

# CHAPTER 11 TRIAGE: DIAGNOSING A DEBTOR'S PROSPECTS FOR SUCCESS

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*This Article presents the results of a large empirical study of Chapter 11 cases filed in 2004, the year before Congress enacted the small business reforms in the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). The study confirms what the National Bankruptcy Review Commission ("Commission") and Congress suspected: Overall rates of plan success are low in Chapter 11, and those low rates are largely attributable to the small Chapter 11 debtor. Congress, however, did a better job than the Commission at determining the criteria for identifying debtors with low prospects for success in Chapter 11. Committee formation—present in the Code's small business debtor definition but absent in the Commission's definition—was significantly associated with increased rates of plan confirmation and successful plan performance. In addition, the \$2 million liability cutoff that Congress put into place in BAPCPA generally served as a better predictor than the Commission's \$5 million limit of the point at which plan confirmation and performance rates became significant.*

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## INTRODUCTION

For more than two decades, judges and commentators have debated whether Chapter 11 is working.<sup>1</sup> After the enactment of the Bankruptcy Code (“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%.<sup>2</sup> As time passed, conventional wisdom had it that the small business debtor accounted for these low rates of plan confirmation.<sup>3</sup> Thus, in 1994, Congress amended the 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 Commission to study various “issues and problems relating” to the Code’s operation.<sup>4</sup> The Commission issued its report and recommendations in 1997. The Commission proposed ten changes to the existing Chapter 11, all aimed at decreasing obstacles to plan confirmation and increasing oversight of small Chapter 11 debtors.<sup>5</sup> The

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1. See, e.g., Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1088–89 (1992) (arguing for the repeal of Chapter 11 based on authors’ conclusion that there are “no economic benefits from court-supervised corporate reorganizations”); Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729, 730 (claiming that it is “clear that something is very wrong with Chapter 11”); Judge 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 to address the cost and complexity of Chapter 11 for small business debtors); Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 638 (2009) [hereinafter *Challenge*] (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 L.J. 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).

2. See NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS 610–11 (1997) [hereinafter COMMISSION REPORT], available at <http://govinfo.library.unt.edu/nbrcreportcont.html> (summarizing results of several Chapter 11 studies).

3. See generally *id.*

4. See Bankruptcy Reform Act of 1994, 11 U.S.C. § 603(1) (1994).

5. See COMMISSION REPORT, *supra* note 2, at 609–60.

Commission's recommendations, while seemingly geared to small business debtors, applied to any Chapter 11 debtor, whether engaged in business or not.<sup>6</sup> Eight years later, with the exception of the "small business debtor" definition, the Commission's proposals made their way, in substantially unchanged form, into current law with the enactment of BAPCPA.<sup>7</sup>

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 distressed debtors.<sup>8</sup> In this Article, then, I use plan confirmation and performance as the measure of Chapter 11 success.<sup>9</sup> Using data from a random sample drawn from the entire population of Chapter 11 cases filed in 2004, I examine the relationship of two factors—the formation of an official unsecured creditors' committee and the size of a debtor's liabilities—to rates of plan confirmation and performance.

As the study's results reveal, the rate of plan confirmation is not nearly as dismal as that suggested by the Commission.<sup>10</sup> Nonetheless, it is indeed quite low—only about a third of debtors that file for relief under Chapter 11 ever confirm a plan.<sup>11</sup> 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 with an official committee of unsecured creditors had significantly higher rates of plan confirmation and successful plan performance than did cases with no committee. Second, debtors with larger aggregate liabilities had significantly higher rates of plan confirmation and successful plan performance than did debtors with smaller aggregate liabilities. But, a comparison of the Code's \$2-million-liability limit with the Commission's \$5 million limit for small Chapter 11 debtors reveals that the \$2 million cutoff better captures, in general, the point at which a debtor's prospects for confirming and successfully performing a Chapter 11 plan significantly improve. Thus, two of the criteria found in the Code's definition of a small business debtor predict, at a

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6. See *infra* notes 33, 44–45 and accompanying text for an explanation of the Commission's definition.

7. See Thomas E. Carlson & Jennifer Frasier Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendments*, 79 AM. BANKR. L.J. 645, 647 (2005).

8. See, e.g., COMMISSION REPORT, *supra* note 2, at 611 (footnote omitted) (stating that the "appropriate use of Chapter 11" is one in which the debtor "confirms and materially performs a plan of reorganization"); *Challenge*, *supra* note 1, at 611 (stating that "plan confirmation is surely the central measure of success in Chapter 11").

9. I use the term "performance" because it covers a broader concept of success than does the Code's term "substantial consummation." The Code defines "substantial consummation" as the transfer of property provided for by the plan, assumption by the debtor or its successor of the business or property dealt with by the plan, and the beginning of plan distributions. See 11 U.S.C. § 1101(2) (2012). By comparison, "successful performance" includes debtors who consummate a plan *and* do not subsequently re-file for bankruptcy under any chapter of the Code. See *infra* note 100 and accompanying text.

10. See *infra* Part III.A.

11. See *infra* Part III.A.

statistically significant level, plan confirmation and performance rates. The legislative history, however, suggests that happenstance, not insight, accounts for this result.

I begin the Article, in Part I, by tracing the evolution of the Code's current small business debtor definition, noting the differences between the Code's and the Commission's definitions of a small Chapter 11 debtor. Part II 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 III, I discuss the results of the statistical analysis conducted on the random sample data. Part III.A presents the findings on overall plan proposal, confirmation, and performance rates. In Part III.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 successful plan performance. I conclude 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 none may exist. I also make suggestions for further empirical work, mindful of the need to balance the benefits of reform against its not insignificant costs.

### I. 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.<sup>12</sup> Under the Act, Chapters X and XI were the main chapters that businesses used to reorganize.<sup>13</sup> Chapter X was intended for publicly held firms and Chapter XI for smaller, privately held enterprises.<sup>14</sup> The problem, however, was that nothing in the Act restricted a publicly held firm from filing under Chapter XI.<sup>15</sup> Large publicly held companies chose Chapter XI, in part, because it allowed management to retain control during the reorganization process.<sup>16</sup> Uncertainty over which chapter applied to the reorganization of large publicly held firms spawned "pointless and wasteful

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12. 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-4C COLLIER ON BANKRUPTCY APP. pt. 4(c) [hereinafter 1973 COMMISSION REPORT].

13. See S. REP. NO. 95-989, at 9 (1978), reprinted in D-4E COLLIER ON BANKRUPTCY APP. pt. 4 [hereinafter 1978 SENATE REPORT].

14. *Id.*

15. See *id.* (stating that the design of the Act was "flawed somewhat by the failure to include a definition of a 'public company'").

16. See Peeples, *supra* note 12, at 67 (noting that "[b]ecause a Chapter X proceeding required the appointment of a trustee, surrender of control by existing management usually followed" (footnote omitted)).

litigation,” with the “patient . . . dy[ing] while the doctors argue[d] over which operating table he should be on.”<sup>17</sup>

The Code, with its single business reorganization chapter, succeeded in “eliminat[ing] unprofitable litigation” over chapter choice,<sup>18</sup> but concerns soon emerged about the expense and time associated with Chapter 11’s plan confirmation process.<sup>19</sup> 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.”<sup>20</sup>

Congress responded to these concerns by creating a small business election in the Bankruptcy Reform Act of 1994 (“1994 Amendments”).<sup>21</sup> The election allowed small business debtors to expedite the plan confirmation process by consolidating into a single hearing the previously separate disclosure statement and plan confirmation hearings.<sup>22</sup> The time and money saved by a consolidated hearing were offset, however, by the requirement that debtors electing small business treatment file a plan within 160 days of the petition.<sup>23</sup> As a consequence, few debtors chose the small business election.<sup>24</sup>

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.<sup>25</sup>

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17. See 1973 COMMISSION REPORT, *supra* note 12, at 23.

18. 1978 SENATE REPORT, *supra* note 13, at 9.

19. See Karen Gross & Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the Bankruptcy Code*, 69 AM. BANKR. L.J. 287, 287 n.2 (1995) (listing articles that discuss concerns about the cost and delay associated with Chapter 11); LoPucki, *supra* note 1, at 730–31 (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” (footnotes omitted)).

20. Small, *supra* note 1, at 981; see also Judge 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” (emphasis added)); Peebles, *supra* note 12, at 66 (discussing the “wisdom of developing a separate set of rules for close corporations”).

21. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

22. Carlson & Hayes, *supra* note 7, at 646.

23. *Id.*

24. *Id.* Approximately 23% of the debtors in the random sample identified themselves as small business debtors on the petition.

25. Bankruptcy Reform Act of 1994, 11 USCA §§ 101, § 217(a) (1994).

Unfortunately, there is little legislative history to the 1994 Amendments that explains *why* Congress made the choices that it did. For example, why did Congress choose *not* to apply the small business election to all Chapter 11 debtors, regardless of whether or not they were engaged in business?<sup>26</sup> Concerns about the impact of Chapter 11's complex rules and cost on plan confirmation rates applied with equal vigor to small non-business Chapter 11 debtors. Yet, the House Report offers only the following one-sentence rationale for amending the Code to provide for the small business election. "This section amends title 11 to expedite the process by which small businesses may reorganize under chapter 11."<sup>27</sup> There is no other discussion and also 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.<sup>28</sup> The 1992 bill established the liability limit for small business debtors at \$1,500,000;<sup>29</sup> in 1993, it was set at \$2,500,000.<sup>30</sup> 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.<sup>31</sup>

In 1997, the Commission, which Congress created with the 1994 Amendments, issued its report and recommendations for reform of the 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."<sup>32</sup> The Commission defined a small business debtor as

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.<sup>33</sup>

While the Commission found "the lack of data available to evaluate the Chapter 11 system . . . particularly troubling,"<sup>34</sup> it proposed a \$5 million liability

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26. Individual "consumer" debtors may file for relief under Chapter 11. *Toibb v. Radloff*, 501 U.S. 157, 166 (1991) ("The plain language of the Bankruptcy Code permits individual debtors not engaged in business to file for relief under Chapter 11.").

27. H.R. REP. NO. 103-835, at 50, 88 (1994).

28. S. REP. NO. 102-279, at 5, 32 (1992); S. REP. NO. 103-168, at 7 (1993).

29. *See* S. REP. NO. 102-279, at 5, 59.

30. *See* S. REP. NO. 103-168, at 7.

31. H.R. REP. NO. 103-835, at 50.

32. COMMISSION REPORT, *supra* note 2, at 609.

33. *Id.* at 618 (footnote omitted).

34. *Id.* at 308.

limit, rather than the statutory \$2 million limit, based on liability data drawn from five judicial districts.<sup>35</sup> 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.”<sup>36</sup>

The purpose of sorting debtors in this manner was to identify those debtors at risk for failure in Chapter 11.<sup>37</sup> In other words, the 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 problematic Chapter 11 debtors. The Commission recommended mandatory reporting requirements and increased oversight of small debtors to more quickly shepherd out of bankruptcy debtors with no genuine prospect for reorganization.<sup>38</sup> At the same time, the Commission proposed more flexible rules for disclosure statements and plans to cut costs and improve confirmation rates for debtors with better prospects for rehabilitation.<sup>39</sup>

Eight years later, with the enactment of BAPCPA, Congress adopted the Commission’s small business recommendations, largely unamended.<sup>40</sup> Congress, however, did not adopt the Commission’s definition of a small business debtor,<sup>41</sup> 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”

(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

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35. *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.

36. *Id.* at 632.

37. See COMMISSION REPORT, *supra* note 2, at 609–10.

38. See *id.* at 638–39.

39. See *id.* at 635–36.

40. See Carlson & Hayes, *supra* note 7, at 647 n.10.

41. See 2-101 COLLIER ON BANKRUPTCY ¶101.51 (2011) (“The legislative history regarding the [small business debtor] definition essentially repeats the statute and does not explain why the recommendations of the Commission were rejected . . .”).



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).<sup>42</sup>

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.<sup>43</sup> It is unclear why. The Commission’s recommendations included a definition entitled “Defining the term ‘Small Business.’”<sup>44</sup> Nonetheless, the actual definition applied to “any debtor in a case under Chapter 11.”<sup>45</sup> Bankruptcy reform bills introduced in Congress in the early years after issuance of the Commission’s report followed the Commission’s lead, defining a “small business debtor” as any person filing for Chapter 11.<sup>46</sup> For some reason not explained in the legislative history, Congress decided not to follow the Commission’s lead and instead retained the business activity restriction from the 1994 Amendments.

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.”<sup>47</sup> The Commission did not exclude debtors engaged in real property activities from small business coverage. Moreover, the Commission’s definition cross-referenced the Code’s definition of a single asset real estate debtor.<sup>48</sup> Congress did not define what constitutes the “primary activity” of “owning or operating real property,” and BAPCPA’s legislative history provides no insight on

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42. H.R. REP. NO. 109-31, pt.1, at 156, 170 (2005) [hereinafter BAPCPA HOUSE REPORT]. Apart from the liability limitation, which has increased to \$2.343 million pursuant to Code-mandated dollar adjustments, the quoted language is the Code’s current definition of a small business debtor. *See* 11 U.S.C. § 101(51D) (2012); 11 U.S.C. § 104(a)(1) (requiring adjustments to the Code’s dollar figures every three years, starting with April 1, 1998).

43. *See* BAPCPA HOUSE REPORT, *supra* note 42, at 156, 170.

44. COMMISSION REPORT, *supra* note 2, at 618.

45. *Id.*

46. *See, e.g.*, Bankruptcy Reform Act of 1999, S. 625, 106th Cong. § 422 (1999) (defining a “small business debtor”, in relevant part, as “a person” with non-contingent liquidated liabilities not exceeding \$4 million); H.R. REP. NO. 105-540, § 231, at 27 (1998) (defining a “small business debtor” in relevant part, as “a person” with non-contingent liquidated liabilities of \$5 million or less).

47. BAPCPA HOUSE REPORT, *supra* note 42, at 156, 170.

48. *See* 11 U.S.C. § 101(51B) (2012) (defining “single asset real estate”).

how a debtor whose “primary activity is the business of owning or operating real property” differs from a single asset real estate debtor.<sup>49</sup>

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.<sup>50</sup> This additional limitation on computing aggregate liabilities first appeared in bankruptcy reform bills proposed after the issuance of the Commission’s 1997 report,<sup>51</sup> 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.<sup>52</sup> Then, in successive pieces of proposed legislation, Congress dropped the liability limit from \$5 to \$2 million, in \$1 million increments.<sup>53</sup> 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.”<sup>54</sup> 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

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49. 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 HOUSE REPORT, *supra* note 42, at 19–20. Yet, BAPCPA’s definition of a small business debtor *excludes* from the definition any debtor whose primary activity involves real property ownership or operation.

50. *See* 11 U.S.C. § 101(2) (2012) (defining “affiliate”); 11 U.S.C. § 101(31) (defining “insider”).

51. *See, e.g.*, Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 231 (1998) (adopting the Commission’s \$5 million liability limit but adding the proviso that “debts owed to 1 or more affiliates or insiders” were to be excluded from that \$5 million limit).

52. *See id.*

53. *See id.* (providing for \$5 million limit); *Id.* § 402 (1998) (reducing limit to \$4 million); Bankruptcy Reform Act of 2000, H.R. 2415, 106th Cong. § 432 (reducing limit to \$3 million); H.R. 333, 107th Cong. § 432 (2002) (reducing limit to \$2 million); *see also* Carlson & Hayes, *supra* note 7, at 665–67 (describing process of reducing liability limits in small business definition).

54. H.R. REP. NO. 107-617, at 231 (2002) (Conf. Rep.).

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.<sup>55</sup> 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.<sup>56</sup> 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 to be a problem that 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.<sup>57</sup>

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 Congress's choices. One thing, however, is clear: The Code's definition is more complex than the Commission's, which makes the initial triaging decision more difficult.

## II. THE STUDY'S DESIGN

### A. Constructing the Population of Cases

The population for this study is all Chapter 11 cases filed between January 1, 2004, and December 31, 2004.<sup>58</sup> The population includes all cases filed by any individual or artificial entity eligible to file for relief under Chapter 11 of the Code.<sup>59</sup> I created the population of cases by conducting district-by-district searches on PACER<sup>60</sup> in all 94 U.S. judicial districts.<sup>61</sup> The population includes

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55. See Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 402 (1998); see also Bankruptcy Reform Act of 1999, S. 625, 106th Cong. § 422 (1999).

56. See, e.g., S. 3186, 106th Cong. § 432 (2000).

57. See H.R. REP. No. 109-31, pt. 1, at 19 (2005).

58. 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.

59. See 11 U.S.C. § 109(d) (2012) (listing those eligible to file under Chapter 11).

60. PACER, which stands for Public Access to Court Electronic Records, is an electronic case service operated by the Administrative Office of the United States 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.

61. One of the challenges of conducting Chapter 11 research is that there are no publicly available searchable "databases" of all Chapter 11 filings. Professor Lynn LoPucki has created a database of large publicly held firms available at <http://lopucki.law.ucla.edu/>. But, no publicly available searchable database of both large and small Chapter 11 filings exists. See generally Katherine Porter, *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

judicial districts in all 50 states, as well as the districts of Guam, Puerto Rico, the Northern Mariana Islands, and the Virgin Islands.<sup>62</sup>

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, 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.<sup>63</sup> Individuals with primarily consumer debts do not qualify as small business debtors under the Code; the definition requires a person to be engaged in “commercial or business activities.”<sup>64</sup> The Commission’s recommendations, on the other hand, applied to “any debtor in a case under Chapter 11,”<sup>65</sup> not merely those debtors engaged in business. It is unclear why Congress chose *not* to include non-business Chapter 11 debtors in BAPCPA’s small debtor reforms.<sup>66</sup> The purpose of this study is to identify certain predictors of Chapter 11 success, focusing on a comparison of the statutory and Commission definitions of small debtors. Thus, the random sample includes both “consumer” and “business” Chapter 11 debtors.<sup>67</sup>

Practical considerations also favored including self-identified “consumer” debtors in the sample. Debtors “commonly misdesignate consumer debt as business debt and vice versa.”<sup>68</sup> 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.<sup>69</sup> Some debtors checked consumer debts on their petition but nonetheless really were filing as a business.<sup>70</sup> The

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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.

62. No Chapter 11 cases were filed in 2004 in either Guam or the Northern Mariana Islands.

63. See *supra* note 26.

64. 11 U.S.C. § 101(51D)(A).

65. COMMISSION REPORT, *supra* note 2, at 618.

66. See *supra* note 43–46 and accompanying text.

67. As discussed more fully *infra* note 113, the success rates for self-identified “consumer” debtors did not differ significantly from those for self-identified “business” debtors.

68. Jennifer Connors Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307, 313 (1996).

69. When a debtor files for bankruptcy, it must file schedules of its assets and liabilities, as well as a statement of its financial affairs. 11 U.S.C. § 521(a)(1)(B)(i), (iii) (2012). 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>.

70. See, e.g., Voluntary Petition, *In re Del Monico*, No. 04-38235 (Bankr. N.D. Ill. Oct. 14, 2004) (Docket No. 1) (joint debtors checked “Consumer/Non-Business” for “Nature of Debts” but also checked that they were a small business and that they elected small business treatment under the Code); Voluntary Petition, *In re Vitello’s, Inc.*, No. 04-38148 (Bankr. E.D. Va. Aug. 27, 2004) (Docket No. 1) (corporate debtor checked

degree of apparent debtor error cautioned against eliminating those cases identified on the petition as consisting of “Consumer/Non-Business” debts.

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 United States 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.<sup>71</sup> Second, in certain districts, such as the Central District of California, intra-district transfer of cases was not uncommon. For example, Huerta Design Associates filed for relief under Chapter 11 in July 2004,<sup>72</sup> but when the case was transferred intra-district in June 2005, it was assigned a new case number.<sup>73</sup> The case came up twice, sporting different case numbers, in my initial search results. After making these adjustments, 10,163 cases remained.<sup>74</sup>

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“Consumer/Non-Business” for “Nature of Debts” but also checked “Corporation” for “Type of Debtor”); 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); Amended Voluntary Petition, *In re Heithaus*, No. 04-50044 (Bankr. D. Conn. March 15, 2004) (Docket No. 50) (individual debtor checked “Consumer/Non-Business” for “Nature of Debts” but also elected small business treatment under the Code); Voluntary Petition, *In re Nelson*, No. 04-09867 (Bankr. N.D. Ill. March 12, 2004) (Docket No. 1) (individual debtor checked “Consumer/Non-Business” for “Nature of Debts” on petition but also indicated under “All Other Names used by the Debtor in the last 6 years” that individual was doing business as “SG Nelson Company”); Voluntary Petition, *In re Blakeslee*, No. 04-00865 (Bankr. W.D. Mich. Jan. 28, 2004) (Docket No. 1) (joint debtors checked “Consumer/Non-Business” for “Nature of Debts” but also checked that they were a small business); *see also* Order Substantively Consolidating Mountain States Investments, LLC into the Bankruptcy Estate of Lie H. Tan, *In re Tan*, No. 04-61694 (Bankr. D. Or. April 11, 2006) (Docket No. 523) (individual debtor checked “Consumer/Non-Business” on Chapter 7 petition, but after conversion to Chapter 11 the bankruptcy court substantively consolidated case of debtor’s limited liability company into debtor’s individual bankruptcy case).

71. Compare Order Dismissing Case with Prejudice *Nunc Pro Tunc*, *In re Reichardt*, No. 04-33138 (Bankr. D. Conn. July 2, 2004) (Docket No. 2) (dismissed for violating 365-day bar to filing established in 2003 bankruptcy case), with *In re Reichardt*, No. 04-34090 (Bankr. D. Conn. Aug. 31, 2004) (second 2004 case filed outside 365-day bar established in dismissal of 2003 bankruptcy case).

72. See Docket, *In re Huerta Design Assocs.*, No. 04-25983 (Bankr. C.D. Cal. July 22, 2004).

73. See Docket, *In re Huerta Design Assocs.*, No. 05-13854 (Bankr. C.D. Cal. June 1, 2005).

74. Even after adjusting for duplicate and serial filers, as well as intra-district transfers, the population included 10,163 cases, or 31 more Chapter 11 cases than indicated

Finally, before drawing the random sample, I made one additional adjustment to the population data.<sup>75</sup> In 2004, the *Footstar* debtors, 2529 affiliated entities, filed for relief under Chapter 11 in the Southern District of New York.<sup>76</sup> The debtors' cases were both jointly administered and substantively consolidated,<sup>77</sup> and the bankruptcy court confirmed a single joint plan covering all 2529 debtors.<sup>78</sup> Therefore, I eliminated 2528 cases (all but *In re Footstar, Inc.*,<sup>79</sup> 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 date, filed their schedules on a consolidated basis,<sup>80</sup> and proposed and confirmed the same plan on the same

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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, after drawing the random sample, I had to eliminate two cases because neither was a Chapter 11 case filed in 2004. See *infra* note 84.

75. I did further culling of jointly administered and/or substantively consolidated cases *after* drawing the random sample. I explain that process *infra* in Part II.B. I was able to eliminate the *Footstar*-related cases prior to drawing the random sample because the number of cases involved made it an outlier and easy to identify among the more than 10,000 cases in the population. Given the size of the 2004 case population, it was impossible to make such an *a priori* judgment call for any other cases; doing so would have required pulling dockets and documents for thousands of cases to determine whether the court had ordered substantive consolidation or whether multiple debtors had filed a single joint plan. Such a process simply was not feasible.

76. See Voluntary Petition Ex. A, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. March 2, 2004) (Docket No. 1) (listing names of the other 2528 affiliated debtors that filed for Chapter 11 on March 2, 2004).

77. Order Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Directing Joint Administration of Chapter 11 Cases, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. March 3, 2004) (Docket No. 37); Order Pursuant to Sections 105, 363 and 1112(b) of the Bankruptcy Code and Bankruptcy Rules 1017 and 9014 Granting Substantive Consolidation, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. Sept. 30, 2005) (Docket No. 2839). See *infra* note 86 for a brief explanation of the difference between procedural consolidation or joint administration, and substantive consolidation.

78. Order Confirming Debtors' First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, Dated December 5, 2005, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. Jan. 27, 2006) (Docket No. 3267).

79. No. 04-22350.

80. Three consolidated sets of schedules were filed based on the company's divisions: (1) Corporate; (2) Athletic; and (3) Meldisco. See Corporate Debtors' Schedules, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. June 15, 2004) (Docket No. 684); Athletic Debtors' Schedules, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. June 15, 2004) (Docket No. 686); Meldisco Debtors' Schedules, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. June 15, 2004) (Docket No. 687).

date.<sup>81</sup> 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 because *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.<sup>82</sup> 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 *Footstar*-adjusted Chapter 11 cases. The initial sample included cases from 89 of the 92 judicial districts in which debtors filed Chapter 11 cases in 2004.<sup>83</sup> There were no bankruptcy filings in either the District of Guam or the District of the Northern Mariana Islands.

Of these 878 cases, 80 were eliminated from the random sample. Of the 80 cases, 3 were mistakenly included (2 due to PACER errors) in the Chapter 11 population described above in Part II.A.<sup>84</sup> Four 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.<sup>85</sup>

I eliminated the other 73 cases to maintain the independence of the data and to avoid skewing the study's results. In some of these 73 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 consolidation<sup>86</sup> of

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81. See Order Confirming Debtors' First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, Dated December 5, 2005, *In re Footstar, Inc.*, No. 04-22350 (Bankr. S.D.N.Y. Jan. 27, 2006) (Docket No. 3267).

82. The original population contained 10,163 cases, and 2528 were eliminated, thereby leaving 7635 cases.

83. The random number generator did not "select" any cases for the random sample from 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.

84. 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 sample); *In re Childress*, No. 04-10470 (Bankr. D. Md. Jan. 8, 2004) (2003 Chapter 11 case filed in the bankruptcy court for the District of Columbia, and then transferred to the bankruptcy court for the District of Maryland in 2004 and given a 2004 case number).

85. See *In re Reagan*, No. 04-77590 (Bankr. W.D. Ark. Nov. 11, 2004); *In re RFI Realty, Inc.*, No. 04-10486 (Bankr. D. Ariz. June 15, 2004); *In re LaVigne*, No. 04-64078 (Bankr. N.D.N.Y. June 4, 2004); *In re North Plaza, LLC*, No. 04-00769 (Bankr. S.D. Cal. Jan. 28, 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.

86. 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

the debtors for plan voting and/or claim distribution purposes.<sup>87</sup> 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.<sup>88</sup> This study examines the relationship of two 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 these 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 80 cases left 798 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 the 92 judicial districts in which debtors filed Chapter 11 cases in 2004.<sup>89</sup>

### C. Obtaining the Data

For each case in the random sample, my research assistants and I collected the docket and documents needed 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 the DCI, and then input the coded DCIs into a database.<sup>90</sup> 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

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“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 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 COLLIER ON BANKRUPTCY ¶ 105.09 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

87. 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”).

88. See, e.g., Order Confirming Chapter 11 Plan, *In re Duris*, No. 04-18655 (Bankr. E.D. La. Feb. 10, 2006) (Docket No. 253) (confirming joint plan of partial liquidation for three jointly administered cases). The random sample included all three cases covered by the joint plan of liquidation. I kept the “lead” case in the random sample and eliminated the other two.

89. See *supra* note 83.

90. My gratitude to Scott Nagele of MSU College of Law, who constructed the database and worked with me on refining, through numerous iterations, the DCI.



simply unavailable for bankruptcy cases filed in calendar year 2004.<sup>91</sup> 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.<sup>92</sup>

#### *D. Defining Success*

What makes for a successful Chapter 11 case? There is no simple answer to the question. Some judges and commentators question the focus on plan confirmation as the sole measure of Chapter 11 success.<sup>93</sup> For example, a debtor may exit Chapter 11 without a confirmed plan but after having reached a satisfactory settlement with creditors.<sup>94</sup> Nonetheless, “plan confirmation is surely the central measure of success in Chapter 11.”<sup>95</sup> In fact, the low rate of plan confirmation in Chapter 11 served as the impetus not only for the Commission’s creation but also Congress’ adoption of the Code’s small business provisions. Thus, in this Article, I use plan confirmation and performance to measure Chapter 11 success.

I tested three variations of this basic definition of “success.” The first is initial success, i.e. plan confirmation, and this can be a plan of reorganization, a

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91. 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.

92. 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, an Administrative Support Specialist in the Northern District of Alabama, and Sheila Skinner-Grant, an Operations Support Specialist in the Southern District of Florida, provided to me in locating documents for cases in their judicial districts.

93. See, e.g., Judge James B. Haines, Jr. & Philip J. Hendel, *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”).

94. See, e.g., Transcript of Hearing Held on Oral Ruling on Joint Motion to Approve Settlement Agreement and/or Dismiss at 12, *In re Paradox Partners, LLC*, No. 04-26279 (Bankr. D. Colo. Sept. 19, 2005) (Docket No. 369) (commending parties for “maximiz[ing] the chances of recovery for everyone involved” and noting that while a plan was not confirmed, the case “provided a venue within which people could sit down and slug it out” in an open and vigorous fashion); *Challenge*, *supra* note 1, at 611 (noting that not every dismissal is a “complete failure,” because dismissal may occur after “debtors and creditors have worked out a settlement that they were not able to achieve prior to the Chapter 11 filing”). 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 COMMISSION REPORT, *supra* note 2, at 308.

95. *Challenge*, *supra* note 1, at 611.

plan of liquidation, or a mixed plan of reorganization and liquidation. I included liquidating plans in the study for several reasons. The Code specifically provides for liquidating plans,<sup>96</sup> and thus, “confirmation of such a plan successfully resolves a case in Chapter 11.”<sup>97</sup> In addition, a liquidating plan under Chapter 11 is not necessarily the equivalent of liquidation under Chapter 7.<sup>98</sup> For example, a liquidating plan may provide for the sale of a firm on a going-concern basis, thereby preserving the business, albeit under different ownership.<sup>99</sup> More importantly, however, this study examines the impact on plan confirmation rates of elements in the statutory and Commission definitions of a small Chapter 11 debtor. These definitions apply with equal force to debtors proposing and confirming plans of reorganization or plans of liquidation.

The second variation 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 Code.<sup>100</sup>

It is important not to confuse ultimate success with the third measure of success—success on confirmation. While both ultimate success and success on confirmation take account of plan failure, the difference in the two measures lies in the sample of cases tested. Ultimate success measures rates of plan success using the entire sample of cases—e.g., 798 cases for the committee analysis. Success on confirmation measures rates of plan success using the sub-sample of confirmed-

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96. See 11 U.S.C. § 1123(b)(4) (2012) (authorizing a liquidating plan). While the Code provides for such plans, Professor Lubben found that successful liquidating plans are an uncommon phenomenon in Chapter 11. See Stephen J. Lubben, *Business Liquidation*, 81 AM. BANKR. L.J. 65, 68 (2007) (“Very few creditors ultimately receive the benefits of a chapter 11 liquidation—most chapter 11 cases convert to chapter 7 and very few liquidating plans are ultimately confirmed.”).

97. *Challenge*, *supra* note 1, at 611.

98. In his study comparing rates of return to unsecured creditors, Professor Lubben found that the average unsecured creditor in Chapter 7 receives “a token payment on their claim, about three quarters of one percent of the face value of the claim, and [in] most chapter 7 cases . . . no payment whatsoever.” Lubben, *supra* note 96, at 80. By comparison, Chapter 11 liquidating plans “return a more respectable 20% to unsecured creditors—although the standard error is large, and the proper number could be as low as 6.9% or as high as 34.7%.” *Id.* at 81 (footnote omitted).

99. See *Challenge*, *supra* note 1, at 611 (contrasting two polar opposite versions of the liquidating plan—the going-concern sale versus piecemeal disaggregation of a firm through individual asset sales).

100. Ultimate success rates may be overstated 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(2) (2012) (allowing a debtor to file for bankruptcy in any judicial district in which there is a pending bankruptcy case by an affiliated debtor). Because the results do not include all possible bankruptcy re-filings, failure rates may be under-stated and, hence, ultimate success rates overstated.

plan cases only—e.g., 269 cases for the committee analysis. For example, a finding that cases with committees have significantly higher rates of ultimate success than cases without committees means that committee formation predicts plan performance for the entire sample of cases; it does not mean that cases with committees produce “better” or more feasible plans than no-committee cases. Success on confirmation, on the other hand, does measure comparative plan feasibility because it examines only those cases in which the debtor confirmed a plan. Thus, a finding that committee-cases have significantly higher rates of success on confirmation than no-committee cases means that committee formation is associated with plan feasibility.

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 debtor. The 2-proportion Z-test was used for all statistical analyses performed.<sup>101</sup> Statistical testing was conducted at the 0.05 significance level, which means that a result is statistically significant if the test’s associated p-value is *less* than 0.05.

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 798 cases.

The second criterion was the size of the debtor’s liabilities. As I explain more fully in Part III.B.2,<sup>102</sup> the random sample for liability testing consisted of 782 cases. Cases for committee formation fell into one of two categories—committee or no committee. But debtor liabilities ranged from the very small, under \$50,000, to the enormous, 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.<sup>103</sup> 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 (“≤\$2 million”); (2) liabilities over \$2 million but not in excess of \$5 million (“\$2 to \$5 million”);<sup>104</sup> and (3) liabilities in excess of \$5 million (“>\$5 million”).

Both Congress and the Commission defined a small 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<sup>105</sup> from the liability totals provided on the

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101. Wenning Feng, a doctoral student in the Department of Statistics and Probability at Michigan State University, conducted all the statistical tests for this Article.

102. See *infra* Part III.B.2.

103. See *infra* notes 125–30 and accompanying text.

104. For ease of description, I use the phrase “between \$2 and \$5 million.” Technically, however, the range covers debtors with liabilities in excess of \$2 million but less than *or equal* to \$5 million.

105. In 38 cases, I categorized the debtor on the basis of liability ranges on the petition because I did not have access to the schedules and the debtor’s identification of

debtor's Summary of Schedules.<sup>106</sup> 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 underreport their liabilities by listing them as contingent or unliquidated.<sup>107</sup> 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 782 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.

### III. THE FINDINGS: COMMITTEE FORMATION, LIABILITY SIZE, AND PLAN SUCCESS

#### A. Plan Confirmation as "Success"

The debtor (or some other entity)<sup>108</sup> proposed a plan in 389 of the 798 cases in the random sample, yielding a plan proposal rate of 49%.<sup>109</sup> The bankruptcy court confirmed a plan in 269 of these 389 cases, for a confirmation rate, once plan proposal occurred, of 69%. 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 269 of the 798 cases in the random sample, for an initial success rate of 34%.<sup>110</sup> If plan

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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.

106. 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 69.

107. *See infra* notes 131–35 and accompanying text.

108. The Code provides the debtor that is not a small business with a 120-day exclusive period during which only it may propose a plan. 11 U.S.C. § 1121(b) (2012). In 2004, debtors electing small business treatment had a 100-day exclusivity period. 11 U.S.C.A. § 1121(e)(1) (2004). Small business debtors currently have a 180-day period during which they alone may propose a plan. 11 U.S.C. § 1121(e)(1) (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.* § 1121(c).

109. In Part III.B.2, the sample is comprised of 782 cases. *See infra* notes 125–30 and accompanying text for an explanation of the change in sample size. A plan was proposed in 388 of these 782 cases, for a plan proposal rate of approximately 50%.

110. This figure is consistent with that found by Professors Warren and Westbrook in their 2009 published study of Chapter 11 cases. *See Challenge, supra* note 1,

confirmation is the measure of success, then almost two-thirds of the Chapter 11 cases in the sample were not successful.<sup>111</sup>

The ultimate success rate is even lower. In 36 of the 269 cases with confirmed plans, the court either dismissed or converted the case, or the debtor refiled for bankruptcy post-confirmation. In total, 13% of the confirmed-plan cases failed. These plan failures lowered the ultimate success rate to 29%, from an initial success rate of 34%.<sup>112</sup> By this measure, then, more than 70% of the Chapter 11 cases were not successful.<sup>113</sup>

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 performance. Formation of an official unsecured creditors' committee and the size of a debtor's liabilities significantly predict both initial and ultimate rates of success.<sup>114</sup> The effects on confirmation rates obtain regardless of whether liabilities include or exclude contingent and unliquidated debt.

#### *1. The Official Committee of Unsecured Creditors*

The Code provides that "the United States trustee shall appoint a committee of creditors holding unsecured claims."<sup>115</sup> The committee normally is

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at 615 (finding that even their "naive metric" of Chapter 11 success showed confirmation rates of 30.3% and 33.4% for their 1994 and 2002 samples, respectively).

111. The initial and ultimate success rates are comparable for the liability sample in Part III.B.2. Of 782 cases in that sample, the court confirmed a plan in 267 cases for an initial success rate of 34%. Thirty-six of those plans failed, leaving 231 ultimately successful cases out of 782 for an ultimate success rate of approximately 30%.

112. There were 233 confirmed-plan cases after accounting for post-confirmation conversions and dismissals, as well as subsequent bankruptcy filings, out of a sample of 798 cases.

113. The initial and ultimate success rates for the "individual consumer" Chapter 11 cases did not differ significantly from those for the "business" Chapter 11 cases. See *supra* note 67 and accompanying text. Of the 695 "business" Chapter 11 cases, 240 initially confirmed a plan, while 29 of the 103 "consumer" cases did so, for initial success rates of 35% and 28%, respectively. The difference in initial success rates is not statistically significant at the 0.05 significance level. Ultimate success rates are 30% (206 of 695 "business" cases) and 26% (27 of 103 "consumer" cases), respectively, for business and consumer Chapter 11 cases. Once again, the difference in ultimate success rates is not statistically significant at the 0.05 significance level.

114. I did not examine the effect of other committees, e.g., equity security holders, on plan confirmation rates. For an excellent empirical analysis of the impact of committees on Chapter 11 outcomes, see Michelle Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors' Committees in Business Reorganizations*, 64 VAND. L. REV. 749 (2011).

115. 11 U.S.C. § 1102(a)(1) (2012). 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

comprised of those creditors, willing to serve, that hold the seven largest unsecured claims against the debtor.<sup>116</sup> While the language of the Code is mandatory, stating that the United States Trustee “shall” appoint an unsecured creditors’ committee, “creditors typically are unwilling to serve.”<sup>117</sup> In fact, a committee was formed in only 18% of the cases in the random sample.<sup>118</sup> The reason for such a low rate of committee formation is that in most cases an insufficient number of creditors were willing to serve.<sup>119</sup>

As Column B of Tables 1 and 2 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 27.41% for no-committee cases (see Table 1, Column B).<sup>120</sup> The story is the same for ultimate success rates. For cases with a committee, the ultimate success rate of 55.17% is more than double the 23.43% success rate for no-committee cases (see Table 2, Column B).<sup>121</sup>

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

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quoted in the text, however, include committees formed in any case in the random sample, regardless of whether the United States Trustee made the appointment.

116. *Id.* § 1102(b)(1).

117. Small, *supra* note 1, at 983.

118. An official unsecured creditors’ committee formed in 145 of the 798 cases (see Figure 1, Column I). 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.

119. *See, e.g.*, Statement of United States Trustee Concerning Inability to Appoint an Official Committee of Unsecured Creditors at ¶ 2, *In re Ocean Beach Transfer*, No. 04-08022 (Bankr. S.D. Cal. April 13, 2005) (Docket No. 41) (noting that notwithstanding efforts to appoint a committee, “sufficient indications of willingness to serve on a committee of unsecured creditors ha[d] not been received from persons eligible to serve on such a committee”); Minutes of the 11 U.S.C. § 341 Meeting, *In re Pixius Commc’ns, LLC*, No. 04-16825 (Bankr. D. Kan. Jan. 14, 2005) (Docket No. 45) (stating that “an insufficient number of creditors ha[d] expressed an interest in serving on a creditors’ committee”).

120. Initial success rates are computed by dividing the number of confirmed plans for each category—committee versus no-committee—by the total number of cases in that category. For example, 179 cases had confirmed plans out of 653 no-committee cases for an initial success rate of 27.41%.

121. Of the 90 cases with a committee and a confirmed plan, 10 plans failed; thus, 80 cases had successful plans out of the 145 cases with a committee. For no-committee cases, 179 cases had confirmed plans and 26 of those plans failed, leaving 153 cases with successful plans out of the 653 no-committee cases.

small—less than 0.001 (see Tables 1 and 2, Column C).<sup>122</sup> This means that, for the random sample of all Chapter 11 debtors, formation of an official unsecured creditors' committee is associated with significantly greater odds of both plan confirmation and successful plan performance.

But is committee formation associated with greater odds of plan performance among the sub-sample of confirmed-plan cases? Official creditors' committees normally disband after plan confirmation; therefore, they cannot serve an oversight function post-confirmation. Is it possible, however, 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 88.89% success-on-confirmation rate for committee cases is only slightly higher than 85.47%, which is the rate for no-committee cases (see Table 3, Column B). Column C of Table 3 shows that the p-value exceeds 0.05, which means that 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 official unsecured creditors' committees existed in only a small minority of the Chapter 11 cases in the random sample, cases that had a committee confirmed and performed plans at a statistically significant higher rate than did cases without a creditors' committee. However, once a plan was confirmed, committee formation did not predict plan performance. Statistically, plan-performance rates for cases without committees were not significantly different from those for cases with committees.

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122. 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).

Figure 1. Committees and Plan Confirmation

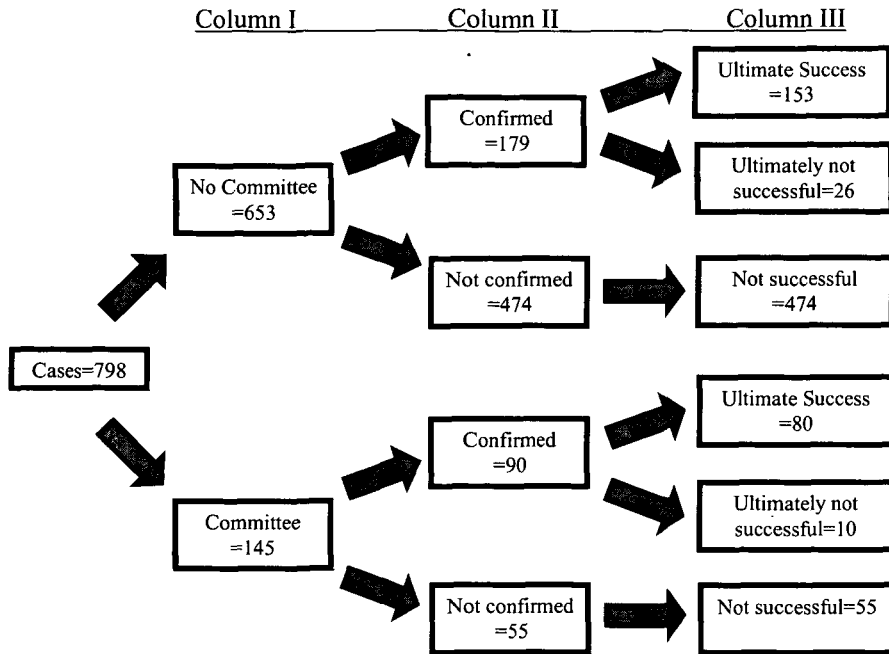


Table 1. Committees and Initial Success Rates

	A	B	C
Total Number of Cases=798	Number Confirmed	Success Percentage <sup>123</sup>	Results
No-committee cases=653	179	27.41%	<i>p&lt;0.001</i> <i>Statistically significant</i> <i>higher rate of confirmation</i> <i>for committee cases</i>
Committee cases=145	90	62.07%	

Table 2. Committees and Ultimate Success Rates

	A	B	C
Total Number of Cases=798	Number Confirmed	Success Percentage	Results
No-committee cases=653	153	23.43%	<i>p&lt;0.001</i> <i>Statistically significant</i> <i>higher rate of ultimate</i> <i>success for committee cases</i>
Committee cases=145	80	55.17%	

123. I use the term “success percentage” in Tables 1, 2, and 3 in lieu of the statistical term “sample proportion.”



Table 3. Committees and Success-on-Confirmation Rates

	A	B	C
<i>Total Number of Cases=269</i>	<b>Number of Ultimately Successful Plans</b>	<b>Success Percentage</b>	<b>Results</b>
<b>No-committee confirmed-plan cases=179</b>	153	85.47%	<i>p&gt;0.05</i> <i>No statistical difference</i>
<b>Committee confirmed-plan cases=90</b>	80	88.89%	

### 2. Size of Debtor Liabilities

To test the relationship between the size of a debtor's liabilities and plan 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.<sup>124</sup> In 54 cases, however, the debtor either filed no schedules, which then precipitated the debtor's dismissal from bankruptcy,<sup>125</sup> or I was unable to access the schedules on PACER or otherwise obtain them.<sup>126</sup> I then turned to other documents in the case, including two important pieces of information on the petition.

The petition requires the debtor to check a box indicating the range of its liabilities, which in 2004 ranged from a low of "\$0 to \$50,000," to a high of "[m]ore than \$100 million."<sup>127</sup> In 2004, the petition also provided a debtor with the option of identifying itself as a small business debtor and/or electing small business treatment.<sup>128</sup> In 38 of the 54 no-schedule cases, I was able to isolate the liability range to which the debtor belonged by using other information filed in the

124. See 11 U.S.C. § 521(a)(1)(B)(i) (2012) (stating that the "debtor shall file . . . unless the court orders otherwise—a schedule of assets and liabilities").

125. See, e.g., *Ex Parte* Order Dismissing Case for Failure to Timely File Schedules, Statements, or Lists, *In re* Kostick, No. 04-42968 (Bankr. W.D. Wash. April 19, 2004) (Docket No. 11).

126. See, e.g., *In re* Slade's of West Virginia, Inc., No. 04-00393 (Bankr. W.D. Va. 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. I deleted two of the six cases in the random sample drawn from the Western District of Virginia because I could not obtain reliable liability information in either case.

127. Currently, the petition's high-end range is "[m]ore than \$1 billion." See U.S. COURTS BANKR. FORMS, VOLUNTARY PETITION (2011), Official Form 1. Official forms are available at the website for the United States Courts, see *supra* note 69.

128. Congress eliminated the small business election in 2005. Compare 11 U.S.C.A. § 1121(e) (2004) (providing plan exclusivity and proposal rules for cases "in which the debtor is a small business and elects to be considered a small business"), with 11 U.S.C. § 1121(e) (2012) (providing plan exclusivity and proposal rules for "small business case[s]"). The voluntary petition now requires the debtor to check that it either is or is not a small business debtor. See FED. R. BANKR. P. 1020(a) (stating that in a voluntary case a Chapter 11 debtor "shall state in the petition whether the debtor is a small business debtor").

debtor's case.<sup>129</sup> In the remaining 16 cases, however, I was unable to do so. I eliminated these 16 cases, which comprised 2% of the original 798-case sample, thereby leaving 782 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.<sup>130</sup> There is a strategic reason why a debtor may do so in a Chapter 11 case.<sup>131</sup> The Federal Rules of Bankruptcy Procedure provide that in a Chapter 11 case, 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."<sup>132</sup> Creditors whose claims are scheduled but not identified as disputed, contingent, or unliquidated need not file a proof of claim in the debtor's bankruptcy case.<sup>133</sup> For example, scheduling a creditor's claim but listing it as contingent or unliquidated forces the creditor to file a proof of claim or risk losing the right to be "treated as a creditor with respect to such claim for the purposes of voting [on] and distribution" under the debtor's plan.<sup>134</sup>

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 III.B.2.a below, I present the results of testing the liability data using the Code's \$2 million liability cutoff in 2004. Part III.B.2.b provides the results of testing the liability data against the Commission's recommended \$5 million liability limit.

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129. In the vast majority of these 38 cases, I categorized the debtor based solely on the liability box checked on the petition. *See, e.g.*, Voluntary Petition, *In re* Highsmith-Harris, No. 04-35079 (Bankr. E.D. Pa. Nov. 8, 2004) (Docket No. 1) (estimated debts listed as \$50,001 to \$100,000); Voluntary Petition, *In re* Rose Manor Props., Inc., No. 04-62639 (Bankr. D. Or. April 4, 2004) (estimated debts of "More than \$100 million"). In three cases, the debtor checked the \$1–10 million box, 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 \$1–10 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.

130. *See, e.g.*, Schedules, *In re* Mark Edgil & Associates, Inc., No. 04-85645 (Bankr. N.D. Ala. Dec. 30, 2004) (Docket No. 17) (listing all liabilities as unliquidated); Schedules A-H, *In re* Tri Axle, No. 04-3315 (Bankr. E.D. Pa. October 20, 2004) (Docket No. 18) (listing all unsecured debt, both priority and general, as contingent, unliquidated, and disputed); *see also* Corporate Debtors' Schedules, *supra* note 80 (listing approximately 94% of unsecured priority debt as contingent and unliquidated).

131. For a discussion of Chapter 11 debtor strategy in scheduling liabilities, see Anne M. Lawton & Lynda J. 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.

132. FED. R. BANKR. P. 3003(b)(1).

133. *Id.* at 3003(c)(2).

134. *Id.*

Finally, in Part III.B.2.c, I present the results of multiple comparison testing across the three liability ranges: (1)  $\leq$ \$2 million; (2) \$2 to \$5 million; and (3)  $>$ \$5 million.

**a. Success Rates Using the \$2 Million Liability Limit**

**i. Non-Contingent, Liquidated Liabilities**

Debtors with more than \$2 million in NCL liabilities comprised only 29% of the cases in the adjusted random sample.<sup>135</sup> Nonetheless, they accounted for more than 40% of the cases in which the debtor confirmed and successfully performed a plan.<sup>136</sup>

A comparison of Columns A and B of Table 4 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 in Column C for both initial and ultimate success rates are small—less than 0.001. 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. I offer explanations for why this might be the case in the following Section.

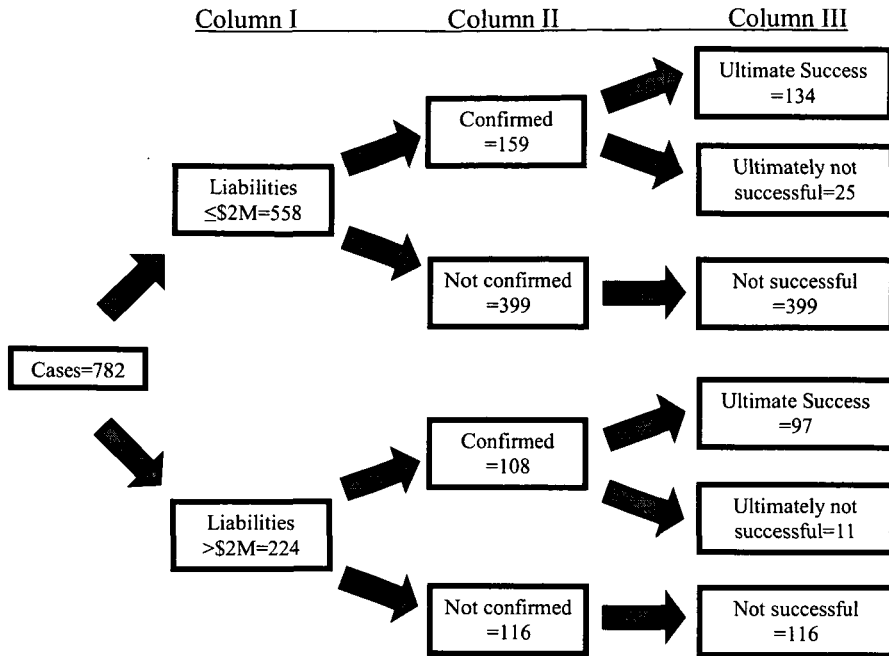
As with the committee data, liability size did not significantly predict success-on-confirmation rates. Columns A and B of Table 4 show a success-on-confirmation rate of 84.28% for debtors with  $\leq$ \$2 million in NCL liabilities compared with a rate of 89.81% for debtors whose NCL liabilities exceed \$2 million. The p-value in Column C is greater than 0.05, which means that for confirmed-plan cases, the size of the debtor's NCL liabilities is not associated with greater odds that the debtor's plan will succeed.

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135. Of the 782 cases in the liability sample, 224 had NCL liabilities in excess of \$2 million (see Figure 2, Column I).

136. Two cases with confirmed plans were removed with the elimination of the 16 cases discussed *supra* at notes 125–30 and accompanying text. Of the 267 cases with confirmed plans, 40.45% or 108 had NCL liabilities in excess of \$2 million (see Figure 2, Column II). Of the 231 cases with ultimately successful plans, 97 or 41.99% had NCL liabilities over \$2 million (see Figure 2, Column III).

**Figure 2. Non-Contingent, Liquidated Liabilities at the \$2 Million Limit and Plan Confirmation**



**Table 4. Non-Contingent, Liquidated Liabilities at the \$2 Million Limit**

	A	B	C
	NCL ≤\$2M	NCL >\$2M	Results
<b>Initial Success</b> <i>Total Cases=782</i>	159/558=28.49%	108/224=48.21%	<i>p&lt;0.001</i>  <i>Statistically significant higher rate of initial success for NCL &gt;\$2M</i>
<b>Ultimate Success</b> <i>Total Cases=782</i>	134/558=24.01%	97/224=43.30%	<i>p&lt;0.001</i>  <i>Statistically significant higher rate of ultimate success for NCL &gt;\$2M</i>
<b>Success on Confirmation</b> <i>Total Cases=267</i>	134/159=84.28%	97/108=89.81%	<i>p&gt;0.05</i>  <i>No statistical difference in success-on-confirmation rates</i>

ii. Total Liabilities

Counting contingent and unliquidated debts in the liability figures reduced by 30 the number of debtors with ≤\$2 million in liabilities and increased by 30 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% of the adjusted random sample,<sup>137</sup> but accounted for 46% of the initially confirmed plans and 49% of the successfully performed plans.<sup>138</sup>

Columns A and B of Table 5 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 C, 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.

The pattern seen for NCL liabilities and success-on-confirmation rates, however, did not hold for total liabilities. Debtors with total liabilities in excess of \$2 million have significantly higher success-on-confirmation rates than do debtors with ≤\$2 million in total liabilities (see Table 5, Column C). Why might this be the case? One explanation may be that liability size serves as a proxy for financial sophistication. Mom-and-pop enterprises or other small businesses are unlikely to have access to multi-million-dollar lines of credit while trade creditors are equally unlikely to allow debtors with fewer resources to maintain high unsecured credit balances. By comparison, debtors with significant liabilities likely have significant assets—banks and other lenders do not lend to borrowers without collateral. As the Commission noted in its report, “the nature and size of the debtor’s liabilities is the single best predictor of case complexity.”<sup>139</sup> A complex case usually involves a debtor with a more elaborate business structure. Such debtors may have access to legal, accounting, and financial expertise. This expertise, in turn, may result in confirmation of a “better” or more feasible plan.

However, a cautionary note is in order. This finding of a statistically significant difference in success-on-confirmation rates for large—versus small—liability debtors does not hold for any other liability measure. It is unclear why that should be the case. If, for example, liability size serves as a proxy for financial sophistication, then success-on-confirmation rates for firms with liabilities in excess of \$5 million should be significantly different than those with liabilities of \$5 million or less. But that is not the case.<sup>140</sup> Of course, the “proxy” argument is only one explanation for this success-on-confirmation finding. Nonetheless, other possible explanations, e.g., greater creditor commitment to plan success in larger cases, also would produce statistically different success-on-confirmation rates for debtors with liabilities in excess of \$5 million.

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137. Of the 782 cases in the liability sample, 254 had total liabilities in excess of \$2 million (see Figure 3, Column I).

138. Of the 267 cases with confirmed plans, 124 or 46.44% had total liabilities in excess of \$2 million (see Figure 3, Column II). Of the 231 successful plans, 113 or 48.92% were filed by debtors with more than \$2 million in total liabilities (see Figure 3, Column III).

139. COMMISSION REPORT, *supra* note 2, at 630 (footnote omitted).

140. See *infra* Part III.B.2.b.

Figure 3. Total Liabilities at the \$2 Million Limit and Plan Confirmation

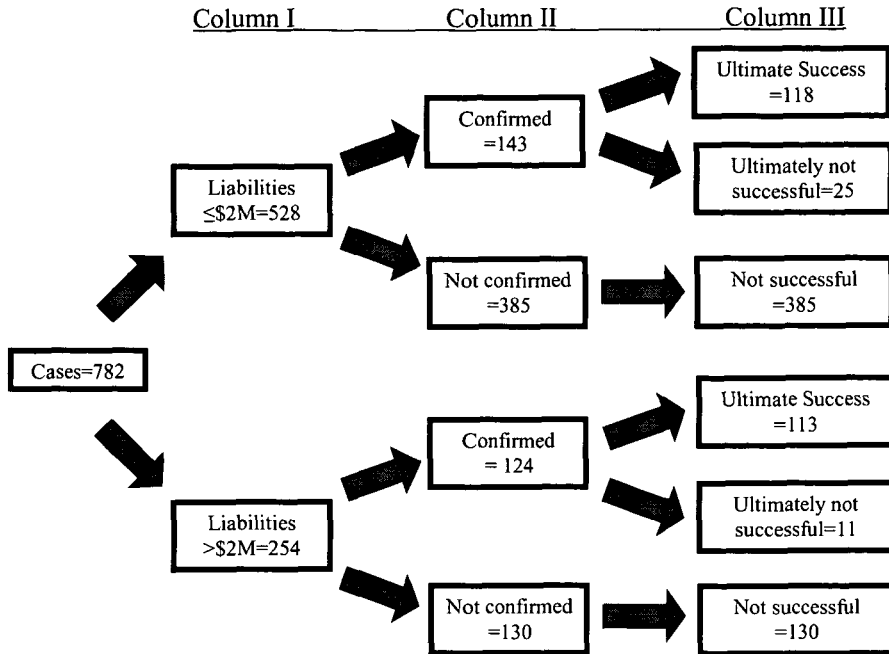


Table 5. Total Liabilities at the \$2 Million Limit

	A	B	C
	Total Liabilities ≤\$2M	Total Liabilities >\$2M	Results
Initial Success Total Cases=782	143/528=27.08%	124/254=48.82%	$p < 0.001$ <i>Statistically significant higher rate of initial success when total liabilities &gt;\$2M</i>
Ultimate Success Total Cases=782	118/528=22.35%	113/254=44.49%	$p < 0.001$ <i>Statistically significant higher rate of ultimate success when total liabilities &gt;\$2M</i>
Success on Confirmation Total Cases=267	118/143=82.52%	113/124=91.13%	$p < 0.05$ <i>Statistically significant higher rate of success on confirmation when total liabilities &gt;\$2M</i>

iii. Summary of Findings: \$2 Million Limit

Congress and the Commission were correct: Chapter 11 is problematic for the small debtor. It is unclear *why* Congress chose \$2 million as the liability cutoff. Nonetheless, that choice was correct: Debtors with more than \$2 million in liabilities confirm and successfully perform plans at significantly higher rates than

do debtors with liabilities of \$2 million or less. These findings obtain regardless of whether debtors' liabilities include or exclude contingent and unliquidated debt.

The nature of a debtor's liabilities does matter, however, when evaluating success-on-confirmation rates. There is no statistical difference in success-on-confirmation rates when using NCL liabilities. Debtors with total liabilities in excess of \$2 million, however, have significantly higher rates of success on confirmation compared with debtors having total liabilities of \$2 million or less. The reason for the latter finding, given the study's other results, is unclear.

#### **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 16% of the cases in the adjusted 782-case random sample.<sup>141</sup> Nonetheless, they accounted for a quarter of confirmed and also ultimately successful plans.<sup>142</sup>

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 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 of Table 6). In addition, as Column C of Table 6 shows, the p-values for both the initial and ultimate-success rate data are small—less than 0.001. Thus, debtors with NCL liabilities in excess of \$5 million confirm and successfully perform plans at a significantly higher rate statistically than do debtors whose liabilities are \$5 million or less.

A comparison of Columns A and B of Table 6 reveals very similar rates of success on confirmation. As Column C 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. Thus, for those debtors that confirm a plan, liability size is not significantly associated with plan performance.

##### **ii. Total Liabilities**

Debtors with total liabilities in excess of \$5 million comprised less than 20% of the adjusted random sample but accounted for 31% of the initially confirmed and 32% of successfully performed plans.<sup>143</sup> Thus, debtors with total

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141. Of the 782 cases in the liability sample, 128 had NCL liabilities in excess of \$5 million (see Figure 4, Column I).

142. Of the 267 cases with confirmed plans, the debtor had NCL liabilities in excess of \$5 million in 68 or 25.47% of the confirmed-plan cases (see Figure 4, Column II). Of the 231 cases with successful plans, 60 or 25.97% had NCL liabilities over \$5 million (see Figure 4, Column III).

143. Of 782 cases in the adjusted random sample, 151 or 19.31% had total liabilities over \$5 million (see Figure 5, Column I). Of 267 cases with confirmed plans, 83 or 31.09% had total liabilities in excess of \$5 million (see Figure 5, Column II). Finally, of

liabilities in excess of \$5 million were disproportionately represented in the group of cases with confirmed and successfully performed 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 7). In addition, the results of the statistical analysis, provided in Column C, 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 C 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: \$5 Million Limit

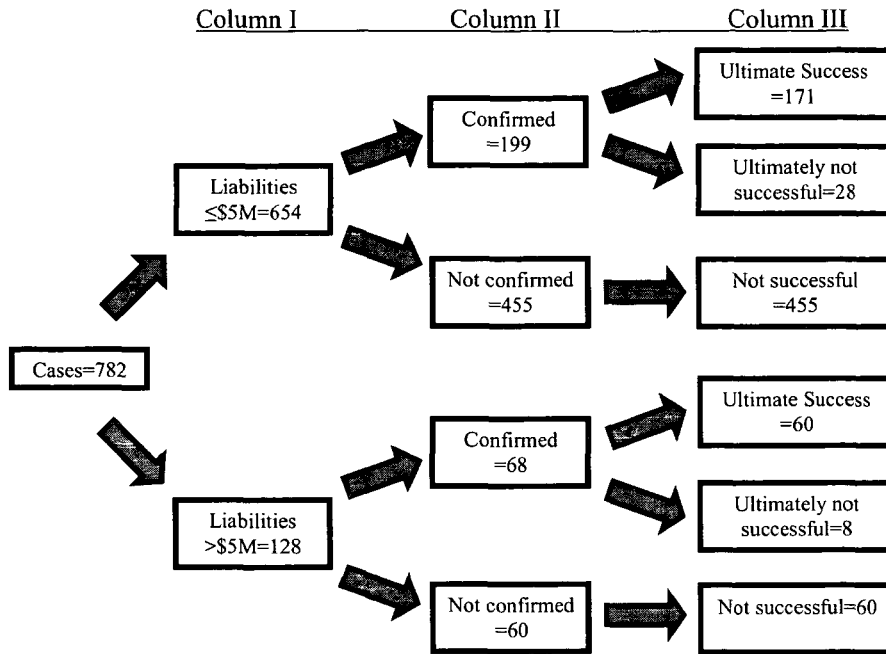
The findings support the Commission's decision to draw the liability cutoff at \$5 million. Debtors with liabilities in excess of \$5 million confirm and perform plans at significantly greater rates than do debtors with liabilities of \$5 million or less. This finding holds regardless of whether debtors' liabilities include or exclude contingent and unliquidated debt. But there is no statistical difference in success-on-confirmation rates between debtors with liabilities above and below \$5 million, regardless of whether the analysis is conducted using NCL or total liabilities. Thus, there is no statistically significant difference in plan performance rates between confirmed-plan cases with liabilities above \$5 million and confirmed-plan cases with liabilities of \$5 million or less.

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231 ultimately successful cases, 32.47% or 75 cases had more than \$5 million in total liabilities (see Figure 5, Column III).



**Figure 4. Non-Contingent, Liquidated Liabilities at the \$5 Million Limit and Plan Confirmation**



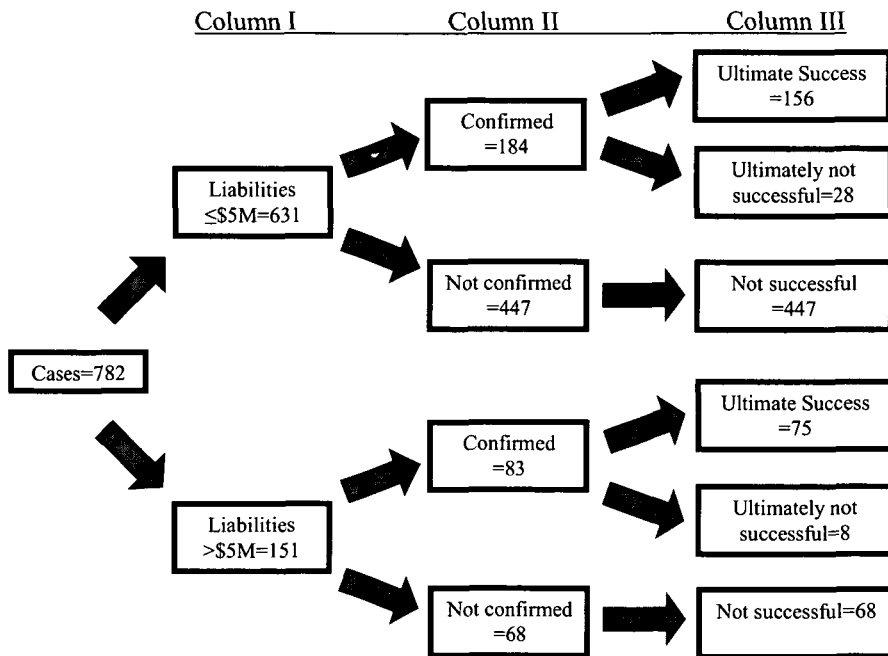
**Table 6. Non-Contingent, Liquidated Liabilities at the \$5 Million Limit**

	A	B	C
	NCL ≤\$5M	NCL >\$5M	Results
<b>Initial Success</b> <i>Total Cases=782</i>	199/654=30.43%	68/128=53.13%	$p < 0.001$ <i>Statistically significant higher rate of initial success when NCL &gt;\$5M</i>
<b>Ultimate Success</b> <i>Total Cases=782</i>	171/654=26.15%	60/128=46.88%	$p < 0.001$ <i>Statistically significant higher rate of ultimate success when NCL &gt;\$5M</i>
<b>Success on Confirmation</b> <i>Total Cases=267</i>	171/199=85.93%	60/68=88.24%	$p > 0.05$ <i>No statistical difference in success-on-confirmation rates</i>

**Table 7. Total Liabilities at the \$5 Million Limit**

	A	B	C
	Total Liabilities ≤\$5M	Total Liabilities >\$5M	Results
Initial Success Total Cases=782	184/631=29.16%	83/151=54.97%	$p < 0.001$  <i>Statistically significant higher rate of initial success when total liabilities &gt;\$5M</i>
Ultimate Success Total Cases=782	156/631=24.72%	75/151=49.67%	$p < 0.001$  <i>Statistically significant higher rate of ultimate success when total liabilities &gt;\$5M</i>
Success on Confirmation Total Cases=267	156/184=84.78%	75/83=90.36%	$p > 0.05$  <i>No statistical difference in success-on-confirmation rates</i>

**Figure 5. Total Liabilities at the \$5 Million Limit and Plan Confirmation**



**c. Where to Draw the Line—\$2 or \$5 Million?**

As the earlier analysis demonstrates, debtors with more than \$2 million in liabilities have initial and ultimate success rates that are significantly higher statistically than debtors with ≤\$2 million in liabilities. But, debtors with \$5 million or more in liabilities *also* have initial and ultimate success rates that are significantly higher statistically than debtors with \$5 million or less in 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 liability ranges:

- 1) **≤\$2 million with \$2 to \$5 million**
- 2) **\$2 to \$5 million with >\$5 million**
- 3) **≤\$2 million with >\$5 million**

i. Non-Contingent, Liquidated Liabilities

A comparison of Columns A, B, and C of Table 8 shows that both initial and ultimate success rates increase as the NCL liability range changes from ≤\$2 million, to \$2 to \$5 million, to >\$5 million. Figure 7 graphically demonstrates the same point.

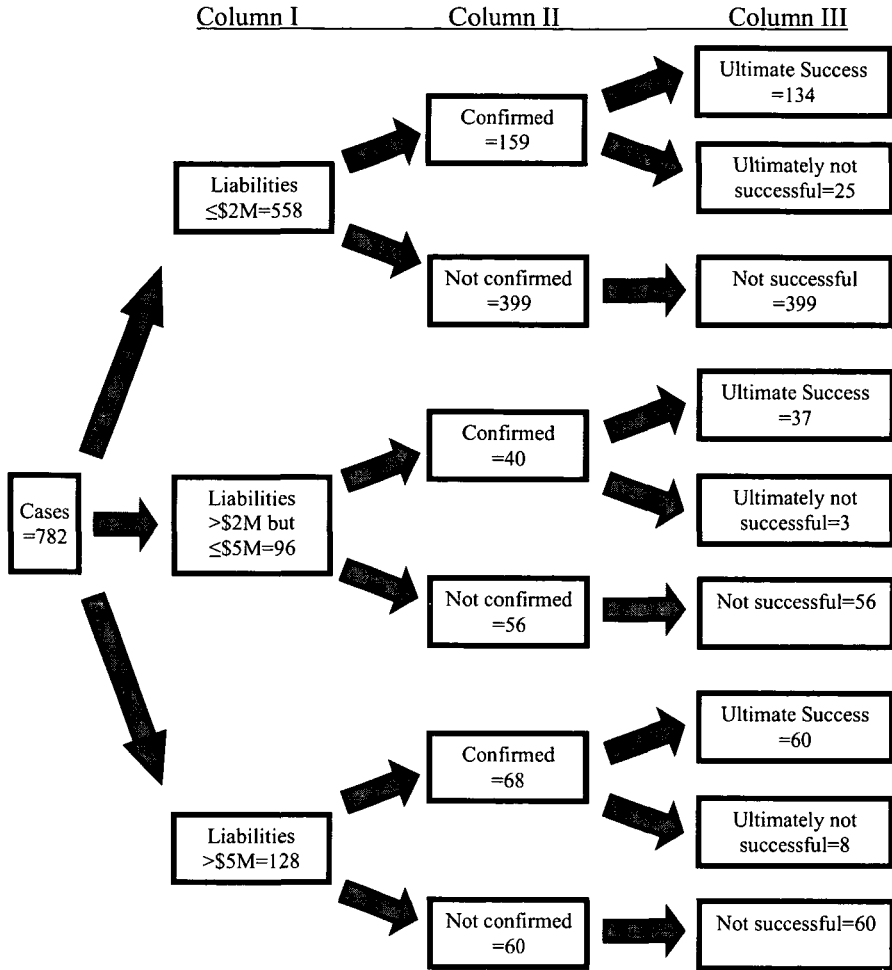
Columns D–F of Table 8 provide the results of performing multiple comparisons among the three liability ranges. Columns D and F show that there is a statistically significant difference in initial and ultimate success rates for two pairs of liability range comparisons:

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

However, perhaps more important, is the finding shown in Column E. There is no statistically significant difference in initial or ultimate success rates for debtors with \$2 to \$5 million in NCL liabilities and those with >\$5 million 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, the Code's \$2 million liability limit, not the Commission's limit of \$5 million, more accurately identifies those debtors with significantly weaker prospects for plan confirmation and performance in Chapter 11.

What about success-on-confirmation rates? Columns D–F of Table 8 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.

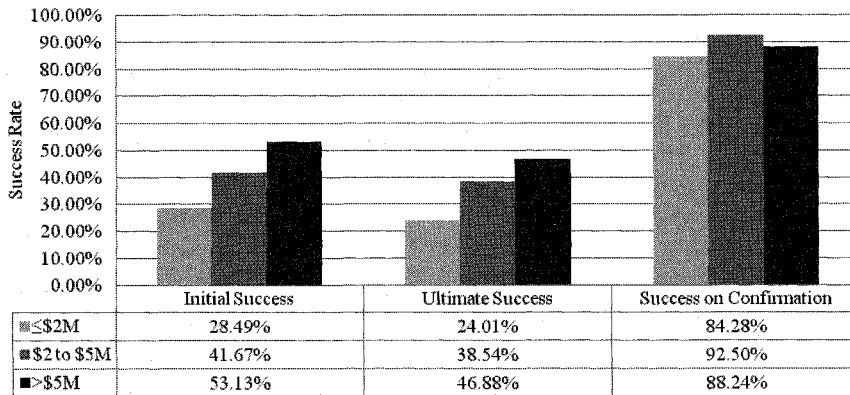
Figure 6. Non-Contingent, Liquidated Liabilities and Success Across Three Liability Ranges



**Table 8. Non-Contingent, Liquidated Liabilities—\$2 Million or \$5 Million Limit?**

	A	B	C	Multiple Comparison Results <sup>144</sup>		
				D	E	F
	≤\$2M	\$2–5M	>\$5M	≤\$2M with \$2–5M	\$2–5M with >\$5M	≤\$2M with >\$5M
<b>Initial Success</b>	159/558= 28.49%	40/96= 41.67%	68/128= 53.13%	<i>p</i> <0.05 <i>Success rates differ</i>	<i>p</i> >0.05 <i>Success rates do not differ</i>	<i>p</i> <0.001 <i>Success rates differ</i>
<b>Ultimate Success</b>	134/558= 24.01%	37/96= 38.54%	60/128= 46.88%	<i>p</i> <0.05 <i>Success rates differ</i>	<i>p</i> >0.05 <i>Success rates do not differ</i>	<i>p</i> <0.001 <i>Success rates differ</i>
<b>Success on Confirmation</b>	134/159= 84.28%	37/40= 92.50%	60/68= 88.24%	<i>p</i> >0.05 <i>Success rates do not differ</i>	<i>p</i> >0.05 <i>Success rates do not differ</i>	<i>p</i> >0.05 <i>Success rates do not differ</i>

**Figure 7. Success Rates: Non-Contingent, Liquidated Liabilities**



ii. Total Liabilities

A look at Columns A–C of Table 9 shows that as the total liability range increases, so do the initial and ultimate success rates. Figure 9 makes the same point graphically. As with NCL liabilities, success-on-confirmation rates increase only when moving from ≤\$2 million in total liabilities to the \$2 to \$5 million range of total liabilities.

The multiple comparison results, provided in Columns D–F of Table 9, paint a somewhat different picture for total liabilities compared with NCL

144. The test statistics were computed using the Bonferroni Correction. The reason for doing the Bonferroni Correction is to ensure that Type I errors—stating that there is a statistically significant result when none exists—are not increased to a level past 0.05. See ANDY FIELD, *DISCOVERING STATISTICS USING SPSS 565* (3d ed. 2009).

liabilities. For initial success rates, there is a statistically significant difference among all three pairs of liability ranges. In other words, for total liabilities, the \$2 million and the \$5 million liability cutoffs are *equally* sound for predicting when plan confirmation rates become statistically significant.

As with NCL liabilities, however, there is a statistically significant difference in ultimate success rates for two pairs of liability range comparisons:

- 1)  $\leq$ \$2 million of total liabilities compared with total liabilities between \$2 and \$5 million (Column D); and
- 2)  $\leq$ \$2 million of total liabilities compared with total liabilities in excess of \$5 million (Column F).

But as the finding in Column E, Table 9, demonstrates, there is no statistical difference in ultimate success rates between debtors with \$2 to \$5 million in total liabilities and debtors with  $>$ \$5 million in total liabilities. Thus, differences in the rates of 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–F of Table 9 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.

What do these findings on total liability mean, then? The plan confirmation findings do not support Congress' choice of the \$2 million liability limit over the Commission's \$5 million cutoff. But plan performance is really a more realistic measure of Chapter 11 success. After all, the point of Chapter 11 is not to simply confirm a plan; it is to successfully perform that plan. Thus, the fact that the difference in ultimate success rates becomes significant at \$2 million suggests that Congress, rather than the Commission, selected the better liability limit in its definition of a small Chapter 11 debtor.

### iii. Summary of Findings: Multiple Comparisons

More than two-thirds of the debtors in the random sample had  $\leq$ \$2 million in liabilities, regardless of whether those liabilities included or excluded contingent and unliquidated debt.<sup>145</sup> Yet, debtors that fell into this liability range had the weakest prospects for confirming and successfully performing a plan.

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. At the same time, the study's results suggest that, in general, Congress selected a liability limit that better captures the group of debtors for which success in Chapter 11 is particularly elusive.

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145. Of 782 debtors, 558 or 71.36% had  $\leq$ \$2 million in NCL liabilities (see Figure 6, Column I). Of 782 debtors, 528 or 67.52% had  $\leq$ \$2 million in total liabilities (see Figure 8, Column I). Interestingly enough, the Commission predicted that "a liabilities-based definition of \$2,000,000 or less *supra* would capture approximately 72% of all Chapter 11 cases filed." COMMISSION REPORT, *supra* note 2, at 630.

Figure 8. Total Liabilities and Success Across Three Liability Ranges

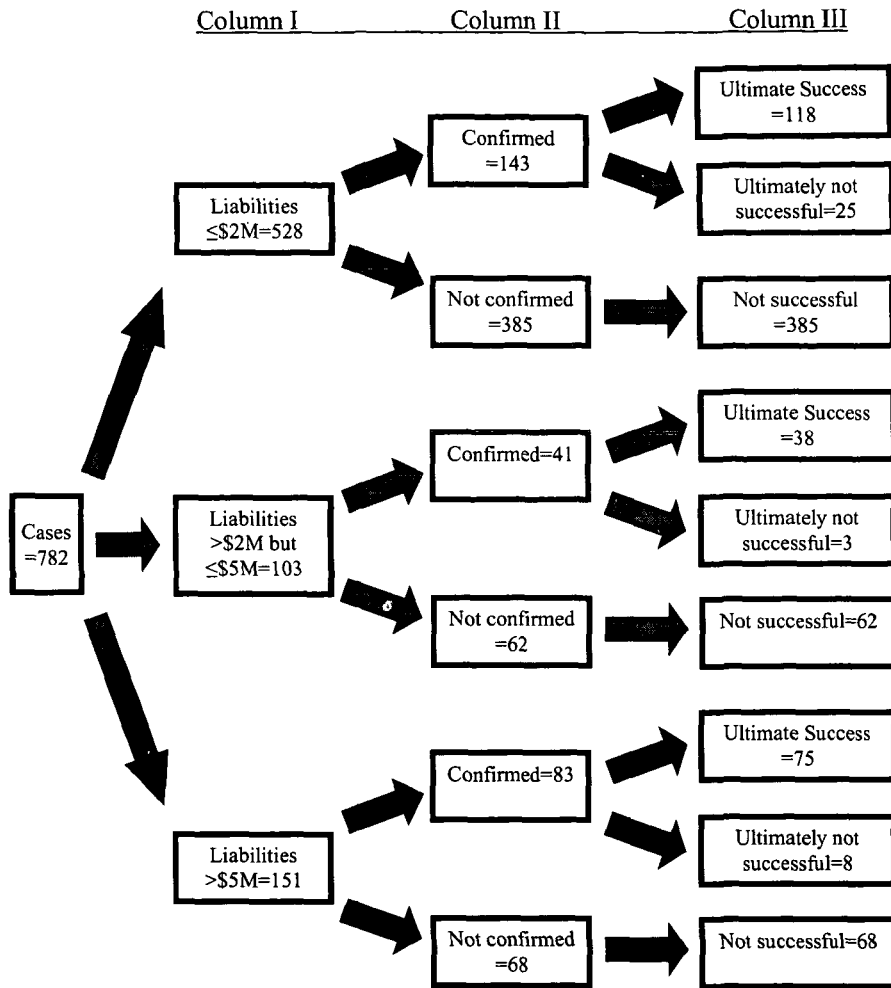
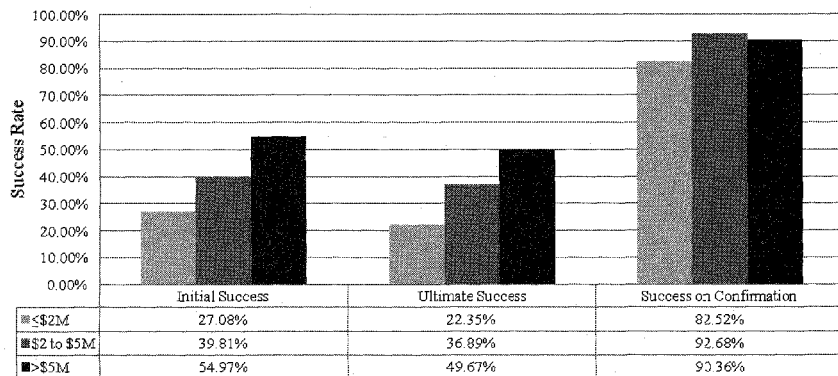


Table 9. Total Liabilities—\$2 Million or \$5 Million Limit?

	A	B	C	Multiple Comparison Results <sup>146</sup>		
				D	E	F
	≤\$2M	\$2–5M	>\$5M	≤\$2M with \$2–5M	\$2–5M with >\$5M	≤\$2M with >\$5M
<b>Initial Success</b>	143/528= 27.08%	41/103= 39.81%	83/151= 54.97%	<i>p</i> <0.05 Success rates differ	<i>p</i> <0.05 Success rates differ	<i>p</i> <0.001 Success rates differ
<b>Ultimate Success</b>	118/528= 22.35%	38/103= 36.89%	75/151= 49.67%	<i>p</i> <0.01 Success rates differ	<i>p</i> >0.05 Success rates do not differ	<i>p</i> <0.001 Success rates differ
<b>Success on Confirmation</b>	118/143= 82.52%	38/41= 92.68%	75/83= 90.36%	<i>p</i> >0.05 Success rates do not differ	<i>p</i> >0.05 Success rates do not differ	<i>p</i> >0.05 Success rates do not differ

Figure 9. Success Rates: Total Liabilities



### 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 determining the criteria for identifying debtors with low prospects for success, although the legislative history suggests that happenstance, not perspicacity, accounts for the result.

Committee formation—present in the Code's small business debtor definition but absent in the Commission's definition—was significantly associated with increased rates of plan confirmation and successful plan performance. Debtors with larger aggregate liabilities—whether those liabilities exceeded the

146. See *supra* note 144 for an explanation of the Bonferroni Correction.



Code's \$2 million limit or the Commission's \$5 million cutoff—confirmed and successfully performed plans at rates that were significantly higher statistically than debtors with smaller aggregate liabilities. But Congress' \$2 million cutoff for NCL liabilities better predicted the point at which plan confirmation and performance rates became significant. For total liabilities, that same cutoff also was a better predictor than the Commission's \$5 million limit of successful plan performance.

Committee formation and debtor liability size each independently predicted plan success in Chapter 11. For example, while there was a substantial overlap between those cases with committees and those with aggregate NCL liabilities in excess of \$2 million, in more than a third of the cases with an official committee the debtor had  $\leq$ \$2 million in NCL liabilities.<sup>147</sup> Thus, this study provides a beginning toward 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 prove 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 is also possible that committee formation operates as nothing more than a positive signal of creditors' *ex ante* evaluation of the likelihood of debtor success in Chapter 11. If the latter is true, and plan confirmation is the goal, then encouraging committee formation or attempting to replicate the role that a committee plays in a Chapter 11 case is a waste of time. Thus, understanding why committee formation is associated with higher rates of plan confirmation and performance requires an initial determination 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 failures of small debtors to reorganize.<sup>148</sup> The concern was that the costs associated with Chapter 11 derailed small debtors, some of which might have been able to reorganize if there had been an expedited and less costly process. Thus, one explanation for the study's findings on liability size is that debtors 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.

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147. Of the 143 cases with committees, 49 had  $\leq$ \$2 million in NCL liabilities. I use 143, not 145, cases here, because the sample is of cases with committees *and* measurable liabilities. If total liabilities are used, a committee formed in 39 of the cases with  $\leq$ \$2 million in total liabilities.

148. COMMISSION REPORT, *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 are both independently 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, predicted 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.<sup>149</sup> 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.<sup>150</sup> If the insider debt is deducted, then Acme's liabilities total \$2,333,000, an amount that is \$10,000 less than the current small business liability limit.<sup>151</sup> If the insider debt is 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.<sup>152</sup> The United States Trustee (or any creditor) may object to Acme's designation, but the United States Trustee then must determine whether Acme "fit[s] the criteria to be classified as a small business

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149. 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", but it does not define what constitutes the "primary activity" of owning or operating real property. Question 18(b) of the Statement of Financial Affairs requires debtors to identify any business that qualifies as single asset real estate. *See* U.S. COURTS BANKR. FORMS, STATEMENT OF FINANCIAL AFFAIRS at 18(b) (2010), *reprinted in* 2011 COLLIER PAMPHLET EDITION, Part 2: Bankruptcy Rules F-59 (2011). Yet, 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). The Commission avoided this problem by sticking with the defined term "single asset real estate debtor" in its small debtor definition. *See* COMMISSION REPORT, *supra* note 2, at 618.

150. *See* 11 U.S.C. § 101(31)(B)(ii) (defining an insider of a corporation to include a corporate officer).

151. The current liability limit now stands at \$2.343 million. *See id.* § 101(51D).

152. *See* FED. R. BANKR. P. 1020(a); U.S. COURTS BANKR. FORMS, VOLUNTARY PETITION (2011), *reprinted in* 2011 COLLIER 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.*

case.”<sup>153</sup> 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 (“OUST”) calculate revised liability totals after checking each page of the debtor’s schedules for affiliate or insider debt?<sup>154</sup>

This seems like an enormous waste of resources, especially given the additional oversight responsibilities required of the OUST by BAPCPA’s reforms.<sup>155</sup> Moreover, these kinds of statutory filters, which are difficult to apply, undermine the goal of early identification of those debtors subject to the Code’s small business provisions.<sup>156</sup> Additional research will help determine whether Congress was right in requiring deduction of affiliate and insider debt when computing debtor liabilities. This subsequent research should take account of current OUST 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 debtor disclosure that Chapter 11 requires. Of course, a simpler metric may miss some debtors that otherwise might qualify as small businesses. On the other hand,

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

154. 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. § 101(2)(A) (2012). Yet, some corporate debtors in the random sample filed disclosures stating that the corporation had no equity security holders. *See, e.g.*, Statement of Financial Affairs Q. 21b, *In re* Tri-Axle, Inc., No. 04-33515 (Bankr. E.D. Pa. Oct. 20, 2004) (Docket No. 22) (checking “none” for question asking for the names of all shareholders with 5% or more of the debtor’s voting or equity securities). Others simply made inconsistent filings in the Chapter 11 case. *Compare* List of Equity Security Holders, *In re* Tiger Steel Constr. Inc., No 04-50338 (Bankr. N.D. Fla. April 12, 2004) (Docket No. 1) (stating “none”), *with* Statement of Financial Affairs Q. 21b, *In re* Tiger Steel Constr. Inc., No 04-50338 (Bankr. N.D. Fla. April 12, 2004) (Docket No. 1) (listing Michael Crutchfield as holding “100% of all stock”). The emergence of new entity forms, such as limited liability companies, not included in the Code’s definitional sections, further complicates the disclosure process. *Compare* List of Equity Security Holders, *In re* Home Acad. Child Care Center LLC, No. 04-44341 (Bankr. S.D. Tex. Oct. 4, 2004) (Docket No. 1) (stating “none”), *with* Statement of Financial Affairs Q. 21b, *In re* Home Acad. Child Care Center LLC, No. 04-44341 (Bankr. S.D. Tex. Oct. 4, 2004) (Docket No. 1) (checking “none” for question asking for the names of all shareholders with 5% or more of the debtor’s voting or equity securities).

155. *See* UST BUDGET REQUEST, *supra* note 153, 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”).

156. *See* U.S. COURTS BANKR. FORMS, VOLUNTARY PETITION COMMITTEE NOTES 2 (2011), *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”).

complex rules spawn confusion and increase cost. Thus, as scholars continue to evaluate BAPCPA's reforms, it is important to consider the trade-offs between precision and confusion, accuracy and cost.

Consideration of trade-offs raises the final issue for 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.<sup>157</sup> 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.<sup>158</sup> The confirmation rate increased about 4%.<sup>159</sup>

The findings are not broken down by type of debtor. Therefore, it is not clear to what extent the post-BAPCPA increase is attributable to increases in rates of plan confirmation for small Chapter 11 debtors. Yet, even if the change in confirmation rates is attributable only to an increase in confirmation of small debtors' plans and even if it resulted exclusively from BAPCPA's reforms,<sup>160</sup> 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.<sup>161</sup>

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157. See Ed Flynn & Phil Crewson, *Chapter 11 Filing Trends in History and Today* 6, Fig. 6 (2008), available at [http://www.justice.gov/ust/eo/public\\_affairs/articles/docs/2009/abi\\_200905.pdf](http://www.justice.gov/ust/eo/public_affairs/articles/docs/2009/abi_200905.pdf).

158. See *id.* at 6.

159. See *id.* at 6, fig.6. The rate increased from 29.4% pre-BAPCPA to 33.2% post-BAPCPA. It is worth noting that the post-BAPCPA confirmation rate of 33.2% is only 0.6% 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.

160. See *id.* at 7 (stating that the "findings should not be viewed as conclusive evidence of a link between BAPCPA and the changes observed").

161. See *supra* notes 93–95 and accompanying text.