

BANKRUPTCY BY THE NUMBERS

Measuring Performance in Chapter 13: Comparisons Across States

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The consumer provisions pending in the proposed reform legislation rely heavily on projected increases in chapter 13 filings as a vehicle to return large amounts of money to general unsecured creditors. At least four reasons are cited to believe that this reliance is misplaced: 1) the pool of chapter 7 debtors who would move into chapter 13 don't have the capacity to repay at the levels reform proponents hope for; 2) even if current chapter 7 debtors who were means-tested into chapter 13 performed at the level of the average current voluntary chapter 13 debtors (a very big if), they would not repay the amounts of unsecured debt that have been claimed as the fruits of means testing; 3) the various deductions and exclusions in the most recent draft bills set rather easy targets for pre-bankruptcy planning that will allow debtors to remain in chapter 7; and 4) anti-lien stripping language in the legislation significantly reduces the chapter 13 incentives for debtors who might otherwise select the chapter.^{2/}

Given the confidence placed on chapter 13 as an ambulance to rescue unsecured creditors, it is a good time to kick the tires. Perhaps the most compelling characteristic of chapter 13 is its regional variability along virtually every important dimension of the practice. Chapter 13 filing rates remain relatively stable over time at about 30 % of total filings. Completion rates hover nationally at about one-third of confirmed plans but this national average is a composite made up of extremely variable figures arising from different courtrooms, divisions, and districts. For example, between 1989-1999, Tennessee displayed chapter 13 consumer-case filing percentages ranging between 55.5% and 65.9%, while Massachusetts ranged between 12.5% and 17.6%.^{3/} Comparable variations can be found in almost every important part of the practice.

^{1/} All views expressed in this article are those of the authors, and do not necessarily represent the views of the Executive Office for United States Trustees.

^{2/} See previous issues of this column for documentation of points 1, 2, and 3, and also Culhane, Marianne B., and White, Michaela M., Taking the New Consumer Bankruptcy Model for a Test Drive: Means Testing Real Chapter 7 Debtors. 7 Amer. Bnkry. Inst. L.J. 27 (1999). The anti-lien stripping language is contained in a pending amendment to 11 U.S.C. §1325(a) that renders §506 inapplicable to §1325(a)(5) for a purchase money interest in an automobile acquired within five years before filing. See Hildebrand, Hank, Survey Shows Big Impact of Anti-Lienstripping Provision in S. 625, www.abiworld.org/legis/bills/99mayhildebrandsurvey.html (May 27, 1999). We recognize that it may be naive to assert that the intent of the legislation is tied necessarily to realizing high paybacks to general unsecured creditors. Taken all together, the credit counseling, means testing, debtor education, tax form reporting and auditing, anti-lien stripping, and extended chapter 13 plan duration provisions create a climate that could significantly reduce consumer filings—and this might satisfy the fundamental intention of the proponents.

^{3/} See <http://www.usdoj.gov/ust/statistics/stats-new/05/statistics5.htm>

Wide variation in chapter 13 practice was a cause of concern for the National Bankruptcy Reform Commission. A strongly dissenting minority didn't dispute the findings about variability but opposed the remedies proposed by the majority. The published dissents presaged the means-testing legislative proposals developed in the House and Senate during the last three years.⁴

Unless one takes the Panglossian position that consumer bankruptcy practice is everywhere a reflection of a system perfectly attuned to local needs and abilities, large variation in chapter 13 performance should be a matter of continuing policy concern. The silver lining in such variability is that districts and states can be viewed as laboratories in which practices are being tested against norms of chapter 13 success.⁵

This assumes that there is consensus on the norms for chapter 13 success. What are the appropriate measures of chapter 13 performance that allow districts to be compared with each other on all important dimensions of the practice? Here, with one example, we illustrate the problem, show a solution, and indicate that the solution raises its own questions and points to other problems.

Disbursements to creditors

It should be uncontroversial that one important norm of chapter 13 is to return as much money as is reasonable to creditors, including general unsecured creditors. The reports of the standing trustees to the Executive Office for U.S. Trustees (EOUST) contain meticulous records of these returns, so it is a fairly straightforward matter to aggregate the reports to arrive at a description of where the money comes from as the system now operates.⁶

For the twelve months ending September 30, 1998, standing trustees disbursed approximately \$2.9 billion, of which \$2.5 billion went to secured, priority, and unsecured creditors.⁷ Table 1 shows the five states with the largest disbursements, the five states with the lowest disbursements, and the six states in the middle of the distribution.

⁴ National Bankruptcy Review Commission, *BANKRUPTCY: THE NEXT TWENTY YEARS* (October 20, 1997). See especially pages 233-302 and the several dissenting reports on consumer bankruptcy. See also Braucher, Jean, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 *Amer. Bnkry. Inst.L.J.*165 (1997), and articles cited there.

⁵ As used here, “norm” means an ideal or aspired-to outcome. When quantified and put onto timetables, norms are expressed as goals.

⁶ The data here are based on all U.S. jurisdictions except for Alabama and North Carolina, which are not included in the U.S. Trustee Program. These are, however, very active chapter 13 jurisdictions.

⁷ Excluded from the \$2.5 billion is \$244 million to debtors attorneys through plans, \$127 million back to debtors after their cases terminated, \$2.8 million to the trustees as fees for unconfirmed filings, and \$1.7 million for miscellaneous noticing.

Table 1: Total Payments to All Creditors, by State, FY 98

HIGH FIVE		MIDDLE SIX		LOW FIVE	
		Minnesota-North Dakota^{8/}	\$33,319,502		
Tennessee	\$303,424,262	Puerto Rico-Virgin Islands^{9/}	\$28,884,891	Rhode Island	\$2,176,580
Texas	\$255,751,205	Massachusetts	\$27,921,556	Hawaii	\$1,903,131
Georgia	\$248,511,363	Kentucky	\$27,161,966	Vermont	\$1,400,215
California	\$231,785,864	Arizona	\$25,078,583	Alaska	\$1,262,719
Florida	\$119,442,740	Oregon	\$24,690,265	South Dakota	\$1,037,949

The table shows that the top five states contributed more than 45% of the \$2.5 billion disbursed for the entire country. The mean amount per state was slightly over \$52 million and the median, falling between the values for Massachusetts and Kentucky, was \$27.5 million. Thus Tennessee, with a population approximately equal to the population of Massachusetts, disbursed almost 11 times more money to chapter 13 creditors. Indeed, standing alone, Tennessee generated more than 10% of the national total disbursed to creditors.

Table 2 shows the top five, middle six, and bottom five states in terms of disbursements to unsecured creditors. The total nationwide disbursements to unsecureds was \$536.3 million, of which the top five states contributed 41%. Tennessee by itself contributed 10%. There is considerable overlap between Tables 1 and 2 at the top and bottom of the distribution.

^{8/} Administered jointly in FY98.

^{9/} Administered jointly in FY98.

Table 2: Total Payments to Unsecured Creditors, by State, FY 98

HIGH FIVE		MIDDLE SIX		LOW FIVE	
		South Carolina	\$8,419,155		
Tennessee	\$52,501,851	Massachusetts	\$7,083,781	Connecticut	\$608,483
California	\$49,400,612	Oklahoma	\$6,884,671	Rhode Island	\$580,737
Texas	\$43,726,556	Oregon	\$6,600,858	South Dakota	\$506,284
Georgia	\$41,037,131	Utah and Wyoming	\$5,666,161	Alaska	\$253,737
Ohio	\$31,446,399	Arkansas	\$5,577,167	Vermont	\$223,880

So far, then, we see that a small number of states contribute the lion's share of disbursements to creditors, and that payments to unsecured creditors, though not a large percentage of payments to all creditors, nevertheless track those payments reasonably closely.

Case volume and per case yield

Total disbursements to creditors reflect two variables: the number of cases paying during the year multiplied by the average payments per case: in other words, case volume times yield per case. Equivalently, per-case yield equals total disbursements divided by case volume. In the current systems of record keeping and reporting by courts, trustees, and U.S. Trustees, there is no publicly available national database in which payments per individual case and case duration are linked together with a case identifier. Because chapter 13 cases last for up to five years, the calculation of per-case yield requires an estimate of the appropriate case volume to use as a denominator.

Per case yield is an important measure of chapter 13 performance because it permits comparisons between states with large and small case volumes. This is an essential step because, otherwise, we are faced with a serious confound between case volume and state population. As shown in table 1, with the obvious exception of Tennessee, there is a strong relationship between the population of a state and the amount of chapter 13 money generated in the state. California, Texas, Florida, and Georgia rank 1,2,4, and 10, respectively, and Tennessee ranks 16. The ranks of the middle six states ranged from 13 to 28, and those of the bottom five from 42 to 49. The predominant mediating variable is chapter 13 volume. Table 3 shows the average number of chapter 13 filings during the years 1995-1999 for the high five, middle six, and low five states in the distribution. These numbers, calculated for all the states, served as the denominators for our calculations of per case yield.¹⁰

Table 3: Average Chapter 13 filings, 1995-1999

¹⁰ The rationale for using this number as the case volume denominator may be derived intuitively or algebraically. Readers who would like full account of the reasoning may contact us at gbermant@erols.com or Edward.Flynn@usdoj.gov.

HIGH FIVE		MIDDLE SIX		LOW FIVE	
		Utah+Wyoming	4,794		
Georgia	36,765	Arizona	4,396	New Hampshire	272
California	36,057	Minnesota+North Dakota	4,285	Rhode Island	239
Texas	29,913	Oregon	3,474	Vermont	123
Tennessee	28,645	Kentucky	3,406	Alaska	121
Florida	14,412	Oklahoma	3,293	South Dakota	110

Comparisons of Table 3 with Tables 1 and 2 show obvious connections between case volumes and total disbursements, particularly at the extremes of the distributions. But there are also some exceptions and details that, as is often the case in bankruptcy, may turn out to be more interesting than the rule.

Table 4 shows the top five, middle six, and bottom five states in terms of per case yields to all creditors. Table 5 displays the same rankings for per case yields to unsecured creditors.

Table 4: Per Case Yields to All Creditors, FY 98

HIGH FIVE		MIDDLE SIX		LOW FIVE	
		Indiana	\$7,874		
Michigan	\$12,010	Minnesota+North Dakota	\$7,776	District of Columbia	\$4,685
Washington	\$11,796	Illinois	\$7,514	Hawaii	\$5,086
Oklahoma	\$11,555	Louisiana	\$7,438	Maryland	\$4,496
Vermont	\$11,347	Kansas	\$7,427	New Jersey	\$4,080
West Virginia	\$11,233	Mississippi	\$7,408	Puerto Rico	\$2,942

It is quite clear that this measurement changes the cast of characters acting in the ranks of the top, bottom, and middle levels of chapter 13 performance. When the effects of case load per se are removed from the equation, both large and small states can be found at both ends of the distributions as well as in the middle. South Dakota, the state with the lowest case volume, reappears as the national leader. Tennessee, far and away the national leader in total disbursements, is in the middle of the pack on a per-case yield basis to unsecured creditors.

Table 5: Per Case Yields to Unsecured Creditors, FY 98

HIGH FIVE		MIDDLE SIX		LOW FIVE	
		Louisiana	\$1,859		
South Dakota	\$4,603	Idaho	\$1,841	Arkansas	\$919
Iowa	\$3,527	Tennessee	\$1,833	New Mexico	\$900
Ohio	\$2,992	Vermont	\$1,814	Pennsylvania	\$878
Kentucky	\$2,947	Missouri	\$1,814	New Jersey	\$763
West Virginia	\$2,882	Illinois	\$1,798	Connecticut	\$443

What does this mean?

Readers will have their own explanations for why some of these states are positioned as they are or how case volume and per case yield relate to each other. In respect to per case yield differences between jurisdictions^{11/}, numerous explanations are theoretically possible and, in the absence of definitive data, plausible a priori. Here, for example, are a few among the possible explanations that are generally compatible with the data but not necessarily with each other:

- ! Chapter 13 filers in states with very high per case yields have more disposable income than filers in states with low yields (likely to be false, given the demographics of the states in question);
- ! filers in states with high per case yields to unsecured creditors stay in their plans longer (see the next section for a test of this idea);
- ! states with high per case yields for all creditors but low yields for unsecured creditors reflect a prevalence of plans that are dismissed or converted shortly after mortgage and other secured and or priority debt arrearages are cured (more information is required to determine this);
- ! states with high per case yields for unsecured creditors reflect a practice of distributing unsecured payments across the entire duration of the plan, rather than beginning them after other expenses and debts have been paid (more information is required to determine this);
- ! states with high per case yields for all creditors and unsecured creditors reflect more active management by standing trustees, including, for example, paying ongoing mortgage payments either with or without a fee attached (more information required to determine this);
- ! some combination of the above factors.

Rates of plan completion

Beginning with their FY98 reports to the EOUST, standing trustees have reported the percentage of terminating cases that were completed, converted, dismissed, or granted a hardship discharge. This information allows an initial exploration of the relationship between the percentage of cases that complete

^{11/} Of course we recognize that several of the states shown in the tables, and others, comprise more than one judicial district. Differences between districts within states, divisions within districts, and courtrooms within divisions, are all sources of variations in chapter 13 practices, of which some are policy-relevant and will be the subject of subsequent research.

and the per case yield to unsecured creditors. Table 6 repeats the information in Table 5 and adds columns showing the percentages of cases terminated by completion during FY98. Table 7 transposes the logic of Table 6, showing the top five, middle six, and low five states in terms of percentage completions, and adds columns showing the related per case yields to unsecured creditors. The two tables together give a fuller representation of a possible relationship between case completion rate and per case yields to unsecured creditors.

Table 6 : Per Case Yields to Unsecured Creditors(% Successful Completions), FY 98

HIGH FIVE		MIDDLE SIX		LOW FIVE	
		Louisiana	\$1,859 (29%)		
South Dakota	\$4,603 (17%)	Idaho	\$1,841 (40%)	Arkansas	\$919 (31%)
Iowa	\$3,527 (41%)	Tennessee	\$1,833 (28%)	New Mexico	\$900 (30%)
Ohio	\$2,992 (43%)	Vermont	\$1,814 (34%)	Pennsylvania	\$878 (17%)
Kentucky	\$2,947 (37%)	Missouri	\$1,814 (25%)	New Jersey	\$763 (15%)
West Virginia	\$2,882 (47%)	Illinois	\$1,798 (29%)	Connecticut	\$443 (15%)

Table 7 : Percent Successful Completions (Per Case Yields to Unsecured Creditors), FY 98

HIGH FIVE		MIDDLE SIX		LOW FIVE	
		Minnesota-ND	29% (\$2,640)		
West Virginia	47% (\$2,882)	Louisiana	29% (\$1,859)	D.C.	16% (\$1,191)
Oregon	46% (\$1,900)	Washington	28% (\$2,635)	Connecticut	15% (\$443)
Nebraska	44% (\$2,288)	Tennessee	28% (\$1,833)	Alaska	15% (\$2,094)
Ohio	43% (\$2,992)	Nevada	27% (\$1,648)	New Jersey	15% (\$763)
Iowa	41% (\$3,527)	Oklahoma	27% (\$2,091)	Florida	11% (\$1,316)

For Table 6, the average completion rates for the top five, middle six, and bottom five per-case-yield states are 37%, 31%, and 22%, respectively. For Table 7, the average per case yield to unsecured creditors for the top five, middle six, and bottom five percent-successful-completion states are \$2,717, \$2,117, and \$1161, respectively. Note that there are large and small states spread throughout the tables, both in terms of overall population and in terms of chapter 13 case volume. The relationships shown in Tables 6 and 7 may be related to factors endogenous to the debtors, or to case management practices, or both. But they strongly support the conclusion that returns to unsecured creditors are higher when plans are completed.

In one sense, this is not a surprising result, given a prevailing view that unsecured creditors are served late in chapter 13 if at all. But if returns to unsecured creditors are a norm to be honored in chapter 13, and if case management procedures, beginning with plan construction and continuing with plan oversight, lead to higher plan completions, then the relationship demonstrated here counsels attorneys,

trustees, and courts to develop and practice such procedures. Given a national completion rate of only about one-third, it seems there is some distance yet to go.