

## **BANKRUPTCY BY THE NUMBERS**

### **Sources of Variability in Chapter 13 Performance**

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Lawyers, trustees and judges who work regularly with Chapter 13 consumer cases understand the chapter's operation very well. The norms and practices in each judicial district have been thoroughly rehearsed by these participants, who repeat their parts of the Chapter 13 process hundreds if not thousands of times each year. If one were to conduct surveys of satisfaction with the ways Chapter 13 operates in the more than 90 judicial districts, we believe that the operations would receive generally favorable report cards from the local participants.

From a national perspective, the most noticeable feature of Chapter 13 performance is its variability. There is great variance among districts in the percentage of consumer cases filed in chapter 13 and in confirmation requirements; returns to secured, priority, and unsecured creditors; successful completion rates; and associated trustee management practices. This variability has been observed for many years and has become the subject of critical commentary. The thrust of the criticism is that the fairness of the disparate Chapter 13 practices must be called into question.<sup>2/</sup>

There is therefore an apparent anomaly: Chapter 13 practices are favorably received in their individual venues, but disparities of practice among the venues create concern that in some locations the Chapter 13 practice does not operate as it should for the benefit of debtors, creditors, or both. Note that we are not referring to problems of dishonesty or serious mismanagement, which no one approves, but rather of variability of practices approved within the local bankruptcy communities.

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<sup>1/</sup>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.

<sup>2/</sup> See for example Whitford, William C., *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protections, and Consumer Protection in Consumer Bankruptcy*. 68 *Amer. Bankr. L.J.* 397 (1994); Whitford, William C., *Has the Time Come to Repeal Chapter 13?* 65 *Ind. L.J.* 85 (1989); Braucher, Jean, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 *Amer. Bnkr. L.J.* 501 (1993); Klee, Kenneth N., *Restructuring Individual Debts*, 71 *Amer. Bnkr. L.J.* 431 (1997); National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* (1997); Jones, Edith H. & Zywicki, Todd J., *It's Time for Means-Testing*, 1999 *B.Y.U.L.Rev.* 177 (1999).

The variability in chapter 13 practice invites the question whether some practices are preferable over others. It is in the spirit of seeking such “best practices” that we are reviewing the quantitative information available from the standing trustees, the courts, and other sources of information to see what they tell us about how Chapter 13 works throughout the country. This information will eventually require supplementation with questionnaires and other methods of inquiry.

In recent contributions to this column, we presented some early findings of our work.<sup>37</sup> We extend those findings here by focusing on a more detailed review of stability and change during fiscal years 1998 and 1999. We have two purposes: first, to provide an accurate account of Chapter 13 disbursements to secured, priority, and general unsecured creditors; and second, to demonstrate variability in performance at the state and judicial district level. We proceed by “drilling down” from information aggregated at the national level to information about separate judicial districts.

### **Disbursements Nationwide, Fiscal Years 1998 and 1999**

Table 1 summarizes the disbursements made by Chapter 13 standing trustees during fiscal years 1998 and 1999. Payments to creditors are divided into secured, priority, and general unsecured classes. The attorney fees reflect only those that were paid out through the plan; this can range from a small to a very large portion of the total fee for the lawyer’s service. The trustee percentage fees represent the costs of operating the trustee operations. The “Other” category includes, among other costs, noticing and clerks’ office fees paid by trustees through the Chapter 13 trust fund.

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<sup>37</sup> Bermant, Gordon, and Flynn, Ed., *Stability and Change in Chapter 13 Activity, 1990-1999*, Amer. Bnkry. Inst. J., November, 2000; Bermant, Gordon, and Flynn, Ed., *Measuring Performance in Chapter 13: Comparisons Across States*, Amer. Bnkry. Inst. J., July/August, 2000.

**TABLE 1**  
**Standing Chapter 13 Trustee Disbursements, Fiscal Years 1999 and 1998**  
**(Reflecting the audited annual reports of the Chapter 13 Standing Trustees)**

PAYMENTS	YEAR	
	1999	1998
SECURED DEBT	\$ 1,882,324,713	\$ 1,700,257,785
PRIORITY DEBT	\$ 296,810,792	\$ 275,462,797
UNSECURED DEBT	\$ 644,577,239	\$ 536,423,390
TOTAL TO CREDITORS	\$ 2,823,712,744	\$ 2,512,143,972
ATTORNEY FEES IN PLANS	\$ 248,321,304	\$ 244,281,688
TRUSTEE PERCENTAGE FEE	\$ 156,565,304	\$ 137,873,593
OTHER	\$ 28,967,241	\$ 23,846,077
<b>GRAND TOTAL DISBURSEMENTS</b>	<b>\$ 3,257,566,593</b>	<b>\$ 2,918,145,330</b>

There was an overall increase in disbursements of 11.6% from 1998 to 1999. Creditors, excluding debtors' attorneys taking part of their fees through the plan, received 86% of all disbursements in 1998 and 87% in 1999. Debtors' attorneys took 8.4% in 1998 and 7.6% in 1999. We do not know what percentage of total debtor attorneys' fees are represented by the amounts paid through plans, though we believe it varies considerably from district to district. These fees are paid at the front end of the plan as an administrative expense.

The trustee percentage fees, representing approximately what it costs to run the Chapter 13 standing trustee operations, accounted for 4.7% of disbursements in 1998 and 4.8% in 1999.

To a first approximation, then, Chapter 13 is a \$3 billion operation that pays 86 to 87 cents on every dollar collected to its primary clients, the creditor body. The secured creditors receive approximately two-thirds of all creditor disbursements, and the general unsecured creditors receive between 21% and 23% of them. The remainder goes to the category of creditor classed as priority unsecured. There are good reasons to believe, however, that this category is treated differently in different districts, so the exact extent of priority debt and repayment is not completely clear at the national level.<sup>4</sup>

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<sup>4</sup> Readers who compare Table 1 with Table 1 in our November 2000 article will notice some differences between values reported for 1998 and 1999 in the two tables. The numbers in the present article reflect final amendments to the annual reports that arrived after the earlier article had been published

**Statewide disbursements, 1998 and 1999**

A large percentage of chapter 13 disbursements arise from a small number of states. Table 2 shows that the same top 12 states, out of 48,<sup>5j</sup> contributed 70% of all disbursements in both 1998 and 1999. The consistency of this performance is rather striking. Note also that the top six states contributed 50% of the total. At the other end of the scale, 19 states contributed the last 5% of the total in 1998, and 17 did so in 1999.

**Table 2: Cumulated Percent of Disbursements to Creditors, by State<sup>6j</sup>**

1999		1998	
STATE	CUMULATED PERCENT TO CREDITORS	STATE	CUMULATED PERCENT TO CREDITORS
Tennessee	12%	Tennessee	12%
Texas	22%	Texas	22%
Georgia	32%	Georgia	32%
California	41%	California	41%
Florida	46%	Florida	46%
Ohio	50%	Ohio	51%
Michigan	55%	Michigan	55%
Illinois	59%	Illinois	59%
New York	62%	New York	62%
Louisiana	64%	Louisiana	65%
Virginia	67%	Washington	68%
Washington	70%	Virginia	70%

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<sup>5j</sup> The count of 48 states arises as follows: Of the 50 states, Alabama and North Carolina are excluded because they are not administered by the U.S. Trustee Program; the District of Columbia and Puerto Rico are added; and, for these purposes, North Dakota is administered with Minnesota and Wyoming is administered with Utah.

<sup>6j</sup> Note that returns to creditors include ongoing mortgage payments in some districts but not in others. The numbers across districts are therefore not strictly comparable.

### **District-wide disbursements, 1998 and 1999**

We can drill down further to learn how disbursements are distributed across judicial districts. What sources of variation might we expect to find in the exploration? Note that each of the 12 states in Table 2 has at least two districts (OH, MI, VA, and WA), some have three districts (TN, GA, FL, IL, LA) and some have four (TX, CA, NY). In general, districts within a state will differ in terms of population size, rural-urban mix, average income, other demographic variables, and the bankruptcy law and local rules specific to the federal district. If there is more than one judicial division within the district, performance differences in Chapter 13 may be even further refined. In particular, we may expect that the bankruptcy court, the Chapter 13 standing trustees, and the local bankruptcy bar in each location will have developed a clear appreciation of what is expected from each participant in the process. This set of mutual understandings, which may be largely tacit, is often referred to as “local legal culture.”<sup>7</sup> On the other hand, districts will share state law (including the state’s decisions regarding exemptions in bankruptcy), the bankruptcy law of the federal circuit to which the state belongs, and whatever traditions of practice have been established through the state bar.

There is no theory that successfully relates these and other factors into a series of predictions about consistency of Chapter 13 operations among districts within a state. Some factors are out of the control of the bankruptcy system while others are subject to judicial and administrative improvements. When we drill down into the district performances of states that are large Chapter 13 producers, we find variability. All of Tennessee’s districts are in the top 25% of districts ranked by total returns to creditors. Three Texas districts also fall in the top 25%. On the other hand, though New York is in the top 25% percent of states, no New York district is in the top 25% of districts. The other high-production states fall between these extremes. Such variability within states, which approximates the amount of variability among states, is additional evidence, if more were needed, that state exemption provisions are not powerful causes of behavior in consumer bankruptcy.

Our goal is to determine what practices are most conducive to achieving the norms inherent in the bankruptcy code (for example, confirmation of feasible plans tailored to the debtor’s individual circumstances that consummate and return as much to unsecured creditors as the debtor can reasonably afford). One step in that direction is to develop accurate measurements of *average disbursements per case* in addition to the current practice of collecting *total disbursements* within a state, district, or trusteeship. By using average disbursements, we can

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<sup>7</sup> See for example Sullivan, Teresa A., Warren, Elizabeth, and Westbrook, Jay Lawrence, *As We Forgive Our Debtors* (1989) at 246-252. It is probably wise, when encountering the term local legal culture, to take it as an admission of ignorance rather than an explanation.

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control for differences in population size and filing rates across districts.

In an earlier article we showed how this measurement distinguishes among states in somewhat surprising fashion.<sup>8</sup> Chapter 13 debtors in several states return large amounts to creditors on the average, but there are not enough of them to make much of a total contribution to the totals returned nationwide. Looking further into the circumstances that produce these high rates of return is one promising approach to identifying best practices in Chapter 13 case administration.

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<sup>8</sup> Bermant and Flynn, *Measuring Performance in Chapter 13*, supra n. 2.