Since that time, courts have been divided on the issue. Some have voiced similar constitutional concerns. *See, e.g., In re Nahat*, 315 B.R. 368 (Bankr. N.D. Tex. 2004); *In re Noonan*, 17 B.R. 793 (Bankr. S.D.N.Y. 1982). Other courts have found no constitutional issue. *In re Graham*, 21 B.R. 235 (Bankr.

is that creditors should not be able to force an individual into a bankruptcy regime that requires payment out of future income.⁷⁹

Possible constitutional issues could not be tested until the 2005 Amendments created the very statutory configuration in chapter 11 that was thought, decades ago, to raise thirteenth amendment problems—that is, the possibility of an involuntary case against an individual debtor who would be required to devote future income to repayment of prepetition debts. Several changes have produced this possibility. First, the amendments added § 1115, which includes as property of the estate “earnings from services performed by the debtor after the commencement of the case.”⁸⁰ Second, the amendments added § 1123(a)(8), requiring that an individual debtor’s chapter 11 plan “provide for the payment to creditors . . . of all or such portion of earnings from personal services performed by the debtor after the commencement of the case . . . as is necessary for the execution of the plan.”⁸¹ Finally, the amendments added § 1129(a)(15)(B), which requires, as a condition for confirmation, that the debtor commit an amount equal to his or her “projected disposable income” for the longer of the next five years or the period for which the plan provides for payments.⁸² These new provisions operate in conjunction with preexisting chapter 11 rules: individual chapter 11 debtors cannot convert an

N.D. Iowa 1982), for example, the debtor’s ex-wife moved to convert his chapter 7 case to a chapter 11, thereby enabling unsecured creditors (including herself) to impose a repayment plan that would reach his substantial post-petition income. The court noted that converting the case would divert the fruits of the debtor’s labors to his prepetition creditors, much like a mandatory chapter 13, but thought the constitutional concerns clearly overblown: “Such a mandatory repayment scheme is so radically different in character from the slavery that the thirteenth amendment was meant to abolish . . . that the Court questions whether the framers of that amendment had the prohibition of mandatory repayment plans in mind when they drafted it. *Id.* at 238 n.3.

⁷⁹ See Margaret Howard, *Bankruptcy Bondage*, 2009 U. ILL. L. REV. 191 (2009).

⁸⁰ 11 U.S.C. § 1129(a)(15) (2012). Post-petition earnings are part of the Chapter 13 estate under § 1306(a).

⁸¹ *Id.* § 1123(a)(8).

⁸² *Id.* § 1129(a)(15), added by Pub. L. No. 109-8, § 321(c)(1). See *infra* notes 238-241 and accompanying text for discussion of how bankruptcy courts interpret the language of § 1129(a)(15).

involuntary case to another chapter;⁸³ chapter 11 plans have no statutory maximum time limit⁸⁴ and can be extended on a creditor's motion;⁸⁵ creditors can propose a plan in chapter 11, unlike in chapter 13,⁸⁶ if the debtor has not done so;⁸⁷ and, finally, debtors in involuntary cases do not have an absolute right to dismiss the case.⁸⁸ Taken together, these provisions allow creditors to use an involuntary chapter 11 bankruptcy to reach a debtor's future income, rendering the constitutional question no longer theoretical. Scholars,⁸⁹ including one of us, have vigorously criticized⁹⁰ these changes. We do not revisit this debate here. Rather, we demonstrate that the ability of a creditor to file an involuntary chapter 11 petition against an individual likely has little or no practical significance.

According to the PACER case reports, just twenty-eight of the 6,666⁹¹ individual chapter 11 bankruptcies in our sample (0.4%) were started with an involuntary chapter 11 petition. Because there were so few involuntary petitions, we examined each one.

In 2010, only fourteen individual cases began with an involuntary petition in chapter 11. Two of these fourteen cases, however, were mistakenly filed as involuntary

⁸³ *Id.* § 1112(a)(2) (2012). A chapter 13 debtor, in contrast, may convert to chapter 7 “at any time.” *Id.* § 1307(a).

⁸⁴ *Id.* § 1129(a)(15)(B). A chapter 13 plan may be no longer than five years. *Id.* § 1322(d)(1).

⁸⁵ *Id.* § 1127(e)(2).

⁸⁶ Section 1321 states that “[t]he debtor shall file a plan.” *Id.* § 1321.

⁸⁷ Chapter 11 permits others, besides the debtor, to propose a plan once the exclusivity period expires in four to six months after the date of filing. 11 U.S.C. § 1121(c) (2012) (terminating the exclusivity period, for a debtor who is not a small business, 120 days after the order for relief, or 180 days after such order if the plan has not been accepted by all impaired classes); *id.* § 1121(e) (providing a 180-day exclusivity period for small business cases, subject to extension for cause).

⁸⁸ *Id.* § 1112(b) (2012) (requiring a showing of cause). Under § 1307(b), the bankruptcy court “shall” grant dismissal of a chapter 13 case upon the debtor's request, unless the case has been previously converted into chapter 13.

⁸⁹ See, e.g., Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483 (2005); G. Eric Brunstad Jr., *The Inapplicability of “Means Testing” to Cases Converted to Chapter 7*, AM. BANKR. INST. J., 1, 60 (Nov. 2005).

⁹⁰ See Howard, *supra* note 79.

⁹¹ The total number of filings in our sample varies from question to question due to some cases with omitted fields.

petitions,⁹² while a third case was transferred intra-district and PACER counted it as two, rather than one, involuntary filing.⁹³ Thus, there were really only eleven involuntary chapter 11 petitions filed in 2010. Another three cases began as involuntary chapter 7 cases that converted to chapter 11.⁹⁴ Of these fourteen cases, however, the bankruptcy court entered an order for relief in four cases, only two of which started with the filing of an involuntary chapter 11 petition.⁹⁵ Neither of these two involuntary chapter 11 cases, however, progressed to plan confirmation. In one case, the bankruptcy court dismissed the case less than four months after entering the order for relief.⁹⁶ In the other, the bankruptcy court ordered the joint administration of the debtor-wife's involuntary case with her debtor-husband's voluntary chapter 11 case,⁹⁷ and later granted the married debtors' motion to convert to chapter 7.⁹⁸ Thus, in none of the cases in 2010 was a debtor forced into proposing and confirming a chapter 11 plan.

In 2013, only seven cases began with the filing of an involuntary chapter 11 petition. Another four cases started with an involuntary chapter 7 petition followed by conversion to chapter 11, but PACER coded one of these cases as an individual filing

⁹² See Ex Parte Motion to Dismiss for Filing by Mistake, *In re Jimenez*, No. 10-18064, at ¶ 1 (Bankr. Cal. S.D. Oct. 14, 2010) (Dkt. #3) (stating that involuntary petition was filed by mistake and that debtor “intended to file a Voluntary Petition”); Sua Sponte Order Dismissing Petition, *In re Pease*, No. 10-50799, at 2-3 (Bankr. W.D. Tex. March 2, 2010) (Dkt. #2) (explaining that case was “not truly an involuntary case at all” with debtor as the “only petitioning creditor”).

⁹³ See *In re Weinberg*, No. 10-12836 (Bankr. C.D. Cal. Feb. 22, 2010) (this case transferred intra-district; original case number 10-16229 filed in the Los Angeles division).

⁹⁴ Five of the six involuntary individual chapter 7 cases filed in 2010 and 2013 were converted to chapter 11 on the debtor's motion. In the sixth, the bankruptcy court ordered substantive consolidation with the individual debtor's voluntary chapter 11 case and, on its own motion, converted the case to chapter 11. See discussion of *In re Munson* *infra* note 102.

⁹⁵ See Order Entering Relief under Chapter 11 on Involuntary Petition and Directing Filing of Required Documents, *In re Ramos*, No. 10-29568 (Bankr. D. Md. Sept. 20, 2010) (Dkt. #8); Order for Relief under Chapter 11 of the Bankruptcy Code, *In re Pettit*, No. 10-20901 (Bankr. D. Utah Apr. 9, 2010) (Dkt. #9).

⁹⁶ Order Dismissing Case, *In re Pettit*, No. 10-20901 (Bankr. D. Utah July 26, 2010) (Dkt. #31).

⁹⁷ Order Providing for Joint Administration of Cases, No. 10-29070 (Bankr. D. Md. Oct. 14, 2010) (Dkt. #42) (order docketed in lead case).

⁹⁸ Order Converting Case to Chapter 7, *In re Ramos*, No. 10-29070 (Bankr. D. Md. Feb. 1, 2011) (Dkt. #117) (order docketed in husband's lead case).

when it was an involuntary corporate filing.⁹⁹ The bankruptcy court entered an order for relief in only three of these ten cases, but these three were involuntary chapter 7 filings. An order for relief was not entered in any of the involuntary chapter 11 cases.

Debtors may also arrive in chapter 11 against their will if they file a voluntary petition in another chapter and creditors or the bankruptcy trustee move to convert the case to chapter 11.¹⁰⁰ We focused our analysis on debtors who initially filed in chapter 7 because the post-petition earnings of chapter 7 debtors are not available to their creditors.

Of the 6,666 individual cases filed in 2010 and 2013 in the seventy-eight judicial districts covered by this study, only 145, or 2.2%, ended up in chapter 11 after conversion from an initial filing under chapter 7 of the Code. In almost all of these 145 cases, however, the debtor alone filed the motion to convert to chapter 11 from chapter 7;¹⁰¹ only two of these 145 cases (one filed in each of 2010 and 2013) were converted to chapter 11 without the debtor's consent.¹⁰² In one of these two cases, the bankruptcy

⁹⁹ See *In re Dynatemp, Inc.*, No. 13-21960 (Bankr. D. Md. July 12, 2013) (involuntary petition filed under Chapter 7, case converted to Chapter 11, and then re-converted back to Chapter 7).

¹⁰⁰ 11 U.S.C. §§ 706(b), 1307(d) (2012).

¹⁰¹ In several cases in 2010 and 2013, the debtor and the United States Trustee stipulated to conversion, typically after the United States Trustee had moved to dismiss for abuse under § 707(b)(2) and (3). See, e.g., *Stipulated Order Converting Case, In re Sharpe*, No. 13-11896 (Bankr. D. N.M. Sept. 24, 2013) (Dkt. #22) (stating that matter was before the court on the U.S. Trustee's dismissal motion, and that the debtor and U.S. Trustee had stipulated to conversion to chapter 11); *Order Approving Stipulation for Voluntary Conversion of Underlying Case to Chapter 11 under 11 U.S.C. §§ 348 and 706(a) and (c) and §707 (b)(1) In Lieu of Case Dismissal, In re Peled*, No. 10-37905 (Bankr. C.D. Cal. Nov. 17, 2010) (Dkt. #28) (stating that married debtors and United States Trustee had stipulated to a voluntary conversion to chapter 11 "in Lieu of Case Dismissal under 11 U.S.C. § 707(b)").

¹⁰² See *Order on Florida Bank's Motion to Convert to Chapter 11 Pursuant to 11 U.S.C. § 706(b), In re Baker*, No. 13-00296 (Bankr. M.D. Fla. Dec. 10, 2013) (Dkt. #83) (stating that conversion to chapter 11 would benefit both the debtor and her creditors, even though debtor opposed conversion and was eligible for relief under chapter 7); *Civil Minute Order, In re Moya*, No. 10-53532 ((Bankr. E.D. Cal. May 4, 2011) (Dkt. #42) (converting case upon motion of United States Trustee to dismiss or, in the alternative, convert debtors' chapter 7 case over debtors' objection to dismissal). Two cases in 2010 that appeared, at first, to be involuntary conversions turned out, upon closer examination, not to be involuntary conversions at all. One case was a mistaken chapter 7 filing; the debtor had intended to file for relief under chapter 11. See *Stipulation and Order Consenting to Conversion of this Chapter 7 Case to One under Chapter 11 of the Bankruptcy Code, In re Cresci*, No. 10-15107 (Bankr. S.D. N.Y. Oct. 1, 2010) (Dkt. #6) (stating that debtor had "intended to file a voluntary individual Chapter 11 petition"). In the other case, the debtor's

court granted the married debtors' motion to dismiss the case shortly after conversion to chapter 11.¹⁰³ The other case was still pending as of this writing; the debtor recently filed a chapter 11 plan, but a confirmation hearing has not yet been scheduled.¹⁰⁴

Involuntary cases are exceedingly rare, regardless of how we count them. The broadest plausible definition would begin with involuntary chapter 11 petitions not filed by mistake, and add cases converted from chapter 7 without the debtor's consent. By this measure, twenty of our 6,666 individual chapter 11 cases (0.3%) were involuntary. The next broadest measure would focus only on cases in which the court entered an order for relief. By this measure, just two of our 6,666 cases (0.03%) were involuntary. Finally, because of concern that individuals may be forced to pay out of their future income, one could restrict the definition to cases in which a plan of reorganization has been confirmed. This had not occurred in any of the cases in our sample, although one case was still pending. Thus, while BAPCPA's amendments to chapter 11 created the possibility of thirteenth amendment involuntary servitude problems for individual chapter 11 debtors, in practice there are virtually no such cases.

creditors filed an involuntary chapter 7 petition against him in October of 2010. *See* Involuntary Chapter 7 Petition, *In re* Munson, No. 10-39795 (Bankr. D. Ore. Oct. 14, 2010) (Dkt. #1). In early January of 2011, the debtor filed his own voluntary chapter 11 petition. *See* Chapter 11 Voluntary Petition, *In re* Munson, No. 11-30811 (Bankr. D. Ore. Jan. 20, 2011) (Dkt. #1). On January 26, 2011, the bankruptcy court (1) granted an order for relief in the involuntary chapter 7 case; (2) substantively consolidated the two cases, deeming the involuntary chapter 7 petition date as the start of the bankruptcy case; and (3) appointed an examiner. *See* Order for Relief; Order Consolidating Cases; Order Directing Appointment of Examiner, *In re* Munson, No. 10-39795 (Bankr. D. Ore. Jan. 26, 2011) (Dkt. #85).

¹⁰³ *See* Civil Minute Order, *In re* Moya, No. 10-53532 (Bankr. E.D. Cal. July 6, 2011) (Dkt. #57) (entered two months after order converting case from Chapter 7 to 11).

¹⁰⁴ *See* Debtor's Plan of Reorganization, *In re* Baker, No. 13-00296 (Bankr. M.D. Fla. June 24, 2016) (Dkt. #252).

III. Coding Individual Cases

The PACER data, discussed in Section II, allowed us to analyze information on a massive number of cases. The disadvantage is that we were limited to variables the courts chose to code. To provide a richer and more nuanced analysis of individual chapter 11 cases, we used a random number generator to draw a smaller sample from the individual chapter 11 cases identified in the courts' PACER spreadsheets for 2010 and 2013. Because we received our PACER waivers over time, we estimated probabilities of inclusion that would yield approximately 100 cases in each year and we applied these same probabilities as we received additional waivers. The final sample contains 109 cases from 2010 and 114 from 2013 (the "random sample data").¹⁰⁵

Initially, we selected only those cases for which PACER listed the debtor type as an individual. To verify the accuracy of PACER's coding, we conducted searches of chapter 11 cases in which the debtor was listed as a partnership or corporation; unsurprisingly, few, if any, of these cases involved individual debtors. But, PACER also has a category of debtor type listed as "other"; searches of this category produced a few individual chapter 11 filings. We included these miscoded cases at the same probability that we used for the cases coded as individual.

Using this data set, we then coded for a host of variables, including many that the PACER spreadsheets do not provide. We coded for the debtor's financial information

¹⁰⁵ One individual debtor shows up twice in our 2013 sample, because two of his 2013 chapter 11 filings were pulled as part of the random sample. *See In re Burr*, No. 13-21050 (Bankr. E.D. Penn. Dec. 27, 2013); *In re Burr*, No. 13-20330 (Bankr. E.D. Penn. Nov. 27, 2013). The debtor had filed a chapter 13 case earlier in 2013, but the bankruptcy court dismissed that case in late October, because debtor's unsecured liabilities exceeded the chapter 13 debt limits. *See Order Dismissing Case, In re Burr*, No. 13-10992 (Bankr. E.D. Penn. Oct. 24, 2013) (Docket No. 66) (granting creditor motion to dismiss, which was based on chapter 13 debt limits). The debtor filed the first of his two chapter 11 cases approximately one month later.

using the last-filed schedules in the chapter 11 case.¹⁰⁶ We were unable to code some information because of missing, incomplete or incomprehensible schedules. We denoted these records as “unknown” and present the percentage of such cases in each table because it varies from question to question (e.g. some debtors complete some schedules but not others). Some debtors listed assets or liabilities without declaring an itemized value and with an implicit valuation of zero in the totals. These entries, therefore, almost certainly understate the true values.

The analysis in this Section, like the analysis of the PACER data in Section II, is largely descriptive. Hand coding the cases in the 2010 and 2013 random sample, however, allowed us to provide a more detailed picture of individuals who file for relief under chapter 11. Our main goals were to determine whether chapter 11 debtors look more like chapter 13 debtors or small and medium-sized enterprises,¹⁰⁷ and whether debtors appear to make good use of the flexibility afforded by chapter 11.

In Section III.A.1 and 2, we provide basic demographic information about the random sample debtors and their business operations. We found that apart from joint filings, men account for three to four times as many individual chapter 11 filings as women. In addition, unlike chapter 13, a significant proportion of the individual debtors in our random sample were engaged in business. In Section III.A.3, we look at the rate of

¹⁰⁶ There were some cases in which the debtor converted into or out of chapter 11 without ever filing schedules during the course of the chapter 11 case. In these instances, we used the schedules filed closest in time to the beginning or end of the chapter 11 case. For example, if the debtor initially filed for relief under chapter 7 and filed schedules during the pendency of the chapter 7 case, but did not re-file schedules when the case converted to chapter 11, we coded the case using the last schedules filed in the chapter 7 case prior to conversion to chapter 11. If the debtor initially filed for relief under chapter 11 and the case converted to chapter 7 without the debtor filing schedules during the chapter 11 case, we used the first schedules filed after conversion to chapter 7.

¹⁰⁷ The American Bankruptcy Institute Commission to Study the Reform of Chapter 11 recommended a number of amendments to chapter 11 for cases involving debtors that qualify as small and medium-sized enterprises (“SME”). See ABI Commission Report, *supra* note 21, at 275-302.

repeat bankruptcy filing and find a fairly high rate of repeat, although not necessarily abusive, filings. For example, about one-third of the debtors in the 2010 random sample had filed for bankruptcy more than once. We wrap up Section III.A with an examination of data about debtor size, using size as a proxy for complexity; these measures show that most debtors in the random sample are small.

In Section III.B, we present a more in-depth analysis of the financial condition of the random sample debtors. The income, expense, home ownership, and asset and liability data show that the debtors in the 2010 and 2013 random sample have higher incomes, higher rates of home ownership, and more significant assets than the typical American and the average chapter 13 debtor.

A. Do Individuals in Chapter 11 Look Like Those in Chapter 13?

One of the major reasons for undertaking this project was to examine whether chapter 13 or some hybrid subchapter tailored to the specific needs of bankrupt individuals would serve individual debtors better than filing for relief under chapter 11. Admittedly, it is not at all clear that chapter 13 effectively provides a fresh start to consumers or that chapter 11 effectively reorganizes the small and medium-sized enterprises dominating its docket. Still, it is worth asking whether individual chapter 11 debtors look more like chapter 13 consumers, albeit with just a little more debt, or like small and medium-sized enterprises.

1. Demographic Information

Tables 9 and 10 present basic demographic information as we begin to sketch a portrait of the individual debtors who file under chapter 11. As the data in Table 9 demonstrate, a little over half of the debtors reported a household size of one or two

individuals. Another 37% to 39% in 2010 and 2013, respectively, reported a household size of three or more persons.

Table 9 shows that a large majority of the debtors (at least 66% in 2010 and 72% in 2013) are married. Almost half of the married debtors (47.4%) chose not to file jointly with their spouses,¹⁰⁸ perhaps suggesting that they had somewhat separate financial affairs. As the data in Table 10 show, only 41.3% of filings were joint filings in 2010; in 2013 this number fell to 34.2%, although the difference is not statistically significant.¹⁰⁹

Table 10 also reports the sex of the chapter 11 filers and the results of prior studies of the sex of chapter 13 filers.¹¹⁰ We determined the sex of our filers by inserting their first name into a web page that states whether the name is primarily used by men or

¹⁰⁸ See *infra* Table 47, Row (8) (showing 73 of 154 married debtors filing singly, not jointly). Spouses may file joint bankruptcy cases. Under § 302(a), “[a] joint case under a chapter of this title is commenced by the filing . . . of a single petition . . . by an individual that may be a debtor under such chapter and such individual’s spouse.” 11 U.S.C. § 302(a) (2012). Official Form 1, used for the filing of a voluntary petition, provides two boxes—one for the name of the debtor and the other for the debtor’s spouse. Other cases, if sufficiently related, may be administratively consolidated See FED. R. BANKR. P. 1015(b).

In the recent past, courts often held same-sex couples ineligible to file jointly, even when the parties were legally married in another jurisdiction. See, e.g., *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) (holding debtors, legally married in Canada, ineligible for joint bankruptcy petition); *Bone v. Allen (In re Allen)*, 186 B.R. 769 (Bankr. N.D. Ga. 1995) (holding that term “spouse” as used in Bankruptcy Code does not apply to homosexual couple, but only to those legally married—a status determined under state law; allowing 20 days to dismiss one joint debtor or suffer dismissal of entire case). But see *Rabin v. Schoenmann (In re Rabin)*, 359 B.R. 242 (B.A.P. 9th Cir. 2007) (holding debtors who were registered domestic partners under California law entitled to exemption rights identical to people who are married); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (permitting same-sex couple to file joint bankruptcy petition).

Recent Supreme Court authority has clarified the law on this issue. First, the Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), invalidated § 1 of the Defense of Marriage Act (DOMA), which defined marriage as a union of a man and a woman for purposes of federal law, holding that application of this provision to deny the benefit of a spousal estate tax exemption under federal law unconstitutionally deprived a surviving spouse of equal protection under the fifth amendment. (The Department of Justice announced that, in light of *Windsor*, same-sex couples were to be treated like heterosexual couples for purposes of bankruptcy, even when the couple was domiciled in a state that did not recognize their marriage. United States Department of Justice, Consumer and Creditor Information, *available at* http://www.justice.gov/ust/eo/public_affairs/consumer_info/index.htm (last visited 10/17-14).) More recently, the Court held in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), that same-sex couples have a constitutionally-protected right to marry.

Although this issue is now resolved, it was uncertain as of 2010—one of the years on which this Study focused.

¹⁰⁹ The p-value is .28.

¹¹⁰ See Norberg & Velkey, *supra* note 2; Eraslan *et al.*, *supra* note 29.

women.¹¹¹ If the debtor’s first name was commonly used by both men and women or was not in the database, we checked the middle name. If that name was also ambiguous or was unavailable, we coded the debtor’s sex as unknown. While other studies have found that more than a third of chapter 13 filers are women filing alone, such debtors make up less than 15% of our sample.

Table 9: Household Size and Marital Status

Household Size	2010	2013
1	27.5%	21.9%
2	25.7%	31.6%
3 to 4	22.0%	26.3%
5+	14.7%	13.2%
Unknown	10.1%	7.0%

Marital Status	2010	2013
Married	66.1%	71.9%
Not Married	23.9%	22.8%
Unknown	10.1%	5.3%

Table 10: Joint Filers and Sex of Debtor

	Chapter 11 Random Samples		Chapter 13	
	2010	2013	Eraslan, Li & Sarte Data	Norberg & Velkey Data
Joint Filing	41.3%	34.2%	35.1%	25.5%
Male	41.3%	50.9%	29.8%	34.8%
Female	14.7%	12.3%	35.1%	34.3%
Unknown	2.8%	2.6%		5.3%

Prior research has found that about as many women as men file for bankruptcy, and some studies found that more women than men file under chapter 13.¹¹² Our results

¹¹¹ <http://genderchecker.com/search.aspx>. Our data suggest that the husband’s name is usually listed first, as “debtor,” when a case is jointly filed.

¹¹² See, e.g., Norberg & Velkey, *supra* note 2; Eraslan, *et al.*, *supra* note 29.

stand in sharp contrast to the existing literature on chapter 13 filers. The data in Table 10 show that in 2010, 41.3% of the individual chapter 11 filers were men filing alone while only 14.7% were women filing alone; in 2013, the figures were 50.9% for men and 12.3% for women. Putting aside joint filings, there are approximately three to four times as many male as female debtors in our 2010 and 2013 samples. We have no explanation for why so few women file for relief under chapter 11.

2. *Business Operations*

In Section II.A.4, we noted that individual chapter 11 debtors are far more likely to check the “primarily business debts” box on the petition than are chapter 13 debtors. We also noted that debtors may not give much thought to whether their debts are primarily consumer or business in nature, and so the PACER data results may underestimate the rate at which debtors are actually engaging in “business.” These issues also arise with the random sample data.

Table 11: Engaged in Business

	(A) Primarily Business Debts		(B) Business1		(C) Business2	
	2010	2013	2010	2013	2010	2013
Yes	45.9%	43.0%	80.7%	86.8%	86.5%	92.1%
No	53.2%	56.1%	12.8%	8.8%	5.4%	3.5%
Unknown	0.9%	0.9%	6.4%	4.4%	6.3%	4.4%

Table 11 demonstrates that the rate at which our random sample debtors checked the “primarily business debts” box on the petition is similar to the rate found in the PACER case report data. This finding is not surprising, given that we randomly drew the small samples from the PACER case reports.

In Table 11, we report debtors' business activity using two alternative measures. We coded a case as "Business1" if the debtor: 1) checked the "primarily business debts" box on the petition, 2) disclosed any business assets on Schedule B,¹¹³ 3) disclosed a currently operating business on the Statement of Financial Affairs, or 4) disclosed business income or business expenses of at least \$1,000 per month on Schedule I. Using this measure, at least 81% of the 2010 debtors and 87% of the 2013 debtors operated a business. *See* Column (B) of Table 11.

Owning and leasing real estate is a form of business activity. We, therefore, created another measure, "Business2," to add those debtors with substantial real estate income. We coded a case as Business2 if the debtor: (1) satisfied any of the requirements for Business1, or (2) had at least \$1,000 per month in real estate income. Using this measure, the business rate rose to 86% in 2010 and 92% in 2013. *See* Column (C) of Table 11. Only 4% to 5% of debtors in each year were not engaged in business under this measure.

As another measure of business engagement, we also checked the extent to which our debtors' financial affairs were entangled with those of legal entities or individuals other than their spouses. As Table 12 shows, the rate at which our debtors disclosed affiliate bankruptcies on their petitions rose sharply from about 5% in 2010 to about 12% in 2013. *See* Column (A) of Table 12. By contrast, the rate of administrative

¹¹³ We used the following instruction to guide the research assistants in their coding efforts: "Are there items listed in items 13, 14, 16, 22-24, 29-30, and/or 32-34 of Schedule B indicating that debtor is operating a business? Answer Y or N, the item numbers from Sch. B, and a short description. Example: debtor lists three firms in item 13, accounts receivable in Item 16, and a patent in Item 22, enter 'Y, 13(3B), 16, & 22(P).' No need to identify in parentheses for items with a single category, like accounts receivable. Please use abbreviations that sufficiently identify the item in parentheses."

consolidation fell from about 7% in 2010 to about 4% in 2013. *See* Column (B) of Table 12. We found no substantive consolidations in our sample. *See* Column (C) of Table 12.

The main conclusion we draw from these findings is that affiliate filings and consolidation, whether procedural or substantive, seem to be somewhat rare among individual chapter 11 debtors. We do not want to overemphasize the differences between the two years. Our sample sizes are relatively small and, thus, there is a significant amount of uncertainty as to the true means for the full population for 2010 and 2013. The difference in the rate of affiliate bankruptcies between 2010 and 2013 may actually be smaller (or larger), and the difference in the rate of administrative consolidation is not statistically significant.

Table 12: Related Bankruptcy Cases

	(A) Affiliate Bankruptcy		(B) Administrative Consolidation		(C) Substantive Consolidation	
	2010	2013	2010	2013	2010	2013
Yes	4.6%	12.3%	7.3%	3.5%	0.0%	0.0%
No	89.9%	85.1%	92.7%	96.5%	100.0%	100.0%
Unknown	5.5%	2.6%	0.0%	0.0%	0.0%	0.0%

To test for further entanglements between a debtor’s financial affairs and those of another individual or legal entity, we also looked at whether the debtor had guaranteed the debt of another or served as a co-debtor for someone other than a spouse. We coded not only for the existence of a guaranty or co-debtor, but also for whether the co-debtor or the obligor on the guaranteed debt was an individual or non-human legal entity. The most striking finding, shown in Table 13, is that more than 30% of the debtors in each year were liable, in some fashion, for debt owed by another legal entity. This finding

suggests substantial entanglement in some business enterprise among the individual chapter 11 debtors in our random samples.

Table 13: Guaranties or Co-Debtors

	Guaranty or Co-Debtor	
	2010	2013
Co-debtor or guarantor of both legal entity and individual	17.4%	20.2%
Legal Entity only	15.6%	17.5%
Individual only	12.8%	14.0%
Unknown Entity	0.0%	0.9%
None	39.4%	29.8%
Unknown	14.7%	17.5%

Given the evidence that a large number of the individual debtors in the 2010 and 2013 random sample were engaged in some form of business activity, we expected a substantial cohort to check the small business debtor box on the voluntary petition. The small business debtor definition in the Code applies to individual debtors and contains no requirement that the debtor be primarily engaged in business or commercial activity.¹¹⁴ Yet, as the data in Table 14 demonstrate, the vast majority of individual chapter 11 debtors in 2010 and 2013 did not identify as small business debtors on the voluntary petition. In 2010, only 15.6% of individual chapter 11 debtors checked the small business debtor box on their voluntary petitions; that figure dropped to 11.4% in 2013.¹¹⁵

In approximately 11% of the cases in the 2010 and 2013 samples, the debtor did not identify his or her status as a small or non-small business debtor on the petition.

¹¹⁴ The small business debtor definition applies to persons, defined to include individuals, 11 U.S.C. § 101(41), who are “engaged in commercial or business activities.” *Id.* at § 101(51D)(A).

¹¹⁵ This difference is not statistically significant.

These cases are shown in Table 14 as “N/A” or “N/A-converted.” Of that 11%, a small number of debtors (less than 3% each year) either failed to check one of the small business status boxes on their chapter 11 petition or checked both boxes; we coded these cases as “N/A.” Another 8% to 9% of the individual debtors in the 2010 and 2013 random sample who failed to identify as a small business debtor began bankruptcy in a chapter other than chapter 11. Only chapter 11 debtors must complete the small business portion of the voluntary petition.¹¹⁶ Upon conversion to chapter 11, many debtors in the 2010 and 2013 random sample did not re-file the voluntary petition and, hence, these debtors did not designate their status as a small or non-small business debtor.

Table 14: Small Business Debtors—2010 and 2013

	2010	2013
Small Business	15.6%	11.4%
Not Small Business	73.4%	77.2%
N/A - converted	8.3%	8.8%
N/A	2.8%	2.6%

It is unclear whether the figures in Table 14 accurately reflect the percentage of small business debtors among the individual chapter 11 debtors in the random sample. With BAPCPA, Congress eliminated the small business election, adopted in 1994, and required debtors to identify as small business debtors if they satisfied the Code’s new definition.¹¹⁷ Yet, some commentators, including one of us, have questioned whether

¹¹⁶ See Voluntary Petition (Superseded), available at <http://www.uscourts.gov/forms/bankruptcy-forms/voluntary-petition>. Form B1 has been superseded by Form B101 for individual debtors, but Question 13 still limits the small business questions to those debtors filing for relief under chapter 11. See Voluntary Petition for Individuals Filing for Bankruptcy, available at <http://www.uscourts.gov/forms/individual-debtors/voluntary-petition-individuals-filing-bankruptcy>

¹¹⁷ See ABI Commission Report, *supra* note 21, at 389 (stating that “the current small business provisions are mandatory and self-executing”); see also *Individual Chapter 11 Debtors*, *supra* note 4, at 462-63.

chapter 11 “small business debtors are not self-reporting and may not be proceeding as small business cases.”¹¹⁸

Individual debtors qualify as small business debtors if: (1) they are engaged in business or commercial activities; (2) their liabilities fall below the statutory debt limit then in place for small businesses;¹¹⁹ (3) no official unsecured creditors’ committees forms; and (4) the debtor’s primary activity is not the business of owning or operating real property.¹²⁰ As Table 11 shows, the vast majority of debtors in the 2010 and 2013 samples were engaged in some form of business or commercial enterprise. Half the debtors in 2010 had total liabilities reported on their summary of schedules, without deducting for contingent and unliquidated debt, of \$1,837,241 or less. *See infra* Table 29. In 2013, that median figure fell to \$1,544,138. *See infra* Table 29. Thus, at least half the debtors in the 2010 and 2013 sample had liabilities substantially below the then-current small business liability cutoff. An official committee of unsecured creditors did not form in any of the cases in our 2010 or 2013 sample. Therefore, unless the primary activity of a substantial number of the debtors in our 2010 and 2013 sample was the business of owning or operating real property, the data in Table 14 suggest that many individual debtors identify as non-small business debtors despite qualifying under the small business debtor provisions.

¹¹⁸ ABI Commission Report, *supra* note 21, at 289-90 (citing study by Professor Robert Lawless, which found that close to two-thirds of debtors that should have designated as a small business failed to do so on the petition). *See also Musings, supra* note 4 (finding, even though Congress made small business designation mandatory with BAPCPA, that the percentage of debtors checking the small business box on the petition increased only slightly among a 2007 sample from a 2004 sample of individual chapter 11 debtors).

¹¹⁹ The debt ceiling in § 101(51D) for a small business debtor changes every three years on April 1. *See* 11 U.S.C. § 104(a) (2012). From January 1, 2010 through March 31, 2010, the small business debt limit was \$2,190,000. For cases filed between April 1, 2010 and March 31, 2013, the debt limit was \$2,343,000. The latter figure increased to \$2,490,925 on April 1, 2013, and recently re-set, on April 1, 2016, to \$2,566,050.

¹²⁰ *See* 11 U.S.C. § 101(51D) (2012).

As our discussion later makes clear,¹²¹ the real estate crisis did play an important role in a number of the cases in the random sample, especially those from 2010. Filing for relief under chapter 11 because of a foreclosure action against a residence, however, does not mean that the debtor’s primary activity was the business of owning or operating real property. Determining which chapter 11 debtors qualify for the “real property” exclusion and, thus, are not small business debtors is difficult, because Congress failed to define what constitutes a debtor’s primary activity. Nonetheless, our data suggest that a not-insignificant number of debtors in both 2010 and 2013 qualified as small business debtors but failed to check the small business debtor box on the voluntary petition.¹²²

Congress created the small business reforms in order to provide better monitoring of small business entities, which perform poorly in chapter 11.¹²³ For the non-small business individual filers, however, there is little oversight in chapter 11 for a number of reasons. First, the United States Trustee’s heightened oversight obligations do not apply.¹²⁴ Second, official creditors’ committees are nonexistent. We found no cases in the random sample in which a committee formed.¹²⁵ The absence of a committee raises concern about creditor disengagement; an unsecured creditor with a small claim may decide that the cost of an attorney outweighs the benefit of participation in the chapter 11 case. In fact, we found evidence of disengagement by unsecured creditors. In

¹²¹ See Section III.B.3, *infra*.

¹²² These figures include debtors who (1) checked neither small business box on their chapter 11 petition; (2) checked neither box on the petition because they initially filed under chapter 7 or 13; and (3) checked that they were not a small business on their chapter 11 voluntary petitions.

¹²³ See Lawton, *supra* note 76, at 90.

¹²⁴ See 11 U.S.C. § 1116 (2012); 28 U.S.C. § 586(a)(7) (2012).

¹²⁵ This finding is not unusual. An official creditors’ committee rarely forms in chapter 11 cases. See Anne Lawton, *Chapter 11 Triage: Diagnosing A Debtor’s Prospects for Success*, 54 ARIZ. L. REV. 985, 1005-1009 (2012) [hereinafter *Chapter 11 Triage*] (finding that official creditors’ committees formed in only 18% of 798 cases in a national random sample of chapter 11 debtors who filed for relief in 2004).

approximately 60% of the random sample cases, there were no objections, of any type, raised by any unsecured creditor. *See* Table 15.

Table 15: Objections by Unsecured Creditors

	2010	2013
Objection	38.5%	39.5%
No Objections	61.5%	60.5%

Third, as the data in Table 16 reveal, trustees and examiners are rarely appointed in individual chapter 11 cases.¹²⁶ The bankruptcy court appointed just four chapter 11 trustees in the 2010 cases and two in the 2013 cases. An examiner was appointed in only one case, in 2010. In fact, as Table 16 shows, in the overwhelming majority of individual chapter 11 cases in our random samples no party even moved for appointment of a chapter 11 trustee or examiner.

Table 16: Appointment of Chapter 11 Trustee or Examiner

	Trustee		Examiner	
	2010	2013	2010	2013
Motion Withdrawn	1%	1%	1%	0%
Motion Denied	5%	3%	0%	1%
Motion Granted	4%	2%	1%	0%
No Motion	91%	95%	98%	99%

As discussed more fully below,¹²⁷ confirmation rates for individual chapter 11 debtors' plans are low relative to confirmation rates in chapter 13.¹²⁸ If the low confirmation rates are attributable to a lack of effective oversight, then the question is

¹²⁶ A debtor-in-possession may be replaced by an appointed trustee, but only under somewhat exceptional circumstances, typically involving fraud, dishonesty, incompetence or gross mismanagement by the debtor-in-possession. 11 U.S.C. § 1107(a) (2012). As Table 16 demonstrates, such appointments are unusual.

¹²⁷ *See* Section IV, *infra*.

¹²⁸ *See infra* Table 46 for data on chapter 11 confirmation rates. For chapter 13, the confirmation rate is substantially higher—about 70%. *See* Flynn, *supra* note 31, at 41.

whether to raise the debt limits in chapter 13¹²⁹ in order to send these debtors to chapter 13, with its more structured process and the oversight of a chapter 13 trustee.¹³⁰ The difficulty lies in the differences between the stereotypical chapter 13 debtor and the typical individual debtor in our random sample. Individual chapter 11 debtors have significantly higher incomes, own more real property, and have more complex cases than typical chapter 13 debtors. Moreover, as the data in Table 11 indicate, the sharply higher rate at which chapter 11 debtors are conducting business is some indication that a different set of procedures may be appropriate. Therefore, if individual filers neither fit in chapter 13 nor perform well in chapter 11, the solution may lie with a special subchapter tailored to the needs of small business and individual debtors.

3. *Prior and Subsequent Bankruptcy Filings*

Prior research has found that many debtors are repeat filers, especially those who file under chapter 13.¹³¹ In 2005, Congress amended § 362(c) of the Bankruptcy Code to discourage bad faith repeat filings by individual debtors filing under chapter 7, 11 or 13.¹³² Congress also added a serial filer provision—found at § 362(n)—applicable to small business debtors.¹³³ The basic argument for these provisions was that debtors were filing and dismissing bankruptcy cases solely to disrupt the foreclosure process, and the

¹²⁹ For a discussion of the chapter 13 debt limits, see *infra* note 159 and accompanying text.

¹³⁰ Chapter 13 cases are administered by a “standing” trustee, who is responsible for duties such as examining proofs of claim, investigating the debtor’s financial affairs, and making payments to creditors in accordance with the plan. See 11 U.S.C. § 1302 (2012). This contrasts with the usual practice in chapter 11 cases, in which the debtor becomes a debtor-in-possession, with the rights and powers of a trustee. *Id.* at § 1107.

¹³¹ See, e.g., Norberg & Velkey, *supra* note 2, at 497 (“Among the most remarkable findings of the Project is that at least half of all of the Chapter 13 debtors in the sample had filed one or more bankruptcy cases in addition to the sample case.”).

¹³² See Hon. William Houston Brown & Lawrence R. Ahern III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS 2D 297 (2006) .

¹³³ See *id.* at 298.

current literature offers some evidence of serial filing, especially in chapter 13.¹³⁴ Repeat filing does not necessarily mean bad faith filing, however. For example, the debtor may have experienced an entirely new financial shock that prevented completion of the reorganization plan.¹³⁵

We measured serial filing in chapter 11 by looking at both prior and subsequent bankruptcy cases. For prior filings, we used the debtor's disclosure on the voluntary petition for both 2010 and 2013. For the 2010 cases, we also searched nationally on Bloomberg Law for both prior and subsequent bankruptcy cases using each debtor's name and the last four digits of the debtor's social security number. Our searches included any *dba* used by the debtor and identified on the voluntary petition.¹³⁶ We did not conduct Bloomberg Law searches for the cases in the 2013 random sample, because too little time has elapsed since the 2013 case filings to provide us with a meaningful comparison to the 2010 data.

Table 17 provides data on prior bankruptcy filings for 2010 and 2013, based on the debtor's disclosures on the petition. As the data show, the percentage of cases with prior bankruptcy filings increased substantially from 2010 to 2013. In 2010, approximately

¹³⁴ See, e.g., Norberg & Velkey, *supra* note 2, at 497 (“Among the most remarkable findings of the Project is that at least half of all of the Chapter 13 debtors in the sample had filed one or more bankruptcy cases in addition to the sample case.”).

¹³⁵ Although chapter 13 allows debtors to modify their plans, the Administrative Office reports that these modifications are somewhat rare. Of the chapter 13 plans actually completed in 2014, just 22% had any modifications, and just 2% had more than two. See BAPCPA Report—2014, Table 6, *available at* <http://www.uscourts.gov/statistics-reports/bapcpa-report-2014>. For a discussion of post-confirmation modification in chapter 11, see *infra* note 191.

¹³⁶ See Bloomberg Law, *available at* <https://www.bloomberglaw.com/start>

10% of the debtors had previously filed for bankruptcy;¹³⁷ that number more than doubled to 27% in 2013.

Table 17: Prior Bankruptcies Based on Debtor Disclosure

	2010	2013
Prior Bankruptcy	10.1%	27.2%
No Prior Bankruptcies	89.9%	78.9%

Table 18 shows the results of the national Bloomberg Law searches for 2010. The data provide a more nuanced picture of the 2010 individual debtors, because it shows all bankruptcy filings by the same debtor over the span of approximately twenty years.

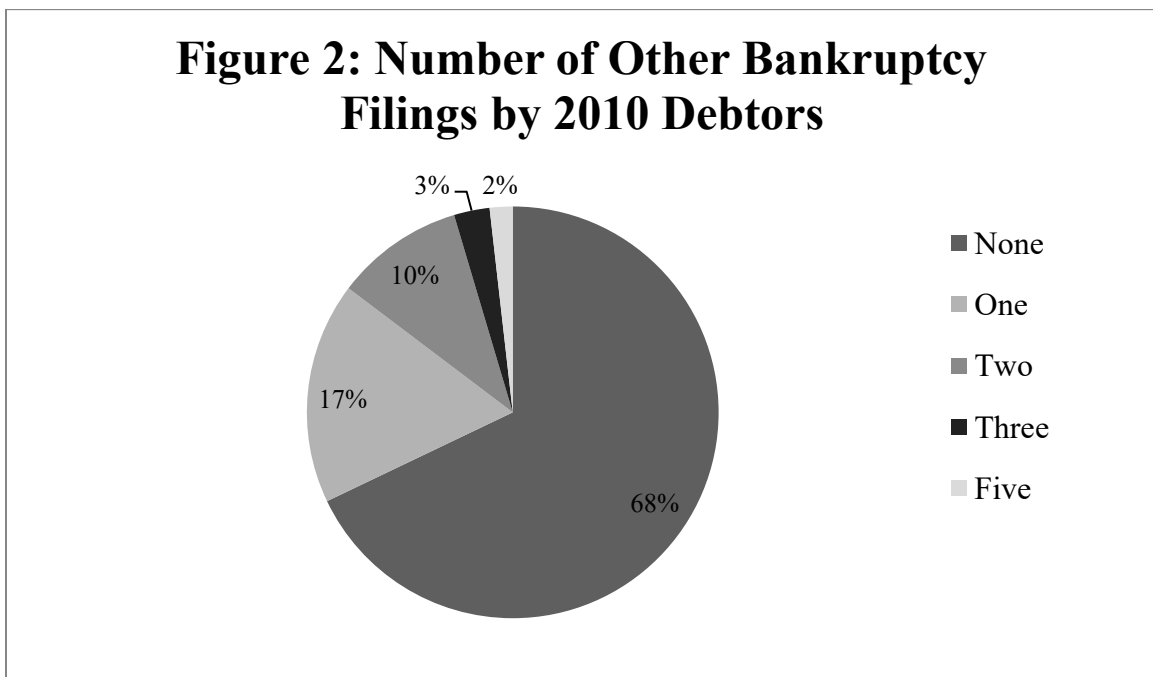
Table 18: Prior and Later Bankruptcies—2010

	Percentage
Prior Bankruptcy Only	7.3%
Later Bankruptcy Only	16.5%
Both Prior and Later Bankruptcies	8.3%
No Other Bankruptcies	67.9%

As Table 18 shows, approximately one-third of the debtors in the 2010 sample filed at least one other bankruptcy case. Later filings were more than twice as common as prior filings for the 2010 sample. This finding is somewhat consistent with Table 17’s data showing that the 2013 debtors were twice as likely to report a prior bankruptcy filing as the 2010 debtors. The data in Table 18 tell us that the period between 2010 and 2015, when we conducted the Bloomberg searches, saw more bankruptcy filings than the period between 2005 and 2010. *See supra* Figure 1. These findings may be the result of economic conditions or of the changes brought by BAPCPA.

¹³⁷ In 2010, twelve debtors disclosed a prior filing on their petitions, but in one case the filing was not by either of the married debtors but rather by a related entity. *See In re Lewis*, No. 10-14965 (Bankr. D. Ariz. May 14, 2010) (disclosing prior filing by Lewis Investment Properties, LLC).

The number of repeat filings is clearly relevant for determining whether a debtor’s filings are in bad faith. A second or even a third bankruptcy filing may simply be attempts to successfully rehabilitate the debtor’s financial affairs.¹³⁸ Reorganization takes time, and successful reorganization may require more than a single bankruptcy filing, but it is harder to tell a positive story when a debtor files five times in rapid succession.¹³⁹ As Figure 2 shows, most debtors filed only one or two other bankruptcy cases. A handful of the 2010 debtors, however, fall into the rapid-succession, repeat-filer category.



¹³⁸ See, e.g., *In re Langdon*, No. 10-07211 (Bankr. E.D. N.C. Sept. 3, 2010) (married debtors’ chapter 11 plan apparently failed, as they re-filed for relief under chapter 13 a little over three years after the bankruptcy court confirmed their plan of reorganization).

¹³⁹ See, e.g., *In re Anderson*, No. 10-39309 (Bankr. E.D. Cal. July 22, 2010) (chapter 11 case dismissed, after debtor had filed and had dismissed four chapter 13 cases in the prior two years in the Northern District of California; debtor then re-filed for relief under chapter 7 in the Eastern District of California, only to have the court dismiss that case within a month of filing); *In re Wiryadimejo*, No. 10-17032 (Bankr. C.D. Cal. May 25, 2010) (chapter 11 case dismissed, after which debtor filed five more bankruptcy cases—four under chapter 7 and one under chapter 11—over the next nineteen months).

BAPCPA’s amendments to § 362 complicate matters for debtors whose first bankruptcy case fails. Section 362(c)(3) limits operation of the automatic stay to thirty days from filing in any individual chapter 7, 11 or 13 case in which the debtor had a case “pending within the preceding one-year period [that was] dismissed.”¹⁴⁰

Section 362(c)(3) only applies if certain conditions are met. First, § 362(c)(3) applies *only* if the earlier bankruptcy case was dismissed, unless the dismissal resulted from application of the means test in chapter 7. Thus, the thirty-day stay-termination rule of § 362(c)(3) does not apply to a second bankruptcy case filed under chapter 11 if the debtor obtained a discharge in an earlier-filed case, even if the earlier case was pending during the year preceding the debtor’s second bankruptcy case.¹⁴¹ Nor does it apply to a bankruptcy case filed within one year of an earlier case in which the debtor confirmed a chapter 11 plan that later failed, so long as the chapter 11 case did not result in dismissal.¹⁴²

Second, the period between filings does not run from petition date to petition date. The Code uses the word “pending.” Therefore, if a debtor files a chapter 13 case in

¹⁴⁰ 11 U.S.C. § 362(c)(3) (2012).

¹⁴¹ *In re Dietz*, No. 10-10574 (Bankr. C.D. Cal. Jan. 8, 2010) (debtor received chapter 7 discharge in case filed in same district 11 months earlier). Unlike chapters 7 and 13, chapter 11 does not limit an individual debtor’s right to a discharge based on the debtor having received a discharge, within certain time frames, in an earlier-filed bankruptcy case. *See* 11 U.S.C. § 1141 (2012) (no language denying discharge based on discharge received in prior bankruptcy case); *cf. id.* at §§727(a)(8), (9) (denying discharge to a chapter 7 debtor if the debtor received a discharge in a case filed, depending on chapter, within 6 to 8 years of the current chapter 7 case); *id.* at § 1328(f) (denying discharge to chapter 13 debtor if debtor received a discharge in a case filed, depending on chapter, within two to four years of the current chapter 13 case).

¹⁴² *See, e.g., In re Inglis*, No. 10-35781 (Bankr. E.D. Va. Aug. 19, 2010) (debtor obtained confirmation of chapter 11 plan, but re-filed for relief under chapter 13 nine months later). The debtor would be entitled to a discharge in the chapter 13 case, because failure of the chapter 11 plan means that the debtor did not receive a discharge in the chapter 11 case. *See* 11 U.S.C. § 1328(f)(1) (2012).

January of 2008, but the case is not dismissed until January of 2010, that chapter 13 case is pending within one year of any other bankruptcy case filed by the debtor in 2010.¹⁴³

The Code does not define the term “pending,” but the case law on the issue, albeit limited, holds that the time period in § 362(c)(3) runs from the date of the order of dismissal, not from the date the bankruptcy case closes.¹⁴⁴ Therefore, we used the date of the dismissal order for the results presented in Table 19.

Table 19: Other Filings 2010 and § 362(c)(3)

	Percentage
No other filings	67.9%
Other Filings/No § 362 Problem	5.5%
Other Filings/ § 362 Problem	26.6%

The 2010 case may not be the one posing a § 362 problem for the debtor. The data in Table 19 track the 2010 debtors over the span of approximately twenty years. Therefore, if a debtor filed for relief in November of 2010, the bankruptcy court dismissed the case in June of 2011, and the debtor then filed for relief under chapter 13 in November of 2011, § 362(c)(3) would apply to the 2011 chapter 13 filing, not the 2010 chapter 11

¹⁴³ See *In re Drabin*, No. 10-16315 (Bankr. M.D. Fla. Dec. 16, 2010) (married debtors filed for bankruptcy in December 2010, about 11 months after bankruptcy court dismissed their 2008 chapter 13 case).

¹⁴⁴ See *In re Linares*, 2010 WL 2788248, at *1 (Bankr. S.D. Fla. July 10, 2010) (holding that dismissal not administrative closing is relevant date from which to run the time period in § 362(c)(3)); *In re Easthope*, 2006 WL 851829, at *3 (Bankr. D. Utah Mar. 28, 2006) (noting that it would be unfair to debtors to run the time period in § 362(c)(3) from the date of case closing because debtors cannot control when the clerk’s office closes a case and, thus, holding that “[t]he plain meaning of the word ‘pending’ as well as policy considerations demonstrate that a case is no longer pending once it has been dismissed”); *In re Moore*, 337 B.R. 79, 81 (Bankr. E.D. N.C. 2005) (stating that debtor’s prior bankruptcy case was “no longer ‘pending’ for purposes of § 362(c)(3) as of the date of dismissal, regardless of when the case was closed”). Courts disagree about whether a motion to vacate or reconsider a dismissal order extends the time that a case is pending. Compare *In re Lundquist*, 371 B.R. 183, 190 (Bankr. E.D. Penn. 2007) (footnote omitted) (holding that “[a] case is ‘pending’ for purposes of section 362(c) until it is dismissed, and a motion to vacate the dismissal does not extend the time that the case is ‘pending’”), with *In re Myers*, 2007 WL 2428694 at *8 (finding “the *Lundquist* analysis unpersuasive” and concluding that debtor’s earlier bankruptcy case was still pending, notwithstanding the court’s order of dismissal, because “the dismissal order lacked finality due to [debtor’s] pending motion for reconsideration”).

filing. Nevertheless, as the data in Table 19 show, § 362(c)(3) posed a problem, at some point in time, for more than one in four of the debtors in the 2010 random sample.

4. *Size and Complexity*

We close out this part of the report with some statistics bearing on the complexity of the bankruptcy cases. Complexity is important because, first, it makes coding the cases much more difficult, increasing the chance of error. For example, many debtors amend their schedules several times over the course of their bankruptcy case, and we tried to use the most recent schedules available.¹⁴⁵ We may have missed some revisions, however, or interpreted some amended schedules as replacements when they were really meant to supplement prior disclosures, or vice versa. In addition, the quality of disclosure varied significantly from debtor to debtor, making it difficult, at times, to determine which scheduled amount to use.¹⁴⁶ Second, complexity makes it harder to argue that these cases belong in chapter 13. Just as many Americans with straightforward financial affairs use simple forms—1040A or 1040EZ—to file their taxes, the same is arguably true of chapter 13. To the extent that individuals do not have simple affairs and have more active creditors, chapter 13 may serve less well.

Size can serve as a proxy for complexity, and the data in Tables 20 through 22 demonstrate that most of the cases in the random sample were small. As shown in Table

¹⁴⁵ See *supra* note 106 and accompanying text.

¹⁴⁶ See, e.g., *In re Tuls*, No. 13-11930 (Bankr. D. Nev. July 2, 2013) (debtor filed schedules with initial chapter 7 filing showing total liabilities of approximately \$2.1 million, converted to chapter 11 four months later and filed an amended Schedule F, and three months after converting to chapter 11 converted the case back to chapter 7 and filed amended schedules with total liabilities of \$3.36 million); *In re McBryde*, No. 10-13394 (Bankr. W.D. Tex. Dec. 6, 2010) (debtors filed initial Summary of Schedules with “Total” of almost \$2.1 million for liabilities, and 14 months later filed an amended Summary of Schedules with \$0 entered for “Total” liabilities, apparently because debtors amendment did not include any amendments to Schedules D, E or F); *In re Anderson*, No. 10-39309 (Bankr. E.D. Cal. July 22, 2010) (Summary of Schedules with negative entry for Real Property Assets, and no values for two parcels of real property listed on Schedule A).

20, the overwhelming majority (around 86%) of debtors estimated at filing that they had fewer than fifty creditors, and only around 3% estimated that they had at least 100.

Table 20: Estimated Number of Creditors

	2010	2013
1 to 49	86.2%	86.0%
50 to 99	10.1%	10.5%
100 to 199	1.8%	1.8%
200 to 299	0.9%	0.9%
Unknown	0.9%	0.9%

The data in Table 21 indicate that the majority of debtors at filing estimated that they had between \$1 and \$5 million of liabilities; the next largest category was between \$500,000 and \$1 million. Fewer than 10% of debtors (6% in 2010 and 8% in 2013) estimated their liabilities as in excess of \$5 million. Even fewer debtors—less than 4% in both 2010 and 2013—estimated their assets as exceeding \$5 million.

Table 21: Estimated Assets and Liabilities

	Assets		Liabilities	
	2010	2013	2010	2013
0 to 50K	17.4%	14.9%	2.8%	1.8%
50K to 100K	0.9%	0.0%	1.8%	1.8%
100K to 500K	14.7%	18.4%	4.6%	10.5%
500K to 1M	11.9%	31.6%	14.7%	21.9%
1M to 5M	48.6%	30.7%	67.0%	55.3%
5M to 10M	0.0%	0.0%	0.0%	0.0%
10M to 50M	3.7%	2.6%	5.5%	7.9%
50M and above	0.0%	0.0%	0.9%	0.0%
n/a	2.8%	1.8%	2.8%	0.9%

Finally, Table 22 provides the debtors' responses to the question on the petition as to whether assets will be available to pay a dividend to general unsecured creditors. As the data in Table 22 reveal, debtors were quite optimistic about their ability to pay such a dividend; approximately 77% of debtors in both 2010 and 2013 checked the box on the

petition indicating that funds would be available to pay unsecured creditors.¹⁴⁷ We cannot determine whether this optimism at filing bears out in the ultimate payout made to unsecured creditors.

Table 22: Assets Available for General Creditors—Random Sample

	2010	2013
Asset	77.1%	77.2%
No Asset	17.4%	21.1%
Unknown	5.5%	1.8%

B. The Debtor’s Financial Condition

Financial information obtained from the debtors’ schedules reveals that individual debtors in the random sample are wealthier than the average American. They are more likely to own real property and their incomes are much higher than that of the typical American household.

1. Occupation, Income and Expenses

Sullivan, Warren and Westbrook famously argued that most consumers in bankruptcy are “middle class,” but with lower incomes.¹⁴⁸ Much of their supporting data was drawn from surveys that we did not try to replicate. We can, however, get some sense as to the characteristics of individual chapter 11 filers by examining their occupation, income, and expenses.

¹⁴⁷ While this 77% figure is optimistic, it is not as optimistic as the roughly 90% rate that we found in our PACER data sample. *See supra* Table 7, and accompanying text. At first, we were concerned that the rate difference between the small sample and the PACER data resulted from a mistake in the randomization process. A check of several cases, however, revealed that the rate difference resulted from coding differences. More specifically, we checked three entries from the Central District of California that our research assistants had marked “No Asset” and one that our research assistant had marked “unknown” and found that the research assistants’ answers differed from those of PACER on three of the four cases. We then checked the petition on Bloomberg Law and verified that our research assistants had correctly coded the box that the debtor checked (or, in the case of the “unknown” response that the debtor failed to check either box). We do not know why PACER coded these cases as it did.

¹⁴⁸ *See* FRAGILE MIDDLE CLASS, *supra* note 2.

Table 23: Occupation

	2010	2013
Real Estate	8%	10%
Professional	9%	13%
Owner, Manager, Executive	24%	24%
Self-Employed	17%	13%
Other	18%	24%
Retired	4%	1%
Unemployed	1%	3%
Unknown	19%	13%

We coded how the debtor (or the first debtor in a jointly filed case) characterized his or her occupation on Schedule I. This coding is admittedly imprecise. For example, some debtors listed their occupation as “Owner” while others stated that they were “Self-Employed.” While the two categories may overlap, the debtor who is an owner may have employees, and the self-employed debtor may operate a business for which he or she alone works. Some debtors listed the company where they worked (or perhaps that they owned) but failed to list a position. We saw little benefit in distinguishing between positions such as “elementary school teacher,” “farmer,” “bartender,” “pilot,” and “IT specialist,” so we created an “Other” category for these kinds of positions. Categorizing the wide variety of occupational responses provided on Schedule I was difficult and required judgment calls. Different researchers may draw the lines in different places. Nonetheless, our results are instructive. Approximately half of the debtors in our random sample (1) were professionals in fields that are often highly compensated (attorney, chiropractor, dentist, engineer, pharmacist, physician, and psychiatrist), (2) ran a business (president, CEO or owner), or (3) were self-employed. We suspect that other debtors, such as realtors and mortgage brokers, as well as some of the debtors in the “other”

category—farmer, investment advisor, photo journalist, and professional truck driver—also were self-employed.

We make two observations from this data on debtor occupation. First, a very large proportion of individual chapter 11 debtors operated businesses as their primary occupations. Second, the data may say something about whether individual chapter 11 debtors are “middle-class,” although this term can have an extremely expansive meaning. Neither self-employment nor even the ownership of a small business necessarily indicates what one might call high living. In a moment, therefore, we turn to the debtors’ income and expenses.

Before doing so, however, we note the very long job tenure claimed by the individual chapter 11 debtors in our sample. The data in Table 24 are based on the responses of one debtor for each case; thus, for joint cases, we used the period provided for the first debtor listed on Schedule I. Several of our debtors did not respond to Schedule I’s inquiry “How long employed.” Those who did respond reported median employment tenure of seven-and-a-half years and nine years in 2010 and 2013, respectively. By contrast, in their study of debtors who filed for relief under chapters 7 or 13 in the early 1980s, Sullivan, Warren and Westbrook found that the median job tenure was just eighteen months.¹⁴⁹ We suspect that the difference in findings may be due to the fact that many of our debtors were self-employed and were simply reporting how long they have been in a particular line of work rather than how long they had worked at their most recent position.

¹⁴⁹ See AS WE FORGIVE, *supra* note 2, at 96.

Table 24: Employment Duration in Years

	2010	2013
Over 25 Years	7.3%	12.3%
10 to 25 Years	17.4%	18.4%
5 to 10 Years	18.3%	15.8%
2 to 5 Years	9.2%	10.5%
1 to 2 Years	2.8%	11.4%
0.5 to 1 Year	2.8%	3.5%
3 to 6 Months	3.7%	0.0%
Fewer than 3 Months	4.6%	2.6%
N/A	33.9%	25.4%
Longest Time Employed	40.00	55.00
Average Duration	10.75	12.85
Median Duration	7.50	9.00

In their study of consumers who filed for bankruptcy in 2007, Lawless and his co-authors found a median income for chapter 13 filers of \$35,688 per year, or about \$37,532 in 2010 dollars.¹⁵⁰ The income levels of the individual chapter 11 debtors in our small sample were dramatically higher. Table 25 presents data on the debtors' current monthly income, as disclosed on the Statement of Current Monthly Income, and their combined average monthly income from Line 16 of Schedule I. Half the debtors in our 2013 random sample reported combined monthly income of \$8,624 or more, which annualizes to a figure in excess of \$100,000. Our findings are roughly consistent with those in the BAPCPA reports prepared by the AO, which show median current and average monthly income of \$7,935 and \$9,212, respectively, in 2010 and \$7,518 and \$9,481, respectively, in 2013.¹⁵¹ These numbers are not directly comparable to our

¹⁵⁰ See *Did Bankruptcy Reform Fail*, *supra* note 2, at 361.

¹⁵¹ Table BAPCPA 2B, December 31, 2010, available at <http://www.uscourts.gov/statistics/table/bapcpa-2b/bankruptcy-abuse-prevention-and-consumer-protection-act-bapcpa/2010/12/31>; Table BAPCPA 2B, December 31, 2013, available at <http://www.uscourts.gov/statistics/table/bapcpa-2b/bankruptcy-abuse-prevention-and-consumer-protection-act-bapcpa/2013/12/31>.

figures because we coded for all individual chapter 11 bankruptcies while the AO focused only on chapter 11 debtors with primarily non-business debts.

The data in Table 25 also show that the debtors in our sample were over-represented among the top income categories. Approximately 36% of our debtors had monthly incomes that placed them in the top 20% of household incomes nationally.¹⁵² Approximately 14% had annual incomes in excess of \$200,200 in 2010 and \$225,333 in 2013, which placed them among the top 5% of American households nationally. Not all the debtors in our sample were high earners, however. Between 12% and 18% of the debtors had incomes that placed them in the bottom 40% of household incomes nationally. But as the data demonstrate, lower-income debtors comprised a smaller percentage of our sample compared with their representation in the American population at large.

Table 25: Debtors' Monthly Income

	Combined Monthly Income—Schedule I		Current Monthly Income	
	2010	2013	2010	2013
Top 5%	13.8%	14.0%	13.8%	14.0%
5th Quintile (includes top 5%)	36.7%	36.0%	35.8%	36.0%
4th Quintile	29.4%	26.3%	11.0%	22.8%
3rd Quintile	7.3%	19.3%	14.7%	21.9%
2nd Quintile	11.0%	6.1%	11.9%	5.3%
1st Quintile (includes 0)	7.3%	6.1%	15.6%	6.1%
0	1.8%	3.5%	9.2%	3.5%
Unknown	8.3%	6.1%	11.0%	7.9%
Maximum	53,383	68,200	55,916	61,000
Average	11,858	11,669	9,993	10,416
Median	9,004	8,624	6,828	7,514

¹⁵² The data on the national income distribution is taken from <https://www.census.gov/hhes/www/income/data/historical/families/>.

Although it may seem surprising that someone with a six-figure income would need bankruptcy, these debtors had expenses comparable in size to their incomes. While median monthly incomes ranged from \$8,600 to \$9,300, the data in Table 26 demonstrate that median monthly expenses ranged from about \$8,200 to \$9,200. In fact, in both 2010 and 2013, more than three in ten debtors in the random sample reported monthly expenses of \$10,000 or more.

Table 26: Debtors' Monthly Expenses

	Schedule J	
	2010	2013
Over 25K	11.0%	8.8%
10K to 25K	27.5%	23.7%
5K to 10K	36.7%	36.8%
2.5K to 5K	10.1%	16.7%
1 to 2.5K	5.5%	4.4%
0	1.8%	1.8%
N/A	7.3%	7.9%
Maximum	114,940	64,780
Average	12,618	10,739
Median	9,243	8,176

Elizabeth Warren and her co-authors have claimed that medical expenses and medical debts are a major cause of consumer bankruptcy.¹⁵³ By contrast, our debtors did not generally claim major medical expenses, at least relative to their incomes.

¹⁵³ See, e.g., RONALD MANN, CHARGING AHEAD (2007); David U. Himmelstein, Deborah Thorne, Elizabeth Warren & Steffie Woolhandler, *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 20 J. AMER. MED. 1 (2009); Melissa Jacoby, et al., *Rethinking the Debates Over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001).

Table 27: Medical Expenses

	2010	2013
More than 500	7.3%	3.5%
400 to 500	5.5%	5.3%
300 to 400	3.7%	7.0%
200 to 300	4.6%	8.8%
100 to 200	22.0%	18.4%
1 to 100	31.2%	38.6%
0	15.6%	14.0%
N/A	10.1%	4.4%
Maximum	1,800	10,514
Average	193	268
Median	100	100

Attorney compensation is another expense that a chapter 11 debtor incurs, albeit not a recurring monthly one. Attorney fees may play a role in whether individual debtors choose to file for relief under chapter 13 rather than chapter 11. In order to compare chapter 13 and chapter 11 attorney fees, we coded information provided on the attorney’s disclosure of compensation form filed at the outset of the case for our debtors in the random sample.¹⁵⁴ These disclosures list the amount that the attorney has agreed to accept for legal services, as well as the amount already received. Some attorneys agreed to receive an amount contingent on some other factor, such as the number of hours they worked; we coded these disclosures as “unknown” or “not available.” We present our findings in Table 28.

Of those records we were able to use, the median agreed amount in our random sample cases was around \$10,000 in each year. *See* Column (B) of Table 28. The median amount already received was \$7,500 in 2013 and \$8,363 in 2010. *See* Column (A) of

¹⁵⁴ We did not try to gather the total amount of attorney’s fees expended by the individual debtors in the random sample.

Table 28. By comparison, the median value for total fees in chapter 13 cases is around \$2,500, though in some jurisdictions total chapter 13 fees approach \$5,000.¹⁵⁵ Thus, the data show that filing for relief under chapter 11 is a far more expensive proposition for individual debtors than is filing for relief under chapter 13.

Table 28: Attorney Compensation

	(A) Amount Received		(B) Agreed Amount	
	2010	2013	2010	2013
	\$100K to \$200K	1.8%	0.0%	1.8%
\$25K to \$100K	8.3%	2.6%	4.6%	5.3%
\$10K to \$25K	20.2%	26.3%	21.1%	21.1%
\$5K to \$10K	20.2%	23.7%	18.3%	15.8%
\$2K to \$5K	19.3%	15.8%	16.5%	7.9%
\$1 to \$2K	6.4%	6.1%	2.8%	0.9%
0	4.6%	5.3%	0.9%	1.8%
n/a or Pro Se	19.3%	20.2%	33.9%	46.5%
Maximum	\$180,000	\$50,000	\$180,000	\$101,424
Average	\$15,801	\$9,855	\$16,588	\$14,653
Median	\$8,363	\$7,500	\$10,000	\$10,287

Finally, we were curious whether debtors filed for chapter 11 in an attempt to avoid a trustee's scrutiny of their expenses. Most of these debtors had some expenses that the average American would label as a luxury. Our median debtor claimed monthly expenses of approximately \$8,200 to \$9,200, or about \$98,000 to \$111,000 per year,

¹⁵⁵ See Lupica, *supra* note 25.

Attorneys' fees are only part of the story. The filing fees for the two chapters are quite different: currently, the filing fee for chapter 13 is \$235, compared with \$1,167 for chapter 11 cases. 28 U.S.C. § 1930(a) (2012). (The statute prescribes a cap; the actual percentage varies from jurisdiction to jurisdiction.) Fees are also paid to the chapter 13 standing trustee, generally calculated as a percentage of the amount of payments under the plan. *Id.* § 1930(e). Quarterly fees, payable to the United States Trustee in a chapter 11 case, are based on the amount disbursed during the relevant quarter. The fees range from \$325 for disbursements up to \$14,999.99, and to \$30,000 for disbursements exceeding \$30,000.00. *Id.* § 1930(a)(6). Individual chapter 11 debtors are highly unlikely to deal with such staggering sums, of course.

while median household income in the United States was \$49,276 in 2010 and \$53,595 in 2013.¹⁵⁶

But that comparison may be inapt. First, some of these expenses were business expenses. Second, it may be appropriate, as one of us has argued, to allow higher-income debtors to claim greater expenses in bankruptcy.¹⁵⁷ We could not develop workable criteria as to what constituted a luxury expense. Instead, we instructed our research assistants to look for “unusual and large expenses that some might think are indicative of a luxurious lifestyle” and told them to be sure to include tuition for private school or for any college, whether public or private. Because there were several research assistants, the standard likely varied from case to case just as the identity of the trustee or bankruptcy judge will cause the standard to vary. Some of the research assistants’ entries showed large expenses for real property (utilities, mortgage, etc.) or business and medical expenses that perhaps should have been included elsewhere on the form. We did find, however, that at least twelve (11%) of the 2010 and sixteen (14%) of the 2013 cases had expenses that might draw the scrutiny of a trustee. These expenses included (1) tuition of at least \$1,000 a month (nine cases with a high of \$4,525 per month), (2) food of at least \$1,000 per month (five cases with a high of \$3,000 per month for a household of three), and (3) a large number of miscellaneous entries for such things as entertainment or recreation (several cases ranging from \$1,720 to \$3,487 per month), gardeners, pool service, golf club fees, boats and recreational vehicles, and \$4,237 for a life insurance policy on a business associate.

¹⁵⁶ Median Household Income in the United States, *available at* <https://research.stlouisfed.org/fred2/series/MEHOINUSA646N>

¹⁵⁷ See, Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301.

2. *Debt*

Table 29 provides data on debtors’ total liabilities reported on the summary of schedules, as well as a breakdown by secured and non-priority unsecured debt. Information in the summary of schedules often differed from information in the full schedules because debtors amended some or all of their schedules without amending the summary. It is not clear which numbers are more accurate. Totals on the individual schedules often reflect the debtor’s last estimates and, therefore, may be more accurate. On the other hand, debtors at times were unclear as to whether their amended schedules supplemented or replaced prior schedules, making it difficult for our research assistants to determine schedule totals in some cases. The results are not usually materially different, so we present the information from the summary of schedules unless there is a good reason not to do so.

Table 29: Distribution of Indebtedness—Liabilities from Summary of Schedules

	Secured Claims		Unsecured Non-Priority Claims		Total Liabilities	
	2010	2013	2010	2013	2010	2013
Over \$10M	2.8%	2.6%	4.6%	5.3%	7.3%	9.6%
\$5M to \$10M	7.3%	4.4%	2.8%	3.5%	8.3%	5.3%
\$2.5M to \$5M	11.9%	9.6%	3.7%	4.4%	19.3%	15.8%
\$1M to \$2.5M	33.9%	23.7%	10.1%	13.2%	41.3%	30.7%
\$500K to \$1M	16.5%	30.7%	16.5%	8.8%	11.0%	21.9%
\$1 to \$500K	16.5%	20.2%	52.3%	56.1%	5.5%	10.5%
0	4.6%	2.6%	2.8%	2.6%	0.9%	0.0%
n/a	6.4%	6.1%	7.3%	6.1%	6.4%	6.1%
Maximum	56,634,114	23,440,918	153,710,706	43,399,184	161,757,352	43,439,884
Average	2,454,233	1,925,596	3,409,150	2,085,418	5,859,607	3,685,636
Median	1,248,607	906,396	229,367	208,207	1,837,241	1,544,138

As the data in Table 29 show, the median debtor in 2010 had over \$1.8 million in total debt, of which \$1.25 million was secured debt and approximately \$229,000 was non-priority unsecured debt. In 2013, these figures were a little lower: \$1.5 million in total debt, of which approximately \$906,000 was secured debt and \$208,000 was non-

priority unsecured debt. As shown in Table 29, most of the debtors in 2010 and 2013 had total debt between \$500,000 and \$2,500,000.

Presumably, many debtors choose chapter 11 because they wish to reorganize but their debts make them ineligible for chapter 13.¹⁵⁸ Because individuals meeting chapter 13's debt limits¹⁵⁹ would be expected to choose that chapter (if, for no other reason, because it is substantially less costly), we were particularly interested in those debtors who nonetheless elect chapter 11.

To examine more carefully the impact of chapter 13's current debt limits, we compared each debtor's liabilities against (1) the debt limits in effect at the time of bankruptcy filing (Column (A) of Table 30), and (2) the debt limits if Congress were to increase those limits by 50% (Column (B) of Table 30). We also used two different measures of debt: 1) the amount of debt listed on the summary of schedules; and 2) the amount of debt listed on the individual schedules. Each measure has its disadvantages. The summary of schedules does not distinguish debts that are both non-contingent and

¹⁵⁸ Chapter 13 carries more restrictive eligibility requirements than either chapter 7 or chapter 11. Only individuals with regular income who meet fairly modest debt limitations are eligible for chapter 13. See 11 U.S.C. § 109(e) (2012). The only other choices for a debtor unable to meet those requirements would be to liquidate under chapter 7 or to forego bankruptcy altogether. (A limited number of debtors—those qualifying as a “family farmer or family fisherman,” *id.* at § 109(f)—may be eligible for chapter 12. We did not track chapter 12 cases.)

¹⁵⁹ These debt limits are adjusted every three years, under the mandate of § 104(a). As of April 1, 2016 the debt limits are \$1,184,200 for secured debts and \$394,725 for unsecured debts. See Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed under Section 104(b) of the Code, 81 Fed. Reg. 8748 (Feb. 22, 2016). Between April 1, 2013 and March 31, 2016 these limits were \$1,149,525 for secured debt and \$383,175 for unsecured debt. See Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed under Section 104(b) of the Code, 78 Fed. Reg. 12089 (Feb. 21, 2013). Between April 1, 2010 and March 31, 2013, the limits were \$1,081,400 for secured debt and \$360,475 for unsecured debt. See Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed under Section 104(b) of the Code, 75 Fed. Reg. 8747 (Feb. 24, 2010). Between April 1, 2007 and March 31, 2010, these limits were \$1,010,650 for secured debt and \$336,900 for unsecured debt. See Revision of Certain Dollar Amounts in the Bankruptcy Code Prescribed under Section 104(b) of the Code, 72 Fed. Reg. 7082 (Feb. 14, 2007). Thus, the debt limits changed during the years on which this Study focused. In addition, the categories of unsecured and secured debts may include only obligations that are non-contingent and liquidated. 11 U.S.C. § 109(e). The debt limits remain the same if an individual files jointly with his or her spouse. *Id.*

liquidated from those that are not, and only the former count toward the debt limits. The full schedules do denote these debts, but it is not always clear whether amended schedules replace or supplement an original schedule, and so the total amount of debt is sometimes uncertain. Moreover, in chapter 11, the debtor may check the boxes for contingent or unliquidated debt for strategic reasons.¹⁶⁰

As the data in Table 30 demonstrate, a significant number of the debtors in our samples had liabilities below the secured and unsecured debt ceilings for chapter 13. Our lowest estimate of chapter 13 eligible debtors is 19.3%, which is the figure for 2010 debtors using the summary of schedules data. This 13-eligible figure rises from 19% to 45% for 2013 using the full schedules rather than the debtor's summary of schedules.

Raising the debt limit by 50% does not significantly increase the percentage of 13-eligible debtors in our random sample. The most dramatic impact is for the full-schedule analysis of debtors who filed in 2010. Raising the debt limits by 50% would increase by 16%—from 27% to 42%—the number of 13-eligible debtors. By contrast, for 2013, the debt-limit change would increase by only 9%—from 47% to 55%—the number of 13-eligible debtors. Of course, a more dramatic change in the debt limit would have a greater impact.

¹⁶⁰ In chapter 11, a creditor must file a proof of claim if the debtor designates the creditor's debt as contingent, unliquidated, or disputed on the schedules. *See* FED. R. BANKR. P. 3003(c)(2). If the creditor fails to do so, the creditor will “not be treated as a creditor with respect to such claim for the purposes of voting and distribution. *Id.*

Table 30: Impact of Chapter 13 Actual and Hypothetical Debt Limits

	(A) Full Schedules		(B) Full Schedules x 1.5	
	2010	2013	2010	2013
Over	67.0%	50.0%	51.4%	41.2%
Under	26.6%	46.5%	42.2%	55.3%
N/A	6.4%	3.5%	6.4%	3.5%
	Summary of Schedules		Summary of Schedules x 1.5	
	2010	2013	2010	2013
Over	73.4%	57.9%	58.7%	43.9%
Under	19.3%	36.0%	33.9%	50.0%
N/A	7.3%	6.1%	7.3%	6.1%

As we discussed earlier,¹⁶¹ our debtors had very high incomes and expenses. They also had enormous debt-to-income ratios relative to the ratios reported by prior scholars studying bankrupt individuals in other chapters. While Lawless and his co-authors found a median debt-to-income ratio of 3.3 in their sample of bankrupt debtors filing in 2007,¹⁶² the median debt-to-income ratio in our sample was eight in 2013 and sixteen in 2010. Table 31 presents these ratios, using figures from the summary of schedules.¹⁶³

¹⁶¹ See Section III.B.1, *supra*.

¹⁶² See *Did Bankruptcy Reform Fail*, *supra* note 2. Other scholars found similar ratios. See, e.g., AS WE FORGIVE, *supra* note 2; FRAGILE MIDDLE CLASS, *supra* note 2. The self-employed have debts that are more than five times their yearly income. See ROBERT M. LAWLESS, *Striking Out on Their Own: The Self-Employed in Bankruptcy*, in KATHERINE PORTER, BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS (2012).

¹⁶³ The results are substantially similar if we use the income figure from Line 16 of Schedule I.

Table 31: Debt-to-Income Ratios

	Summary of Schedules Debt: Summary of Schedules Income	
	2010	2013
Over 75	11%	2%
51 to 75	6%	3%
25 to 50	10%	5%
10 to 25	37%	17%
6 to 10	18%	37%
5 or less	6%	25%
Undefined: Zero or Negative Income	6%	4%
N/A	6%	8%
Median	16	8

The Code’s rules for payment of priority debt also favor selection of chapter 13 for 13-eligible debtors. A chapter 13 debtor’s plan must provide for payment in full, in deferred cash payments, of all priority claims.¹⁶⁴ The rules for chapter 11, which are more complicated generally, may make plan confirmation more difficult for an individual debtor because deferred cash payments are not an option for all types of priority debt. The chapter 11 plan must provide for payment in cash, on the plan’s effective date, of all administrative claims,¹⁶⁵ and if any class of priority claimants other than tax claimants votes not to accept the plan, then the holders of claims in that class, too, must be paid in full, in cash, on the plan’s effective date.¹⁶⁶ Finally, unless a tax creditor agrees to the contrary, the chapter 11 plan must provide for payment of the value, as of the effective date, of all priority tax claims over a period of time not to exceed five years from the filing of the petition, not from plan confirmation, in a voluntary case.¹⁶⁷ In other words,

¹⁶⁴ 11 U.S.C. § 1322(a)(2) (2012).

¹⁶⁵ *Id.* § 1129(a)(9)(A).

¹⁶⁶ *Id.* § 1129(a)(9)(B).

¹⁶⁷ 11 U.S.C. § 1129(a)(9)(C) (2012).

the longer it takes debtors to confirm their plans, the less time they have under the terms of their plans to pay off the debts owed to priority tax claimants. But if individual chapter 11 debtors hold little priority debt, then the differences in priority debt treatment for chapter 13 versus chapter 11 plans are inconsequential.

In order to determine the extent of priority debt among our chapter 11 debtors, we first coded for the various types of priority debt listed on Schedule E. Table 32, which presents those results, reveals that about six in ten of the individual debtors in the random sample disclosed priority tax liabilities on their schedules. Approximately a third of our debtors, however, reported no priority debt at all.

Table 32: Types of Priority Debt

	2010	2013
Domestic	3.7%	5.3%
Deposits by Individuals	0.9%	1.8%
Taxes	57.8%	60.5%
Wages	0.0%	1.8%
None	34.9%	32.5%
Unknown	7.3%	3.5%

We also coded for the amount of priority debt by type of debt. Table 33 presents those results. Because some debtors listed multiple types of priority debt, the rows within a column do not add to 100%.

Table 33: Amount of Priority Debt by Category

	Taxes		Domestic Support		All Priority	
	2010	2013	2010	2013	2010	2013
Over 500K	0.9%	5.3%	0.0%	0.0%	1.8%	5.3%
250K to 500K	2.8%	3.5%	0.0%	0.9%	1.8%	4.4%
100K to 250K	3.7%	7.9%	0.9%	0.0%	3.7%	7.9%
50K to 100K	9.2%	4.4%	0.0%	0.0%	10.1%	6.1%
25K to 50K	11.0%	7.9%	0.9%	0.9%	10.1%	8.8%
1 to 25K	16.5%	18.4%	0.9%	2.6%	16.5%	20.2%
0	48.6%	48.2%	89.9%	91.2%	48.6%	43.0%
N/A	7.3%	4.4%	7.3%	4.4%	9.2%	4.4%
Maximum	1,063,692	5,654,393	139,500	498,260	1,063,692	5,654,393
Average	41,872	143,432	1,796	5,230	42,137	150,079
Median	0	0	0	0	0	2,500

The results are striking. Most of the debtors in the random samples reported little priority debt, apart from tax liabilities. While over half of the debtors listed tax obligations, some debtors reported those obligations as “notice only” or with a value of “unknown” or “0.” About 28% of the debtors in each year disclosed total priority tax debts of \$25,000 or more, however, and in 2013 more than 20% disclosed tax debts of \$50,000 or more.

3. *Assets*

The data in Table 34, taken from the last-filed summary of schedules in the debtor’s chapter 11 case, show that the debtors in our sample held substantial assets. The median value of assets in 2010 was \$1,145,820; in 2013, that figure fell by 28% to \$820,777. These medians, however, hide a great deal of variance. One debtor in our sample disclosed more than \$66 million in assets, but 21% and 25% of our debtors in 2010 and 2013, respectively, disclosed less than \$500,000 in total assets.

Table 34: Assets from Summary of Schedules

	Real Property		Personal Property		Total Assets	
	2010	2013	2010	2013	2010	2013
Over \$10M	1.8%	0.9%	3.7%	0.9%	5.5%	1.8%
\$5M to \$10M	6.4%	2.6%	0.9%	0.0%	7.3%	3.5%
\$2.5M to \$5M	8.3%	3.5%	0.9%	1.8%	11.0%	4.4%
\$1M to \$2.5M	26.6%	19.3%	5.5%	5.3%	28.4%	28.1%
\$500K to \$1M	20.2%	31.6%	6.4%	4.4%	20.2%	30.7%
\$1 to \$500K	21.1%	29.8%	75.2%	81.6%	18.3%	25.4%
0	9.2%	6.1%	0.9%	0.0%	2.8%	0.0%
N/A	6.4%	6.1%	6.4%	6.1%	6.4%	6.1%
Maximum	66,647,000	11,250,000	43,246,837	10,555,535	66,671,585	18,740,635
Average	2,217,490	1,097,198	1,147,352	361,666	3,359,966	1,460,836
Median	927,500	637,609	113,835	55,428	1,145,820	820,777

Most of the debtors' assets were in the form of real property, which played a greater role on the balance sheet of the individual chapter 11 debtor than did personal property. In 2010, the median value for real property was \$927,500; for personal property, the median was \$113,835. In 2013, the median real property value was \$637,609; for personal property, it was \$55,428. If we look at totals (or averages), real property comprised 66% of our debtors' assets, while in 2013 that figure rose to 75% of debtors' assets. These shares are a little lower than the findings of the AO, which reported that in 2013 real property comprised approximately 70% of the assets of individuals who filed non-business chapter 11 bankruptcy petitions.¹⁶⁸

In order to develop a fuller picture of our debtors' holdings, we examined the full schedules, starting with homeownership. The overwhelming majority of our debtors owned a home; only 6% in 2010 and 8% in 2013 clearly had no home. We also coded the

¹⁶⁸ Table BAPCPA 1B (December 31, 2013), available at <http://www.uscourts.gov/statistics/table/bapcpa-1b/bankruptcy-abuse-prevention-and-consumer-protection-act-bapcpa/2013/12/31>

debtor’s estimate of the value of the home and the amount of the home mortgage, and present that data in Table 35. We were not able to determine home ownership for a number of debtors because either the debtor did not complete the relevant schedules or we could not tell if the property listed was the debtor’s principal residence.

Table 35: Home Ownership

	(A) Home Value		(B) Home Mortgage Amount	
	2010	2013	2010	2013
Over \$5M	0.0%	0.9%	0.0%	0.9%
\$2.5M to \$5M	4.6%	2.6%	5.5%	2.6%
\$1M to \$2.5M	11.9%	7.0%	10.1%	13.2%
\$500K to \$1M	20.2%	14.9%	21.1%	13.2%
\$250K to \$500K	25.7%	29.8%	22.9%	21.1%
\$1 to \$250K	16.5%	28.1%	15.6%	27.2%
Unknown Value	4.6%	1.8%	4.5%	5.3%
Home But No Mortgage			2.8%	1.8%
No Home	6.4%	7.9%	6.4%	7.9%
N/A	10.1%	3.5%	11.0%	7.0%
Maximum	4,500,000	9,200,000	3,557,890	10,200,000
Average	739,191	624,764	742,362	692,424
Median	450,000	320,000	473,562	341,260

Home value is another indicator of a debtor’s socio-economic status. Given the reports of celebrities in chapter 11, one might expect to find a large number of very expensive homes. We did find a few such homes; the most valuable home in our sample exceeded \$9,000,000. The median home value, however, was just \$450,000 in 2010 and \$320,000 in 2013. Of the 2010 debtors, only 16.5% claimed homes worth more than \$1,000,000—the same percentage as those who claimed homes worth less than \$250,000. In 2013, substantially more debtors claimed homes worth less than \$250,000 (28.1%) than claimed homes worth more than \$1,000,000 (10.5%). These figures represent a

fairly wide distribution of home values. Still, these values are substantially greater than median home values in the United States. The median sales price for a new home ranged, by month, between \$204,000 and \$241,000 in 2010 and between \$251,000 and \$279,000 in 2013.¹⁶⁹ According to the National Association of Realtors, the median sales price of an existing family home was \$197,400 in 2013.¹⁷⁰ Thus, most of our debtors were not “ultra-wealthy,” but most owned a home worth substantially more than that of the median American homeowner.

To determine whether debtor estimates of home value were erroneous, we compared home values with home mortgage debt. The data in Column (B) of Table 35 support the conclusion that debtor estimates of home value were not wildly inaccurate. For example, in 2010, 16.5% of debtors listed their home value in the \$1-to-\$250,000 range; 15.6% listed the amount of their home mortgage as falling within that same dollar range. The pattern is similar for 2013 and across most dollar ranges in Table 35. If debtors had listed inflated or depressed values for their homes, we would expect to find a larger difference between the percentage of debtors in each home value dollar category compared to the percentage in the same dollar category for home mortgage amounts.

We also looked for other real estate holdings. Table 36 provides the value of other real property owned by the debtor as well as the mortgages owed against these properties. Perhaps the most striking finding is that over 70% of those debtors for whom we have data owned other real property. These data provide more evidence that the individual

¹⁶⁹ Median and Average Sales Prices of New Homes Sold in United States, *available at* <https://www.census.gov/construction/nrs/pdf/uspricemon.pdf>

¹⁷⁰ National Association of Realtors, *Existing-Home Sales*, *available at* <http://www.realtor.org/topics/existing-home-sales>

chapter 11 debtors in our sample own substantially greater assets than the average American.

Table 36: Other Real Property

	Other Real Property		Other Mortgage Total	
	2010	2013	2010	2013
More than \$10M	0.9%	0.0%	1.8%	0.0%
\$5M to \$10M	2.8%	1.8%	2.8%	0.0%
\$2.5M to \$5M	10.1%	3.5%	7.3%	7.0%
\$1M to \$2.5M	12.8%	9.6%	19.3%	16.7%
\$500K to \$1M	13.8%	18.4%	14.7%	17.5%
\$250K to \$500K	11.9%	18.4%	11.9%	9.6%
\$1 to \$250K	11.0%	14.0%	3.7%	11.4%
0			0.9%	3.5%
No Other Real Property	20.2%	28.1%	20.2%	28.1%
N/A	16.5%	6.1%	17.4%	6.1%
Maximum	65,382,500	6,013,150	40,727,735	4,947,902
Average	2,316,483	617,228	2,170,030	1,033,302
Median	826,850	322,000	1,006,633	720,912

We also coded for the number of parcels, and these data in Table 37 are even more striking. Over 40% of the debtors (47% in 2010, 42% in 2013) listed more than two pieces of real property. In 2010, about twice as many debtors disclosed interests in at least ten parcels of land as those who disclosed owning no real property at all. It is hard to reconcile the number of parcels of land held with the dollar values listed in Tables 35 and 36. We would expect values far in excess of those shown in Tables 35 and 36, given the number of parcels of real property disclosed on the schedules. We have two theories to explain the discrepancy. First, some debtors could have disclosed parcels with little value, such as time-shares or interests in LLCs that owned real property without equity. Second, the dollar values in Tables 35 and 36 may be understated because the debtors

failed to list the value of some properties on their schedules or counted as personal property interests in LLCs or other entities that themselves owned real property.¹⁷¹

Table 37: Number of Parcels

	2010	2013
10+	11.0%	4.4%
9	1.8%	0.0%
8	0.9%	4.4%
7	3.7%	2.6%
6	1.8%	7.0%
5	1.8%	6.1%
4	10.1%	10.5%
3	15.6%	7.0%
2	16.5%	21.9%
1	24.8%	26.3%
0	6.4%	5.3%
N/A	5.5%	4.4%

Finally, in Table 38, we provide an estimate of the debtors' equity in their homes and their other real property. Note that the other real property measure simply subtracts the total value of the debtor's mortgages from the total value of other real property; it does not calculate equity parcel by parcel. In light of the real estate collapse, we expected to find that a large number of debtors were using bankruptcy to try to renegotiate mortgages worth more than their homes. After all, one advantage of chapter 11 over chapter 13 is that the former is not subject to the latter's requirement that a plan be

¹⁷¹See, e.g., Amended Schedule B, *In re Behrendt*, No. 11-11379 (Bankr. C.D. Cal. March 25, 2010) (valuing at \$42 million notes receivable and corresponding deeds of trust from sale of properties by various LLCs and trusts, and valuing at zero numerous interests in various corporations and LLCs, some of which were real estate firms)

completed in five years.¹⁷² That requirement makes it very difficult for a debtor to repay a mortgage in full under chapter 13.¹⁷³

The data in Table 38 show that many of our debtors were under water on their mortgages. Nonetheless, 35% of the debtors in 2010 and 33% in 2013 reported equity in their home, while 23% to 25% reported equity in other real property. At a time when real estate prices were seriously depressed—particularly in 2010—this finding suggests that individual debtors in chapter 11 hold more wealth than the typical American and are unlike the stereotypical chapter 13 debtor.

¹⁷² 11 U.S.C. § 1322(d)(2) (2012).

¹⁷³ Individual debtors in chapter 11 cases also have more flexibility to modify obligations to secured creditors other than holders of residential mortgages. (Both chapters 11 and 13 prohibit the modification of obligations secured only by the debtor’s principal residence. 11 U.S.C. §§ 1123(b)(5) & 1322(b)(2) (2012)). Because the language of these sections is identical, the Supreme Court’s holding in *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993), interpreting 11 U.S.C. § 1322(b)(2), is equally applicable to the interpretation of 11 U.S.C. § 1123(b)(5).) This flexibility derives, in part, from the fact that chapter 11 plans may extend beyond the five-year limit applicable in chapter 13. Thus, a debtor may restructure a long-term mortgage on rental property only in chapter 11. Individual chapter 11 debtors also have more flexibility in modifying secured claims on personal property. The infamous “hanging paragraph,” codified at the end of 11 U.S.C. § 1325(a)(9), applies only in chapter 13. Thus, individual debtors in chapter 11 may modify secured claims even though the collateral is an automobile purchased within 910 days before filing, or is another type of collateral securing a debt incurred within a year before the petition.

Table 38: Debtor Equity in Real Property

	Home Equity		Other Real Property Equity (Net)	
	2010	2013	2010	2013
Over \$1,000,000	0.9%	1.8%	6.4%	2.6%
\$500,001 to \$1,000,000	8.3%	2.6%	3.7%	2.6%
\$250,001 to \$500,000	4.6%	5.3%	0.9%	1.8%
\$50,001 to \$250,000	13.8%	15.8%	10.1%	11.4%
\$1 to \$50,000	7.3%	7.9%	1.8%	7.0%
0 to -\$50,000	15.6%	14.0%	9.2%	8.8%
-\$50,001 to -\$250,000	18.3%	20.2%	12.8%	10.5%
-\$250,001 to -\$500,000	3.7%	5.3%	1.8%	9.6%
-\$500,001 to -\$1,000,000	1.8%	7.0%	9.2%	7.9%
Less than - \$1,000,000	2.8%	3.5%	6.4%	4.4%
Unknown	6.4%	1.8%	0.0%	0.0%
N/A	10.1%	7.0%	17.4%	5.3%
No home or other real property	6.4%	7.9%	20.2%	28.1%
Average	3,383	-67,660	234,972	-136,715
Median	0	-7,069	-44,116	-40,004
Maximum	1,743,520	1,784,149	24,654,765	3,263,515
Minimum	-2,196,000	-2,393,432	-6,828,510	-2,202,000

IV. Is Chapter 11 Succeeding?

A central question motivating much of the empirical bankruptcy literature is whether bankruptcy successfully serves the interests of individual debtors and their creditors. The most common definition of success focuses on the goals of the debtor and asks whether individuals receive a discharge in chapter 13 or whether corporations confirm a plan of reorganization in chapter 11.¹⁷⁴ While discharge or confirmation may be the best definition of success for individuals in chapter 11, the literature recites a host of problems. One is the fact that individuals, unlike corporations, do not receive their discharge until their plan is completed,¹⁷⁵ and few individual debtors will complete their

¹⁷⁴ See, e.g., Norberg & Velkey, *supra* note 2; *Success of Chapter 11*, *supra* note 3.

¹⁷⁵ See 11 U.S.C. § 1141(d)(5) (2012).

plans within the three-to-six-year window in which we observed the cases.¹⁷⁶ In addition, many debtors do not belong in a reorganization chapter; an efficient bankruptcy system would quickly dismiss these cases or convert them so that the estates can be liquidated.¹⁷⁷

Thus, we adopted a broader definition of success to include any case in which the debtor received a discharge or avoided conversion and dismissal for four years.¹⁷⁸ If we apply the simple metric used in prior studies by measuring how long it takes bankruptcy courts to dispose of the “failed” reorganizations,¹⁷⁹ the individual chapter 11 cases fare worse than chapter 13s. More specifically, we found that courts take longer to dismiss the “obvious” individual chapter 11 failures than to dismiss failed chapter 13 cases.¹⁸⁰

In addition to this debtor-centric definition of success—asking whether the debtor received a discharge, confirmed a plan, or at least avoided dismissal or conversion for a significant period of time—we also examined case characteristics associated with success, such as joint filing, pro se filing, or filing in a district that had previously interpreted the absolute priority rule in a manner favorable to debtors.

We discuss our findings on success for the large PACER data set in Section IV.A and for the much smaller but more richly-coded random sample of cases in Section IV.B. Section B also provides the results of our search for absolute priority objections and the impact of such objections on plan confirmation.

¹⁷⁶ Many of the plans that our random sample debtors proposed are scheduled to last 30 years. *See infra* note 239 and accompanying text.

¹⁷⁷ *See, e.g., Bankruptcy Decision Making, supra* note 3; *Small Business Workouts, supra* note 3; *Success of Chapter 11, supra* note 3.

¹⁷⁸ This follows the example of many other scholars. *See, e.g., Bankruptcy Decision Making, supra* note 3; *Success of Chapter 11, supra* note 3; Norberg & Velkey, *supra* note 2.

¹⁷⁹ *See, e.g., Bankruptcy Decision Making, supra* note 3; *Success of Chapter 11, supra* note 3.

¹⁸⁰ *See infra* Table 52, and notes 296-297 and accompanying text. This results, apparently, from a combination of factors: lack of rigid timing rules; absence of a bankruptcy trustee; and fairly low stakes that limit creditor participation.

In Section IV.C, we take up the question of success as it relates to the functioning of the chapter 11 system. An optimal bankruptcy process should quickly and accurately identify debtors who are unable to reorganize successfully, and either dismiss or convert those cases to chapter 7.¹⁸¹ As a result, some scholars have measured success by the length of time it takes courts to dismiss or convert failed reorganizations.¹⁸² In Sections C.1 and C.2, we apply a version of this length-of-time definition to the individual chapter 11 cases in both our PACER data set and the random sample. For the cases in the random sample, we also provide data in Section IV.C.2 on the time it takes to reach various case milestones, such as filing schedules and proposing a plan.

A. Debtor Success—The PACER Data

The PACER data include the full universe of bankruptcy filings in the relevant districts, but they provide limited information about each case. The PACER data do not include information on plan proposal, confirmation, or plan success. Thus, in Part 1, we define success as avoiding dismissal or conversion for a significant period of time. We found that about a third of our 2010 cases met this broad definition of success.

In Part 2, we discuss the variables that predict success. We found that success is more likely if (1) a case is filed jointly, (2) a case is filed by an attorney experienced with individual chapter 11s, (3) the debtor owes primarily business debt, or (4) the debtor expects assets to be available for general unsecured creditors. We also found some

¹⁸¹ See *Success of Chapter 11*, *supra* note 3 at 627-32; see also NATIONAL BANKRUPTCY REVIEW COMMISSION, THE NEXT TWENTY YEARS 609 (1997) (footnote omitted) (stating that there are two categories of chapter 11 cases and “[t]he second category consists of the much larger proportion of cases in which the debtor has no reasonable prospect of rehabilitation”) [hereinafter 1997 Commission Report].

¹⁸² See *Bankruptcy Decision Making*, *supra* note 3; *Success of Chapter 11*, *supra* note 3.

evidence that a jurisdiction's interpretation of the exception to the absolute priority rule affects the success rate.

1. Defining Success

PACER case reports provide only a case's disposition, not whether the bankruptcy court confirmed a chapter 11 plan. Thus, we counted a case as a success if it survived dismissal and conversion. More specifically, we counted a case as a success if the debtor received a discharge, or if the result field was left blank or coded as "Discharge Not Applicable." We counted as a failure any case that was dismissed or for which discharge was withheld, denied or waived.¹⁸³ We also counted as a failure any case that was converted to chapter 7 or 13 under the theory that the debtor should have begun in those chapters. Finally, a small number of cases had more ambiguous procedural terminations, such as a case transfer or a notation that the case was filed in error. We also counted these cases as failures, but we list them separately in our tables.

Table 39 provides data on case disposition for the individual chapter 11 cases in the PACER sample. Individual debtors may file jointly, so the PACER case reports contain a field for the first debtor and another field for the second debtor, if any. Table 39 summarizes the disposition for the first debtor only.

¹⁸³ It is not worth debating whether a waived discharge is really a failure because these waivers account for a negligible percentage of the cases.

Table 39: Outcomes of Individual Chapter 11 Cases

	All Individual Chapter 11s	
	2010	2013
Standard Discharge	9.90%	4.90%
Hardship Discharge	0%	0%
Blank	9%	28.20%
Discharge Not Applicable	13.60%	9.90%
Total "Survive"	32.50%	42.90%
Converted to Chapter 7	23.10%	14.50%
Converted to Chapter 13	1.20%	1.10%
Dismissed	35.7%	34.90%
Discharge Denied, Revoked, Waived or Withheld	6.10%	5.20%
Case Transferred	1.20%	1.20%
Other Procedural Disposition (Filed in Error, Split or Closed in Error)	0.10%	0.20%
Total "Failure"	67.50%	57.1%
Total Number	4,049	2,617

We recognize the limitations of our definition of success as survival, but it is the best definition we could implement, given the limitations of the data. For several reasons, we do not want to focus exclusively on discharge. Some debtors do not need a discharge for financial recovery. For example, chapter 13 is often criticized for seldom leading to a discharge,¹⁸⁴ but relatively few chapter 13 debtors list the receipt of a discharge as their primary goal; most commonly, the primary goal is to save the debtor's home.¹⁸⁵ Whether bankruptcy can successfully serve debtors' interests without leading to a discharge is a

¹⁸⁴ See, e.g., Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103 (2011).

¹⁸⁵ *Id.*

matter of scholarly debate.¹⁸⁶ Moreover, our findings rely on the PACER case reports’ “standard discharge” designation, which may not always be accurate.¹⁸⁷

Timing, however, is the biggest problem with using discharge as the exclusive measure of success. Corporations receive a discharge upon confirmation of a chapter 11 plan of reorganization, unless they are using chapter 11 to liquidate.¹⁸⁸ By contrast, individuals do not receive a discharge in chapter 11 until they complete their plan,¹⁸⁹ and many chapter 11 plans call for payments over thirty years.¹⁹⁰ While the Code allows a

¹⁸⁶ *Id.*

¹⁸⁷ We checked fifteen cases in which PACER recorded the debtor as having received a standard discharge. In five of those fifteen cases, the top of the docket contained the notation “standard discharge”; while the debtor had confirmed a plan in all five cases, he or she had not yet received a discharge. *See In re Rinkenberger*, No. 13-36386 (Bankr. N.D. Tex. Dec. 11, 2013); *In re Mitcham*, No. 13-11973 (Bankr. N.D. Ga. Aug. 5, 2013); *In re Vargas*, No. 13-29364 (Bankr. C.D. Cal. July 31, 2013); *In re Ragira*, No. 13-41986 (Bankr. N.D. Tex. May 2, 2013); *In re Ramirez*, No. 10-56945 (Bankr. N.D. Cal. July 5, 2010). While these errors raise questions about the accuracy of the “standard discharge” designation in the PACER case reports, they do not affect our findings, because the measure of success used includes obtaining a discharge *or* avoiding dismissal for a significant period of time. The incorrectly-coded “standard discharge” cases involve confirmed plans; thus, the debtor succeeded by avoiding dismissal for a significant period of time. While the incorrect PACER coding affects the categories into which these successful cases fall, e.g., standard discharge versus discharge not applicable, it does not affect the percentage of successful cases found.

¹⁸⁸ 11 U.S.C. § 1141(d)(1), (3) (2012).

¹⁸⁹ *Id.* at § 1141(d)(5). Section 1141(d)(5) provides that an individual debtor is not discharged until “completion of all payments under the plan,” unless modification is impractical and the debtor has paid unsecured creditors at least as much as they would have received in a chapter 7. This change to the date of discharge for individuals in chapter 11 was one of the most important changes wrought by the 2005 Amendments. Pub. L. 109-8, § 321(d)(2). There is an exception available for “cause,” which is discussed *infra* at note 244.

¹⁹⁰ *See infra* note 239 and accompanying text.

court to grant a discharge early if modification of the plan is not feasible¹⁹¹ or if the court finds cause,¹⁹² these provisions are exceptions to the general rule.

Because we examined the cases during the summers of 2014 and 2015, many cases were not yet completed, particularly those filed in 2013. We counted open cases as successes because the debtor had avoided conversion or dismissal. Some debtors could still have been trying for plan confirmation, but our search of the individual records suggested that in most of the open cases, at least for 2010, the debtor had obtained confirmation of a plan and was still making the payments required by that plan.¹⁹³ We suspect that cases in which the disposition code was blank were likely still open. During our pilot project, we checked fifty randomly selected individual chapter 11 cases with a blank disposition field. Forty-seven of the fifty were indeed live cases as of June 1, 2014. We could not determine the status of one of the remaining three because the docket was not available electronically. The last two cases had been administratively closed.¹⁹⁴

¹⁹¹ 11 U.S.C. § 1141(d)(5)(B) (2012). Before 2005, only the debtor and a plan proponent had standing to seek modification of a confirmed plan. That rule remained unchanged post-2005 for chapter 11 debtors that were not individuals. The 2005 amendments, however, expanded the list of appropriate parties for chapter 11 cases filed by individuals. Now, parties with standing to seek post-confirmation modifications under chapter 11 include the debtor, United States Trustee, any appointed trustee, and unsecured creditors. *Id.* §1127(e). A modification may seek to increase or decrease payments, and must be sought before the completion of payments; the fact that the plan has been substantially consummated is irrelevant. *Id.*

Courts have not developed standards for post-confirmation modification of an individual debtor's chapter 11 plan, although at least one court has imported chapter 13's standard—specifically, a substantial change in the debtor's income or expenses that was not anticipated at the time of confirmation. *In re Mercer*, 09-04088-8-ATS, 2013 WL 6507585, at *3-4 (Bankr. E.D.N.C. Dec. 12, 2013) (applying § 1329(a)'s standard to decide whether to grant modification to individual chapter 11 debtor; rejecting arguments for "more liberal standard"). *See supra* note 191 for discussion of plan modification in chapter 13 cases.

¹⁹² 11 U.S.C. § 1141(d)(5)(A) (2012). The PACER case reports listed no hardship discharges in chapter 11 during the periods we studied. As noted below, however, some courts did grant debtors an early discharge. *See infra* note 244 and accompanying text.

¹⁹³ *See infra* Table 55 and accompanying text.

¹⁹⁴ Chapter 11 debtors are required to pay quarterly fees to the United States Trustee for each calendar quarter during which the case remains open, and is not converted, dismissed or closed. 28 U.S.C. § 1930(a)(6) (2012). To save individuals from having to pay these fees, many courts administratively close a case after confirmation of the plan and then reopen the case upon completion of the plan so that the debtor can receive a discharge. The Code requires the bankruptcy court to close a case that has been "fully

Courts that administratively close a case more typically code the disposition as “discharge not applicable,”¹⁹⁵ and we counted this disposition as a success, as well.

One of the most striking statistics from Table 39 is that almost a third of all individual chapter 11 cases from 2010 appear to be succeed by avoiding discharge and conversion. The rate is even higher for cases filed in 2013, but this figure is misleading, as we explain below. In addition, our one-third “success” rate is not directly comparable

administered,” § 350(a), but it does not define that phrase. Thus, courts usually look to the 1991 Advisory Committee Notes to Rule 3022. It lists six relevant factors that the court should consider in determining whether the estate has been fully administered:

(1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or the successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

FED. R. BANKR. P. 3022, Advisory Committee Note (1991). Most significantly, the Notes assert that “[e]ntry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed.” The United States Trustee Program has stated that it “will not object to an individual chapter 11 debtor’s request to close the case before discharge, subject to reopening for the entry of a discharge upon the completion of plan payments, if the estate has been fully administered and any trustee has been discharged.” Walter W. Theus, Jr., *Individual Chapter 11s: Case Closing Reconsidered*, 29 AM. BANKR. INST. J., Feb. 2010, at 1. In the absence of a trustee, the question turns on whether the case has been fully administered.

The authorities appear to be divided on the propriety of this strategy, although several clearly endorse this maneuver. *In re Necaie*, 443 B.R. 483 (Bankr. S.D. Miss. 2010) (applying factors in Advisory Committee Note); *In re Johnson*, 402 B.R. 851 (Bankr. N.D. Ind. 2009) (granting motion after all issues pertaining to plan had been resolved, and noting that otherwise fees could continue for “potentially unlimited duration” if debtor’s mortgage were paid through the plan); *In re Sheridan*, 391 B.R. 287, 290 n.2 (Bankr. E.D.N.C. 2009) (noting that most cases in Eastern District of North Carolina are closed upon substantial consummation, to be reopened—without payment of fee—for entry of discharge). Even cases denying the debtor’s motion to close the case, however, are less than categorical. *See Shotkoski v. Fokkena (In re Shotkoski)*, 420 B.R. 479 (B.A.P. 8th Cir. 2009) (affirming, under abuse of discretion standard, lower court’s refusal to close debtor’s case, and asserting that other cases might come out differently upon case-by-case inquiry); *In re Belcher*, 41 B.R. 206 (Bankr. W.D. Va. 2009) (finding Advisory Committee Notes inapplicable to individual chapter 11 cases, and refusing to grant motion to close case, but observing that debtor could move to modify plan if fee obligation became too burdensome).

¹⁹⁵ Judge Collins of the Bankruptcy District of Arizona first explained this coding system to us, and Nancy Dickerson, Chief Deputy Clerk of the Bankruptcy District of Arizona, confirmed this to be true. *See* e-mail exchange among the Honorable Daniel Collins, Nancy B. Dickerson, Margaret Howard and Richard Hynes, Aug. 14, 2014 (on file with authors). To check the plausibility of this assumption, we searched twenty randomly selected individual chapter 11 cases in which the disposition was coded as “discharge not applicable” and found just one with a disposition inconsistent with this explanation. That case was voluntarily dismissed prior to plan approval.

to the roughly 36% success rate typically found in studies of chapter 13,¹⁹⁶ because we used a different definition of success. We counted cases as successes even if the debtor had not yet received a discharge. To see the consequence of this definition, we applied our definition to the chapter 13 cases in the PACER dataset. We provide the results in Table 40.

The chapter 13 success rate exceeds 40% in 2010. Note, however, that cases in which the debtor actually received a discharge account for only 18% of our cases; most of our “successes” are cases for which the PACER case reports left the disposition field blank.

Table 40: Chapter 13 Outcomes

	2010	2013
Standard Discharge	17.7%	1.2%
Hardship Discharge	0.1%	0.0%
Blank	27.9%	52.5%
Discharge Not Applicable	0.1%	0.0%
Total "Survive"	45.8%	53.8%
Converted to Chapter 7	10.6%	6.7%
Dismissed	42.8%	39.0%
Discharge Denied, Revoked or Withheld	0.5%	0.2%
Case Transferred	0.1%	0.1%
Other Procedural Disposition (Filed in Error, Split or Closed in Error)	0.1%	0.1%
Total "Failure"	54.2%	46.2%
Total Number of Cases	406,495	298,251

¹⁹⁶ While debtors in approximately 70% of chapter 13 cases confirm a plan, the plan “completion rate has been about 36 percent” over the period of time from 2007 to 2013. *See* Flynn, *supra* note 31, at 76.

We cannot use the data in Tables 39 and 40 to directly compare the outcomes of the 2010 and the 2013 cases because we define “success” as the absence of failure, and 2010 cases have had much more time to fail. We, therefore, made use of the PACER fields that record the date of conversion or dismissal to estimate the status of each case 545 days after filing—roughly the time between a case filed on December 31, 2013, and when we first started gathering PACER case reports for the 2013 cases. Table 41 presents the results. With this adjustment, the outcomes of the 2010 and 2013 cases look remarkably similar, with about half of each year’s cases qualifying as a “success” 545 days after filing.

Table 41: Outcomes Measured at 545 Days

	2010	2013
Standard Discharge	1.1%	2.2%
Hardship Discharge	0.0%	0.0%
Blank	43.9%	41.5%
Discharge Not Applicable	4.2%	6.0%
Total "Survive"	49.2%	49.7%
Converted to Ch. 7	18.7%	12.6%
Converted to Ch. 13	1.1%	1.1%
Dismissed	28.2%	32.1%
Discharge Denied, Revoked, Waived or Withheld	1.5%	3.2%
Case Transferred	1.2%	1.2%
Other Procedural Disposition (Filed in Error, Split or Closed in Error)	0.1%	0.2%
Total "Failure"	50.8%	50.3%
Total Number of Cases	4,049	2,617

2. *Predicting Success*

In this section, we consider two measures of success. The first, *Survive2010*, measures survival, as in Table 39, at the time that we downloaded the relevant PACER case report. The *Survive2010* measure applies only to cases filed in 2010. The second measure, *Survive545*, on the other hand, applies to both the 2010 and 2013 cases, and, as in Table 41, uses the status of the case 545 days after the filing of bankruptcy.¹⁹⁷ The 545-day cutoff gives all cases an equal chance to fail and allows us to compare the success rates for the 2010 and 2013 cases

Table 42: Predictors of Success

<i>Variables</i>	(A) Survive545			(B) Survive2010		
	(1) Mean if no (# cases)	(2) Mean if yes (# cases)	(3) <i>p-value of difference</i>	(1) Mean if no (# cases)	(2) Mean if yes (# cases)	(3) <i>p-value of difference</i>
Filed 2010	49.68% (2,617)	49.22% (4,409)	.72	32.53% (4049)		
Primarily Business Debt	48.39% (3,660)	50.63% (3,006)	.07*	29.29% (2,240)	36.54% (1,809)	.00***
No asset	52.81% (5,914)	22.83% (736)	.00***	37.12% (3,499)	3.35% (538)	.00***
Joint filing	44.63% (4,013)	57.89% (2,529)	.00***	27.62% (2,346)	39.94% (1,650)	.00**
<i>Pro se</i>	52.27% (6,120)	17.22% (546)	.00***	34.73% (3,697)	9.38% (352)	.00***

***p<0.01, ** p<0.05, * p<0.01

Table 42 provides data on the relationship between our definitions of success and a series of five explanatory variables (listed down the far-left column of Table 42) that we derived from the PACER case reports. All of the explanatory variables in Table 42 are dichotomous—that is, a filer is either pro se or not, a debtor either expects assets to be available for creditors or not. Columns (A)(1) and (B)(1) provide the average or mean

¹⁹⁷ This measure allowed us to compare cases filed in 2010 with those filed in 2013. It is the elapsed time from December 31, 2013 and when we downloaded our first 2013 case report.

rates of success when the variable in the far-left column of Table 42 is *not* present. That is, the case was filed in 2013 instead of 2010, debts were not primarily business in nature, the debtor expected assets would be available for payout to creditors, the case was not a joint filing, or the debtor was represented by an attorney. Columns (A)(2) and (B)(2) provide the average or mean rates of success when the variable in the far-left column of Table 42 *is* present. That is, the case was filed in 2010, debts were primarily business in nature, the debtor checked the no-asset box on the petition, the case was a joint filing, or the debtor proceeded in chapter 11 on a pro se basis. Columns (A)(3) and (B)(3) provide the p-value for the difference in success rates in Columns (1) and (2).¹⁹⁸ Finally, the numbers in parentheses in Columns (A) and (B) are the number of cases or observations.

Table 42 shows that, with the exception of the year of filing, all of the variables listed in the far-left column were statistically significant predictors of plan success—both with and without a 545-day time constraint. Macroeconomic conditions improved between 2010 and 2013,¹⁹⁹ and there were many more individual chapter 11 filings in 2010.²⁰⁰ Therefore, we were surprised to find that cases filed in 2010 had strikingly similar dispositions at 545 days to those filed in 2013; the difference of less than a half of a percent (49.68% versus 49.22%) is neither statistically nor practically significant (p-value of .72).

¹⁹⁸ Differences in success rates may be due to nothing more than chance. A p-value expresses the probability that chance explains the observed result using a chi-squared test. Thus, a p-value of .00 means that the probability that the difference in success rates is the result of chance is less than 1 in 100 using a chi-squared test.

¹⁹⁹ The unemployment rate fell from 9.4% in June of 2010 to 7.5% in June of 2013. <http://data.bls.gov/timeseries/LNS14000000>. The S&P/Case-Shiller U.S. National Home Price Index also rose from 147.68 in June of 2010 to 156.49 in June of 2013. <http://us.spindices.com/indices/real-estate/sp-case-shiller-us-national-home-price-index>

²⁰⁰ See *supra* Table 1.

The second variable in the table, however, is a statistically significant predictor of success. We found that cases with primarily business debts succeeded more often than cases with primarily non-business debts. Although the difference is just a little over 2% at 545 days (48.39% versus 50.63%), for *Survive2010*, it increases to over 7% (29.29% versus 36.54%).

Statisticians sometimes measure how well a variable predicts success in terms of odds-ratios. An odds-ratio is a ratio of ratios—the probability of success divided by the probability of failure of one group over the probability of success divided by the probability of failure of the other group.²⁰¹ If we use *Survive545* as the outcome measure, then the odds-ratio for primarily business versus primarily non-business debts is 1.09; if *Survive2010* is the measure, then the odds-ratio is about 1.39.

The debtor's belief that assets will be available for general unsecured creditors is a very strong predictor of success. As the data in Table 42 show, approximately 53% of the cases in which the debtor indicated on the petition that assets would be available to creditors (Column (A)(1)) were successful 545 days after the start of chapter 11; by comparison, only about 23% of the no-asset cases (Column (A)(2)) were successful in that same time frame. As the p-value in Column (A)(3) indicates, the difference in success rates for asset versus no-asset cases is statistically significant ($p < 0.01$).

At 545 days, the odds-ratio for asset versus no-asset cases is 3.78; the odds-ratio for *Survives2010* is an astounding 17.03. Just 3.35% of the no-asset cases filed in 2010

²⁰¹ See, e.g., Magdalena Szumilas, *Explaining Odds Ratios*, 19 J. CAN. ACAD. CHILD. ADOLESC. PSYCHIATRY 227 (2010).

qualified as successful under our measure compared to 37.12% of the cases in which the debtor indicated that assets would be available for general creditors.²⁰²

There are at least four possible explanations for why no-asset cases in our PACER sample fare so poorly, with a success rate sharply lower than what we estimate for our random sample.²⁰³ First, some chapter 13 trustees and judges will only approve plans that offer minimum repayment to general unsecured creditors;²⁰⁴ perhaps a similar phenomenon is at work in individual chapter 11 bankruptcies. Second, classes of claims that receive nothing under a plan are conclusively presumed to vote against the plan,²⁰⁵ so debtors proposing such plans must satisfy the cumbersome cramdown rules of chapter 11.²⁰⁶ Third, checking the “no asset” box on the petition may signal that a debtor cannot even afford to pay expenses and secured claims and, thus, will be unable to confirm and complete a plan of reorganization. Finally, the extreme odds-ratio could be due to coding problems in the PACER Case Reports that overstate the number of cases in which the debtor marks the petition as a no-asset case.²⁰⁷

For the remaining two variables in Table 42, we had to manipulate the PACER case report data. To determine whether a case was a joint filing, we looked for the word “and” in the case title. We excluded cases that were marked as an individual filing but had terms such as “LLC” or “Inc.” in the title, which indicated that these cases were

²⁰² The PACER case reports left this field blank for eleven individual Chapter 11 cases. Three of these eleven (27.27%) could be considered successful.

²⁰³ See Section IV.B.2, *infra*. We suspect that this difference is due in part to some coding errors in the PACER reports. See *infra* Tables 39-41, and accompanying text.

²⁰⁴ See 1997 Commission Report, *supra* note 181, at 235 (“Some courts confirm plans paying zero percent to unsecured creditors. Other courts condition confirmation on payment of high percentages of unsecured debt.”).

²⁰⁵ 11 U.S.C. § 1126(g) (2012).

²⁰⁶ *Id.* § 1129(b).

²⁰⁷ See *supra* note 148.

misclassified entities. We found that jointly filed cases fared much better than cases with a single debtor; the odds-ratios were 1.71 and 1.74 for *Success545* and *Success2010*, respectively. A debtor can only file jointly with his or her spouse,²⁰⁸ and we initially thought that a joint filing was merely a proxy for the effects of marriage. Our finding that many married debtors do not file jointly with their spouses, however, shows that this is not a complete explanation.²⁰⁹

We also found that pro se filing, the final variable in Table 42, strongly predicts failure; the odds-ratios of represented to pro se filings are 5.26 and 5.14 for *Success 545* and *Success2010*, respectively. Chapter 11 is extremely complicated, and few individuals are able to competently handle their own case. We were surprised, however, that pro se filing is not a stronger predictor of failure; perhaps this merely reflects the fact that we used rough proxies for our measure of success. We return to this issue in Section IV.B.2.

Many individual chapter 11 cases are filed by attorneys who do not appear to specialize in chapter 11 practice, and we wondered whether success is correlated with attorney experience. Indeed, the number of times a listed attorney appears in our sample strongly predicts success.²¹⁰ Logit regressions, with the number of cases as the sole explanatory variable (and pro se cases omitted), yield odds-ratios of 1.012 for *Success545* and 1.013 for *Success2010*. Both are significant at the 1% level.

The effect of attorney experience is likely to be highly non-linear; the second case that an attorney handles is likely to provide a much more valuable lesson than the thirtieth case. We, therefore, reran the regressions with the log of the number of cases as

²⁰⁸ 11 U.S.C. § 302(a) (2012).

²⁰⁹ See *supra* note 108 and accompanying text.

²¹⁰ The measure we use here was not manually cleaned by our research assistants and so does not precisely match the results in Table 8.

the sole explanatory variable and found odds-ratios of 1.26 and 1.22 for *Success545* and *Success2010*, respectively. Both were again significant at the 1% level.

Odds-ratios are difficult to comprehend, so we also divided our attorneys into three groups: (1) those who handled only 1 or 2 cases in our sample (Low Experience); (2) those who filed three to ten cases (Mid Experience); and (3) those who filed more than ten cases (High Experience). Table 43 summarizes the differences in success rates depending on the experience of the debtor’s attorney. Nearly all differences in the success rates of the various groups are statistically significant at the 1% level. The one exception is the difference in success rates between the mid- and high-experience attorneys; that difference has a p-value of 0.20.

Table 43: Success by Attorney Representation

	Success545	Success2010
	Mean (# cases)	Mean (# cases)
Pro se	17.22% (546)	9.38% (352)
Low Experience (1-2)	45.35% (2,538)	29.10% (1,543)
Mid Experience (3-10)	54.56% (2,399)	37.79% (1,405)
High Experience (11+)	62.47% (739)	40.59% (749)

Cases are not randomly assigned to attorneys. As a result, our findings do not necessarily mean that attorneys who rarely file individual chapter 11 cases are less competent than those who handle them on a regular basis. Instead, debtors who are more likely to succeed may seek out more experienced attorneys, and individuals may be more likely to file under chapter 11 (and, hence, attorneys will gain more experience) if the district has adopted rules and practices that make success more likely. The paucity of information that we have about the PACER cases prevents us from completely separating

the treatment and selection effects; we mitigate (but do not completely solve) this problem through regression analysis and present the results in Table 45 below.

The final variable we examined using the PACER case report data was the jurisdiction’s precedent, if any, on application of the absolute priority rule to individual chapter 11 cases. Courts have split as to the proper interpretation of the exception that protects individual debtors from the full force of the absolute priority rule (“APR”).

The absolute priority rule requires that a junior class of claims or interests receive no part of the estate if a senior objecting class is not paid in full.²¹¹ Whether, and how, the rule applies to individual debtors in chapter 11 became a significant issue following two amendments to the Code in 2005. First, language was added to the subsection setting out the rule: “except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.”²¹² Second, the amendments added § 1115, which defines property of the individual debtor’s bankruptcy estate to include postpetition earnings, “in addition to the property specified in section 541.”²¹³ The question is whether these amendments implicitly repealed the absolute priority rule with respect to individual chapter 11 cases. More specifically, the issue is whether “all property . . . specified in section 541” and retained by the individual chapter 11 debtor under § 1115(a) refers to all of the property in the estate, or only to a portion of that property.

²¹¹ 11 U.S.C. § 1129(b)(2)(B)(2)(ii) (2012).

²¹² *Id.* at § 1129(b)(2)(B)(2)(ii). One of the statutory puzzles is whether the drafters meant to cross-reference § 1129(a)(15) rather than subsection (a)(14). The latter mandates payment of postpetition domestic support obligations, as a prerequisite for plan confirmation. Subsection (a)(15), on the other hand, is the disposable income test, discussed below. *See infra* notes 238-239 and accompanying text.

²¹³ 11 U.S.C. §1115 (2015).

Most courts (and all circuit courts) that have addressed the issue have adopted a “narrow” interpretation that only shields income earned after the filing of the petition. Some courts, however, have adopted a “broad” interpretation, holding that the absolute priority rule simply does not apply to individual debtors. This approach allows an individual chapter 11 debtor to retain all property included in the bankruptcy estate by § 1115.²¹⁴

To assess the importance of this split of authority, we defined a variable called *broad*, which we applied to any jurisdiction in which a court had adopted the broad interpretation of the exception to the APR and in which no subsequent court had adopted the narrow interpretation. We defined the variable *narrow* in the opposite manner. These variables do not measure the effect of a broad or narrow exception to the APR, but rather the effect of a broad or narrow precedent. Many of the decisions were made by bankruptcy courts and, therefore, have very little precedential value. Thus, we defined alternative measures that considered only circuit court and bankruptcy appellate panel decisions; we labeled those variables *broad circuit* and *narrow circuit*. Because there were no relevant circuit or BAP decisions in 2010, we did not use these measures when examining the 2010 cases. Finally, we used the rule in place six months after the debtor’s bankruptcy filing, because nearly all plans were filed between three months and one year after the filing.²¹⁵ Table 44 presents the results of our analysis for the PACER data.

²¹⁴ See *infra* Appendix C for a list of jurisdictions that have adopted either the narrow or broad interpretation of the exception to the absolute priority rule.

²¹⁵ See *infra* Table 55, and accompanying text.

Table 44: Success and Interpretation of the APR Exception—PACER Data

<i>Precedent</i>	(A) Survive545	(B) Survive2010
	Mean (# of cases)	Mean (# of cases)
1) Broad	63.57% (840)	47.28% (239)
2) No precedent	48.20% (3,834)	32.64% (3,015)
3) Narrow	45.73% (1,992)	27.67% (795)
4) Broad Circuit	50.74% (743)	
5) No Circuit	49.56% (5,502)	
6) Narrow Circuit	44.89% (189)	

The findings in Table 44 are consistent with the theory that a more debtor-friendly interpretation of the APR allows individuals in chapter 11 to succeed more often. The success rate rises uniformly as the APR interpretation becomes more debtor-friendly—from the narrow view to no precedent to the broad view. *Compare, e.g., Row (3), Column (A) with Row (1), Column (A) of Table 44.* If we consider all cases, then we can reject with 99% certainty ($p < 0.01$) the null hypothesis that the success rates do not vary with the court’s interpretation of the exception to the APR. If we focus only on the circuit court cases, then we cannot reject the hypothesis of no difference with 90% certainty; the p-value rises to 0.13. *See Column (A), Rows 4-6 of Table 44.* Even if the court’s interpretation of the exception to the APR is correlated with the rate of success, this may be due to other factors that are themselves correlated with each variable (omitted variable bias).²¹⁶ For example, jurisdictions that adopt the broad interpretation may be more likely to have adopted other debtor-friendly rules or procedures. To address the problem of omitted variable bias, we used regression analysis.

²¹⁶ If a predictive model leaves out one or more relevant variables, then bias results. The model makes up for the omission by either overestimating or underestimating the impact of the other variables in the model.

Table 45 presents the results of six regressions that use the variables set forth in Tables 42 through 44, as well as the unemployment rate in the relevant judicial district. The first two columns (A) and (B) of Table 45 present the results of models that do not include fixed district effects.²¹⁷ Some variables are not included in every regression. If a variable is omitted, the corresponding cell is left blank.

Column (A) restricts the sample to cases filed in 2010; outcome information is not limited to 545 days. Because there were no APR precedents on the circuit or BAP level in 2010, the measures *broad* and *narrow* are used. The coefficients on *broad* and *narrow* should be interpreted relative to cases lacking relevant precedent (the omitted group). Column (B) looks at the full sample, 2010 and 2013, and is limited to outcomes that occurred within 545 days of the start of each chapter 11 case. Column (B) also considers only circuit court and bankruptcy appellate panel precedent. The numbers in parentheses are p-values.

²¹⁷ We present linear probability models because they are much easier to interpret. The results of logit specifications are not materially different.

Table 45: Regressions of Survival Rate—PACER Data

<i>Variables</i>	(A) Survive 2010	(B) Survive 545	(C) Survive 545	(D) Survive 545	(E) Survive 545	(F) Survive 545
Chapter	11	11	11	11	13	13
Fixed Effects	No	No	Yes	Yes	Yes	Yes
1) Broad	0.102*** (0.00)		0.016 (0.60)		0.026** (0.02)	
2) Narrow	-0.043** (0.04)		.015 (0.46)		0.012** (0.04)	
3) Broad circuit		-0.027 (0.90)		0.060* (0.09)		0.0323*** (0.00)
4) Narrow circuit		-0.066** (0.02)		-0.0536 (0.12)		0.007 (0.27)
5) Joint	0.109*** (0.00)	0.105*** (0.00)	0.0892*** (0.00)	0.0888*** (0.00)	0.120*** (0.00)	0.120*** (0.00)
6) Pro se	-0.261*** (0.00)	-0.421*** (0.00)	-0.368*** (0.00)	-0.368*** (0.00)	-0.515*** (0.00)	-0.515*** (0.00)
7) AttyLow	-0.096*** (0.00)	-0.160*** (0.00)	-0.104** (0.02)	-0.105** (0.02)		
8) AttyMid	-0.012 (0.59)	-0.073*** (0.00)	-0.020 (0.57)	-0.0213 (0.55)		
9) Atty13Low					-0.173*** (0.00)	-0.174*** (0.00)
10) Atty13Mid					-0.122*** (0.00)	-0.122*** (0.00)
11) 2010		-0.007 (0.68)	0.025 (0.58)	-0.0145 (0.74)	0.063*** (0.00)	0.0571*** (0.00)
12) NoAsset	-0.326*** (0.00)	-0.292*** (0.00)	-0.271*** (0.00)	-0.271*** (0.00)	-0.345*** (0.00)	-0.345*** (0.00)
13) Business	0.0807*** (0.00)	0.045*** (0.00)	0.0498** (0.00)	0.0505*** (0.00)	-0.115*** (0.00)	-0.115*** (0.00)
14) Unemp	-0.004 (0.29)	-0.002 (0.66)	-0.008 (0.60)	0.00853 (0.53)	-0.003 (0.47)	-0.001 (0.87)
15) Constant	0.395*** (0.00)	0.618*** (0.00)	0.607*** (0.00)	0.477*** (0.00)	0.643*** (0.00)	0.625*** (0.00)
Observations	3,925	6,353	6,353	6,353	688,892	688,892
R-squared	0.114	0.101	0.084	0.086	0.158	0.158
Number of courts			76	76	76	76

*p<0.10, **p<0.05, ***p<0.01

The data in Columns (A) and (B) each offer some support for the theory that the jurisdiction’s interpretation of the APR exception affects the rate of success. The number

in Column (A), Row (1) suggests that a case in a jurisdiction with a broad interpretation will succeed 10% more often than a case in a jurisdiction with no relevant precedent. The negative sign before the number in Row (2), Column (A) means that the narrow view is negatively correlated with success; in other words, cases in jurisdictions with narrow interpretations are less likely to succeed than cases in jurisdictions with no relevant precedent.²¹⁸ The figures in rows (3) and (4) of Column (B) show the impact of a circuit or BAP decision interpreting the exception to the APR; the coefficient on the broad interpretation is no longer statistically significant and is, effectively, zero. The coefficient on the narrow interpretation, however, is significantly negative, which means that cases are less likely to succeed in jurisdictions with circuit or BAP decisions adopting the narrow interpretation of the exception to the APR.

The correlations detected in columns (A) and (B) could be due to omitted differences between districts. For example, the Central District of California has a model chapter 11 plan,²¹⁹ and it also had a broad precedent during our sample window.²²⁰ If the model plan significantly contributed to debtor success in chapter 11, then the regression may wrongfully attribute the model plan's role in success to the jurisdiction's broad interpretation of the exception to the APR.

To address this problem, Columns (C) and (D) present the results of models that include fixed district effects to account for differences across districts that do not change over time.²²¹ Column (C), which considers all court decisions, no longer supports the

²¹⁸ The coefficient on “broad” is similar if one uses these same legal measures on the full data set with *survive545* as the dependent variable, but the coefficient on “narrow” is no longer statistically significant.

²¹⁹ See F 2081-1.PLAN available at <http://www.cacb.uscourts.gov/forms/individual-debtors-chapter-11-plan-reorganization>

²²⁰ See *In re Friedman*, 466 B.R. 471 (B.A.P. 9th Cir. 2012).

²²¹ The standard errors in Columns (C) through (F) are clustered at the district level.

hypothesis that the interpretation of the exception to the APR affects the rate of success, but Column (D), which considers only circuit level decisions, does. The coefficient on *broad circuit* suggests that a broad interpretation of the exception increases the rate of success by 6%, a meaningful amount given that the average success rate is about 50%.²²² The coefficient on *narrow circuit* suggests that a narrow interpretation reduces the success rate by about 5%, but the coefficients' p-value of 11% does not meet ordinary standards of statistical significance.

Fixed-effects regressions can yield false positives if there are omitted variables affecting the success rate that are correlated with changes in the legal variable. Unfortunately, a good number of the legal changes are due to a single 2012 opinion by the Ninth Circuit's Bankruptcy Appellate Panel, *In re Friedman*,²²³ that adopted the broad interpretation of the APR exception. If other changes occurred in the Ninth Circuit between 2010 and 2013, we could wrongly attribute the effects of these changes to the *Friedman* court's interpretation of the absolute priority rule exception.

To address this concern, we used chapter 13 success rates to run a placebo test. See Columns (E) and (F) of Table 45. The absolute priority rule does not apply in chapter 13, and so interpretations of a chapter 11 exception to the APR should have no effect on the success rate. The interpretation of the APR exception could affect the debtor's choice between chapter 11 and chapter 13,²²⁴ but the chapter 13 filing rate is so much higher

²²² See *supra* Table 41.

²²³ 466 B.R. 471 (B.A.P. 9th Cir. 2012). The Ninth Circuit overruled *Friedman* in *Zachary v. California Bank & Trust*, 811 F.3d 1191 (9th Cir. 2016).

²²⁴ We tested this proposition using quarterly non-business bankruptcy filings between 2006 and the first quarter of 2016, and found some evidence that the court's interpretation of the APR affected the debtors' choice of chapter.

than the individual chapter 11 rate that any such effect should be negligible.²²⁵ The coefficients on *broad* and *broad circuit* in Column (E), Row (1) and Column (F), Row (3) are statistically significant, however. The broad interpretation increases the success rate by about 3%; the average success rate for chapter 13, depending on year, is 46% to 54%.²²⁶

The chapter 13 models have nearly 700,000 observations; thus, even small differences in outcomes will be statistically significant. Moreover, the estimated chapter 13 effect is smaller than the chapter 11 effect. On the other hand, the chapter 13 model should not have found any effect for the jurisdiction's interpretation of the APR exception. Therefore, the results suggest that at least some of the measured effect could be due to some other, unknown change.

Most of our other explanatory variables remain robust predictors of success, even after controlling for the other factors. Joint cases appear to succeed an additional 9% to 11% of the time (see row (5), Columns (A) through (D)) while business cases appear to succeed an additional 5% to 8% of the time. *See* Row (13). No-asset cases fail dramatically more often. *See* Row (12). Attorney representation also seems to matter. *See* Rows (6) through (10). Pro se cases had a much lower rate of success, and attorneys who rarely handle individual chapter 11 cases appear to have lower rates of success, as well. The coefficients on these variables should be interpreted as the success rate relative to those cases brought by attorneys with a high level of experience, as this is the omitted dummy variable. The coefficient for attorneys with moderate experience is no longer

²²⁵ Compare “Total Number of Cases” for Table 39 with “Total Number of Cases” for Table 40 (showing that in our sample the ratio of chapter 13 cases to individual chapter 11 cases was more than 100 to 1.)

²²⁶ *See supra* Table 40.

significant, however, and is estimated at just 2% using the fixed-district effects model. *Compare, e.g., Column (B), Row (8) with Column (D), Row (8).* This finding suggests that some of the difference in outcome between mid- and high-volume attorneys may be attributable to differences in the districts where they practice.²²⁷

B. Debtor Success—The Random Sample Data

In this Section, we return to the question of how to measure success for individual chapter 11 debtors, but do so using the random sample data. In Section B.1, we develop three definitions of success, and find, depending on the applicable definition, that between 36% and 42% of the random sample cases qualified as successes. In Section B.2, we examine the predictors of success. The limited size of our sample limits our ability to establish robust relationships, but we do find some evidence that is consistent with the findings from the PACER data.²²⁸ Finally, in Section B.3, we present more direct evidence of the impact of the absolute priority rule on case outcome.

1. Defining Success

In Section IV.A, we defined success to include any case in which the debtor received a discharge or avoided dismissal or conversion for 545 days. We used this definition because the PACER case reports do not include information on plan proposal or confirmation. For the random sample cases, however, we had access to the dockets and hand-coded each case, which provided rich information about plan proposal, time to

²²⁷ Our variables also seem to predict success in chapter 13. The one exception is that business chapter 13 cases appear more likely to fail, while business individual chapter 11 cases appear more likely to succeed. We defined the attorney experience variables for chapter 13 to match those of chapter 11 (one or two chapter 13 cases means low, three to ten means mid-level experience), because we were trying to run a placebo test and not trying to understand the determinants of success in chapter 13.

²²⁸ See Section IV.A.2, *supra*.

disposition, plan confirmation, and plan failure. Thus, in this section, we use three different measures of success—*survive*, *confirm*, and *s&c* (*survive and confirm*).

Survive, the first measure, most closely resembles the measure of success used for the PACER data. We included in the *survive* count any case in which there was neither an order of conversion nor dismissal for at least 881 days, or the time between December 31, 2013 (the last day that one of our cases could have been filed) and June 1, 2016 (the date that we chose for closing the study). This definition is imperfect. For example, a few of the random sample cases languished in bankruptcy at least this long with neither a confirmed plan nor an order of conversion or dismissal.²²⁹ We defined the second measure, *confirm*, to include any case in which the bankruptcy court confirmed a plan of reorganization. A bankruptcy court, however, can convert or dismiss an individual chapter 11 case after confirmation if the debtor stops making plan payments.²³⁰ Our preferred definition combines these two measures. Thus, our third variable, *s&c*, captures any case in which the bankruptcy court confirmed a plan and did not enter an order of conversion or dismissal for the 881-day period starting December 31, 2013.

Table 46: Random Sample Data Success Rates

	Percentage of Cases
<i>Survive</i>	41.26%
<i>Confirm</i>	38.57%
<i>S&C</i>	35.87%

²²⁹ See, e.g., *In re Blonder*, No. 13-76658 (Bankr. N.D. Ga. Dec. 9, 2013); *In re Anderson*, No. 13-38712 (Bankr. N.D. Ill. Nov. 12, 2013); *In re Jenkinson*, No. 13-24701 (Bankr. D. N.J. July 2, 2013). The *Jenkinson* case began in chapter 13. On October 28, 2013, the bankruptcy court converted the case to chapter 11. See Order Converting Case to Chapter 11, *In re Jenkinson*, No. 13-24701 (Bankr. D. N.J. Oct. 28, 2013) (Docket No. 36).

²³⁰ Confirmation does not provide a discharge in an individual chapter 11 case. 11 U.S.C. § 1141(d)(5) (2012).

As the data in Table 46 show, the success rate drops as our definition becomes more stringent. More than four in ten of the random sample debtors survived 881 days without having their case converted or dismissed. Almost 39% of these debtors confirmed a plan, but at 881 days some of these plans had failed. Only 36% of the random sample debtors succeeded under the most restrictive of the three definitions of success.

Before moving on to a discussion of the predictors of success for the cases in the random sample, we note three Code provisions to which some bankruptcy courts have given creative interpretations.²³¹ By doing so, these courts both increase the odds that the debtor will confirm a plan and obtain a discharge, and make individual chapter 11 bankruptcies look a little more like chapter 13 cases.

First, the absolute priority rule applies if a class of unsecured creditors has not accepted the plan.²³² Section 1126(c) of the Code provides that a class of creditors accepts the plan when creditors “hold[ing] at least two-thirds in amount and more than one-half in number” of voting claims vote to accept the plan.”²³³ The Code apparently does not count silence or lack of objection as acceptance; rather, the creditor must vote, in order to accept the plan.

Yet, the bankruptcy court in *In re Parker*²³⁴ confirmed the debtor’s plan even though several classes of impaired secured classes did not cast votes. In his ballot summary, the debtor asserted that these classes were “deemed to have accepted the

²³¹ There is, of course, a long tradition of bankruptcy courts reading statutes broadly to allow some play in the joints of the machine. *See, e.g., Missouri, Kansas & Texas Ry. Co. v. May*, 194 U.S. 267, 270, 24 S. Ct. 638, 639, 48 L.Ed. 971 (1904).

²³² 11 U.S.C. § 1129(b)(1) (2012).

²³³ *Id.* § 1126(c) (2012).

²³⁴ No. 13-10897 (Bankr. D. Colo. Jan. 23, 2013).

plan.”²³⁵ In its confirmation order, the court held that the plan had “been accepted or [could] be confirmed as to all classes of creditors and interest holders” as provided for in the debtor’s ballot summary.²³⁶ The confirmation order mentioned neither § 1129(b)(2)—the provision defining the requirements for finding a plan fair and equitable—nor cram down.²³⁷ By counting silence as assent, a bankruptcy court allows the debtor to avoid the need to cram down the plan. That, in turn, increases a debtor’s odds of obtaining plan confirmation.

Second, § 1129(a)(15) allows an unsecured creditor who is not fully paid to demand that the plan propose payments equal to the debtor’s projected disposable income for five years or “during the period for which the plan provides payments, whichever is longer.”²³⁸ The majority of confirmed plans in our sample called for payments extending beyond five years; the most common time frame for payment of secured creditors in these

²³⁵ Debtor’s Summary of Voting Results ¶¶ 2, 5 & 6, *In re Parker*, No. 13-10897 (Bankr. D. Colo. Nov. 11, 2014) (Docket No. 582). The debtor cited *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988), in support of this assertion. In *Ruti-Sweetwater*, the Tenth Circuit found that an impaired creditor who neither objected to nor voted to reject the debtor’s plan was presumed to have accepted the plan. The court explained that because acceptance of the non-voting creditor was presumed, the bankruptcy court did not have to conduct a cram down analysis. *See id.* at 1268. *See also In re Campbell*, 89 B.R. 187 (Bankr. N.D. Fla. 1988) (holding that “impaired classes which failed to vote and did not object to confirmation of the plan are deemed to have accepted the plan for purposes of meeting the requirements of § 1129(a)(8) of the Bankruptcy Code” and, therefore, the court did not have to conduct a cram down analysis); *but see In re Friese*, 103 B.R. 90, 92 (Bankr. S.D.N.Y. 1989) (stating that rationale of *Ruti-Sweetwater* decision is “faulty” and disagreeing with *Campbell*).

²³⁶ Order Confirming Third Amended Plan of Reorganization Dated August 22, 2014 ¶8, *In re Parker*, No. 13-10897 (Bankr. D. Colo. Nov. 18, 2014) (Docket No. 584).

²³⁷ *See id.*

²³⁸ 11 U.S.C. § 1129(a)(15)(B) (2012). This subsection applies only if an unsecured creditor objects to confirmation of the plan; merely voting against the plan is insufficient. *In re Roedemeier*, 374 B.R. 264, 271 (Bankr. D. Kan. 2007) (noting that “this provision applies only when the holder of an allowed unsecured claim objects to confirmation, which [the creditor] did not do in this case”). In the alternative, a debtor may pay all allowed unsecured claims in full, § 1129(a)(15)(A).

This is quite different than chapter 13’s parallel provision—§ 1325(b)—which limits the applicable commitment period to no more than five years. 11 U.S.C. § 1325(b) (2012). Subsection § 1325(b)(1)(B) requires that a debtor devote all projected disposable income, during the applicable commitment period, to payment of unsecured claims. This provision is triggered when the trustee or an unsecured creditor raises an objection to plan confirmation, and the debtor does not repay unsecured claims in full.

plans was thirty years.²³⁹ Thus, § 1129(a)(15) plainly requires that if an unsecured creditor objects, the debtor must devote an amount equal to his or her disposable income to plan payments over that thirty-year period.

Yet we found no plans that offered payments to unsecured creditors after five years, suggesting either that courts are restricting the projected disposable income test to five years or that unsecured creditors are not demanding more.²⁴⁰ As a matter of practice, courts are limiting the devotion of projected disposable income in chapter 11 cases to the period applicable in chapter 13—namely, the period for which the plan provides payments *to unsecured creditors*.²⁴¹ The end result makes individual chapter 11 cases look much more like chapter 13 cases.

Finally, both chapters 11 and 13 delay discharge until the plan is completed. Unlike a chapter 11 plan, which may extend for decades, chapter 13 plans cannot last more than five years.²⁴² Many debtors will still owe payments on their mortgage after this time, but if they default on these payments their discharge is not in jeopardy. Chapter 11's identical language, holding discharge in abeyance until completion of the plan,²⁴³ has a very different effect; it states that a debtor cannot receive a discharge until all payments—secured and unsecured alike—are completed, no matter how long it takes. Some courts, however, are using language in § 1141(d)(5)(A) that allows them to grant an early discharge for “cause” upon completion of payments to administrative, priority,

²³⁹ See, e.g., Order Confirming Chapter 11 Plan of Reorganization of Shane L. Blackbird and Tracy A. Blackbird at 9, *In re Blackbird*, No. 13-18854 (Bankr. D. Nev. Mar. 25, 2015) (Docket No. 120) (paying secured creditor over 30 years).

²⁴⁰ See *id.* at 10-11 (paying Class 7 unsecured creditors over five years, starting payments in month 54 from the effective date).

²⁴¹ 11 U.S.C. § 1325(b)(1)(B) (2012).

²⁴² *Id.* § 1322(d) (2012).

²⁴³ *Id.* § 1141(d)(5).

and general unsecured creditors.²⁴⁴ The end result, once again, is to make chapter 11 cases look much more like those in chapter 13.

2. *Predicting Success*

The random sample data allow us to define success much more carefully than the PACER data permitted, and to explore new theories. There are many fewer observations, however, so we cannot estimate the predictive power of these variables with as much precision. As a result, what appear to be important relationships may be due to chance. We include p-values so that the reader can more easily judge the level of confidence to have in the findings. On the other hand, the absence of statistical significance for a finding does not mean the absence of any relationship. In many cases, the estimated values are practically, but not statistically, significant, because the small number of

²⁴⁴ In ascertaining “cause,” courts generally focus on the likelihood that creditors will be paid in accordance with the plan. *See, e.g., In re Grogan*, BR 11-65409-FRA, 2013 WL 4854313 (Bankr. D. Or. Sept. 10, 2013) (based on totality of the circumstances, debtor must establish “ability to make plan payments with a high degree of certainty”). Most courts do not permit early discharge. *See, e.g., In re Beyer*, 433 B.R. 884, 889 (Bankr. M.D. Fla. 2009) (requiring more than “just substantial consummation” of the plan, but that debtor show ability to “make all future payments with a high degree of certainty”; holding “unknown, potential federal tax liability,” which might be incurred upon surrender of real estate collateral to secured creditors in full satisfaction of obligations, insufficient to support early discharge). *Cf. Order Confirming Debtor’s Plan of Reorganization* ¶ 14, *In re Robles*, No. 13-13476 (Bankr. S.D. Fla. Sept. 18, 2013) (Docket No. 167) (stating that debtor would be discharged from all pre-confirmation debts “upon completion of all payments required under the Plan to Class 7 general unsecured creditors, as well as administrative and priority claimants”).

In one of the few cases finding “cause” sufficient to support early discharge, *In re Sheridan*, 391 B.R. 287, 291 (Bankr. E.D.N.C. 2008), the court stated the usual rule—that creditors will receive amounts promised under the plan. The court based its finding of the necessary assurance on the stable income of one debtor (a lawyer), and the securing of obligations to otherwise unsecured creditors by a second deed of trust against the debtors’ home with equity.

A related provision, § 1141(d)(5)(b), permits a hardship discharge much like that available in chapter 13, under § 1328(b). Both §§ 1145(d)(5)(B) and 1328(b) mandate that the debtor satisfy the best interests of creditors test (unlike § 1141(d)(5)(A), which by its terms does not require that the debtor satisfy the best interests test in order to utilize the “cause” exception), and that a modification of the plan is not feasible. Section 1328(b), however, also requires a finding that “the debtor’s failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable.”

Although both chapters 11 and 13 grant the court the power to order a hardship discharge, *id.* §§ 1141(d)(5) & 1328(b), this power is almost never exercised.

observations limits the power of our tests. In these cases, a lack of statistical significance merely means that further research is needed to settle the question.

Table 47 summarizes the relationship between a series of dichotomous variables and our measures of success, presenting the success rate of each group as well as the p-value from a chi-squared test of the null hypothesis that the true difference is zero. Not all explanatory variables can be neatly divided into two categories, and so Table 48 presents the estimated marginal effects from logit regressions with a single explanatory variable.

For Table 47, mean 1st is the mean for the first item in the comparison; mean 2nd is for the second item, and is provided underneath the figure for mean 1st in all columns. P-values are provided in parentheses underneath mean 2nd. For example, for cases filed in 2013, the mean for the *survive* measure of success is .456 (mean 1st), while the mean for 2010 is .367 (mean 2nd). The p-value is .18, which means that there is not a statistically significant difference in survival rates between 2010 and 2013. The number of cases or observations is in parentheses following each half of the relevant comparison in the far left column of Table 47. In many rows the number of observations do not sum to 223 because some cases were missing the relevant information and were dropped. Finally, some debtors reported zero income or zero assets. To prevent the loss of these observations when we look at ratios or logs, we added \$1 to all income and total asset values.

Table 47: Success Comparisons

	Survive	Confirm	S&C
<i>Comparisons</i> (# cases)	Mean1st Mean 2nd (p-value)	Mean1st Mean 2nd p-value)	Mean1st Mean 2nd (p-value)
(1) Cases filed in 2013 (114) v. 2010 (109)	.456 .367 (.18)	.412 .358 (.40)	.395 .321 (.25)

(2) Non-business debt (122) v. business debt (99)	.361 .475 (.09)*	.361 .414 (.42)	.328 .394 (.31)
(3) No business operations (24) v. business operations (174)	.292 .456 (.12)	.25 .437 (.08)*	.25 .402 (.15)
(4) Not small business (168) v. small business (30)	.422 .433 (.91)	.399 .467 (.49)	.369 .433 (.50)
(5) Assets expected to be available for general unsecured creditors (172) v. no-asset case (43)	.448 .302 (.08)*	.419 .279 (.09)*	.389 .279 (.18)
(6) One debtor (139) v. joint filing (84)	.360 .500 (.04)**	.295 .536 (.00)*	.281 .488 (.00)***
(7) Single (52) v. married (154)	.346 .474 (.11)	.250 .468 (.01)***	.250 .430 (.02)**
(8) Married debtor filing alone (73) v. married filing jointly with spouse (81)	.425 .519 (.24)	.370 .556 (.02)**	.343 .506 (.04)**
(9) Non-homeowner (18) v. homeowner (186)	.389 .441 (.67)	.333 .419 (.48)	.333 .387 (.65)
(10) Employment duration more than a year (142) v. less than a year (15)	.444 .400 (.75)	.430 .400 (.83)	.390 .333 (.65)
(11) Represented debtor (205) v. pro se filing (18)	.449 .00 (.00)***	.420 0 (.00)***	.390 0 (.00)***
(12) Low-experience attorney (81) v. mid-experience attorney (80)	.420 .450 (.70)	.370 .413 (.59)	.321 .400 (.30)
(13) Low-experience attorney (81) v. high-experience attorney (44)	.420 .5 (.39)	.370 .523 (.10)*	.321 .500 (.05)*
(14) Mid-experience attorney (80) v. high-experience attorney (44)	.45 .5 (.59)	.413 .523 (.24)	.400 .500 (.28)
(15) No prior bankruptcy (174) v. prior bankruptcy (42)	.442 .286 (.06)*	.409 .286 (.14)	.381 .262 (.15)
(16) Priority debt less than 12*monthly income (177) v. greater than 12* monthly income (28)	.467 .286 (.07)*	.446 .25 (.05)*	.412 .25 (.10)
(17) Less than 3 real estate parcels (113) v. more than 2 real estate parcels (110)	.345 .535 (.01)***	.354 .465 (.10)	.310 .455 (.03)**
(18) Cases originated in chapter 11 (200) v. cases converted from another chapter (23)	.425 .304 (.27)	.405 .217 (.08)*	.375 .217 (.14)
(19) Over chapter 13 debt limit (146) v. under debt limit (62)	.425 .484 (.43)	.370 .516 (.05)*	.343 .484 (.06)*

(20) Over limit but under 1.5 times limit (32) v. under chapter 13 debt limit (62)	.406 .484 (.47)	.375 .516 (.19)	.375 .484 (.31)
---	-----------------------	-----------------------	-----------------------

*p<0.10, **p<0.05, ***p<0.01

We find a much bigger difference in outcomes between cases filed in 2010 and those filed in 2013 for the random sample data, *see* Table 47, Row (1), than we do for the PACER data.²⁴⁵ It is unclear, however, whether this is due to better definitions of success or to the fact that we are looking at a much smaller sample. None of the differences are significant at the 10% level.

Rows (2) through (4) of Table 47 compare business and non-business cases. In Section IV.A.2, we found that cases with primarily business debts succeeded an additional 2% or 7% of the time, depending on the definition of success used. Row (2) shows similar and even larger estimates, but none of the differences are statistically significant at the 10% level. As discussed earlier, many debtors who operated a business did not check the box stating that their debts were primarily business debts.²⁴⁶

In Row (3), we compare debtors who operated a business with those few who did not. The non-business cases had sharply lower rates of success; the odds-ratios range between 2.02 and 2.34, depending on the measure of success used. Row (4) compares small-business cases with those cases in which the debtor checked it was not a small business case.²⁴⁷ Under all measures, the small business cases have a higher rate of success, but none of the differences are close to statistically significant.

The data in Row (5) show that no-asset cases have a much lower rate of success than asset cases, and the difference is statistically significant in two of our three

²⁴⁵ *See* Section IV.A.2.

²⁴⁶ *See supra* Section III.A.4, and Table 11 and accompanying text.

²⁴⁷ The total number of cases does not add to 223, because in some cases the debtor checked neither box on the petition.

measures. The differences, however, are not as pronounced as those in Section IV.A.2. We suspect that the difference is due, at least in part, to differences in our coding of no-asset cases.²⁴⁸

In Section IV.A.2, we found that joint filing is a strong predictor of success; here, focusing on our random sample, we also find that jointly filed cases are much more likely to succeed, regardless of the measure of success used. *See* Row (6). In Section IV.A.2, we hypothesized that joint filing serves as a proxy for marriage. Our random sample allowed us to explore this theory as we used Schedule I to determine the debtor’s marital status. Seventeen of the debtors did not complete this schedule; these cases all ended in failure. Of the 206 cases in which the debtor filed Schedule I, 154 listed a spouse. Of these 154, a little more than half (81) involved a joint petition.²⁴⁹ Of the debtors who completed Schedule I, those who reported a spouse were much more likely to succeed than those who did not. *See* Table 47, Row (7). Row (8) compares the married debtors who filed jointly with those who filed alone. The joint filings were significantly more likely to succeed, and this difference was statistically significant in two of the three measures. In other words, a joint filing is not merely a proxy for marriage.

We tested two other measures of “stability”—homeownership and employment duration—but neither proved particularly useful in predicting success. Of the debtors who filed intelligible schedules, over 90% owned a home. The homeowners had higher rates of success than the non-homeowners, but the differences were not very large and were not close to statistically significant under any of our measures. *See* Table 47, Row (9).

²⁴⁸ *See supra* note 147 and accompanying text.

²⁴⁹ One debtor listed his spouse as “common law” and disclosed that they had three children together. We treated this debtor as married. *See* Schedules and Statements, *In re* Etter, No. 10-15015 (Bankr. D. Ariz. June 7, 2010) (Docket No. 12).

We also used Schedule I to determine the duration of the debtor's employment. As we noted above,²⁵⁰ chapter 11 debtors report very long periods of employment. In the random sample, more than 90% reported employment duration of more than one year. As with home ownership, those debtors with more than a year of employment succeeded more often than those with less than a year, but the differences were not particularly large or close to statistically significant.

As with our PACER data,²⁵¹ we found that pro se cases are more likely to fail, but the effects are far stronger for the random sample data. In fact, we found no successful pro se cases using any of our measures. *See* Table 47, Row (11).

For represented debtors, the data in Row (1) of Table 48 show that there is a statistically significant relationship between the log of the number of times that an attorney's name appears in the cases in the random sample and our measures of success.²⁵² In rows (12) through (14) of Table 47, we compare the success rates of attorney experience groups against each other. Groups with more experience always have higher rates of success, but the only statistically significant difference is between the low- and high-experience attorneys.

The findings in row (15) of Table 47 suggest that debtors who disclosed a prior bankruptcy filing on their petitions failed more often than those who did not. The difference is only statistically significant for one measure of success, but the estimated difference is practically significant (odds-ratios range from 1.76 to 1.99), and the differences in the other two measures are close to statistical significance.

²⁵⁰ *See supra* Table 24 and accompanying text.

²⁵¹ *See* Section IV.A.2, *supra*.

²⁵² In an omitted specification, we also find a statistically significant relationship between the raw number of appearances and the success rates.

We expected to find that debtors with greater income, or greater income relative to their expenses, would be more likely to succeed. Despite trying different ways to measure a debtor’s income and expenses, we found little evidence to support this hypothesis. Row (2) of Table 48 reports the marginal effects of increasing the log of the debtor’s monthly income. The estimated effect is positive, but it is not close to statistically significant. We found similar results when we analyzed the debtor’s unadjusted monthly income, the debtor’s net income, and the ratio of the debtor’s income to expenses.

Table 48: Marginal Effects for Non-Dichotomous Variables

<i>Variable (# cases)</i>	Survive	Confirm	S&C
	Marginal Effect (dy/dx) (p-value)	Marginal Effect (dy/dx) (p-value)	Marginal Effect (dy/dx) (p-value)
(1) Log of attyct (205)	.0391 (.18)	.0676** (.02)	.0693** (.01)
(2) Log of current monthly income (206)	.026 .17	.024 .20	.019 .30
(3) Priority debt divided by (current income +\$1) using summary of schedules (205)	-.00005 (.73)	-.00005 (.71)	-.00004 (.68)
(4) Secured debt/total debt (206)	.211** (.04)	.184* (.08)	.203* (.05)
(5) Real property/ Total assets (208)	.170 (.16)	.220* (.07)	.203* (.09)
(6) Number of real estate parcels disclosed on schedules (212)	.046*** (.00)	.031*** (.00)	.037*** (.00)
(7) log of total assets listed on summary of schedules (208)	.021 (.28)	.005 (.78)	.007 (.71)
(8) log of total liabilities listed on summary of schedules (208)	-.015 (.61)	-.053* (.07)	-.051* (.08)

*p<0.10, **p<0.05, ***p<0.01

Debtors must repay their priority debts in full within five years of the order for relief,²⁵³ and so we expected to find that debtors with significant priority debts would be more likely to fail. We tested this theory by looking at the ratio of the debtor's priority debts to his or her current monthly income. The evidence is mixed. The figures in Row (3) of Table 48 suggest that debtors with a larger ratio are less likely to succeed, but the estimated effect is close to one and not statistically significant. For the data in Row (16) of Table 47, we used a simpler test, comparing those debtors with priority debts in excess of one year's worth of estimated income (twelve times the income reported on the summary of schedules) to those with less than this amount. Here, the difference is statistically significant for two of our three measures of success and almost significant (p-value rounds to 10%) for the third.

Because we studied a time period with an historic collapse in real estate prices and many debtors reported significant real estate holdings, we decided to test whether cases with significant real estate succeeded at a different rate. Our theory was that there would be less uncertainty about the proper use of assets in these cases and that the primary role of these bankruptcies was to facilitate negotiations between the debtor and secured creditors. We tested three measures: (1) the number of real estate parcels reported by the debtor on Schedule A, (2) the ratio of the debtor's real property to total assets reported on the summary of schedules, and (3) the ratio of secured debt to total debt reported on the summary of schedules. There are issues with all three measures. In an effort to save coding time, we told our research assistants to stop counting parcels once they reached ten, and a great many of the debtors reached this limit. The biggest problem

²⁵³ 11 U.S.C. § 1129(a)(9) (2012).

with our real property and secured debt ratios is that individual debtors do not report consolidated financial statements; some debtors (correctly) reported tens of millions of dollars of unsecured debts and almost no secured debts even though substantially all of the debtor's unsecured debt came from personal guarantees of mortgages owed by wholly owned LLCs.²⁵⁴

Despite these limitations, all of our measures suggest that real estate cases are more likely to succeed. The estimated effects for the number of parcels, the ratio of secured to total debt, and the ratio of real to total property are all greater than one, though two of the three estimates for the real property ratio are not statistically significant at the 10% level. *See* Table 48, Rows (4)-(6). Row (17) of Table 47 reports a simplified comparison, contrasting those cases in which the debtors reported three or more parcels with those in which the debtors reported two or fewer. This comparison also suggests that debtors who own more real estate are much more likely to succeed.

A few of our cases converted into chapter 11. We expected these cases to fail more often because chapter 11 was not the debtor's first choice. The estimated success rates for these cases are indeed markedly lower, but only one of the three differences is statistically significant at the 10% level. *See* Table 47, Row (18).

A surprising number of debtors chose chapter 11 even though they reported debts well below the chapter 13 debt limits. The figures in Row (19) of Table 47 show that these debtors are much more likely to succeed, particularly if plan confirmation is needed for success.²⁵⁵ There are two reasons why these cases may succeed more often. First,

²⁵⁴ See *supra* note 171 and accompanying text.

²⁵⁵ Our largest cases had tens of millions of dollars of debt, and so might not be good comparisons. We tried comparing the debtors below the debt limits to those above the limits but below 1.5 times the debt

chapters 11 and 13 are quite different,²⁵⁶ and each may be well-designed for some debtors but not others. The fact that these debtors chose chapter 11 over chapter 13 suggests that chapter 11 is well-designed for their needs. Second, there could be a scale effect. We tested the latter theory, and provide the results in Rows (26) and (27) of Table 48. There seems to be no meaningful relationship between the log of the assets reported and our measures of success, but debtors with more debt appear less likely to confirm a plan.

In Table 49, we return to an examination of the impact of the APR on debtor success. Using the random sample data, we tested the effect, if any, of the broad versus the narrow view of the APR exception on success rates, using the three measures described earlier.

Table 49: Success and Interpretation of the APR Exception—Random Sample

<i>Precedent</i> (# of cases)	(A) Survive	(B) Confirm	(C) S&C
	Mean	Mean	Mean
Broad (30)	53.33	53.33	50.00
No Precedent (118)	43.22	38.98	36.44
Narrow (75)	33.33	32.00	29.33
Broad Circuit (31)	45.16	38.71	38.71
No Circuit (177)	42.37	39.55	36.72
Narrow Circuit (15)	20.00	26.67	20.00

As the data in Table 49 show, for five of the six measurements the rate of success rises with a more debtor-friendly precedent. Yet, the differences in success rates among narrow, broad, and no-precedent jurisdictions are not statistically significant. Therefore,

limits. Those below the debt limits had a higher rate of success, but the sample size was very small so the difference was not statistically significant.

²⁵⁶ See *supra* notes 6-13 and accompanying text.

we cannot reject with 90% confidence the hypothesis that the differences in success rates result from chance.

Table 50 presents the results of some cross-sectional linear probability regressions that use *s&c* as the dependent variable; our findings were similar when we used *confirm* or *survive* as the dependent variables. Our findings are consistent with a number of our theories, but only some of the results are statistically significant. Once again, however, we caution that a failure to find statistical significance should not be interpreted as confirming the null hypothesis of no-effect. A finding of no statistical significance just means that we cannot be 90% certain, for example, that the null hypothesis is wrong. Indeed, in some cases the predicted effect is practically significant, but our small sample size prevents estimation of the true effect with sufficient precision.

Table 50: Regressions of Success Rates—Random Sample

<i>Variables</i>	(A) S&C	(B) S&C	(C) S&C	(D) S&C	(E) S&C	(F) S&C
(1) Joint filing	0.210*** (0.00)	0.234*** (0.00)	0.218*** (0.00)	0.194*** (0.01)	0.176** (0.02)	0.215*** (0.00)
(2) Filed in 2010	-.115 (0.11)	-.142* (0.05)	-.162** (0.04)	-.132 (0.11)	-0.128 (0.14)	-0.137* (0.08)
(3) No asset	-0.140* (0.09)	-0.145* (0.08)	-0.175** (0.05)	-0.140 (0.13)	-0.100 (0.30)	-0.159* (0.08)
(4) Converted into chapter 11					0.0012 (0.996)	-0.151 (0.20)
(5) Primarily business debt	0.0782 (0.24)	0.0880 (0.18)	0.052 (0.46)			0.112 (0.13)
(6) Business operations				0.141 (0.22)		
(7) Small business					0.186* (0.08)	
(8) <i>Pro se</i>	-0.382** (0.01)	-0.353** (0.02)	-0.326 (0.010)		-0.467*** (0.01)	-0.366* (0.06)
(9) Log of attorney cases				0.057* (0.06)		
(10) AttyLow	-0.145 (0.11)	-0.150* (0.09)	-0.136 (0.10)		-0.113 (0.25)	-0.123 (0.18)
(11) AttyMid	-0.042 (0.65)	-0.048 (0.60)	-0.022 (0.82)		-0.020 (0.84)	-0.023 (0.81)

(12) Number of parcels				0.040*** (0.00)		
(13) Real/(total property)					0.202 (0.11)	
(14) Secured/(total debt)						0.220** (0.04)
(15) Priority debt/income				-1.37e-06 (0.68)		
(16) Priority debt/income>12			-0.138 (0.17)			
(17) Income/expenses				0.023 (0.63)		
(18) Log of (income+1)						-0.004 (0.84)
(19) More than 3 parcels			0.111 (0.12)			
(20) Log of (liabilities)				-0.087** (0.01)		-0.069** (0.03)
(21) Log of (assets+1)			-0.009 (0.66)			
(22) Under chapter 13 debt limit					0.0895 (0.28)	
(23) Broad circuit		-0.020 (0.84)	-0.040 (0.73)	.015 (0.90)	0.0156 (0.89)	-0.0293 (0.80)
(24) Narrow circuit		-0.308*** (0.02)	-0.340** (0.02)	-0.323** (0.03)	-0.302** (0.04)	-0.329** (0.02)
(25) Broad	0.054 (0.60)					
(26) Narrow	-0.123 (0.10)					
(27) Constant	0.468*** (0.00)	0.458*** (0.00)	0.595*** (0.00)	1.33** (0.01)	0.309** (0.02)	1.356*** (0.01)
Observations	214	214	196	175	182	196
R-squared	0.135	0.141	0.146	0.192	0.155	0.180

*** p<0.01, ** p<0.05, * p<0.1

Table 50 provides a lot of data, and a few observations are in order. First, even after controlling for other factors in this small data set, whether a case was filed jointly and whether it was filed in 2010 both appear to be valuable in predicting whether the case will succeed. *See* Table 50, Rows (1) and (2). Second, whether a case is a “no-asset” case is also useful information as the relevant coefficient is large and statistically significant in many specifications. *See* Table 50, Row (3).

Third, by comparison, the coefficient on whether a case was converted into chapter 11 is statistically insignificant and varies sharply depending on the other variables included. *See* Table 50, Row (4). One reason is that inclusion of some variables required dropping several observations for which the relevant data were missing. Fourth, the coefficients on the business-term variables, *see* Rows (5)-(7), suggest that business cases are more likely to succeed; however, only the coefficient on the small business dummy is statistically significant, and even this coefficient is not significant in some omitted specifications.

Fifth, once again we find that pro se cases are much more likely to fail, *see* Row (8), and that the probability of success increases with the volume of individual chapter 11 cases that the attorney has handled. The coefficient on the log of cases is strongly significant. *See* Table 50, Row (9). When we include dummies for each category of attorney (the high experience attorneys are the omitted group), the coefficient for the low volume attorneys is significant in just one specification, *see* Column (B), Row (10), and the dummy for the moderate attorneys is never significant. Still, both take the “correct” sign. Once again, we urge caution in interpreting these results as demonstrating that more experienced attorneys are more effective as we have not fully controlled for the selection effect. That is, we don’t know whether more experienced attorneys are more effective or whether they have better clients.

Sixth, the coefficient relating to the number of parcels owned by the debtor is strongly significant, suggesting that real estate cases are more likely to succeed. *See* Column (D), Row (12). The coefficients on our other real estate measures take the right

sign but are not significant. *See* Column (C), Row (13) and Column (E), Row (14). As noted above, however, there are significant concerns with these other measures.²⁵⁷

Finally, we note that the coefficient on the narrow interpretation of the exception to the APR is negative and strongly significant. *See* Table (50), Row (24). While this is consistent with the view that a less-debtor friendly interpretation will reduce the rate of success, we remind the reader that a cross-sectional regression is especially vulnerable to omitted variable bias.

3. *Direct Evidence of the Impact of the Absolute Priority Rule*

In Sections IV.A.2 and B.2, we examined the relationship between the absolute priority rule and success, using the tools of a social scientist. Here we use tools more familiar to lawyers. More specifically, we looked for absolute priority rule objections in all of the random sample cases in which a plan was filed, and then tried to determine whether the objection affected the outcome of the case.

As Column (A) of Table 51 shows, plans were proposed in approximately 60% of the cases in the 2010 and 2013 random samples. For each of the cases with a proposed plan, we searched the case docket for objections. We included in Column (B) of Table 51 any case in which the substance of the objection rested on absolute priority grounds, even if the objecting party failed to invoke the magic phrase “absolute priority rule” or to cite § 1129(b)(2)(B)(ii).²⁵⁸ Also included in Column (B) of Table 51 are several cases in which a party in interest raised an objection to the plan proponent’s failure to include in

²⁵⁷ *See supra* note 254 and accompanying text.

²⁵⁸ *See, e.g.*, Objection to Confirmation ¶¶ 6, 7 & 10, *In re* Stickler, No. 10-10080 (Bankr. M.D. Ala. Dec. 15, 2010) (Docket No. 90) (stating that debtor had non-exempt assets that were not being paid to unsecured creditors and that the plan was not fair and equitable because the plan spread payments to the unsecured creditors over eighty-four months while the debtor “continue[d] to live in his \$1,000,000 home”).

the disclosure statement information about the applicability of the absolute priority rule.²⁵⁹ The vast majority of objections, however, were objections to plan confirmation, not simply objections to inadequate disclosure.

We found APR objections in 22% of the cases in which a plan was proposed.²⁶⁰ As Column (B) of Table 51 shows, the percentage of APR objections increased between 2010 and 2013. In 2010, creditors raised APR objections in approximately 17% of the cases with proposed plans; that figure increased to about 27% in 2013. Our sample is small, however, so the difference is not statistically significant ($p = .17$).

Table 51: APR Objections

	(A) Plan Proposed	(B) APR Objection	(C) Plan not confirmed	
			APR Objection	No APR Objection
2010	66/109 = 60.6%	11/66 = 16.7%	5/11 = 45.5%	22/55 = 40.0%
2013	68/114 = 59.6%	18/68 = 26.5%	3/18 = 16.7% ²⁶¹	15/50 = 30.0%

²⁵⁹ See, e.g., Objection to Disclosure Statement ¶ 23, *In re Blonder*, No. 13-76658 (Bankr. N.D. Ga. Sept. 8, 2014) (Docket No. 84) (under-secured creditor’s objection to failure of disclosure statement to discuss the absolute priority rule); Alan Schlosser’s Objection to Debtors’ Disclosure Statement at 4, *In re Trapp*, No. 13-16412 (Bankr. D. Ariz. July 31, 2014) (Docket No. 80) (noting that debtors had “not applied the Rule or discussed the Rule or its impact in this case”); Objection to Amended Plan and Disclosure Statement, *In re Levin*, No. 10-33696 (Bankr. S.D. Fla. June 6, 2014) (Docket No. 739) (objection by the SEC, an unsecured creditor, to debtor’s failure to include in the disclosure statement “a discussion of the absolute priority rule” and an explanation of “why the Debtor’s Plan Contribution is a fair and reasonable resolution of the absolute priority issue”).

²⁶⁰ Plans were proposed in 134 cases, and there were twenty-nine cases with objections. That is an objection rate of 21.6%.

²⁶¹ In five cases from 2013, an APR objection was raised and confirmation did not occur; two of those five cases, however, are still open as of the writing of this Article and, thus, are not included in the figure in Column (C) of Table 51. See *In re Blonder*, No. 13-76658 (Bankr. N.D. Ga. Dec. 9, 2013); *In re Lopez*, No. 13-12073 (Bankr. N.D. Cal. Nov. 12, 2013). The APR objection in *Blonder* was an objection to the adequacy of information in the disclosure statement. See *supra* note 259. In addition, as of the writing of this Report, the creditor has withdrawn its objection and no further APR objections have been filed with the bankruptcy court. See Withdrawal of Objection to Disclosure Statement (Docket Entry No. 84), *In re Blonder*, No. 13-76658 (Bankr. N.D. Ga. April, 19, 2016) (Docket No. 215).

The more surprising finding is the lack of direct evidence that the APR prevents debtors from confirming plans.²⁶² In fact, Column C shows that cases in which an APR objection was raised failed less often than cases in which a plan was proposed but no objection was raised. In 2010 and 2013, only eight of twenty-nine cases (27.6%) in which an APR objection was raised failed; by comparison, 35.2% of cases in which no APR objection was raised failed. Moreover, in only one of the eight failed APR objection cases did the bankruptcy court definitively identify the absolute priority rule as the reason for plan failure.²⁶³ In the other seven cases, the bankruptcy court's order denying confirmation and/or converting or dismissing the chapter 11 case (1) rested on grounds other than the APR,²⁶⁴ (2) provided no reason in the written order for its decision,²⁶⁵ or (3) spoke in general terms about the debtor's failure to propose a confirmable plan.²⁶⁶

This inability to identify APR as the *sole* reason for plan failure is not surprising. The absolute priority rule is rarely the only objection to plan confirmation raised by a creditor, the United States Trustee, or the Bankruptcy Administrator. For example, in an individual chapter 11 case, a creditor may object to the amount paid to unsecured

²⁶² This finding is somewhat at odds with our earlier results in Sections IV.A.2 and B.2. *See, e.g.*, Tables 44 & 45 (PACER data) and Tables 49 & 50 (random sample data).

²⁶³ *See* Order on Motion to Appoint Trustee and Objection to Confirmation, *In re Chlad*, No. 13-40141 (Bankr. N.D. Ill. Oct. 6, 2014) (Docket No. 133) (sustaining unsecured creditors' absolute priority rule objection to plan and denying confirmation).

²⁶⁴ *See, e.g.*, Order Converting Case to Chapter 7, *In re Sandford*, No. 10-14424 (Bankr. D. N.M. Oct. 18, 2013) (Docket No. 349) (converting case to chapter 7 and referencing earlier stipulation, which provided for immediate conversion to chapter 7 if debtor failed to comply with terms of stipulated order and secured creditor filed notice of default).

²⁶⁵ *See, e.g.*, Order Denying Confirmation and Converting Chapter 11 Case to Chapter 7, *In re Drabin*, No. 10-16315 (Bankr. M.D. Fla. Jan. 20, 2011) (Docket No. 96) (denying confirmation and converting case to chapter 7 "[f]or the reasons stated orally and recorded in open court").

²⁶⁶ *See* Order Converting Case Under Chapter 11 to Case Under Chapter 7, *In re Wrieden*, No. 13-32636 (Bankr. S.D. Fla. Sept. 10, 2014) (Docket No. 143) (granting motion of U.S. Trustee to convert case and noting that the debtor "is unable to propose a confirmable plan of reorganization and therefore agrees to conversion"); Order Dismissing Chapter 11 Case, *In re Abraham*, No. 10-11953 (Bankr. M.D. Fla. Nov. 17, 2011) (Docket No. 93) (dismissing case at hearing for plan confirmation at which time debtor's attorney informed court that debtor "was unable to prosecute the plan to confirmation").

creditors on the basis of both the absolute priority rule and the disposable income requirement.²⁶⁷ In *In re Abraham*,²⁶⁸ the United States Trustee identified more than twenty problems with the debtor’s proposed plan, including the possibility that the debtor would prove unable to confirm a plan if the unsecured creditor class voted to reject the plan.²⁶⁹

Of the other twenty-one cases in which an APR objection was raised, the bankruptcy court confirmed a plan in nineteen; two were still open without a confirmed plan or an order of dismissal or conversion as of June 1, 2016. In the vast majority of the nineteen confirmed-plan cases with APR objections, the class of unsecured creditors voted to accept the plan, thereby obviating the need for the debtor to request confirmation under § 1129(b)(2)(B).²⁷⁰

²⁶⁷ Cf. Objection by the U.S. Securities and Exchange Commission to Debtor’s Disclosure Statement for Debtor’s Amended Plan of Reorganization ¶¶ 17B & C, *In re Levin*, No. 10-33696 (Bankr. S.D. Fla. June 6, 2014) (Docket No. 739) (citations omitted) (unsecured creditor SEC objected to the adequacy of debtor’s disclosure statement on several grounds, including failure of the disclosure statement to (1) explain how the debtor intended to satisfy § 1129(a)(15) if an unsecured creditor objected to the plan and (2) “include a discussion of the absolute priority rule, which likely will be applicable if the Debtor retains property when his creditors are not paid in full”).

²⁶⁸ No. 10-11953 (Bankr. M.D. Fla. May 20, 2010).

²⁶⁹ United States Trustee’s Objection to the Confirmation of the Individual Debtor’s Amended Plan of Reorganization Filed November 1, 2010, *In re Abraham*, No. 10-11953 (Bankr. M.D. Fla. Mar. 23, 2011) (Docket No. 66); see also Marvin O. Clark’s Objection to Confirmation of Debtors’ Plan of Reorganization ¶¶ 3, 10, *In re Drabin*, No. 10-16315 (Bankr. M.D. Fla. Jan. 13, 2011) (Docket No. 89) (objecting to plan confirmation and stating that debtors’ plan “fail[ed] to comply with 11 U.S.C. § 1129(a)(1), (2), (3), (7), (8), (10) and (11)” and also did “not satisfy the absolute priority rule”).

²⁷⁰ See, e.g., Amended Report of Balloting for Plan of Reorganization at 1-2, *In re Blackbird*, No. 13-18854 (Bankr. D. Nev. Mar. 5, 2015) (Docket No. 115) (showing that Class 7, impaired class of general unsecured creditors, voted to accept plan); Order Confirming Debtor’s Fourth Amended Plan of Reorganization [ECF No. 897] ¶ F, *In re Levin*, No. 10-33696 (Bankr. S.D. Fla. Aug. 25, 2014) (Docket No. 907) (stating that the “only class of claims impaired” under debtor’s plan, which was the class of general unsecured creditors, had accepted the plan); Amended Summary of Ballots, *In re Rast*, No. 13-11233 (Bankr. E.D. Tenn. May 13, 2014) (Docket No. 85) (showing that impaired class of unsecured creditors voted to accept plan); Order Confirming Debtor’s Chapter 11 Plan of Reorganization at 1, *In re Ravipati*, No. 13-82145 (Bankr. N.D. Ala. Apr. 7, 2014) (Docket No. 142) (explaining that sole unsecured creditor in impaired unsecured creditor class to vote on the plan had “change[d] its ballot from ‘no’ to ‘yes’ in favor of the Debtor’s Plan as amended”); Order Confirming Debtors’ Fifth Amended Plan of Reorganization ¶ 11, *In re Nissley*, No. 10-14372 (Bankr. S.D. Ind. Oct. 17, 2013) (Docket No. 335) (stating that “all classes of impaired claims . . . have all accepted the Plan”, with the class of unsecured creditors being one of those impaired classes); Order Confirming Plan ¶ 1, *In re Hines*, No. 13-00298 (Bankr. E.D. N.C. May 29, 2013) (Docket No. 63)

Given the small number of failed cases with APR objections and the difficulty of identifying the reason for plan failure among the cases in the random sample, we are unable to conclude for individual chapter 11 debtors that the absolute priority rule is a substantial barrier to plan confirmation once a plan is proposed. Of course, the APR rule could have effects in the shadows, discouraging some debtors from filing a plan or from filing for bankruptcy at all.²⁷¹

We found more direct evidence that the APR has some impact on the amount that the debtor pays under the plan, with objections by unsecured creditors at times resulting in more favorable recovery for the class of unsecured creditors. For example, in *In re Stickler*,²⁷² the debtor initially proposed paying his unsecured creditors a total of \$160,000 at 4% interest over seven years.²⁷³ Several unsecured creditors objected on the grounds that the debtor had non-exempt assets whose value was not being paid to the unsecured creditors, and that the debtor would “continue[] to live in his \$1,000,000 house” during that seven-year period.²⁷⁴ The debtor modified the plan to pay his

(stating that Class 13, the impaired class of general unsecured creditors, had voted to accept the plan). In at least one case, *In re McPhail*, No. 13-04110 (Bankr. E.D. N.C. July 1, 2013), the Bankruptcy Administrator raised the absolute priority rule as an issue for plan confirmation if the unsecured creditors voted to reject the plan, asking “[h]ow is it fair to allow the debtors to keep a business, multiple properties, a Range Rover, a large settlement, and pay only a 1.1% dividend to unsecured creditors?” See Response to Confirmation and Approval of Disclosure Statement ¶ 17, *In re McPhail*, No. 13-04410 (Bankr. E.D. N.C. Nov. 12, 2103) (Docket No. 48). Nonetheless, the unsecured creditors voted to accept the plan, even though the debtors did not increase the dividend paid to the unsecured creditor class. See Summary of Ballots, *In re McPhail*, No. 13-04110 (Bankr. E.D. N.C. Nov. 18, 2013) (Docket No. 53) (showing Class X, the unsecured creditor class, as accepted the plan).

²⁷¹ This possibility is discussed more extensively in Appendix B.

²⁷² No. 10-10080 (Bankr. M.D. Ala. Jan. 19, 2010).

²⁷³ Chapter 11 Plan of Reorganization of Ryan William Stickler Dated November 16, 2010 at 13, *In re Stickler*, No. 10-10080 (Bankr. M.D. Ala. Nov. 16, 2010) (Docket No. 76).

²⁷⁴ Objection to Confirmation ¶¶ 6, 7 & 10, *In re Stickler*, No. 10-10080 (Bankr. M.D. Ala. Dec. 15, 2010) (Docket No. 90); see also Second Modification to Debtor’s Second Amended Plan of Reorganization Under Chapter 11 ¶¶ 1A, C-E, G, J, *In re Manteghi*, No. 10-43851 (Bankr. E.D. Tex. Oct. 6, 2011) (Docket No. 120) (debtor resolved various objections by his largest unsecured creditors, which resulted in increasing the sources available to fund payments to the class of general unsecured creditors).

unsecured creditors \$231,000 without interest over five years,²⁷⁵ and the unsecured creditor class voted to accept the plan.²⁷⁶

General unsecured creditors, however, filed only a small proportion of the APR-based objections in cases with confirmed plans. Under-secured creditors were far more likely to object on the basis of the APR than their wholly unsecured counterparts. What is interesting is that APR objections by under-secured creditors did not always result in an increase in the dividend paid to the class of unsecured creditors. For example, in *In re Robles*,²⁷⁷ Wells Fargo—the holder of an under-secured first mortgage on a parcel of the debtor’s real property—objected to the debtor’s plan on a number of grounds, including the absolute priority rule.²⁷⁸ The debtor’s originally-filed plan valued Wells Fargo’s secured claim at \$143,420, with payments over thirty years at 3% interest.²⁷⁹ Even though the bankruptcy court did not conduct a valuation hearing, the confirmed plan valued Wells Fargo’s secured claim at \$152,000, with payments to occur over thirty years at 5% interest.²⁸⁰ The debtor did not increase the dividend paid to unsecured creditors.²⁸¹

In *In re Chavez*,²⁸² both Wells Fargo and Deutsche Bank ended up with improved plan treatment of their secured claims after objecting to the debtor’s plan, in part on the basis of the absolute priority rule. The debtor and Wells Fargo entered into two

²⁷⁵ See Second Amended Chapter 11 Plan of Reorganization of Ryan William Stickler Dated March 21, 2011, *In re Stickler*, No. 10-10080 (Bankr. M.D. Ala. Mar. 22, 2011) (Docket No. 142).

²⁷⁶ See Application for Confirmation Under Section 1129(b)(1) of the Bankruptcy Code ¶ 11, *In re Stickler*, No. 10-10080 (Bankr. M.D. Ala. Mar. 22, 2011) (Docket No. 144).

²⁷⁷ No. 13-13476 (Bankr. S.D. Fla. Feb. 15, 2013).

²⁷⁸ See Objection to Chapter 11 Plan ¶ 9, *In re Robles*, No. 13-13476 (Bankr. S.D. Fla. Aug. 7, 2013) (Docket No. 144).

²⁷⁹ See *id.* at ¶ 3.

²⁸⁰ Order Confirming Debtor’s Plan of Reorganization ¶ 6, *In re Robles*, No. 13-13476 (Bankr. S.D. Fla. Sept. 18, 2013) (Docket No. 167).

²⁸¹ Compare Debtor’s Plan of Reorganization ¶ 3.11, *In re Robles*, No. 13-13476 (Bankr. S.D. Fla. June 3, 2013) (Docket No. 79), with Debtor’s Amended Plan of Reorganization ¶ 3.11, *In re Robles*, No. 13-13476 (Bankr. S.D. Fla. July 17, 2013) (Docket No. 105).

²⁸² No. 13-10534 (Bankr. N.D. Cal. March 18, 2013).

stipulations in which the debtor agreed to increase the value of Wells Fargo's secured claim from \$185,000 to \$270,000 on one piece of real property, and from \$95,000 to \$99,000 on another.²⁸³ In addition, the debtor increased the interest rate paid on Wells Fargo's secured claims from 3% to 4% in one instance and from 3% to 4.5% in another.²⁸⁴ The debtor also entered into two stipulations with Deutsche Bank in which the debtor agreed to increase the value of Deutsche Bank's secured claim on one piece of real property from \$110,000 to \$154,000, and from \$83,000 to \$91,000 on another.²⁸⁵ The debtor increased the interest rate paid on those secured claims from 3% to 4% on one claim and from 3% to 5% on another.²⁸⁶ Thus, objections by under-secured creditors, partly on the basis of the absolute priority rule, did not lead to an increased dividend for unsecured creditors.²⁸⁷

C. Timely Disposition of Cases

In this Section, we evaluate success by looking at how expeditiously cases move through the chapter 11 system. Scholars have pointed out that a good bankruptcy system will sort between cases that should be reorganized and those that should not, quickly dismissing the latter.²⁸⁸ Morrison examined ninety-one cases filed in 1998 in the Northern District of Illinois by corporations that: 1) were not single-asset real estate

²⁸³ See Stipulation re: Treatment of Creditor's Claim Under Debtor's Proposed Chapter 11 Plan of Reorganization at 2, ¶ 1, *In re Chavez*, No 13-10534 (Bankr. N.D. Cal. July 17, 2013) (Docket No. 73); Stipulation re: Treatment of Creditor's Claim Under Debtor's Proposed Chapter 11 Plan of Reorganization at 2, ¶ 1, *In re Chavez*, No 13-10534 (Bankr. N.D. Cal. July 17, 2013) (Docket No. 72).

²⁸⁴ See *id.*

²⁸⁵ See Stipulation re: Treatment of Creditor's Claim Under Debtor's Proposed Chapter 11 Plan of Reorganization at 2, ¶ 1, *In re Chavez*, No 13-10534 (Bankr. N.D. Cal. July 17, 2013) (Docket No. 74); Stipulation Resolving Chapter 11 Plan Treatment (2033 Finch Court Atwater, California 95301 Class 8) ¶ 1, *In re Chavez*, No 13-10534 (Bankr. N.D. Cal. July 17, 2013) (Docket No. 71).

²⁸⁶ See *id.*

²⁸⁷ Compare Chapter 11 Plan of Reorganization (July 17, 2013) at 13, *In re Chavez*, No 13-10534 (Bankr. N.D. Cal. July 17, 2013) (Docket No. 75) with Chapter 11 Plan of Reorganization at 13, *In re Chavez*, No 13-10534 (Bankr. N.D. Cal. Mar. 19, 2013) (Docket No. 10).

²⁸⁸ See *Bankruptcy Decision Making*, *supra* note 3; *Success of Chapter 11*, *supra* note 3.

cases, 2) were not using chapter 11 to sell assets or settle a dispute with a particular creditor, 3) were not “dead on arrival,” 4) were not publicly traded, 5) did not lack sufficient information, and 6) were not pushed into bankruptcy involuntarily.²⁸⁹ He found that 62% of the businesses in his sample were shut down or forced to exit chapter 11.²⁹⁰ Of these cases, half of the firms were shut down within three months and 70% within five months.²⁹¹

Warren and Westbrook examined 437 “business”²⁹² cases filed under chapter 11 in 2002. They found that

of all the cases that were eventually pushed out of chapter 11 without a plan having been filed, more than half were gone in less than six months, 70% were gone by nine months, and more than 80% were gone within a year. By eighteen months, more than 90% of all the cases that would ever exit chapter 11 without a plan on file had done so already.²⁹³

Likewise, we apply a time-to-disposition definition of success to determine how long it takes bankruptcy courts to dispose of the failed cases. In Section C.1, we apply this definition of success to the cases in the PACER sample. In Section C.2, we use this same definition for the cases in the 2010 and 2013 random sample. But we have more case-specific data for the random sample; thus, we can evaluate whether individual debtors met various case milestones—such as filing of schedules and plan proposal—in an expeditious fashion. We conclude that regardless of the measure of success used,

²⁸⁹ See *Small Business Workouts*, *supra* note 3, at 385-86. Morrison also consolidated affiliate filings and dropped repeat filings.

²⁹⁰ *Id.* at 389.

²⁹¹ *Id.* at 382.

²⁹² Warren and Westbrook defined business to include: i) all cases in which the debtor checked “business”, ii) all cases organized as a corporation, partnership or LLC, and iii) all cases in which there was a business name in the title. *Success of Chapter 11*, *supra* note 3, at 609.

²⁹³ *Id.* at 630.

bankruptcy courts move most individual chapter 11 cases through the system in a timely manner.

1. *PACER Data*

For the 2010 PACER data, we use a cruder measure of success than did Morrison, or Warren and Westbrook. Their samples were hand-coded, allowing them to focus on particular subsets of cases, such as those not operating in particular industries or those for which no plan was proposed. Thus, we do not claim to update the Morrison, or Warren and Westbrook findings using our 2010 PACER data. While our measure is cruder, our data set is much larger and more recent.

Table 52 presents data on the number of days to conversion or dismissal—that is, the time to “failure”—for those 2010 cases for which PACER provided the relevant dates. To provide some frame of reference, we include this same time-to-failure measure for corporate chapter 11 cases, small business chapter 11 cases, and chapter 13 cases.

Table 52: Days to Conversion or Dismissal for “Failed” Cases in 2010—PACER Data

Percent of Failures Converted or Dismissed	(A) Individual Chapter 11	(B) Corporate Chapter 11	(C) Small Business Chapter 11	(D) Chapter 13
(1) 10%	58	42	27	25
(2) 25%	140	105	63	72
(3) 50%	293	226	181	252
(4) 75%	487	407	343	643
(5) 90%	785	663	572	1,059
(6) Average	363	302	251	407
(7) Standard Deviation.	303	272	260	412
Number of Cases	2,389	4,778	1,424	217,253

The median time to conversion or dismissal for individual chapter 11 cases is 293 days, or between nine and ten months. *See* Table 52, Column (A), Row (3). At about

sixteen months, 75% of the individual chapter 11 failures had been kicked out of the system. It took 140 days—between four and five months—to kick out just 25% of the individual chapter 11 failures. *See* Table 52, Column (A), Row (2). This time to dismissal is substantially longer than the times estimated by Morrison and by Warren and Westbrook, but, as noted above, measurements are not directly comparable given the differences in samples.

A comparison between individual and corporate chapter 11 cases is more difficult because of the different rules for discharge. Once a corporate chapter 11 debtor confirms a plan, it receives a discharge in short order.²⁹⁴ If it later cannot pay the obligations set forth in its plan, it may re-file bankruptcy, but its discharge is unaffected. By contrast, an individual debtor does not receive a discharge until plan payments are complete.²⁹⁵ Therefore, we should expect individual chapter 11 cases to last longer before dismissal, and this is indeed what we find. The median time to dismissal for corporate chapter 11 cases is 226 days—about two months shorter than the median time for individual chapter 11 cases. *Compare* Column (B), Row (3) *with* Column (A), Row (3). The difference between the timing of small business bankruptcies and individual chapter 11 bankruptcies is especially pronounced, probably due to the deadlines imposed on small business debtors. *Compare, e.g.,* Column (C), Row (3) *with* Column (A), Row (3).

A trustee monitors chapter 13 cases,²⁹⁶ and the debtor must meet strict deadlines.²⁹⁷ Therefore, we expected to find failed chapter 13 cases kicked out more

²⁹⁴ 11 U.S.C. § 1141(d)(1) (2012).

²⁹⁵ *Id.* § 1141(d)(5).

²⁹⁶ *Id.* § 1302.

²⁹⁷ For example, a chapter 13 debtor must propose a plan of reorganization within fourteen days of filing, FED. R. BANKR. PROC. 3015(b), and the debtor must begin making payments within 30 days of filing, 11 U.S.C. § 1326 (2012).

quickly, especially at the beginning of the process. This is exactly what we find. It took just 72 days to kick out 25% of the chapter 13 failures (more than a month less than it took in individual chapter 11 cases). *See* Column (D), Row (2). The difference becomes less pronounced moving out the distribution of cases, however. It took almost as long (239 days as opposed to 252) to kick out half of the chapter 13 debtors as it did half of the individual chapter 11 debtors, and it actually took longer (1,051 versus 707 days) to kick out three-quarters of the chapter 13 debtors than to kick out three-quarters of the individual chapter 11 debtors. Perhaps this finding is not surprising. The cases lasting the longest before failure will be cases in which the debtor fails to comply with a confirmed plan, and there is little reason to think that chapter 13 will identify and kick out these cases more quickly. In fact, we found that courts dismissed 75% of the failed individual chapter 11 cases more quickly than they dismissed 75% of the failed chapter 13 cases (405 versus 494 days).

2. *The Random Sample Data*

Unlike chapter 13, chapter 11—with the exception of small business cases—does not provide individuals with strict deadlines. To ascertain how quickly individual cases in our random sample move through bankruptcy, we began by measuring how long it took debtors to file their schedules. Table 53 provides the data.

Table 53: Filing of Schedules—Time in Days

	(A)		(B)	
	First Summary of Schedules		Last Schedule	
	2010	2013	2010	2013
(1) More than 2 years	0.0%	0.0%	2.8%	0.0%
(2) 366 days to 2 years	0.0%	0.0%	6.4%	2.6%
(3) 181 to 365 days	0.0%	0.0%	4.6%	7.9%
(4) 91 to 180 days	0.0%	0.9%	9.2%	9.6%
(5) 61 to 90 days	0.0%	0.9%	9.2%	8.8%
(6) 31 to 60 days	4.6%	3.5%	12.8%	14.9%
(7) 1 to 30 days	44.0%	43.9%	22.0%	25.4%
(8) 0	33.9%	36.8%	15.6%	18.4%
(9) No Schedule Filed	5.5%	5.3%	5.5%	3.5%
(10) Conversion	11.9%	8.8%	11.9%	8.8%
Maximum Days	48	128	1,362	490
Average Days	12	13	120	68
Median Days	14	13	36	30

While a few debtors never filed any schedules, of those who did, the median time for filing the summary of schedules was fourteen days. Only about 5% of all debtors waited more than thirty days to file their first summary of schedules. *See* Column (A), Rows (1)-(6). Many schedules were later amended or supplemented, however. The median time between filing of the petition and the filing of the last schedules in the chapter 11 case was around one month (thirty-six days in 2010 and thirty in 2013), and more than 28% of all debtors were still amending their schedules more than six months after filing. *See* Column (B), Rows (1)-(5).

The large number of amendments may suggest that debtors do not have a good understanding of their financial affairs at the start of the case and need time to sort them out. If that is true, then a rigid system like chapter 13 may not work so well. On the other hand, it may mean that nobody is pressing the chapter 11 debtor to move forward. If so,

having trustee oversight, as in chapter 13, may prod debtors to settle on a set of final schedules and move onto plan negotiation and proposal.

Plan proposal is another measure of case progress. In about 60% of our random sample cases (61% in 2010 and 58% in 2013), a plan was proposed.²⁹⁸ The debtor proposed the plan in the overwhelming majority of cases. We found only one case in 2010 and two in 2013 in which a party other than the debtor offered a reorganization plan. *See* Table 54.

Table 54: Plan Proposed by Non-Debtor

	2010	2013
Yes	0.9%	2.6%
No	99.1%	97.4%

Virtually none of the plans were filed within the fourteen-day limit imposed on chapter 13 debtors;²⁹⁹ few, however, were filed past the 300-day limit imposed on small businesses.³⁰⁰ Table 55 provides data on the time to first plan proposal and to plan confirmation from the start of the chapter 11 case. The data include cases initiated in chapter 11 and also those converted to chapter 11. For cases that began in chapter 11, we ran the period from the filing of the petition. For cases converted from another chapter, we ran the period from the order of conversion to chapter 11. Six of the 2013 cases counted as “None” in Column (B) are still open without disposition; the debtor has

²⁹⁸ In a study of all Chapter 11 filings in 2004, one of us found a 49% plan proposal rate. *See Chapter 11 Triage, supra* note 125, at 1004 (2012).

²⁹⁹ FED. R. BANKR. PROC. 3015(b). This time period may be extended, but only for cause. Payments under a chapter 13 plan must begin 30 days after the filing of the petition. *See* 11 U.S.C. § 1326(a)(1) (2012). Chapter 11 has no such deadline. It merely requires that payments begin upon the effective date of the plan, which is normally shortly after confirmation. FED. R. BANKR. PROC. 3021 (providing that, after plan confirmation, “distribution shall be made to creditors whose claims have been allowed”). This substantial delay in the requirement for beginning payments may benefit debtors who lack the wherewithal to pay creditors at the time of filing, but who anticipate income at a later date.

³⁰⁰ 11 U.S.C. § 1121(e)(2) (2012).

proposed a plan in three cases, but in none has the court confirmed a plan, or converted or dismissed the case.³⁰¹

Table 55: Plan Timing

	(A) Time to First Plan Proposal		(B) Time to Plan Confirmation	
	2010	2013	2010	2013
(1) More than 2 years	0.9%	0.0%	8.3%	3.5%
(2) 1 to 2 years	11.0%	6.1%	17.4%	17.5%
(3) 181 to 365	18.3%	19.3%	8.3%	9.6%
(4) 91 to 180	26.6%	26.3%	0.9%	4.4%
(5) 31 to 90	1.8%	4.4%	0.9%	0.0%
(6) 15 to 30	0.9%	0.9%	0.0%	0.0%
(7) 1 to 14	0.0%	0.9%	0.0%	0.0%
(8) 0	0.9%	0.0%	0.0%	0.0%
(9) None	39.4%	42.1%	64.2%	64.9%
Maximum	741	696	1,120	930
Average	247	208	530	450
Median	181	175	485	440

The figures in Column (A) of Table 55 show that just one debtor (0.9%) in each of 2010 and 2013 filed a plan within the fourteen-day limit applicable to chapter 13 debtors. *See* Column (A), Rows (7) & (8). Half of the individual debtors who proposed plans in 2010 and 2013, however, did so within six months of the start of their chapter 11 cases. Outliers do exist. Of those debtors who proposed plans, 88% in 2010 and 94% in 2013 did so within one year of the beginning of their chapter 11 cases. *See* Column (A), Rows (3)-(8). While approximately 60% of our debtors proposed a plan, only about 35% had a plan approved. This confirmation rate is similar to the 30% to 33% confirmation rate found by Warren and Westbrook in their study of all chapter 11 filings,³⁰² and the

³⁰¹ *See, e.g., In re Blonder*, No. 13-76658 (Bankr. N.D. Ga. Dec. 9, 2013); *In re Chen*, No. 13-25674 (Bankr. C.D. Cal. June 14, 2013).

³⁰² *See Success of Chapter 11*, *supra* note 3.

34% confirmation rate one of us found in a study of chapter 11 filings in 2004.³⁰³ Plan confirmation took time. Column (B) of Table 55 shows that the median time to plan confirmation for the debtors in our sample was between fifteen and sixteen months from the start of the chapter 11 case. The time from the start of the chapter 11 case until confirmation appears to be 25% to 30% longer than that found by Warren and Westbrook. In their study, the median time to confirmation was about one year.³⁰⁴

The figures in Table 55 include the few individual debtors who identified as small businesses—seventeen in 2010 and thirteen in 2013.³⁰⁵ Congress amended the Bankruptcy Code in 2005 to require debtors in small business cases to file a plan “not later than 300 days after the date of the order for relief.”³⁰⁶ Of the debtors who identified as small businesses, the vast majority satisfied the Code’s 300-day plan-proposal requirement.³⁰⁷ As Table 56 shows, thirteen of 2010’s seventeen small business debtors proposed plans; nine did so within 300 days of the start of their chapter 11 cases.³⁰⁸ All

³⁰³ See *Chapter 11 Triage*, *supra* note 125, at 1004.

³⁰⁴ See *Success of Chapter 11*, *supra* note 3, at 632.

³⁰⁵ See *supra* Table 14.

³⁰⁶ 11 U.S.C. § 1121(e)(2) (2012). This provision was added in 2005, Pub. L. 109-8, § 437, apparently because Congress believed that too many debtors were languishing in bankruptcy. Thus, Congress created new exclusivity and plan-proposal time limits applicable only to small business debtors. Such a debtor has a 180-day exclusivity period, compared with the 120-day period for non-small business debtors. *Compare* 11 U.S.C. § 1121(b) (120 days), *with* 11 U.S.C. § 1121(e)(1) (180 days).

Three hundred days is a limit; if the debtor has not filed a plan by that time, the case may be dismissed. *See, e.g., In re Randi’s, Inc.* 474 B.R. 783, 786 (Bankr. S.D. Ga. 2012) (holding that “[o]nce the 300-day time period ends and there is no plan filed by any party in interest, ‘cause’ for dismissal exists”); *In re Castle Horizon Real Estate, LLC*, 2010 WL 3636160, at *2 (Bankr. E.D.N.C. Sept. 10, 2010) (stating that “no relief is available” if no one has filed a plan within 300 days). Some cases hold the 300-day deadline applicable only to plans filed by the debtor, however. *See, e.g., In re Florida Coastal Airlines, Inc.*, 361 B.R. 286, 292 (Bankr. S.D. Fla. 2007) (holding that the 300-day plan period in § 1121(e)(2) “applies only to plans filed by the debtor and that there is no statutory deadline for the filing of such a reorganization plan by any party in interest other than the debtor”).

³⁰⁷ We counted from the start of the chapter 11 case, not from the order for relief in cases in which the debtor first filed under another chapter of the Bankruptcy Code because a debtor who initially files under chapter 7 or 13 would not propose a chapter 11 plan until the case converted to chapter 11.

³⁰⁸ One of the four debtors did not technically satisfy the 300-day plan-proposal requirement, having proposed his plan 301 days from filing his chapter 11 case. *See In re Stickler*, No. 10-10080 (M.D. Ala. Jan. 19, 2010). Debtor obtained confirmation of his plan a little over fourteen months from the filing of his

of 2013’s small business debtors who proposed plans did so within the Code’s 300-day window. Less than a quarter of the small business debtors in 2010 failed to propose a plan; more than half failed to do so in 2013. One should not overemphasize these differences, however, because we are dealing with so few debtors.

Table 56: Small Business Debtors and Time to First Plan Proposal

	2010		2013	
	Number	Percentage	Number	Percentage
>1 year	2	11.8%	0	0%
301-365 days	2	11.8%	0	0%
181-300 days	4	23.5%	3	23.1%
91-180 days	5	29.4%	2	15.4%
1-90 days	0	0%	1	7.7%
No Plan	4	23.5%	7	53.8%
Total Cases	17		13	

We also looked at the time it took debtors to obtain confirmation once they had proposed a plan. The median time from first-plan proposal to confirmation ranged from more than seven months in 2010 to more than five months in 2013. In small business cases, § 1129(e) requires the bankruptcy court to confirm a plan “not later than 45 days after the plan is filed.”³⁰⁹ None of the small business debtors who obtained confirmation

petition for relief under chapter 11. *See* Final Order Approving Disclosure Statement and Confirming Plan, *In re* Stickler, No. 10-10080 (M.D. Ala. Mar. 30, 2011) (Dkt. No. 146). In two of the other three cases, the bankruptcy court confirmed a plan, while in the third the court dismissed the case. *See* Stipulated Order Confirming Plan, *In re* McManus Enterprises, Inc., No. 10-40983 (Bankr. D. Neb. Sept. 6, 2012) (Docket No. 183) (bankruptcy court entered order of confirmation on docket of lead corporate case for plan covering married individual debtors and three jointly administered business cases); Order Dismissing Case and Barring Refiling, *In re* Church, No. 10-50168 (Bankr. W.D. N.C. March 11, 2011) (Docket No. 126) (capitalization in original) (granting motion of Bankruptcy Administrator to dismiss case, noting dismissal of debtor’s previously filed 2009 chapter 13 case, barring debtor’s refiling within 180 days of dismissal order of any case under chapters 11, 12 or 13, and explaining that while debtor could refile under chapter 7 doing so would “NOT INVOKE THE STAY PROVISIONS OF 11 U.S.C. § 362”); *In re* Zakaria, No. 10-03146 (Bankr. M.D. Tenn. March 24, 2010) (plan confirmed and case later reopened for entry of order of discharge).

³⁰⁹ 11 U.S.C. § 1129(e) (2012).

met this forty-five-day requirement.³¹⁰ In fact, not a single debtor in 2010 or 2013, regardless of his or her small business designation, obtained confirmation of a plan within forty-five days of having first proposed it.³¹¹

Approximately 65% of the debtors in the random sample did not confirm a plan of reorganization. This low rate of plan confirmation, however, does not mean that chapter 11 is unsuccessful. One goal of a successful bankruptcy system is to identify early on those cases with “no reasonable prospect of rehabilitation” in order to “reduce the amount of time they consume in Chapter 11.”³¹²

In Table 57, we provide data on the time to conversion or dismissal for cases that are kicked out of chapter 11, using several different measurements. Since individual debtors do not generally receive a chapter 11 discharge until plan payments are completed,³¹³ a bankruptcy court may dismiss or convert the case after plan approval.³¹⁴ In Columns (A) and (B), we do not include cases in which the bankruptcy court initially

³¹⁰ It is not clear whether the forty-five days runs from the first-filed plan or re-sets when the debtor amends the first plan. *See In re Crossroads Ford, Inc.*, 453 B.R. 764, 769-70 (Bankr. D. Neb. 2011) (holding that debtor’s failure to confirm initially filed plan within forty-five days did not preclude debtor from filing an amended plan within 300 days and obtaining confirmation of that plan within forty-five days of its filing); *cf. In re Save Our Springs Alliance, Inc.*, 388 B.R. 202, 225 (Bankr. W.D. Tex. 2008) (holding that forty-five-day confirmation period runs from filing of the original plan, “at least when an amended plan is not substantially different from the original plan”).

³¹¹ The National Bankruptcy Review Commission recommended establishing deadlines for plan proposal and confirmation, and “directing bankruptcy judges to use modern case-management techniques . . . to further reduce cost and delay” for small business cases. 1997 COMMISSION REPORT, *supra* note 181, at 615 (footnote omitted). In its discussion, the Commission noted the “fast track” procedures that the Honorable Thomas A. Small had pioneered in the Eastern District of North Carolina in the 1980s. *See id.*, n. 1569. With BAPCPA, Congress adopted the Commission’s recommendation to create deadlines for plan proposal and confirmation for small business cases, but changed the time periods that the Commission had suggested. Congress significantly lengthened the plan-proposal period—from ninety to 300 days—while effectively shortening the time to confirmation from plan proposal from sixty to forty-five days. *See id.* at 621.

³¹² 1997 COMMISSION REPORT, *supra* note 181, at 609 (footnote omitted).

³¹³ 11 U.S.C. § 1141(d)(5) (2012). As discussed in note 242, however, courts sometimes grant an early discharge for cause.

³¹⁴ *See, e.g., In re Sorge*, No. 10-17070 (Bankr. D. N.J. Mar. 11, 2010) (confirming debtor’s plan of reorganization and, seven months later, granting United States Trustee’s motion to convert to chapter 7).

confirmed a chapter 11 plan but subsequently ordered conversion or dismissal of the case. Column (A) runs the time to conversion or dismissal from the start of the chapter 11 case. Some of the individual chapter 11 cases in our random sample, however, began in chapter 7 or chapter 13; therefore, the data in Column (B) are based on the time from the start of the bankruptcy case, regardless of starting chapter, to the conversion or dismissal order.

Columns (C) and (D) of Table 57 include cases with failed plans—that is, those cases, as of the date of our coding, in which the bankruptcy court converted or dismissed the case after plan confirmation. Six plans failed post-confirmation and, thus, those cases are included in the figures in Columns (C) and (D) of Table 57. In Column (C), we observe the time to conversion or dismissal from the start of the chapter 11 case, while the data in Column (D) are based on the time from the start of the bankruptcy case, regardless of starting chapter.

Table 57: Time in Days to Conversion or Dismissal—Random Sample

	Failed Plans Not Included				All Cases			
	(A) From Start of Chapter 11 Case		(B) From Filing of Bankruptcy Petition		(C) From Start of Chapter 11 Case		(D) From Filing of Bankruptcy Petition	
	2010	2013	2010	2013	2010	2013	2010	2013
2 or more years	6.4%	4.4%	7.3%	4.4%	8.3%	6.1%	9.2%	6.1%
1 to 2 years	12.8%	11.4%	14.7%	12.3%	15.6%	12.3%	17.4%	13.2%
180 days to 1 year	21.1%	13.2%	22.0%	14.0%	21.1%	13.2%	22.0%	14.0%
0 to 180 days	23.9%	24.6%	20.2%	22.8%	23.9%	24.6%	20.2%	22.8%
n/a	35.8%	41.2%	35.8%	41.2%	31.2%	38.6%	31.2%	38.6%
Open	0%	5.3%	0%	5.3%	0%	5.3%	0%	5.3%
Maximum	1,794	907	1,794	907	1,794	969	1,794	969
Average	329	279	356	292	360	298	385	312
Median	227	203	294	205	272	205	302	214

If the time to conversion or dismissal for failed plans is not included, then the median time from the start of the chapter 11 case to conversion or dismissal is about 7-½ months for 2010 and greater than 6-½ months for 2013. *See* Table 57, Column (A). If failed plans are not included and the time to conversion or dismissal is measured from the start of bankruptcy proceedings, regardless of chapter, the median period increases by more than two months to close to ten months in 2010; the increase in median time is only two days for 2013. *See* Column (B) of Table 57. Of course, six cases from 2013 are still open with no disposition,³¹⁵ which may account for the shorter period to conversion or dismissal for the 2013 cases compared with those from the 2010 sample. Stated more simply, the 2013 cases have had less time to fail.

When we include the time to conversion or dismissal for failed plans, the median time increases, although perhaps by less than expected. This is because most of our failed cases failed before a plan was confirmed. Just five of our 2010 cases and three of our 2013 cases failed after plan confirmation. In 2010, the median time to conversion or dismissal from the start of the chapter 11 case increased a month and a half from 227 to 272 days. *Compare* Column (A) with Column (C) of Table 57. The impact of the failed plans is less dramatic for 2013, no doubt due to the fact that less time has elapsed between our coding and the start of the 2013 cases. As a result, not only are there fewer failed plans but plans that take longer to fail are less likely to appear in the 2013, than in the 2010, figures.

By any of these measures, however, chapter 11 is succeeding. Bankruptcy courts dismissed or converted half the cases in the 2010 random sample in 227 days or

³¹⁵ *See supra* note 301 and accompanying text.

approximately 7-½ months from the start of the chapter 11 case. This time frame is 2-½ months less than the 300-day “drop dead” date that Congress created for small business debtors to propose a plan.³¹⁶

V. Conclusion

Individuals now account for between a quarter and a third of all chapter 11 filings nationally.³¹⁷ Perhaps these debtors belong in chapter 13, the more common individual reorganization, but their choices suggest that they disagree. We found that as many as 46% of the chapter 11 debtors in the 2013 sample had liabilities below chapter 13’s debt limits, yet still chose chapter 11.³¹⁸ The rules governing individual chapter 11 bankruptcies are very different than those that govern chapter 13, and it is possible that the latter would be a poor fit for these debtors. Chapter 11 debtors have much higher incomes,³¹⁹ substantially more assets and much more debt,³²⁰ and they are far more likely to operate a business.³²¹ As a result, they are more likely to have complicated cases and have difficulty complying with the tight deadlines imposed by chapter 13.³²² Chapter 11 debtors also have substantial real estate interests³²³ (and substantial mortgage debt that they need to modify),³²⁴ and they may, therefore, need plans of reorganization that extend beyond five years.³²⁵

³¹⁶ See 11 U.S.C. § 1121(e)(2) (2012).

³¹⁷ See *supra* Table 1 and Figure 1. This percentage is much higher in some districts. See *infra* Table 58 in the Appendix.

³¹⁸ See *supra* Table 30.

³¹⁹ See *supra* Table 25 and accompanying text.

³²⁰ See *supra* Table 21 and accompanying text.

³²¹ See *supra* Table 11 and accompanying text.

³²² See *supra* notes 9-11 and accompanying text.

³²³ See *supra* Tables 35-38 and accompanying text.

³²⁴ See *supra* Table 29 and accompanying text.

³²⁵ 11 U.S.C. § 1322(d) (2012).

We found that a little more than a third of individuals in chapter 11 “succeed” by confirming a plan and avoiding dismissal or conversion for 881 days.³²⁶ Success rates are higher in cases with joint filing or significant real property, and lower in no-asset cases and cases in which the debtor is represented by an inexperienced attorney or no attorney at all.³²⁷ We also found that cases are more likely to succeed in jurisdictions that follow the broad interpretation of the exception to the absolute priority rule, rather than in jurisdictions that adopt the narrow interpretation.³²⁸ We cannot be sure of causal effects, however.

Many individuals successfully reorganize in chapter 11, but the normative case for an individual reorganization chapter separate from chapter 13 remains unclear. The absence of a bankruptcy trustee means that creditors must do more to monitor the debtor, and whether they are adequately doing so is uncertain. Reasonable minds may believe that these individual chapter 11 cases drag on too long.³²⁹ We cannot resolve normative questions, such as the time debtors should spend in chapter 11, with the results of a single study. We hope, however, that our findings will provide a framework for discussing reform efforts aimed at the individual chapter 11 debtor.

³²⁶ See *supra* Table 46 and accompanying text. This is about the same as the oft-quoted rate for chapter 13, see *supra* note 29, but our definition of success is much broader.

³²⁷ See *supra* Tables 42, 43, 45-48 and 50 and accompanying text.

³²⁸ See *supra* Tables 44 and 49 and accompanying text.

³²⁹ See *supra* Section IV.C.

Appendix A: Individual Chapter 11 Filings by District

Table 4 in Section II.A.3 provides data from the five districts with the highest and lowest number of individual chapter 11 filings in 2010 and 2013. Table 58 below provides individual chapter 11 filing data for all 78 of the judicial districts covered by this study. The table shows the number of individual cases filed in each district, the district's share of the total sample, and the percentage of chapter 11 cases filed by individuals in that district.

Table 58: Individual Chapter 11 Filings by District

District	2010			2013		
	Individual Ch. 11	% Whole Sample	% Individual of District Ch. 11	Individual Ch. 11	% Whole Sample	% Individual of District Ch. 11
AK	3	0%	27%	2	0%	33%
ALMD	17	0%	40%	5	0%	21%
ALND	38	1%	42%	20	1%	35%
ARED	12	0%	44%	7	0%	32%
ARWD	15	0%	24%	16	1%	44%
AZ	294	7%	42%	117	4%	41%
CACD	581	14%	47%	349	13%	47%
CAED	118	3%	48%	59	2%	49%
CAND	312	8%	65%	127	5%	61%
CASD	77	2%	53%	33	1%	40%
CO	59	1%	31%	34	1%	32%
DE	7	0%	1%	3	0%	0%
FLMD	232	6%	29%	146	6%	35%
FLND	12	0%	26%	19	1%	40%
FLSD	115	3%	27%	127	5%	39%
GAMD	13	0%	16%	16	1%	37%
GAND	68	2%	20%	61	2%	25%
GASD	24	1%	23%	16	1%	33%
IAND	3	0%	43%	0	0%	0%
IASD	8	0%	25%	2	0%	20%
ID	31	1%	46%	11	0%	41%
ILCD	6	0%	30%	7	0%	32%

ILND	82	2%	26%	101	4%	33%
INSD	16	0%	14%	15	1%	19%
KS	17	0%	29%	12	0%	28%
KYED	5	0%	13%	4	0%	10%
KYWD	6	0%	14%	6	0%	18%
LAED	8	0%	15%	10	0%	29%
LAMD	1	0%	6%	1	0%	10%
LAWD	20	0%	27%	17	1%	43%
MA	125	3%	47%	54	2%	44%
MD	153	4%	49%	81	3%	45%
MIED	50	1%	27%	33	1%	21%
MIWD	14	0%	27%	10	0%	26%
MN	13	0%	16%	14	1%	19%
MOW D	21	1%	31%	19	1%	37%
MSND	7	0%	24%	10	0%	38%
MSSD	10	0%	21%	12	0%	41%
MT	12	0%	34%	9	0%	56%
NCED	62	2%	38%	50	2%	40%
NCMD	4	0%	11%	4	0%	13%
NCWD	21	1%	18%	9	0%	18%
ND	3	0%	38%	0	0%	0%
NE	22	1%	28%	4	0%	14%
NH	12	0%	30%	9	0%	26%
NJ	93	2%	27%	80	3%	24%
NM	16	0%	32%	13	0%	43%
NV	200	5%	40%	125	5%	47%
NYED	43	1%	15%	34	1%	13%
NYND	8	0%	18%	7	0%	23%
NYSD	66	2%	6%	41	2%	10%
OHND	21	1%	19%	13	0%	25%
OHSD	21	1%	35%	22	1%	36%
OKED	3	0%	27%	2	0%	67%
OKND	2	0%	8%	1	0%	17%
OR	26	1%	39%	12	0%	32%
PAED	36	1%	23%	29	1%	23%
PAMD	9	0%	21%	7	0%	14%
PAWD	66	2%	37%	46	2%	43%
PR	60	1%	36%	131	5%	58%
RI	5	0%	18%	1	0%	20%
SC	40	1%	44%	27	1%	42%

SD	8	0%	53%	1	0%	20%
TNED	38	1%	37%	26	1%	40%
TNMD	94	2%	54%	47	2%	49%
TNWD	25	1%	36%	22	1%	38%
TXED	27	1%	20%	11	0%	17%
TXND	56	1%	14%	42	2%	18%
TXWD	67	2%	26%	34	1%	28%
UT	21	1%	24%	11	0%	28%
VAED	85	2%	34%	59	2%	42%
VAWD	11	0%	27%	8	0%	38%
VT	3	0%	33%	0	0%	0%
WAED	8	0%	22%	10	0%	38%
WAW D	126	3%	41%	75	3%	52%
WIWD	23	1%	53%	15	1%	45%
WVND	7	0%	25%	0	0%	0%
WY	6	0%	32%	4	0%	44%
Total	4049			2617		

Appendix B: Impact of APR on Chapter Choice

In Section IV, we examined the impact of the exception to the absolute priority rule on survival and plan-confirmation rates. That analysis was limited to cases in which the debtor already had chosen to file for relief under chapter 11. A jurisdiction's precedent interpreting the APR exception in individual cases, however, may affect not only survival and confirmation rates for cases in chapter 11, but also debtors' decisions whether to file for relief under chapter 11 in the first place. Therefore, in this appendix, we estimate the effects of the absolute priority rule on the individual debtor's choice of chapter.

A more vigorous absolute priority rule for individuals in chapter 11 could cause some debtors to choose a different chapter or forego bankruptcy entirely. We test this hypothesis using a fixed effects regression that makes use of the timing of legal opinions and data from the Administrative Office of the U.S. Courts. The AO does not publish the number of individual chapter 11 filings,³³⁰ but it does report the number of non-business chapter 11 cases by chapter, district, and quarter. We use the reports for the first quarter of 2006 through the first quarter of 2016.³³¹ An analysis of our 2010 and 2013 filings data suggests that a little more than half (55%) of individuals in chapter 11 report that their debts are primarily non-business debts. All of the non-business chapter 11 cases are filed by individuals and only 15% of business chapter 11 cases were filed by individuals. We, therefore, use the number of non-business chapter 11s as a proxy for the number of

³³⁰ EPIQ reported the number of individual Chapter 11s until January of 2013, but this is before many of our legal changes. Our results are consistent. Also note that these numbers are no longer publicly available.

³³¹ See Table F-2 (Three Months), available at <http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables>

individual chapter 11s. More specifically, our dependent variable is the percentage of non-business bankruptcies filed in chapter 11 ($100 \times \text{non-business chapter 11} / \text{total non-business bankruptcies}$).

All regressions take the following form: $y_{dq} = \beta_0 + \beta_1 \text{Legal} + \mu_d + \lambda_q + \epsilon_{dq}$. Fixed district effects, μ , control for differences between districts that are constant across time, and fixed quarter effects, λ , control for differences across time that are constant across districts. We do not include macroeconomic controls because they are not available at the district level for the most recent quarters. Our chosen dependent variable may make these controls necessary if an economic downturn affects the number of filings in the various chapters proportionally.

We adopt the same legal measures that we used in Section IV with one important exception. In Section IV, we used the interpretation in place six months after the filing of the debtor’s petition because most debtors will wait several months to propose their plan. Here, we focus on the filing decision; thus, we assume that precedents have an immediate effect.³³²

Table 59: Impact of APR on Chapter Choice

Variable	Mean	Std. Dev
Broad	.066	.245
Narrow	.163	.364
Broad Circuit	.042	.198
Narrow Circuit	.118	.319
Ch11p (% non-business bankruptcies filed in chapter 11)	.0930	.149
Total Observations: 3,690		

³³² If an opinion was decided before the end of a quarter we assumed that its effect was proportional to the number of days remaining in the quarter.

Table 59 presents the summary statistics. In the vast majority of the district-quarter observations included in the regression there was no prior precedent for how to interpret the APR. Chapter 11 accounts for a very small share of all non-business filings. There are some outliers, however; the highest observed value was 1.942. The high value of the maximum observed is due, in part, to the fact that some districts-quarters have very few filings. In fact, there are some districts that had no bankruptcy filings in some quarters. To mitigate this problem we excluded all U.S. territories (Guam, Northern Mariana Islands, Puerto Rico and the Virgin Islands), but doing so did not completely solve the problem. The number of non-business bankruptcy filings varies radically from district to district, and so the percentage of filings made in chapter 11 may be estimated much more accurately in big districts than in small districts (heteroskedasticity). One solution is to weight districts with more filings more heavily, but this can create its own problems.³³³ We, therefore, present both weighted (by the number of non-business bankruptcies) and unweighted regressions. Doing so has the added advantage of testing for misspecification. The differences in differences model assumes that the legal rule has the same effect in every district, but this is almost certainly not the case as some districts will have a higher proportion of high-asset individuals for whom chapter 11 is much more attractive. It is likely that these high-asset individuals are concentrated in more populous districts (with larger cities), and thus weighting by non-business bankruptcies should increase the estimated coefficients. All standard errors are clustered by district.

³³³ See Gary Solon, Steven J. Haider, & Jeffrey Wooldridge, *What Are We Weighting For?*, NBER Working Paper No. 18859, available at <http://www.nber.org/papers/w18859>

Table 60: Percentage of Non-Business Cases in Chapter 11

	(A)	(B)	(C)	(D)
Broad	0.054 (.21)		0.076** (.08)	
Narrow	-0.004 (.67)		0.010 (.49)	
Broad Circuit		0.00732 (.66)		0.0335 (.20)
Narrow Circuit		-0.0292** (.03)		-0.0360** (.04)
Constant	0.0929*** (0.00)	0.0929*** (0.00)	0.115*** (0.00)	0.115*** (0.00)
Observations	3,690	3,690	3,690	3,690
R-squared	0.041	0.020	0.038	0.022
Number of districts	90	90	90	90

Table 60 presents the results. Seven of the eight coefficients have the “correct” sign; broad decisions are followed by more chapter 11 filings and narrow decisions are followed by fewer chapter 11 filings. Five of the eight coefficients are not statistically significant at the 10% level, however, meaning that we cannot reject the hypothesis that there is no relationship between the decisions and the filing rate with 90% certainty. Even when not statistically significant, the coefficients suggest that the effects may be economically significant. For example, consider the results in column (A). These results suggest that a broad interpretation may increase the percentage of non-business filings made in chapter 11 by 0.05; while this is a small number, the mean is just 0.09.

As expected, weighting the regressions by the total number of non-business filings in a district increases both the predicted magnitude of the effects and usually the statistical significance. The fact that the magnitude increases suggests that if there is an effect it is stronger in the larger, more populous districts. As noted above, this is

consistent with the theory that a greater proportion of high-asset individuals live in these districts.

The coefficient on broad is much larger than the coefficient on narrow. Perhaps this is because most lawyers expected courts to adopt the narrow interpretation of the exception to the APR and a broad ruling is, therefore, a greater surprise. This does not hold true for the circuit court decisions, but this may also make sense. The broad “circuit” court decision isn’t really a circuit court decision at all but rather a decision by the Ninth Circuit’s Bankruptcy Appellate Panel.³³⁴ At least one bankruptcy court in the Ninth Circuit has stated that it is not bound by BAP precedent and has expressly rejected this broad interpretation.³³⁵ Moreover, debtors’ attorneys may have feared that the Ninth Circuit could overrule the BAP, as it did in January of 2016.³³⁶

³³⁴ *In re Friedman*, 466 B.R. 471 (B.A.P. 9th Cir. Mar. 19, 2012);

³³⁵ *In re Arnold*, 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012), *appeal dismissed* (Jan. 16, 2013).

³³⁶ *Zachary v. California Bank & Trust*, 811 F.3d 1191 (9th Cir. Jan 28, 2016).

Appendix C: Court Decisions Interpreting the APR Exception

Jurisdiction	Case Citation	View Adopted
<i>First Circuit</i>		
Bankr. D.P.R.	<i>In re Lee Min Ho Chen</i> , 482 B.R. 473 (Bankr. D.P.R. Nov. 9, 2012)	Narrow
Bankr. D. Mass.	<i>In re Walsh</i> , 447 B.R. 45 (Bankr. D. Mass. Mar. 9, 2011)	Narrow
<i>Third Circuit</i>		
E.D. Pa.	<i>In re Brown</i> , 505 B.R. 638 (E.D. Pa. Feb. 24, 2014)	Narrow
Bankr. E.D. Pa.	<i>In re Alfaro</i> , 501 B.R. 292 (Bankr. E.D. Pa. Nov. 22, 2013)	Narrow
Bankr. E.D. Pa.	<i>In re Brown</i> , 498 B.R. 486 (Bankr. E.D. Pa. Sept. 26, 2013) <i>aff'd</i> , 505 B.R. 638 (E.D. Pa. 2014)	Narrow
<i>Fourth Circuit</i>		
4th Circuit	<i>In re Maharaj</i> , 681 F.3d 558 (4th Cir. June 14, 2012)	Narrow
Bankr. W.D.N.C.	<i>In re Eagan</i> , No. 12-30525, 2013 WL 237812 (Bankr. W.D.N.C. Jan. 22, 2013)	Narrow
Bankr. D.S.C.	<i>In re Ferguson</i> , 474 B.R. 466 (Bankr. D.S.C. July 6, 2012)	Narrow
Bankr. E.D. Va.	<i>In re Maharaj</i> , 449 B.R. 484 (Bankr. E.D. Va. May 9, 2011) <i>aff'd</i> , 681 F.3d 558 (4th Cir. 2012)	Narrow
Bankr. E.D. Va.	<i>In re Simon</i> , No. 07-31414-KRH, 2008 WL 2953471 (Bankr. E.D. Va. July 29, 2008)	Narrow
Bankr. W.D. Va.	<i>In re Mullins</i> , 435 B.R. 352 (Bankr. W.D. Va. June 22, 2010)	Narrow
<i>Fifth Circuit</i>		
5th Circuit	<i>In re Lively</i> , 717 F.3d 406 (5th Cir. May 29, 2013)	Narrow
Bankr. N.D. Tex.	<i>In re Texas Star Refreshments, LLC</i> , 494 B.R. 684 (Bankr. N.D. Tex. Mar. 22, 2013)	Narrow
Bankr. S.D. Tex.	<i>In re Lively</i> , 467 B.R. 884 (Bankr. S.D. Tex., Mar. 21, 2012)	Narrow
Bankr. S.D. Tex.	<i>In re Lively</i> , 466 B.R. 897 (Bankr. S.D. Tex. Dec. 30, 2011) <i>aff'd</i> , 717 F.3d 406 (5th Cir. 2013)	Narrow
Bankr. S.D. Tex.	<i>In re Stephens</i> , 445 B.R. 816 (Bankr. S.D. Tex. Feb. 22, 2011)	Narrow
<i>Sixth Circuit</i>		
6th Cir.	<i>Ice House Am., LLC v. Cardin</i> , 751 F.3d 734 (6th Cir. May 13, 2014)	Narrow

E.D. Tenn.	<i>In re Cardin</i> , No. 11-52077 (Bankr. E.D. Tenn. Aug. 7, 2012) (unpublished order), <i>rev'd</i> , <i>Ice House Am., LLC v. Cardin</i> , 751 F.3d 734 (2014).	Broad
E.D. Tenn.	<i>In re Lindsey</i> , No. 3:11-CV-00445, 2012 WL 4854718 (E.D. Tenn. Oct. 11, 2012) <i>appeal dismissed</i> , 726 F.3d 857 (6th Cir. 2013) <i>vacated</i> , No. 3:11-CV-00445, 2013 WL 5436968 (E.D. Tenn. Sept. 27, 2013)	Narrow
Bankr. E.D. Tenn.	<i>In re Lindsey</i> , 453 B.R. 886 (Bankr. E.D. Tenn. Aug. 5, 2011) <i>aff'd</i> , No. 3:11-CV-00445, 2012 WL 4854718 (E.D. Tenn. Oct. 11, 2012) <i>vacated</i> , No. 3:11-CV-00445, 2013 WL 5436968 (E.D. Tenn. Sept. 27, 2013)	Narrow
<i>Seventh Circuit</i>		
Bankr. N.D. Ill.	<i>In re Batista-Sanechez</i> , 505 B.R. 222 (Bankr. N.D. Ill. Jan. 31, 2014)	Narrow
Bankr. N.D. Ill.	<i>In re Draiman</i> , 450 B.R. 777 (Bankr. N.D. Ill. Apr. 19, 2011)	Narrow
Bankr. E.D. Wis.	<i>In re Gerard</i> , 495 B.R. 850 (Bankr. E.D. Wis. Aug. 7, 2013)	Narrow
<i>Eighth Circuit</i>		
BAP	<i>Heritage Bank v. Woodward (In re Woodward)</i> , 537 B.R. 894 (BAP 8th Cir. Aug 13, 2015)	Narrow
Bankr. D. Neb.	<i>In re Woodward</i> , No. BK11-40936, 2014 WL 1682847 (Bankr. D. Neb. Apr. 29, 2014)	Broad
Bankr. D. Neb.	<i>In re Tegeder</i> , 369 B.R. 477 (Bankr. D. Neb. May 23, 2007)	Broad
<i>Ninth Circuit</i>		
9th Cir.	<i>Zachary v. California Bank & Trust</i> , 811 F.3d 1191 (9th Cir. 2016)	Narrow
B.A.P. 9th Cir.	<i>In re Friedman</i> , 466 B.R. 471 (B.A.P. 9th Cir. Mar. 19, 2012), overruled by <i>Zachary v. California Bank & Trust</i> , 811 F.3d 1191 (9th Cir. 2016).	Broad
Bankr. D. Haw.	<i>In re Kelley</i> , No. 12-02066, 2013 WL 6330942 (Bankr. D. Haw. Dec. 5, 2013)	Broad
Bankr. D. Ariz.	<i>In re Sample</i> , No. 2:10-38373-DPC, 2013 WL 3759795 (Bankr. D. Ariz. July 15, 2013)	Broad
Bankr. C.D. Cal.	<i>In re Arnold</i> , 471 B.R. 578 (Bankr. C.D. Cal. May 17, 2012), <i>appeal dismissed</i> (Jan. 16, 2013)	Narrow
Bankr. C.D. Cal.	<i>In re Kamell</i> , 451 B.R. 505 (Bankr. C.D. Cal. May 4, 2011)	Narrow
Bankr. D. Or.	<i>In re Tucker</i> , 479 B.R. 873 (Bankr. D. Or. Oct. 11, 2012), <i>abrogated</i> by <i>Zachary v. California Bank & Trust</i> , 811 F.3d 1191 (9th Cir. 2016).	Broad

Bankr. D. Or.	<i>In re Tucker</i> , No. BR 10-67281, 2011 WL 5926757 (Bankr. D. Or. Nov. 28, 2011)	Narrow
Bankr. D. Mont.	<i>In re Anderson</i> , 11-61845-11, 2012 WL 3133895 (Bankr. D. Mont. Aug. 1, 2012), <i>abrogated by Zachary v. California Bank & Trust</i> , 811 F.3d 1191 (2016).	Broad
Bankr. D. Idaho	<i>In re Borton</i> , No. 09-00196-TLM, 2011 WL 5439285 (Bankr. D. Idaho Nov. 9, 2011)	Narrow
Bankr. S.D. Cal.	<i>In re Karlovich</i> , 456 B.R. 677 (Bankr. S.D. Cal. Nov. 16, 2010)	Narrow
Bankr. N.D. Cal.	<i>In re Gbadebo</i> , 431 B.R. 222 (Bankr. N.D. Cal. Apr. 16, 2010)	Narrow
Bankr. D. Nev.	<i>In re Shat</i> , 424 B.R. 854 (Bankr. D. Nev. Feb. 22, 2010), <i>abrogated by Zachary v. California Bank & Trust</i> , 811 F.3d 1191 (2016).	Broad
<i>Tenth Circuit</i>		
10th Cir.	<i>In re Stephens</i> , 704 F.3d 1279 (10th Cir. Jan 15, 2013)	Narrow
Bankr. D. Kan.	<i>In re Roedemeier</i> , 374 B.R. 264 (Bankr. D. Kan. Aug. 16, 2007)	Broad
<i>Eleventh Circuit</i>		
M.D. Fla.	<i>SPCP Grp., LLC v. Biggins</i> , 465 B.R. 316 (M.D. Fla. Sept 21, 2011)	Broad
Bankr. M.D. Fla.	<i>In re Martin</i> , 497 B.R. 349 (Bankr. M.D. Fla. Sept 17, 2013)	Narrow
Bankr. M.D. Fla.	<i>In re Gelin</i> , 437 B.R. 435 (Bankr. M.D. Fla. Sept 29, 2010)	Narrow
Bankr. S.D. Ga.	<i>In re Steedley</i> , No. 09-50654, 2010 WL 3528599 (Bankr. S.D. Ga. Aug. 27, 2010)	Narrow
Bankr. N.D. Ga.	<i>In re Akinpelu</i> , 530 B.R. 822 (Bankr. N.D. Ga., May 4, 2015)	Narrow