March 7, 2012

Chapter 11 Triage: Diagnosing A Debtor's Prospects for Success

Anne Lawton

Available at: https://works.bepress.com/anne_lawton/1/
In 2005, Congress enacted a number of provisions aimed at improving success rates for Chapter 11 small business debtors. The available empirical data, albeit limited in scope, showed startlingly low rates of plan confirmation. Conventional wisdom attributed the plan confirmation problem to the high failure rate of the Chapter 11 small business debtor.

This Article presents the results of a large empirical study of Chapter 11 cases filed in 2004, the year before the small business amendments. The study examines the following questions. First, are confirmation rates in Chapter 11 low, and how do small debtors fare in terms of confirming and consummating plans? Second, does the Code’s definition of a small business debtor accurately capture the category of debtors for which plan confirmation is particularly challenging?

The data in the Article are based on a random sample of approximately 800 debtors drawn from the entire population of Chapter 11 cases filed in 2004. Cases from 89 judicial districts are represented in the sample.

The study’s findings demonstrate that Congress was indeed correct: plan confirmation rates are low in Chapter 11 (though not as dismal as believed), and the low rate is largely attributable to the small Chapter 11 debtor. The results of the study also show that all Chapter 11 debtors are not created equal in terms of their prospects for plan success. Cases in which an official committee of unsecured creditors is formed are associated with statistically higher odds of plan confirmation than are cases without committees. Debtors with liabilities in excess of $2 million also confirm plans at significantly higher rates statistically than do debtors with liabilities of $2 million or less.

Interestingly enough, the definition adopted as part of the 2005 amendments includes creditor committee formation and debtor liability size as two criteria for sorting small from non-small business debtors. Thus, Congress correctly identified two of the factors that are significantly associated with increased rates of plan success in Chapter 11, although the legislative history suggests that happenstance more than insight accounts for the result.

The Article concludes with a discussion of the limitations of the research findings, including a cautionary note that the statistical associations found in the study do not necessarily equate with a finding that committee formation or liability size cause increased plan confirmation rates. The conclusion also makes suggestions for further empirical work, mindful of the need to balance the benefits of reform against its not insignificant costs.
CHAPTER 11 TRIAGE: DIAGNOSING A DEBTOR’S PROSPECTS FOR SUCCESS

by

Anne Lawton

I. INTRODUCTION

II. THE EVOLUTION OF A DEFINITION

III. THE STUDY’S DESIGN
   A. Constructing the Population of Cases
   B. The Random Sample
   C. Obtaining the Data
   D. Defining Success

IV. THE FINDINGS: COMMITTEE FORMATION, LIABILITY SIZE AND PLAN SUCCESS
   A. Plan Confirmation as “Success”
   B. Unequal Success Rates
      1. The Official Committee of Unsecured Creditors
      2. Size of Debtor Liabilities
         (a) Success Rates using the $2 Million Liability Limit
            i. Non-contingent, liquidated liabilities
            ii. Total liabilities
            iii. Summary of Findings: $2M Limit
         (b) Success Rates using the $5 Million Liability Limit
            i. Non-contingent, liquidated liabilities
            ii. Total liabilities
            iii. Summary of Findings: $5M Limit
         (c) Where to draw the line - $2 or $5 Million?
            i. Non-contingent, liquidated liabilities
            ii. Total Liabilities
            iii. Summary of Findings: Multiple Comparisons

V. CONCLUSION: LESSONS AND LIMITATIONS
INDEX OF CHARTS, FIGURES AND TABLES

Charts
Chart 1 – Success Rates: Non-Contingent, Liquidated Liabilities 33
Chart 2 – Success Rates: Total Liabilities 36

Figures
Figure 1: Committees and Plan Confirmation 19
Figure 2: Non-Contingent and Liquidated Liabilities at the $2M Limit and Plan Confirmation 23
Figure 3: Total Liabilities at the $2M Limit and Plan Confirmation 25
Figure 4: Non-Contingent, Liquidated Liabilities at the $5M Limit and Plan Confirmation 28
Figure 5: Total Liabilities at the $5M Limit and Plan Confirmation 30
Figure 6: Non-Contingent, Liquidated Debt and Success Across Three Liability Ranges 32
Figure 7: Total Liabilities and Success Across Three Liability Ranges 35

Tables
Table I: Committees and Initial Success Rates 20
Table II: Committees and Ultimate Success Rates 20
Table III: Committees and Success-on-Confirmation Rates 20
Table IV: Non-contingent and liquidated liabilities at the $2M limit 24
Table V: Total liabilities at the $2M limit 26
Table VI: Non-contingent and liquidated liabilities at the $5M limit 29
Table VII: Total liabilities at the $5M Limit 29
Table VIII: Non-contingent, liquidated debt - $2M or $5M Limit? 33
Table IX: Total liabilities - $2M or $5M Limit? 36
CHAPTER 11 TRIAGE: DIAGNOSING A DEBTOR’S PROSPECTS FOR SUCCESS

by

Anne Lawton*

I. INTRODUCTION

For more than two decades, judges and commentators have debated whether Chapter 11 is working.1 After enactment of the Bankruptcy Code in 1978, concerns soon emerged about Chapter 11. The available empirical evidence, while limited in scope, showed startlingly low rates of plan confirmation, ranging from 6.5% to 17.5%.2 As time passed, conventional wisdom had it that the small business debtor accounted for these low rates of plan confirmation.3 Thus, in 1994, Congress amended the Bankruptcy Code to provide a small business election, designed, in part, to simplify certain aspects of the plan confirmation process. Simplification meant lower cost, which supposedly would translate into higher confirmation rates.

Congress, with an eye to reform, also created the National Bankruptcy Review Commission to study various “issues and problems relating” to the Code’s operation.4 The Commission issued its report and recommendations in 1997. The Commission’s Working Group on Small Business, Partnerships and Single-Asset Real Estate proposed ten changes to existing Chapter 11, all aimed at decreasing obstacles to plan confirmation and increasing oversight of small Chapter 11 debtors. Eight years later, with the enactment of the Bankruptcy Abuse

---

*Associate Professor, Michigan State University College of Law. Copyright 2012. This project would not have been possible without the help of a number of people. First, my thanks to the chief bankruptcy judges who granted me waivers of PACER fees so that I could access the documents necessary to undertake this research study. Second, I owe a debt of gratitude to Scott Nagele (MSU College of Law) who created the database for this project and helped me work through numerous iterations of the data collection instrument used to code the data collected from the cases in this study’s random sample. Third, I wish to thank Wenning Feng, a doctoral student in the Department of Statistics and Probability at Michigan State University, whose statistical work and explanations of statistical concepts enriched the analysis in this Article. I also wish to acknowledge my colleagues, Barbara Bean, Mae Kuykendall, and Barbara O’Brien, who offered helpful suggestions and encouragement as this project unfolded. Last, but certainly not least, I want to thank my research assistants Lyndsay Anderson, Brooke Cartwright, Lisa Dingman, Stephanie Gagerie, Elizabeth Lammhier, Christina Mayfield, Corey Nelson, Sam Olsen, and Kristen Polanski, whose work in coding and inputting the data for this study proved invaluable.

1 See, e.g., Michael Bradley and Michael Rosenzweig, The Untenable Case for Chapter 11, 101 YALE L.J. 1043, 1089 (arguing for the repeal of Chapter 11 based on authors’ conclusion that there are “no economic benefits from court-supervised reorganizations”); Lynn LoPucki, 1993 WIS. L. REV. 729, 730 (1993) (claiming that it is “clear that something is very wrong with Chapter 11”); The Honorable A. Thomas Small, If You Fix It, They Will Come – A New Playing Field for Small Business Bankruptcies, 79 AM. BANKR. L.J. 981, 983 (2005) (proposing a small business Chapter 11 to address the cost and complexity of Chapter 11 for small business debtors); Elizabeth Warren and Jay Lawrence Westbrook, The Success of Chapter 11: A Challenge to the Critics, 107 MICH. L. REV. 603 (claiming that Chapter 11 works well and that bankruptcy courts prior to the 2005 amendments to the Code “were doing a very good job of resolving cases quickly”); Elizabeth Warren, The Untenable Case for Repeal of Chapter 11, 102 YALE J. ON REG. 437, 478-79 (1992) (arguing that Bradley and Rosenzweig’s data were unsound, thereby calling into serious question their call for repeal of Chapter 11).


3 See generally id.

Prevention and Consumer Protection Act, those proposals made their way, in substantially unchanged form, into current law.

While debate exists about what constitutes success in Chapter 11, many agree – Congress and the Commission included - that a central purpose of Chapter 11 is the rehabilitation, through the Code’s plan process, of financially flagging enterprises. In this Article, then, I use plan confirmation and consummation as the measure of Chapter 11 success. Using data from a random sample drawn from the entire population of Chapter 11 cases filed in 2004, I examine the relationship between two statutory factors – the formation of an unsecured creditors’ committee and the size of a debtor’s liabilities – and rates of plan confirmation and consummation. I selected committee formation and debtor liability size because Congress used these characteristics as part of its definition of a small business debtor.

As the study’s results reveal, the rate of plan confirmation is not nearly as dismal as that suggested by the Commission. Nonetheless, it is indeed quite low – only about a third of debtors that file for relief under Chapter 11 ever confirm a plan. Moreover, Congress and the Commission were right: small debtors are the reason for the low confirmation rate in Chapter 11.

All debtors are not created equal, however, in terms of their prospects for success in Chapter 11. First, cases in which the United States Trustee or Bankruptcy Administrator appointed an official committee of unsecured creditors had significantly higher rates of plan confirmation and consummation than did cases with no committee. Second, debtors with aggregate liabilities in excess of $2 million also had significantly higher rates of plan confirmation and consummation than did debtors with liabilities of $2 million or less. Thus, two of the criteria found in the Code’s current definition of a small business debtor predict, at a statistically significant level, plan confirmation rates. The legislative history, however, suggests that happenstance not insight accounts for this result.

I begin the Article, in Part II, by tracing the evolution of the Code’s current small business debtor definition. Part III of the Article then describes the population of cases from which the study’s random sample is drawn, the process of obtaining the data that form the basis of this study, and the study’s basic design. In Part IV, I discuss the results of the statistical analysis conducted on the random sample data. Part IV.A presents the findings on overall plan proposal, confirmation, and consummation rates. In Part IV.B, I present the study’s findings that creditor committee formation and debtor liability size are significantly associated with greater odds of plan confirmation and consummation. I conclude in Part V with a brief explanation of the limitations of the study’s findings, including a cautionary note about misconstruing the study’s results to find causal links where they may not exist. I also make suggestions for further empirical work, mindful of the need to balance the benefits of reform against its not insignificant costs.
II. THE EVOLUTION OF A DEFINITION

In 1978, Congress enacted the Bankruptcy Reform Act, which consolidated Chapters X, XI, and XII of the Bankruptcy Act (the “Act”) into a single reorganization Chapter - Chapter 11.\(^5\)

Under the Act, Chapters X and XI were the main Chapters that businesses used to reorganize.\(^6\) Chapter X was intended for publicly held firms and Chapter XI for smaller, privately held enterprises.\(^7\) The problem, however, was that nothing in the Bankruptcy Act restricted a publicly held firm from filing under Chapter XI.\(^8\) Large publicly held companies chose Chapter XI, in part, because it allowed management to retain control during the reorganization process.\(^9\)

Uncertainty over which Chapter applied to the reorganization of large publicly held firms spawned “pointless and wasteful litigation” with the “patient . . . dy[ing] while the doctors argue[d] over which operating table he should be on.”\(^10\)

The Code, with its single business reorganization Chapter, succeeded in “eliminate[ing] wasteful litigation” about Chapter choice.\(^11\) But, concerns soon emerged about the expense and time associated with Chapter 11’s plan confirmation process.\(^12\) Judges and commentators wondered whether Chapter 11 suited the needs of smaller debtors. “[T]he costs [of Chapter 11] are too high. It is also true that Chapter 11 contains too many obstacles, and the reorganization of small businesses under Chapter 11 is simply too difficult for many businesses.”\(^13\)

Congress responded by creating a small business election in the Bankruptcy Reform Act of 1994 (“1994 Amendments”).\(^14\) The election allowed small business debtors to expedite the plan confirmation process by consolidating into a single hearing the heretofore separate

---

5 Ralph A. Peeples, Staying In: Chapter 11, Close Corporations and The Absolute Priority Rule, 63 AM. BANKR. L. J. 65, 66 (1989). Chapter X was designed for large corporate reorganizations, Chapter XI for unsecured debt adjustment by corporations, individuals, and partnerships, and Chapter XII for secured debt adjustment by individuals and partnerships. See H.R. DOC. NO. 93-137, at 23 (1973), reprinted in B-C COLLIER ON BANKRUPTCY APP. Pt. 4(c) [hereinafter 1973 Commission Report].


7 Id.

8 See id. (stating that the design of the Act was “flawed somewhat by the failure to include a definition of a ‘public company’”).

9 See Peeples, supra note 5, at 67 (footnote omitted) (noting that “[b]ecause a Chapter X proceeding required the appointment of a trustee, surrender of control by existing management usually followed”).


12 See Karen Gross and Patricia Redmond, In Defense of Debtor Exclusivity: Assessing four of the 1994 Amendments to the Bankruptcy Code, 69 AM. BANKR. L. J. 287, 288 n. 2 (1995) (listing articles that discuss concerns about the cost and delay associated with Chapter 11); LoPucki, supra note 1, at 730-31 (footnotes omitted) (noting that “something is very wrong with Chapter 11 . . . the burgeoning expense, the excessive debtor leverage, the poor performance of the reorganizing companies, and the high rate of recidivism”).

13 Small, supra note 1, at 981; see also The Honorable Leif M. Clark, Chapter 11 – Does One Size Fit All?, 4 AM. BANKR. INST. L. REV. 167, 176 (1996) (noting that the 1994 amendments to the Code “reflect[ed] a perceived need to ‘tailor’ Chapter 11 to fit certain kinds of situations, a tacit acknowledgment that, after all, perhaps one size does not fit all”); Peeples, supra note 5, at 66 (discussing the “wisdom of developing a separate set of rules for close corporations”).

disclosure statement and plan confirmation hearings. The savings in time and expense of a consolidated hearing were offset, however, by the requirement that debtors electing small business treatment file a plan within 160 days of the petition. As a consequence, few debtors chose the small business election.

The 1994 Amendments defined a small business as

a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed $2,000,000.

Unfortunately, there is little legislative history for the 1994 Amendments that explains why Congress made the choices that it did. The House Report offers only the following one-sentence rationale for amending the Code to provide for the election. “This section amends title 11 to expedite the process by which small businesses may reorganize under title 11.” There is no other discussion and no explanation of why Congress chose $2 million as the liability limit for the new small business debtor definition.

Earlier legislative efforts to create special rules for small business debtors also shed no light on why Congress selected $2 million as the liability limit in the 1994 Amendments. In both 1992 and 1993, legislation was introduced in the Senate to create a new Chapter 10 for small business debtors. The 1992 bill established the liability limit for small business debtors at $1,500,000; in 1993, it was set at 2,500,000. In neither case, however, did the Senate Reports explain the reason for the liability limits selected. It seems that Congress split the difference in the 1994 Amendments; the $2 million liability limit lies midway between the $1.5 and 2.5 million figures proposed in 1992 and 1993, respectively.

In 1997, the National Bankruptcy Review Commission, which Congress created with the 1994 Amendments, issued its report and recommendations for reform of the Bankruptcy Code. The Commission’s report included a set of proposals aimed at “strengthen[ing] the 1994 ‘small business’ amendments to reduce the cost and delay in small business Chapter 11 cases.” The Commission defined a small business debtor as

---

16 See id.
17 See id. Approximately 23% of the debtors in the random sample (186 of 799) identified themselves as small business debtors on the petition.
22 Commission Report, supra note 2, at 609.
any debtor in a case under Chapter 11 (including any group of affiliated debtors) which has aggregate noncontingent, liquidated secured and unsecured debts as of the petition date or order for relief of five million dollars ($5,000,000) or less and any single asset real estate debtor as defined in 11 U.S.C. §101(51B) regardless of the amount of such debtor’s liabilities.  

While the Commission found “the lack of data available to evaluate the Chapter 11 system [ ] particularly troubling,” it proposed a $5 million liability limit, rather than the statutory $2 million limit, based on liability data drawn from five judicial districts. The Commission selected the $5 million cutoff after concluding that in cases with debt levels below $5 million “creditor participation . . . so often tends to be absent that imposition of the higher standards for small business cases is necessary.”

The purpose of sorting debtors in this manner was to identify those debtors at risk for failure in Chapter 11. In other words, the small business definition served an initial triaging function, identifying debtors with reduced prospects for success in Chapter 11. But, the Commission recognized that not all small debtors face the same difficulties in Chapter 11. Thus, the Commission proposed two categories of reform measures, premised on its conclusion that there are two kinds of problem Chapter 11 debtors. The Commission recommended mandatory reporting requirements and increased oversight of small debtors to shepherd more quickly out of bankruptcy those debtors with no genuine prospect for reorganization. At the same time, with an eye to improving confirmation rates for those debtors with reasonable prospects for rehabilitation, the Commission proposed more flexible rules for disclosure statements and plans as a way to cut costs.

Eight years later, with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), Congress adopted, largely in the form proposed, the Commission’s small business recommendations. Congress, however, did not adopt the Commission’s definition of a small business debtor, instead retaining the $2 million liability limit established in the 1994 Amendments while also making the small business definition longer and more complex.

The term “small business debtor” –

---

23 Id. at 618.
24 Id. at 308.
25 See id. at 630-32. The text of the Commission’s report says that the data is drawn from two districts, but the averages provided in the total liabilities and gross income tables are based on data from five districts. The footnotes to the average column for both tables state that data from the district of Delaware, although listed on the table, is not included in the averages.
26 Id. at 632.
27 See id. at 638-39.
28 See id. at 635-36.
29 See Carlson and Hayes, supra note 15, at 647.
(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the order for relief in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,000,000 (excluding debt owed to 1 or more affiliates or insiders).\textsuperscript{30}

This definition of a small business debtor varies in several significant respects from that of the Commission. First, Congress kept the “commercial or business” activity limitation from the 1994 Amendments in the Code’s definition of small business.\textsuperscript{31} The Commission’s recommendations included a definition entitled “Defining the term ‘Small Business,’”\textsuperscript{32} Nonetheless, the actual definition applied to “any debtor in a case under Chapter 11.”\textsuperscript{33} Thus, the Commission’s definition encompassed both business and non-business debtors, while the Congressional definition applied only to those Chapter 11 debtors engaged in business.\textsuperscript{34}

Second, Congress retained the language from the 1994 Amendments that excluded from the definition of small businesses “a person whose primary activity is the business of owning or operating real property or activities incidental thereto.”\textsuperscript{35} The Commission also excluded debtors engaged in real property activities from small business coverage. But, the Commission’s definition cross referenced the Code’s definition of single asset real estate debtor.\textsuperscript{36} Congress did not define what constitutes the “primary activity” of “owning or operating real property”, and BAPCPA’s legislative history provides no insight on how a debtor whose “primary activity is the business of owning or operating real property” differs from a single asset real estate debtor.\textsuperscript{37}


\textsuperscript{31} See BAPCPA House Report, supra note 30, at 146.

\textsuperscript{32} Commission Report, supra note 2, at 618.

\textsuperscript{33} Id.

\textsuperscript{34} See infra notes 47 and 51, and accompanying text regarding who may file for relief under Chapter 11 of the Bankruptcy Code.

\textsuperscript{35} BAPCPA House Report, supra note 30, at 146.


\textsuperscript{37} In fact, the legislative history is confusing. The House Report, in explaining BAPCPA’s amendments to the definition of “single asset real estate”, provides that the amendments “make[] these debtors subject to the bill’s small business reforms.” BAPCPA’s House Report, supra note 30, at 19-20. Yet, BAPCPA’s definition of a small
Third, Congress retained the qualification – also present in the Commission’s definition – that only non-contingent, liquidated liabilities count toward the $2 million liability limit for a small business debtor. But, Congress added language requiring that debts to affiliates and insiders also not be included in the $2 million liability cutoff.38 This additional limitation on computing aggregate liabilities first appeared in bankruptcy reform bills proposed after the issuance of the Commission’s 1997 report,39 but nothing in the legislative history explains why.

Fourth, Congress reverted to the $2 million liability limit first established in the 1994 Amendments. “Reverted” is the appropriate word, because the initial post-Commission reform legislation introduced in Congress adopted the Commission’s $5 million recommendation.40 In successive pieces of proposed legislation, however, Congress dropped, in $1 million increments, the liability limit from $5 to $2 million.41 A 2002 conference report contains the following two sentences about the reduction of the liability limit from $3 to $2 million. “This monetary definition is a compromise. The House and Senate antecedents specified a $3 million definitional limit.”42 Apart from these two sentences, the legislative history, once again, is silent on Congress’s decision to reject the Commission’s $5 million recommendation.

The committee-formation proviso is the final difference between the Code’s current small business definition and the Commission’s recommendation. The Code excludes from the small business reforms any case in which the United States Trustee has appointed an active and representative official committee of unsecured creditors. Creditor committees first appeared in small business debtor definitions in bankruptcy reform legislation introduced in 1998, in the aftermath of the release of the Commission’s report. The proposed legislation, however, defined a small business debtor as one with not without an active and representative official creditors’ committee.43 The sponsors of reform legislation soon changed course, excluding from the definition of a small business debtor any case with an active and representative committee.44 It is unclear why Congress did so. But, a one-paragraph discussion of the small business reforms in BAPCPA’s legislative history suggests that Congress considered the absence of creditor participation and, hence, oversight in smaller Chapter 11 cases a problem, which necessitated
close monitoring by the Office of the United States Trustee in order to “weed out” those small debtors with no real prospects for reorganization.\textsuperscript{45}

It is unclear why Congress deviated from the Commission’s small business debtor definition or why it altered the definition originally put in place by the 1994 Amendments. The legislative history offers few insights and no empirical evidence to support the choices that Congress made. One thing, however, is clear. The Code’s definition is more complex than the Commission’s, thereby making the initial triaging decision more difficult.

\section{The Study’s Design}
\subsection{Constructing the Population of Cases}

The population for this study is all Chapter 11 cases filed between January 1, 2004, and December 31, 2004.\textsuperscript{46} The population includes all cases filed by any individual or artificial entity eligible to file for relief under Chapter 11 of the Bankruptcy Code.\textsuperscript{47} I created the population of cases by conducting district-by-district searches on PACER\textsuperscript{48} in all 94 U.S. judicial districts.\textsuperscript{49} The population includes judicial districts in all 50 states, as well as the districts of Guam, Puerto Rico, the Northern Mariana Islands, and the Virgin Islands.\textsuperscript{50}

There are several things to note about the case population. First, it includes all Chapter 11 debtors, not simply artificial entities engaged in business. Individuals may file for relief under Chapter 11,\textsuperscript{51} and the population includes individual debtors, even those who checked the “Consumer/Non-Business” box on the petition to describe the nature of their debts. Individuals with primarily consumer debts do not qualify as small business debtors under the Bankruptcy Code; the definition requires a person to be engaged in “commercial or business activities.”\textsuperscript{52}

\footnotesize
\begin{itemize}
\item \textsuperscript{45} \textit{See} H. REP. No. 109-31, pt. 1, at 19 (2005).
\item \textsuperscript{46} This study examines only cases filed in calendar year 2004. The next part of the study, which examines data obtained from calendar year 2007 cases, currently is underway.
\item \textsuperscript{47} \textit{See} 11 U.S.C. §109(d) (2012) (listing those eligible to file under Chapter 11).
\item \textsuperscript{48} PACER, which stands for Public Access to Court Electronic Records, is an electronic case service operated by the Administrative Office of the U.S. Courts that allows users, for a per-page fee, to search for and download dockets and documents filed in any federal court case, including bankruptcy cases. This project would not have been possible without the PACER fee waivers I obtained from the chief bankruptcy judges in most of the 94 judicial districts.
\item \textsuperscript{49} One of the challenges of conducting Chapter 11 is that there are no searchable “databases” of all Chapter 11 filings. Professor Lynn LoPucki has created a database of large publicly held firms available at \url{http://lopucki.law.ucla.edu/}. No searchable database of both large and small Chapter 11 filings exists. \textit{See generally}, Katherine Porter, \textit{The Potential and Peril of BAPCPA for Empirical Research}, 71 Mo. L. REV. 963 (2006) (discussing the challenges of empirical bankruptcy research). Therefore, in order to obtain the entire population of Chapter 11 cases filed in 2004, I and my research assistants conducted four distinct searches within each judicial district: (1) cases in Chapter 11 on the search date; (2) cases that had converted from Chapter 11 to Chapter 7; (3) cases that had converted from Chapter 11 to Chapter 12; and (4) cases that had converted from Chapter 11 to Chapter 13.
\item \textsuperscript{50} No Chapter 11 cases were filed in 2004 in either Guam or the Northern Mariana Islands.
\item \textsuperscript{51} \textit{See} \textit{Toibb v. Radloff}, 501 U.S. 157, 166 (1991) (holding that “[t]he plain language of the Bankruptcy Code permits individual debtors not engaged in business to file for relief under Chapter 11”).
\item \textsuperscript{52} 11 U.S.C §101(51D)(A) (2012).
\end{itemize}
But, debtors “commonly misdesignate consumer debt as business debt and vice versa.”53 It was not unusual in the random sample to find a mismatch between the information on the debtor’s petition and that on the schedules and statement of financial affairs.54 Some debtors checked consumer debts on their petition but nonetheless really were filing as a business.55 I avoided the difficulty of accurately categorizing debtors as engaged or not engaged in business, by including all individual debtors in the population of cases. Thus, unless discussing the Code’s or Commission’s definition, I use the term “small debtor” to report the findings in this Article.

Second, the district-by-district searches yielded a total of 10,384 Chapter 11 cases filed during calendar year 2004. According to the Administrative Office of the U.S. Courts (“AO”), however, there were only 10,132 Chapter 11 filings in 2004. Why the difference? At least two reasons exist for the larger number of cases in my initial population of 2004 cases than is reported by the AO. First, my initial search results included duplicate and serial Chapter 11 filings by the same debtor.56 Second, in certain districts, such as the Central District of California, intra-district transfer of cases was a not uncommon phenomenon. For example, Huerta Design Associates filed for relief under Chapter 11 in July of 2004,57 but when the case was transferred intra-district in June of 2005 it was assigned a new case number.58 The case came up twice, sporting different case numbers, in my initial search results. After making these adjustments, 10,163 cases remained.59

54 When a debtor files for bankruptcy, it must file schedules of its assets and liabilities, as well as a statement of its financial affairs. See 11 U.S.C. §521(a)(1)(B)(i), (iii). Official Form 6 contains the various schedules while Official Form 7 is the Statement of Financial Affairs. All forms are available on the website for the United States Courts at http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx
55 See, e.g., Voluntary Petition, In re Witherspoon, No. 04-12437 (Bankr. S.D. Ala. April 27, 2004) (Docket No. 1) (individual debtor checked “Consumer/Non-Business” for “Nature of Debts” but did business as lawn and garden center, and scheduled debts were largely those of the business); Voluntary Petition, In re Doyle, No. 04-00524 (Bankr. D. D.C. March 30, 2004) (Docket No. 1) (petition filed in name of individual debtor who checked “Consumer/Non-Business” for “Nature of Debts”, but also checked “Individual” and “Partnership” for “Type of Debtor” and elected Chapter 11 small business treatment); Voluntary Petition, In Re Vitello’s, Inc., No. 04-38148 (Bankr. E.D. Va. Aug. 27, 2004) (Docket No. 1) (corporate debtor checked “Consumer/Non-Business” for “Nature of Debts” but also checked “Corporation” for “Type of Debtor”).
58 In re Huerta Design Assocs., No. 05-13854 (Bankr. C.D. Cal. June 1, 2005).
59 Even after adjusting for duplicate and serial filers, as well as intra-district transfers, my population included 10,163 cases, or 31 more Chapter 11 cases than indicated by the AO’s figures. There was no pattern, however, to the district-by-district results. In 45 districts, my search results produced more case filings than those reported by the AO, in 19 districts the search results match those reported by the AO, and in 30 districts I found fewer cases than reported by the AO. The discrepancy in some districts may be due to a failure to eliminate all duplicate or serial filings, but the variation across districts in number of case filings when compared with the AO’s figures suggests some unexplained anomaly associated with the search functions on PACER. In fact, I found two additional cases after drawing the random sample that had to be eliminated since none involved a 2004 Chapter 11 case. See infra note 66.
Finally, before drawing the random sample, I made one additional adjustment to the population data. In 2004, the Footstar debtors, 2529 affiliated entities, filed for relief under Chapter 11 in the Southern District of New York. The debtors’ cases were both jointly administered and substantively consolidated\(^{60}\), and the bankruptcy court confirmed a single joint plan covering all 2529 debtors.\(^ {61}\) Therefore, I eliminated 2528 cases (all but *In re Footstar, Inc.*,\(^ {62}\) the lead case) from the final population of cases. Otherwise, the presence of 2528 additional debtors in the population would have skewed the results because the Footstar debtors filed for bankruptcy on the same day, filed their schedules on a consolidated basis,\(^ {63}\) and proposed and confirmed the same plan on the same date. Given the size of the Footstar bankruptcy, multiple Footstar debtors would have ended up in the random sample had all 2528 eliminated cases been included in the population of cases. Rather than eliminate multiple Footstar debtors after drawing the random sample, I did so beforehand. The Footstar cases, however, are represented in the random sample as *In re Footstar*, the lead case, was drawn as part of that sample.

B. The Random Sample

The Footstar adjustment left 7635 Chapter 11 cases in the population.\(^ {64}\) Each case remaining in the adjusted population was assigned a random number using a random number generator. The initial random sample contained 878 cases, which is 11.5% of the population of 7635 Chapter 11 cases. The initial sample included cases from 89 of the 92 judicial districts in which debtors filed Chapter 11 cases in 2004.\(^ {65}\)

Of these 878 cases, 79 were eliminated from the random sample. Of the 79 cases, 3 were mistakenly included, two due to PACER errors, in the Chapter 11 population described above in Part A.\(^ {66}\) Three other cases are still open, as of January 2012, with no dispositive action taken, e.g., conversion, dismissal, or plan confirmation and, thus, also were removed from the sample.\(^ {67}\)


\(^{62}\) No. 04-22350 (Bankr. S.D. N.Y. March 2, 2004).

\(^{63}\) Three consolidated sets of schedules were filed based on the company’s divisions: (1) Corporate; (2) Athletic; and (3) Meldisco. See, e.g., Corporate Debtors’ Schedules, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D. N.Y. June 15, 2004) (Docket No. 684).

\(^{64}\) The original population contained 10,163 cases, and 2528 were eliminated, thereby leaving 7635 cases.

\(^{65}\) There were no bankruptcy filings in either the District of Guam or the District of the Northern Mariana Islands. The random number generator did not “select” any cases for the random sample for the following three judicial districts: (1) the Middle District of Alabama, (2) the District of North Dakota, or (3) the District of the Virgin Islands.

\(^{66}\) *See In re Grady*, No. 04-14883 (Bankr. E.D. Ark. April 22, 2004) (Chapter 13 case incorrectly included by PACER in its search results for Chapter 11 cases converted to Chapter 7); *In re Nelson*, No. 04-09867 (Bankr. N.D. Ill. March 12, 2004) (first of two filings by same debtor that was not culled from the population prior to random
I eliminated the other 73 cases to maintain the independence of the data and to avoid skewing the study’s results. In some cases, the debtors were members of a jointly administered case in which the court confirmed a joint plan of reorganization or liquidation providing for substantive consolidation68 of the debtors for plan voting and/or claim distribution purposes.69 In others, the eliminated debtors were members of a jointly administered case in which petition filing dates, document filing dates, and/or dispositive actions, such as confirmation or dismissal, tracked those of an affiliated debtor already included in the random sample.70 This study examines the relationship of two statutory factors – the formation of an official unsecured creditors’ committee and the size of a debtor’s liabilities - to Chapter 11 success, as measured by plan confirmation rates. Including multiple debtors from jointly administered cases would have skewed the study’s results, because the affiliated debtors operated as if they were a single entity, at least for purposes of plan proposal and confirmation, or other dispositive action, such as dismissal or conversion to Chapter 7.

Eliminating these 79 cases left 799 cases in the random sample, or 10.5% of the Footstar-adjusted original population of Chapter 11 cases. The eliminations did not alter the number of districts represented. The final sample includes cases from 89 of 94 judicial districts.71

C. Obtaining the Data

For each case in the random sample, I and my research assistants collected the docket and documents necessary to complete a data collection instrument (“DCI”) that I had designed for this project. We coded information from the petition, schedules, plans, and dispositive orders on

---

67 See In re RFI Realty, Inc., No. 04-10486 (Bankr. D. Ariz. June 15, 2004); In re Cheryl A. Reagan, No. 04-77590 (Bankr. Ark. W.D. Nov. 11, 2004); In re Andrew N. LaVigne, No. 04-64078 (Bankr. N.Y. N.D. June 4, 2004). As of the writing of this Article, 38 other cases are administratively open, but in all 38 the court has confirmed a plan, or has dismissed or converted the case.

68 The Federal Rules of Bankruptcy Procedure permit a court to enter an order directing the joint administration, or procedural consolidation, of affiliated debtors. Fed. R. Bankr. P. 1015(b). In a jointly administered case, docketing occurs on the docket for the “lead” case, but the affiliated debtors’ assets and liabilities are not combined. Thus, creditors have recourse only to the assets of the debtor for which they are a creditor, not to the combined assets of all affiliated debtors in the jointly administered case. There is no specific Bankruptcy Code section or rule providing for substantive case consolidation. With substantive consolidation, the “assets and liabilities of different legal entities [are] consolidated and dealt with as if the assets were held by and the liabilities were owed by a single legal entity.” 2-105 COLLIER ON BANKRUPTCY ¶105.09 (2011).

69 See, e.g., Order Confirming Debtors’ Second Amended and Restated Joint Plan under Chapter 11 of the Bankruptcy Code as Modified ¶37 at 16, In re International Wire Group, Inc., No 04-11991 (Bankr. S.D. N.Y. Aug. 25, 2004) (Docket No. 291) (holding that “each and every Claim filed or to be filed in the Chapter 11 cases shall be deemed filed against the deemed consolidated Debtors and shall be deemed one Claim against, and obligation of, the deemed consolidated Debtors”).


71 See supra note 65.
the DCI, and then input the coded DCIs into a database. With the exception of eight judicial districts, we found the necessary documents for the DCIs on PACER. In these eight districts, however, access to case documents on PACER was limited or simply unavailable for bankruptcy cases filed in calendar year 2004. For these eight districts, most documents were obtained, for a fee, either directly from the judicial district, or in most cases, from the regional office for the National Archives and Records Administration.

D. Defining Success

What makes for a successful Chapter 11 case? A traditional measure of success is the emergence of a debtor from Chapter 11 with a feasible confirmed plan.

I tested three variations of this basic definition of “success”. The first is initial success, defined as plan confirmation. The second is ultimate success, which takes account of plan failure. A case that is ultimately successful is one for which the bankruptcy court did not convert or dismiss the case post-confirmation, and the debtor did not subsequently re-file for bankruptcy under any Chapter of the Bankruptcy Code. The third and final is success on confirmation, which measures rates of success once confirmation occurs. The difference between ultimate success and success on confirmation lies in the sample of cases tested. Ultimate success measures rates of confirmation using the entire population of cases, while success on confirmation measures rates of ultimate success using the sub-sample of confirmed-plan cases.

I then measured initial and ultimate success, and success-on-confirmation, rates using two basic criteria selected by Congress or the Commission for defining a small business debtor.

---

72 My gratitude to Scott Nagele of MSU College of Law, who constructed the database and worked with me on refining, through numerous iterations, the data collection instrument (DCI).

73 Access to documents on PACER is limited for bankruptcy cases filed in 2004 for the following judicial districts: (1) Northern District of Alabama; (2) Southern District of Florida; (3) Middle District of Georgia; (4) Eastern District of Michigan; (5) Southern District of Mississippi; (6) Eastern District of Tennessee; (7) Middle District of Tennessee; and (8) Western District of Virginia. Access to documents on PACER also is limited for the District of the Virgin Islands, but no cases from that district were selected by the random number generator for inclusion in the random sample.

74 I want to thank Danny W. Armstrong, the Clerk of Court for the Eastern District of Tennessee, who provided me with the necessary documents free of charge. I also wish to acknowledge the invaluable assistance that Kristy Cobb of the Northern District of Alabama and Sheila Skinner-White of the Southern District of Florida provided to me in locating documents for numerous cases.

75 See, e.g., Warren & Westbrook, supra note 1, at 611 (2009) (noting that “plan confirmation is surely the central measure of success in Chapter 11”).

76 The study does not separate plans of reorganization from plans of liquidation. Thus, all success rates in this Article involve confirmation of any plan, whether one of liquidation, partial liquidation and partial reorganization, or reorganization. See 11 U.S.C. §1129(a)(11) (2012) (authorizing a liquidating plan).

77 Ultimate success rates may be understated in this study. Unless there was some indication to the contrary in the debtor’s initial bankruptcy filing, I and my research assistants searched for subsequent bankruptcy filings only in the judicial district in which the debtor originally filed its Chapter 11 case. Searching for subsequent filings in 93 other judicial districts for 800 cases was simply not feasible. See 28 U.S.C. §1408(b) (2012) (allowing a debtor to file for bankruptcy in any judicial district in which there is pending a bankruptcy case by an affiliated debtor).
The 2-proportion Z-test was used for all statistical analyses performed. The first criterion tested was formation of an official committee of unsecured creditors, which Congress added to the small business debtor definition in 2005. The random sample for this test consisted of 799 cases.

The second was the size of the debtor’s liabilities. As explained more fully infra, the random sample for liability testing consisted of 783 cases. Cases for committee formation fell into one of two categories – a committee or no committee. But, debtor liabilities ranged from the very small, e.g., under $50,000, to the enormous, e.g., over $100 million. While I had specific liability figures for the vast majority of cases in the random sample, in approximately 7% of the cases I had to rely on liability-range data from the debtor’s petition. Thus, in order to test the relationship between debtor liabilities and plan success rates, I established the following three liability ranges, using the statutory $2 million and Commission $5 million figures as liability limits for the ranges: (1) liabilities at or below $2 million (“≤$2M”); (2) liabilities over $2 million but not in excess of $5 million ($2 to $5M”); and (3) liabilities in excess of $5 million (“>$5M”).

Both Congress and the Commission defined a small business debtor by reference to the debtor’s aggregate non-contingent, liquidated liabilities (“NCL liabilities”). Therefore, when creating the first set of liability data, I deducted any debt identified as contingent or unliquidated from the liability totals provided on the debtor’s Summary of Schedules. Based on these figures, I then placed each debtor into one of the three liability ranges described above.

Incentives exist, however, for some debtors to under-report their liabilities by listing them as contingent or unliquidated. To account for the possibility that strategic scheduling of liabilities might understate actual total liabilities, I created a second liability data set using the same 783 cases. Debtor liabilities in this second data set included all liabilities, whether contingent or not, and unliquidated or not (“total liabilities”). Once again, debtors were categorized by liability range, using the three ranges described above.

---

78 Wenning Feng, a doctoral student in the Department of Statistics and Probability at Michigan State University, conducted all the statistical tests for this Article.
79 See infra Part IV.B.2.
80 See infra notes 98-101 and accompanying text.
81 For ease of description, I use the phrase between $2 and $5 million. Technically, however, the range covers firms with liabilities in excess of $2 million but less than or equal to $5 million.
82 In 38 cases, I categorized the debtor on the basis of liability ranges on the petition. I did not have access to the schedules and the debtor’s identification of contingent or unliquidated debts. But, in 35 of these cases, the debtor’s petition information identified the debtor as falling under the $2 million liability limit; therefore, while any deductions for contingent or unliquidated debt would have lowered the debtor’s overall liabilities it would not have changed the fact that the debtor’s liabilities did not exceed $2 million. In the remaining three cases, the debtor checked “more than $100 million” in liabilities on the petition. While it is possible that these debtors’ schedules might identify $95 million or more of their liabilities as contingent or unliquidated, thereby changing their liability range. I assumed that such a radical decrease in liabilities was unlikely.
83 Most, although not all, debtors filed Official Form B6, which provides summary data for the debtor’s assets, both real and personal, as well as its liabilities, both secured and unsecured. The official bankruptcy forms are on the United States Courts’ website. See supra note 54.
84 See infra notes 102-106 and accompanying text.
IV. THE FINDINGS: COMMITTEE FORMATION, LIABILITY SIZE AND PLAN SUCCESS

A. Plan Confirmation as “Success”

The debtor (or some other entity) proposed a plan in 391 of 799 cases in the random sample, yielding a plan proposal rate of 48.94%. The bankruptcy court confirmed a plan in 270 of those 391 cases for a confirmation rate, once plan proposal occurred, of 69.05%. While that number “looks good”, it is important to keep in mind that in more than half of the cases in the random sample no plan was ever proposed. Thus, plan confirmation occurred in only 270 of the 799 cases in the random sample, for an initial success rate of only 33.79%. If plan confirmation is the measure of success, then almost two-thirds of the Chapter 11 cases in the sample were not successful.

The ultimate success rate was even lower. In 38 of the 270 cases with confirmed plans, the court either dismissed or converted the case, or the debtor re-filed for bankruptcy post-confirmation. In total, 14% of the confirmed-plan cases failed. These plan failures lowered the ultimate success rate to 29.04% from an initial success rate of 33.79%. By this measure, then, more than 70% of the Chapter 11 cases were not successes.

This rough metric, however, masked important differences in success rates when committee formation and liability size were taken into account.

B. Unequal Success Rates

Chapter 11 debtors are not created equal in terms of their prospects for plan confirmation and consummation. Creditor committee formation and the size of a debtor’s liabilities significantly predicted both initial and ultimate rates of success. The effects on confirmation rates obtained regardless of whether liabilities included or excluded contingent and unliquidated debt.

1. The Official Committee of Unsecured Creditors

The Bankruptcy Code provides that “the United States trustee shall appoint a committee of creditors holding unsecured claims.” The committee normally is comprised of those creditors, willing to serve, that hold the seven largest unsecured claims against the debtor.

---

85 The Bankruptcy Code provides the debtor with an exclusive period during which only it may propose a plan. See 11 U.S.C. §1121(b) (2012). After the expiration of the debtor’s exclusivity period, “any party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or an indenture trustee, may file a plan.” Id. at §1121(c).
86 In Part IV.B.2, the sample is comprised of 783 cases with 268 confirmed plans, for an initial plan confirmation rate of 34.23%. See infra notes 98-101 and accompanying text for an explanation of the change in sample size.
87 This figure is consistent with that found by Professors Warren and Westbrook in their 2009 published study of Chapter 11 cases. See Warren and Westbrook, supra note 1, at 615 (finding that even their “naïve metric” of Chapter 11 success showed confirmation rates of 30.3% and 33.4% for their 1994 and 2002 samples, respectively).
88 There were 232 confirmed-plan cases after accounting for post-confirmation conversions and dismissals, as well as subsequent bankruptcy filings, out of a sample of 799 cases.
While the language of the Code is mandatory, stating that the United States trustee “shall” appoint a committee, “creditors typically are unwilling to serve.” In fact, a committee was formed in only 18.15%, or 145 of the 799, cases in the random sample. See Figure 1, Column I. The reason for such a low rate of committee formation is that in most cases an insufficient number of creditors were willing to serve.

As Columns (B) of Tables I and II illustrate, both the initial and ultimate success rates differ markedly for committee and no-committee cases. The initial success rate of 62.07% for cases with an official committee is more than twice as high as the initial success rate of 27.52% for no-committee cases. See Table I, Column (B). The story is the same for ultimate success rates. For cases without an official creditors’ committee, 27 cases failed post-confirmation, leaving 153 cases and an ultimate success rate of 23.39%. By comparison, 11 of the 90 cases with committees failed post-confirmation, for an ultimate success rate - 54.48% - that is more than double that for no-committee cases. See Table II, Column (B).

These differences in initial and ultimate success rates for committee and no-committee cases are statistically significant. The p-value in both cases is very small – less than 0.000001. See Tables I & II, Column (C). That means that both the initial and ultimate success rates for cases with committees are significantly higher statistically than the initial and ultimate success rates for cases without committees.

Committees normally disband after plan confirmation; therefore, they cannot serve an oversight function post-confirmation. But, is it possible that a committee’s participation in plan negotiations positively affects the feasibility of any plan confirmed by the court, thereby influencing ultimate success rates for confirmed-plan cases? The short answer is “no.” The 87.78% success-on-confirmation rate for committee cases is only slightly higher than 85%,

---

91 Small, supra note 1, at 983.
92 The 145 cases consist of only those cases in which the docket, in the header or as a separate docket entry, or a case document, e.g., a disclosure statement, §341 meeting minutes, or a motion to dismiss or convert, affirmatively indicated the formation of a committee. In some jurisdictions, the United States Trustee placed on the docket a statement of inability to form a creditors’ committee. But, in a number of jurisdictions there was no mention at all of either the formation or non-formation of an official committee. Given the important role that the official unsecured creditors’ committee plays in a Chapter 11 case, I assumed that the failure to find any evidence of committee appointment on the docket or case documents meant that no committee was formed.
93 The United States trustee does not have oversight responsibilities for the bankruptcy courts in the judicial districts of Alabama and North Carolina. Instead, bankruptcy administrators perform those functions. The figures quoted in the text, however, include committees formed in any case in the random sample, regardless of whether the United States trustee or a bankruptcy administrator made the appointment. In none of the committee cases did the bankruptcy court find that the committee was “not sufficiently active [or] representative to provide effective oversight of the debtor.” 11 U.S.C. §101(51D)(A) (2012).
95 A p-value “usually expresses the probability that results at least as extreme as those obtained in a sample were due to chance.” Sarah Boslaugh & Paul Andrew Watters, Statistics in a Nutshell 145 (2008).
which is the rate for no-committee cases. See Table III, Column (B). Column (C) of Table III shows that the p-value exceeds 0.05. In other words, there is no statistically significant difference between the success-on-confirmation rates of cases with appointed committees and cases without such committees.

In conclusion, while committees existed in only a small minority of the Chapter 11 cases in the random sample, cases with a committee confirmed and performed plans at a statistically significant higher rate than did cases without a creditors’ committee. The data, however, show no statistically significant difference in success-on-confirmation rates for committee and no-committee cases.

**Figure 1: Committees and Plan Confirmation**

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Committee = 654</td>
<td>Confirmed = 180</td>
<td>Ultimate Success = 153</td>
</tr>
<tr>
<td></td>
<td>Not confirmed = 474</td>
<td>Ultimately not successful = 27 cases</td>
</tr>
<tr>
<td>Cases = 799</td>
<td></td>
<td>Not successful = 474 cases</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Committee = 145</td>
<td>Confirmed = 90</td>
<td>Ultimate Success = 79</td>
</tr>
<tr>
<td></td>
<td>Not confirmed = 55</td>
<td>Ultimately not successful = 11</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not successful = 55</td>
</tr>
</tbody>
</table>

Ultimate not successful = 27 cases

Ultimate Success = 153

Ultimate Success = 79

Ultimate not successful = 11
### Table I: Committees and Initial Success Rates

<table>
<thead>
<tr>
<th></th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Number of Cases = 799</strong></td>
<td></td>
<td></td>
<td><strong>H₀: equal rates</strong></td>
</tr>
<tr>
<td><strong>No-committee cases = 654</strong></td>
<td></td>
<td></td>
<td><strong>H₁: cte. confirmation rate &gt; no-cte. confirmation rate</strong></td>
</tr>
<tr>
<td>Number Confirmed</td>
<td>180</td>
<td>27.52%</td>
<td>p-value = 8.92 x 10⁻¹⁶ &lt; 0.000001*</td>
</tr>
<tr>
<td><strong>Committee cases = 145</strong></td>
<td>90</td>
<td>62.07%</td>
<td><strong>Statistically significant higher rate of confirmation for committee cases</strong></td>
</tr>
</tbody>
</table>

*0.05 significance level

### Table II: Committees and Ultimate Success Rates

<table>
<thead>
<tr>
<th></th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Number of Cases = 799</strong></td>
<td></td>
<td></td>
<td><strong>H₀: equal ultimate success</strong></td>
</tr>
<tr>
<td><strong>No-committee cases = 654</strong></td>
<td></td>
<td></td>
<td><strong>H₁: cte. ultimate success &gt; no-cte. ultimate success</strong></td>
</tr>
<tr>
<td>Number Confirmed</td>
<td>153</td>
<td>23.39%</td>
<td>p-value = 4.32 x 10⁻¹⁴ &lt; 0.000001*</td>
</tr>
<tr>
<td><strong>Committee cases = 145</strong></td>
<td>79</td>
<td>54.48%</td>
<td><strong>Statistically significant higher rate of ultimate success for committee cases</strong></td>
</tr>
</tbody>
</table>

*0.05 significance level

### Table III: Committees and Success-on-Confirmation Rates

<table>
<thead>
<tr>
<th></th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total Number of Cases = 270</strong></td>
<td></td>
<td></td>
<td><strong>H₀: equal ultimate success</strong></td>
</tr>
<tr>
<td><strong>No-committee confirmed-plan cases = 180</strong></td>
<td></td>
<td></td>
<td><strong>H₁: cte. ultimate success &gt; no-cte. ultimate success</strong></td>
</tr>
<tr>
<td>Number of Success-on-Confirmation</td>
<td>153</td>
<td>85.00%</td>
<td>p-value = 0.268 &gt; 0.05*</td>
</tr>
<tr>
<td><strong>Committee confirmed-plan cases = 90</strong></td>
<td>79</td>
<td>87.78</td>
<td><strong>No statistical difference</strong></td>
</tr>
</tbody>
</table>

*0.05 significance level

---

96. H₀ is the null hypothesis and H₁ is the alternative hypothesis. The null hypothesis is that the initial success rates for committee and no-committee cases are equal. The alternative hypothesis is that the initial success rate for committee cases is higher, at a statistically significant level, than that for no-committee cases. The p-value is less than 0.05 – in fact, it is less than 0.000001 - which means that the null hypothesis – confirmation rates for committee and no-committee cases are equal – is rejected.

97. The term “success percentage”, used in Tables I, II and III, means the same thing as the statistical term “sample proportion.”
2. **Size of Debtor Liabilities**

In order to test the relationship between liability totals and confirmation rates, I obtained liability information from the debtor’s schedules. Bankruptcy debtors must file schedules of assets and liabilities, the latter of which provide detail about a debtor’s secured and unsecured debt. In 54 cases, however, the debtor either filed no schedules, which then precipitated the debtor’s dismissal from bankruptcy, or I was unable to access the schedules on PACER or otherwise obtain them. I then turned to the petition, which requires the debtor to check a box indicating the range, e.g., $1,000,001 to $10 million, of its estimated debts. In 38 of the 54 no-schedule cases, the debtor checked a box, e.g., “$500,001 to $1,000,000” or “More than $100 million”, which isolated the liability range to which the debtor’s case belonged. In the remaining 16 cases, I was unable to accurately identify that range. I eliminated these 16 cases, which comprised 2% of the original 799-case sample, thereby leaving 783 cases in the debtor liability sample.

In the process of coding cases, I noticed that some debtors listed a significant portion of their debt as contingent or unliquidated. There is a strategic reason why a debtor may do so in a Chapter 11 case. The Federal Rules of Bankruptcy Procedure provide that the debtor’s scheduled liabilities “constitute prima facie evidence of the validity and amount of the claims of creditors unless they are scheduled as disputed, contingent, or unliquidated.” Creditors whose claims are not identified as disputed, contingent or unliquidated need not file a proof of claim in the debtor’s bankruptcy case. Scheduling a creditor’s claim but listing it as contingent or unliquidated, for example, forces the creditor to file a proof of claim or risk losing the right to be

---

100 See, e.g., In re Slade’s of West Virginia, Inc., No. 04-00393 (Bankr. Va. W.D. March 3, 2004). In the fall of 2011, I twice made contact with the bankruptcy court for the Western District of Virginia. On both occasions court personnel informed me that they could not access case documents from 2004 due to building renovations occurring at the court.
101 In three cases, the debtor checked the $1 to $10 million range but also identified itself on the petition as a small business debtor. See, e.g., Voluntary Petition, In re Body Tech Park City, Inc., No. 04-36156 (Bankr. D. Utah Oct. 5, 2004) (Docket No. 1) (checking $1 to $10 million liability range but checking “Debtor is a small business defined in 11 U.S.C. §101”). In 2004, a debtor with more than $2 million in liabilities did not qualify as a small business debtor. Hence, a debtor that checked either of the “small business” boxes on the voluntary petition should have had no more than $2 million in aggregate liabilities.
103 For a discussion of Chapter 11 debtor strategy in scheduling liabilities, see Lawton and Oswald, Scary Stories and the Limited Liability Polluter in Chapter 11, 65 WASH. & LEE L. REV. 451, 521 (2008). Of course, under-reporting of liabilities post-BAPCPA may subject the debtor to treatment as a small business debtor.
105 Id. at 3003(c)(2).
“treated as a creditor with respect to such claim for the purposes of voting [on] and distribution” under the debtor’s plan.\textsuperscript{106}

To account for the possibility that strategic scheduling of liabilities might understate actual total liabilities, the liability data were tested twice – once using the debtor’s NCL liabilities and again using the debtor’s total liabilities. In Part (a) below, I present the results of testing the liability data using the $2 million liability cutoff that existed in 2004 for small business debtors. Part (b) provides the results of testing the liability data against the Commission’s recommended $5 million liability limit. Finally, in Part (c), I present the results of multiple comparison testing across the three liability ranges: (1) ≤$2M; (2) $2 to $5M; and (3) >$5M.

(a) \textit{Success Rates using the $2 Million Liability Limit}

i. \textit{Non-contingent, liquidated liabilities}

Debtors with NCL liabilities in excess of $2 million comprised only 28.35% of the cases in the adjusted 783-case random sample. Nonetheless, they accounted for approximately 40% of the 268 cases in which the debtor confirmed and successfully consummated a plan.\textsuperscript{107}

A comparison of Columns (A) and (B) of Table IV reveals a marked difference in the initial and ultimate success rates for debtors above and below the $2 million liability cutoff. In addition, the p-values shown in Column (D) for both initial and ultimate success rates are less than 0.05. Therefore, debtors with NCL liabilities in excess of $2 million have initial and ultimate success rates that are significantly higher statistically than debtors whose liabilities are $2 million or less.

As with the committee data, liability size did not significantly predict success-on-confirmation rates. Columns (A) and (B) of Table IV show a success-on-confirmation rate of 83.85% for debtors with ≤$2M in NCL liabilities compared with a rate of 88.79% for debtors whose NCL liabilities exceed $2 million. In addition, the p-value in Column (D) is greater than 0.05, which means that once a debtor confirms a plan, the size of the debtor’s NCL liabilities does not affect, at a statistically significant level, the probability that the debtor’s plan will succeed.

\textsuperscript{106} \textit{Id.}
\textsuperscript{107} Two cases with confirmed plans were removed with the elimination of 16 cases from the random sample. See supra notes 98-101 and accompanying text. Of the 268 cases with confirmed plans, 39.93% or 107 had NCL liabilities in excess of $2 million. See Figure 2, Column II. Of the 230 cases with ultimately successful plans, 95 or 41.30% had NCL liabilities over $2 million. See Figure 2, Column III.
Figure 2: Non-Contingent and Liquidated Liabilities at the $2M Limit and Plan Confirmation

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cases</strong> = 783</td>
<td><strong>Confirmed</strong> = 161</td>
<td>Ultimate Success = 135</td>
</tr>
<tr>
<td>Liabilities ≤ $2M = 561 cases</td>
<td>Not confirmed = 400</td>
<td>Ultimately not successful = 26</td>
</tr>
<tr>
<td>Liabilities &gt; $2M = 222 cases</td>
<td>Confirmed = 107</td>
<td>Ultimate Success = 95</td>
</tr>
<tr>
<td></td>
<td>Not confirmed = 115</td>
<td>Ultimately not successful = 12</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not successful = 115</td>
</tr>
</tbody>
</table>
Table IV: Non-contingent and liquidated liabilities at the $2M limit

<table>
<thead>
<tr>
<th></th>
<th>(A)</th>
<th>(B)</th>
<th>Hypotheses108</th>
<th>Results*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initial Success</strong></td>
<td>161/561 = 28.70%</td>
<td>107/222 = 48.20%</td>
<td>H0: equal initial rates of success</td>
<td>p-value = 1.093 x 10^{-7} &lt; 0.05</td>
</tr>
<tr>
<td><em>Total Cases = 783</em></td>
<td>135/561 = 24.06%</td>
<td>95/222 = 42.79%</td>
<td>H0: equal ultimate rates of success</td>
<td>p-value = 1.077 x 10^{-7} &lt; 0.05</td>
</tr>
<tr>
<td><strong>Ultimate Success</strong></td>
<td>135/561 = 24.06%</td>
<td>95/222 = 42.79%</td>
<td>H0: equal ultimate rates of success</td>
<td>p-value = 0.25678 &gt; 0.05</td>
</tr>
<tr>
<td><em>Total Cases = 783</em></td>
<td>135/561 = 24.06%</td>
<td>95/222 = 42.79%</td>
<td>H0: equal ultimate rates of success</td>
<td>p-value = 0.25678 &gt; 0.05</td>
</tr>
<tr>
<td><strong>Success on confirmation</strong></td>
<td>135/161 = 83.85%</td>
<td>95/107 = 88.79%</td>
<td>H0: equal ultimate rates of success for confirmed-plan cases</td>
<td>No statistical difference in success-on-confirmation rates</td>
</tr>
<tr>
<td><em>Total Cases = 268</em></td>
<td>135/161 = 83.85%</td>
<td>95/107 = 88.79%</td>
<td>H0: equal ultimate rates of success for confirmed-plan cases</td>
<td>No statistical difference in success-on-confirmation rates</td>
</tr>
</tbody>
</table>

*All results shown at 0.05 significance level

## ii. Total liabilities

Counting contingent and unliquidated debts in the liability figures reduced by 32 the number of debtors with ≤$2M in liabilities and increased by 32 the number of debtors with liabilities in excess of $2 million. See Figure 3, Column I. Debtors with total liabilities in excess of $2 million comprised only 32.44% of the adjusted random sample, but accounted for 46.27% of the initially confirmed plans and 48.70% of the successfully consummated plans.109

Columns (A) and (B) of Table V reveal a considerable difference in both initial and ultimate success rates for debtors with total liabilities above and below $2 million. The results of the statistical analysis, provided in Column (D), demonstrate that debtors with total liabilities in excess of $2 million have both initial and ultimate success rates that are significantly different statistically from debtors with total liabilities of $2 million or less.

Finally, unlike the results for NCL liabilities, there is a statistically significant difference in the success-on-confirmation rates when comparing firms with total liabilities above and below $2 million. The results of the 2-proportion Z-test, provided in Column (D) of Table V, demonstrate that the rate of success on confirmation for debtors with total liabilities in excess of $2 million is significantly higher statistically than is the comparable rate for debtors with ≤$2M in total liabilities.

108 For an explanation of the null and alternative hypotheses, see supra note 96.

109 Of the 268 cases with confirmed plans, 124 or 46.27% had total liabilities in excess of $2 million. See Figure 3, Column II. Of the 230 successful plans, 112 or 48.70% were filed by debtors with more than $2 million in total liabilities. See Figure 3, Column III.
Figure 3: Total Liabilities at the $2M Limit and Plan Confirmation

<table>
<thead>
<tr>
<th>Liabilities ≤ $2M = 529 cases</th>
<th>Column II</th>
<th>Column III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confirmed = 144</td>
<td></td>
<td>Ultimate Success = 118</td>
</tr>
<tr>
<td>Not confirmed = 385</td>
<td></td>
<td>Ultimately not successful = 26</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities &gt; $2M = 254 cases</th>
<th>Column II</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Confirmed = 124</td>
<td></td>
<td>Ultimate Success = 112</td>
</tr>
<tr>
<td>Not confirmed = 130</td>
<td></td>
<td>Ultimately not successful = 12</td>
</tr>
</tbody>
</table>

Cases = 783
Table V: Total liabilities at the $2M limit

<table>
<thead>
<tr>
<th>Liabilities ≤$2M</th>
<th>Liabilities&gt;$2M</th>
<th>Hypotheses</th>
<th>Results*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Initial Success</strong></td>
<td><strong>Total Cases = 783</strong></td>
<td>144/529 = 27.22%</td>
<td>124/254 = 48.82%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities ≤$2M</th>
<th>Liabilities&gt;$2M</th>
<th>Hypotheses</th>
<th>Results*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ultimate Success</strong></td>
<td><strong>Total Cases = 783</strong></td>
<td>118/529 = 22.31%</td>
<td>112/254 = 44.09%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities ≤$2M</th>
<th>Liabilities&gt;$2M</th>
<th>Hypotheses</th>
<th>Results*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ultimate Success for confirmed-plan cases</strong></td>
<td><strong>Total Cases = 268</strong></td>
<td>118/144 = 81.94%</td>
<td>112/124 = 90.32%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*All results shown at 0.05 significance level

iii. Summary of Findings: $2M Limit

The statistical results provided in Tables IV and V demonstrate that both initial and ultimate success rates are significantly higher for debtors with liabilities in excess of $2 million. These results obtain regardless of whether debtors’ liabilities include or exclude contingent and unliquidated debt. The nature of the debtor’s liabilities matters only when evaluating success-on-confirmation rates. There is no statistical difference in success-on-confirmation rates when using NCL liabilities. But, the success-on-confirmation rate for debtors with total liabilities in excess of $2 million is significantly higher statistically than the comparable rate for debtors with ≤$2M in total liabilities.

(b) Success Rates using the $5 Million Liability Limit

i. Non-contingent, liquidated liabilities

Debtors with NCL liabilities in excess of $5 million comprised only 15.96% of the cases in the adjusted 783-case random sample. Nonetheless, they accounted for approximately 24% of confirmed and also ultimately successful plans.¹¹⁰

The pattern of initial and ultimate success rates for debtors with NCL liabilities above and below $5 million is similar to that seen for debtors with NCL liabilities above and below $2

¹¹⁰ Of the 268 cases with confirmed plans, the debtor had NCL liabilities in excess of $5 million in 66 or 24.63% of the confirmed-plan cases. See Figure 4, Column II. Of the 230 cases with successful plans, 57 or 24.78% had NCL liabilities over $5 million. See id., Column III.
million. The initial and ultimate success rates for debtors with NCL liabilities over $5 million are strikingly higher than comparable rates for debtors with NCL liabilities of $5 million or less. Compare Column (A) with Column (B) in Table VI. In addition, as Column (D) of Table VI shows, the p-values for both the initial and ultimate success-rate data are less than 0.05. Thus, debtors with NCL liabilities in excess of $5 million have both initial and ultimate success rates that are significantly higher statistically than debtors whose liabilities are $5 million or less.

But, once again, a comparison of Columns (A) and (B) of Table VI reveals strikingly similar rates of success on confirmation. As Column (D) illustrates, there is no statistically significant difference between the success-on-confirmation rate for debtors whose NCL liabilities exceed $5 million and those whose NCL liabilities are $5 million or less.

ii. Total Liabilities

Debtors with total liabilities in excess of $5 million comprise only 19.03% of the adjusted random sample, but account for 30.22% of the initially confirmed plans and 31.30% of the successfully consummated plans.\(^\text{111}\) Thus, debtors with total liabilities in excess of $5 million are disproportionately represented in the group of cases with confirmed and substantially consummated plans.

A closer examination of the data reveals a marked difference in both the initial and ultimate success rates for debtors with total liabilities above and below $5 million. Compare Column A with Column B of Table VII. In addition, the results of the statistical analysis, provided in Column (D), demonstrate that debtors with total liabilities in excess of $5 million have both initial and ultimate success rates that are significantly different statistically from debtors whose total liabilities are $5 million or less.

Once again, however, the success-on-confirmation rates are similar for debtors with total liabilities above and below $5 million. As Column (D) illustrates, there is no statistically significant difference between the success-on-confirmation rate for debtors whose total liabilities exceed $5 million and those whose total liabilities are $5 million or less.

iii. Summary of Findings: $5M Limit

Both the initial and ultimate success rates are significantly higher statistically for debtors with liabilities in excess of $5 million when compared with debtors with $5 million or less in liabilities. These results hold regardless of whether debtors’ liabilities include or exclude contingent and unliquidated debt. Unlike the results of statistical testing of the $2 million liability limit, however, the nature of the debtor’s liabilities does not affect success-on-confirmation rates. In other words, there is no statistical difference in success-on-confirmation rates between debtors with total liabilities above and below $5 million.

---

\(^{111}\) Of 783 cases in the adjusted random sample, 149 or 19.03% have total liabilities over $5 million. See Figure 5, Column I. Of 268 cases with confirmed plans, 81 or 30.22% have total liabilities in excess of $5 million. See id., Column II. Finally, of 230 ultimately successful cases 31.30% or 72 cases have more than $5 million in total liabilities. See id., Column III.
Figure 4: Non-Contingent Liquidated Liabilities at the $5M Limit and Plan Confirmation

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liabilities ≤ $5M = 658 cases</td>
<td>Confirmed = 202</td>
<td>Ultimate Success = 173</td>
</tr>
<tr>
<td>Not confirmed = 456</td>
<td></td>
<td>Ultimately not successful = 29</td>
</tr>
<tr>
<td>Cases = 783</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Liabilities &gt; $5M = 125 cases</td>
<td>Confirmed = 66</td>
<td>Ultimate Success = 57</td>
</tr>
<tr>
<td>Not confirmed = 59</td>
<td></td>
<td>Ultimately not successful = 9</td>
</tr>
<tr>
<td>Not successful = 59</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table VI: Non-contingent and liquidated liabilities at the $5M limit

<table>
<thead>
<tr>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NCL $\leq$ $5M$</td>
<td>NCL $&gt;$ $5M$</td>
<td>Hypotheses</td>
<td>Results*</td>
</tr>
<tr>
<td><strong>Initial Success</strong>&lt;br&gt;Total Cases = 783</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>202/658 = 30.70%</td>
<td>66/125 = 52.80%</td>
<td>$H_0$: equal initial rates of success&lt;br&gt;$H_A$: initial success rate higher when NCL $&gt;$ $5M$</td>
<td>p-value = $9.39 \times 10^{-7} &lt; 0.05$&lt;br&gt;Statistically significant higher rate of initial success for NCL $&gt;$ $5M$</td>
</tr>
<tr>
<td><strong>Ultimate Success</strong>&lt;br&gt;Total Cases = 783</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>173/658 = 26.29%</td>
<td>57/125 = 45.60%</td>
<td>$H_0$: equal ultimate rates of success&lt;br&gt;$H_A$: ultimate success rate higher when NCL $&gt;$ $5M$</td>
<td>p-value = $6.977 \times 10^{-5} &lt; 0.05$&lt;br&gt;Statistically significant higher rate of initial success for NCL $&gt;$ $5M$</td>
</tr>
<tr>
<td><strong>Ultimate Success</strong>&lt;br&gt;for confirmed-plan cases&lt;br&gt;Total Cases = 268</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>173/202 = 85.64%</td>
<td>57/66 = 86.36%</td>
<td>$H_0$: equal ultimate rates of success for confirmed-plan cases&lt;br&gt;$H_A$: success-on-confirmation rate higher when NCL $&gt;$ $5M$</td>
<td>p-value = $0.88424 &gt; 0.05$&lt;br&gt;No statistical difference in success-on-confirmation rates</td>
</tr>
</tbody>
</table>

*All results shown at 0.05 significance level

Table VII: Total liabilities at the $5M limit

<table>
<thead>
<tr>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NCL $\leq$ $5M$</td>
<td>NCL $&gt;$ $5M$</td>
<td>Hypotheses</td>
<td>Results*</td>
</tr>
<tr>
<td><strong>Initial Success</strong>&lt;br&gt;Total Cases = 783</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>187/634 = 29.50%</td>
<td>81/149 = 54.36%</td>
<td>$H_0$: equal initial rates of success&lt;br&gt;$H_A$: initial success rate higher when NCL $&gt;$ $5M$</td>
<td>p-value = $4.302 \times 10^{-9} &lt; 0.05$&lt;br&gt;Statistically significant higher rate of initial success for NCL $&gt;$ $5M$</td>
</tr>
<tr>
<td><strong>Ultimate Success</strong>&lt;br&gt;Total Cases = 783</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>158/634 = 24.92%</td>
<td>72/149 = 48.32%</td>
<td>$H_0$: equal ultimate rates of success&lt;br&gt;$H_A$: ultimate success rate higher when NCL $&gt;$ $5M$</td>
<td>p-value = $8.368 \times 10^{-9} &lt; 0.05$&lt;br&gt;Statistically significant higher rate of initial success for NCL $&gt;$ $5M$</td>
</tr>
<tr>
<td><strong>Ultimate Success</strong>&lt;br&gt;for confirmed-plan cases&lt;br&gt;Total Cases = 268</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>158/187 = 84.49%</td>
<td>72/81 = 88.89%</td>
<td>$H_0$: equal ultimate rates of success for confirmed-plan cases&lt;br&gt;$H_A$: ultimate success rate for confirmed-plan cases is higher when NCL $&gt;$ $5M$</td>
<td>p-value = $0.3433&gt; 0.05$&lt;br&gt;No statistical difference in success-on-confirmation rates</td>
</tr>
</tbody>
</table>

*All results shown at 0.05 significance level
Figure 5: Total Liabilities at the $5M Limit and Plan Confirmation

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases = 783</td>
<td>Liabilities ≤ $5M = 634 cases</td>
<td>Confirmed = 187</td>
</tr>
<tr>
<td>Liabilities &gt; $5M = 149 cases</td>
<td>Not confirmed = 447</td>
<td>Not successful = 447</td>
</tr>
<tr>
<td></td>
<td>Confirmed = 81</td>
<td>Ultimate Success = 72</td>
</tr>
<tr>
<td></td>
<td>Not confirmed = 68</td>
<td>Ultimately not successful = 9</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not successful = 68</td>
</tr>
</tbody>
</table>
(c) Where to draw the line - $2 or $5 Million?

As the earlier analysis demonstrates, debtors with more than $2 million in NCL liabilities have initial and ultimate success rates that are significantly higher statistically than debtors with ≤$2M in NCL liabilities. But, debtors with $5M or more in NCL liabilities also have initial and ultimate success rates that are significantly higher statistically than debtors with $5 million or less in NCL liabilities. Therefore, at what liability range does the difference in success rates become statistically significant? Making that determination requires a comparison of success rates across the following three pairs of NCL liability ranges:

1) ≤$2M with $2 to $5M (“Pair 1”)
2) $2 to $5M with >$5M (“Pair 2”)
3) ≤$2M with >$5M (“Pair 3”)

i. Non-contingent, liquidated liabilities

A comparison of Columns (A), (B), and (C) of Table VIII shows that both initial and ultimate success rates increase as the NCL liability range changes from ≤$2M, to $2 to $5M, to >$5M. Chart 1 graphically demonstrates the same point.

Columns (D) through (F) of Table VIII provide the results of performing multiple comparisons among the 3 liability ranges using the 2-proportion Z-test. Columns (D) and (F) show that there is a statistically significant difference in initial and ultimate success rates for two pairs of liability range comparisons:

(1) ≤$2M of NCL liabilities compared with NCL liabilities between $2 and $5M (Column D); and
(2) ≤$2M of NCL liabilities compared with >$5M in NCL liabilities (Column F).

Perhaps more important, however, is the finding shown in Column (E). There is no statistical difference in initial or ultimate success rates for debtors with $2 to $5M in NCL liabilities and those with >$5M in such liabilities. Thus, differences in the rate of both initial and ultimate success become significant at the $2 million threshold. At least for cases filed in 2004, then, the Code’s $2 million, not the Commission’s $5 million, liability limit better predicts those debtors with significantly weaker prospects for reorganization in Chapter 11.

What about success-on-confirmation rates? Columns (D) through (F) of Table VIII show that among any of the three pairs of liability range comparisons, there is no statistically significant difference in ultimate success once a plan is confirmed.
**Figure 6: Non-Contingent, Liquidated Debt and Success Across Three Liability Ranges**

<table>
<thead>
<tr>
<th>Liabilities ≤ $2M = 561 cases</th>
<th>Column II</th>
<th>Column III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confirmed = 161</td>
<td>Ultimate Success = 135 cases</td>
<td></td>
</tr>
<tr>
<td>Not confirmed = 400</td>
<td>Ultimately not successful = 26 cases</td>
<td></td>
</tr>
<tr>
<td>Not successful = 400 cases</td>
<td>Not successful = 400 cases</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities &gt; $2M but ≤ $5M = 97 cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confirmed = 41</td>
</tr>
<tr>
<td>Ultimately not successful = 3 cases</td>
</tr>
<tr>
<td>Not confirmed = 56</td>
</tr>
<tr>
<td>Not successful = 56 cases</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Liabilities &gt; $5M = 125 cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confirmed = 66</td>
</tr>
<tr>
<td>Ultimately not successful = 9 cases</td>
</tr>
<tr>
<td>Not confirmed = 59</td>
</tr>
<tr>
<td>Not successful = 59 cases</td>
</tr>
</tbody>
</table>

Cases = 783
Table VIII: Non-contingent, liquidated debt - $2M or $5M Limit?

<table>
<thead>
<tr>
<th></th>
<th>(A)</th>
<th>(B)</th>
<th>(C)</th>
<th>(D)</th>
<th>(E)</th>
<th>(F)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>≤$2M</td>
<td>$2-5M</td>
<td>&gt;$5M</td>
<td>≤$2M with $2-5M</td>
<td>$2.5M with &gt;$5M</td>
<td>≤$2M with &gt;$5M</td>
</tr>
<tr>
<td>Initial Success</td>
<td>161/561=28.70%</td>
<td>41/97=42.27%</td>
<td>66/125=52.80%</td>
<td>p-value=0.007&lt;0.01667</td>
<td>Success rates differ</td>
<td>p-value=0.1193&gt;0.01667</td>
</tr>
<tr>
<td>Ultimate Success</td>
<td>135/561=24.06%</td>
<td>38/97=39.18%</td>
<td>57/125=45.60%</td>
<td>p-value=0.002&lt;0.01667</td>
<td>Success rates differ</td>
<td>p-value=0.3372&gt;0.01667</td>
</tr>
<tr>
<td>Ultimate Success on Confirmation</td>
<td>135/161=83.85%</td>
<td>38/41=92.68%</td>
<td>57/66=86.36%</td>
<td>p-value=0.1499&gt;0.01667</td>
<td>Success rates do not differ</td>
<td>p-value=0.6340&gt;0.01667</td>
</tr>
</tbody>
</table>

112 The reader may wonder why the p-value is compared with 0.01667 here and 0.05 in the earlier analysis. If the significance level is 0.05, then in order to maintain that significance level when conducting multiple comparisons (in this case 3 pairs of ranges are compared), then the 0.05 level must be distributed equally to each test. Therefore, 0.05 is divided by 3 to produce a 0.01667 significance level that applies to each test. This is known as the Bonferroni Correction.
ii. Total Liabilities

A look at Columns (A), (B), and (C) of Table IX shows that as the total liability range increases so do the initial and ultimate success rates. Chart 2 makes the same point graphically. As with NCL liabilities, success-on-confirmation rates only increase when moving from ≤$2M in total liabilities to the $2 to $5M range of total liabilities.

The multiple comparison results, provided in Columns (D) and (F) of Table IX, once again show that there is a statistically significant difference in initial and ultimate success rates for two pairs of liability range comparisons:

1. ≤$2M of total liabilities compared with total liabilities between $2 and $5M (Column D); and
2. ≤$2M of total liabilities compared with total liabilities in excess of $5M (Column F).

But, as the finding in Column (E) demonstrates, there is no statistical difference in initial or ultimate success rates between debtors with $2 to $5M in total liabilities and debtors with >$5M in total liabilities. Thus, differences in the rates of both initial and ultimate success become significant at the $2 million liability limit.

The results for success-on-confirmation rates are the same for both NCL and total liabilities. As Columns (D) through (F) of Table IX show, once a plan is confirmed there is no statistically significant difference in ultimate success among any of the three pairs of liability range comparisons.

iii. Summary of Findings: Multiple Comparisons

More than two-thirds of the debtors in the random sample had ≤$2M in liabilities, regardless of whether those liabilities included or excluded contingent and unliquidated debt. Yet, debtors that fell into this liability range had the weakest prospects for reorganization.

Both Congress and the Commission operated on the assumption that debtors with larger liabilities have better prospects for success in Chapter 11. This study provides support for that assumption. Nonetheless, the findings indicate that Congress selected a liability limit that better captures the group of debtors for whom reorganization in Chapter 11 is particularly challenging.

---

113 Of 783 debtors, 561 or 71.65% had ≤$2M in NCL liabilities. See Figure 6, Column I. Of 783 debtors, 529 or 67.56% had ≤$2M in total liabilities. See Figure 7, Column I.
**Figure 7: Total Liabilities and Success Across Three Liability Ranges**

<table>
<thead>
<tr>
<th>Column I</th>
<th>Column II</th>
<th>Column III</th>
</tr>
</thead>
<tbody>
<tr>
<td>Liabilities $\leq$ $2M = 529$ cases</td>
<td>Confirmed = 144</td>
<td>Ultimate Success = 118 cases</td>
</tr>
<tr>
<td></td>
<td>Not confirmed = 385</td>
<td>Ultimately not successful = 26 cases</td>
</tr>
<tr>
<td>Cases = 783</td>
<td></td>
<td>Not successful = 385 cases</td>
</tr>
<tr>
<td>Liabilities $&gt;$ $2M$ but $\leq$ $5M = 105$ cases</td>
<td>Confirmed = 43</td>
<td>Ultimate Success = 40 cases</td>
</tr>
<tr>
<td></td>
<td>Not confirmed = 62</td>
<td>Ultimately not successful = 3 cases</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not successful = 62 cases</td>
</tr>
<tr>
<td>Liabilities $&gt;$ $5M = 149$ cases</td>
<td>Confirmed = 81</td>
<td>Ultimate Success = 72 cases</td>
</tr>
<tr>
<td></td>
<td>Not confirmed = 68</td>
<td>Ultimately not successful = 9 cases</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Not successful = 68 cases</td>
</tr>
</tbody>
</table>
Table IX: Total liabilities - $2M or $5M Limit?

<table>
<thead>
<tr>
<th>(A) ≤$2M</th>
<th>(B) $2-5M</th>
<th>(C) &gt;$5M</th>
<th>(D) ≤$2M with $2-5M Success rates differ</th>
<th>(E) $2-5M with &gt;$5M Success rates do not differ</th>
<th>(F) ≤$2M with &gt;$5M Success rates differ</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial Success</td>
<td>144/529=27.22%</td>
<td>43/105=40.95%</td>
<td>81/149=54.36%</td>
<td>p-value=0.005&lt;0.01667</td>
<td>p-value=0.0352&gt;0.01667</td>
</tr>
<tr>
<td>Ultimate Success</td>
<td>118/529=22.31%</td>
<td>40/105=38.10%</td>
<td>72/149=48.32%</td>
<td>p-value=6.3427x10^{-4}&lt;0.01667</td>
<td>p-value=0.1060&gt;0.01667</td>
</tr>
<tr>
<td>Ultimate Success on Confirmation</td>
<td>118/144=81.94%</td>
<td>40/43=93.02%</td>
<td>72/81=88.89%</td>
<td>p-value=0.0782&gt;0.01667</td>
<td>p-value=0.4586&gt;0.01667</td>
</tr>
</tbody>
</table>

V. CONCLUSION: LESSONS AND LIMITATIONS

Congress and the Commission were right: overall rates of plan success in Chapter 11 are low and those low rates are largely attributable to the small debtor. Congress, however, did a better job than the Commission at identifying the criteria for identifying debtors with low...
prospects for reorganization, although the legislative history suggests that happenstance not perspicacity accounts for the result.

Committee formation – present in the Code’s but absent in the Commission’s small business debtor definition – is significantly associated with increased rates of plan confirmation and consummation. Debtors with more than $2 million in aggregate liabilities – the liability limit that Congress adopted in BAPCPA – also confirm and successfully perform plans at rates that are significantly higher statistically than those for debtors with aggregate liabilities of $2 million or less. But, liability size predicts plan success regardless of whether contingent and unliquidated debts are included or excluded from debtor liability totals.

Committee formation and debtor liability size each independently predicts plan success in Chapter 11. While there is a substantial overlap between those cases with committees and those with aggregate NCL liabilities in excess of $2 million, in 35% of the 144 cases with an official committee the debtor had \( \leq $2M \) in NCL liabilities.\(^{114}\) Thus, this study provides a beginning for understanding the predictors of plan success in Chapter 11. But, there are three issues that require further research.

First, the findings in this Article do not necessarily mean that committee formation or debtor liability size cause higher rates of plan success in Chapter 11. Take committee formation as an example. It is possible that participation of unsecured creditors through the vehicle of a strong committee pushes the debtor toward the path of plan confirmation. But, it also is possible that committee formation operates as nothing more than a positive signal of creditors’ \textit{ex ante} evaluation of the likelihood of debtor success in Chapter 11. If the latter, then encouraging committee formation or attempting to replicate the role that a committee plays in a Chapter 11 case is a waste of time, if increasing plan confirmation rates is the goal desired. Thus, understanding why committee formation is associated with higher rates of plan confirmation and consummation requires a determination first of whether a causal link exists between committee formation and increased rates of plan success in Chapter 11.

The same is true for debtor liability size. The Commission recommended a streamlined plan confirmation process after concluding that Chapter 11 itself accounted for some of the failure of small firms to reorganize.\(^{115}\) The concern was that the costs associated with Chapter 11 derailed small businesses, some of which might otherwise reorganize given an expedited and less costly process. Thus, one explanation for the study’s findings on liability size is that firms with larger liabilities are better able to absorb the costs associated with the Chapter 11 process. But, what if debtor liability size affects plan confirmation rates regardless of the costs of Chapter 11? In other words, if it is the debtors and not some deficiency in the process that cause low confirmation rates, then tinkering with the process will not improve success rates in Chapter 11.

\(^{114}\) I use 144, not 145, cases here, because the sample is of cases with committees and measurable liabilities. Of the 144 cases with committees, 50 had \( \leq $2M \) in NCL liabilities. If total liabilities are used, a committee formed in 40 or 72% of the cases with \( \leq $2M \) in NCL liabilities. Interestingly enough, the Commission predicted that “a liabilities-based definition of $2,000,000 or less would capture approximately 72% of all Chapter 11 cases filed.” Commission Report, \textit{supra} note 2, at 630. The Commission, however, based its definition on NCL, not total, liabilities.

\(^{115}\) Commission Report, \textit{supra} note 2, at 614.
Second, the findings in this Article are not an endorsement of the Code’s current definition of a small business debtor. The findings do demonstrate that committee formation and debtor liability size is each associated with greater odds of plan success in Chapter 11. But, both Congress and the Commission were wrong in requiring the subtraction of contingent and unliquidated debts from debtor liability totals. Liability totals, regardless of the inclusion or exclusion of contingent and unliquidated debts, predict plan success in Chapter 11. This latter finding is significant, because there is no easy way, given current debtor reporting requirements, to obtain the total of a debtor’s NCL liabilities. A similar problem arises with other elements of the Code’s definition that are not examined in this study. 

Affiliate and insider debts provide an example of the problem.

Suppose Acme Corporation files for relief under Chapter 11 and schedules total liabilities of $2.45 million. It lists a debt of $117,000 as owed to the corporate president, who is an insider. If the insider debt is deducted, then Acme’s liabilities total $2,333,000, which is $10,000 under the current liability limit. If not deducted, then Acme is not a small business debtor. Suppose Acme checks the box on the petition stating that it is not a small business debtor. The United States trustee (or any creditor) may object to Acme’s designation, but the U.S. trustee then must determine whether Acme “fit[s] the criteria to be classified as a small business case.”

Herein lies the problem. Liability totals on the Summary of Schedules are based on all liabilities - contingent and non-contingent, liquidated and unliquidated, affiliate and non-affiliate, insider and non-insider. The debtor does not complete any document that separately itemizes affiliate, insider, contingent, and unliquidated debt. Must analysts in the Office of the United States Trustee (“OUS{T}”) calculate revised liability totals after checking each page of the debtor’s schedules for affiliate or insider debt?

---

116 A similar problem exists in determining those debtors “whose primary activity is the business of owning or operating real property or activities incidental thereto.” 11 U.S.C. §101(51D) (2012). The Code defines the term “single asset real estate” or “SARE”. The Commission’s small business definition excluded SAREs from small business coverage. See Commission Report, supra note 2, at 618. Moreover, Question 18(b) of the Statement of Financial Affairs requires debtors to identify any business that qualifies as single asset real estate. See Statement of Financial Affairs, Official Form 7 at 18(b), reprinted in 2011 COLLI{ER PAMPHLET EDITION, Part 2: Bankruptcy Rules F-59 (2011). The Code, however, does not define what constitutes the “primary activity” of owning or operating real property, and there is no “primary activity” counterpart to the SARE question on the Statement of Financial Affairs. While there is an overlap between the categories of “single asset real estate” and “primary activity”, the latter term appears broader in scope. Therefore, is “primary activity” status determined by how the debtor describes itself? By the amount of time the debtor devotes to the activity? By the percentage of income derived from the activity? See, e.g., In re Gary Newton, No. 04-53451 (Bankr. N.D. Cal. May 27, 2004) (debtor operates a chiropractic clinic but derives 65% of his monthly income from rental properties). All of these questions make early identification of a small business debtor more difficult.


118 The current liability limit now stands at $2.343 million. See supra note 30.

119 See FED. R. BANKR. P. 1020(a); Voluntary Petition, Official Form 1, reprinted in 2011 COLLI{ER PAMPHLET EDITION, Part 2: Bankruptcy Rules F-1 (2011). If the debtor is a small business debtor, then it also should check a box indicating that its non-contingent liquidated debts are less than the statutory liability limit. See id.

120 UNITED STATES DEP’T OF JUSTICE, UNITED STATES TRUSTEE PROGRAM FISCAL YEAR 2009 BUDGET REQUEST 6 (2008) [hereinafter UST Budget Request].

121 Exacerbating the problem is poor disclosure by debtors of affiliates and insiders. For example, the Code’s definition of an affiliate includes an entity owning 20% or more of the debtor’s voting securities. See 11 U.S.C.
This seems like an enormous waste of resources, especially given the additional oversight responsibilities required of the OUST by BAPCPA’s reforms. Moreover, these kinds of statutory filters, which are difficult to apply, undermine the goal of identifying early in the case those debtors subject to the Code’s small business provisions. Only additional research will determine whether Congress was right in requiring deduction of affiliate and insider debt when computing debtor liabilities. But, such research should take account of current practice. It is quite possible that staff in the OUST already use a simpler measure of liabilities – totals on the Summary of Schedules – not the Code’s more complex liability measure. They may do so because the Code’s method of calculating liabilities is not feasible, given the current level of disclosure required of Chapter 11 debtors. Of course, a simpler metric may miss some debtors that otherwise might qualify as small businesses. But, complex rules spawn confusion and increase cost. Thus, as scholars continue to evaluate BAPCPA’s reforms, it is important to consider the trade-off between precision and confusion, accuracy and cost.

Consideration of trade-offs raises the final issue meriting further investigation. What degree of success is enough to warrant the increased costs of oversight and reporting mandated by BAPCPA’s reforms? A 2008 study by analysts in the Executive Office of the United States Trustee found a small but statistically significant increase in rates of plan confirmation post-BAPCPA. The study compared the confirmation rate for cases filed in the year ending June 30, 2005, with that for cases filed in calendar year 2006. The confirmation rate increased about 4%.


122 See UST Budget Request, supra note 120, at 5 (stating that the OUST’s “responsibilities in terms of implementing the provisions of BAPCPA have grown significantly” and that the “workload associated with the new provisions [has] increased significantly”).

123 See Committee Notes, Official Form 1, reprinted in 2011 COLLIER PAMPHLET EDITION, Part 2: Bankruptcy Rules F-11 (2011) (stating that it is “desirable to identify eligible debtors at the outset of the case”).

124 See Ed Flynn and Phil Crewson, Chapter 11 Filing Trends in History and Today 6, Fig. 6 (2008) available at [Insert URL].

125 See id.

126 See id. at 6, Fig. 6. The rate increased from 29.4% pre-BAPCPA to 33.2% post-BAPCPA. It’s worth noting that the post-BAPCPA confirmation rate of 33.2% is only .6% higher than the initial success rate found in this study. Therefore, it is possible that the post-BAPCPA increase found in the Executive Office study is nothing more than a normal variation in confirmation rates across time.
small Chapter 11 debtors. Yet, even if the change in confirmation rates is attributable only to an increase in small debtor plan confirmation and even if it resulted exclusively from BAPCPA’s reforms,\textsuperscript{127} does a 4\% increase in plan success merit the resources devoted to achieving it?

The question brings to the fore our expectations for what Chapter 11 should accomplish. It is possible that no amount of tinkering will create a substantial increase in plan confirmation rates for the small Chapter 11 debtor. If that is the case, then, as some commentators have suggested, a broader definition of success may be in order.\textsuperscript{128}

\textsuperscript{127} See \textit{id.} at 7 (stating that the “findings should not be viewed as conclusive evidence of a link between BAPCPA and the changes observed”).

\textsuperscript{128} See, e.g., The Honorable James B. Haines, Jr. and Philip J. Hendel, \textit{No Easy Answers: Small Business Bankruptcies after BAPCPA}, 47 B.C. L. REV. 71, 75 (2005) (arguing that the focus on plan confirmation as the sole measure of success “ignores, among other things, that the essential purpose of the process is to rehabilitate the debtor while treating creditors fairly”); Warren & Westbrook, supra note 1, at 611 (noting that not every dismissed Chapter 11 case is a failure as dismissal may follow on the heels of a resolution with creditors). While the Commission defined success as plan confirmation, it acknowledged that many practitioners did not necessarily equate case dismissal without confirmation as a Chapter 11 failure. See \textit{Commission Report}, supra note 2, at 308.