

**Where is Local Legal Culture?
The Case of Consumer Chapter Choice^{1/}**

Contributing Editors:

Gordon Bermant

Burke, Va.

Ed Flynn

Executive Office for United States Trustees

Also written by:

Karen Bakewell

Executive Office for United States Trustees

Over the past dozen years evidence has accumulated that the choice of chapter by consumer filers cannot be accurately predicted by economic differences among the filers nor by legal differences between jurisdictions such as state exemption levels.^{2/} In order to explain why, for example, chapter 13 cases account for 70% of filings in Puerto Rico and 3.5% of filings in South Dakota, scholars have turned to the idea of *local legal culture*: “...systematic and persistent variation in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality, and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal legal regime.”^{3/}

^{1/} All views expressed in this article are those of the authors and do not necessarily represent the views of the Executive Office for U.S. Trustees or the Department of Justice.

^{2/} The point was forcefully made by Professors Sullivan, Warren and Westbrook in their 1989 book As We Forgive Our Debtors. “[T]here are no important economic differences among the debtors in these districts that would explain the dramatic different district filing rates” (247). The point about exemption levels, also made in the book, is based on levels of within-state variation that approximate between-state variation covering very different levels of exemption.

^{3/} Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook, “The Persistence of Local Legal Culture: Twenty Years of Experience From the Federal Bankruptcy Courts.” 17 Harvard

Beyond doubt, variations in consumer chapter filing choice around the country look like the consequences of local legal culture. In this article we address the following two questions: what is a “locality” in local legal culture; and, as a practical matter, why should anyone care?

Where Is It: State, District, Division, Office...?

Measured at the level of the states, intensive chapter 13 practice runs in a broad band across the South and includes Puerto Rico. In 1999, for example, Puerto Rico held the top rank at 70% chapter 13 filings, followed by Georgia, Alabama, North Carolina, Tennessee, South Carolina, Texas, Louisiana, Mississippi, and Arkansas, which had 39% chapter 13 filings (Florida, at 25.8%, is 21st in line, between Nevada and Virginia). At the other end of the spectrum, chapter 13s counted for fewer than 1 in 10 filings in Hawaii (9.2%), Alaska, Vermont, Maine, New Hampshire, Wyoming, Rhode Island, Iowa, West Virginia, North Dakota, and South Dakota (3.5%).⁴

The numbers for 1999 are not unique. There is considerable consistency from year to year in the percentages of consumers who choose one chapter or the other in each state. There are other interesting aspects of these lists, of course, including the larger populations and overall filing numbers of the high versus the low chapter 13 filing states. It is natural to wonder whether there are differences in *per capita* bankruptcy filing between the extremes of the chapter 13 percentage distribution: for example, might some social or cultural characteristics associated with the low density, harsh climate states (closing our eyes for a moment on Hawaii) in the low

Journal of Law & Public Policy 801, 804 (1994). We thank Professor Westbrook for very helpful correspondence on these issues.

⁴ Readers may notice that states with unlimited homestead exemptions appear in both lists.

chapter 13 states contribute to the observed differences at the extremes? The per capita filing rates are generally consistent with this possibility, but the exceptions are great enough to weaken the generality. Though states in the high-13 belt have generally high per capita bankruptcy filing rates and those in the low-13 belt have generally low per capita rates, the Carolinas are a profound counter-example. In 1990, for example, South Carolina's per capita filing rate (7 and 13) was less than all low-13 states except Vermont. North Carolina's rate was less than all low-13 states except Vermont, Maine, New Hampshire, and North Dakota. And at the other end, Wyoming's rate was greater than the median value for Puerto Rico and the 11 states in the high-13 group.⁵⁷

While there are consistent differences among states, there are also considerable and consistent differences within them. In fact, it was such differences among judicial districts that originally called into question the importance of state-law exemptions as significant factors in chapter choice. Given the local nature of consumer bankruptcy practice, we should expect strong influences of local legal culture to operate at the district level.

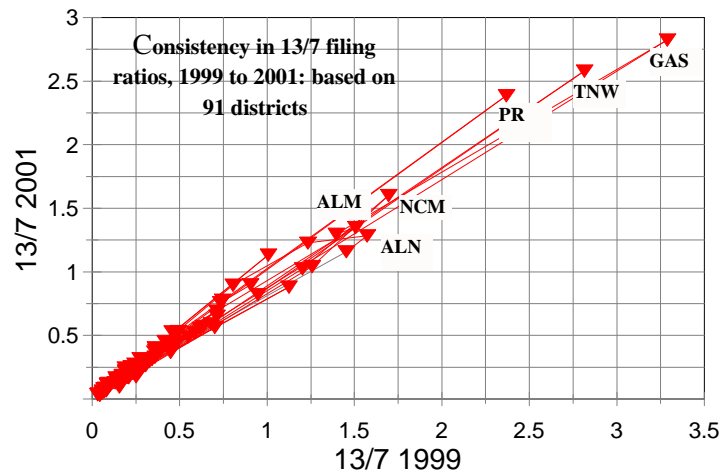
And indeed they do. The graph in Figure 1 shows a near-perfect correlation of chapter 13 to chapter 7 ratios for 1999 and 2001.⁵⁸ The high-side outliers in chapter 13 activity are clearly shown in the figure. In the states at the very ends of the chapter 13 practice continuum, especially where the districts are of approximately equal size, the districts themselves tend to

⁵⁷ Per capita filing rates for 1970, 1980, and 1990 were published by Sullivan et al, supra n. 4. We intend to make more recent figures available on the U.S. Trustee website, accessible at www.usdoj.gov.

⁵⁸ The ratio of 13 filings to 7 filings conveys much the same information as the percentage of chapter 13 filings to all filings, but spreads the data out more for clearer display.

gather at the expected ends of the continuum. But the consistency is by no means complete. In Tennessee, in particular, the 4th place rank of the state overall is due more to the contribution of the Western District (Memphis in particular) than to the Middle and Eastern Districts.

FIGURE 1



The position of some states in the distribution of chapter 13 practice is little more than artifact arising from very different conduct among the districts within the state. Pennsylvania is the clearest case. The Eastern District has a high proportion of 13 filings (41% in 2001), while the Middle and Western Districts are way down on the list. Because the total filings of 13s in the Eastern District are almost as large as in the other two districts combined, the average for the state overall is a composite that doesn't reflect the reality of any of its locations.

The judicial district seems to be a natural location for the operation of local legal culture. However, as populations increase and the number of judges, trustees, and lawyers serving in the

district also grow, we should expect variation within a district to increase. Also, where geography, demography and politics have combined to create divisions or places of holding court within a district, we might expect that these distinctions will create some of their own preferred consumer bankruptcy practices. Although local legal culture is, as a term of art, defined to be resistant to changes in judges, administrators, and practitioners, we should not expect practices in a district to be immutable.

Just as states can contain disparate judicial districts, so districts can contain disparate divisions and/or offices.⁷ We have reviewed the chapter choice statistics in 264 court offices reported by the Administrative Office of the U.S. Courts for Fiscal Year 2001 (ending September 30). Again, the Third Circuit provides interesting examples. In New Jersey, for example, Camden, Newark and Trenton differ markedly from each other. Camden had a 13/7 ratio of 0.84, placing it 53rd out of 264 offices. Trenton's ratio was 0.56, giving it a rank of 75. And Newark's ratio was 0.31, placing it in 119th position. Given the positions of the district's offices across a considerable portion of the entire national spectrum, it seems a bit of a stretch to characterize the district (and in this case the state), vis a vis the other 90+ districts, as displaying a singular legal culture. The locality in this instance seems better placed at the level of the office.

⁷ Federal courts distinguish several categories of location below the judicial district: division, place of holding court (judge's official duty station), additional place of holding court, and office. For district courts, divisions and places of holding court are specified in 28 U.S.C. §§81-131. For bankruptcy courts, the district courts' divisions apply, but the official duty stations of bankruptcy judges and additional places of holding court are specified from time to time by the Judicial Conference as authorized by 28 U.S.C. §152(a)(4). An office is any location owned by the courts or for which the courts pay rent. There are approximately 800 such locations. As of September, 2001, the Judicial Conference had authorized approximately 400 offices as official duty stations or additional places of holding bankruptcy court. The Administrative Office reported filing numbers for 264 of these locations, which included all cases filed during the fiscal year 2001.

The Eastern District of Pennsylvania supplies another example. The high chapter 13 performance mentioned above for the district is entirely a consequence of a large proportion of chapter 13 filings in Philadelphia (17,633 filings; 13/7 ratio = 0.90; rank 50th out of 264) as distinct from Reading (6,996 filings; 13/7 ratio = 0.27; rank 129th out of 264). There are other examples, but they all make the same point: wide variation is found at every reported level of organization.

Why Should Anyone Care?

The role of local legal culture in bankruptcy practice has been discussed largely in law reviews and other academic sources. Why is it more than a matter of academic interest? The answer is that debtors and creditors may be better served by the practices of some of these local cultures than they are by others. If that is true, then it seems that there should be an effort by all involved in the system to discern which practices should be adopted and which should be let go.

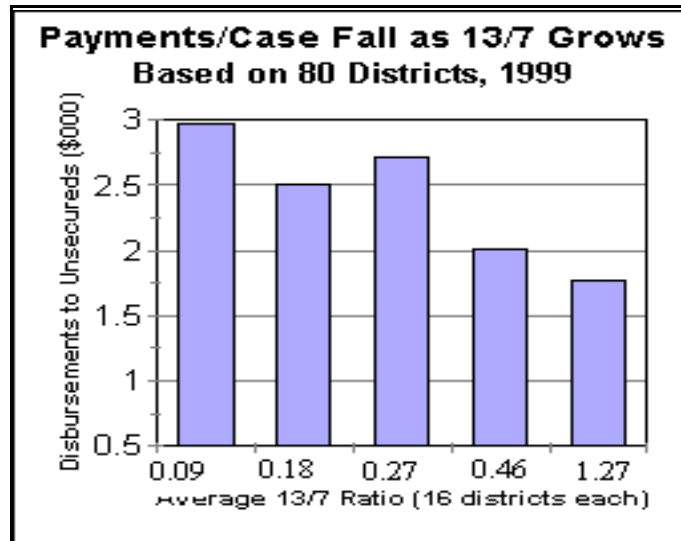
When do the practices in a location serve debtors and creditors optimally? The short answer is that, in general, we don't know, even though practitioners and judges are strong advocates on behalf of their own practices. There are, however, ways to look at chapter 13 performance that may help to clarify the nature of effective practice. We give one example here.

States with large numbers of chapter 13 cases disburse more to creditors than states with lower numbers of chapter 13 filings.^{8/} There is, however, an inverse relationship between the per case disbursements to creditors and the chapter 13 to chapter 7 ratios. In other words, as the 13/7 ratio goes up, the average disbursements per case go down. The relationship is shown graphically

^{8/} We originally addressed this relationship in our column of July-August 2000, called Measuring Performance in Chapter 13: Comparisons Across States.

in Figure 2.⁹

FIGURE 2



The graph shows that the 16 districts with the lowest 13/7 ratios (0.09 for the group average) returned the highest per-case amounts to general unsecured creditors. The average amount going to general unsecured creditors for this group was \$2,978. For the 16 districts at the high end of the 13/7 spectrum (average ratio of 1.27), the average per case disbursement to general unsecureds was \$1,765.¹⁰

The hypothesis of local legal culture is that there are no significant economic differences

⁹ Does not include information from Alabama and North Carolina, which are not served by the U.S. Trustee Program. Notice that the actual 13/7 ratios cover a range of more than 14 to 1. The 80 districts were divided into 5 groups of 16 each for ease of graphing.

¹⁰ There is also a reduction across the groups in total payments to all creditors, from \$9,873 for the lowest 13/7 group to \$8,191 for the highest 13/7 group.

among the debtors in these groups, but that hypothesis has not been checked for large numbers of districts. We also need much more systematic information about typical plan characteristics (usual duration, scheduling of unsecured debt payments, ongoing mortgage payments by the debtor or the trustee, proportion of attorneys' fees paid through the plan, minimum required unsecured debt repayment required for plan confirmation, and so on) as they may differ among the districts.

These factors, and others that might be listed, could be characterized as aspects of local legal cultural practices that have grown up in each district and are now very resistant to change. An alternative characterization is that they are the techniques of bankruptcy administration that have evolved at the local level without being compared for effectiveness to practices in other locations. They are the tools of the consumer bankruptcy system's trade. It should at least be possible to determine how the tools can be used most effectively and then make that information available to all who use them.

Finally, what is the most natural and useful specification of the unit of chapter 13 practice? One very attractive candidate is the operation of an individual standing trustee in concert with the judge or judges that the trustee operation serves. In important ways, this is where the action is, and where the benefits of best practices can be assessed and developed for wide dissemination.