2015

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The Individual Chapter 11 Debtor Pre- and Post-BAPCPA

by

Anne Lawton*

INTRODUCTION

Over the past thirty years, bankruptcy scholars have built a rich body of empirical literature on chapter 11.1 Yet little is known about the individual chapter 11 debtor.2 What proportion of chapter 11 debtors file as individuals? Is the individual debtor's decision to file for chapter 11 a true choice, or do chapter 13's debt limits force such debtors into chapter 11? Are individual debtors successful in chapter 11?

*Professor of Law, Michigan State University. Many people helped make this project possible. First, the chief bankruptcy judges in almost every U.S. judicial district granted waivers of PACER fees, thereby defraying the significant cost of data collection. Second, I owe an enormous debt of gratitude to Scott Nagele of Michigan State University, who designed and created the database for both the 2004 and the 2007 random sample cases. Third, I appreciate the feedback that the Honorable Scott Dales and the Honorable Robert Martin provided on an earlier draft of this Article. I also wish to thank my colleagues Barbara O'Brien, who patiently answered my questions about statistical matters, Mae Kuykendall, who helped me to frame explanations for certain of the phenomena reported in this piece, and Barbara Bean, who worked her library-research magic on several occasions during the drafting of this Article. My appreciation to Chi Chang, M.A., of the Measurement and Quantitative Methods Program and Epidemiology and Biostatistics Program at MSU, who answered statistical questions that arose during the analysis phase of the project. Finally, my thanks to Frankie Dame, Erin Diaz, Stephanie Gagerie, Michael Hollowell, Kristen Polanski, Elizabeth Lamphier, Morgan Mcatamney, Jessica Odell, and Jessica Wynalda, all of whom worked as research assistants over the course of the data collection process and helped to code, input, and/or check the data used in this Article.


2The first published work from the Business Bankruptcy Project provided some insights into the individual chapter 11 debtor. See Elizabeth Warren and Jay Lawrence Westbrook, Financial Characteristics of Businesses in Bankruptcy, 73 AM. BANKR. L.J. 499 (1999) [hereinafter Financial Characteristics]. But, the focus of that work was on business debtors—in chapters 7, 11, and 13. In addition, the project's data is now twenty years old, having been drawn from multiple judicial districts across the United States in 1994.
In this Article, I endeavor to provide preliminary answers to these questions, using data from 370 individual chapter 11 cases filed both before and after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005's ("BAPCPA") amendments to the Bankruptcy Code. The individual cases are part of two large random samples of chapter 11 cases drawn from the entire population of chapter 11 cases filed in calendar years 2004 and 2007.

As the study's findings reveal, individual debtors comprise a sizeable proportion—more than one in five—of the chapter 11 debtors in the adjusted 2004 and 2007 random samples. Moreover, the percentage of chapter 11 cases identified as individual filings increased from approximately 23% in 2004 to slightly more than 27% in 2007. The reason for the increase, however, is unclear. Neither chapter 7's newly minted "means test" nor chapter 13's eligibility requirements adequately explains the uptick in individual chapter 11 filings.

At the same time, the proportion of individual chapter 11 debtors who were eligible to file for relief under chapter 13 dropped sharply from 2004 to 2007. It appears that BAPCPA's changes to chapter 11 made it a less attractive alternative for debtors who also qualified for relief under chapter 13. Nonetheless, approximately 18% of individuals eligible for relief under chapter 13 still filed for relief under chapter 11 in 2007. In other words, chapter 11 still offers advantages not obtainable in chapter 13 for a small, but not insignificant, percentage of individual debtors.

The study's findings also show that individual debtors do not perform well in chapter 11. While plan-proposal rates nudged up slightly in 2007—approximately one in two debtors proposed a plan—plan performance rates dropped significantly from 2004. Even in 2004, however, only about 28% of individual debtors confirmed and successfully performed a plan. Counting not only cases with confirmed plans but also dismissed cases with settlements or creditor payouts as "successes" did little to improve success rates. Using this expanded definition of success, only one in three individual debtors in 2004 and less than one in five in 2007 succeeded in chapter 11. While the Great Recession may account for the significant decline in success rates in

3Pub. L. No. 109-8, 119 Stat. 213 (2005). Recently, the American Bankruptcy Institute's Anthony H.N. Schnelling Endowment funded a large-scale study (the "ABI study") about the reasons why individual debtors file for relief under chapter 11 and how they decide whether to file for chapter 11 or chapter 13 relief. But, the data for the project is to be drawn from post-BAPCPA individual chapter 11 cases only. See ABI Endowment to Fund Study of Why Individuals Choose to File for Chapter 11 (Dec. 16, 2013), available at http://news.abi.org/press-releases/abi-endowment-to-fund-study-of-why-individuals-choose-to-file-for-chapter-11. Professor Margaret Howard is the study's Reporter, Professor Richard Hynes is the principal investigator, and I am the associate investigator for the study.

4See infra notes 20-25 and accompanying text, describing how I adjusted the random samples for related entity filings.
2007, individual debtors were not performing well in chapter 11 when the economy was doing well. In short, individual debtors struggle to succeed in chapter 11.

I begin the Article, in Part I, by describing the process used to create the 2004 and 2007 case populations and random samples. In Part II, I examine the question of why individual debtors file for relief under chapter 11. Part II.A briefly describes some of BAPCPA's changes to chapter 11, many of which made chapter 11 less attractive for the individual debtor seeking bankruptcy protection. In Part II.B, I then compare the individual debtor samples for 2004 and 2007, finding that, contrary to expectation, individual chapter 11 filings increased post-BAPCPA. Yet, neither chapter 7's new "means" test nor chapter 13's debt limits satisfactorily accounts for the upturn in individual chapter 11 filings in 2007.

In Part III, I examine success rates for the individual cases in the pre- and post-BAPCPA samples, using two different measures of success. In Part III.A, I count as successes only those cases in which the debtor completed performance of his plan. In Part III.B, I expand the definition to include as a success certain voluntarily dismissed cases with payments to creditors or some form of creditor settlement. Regardless of the metric used, however, the rate of chapter 11 success was significantly higher in 2004 than in 2007. Yet, even in 2004, at best only one in three individual debtors succeeded in chapter 11.

I conclude in Part IV with a summary of the study's findings, an examination of its limitations, and suggestions for further empirical research.

I. CONSTRUCTING THE DATASETS

A. THE POPULATIONS

The individual chapter 11 cases analyzed in this Article are part of two large random samples drawn, respectively, from the population of cases filed in calendar year 2004 and calendar year 2007. I created the case populations by conducting district-by-district searches on PACER. The populations contain all chapter 11 cases filed in each of the ninety-four judicial districts in the United States, including the districts of Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. Individual consumer and business cases, both voluntary and involuntary, are included in both populations.

In order to reduce the possibility of pulling the same debtor more than once into the random sample, I eliminated from both case populations obvious

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5PACER is an acronym for Public Access to Court Electronic Records. My thanks to the many chief bankruptcy judges who granted PACER fee waivers for this project.
6In 2004, no bankruptcy cases were filed in either Guam or the Northern Mariana Islands. In 2007, no cases were filed in the Northern Mariana Islands.
duplicate and serial filings by the same debtor. In addition, if a debtor's case was transferred either inter- or intra-district, two cases sporting different case numbers showed up in the population. Therefore, I eliminated the initially filed case for cases that later were transferred intra- or inter-district.

Before drawing the random sample, I made one last adjustment to the case population for 2004. In March of 2004, Footstar, Inc. and 2528 affiliated entities filed for relief under chapter 11 in the Southern District of New York. The cases were substantively consolidated, and the bankruptcy court confirmed a joint plan covering all 2529 debtors. I deleted all but the lead case, from the 2004 case population to avoid pulling the same substantively consolidated case multiple times into the random sample. The lead case, however, is part of the random sample, because it was “selected” by the random number generator used to create the sample.

These eliminations left an adjusted population of 7635 and 6376 cases for 2004 and 2007, respectively. From the adjusted populations, I created the two random samples.

B. The Random Samples

Using a random number generator, I then assigned a random number to each case in the 2004 population. I did the same for the 2007 case population.

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7 See, e.g., Endorsed Order, In re Krikorian, No. 07·42301 (Bankr. D. Mass. Jan. 9, 2008) (Docket No. 6) (order dismissing duplicate case filed due to unfamiliarity with electronic filing system); In re San Francisco Rawhide, No. 07·30516 (Bankr. N.D. Cal. May 2, 2007) (second chapter 11 case filed by debtor in 2007, about two weeks after dismissal of prior case); see also Anne Lawton, Chapter 11 'Triage: Diagnosing a Debtor's Prospects for Success, 54 ARIZ. L. REV. 985, 997 n.71 [hereinafter Chapter 11 'Triage] (discussing the elimination of duplicate and serially filed cases).

8 See, e.g., In re Kreisel, No. 07·13349 (Bankr. C.D. Cal. Apr. 25, 2007) (case eliminated from population, while case transferred intra-district from Los Angeles to San Fernando Valley division left in population); Order Transferring Venue, In re Heber Homes, No. 2: 07·10268 (Bankr. E.D. Ark. Apr. 18, 2007) (Docket No. 38) (case eliminated from population after inter-district transfer from Eastern District to the Western District of Arkansas); see also Chapter 11 'Triage, supra note 7, at 997.


12 No. 04·22350 (Bankr. S.D.N.Y. March 2, 2004).

13 I pulled the Footstar cases out of the population before drawing the random sample because they were easily identifiable, given the number of cases filed. For more explanation about the Footstar cases, see Chapter 11 'Triage, supra note 7, at 998-99. It was too difficult, however, to locate all substantively consolidated cases in the population just by looking at case names. Therefore, I made the relevant adjustments for all other substantively consolidated cases after pulling the random sample. See infra notes 20-22 and accompanying text.
The random number generator drew cases for the 2004 random sample from eighty-nine of the ninety-two U.S. judicial districts in which debtors filed chapter 11 cases. For 2007, cases were drawn from eighty-four of the ninety-three districts in which debtors filed for relief under chapter 11.

I then eliminated a number of cases from both the 2004 and 2007 initial random samples. For both 2004 and 2007, I removed: (1) a small number of cases that were mistakenly included in the relevant year's case population; and (2) several involuntary chapter 11 cases in which the bankruptcy court never entered an order for relief. For 2007, I also deleted from the random sample three cases that are still open without disposition, i.e., confirmation, conversion, or dismissal, as of the writing of this Article. There no longer are cases without disposition in the 2004 random sample.

I also removed a number of other cases from the 2004 and 2007 initial random samples in order to avoid skewing or distorting the results of the analysis.
study. In several cases, the bankruptcy court ordered that two or more random sample debtors be substantively consolidated. In a substantively consolidated case, the bankruptcy court "consolidates estates of different entities," thereby treating the combined assets and liabilities of the consolidated cases as those of a single entity. To avoid duplicating the same disposition multiple times, e.g., dismissal, I coded the first random sample debtor on the population spreadsheet and removed any other random sample debtors that were part of the same substantively consolidated case.

In the remaining eliminated cases, two or more random sample debtors, typically members of a jointly administered case, operated like a single entity in chapter 11: same filing dates, same determinations on official creditor committee formation, and same disposition by a single confirmed plan, or joint motion to dismiss or convert. In fact, in some cases, the confirmed joint plan provided for limited substantive consolidation of the debtors for purposes of voting and distribution under the plan.

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20 See Chapter 11 Triage, supra note 7, at 999-1000 (explaining the reasons for removal and the types of cases removed from the original 2004 random sample).

21 See, e.g., Order Granting Substantive Consolidation of the Joint Debtors' Estates at 2, In re Pearlman, No. 6:07-00761 (Bankr. M.D. Fla. Apr. 25, 2011) (Docket No. 3488) (substantively consolidating nunc pro tunc the estates of eleven chapter 11 debtors, two of which were random sample debtors); see also Order Confirming Debtor's Plan, In re Almacenes Linda, Inc., No. 3: 07-0130 (Bankr. D.P.R. Aug. 27, 2008) (Docket No. 873) (order confirming joint plan of Almacenes Linda, Inc., substantively consolidated with random sample debtor Contessa de las Americas, and Saul Kleiman Katz, sole owner of Almacenes Linda, Inc. and Contessa de las Americas); Order Granting Motion to Approve to substantively consolidate eight pending bankruptcy cases pursuant to Fed. R. Bankr. P. 1013(b), In re Taxi USA, Inc., No. 07-02188 (Bankr. N.D. Ill. Mar. 19, 2008) (Docket No. 370) (order substantively consolidating eight chapter 11 cases, two of which were random sample debtors); 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, 2003) (Docket No. 2839) (granting substantive consolidation of 2529 related chapter 11 cases).

22 See, e.g., Order Converting Chapter 11 Cases to Chapter 7, In re Check Elect, Inc., No. 07-21768 (Bankr. C.D. Cal. Oct. 8, 2008) (Docket No. 9) (order converting 11 jointly administered cases, five of which are random sample debtors whose petitions were filed on the same date); Order Confirming Debtors' and Term Lenders' Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code (As Modified on August 21, 2008), In re Fedders North America, Inc., No. 07-11176 (Bankr. D. Del. Aug. 22, 2008) (Docket No. 1466) (order confirming joint plan of liquidation for seventeen jointly administered debtors, three of which are random sample debtors whose petitions were filed on the same date); Order Converting Debtors' Chapter 11 Cases to Cases Under Chapter 7, In re The Rag Shop/Port Richey, Inc., No. 07-42277 (Bankr. E.D. N.Y. Nov. 7, 2007) (Docket No. 9) (order converting sixty-nine jointly administered cases, seven of which are random sample debtors all filed on the same day); see also Chapter 11 Triage, supra note 7, at 1000 n.88.

23 See, e.g., Order Confirming Official Committee of Unsecured Creditors' Third Amended Plan of Liquidation and Setting Bar Date for Rejection Claims, In re All American Semiconductor, Inc., No. 07-12963 (Bankr. S.D. Fla. Apr. 10, 2009) Docket No. 1175) (order confirming official committee of unsecured creditors' plan providing for substantive consolidation for voting and distribution purposes of forty jointly administered debtors, four of which are random sample debtors); Order Confirming Debtors' Sec-
Imagine a jointly administered case with ten debtors, five of which are random sample debtors. All ten debtors file for chapter 11 on the same date, no plan is filed, and all ten cases are dismissed, upon motion of the United States trustee, on the same date. Counting the disposition for study purposes as five chapter 11 failures rather than one—no plan confirmed and no settlement reached—distorts the study’s findings on success and failure. While not substantively consolidated, the random sample debtors in this kind of example operate like a single entity for purposes of measuring chapter 11 success.

These various adjustments resulted in a random sample of 802 and 690 cases in 2004 and 2007, respectively. The difference in random sample size between the two years is attributable to differences in the number of filings in 2004 and 2007. The adjusted population in 2004 was larger than that for 2007: 7635 cases versus 6376. The random sample size, however, is approximately the same percentage of the adjusted population in both years: 10.5% and 10.8% of the adjusted 2004 and 2007 case populations, respectively.

Before moving on to an analysis of the individual cases in both samples, a final note is in order. Both random samples contain a very small number of chapter 11 involuntary cases—one in 2004 and three in 2007—in which the bankruptcy court entered the order for relief after the end of the relevant calendar year. They also include a small number of cases—thirteen in 2004 and 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”).

25 The 2004 random sample for this study is slightly larger than the random sample described in Chapter 11 Triage, because several cases without disposition at the writing of the Chapter 11 Triage article now have reached disposition. See Chapter 11 Triage, supra note 7, at 999 n.85.

26 The 7635-case figure is the number after adjusting for a single large jointly administered and substantively consolidated case filed in the Southern District of New York. See supra notes 9-13 and accompanying text.

27 In both 2004 and 2007, my adjusted case populations were slightly larger than the case filing figures provided by the Administrative Office of the United States Courts. In both years, the difference in numbers was small—0.4%. See, e.g., Chapter 11 Triage, supra note 7, at 997 n.74 (explaining the difference between the AO’s numbers and my case population figures for 2004).

II. WHY CHAPTER 11?

With BAPCPA, Congress made significant changes to the Code’s treatment of chapter 11 debtors. It created a host of new rules governing chapter 11 bankruptcy cases for both small businesses and individual debtors. On balance, these changes, some of which are described below, made chapter 11 less attractive for individual debtors post-BAPCPA than it was pre-BAPCPA.

A. BAPCPA’s CHANGES TO CHAPTER 11 FOR INDIVIDUAL DEBTORS

The Code’s small business debtor definition may apply to an individual debtor filing for relief under chapter 11. Take the case of James Stokes Holt.

IV. 30 Holt filed for relief under chapter 11 in 2007, identifying his filing as that of an individual business debtor. 31 He practiced law, doing business as “Jim Holt & Associates.” 32 Holt’s Summary of Schedules showed total liabilities of $286,368, and the United States trustee did not appoint an official unsecured creditors’ committee in Holt’s case. 33 Thus, Holt satisfied the Code’s definition of a small business debtor. His chapter 11 case concerned a
"person engaged in commercial or business activities" whose primary activity was not "the business of owning or operating real property," he had liabilities far below the $2.19 million statutory cutoff in effect after April 1, 2007, and the United States trustee had not appointed a committee of unsecured creditors.\textsuperscript{34}

In 2004, Holt could have decided not to elect small business status even though he would have fit within the Code’s definition of a "small business."\textsuperscript{35} But, with BAPCPA, Congress eliminated the election that it earlier had created in 1994, thereby making small business treatment mandatory for debtors, like Holt, who met the Code’s newly expanded definition of a "small business debtor."\textsuperscript{36}

For individuals deciding whether to file for relief under chapter 11, these new requirements for "small business debtors" are a mixed bag. Some are aimed at reducing the time spent in chapter 11, thereby reducing the cost of a chapter 11 case for small business debtors. For example, in a small business case the bankruptcy court may decide that the debtor need not provide a separate disclosure statement because the plan provides adequate information for creditors.\textsuperscript{37}

Other provisions, however, make the process more burdensome for small business debtors. Small business debtors have increased reporting requirements.\textsuperscript{38} In addition, while Congress expanded the small business debtor’s exclusivity period for proposing a plan,\textsuperscript{39} it also created “drop dead” dates for plan proposal and confirmation that do not exist for non-small business debtors in chapter 11.\textsuperscript{40}


\textsuperscript{35} See Official Form 1, Voluntary Petition (providing debtors with the option to check "Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)"); see also 11 U.S.C. § 101(51C) (2000) (defining "small business").


\textsuperscript{38} See, e.g., 11 U.S.C. § 1116(1)(A) (2012) (requiring small business debtors to append to the petition the "most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return").


\textsuperscript{40} See 11 U.S.C. § 1121(e)(2) (2012) (providing that unless an order extending the time is signed prior to the expiration of the Code’s deadline, the debtor shall file its plan and disclosure statement within 300 days of the order for relief); 11 U.S.C. § 1129(e) (2012) (stating that in a small business case "the court shall confirm" a plan “not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3)").
Congress also changed a number of provisions governing the treatment of all individual chapter 11 debtors, whether they conduct business or not. Congress created a "disposable income" requirement for plan confirmation similar, although not identical, to the one created for chapter 13 cases. Thus, a bankruptcy court may not confirm a chapter 11 plan if an unsecured creditor objects to the plan, and the plan either fails to pay the unsecured creditor the value, as of the effective date, of its claim or the plan fails to pay an amount equal to the debtor’s disposable income over the longer of five years or the plan’s payment period.

In addition, Congress changed the discharge rules applicable to individual chapter 11 debtors. Prior to BAPCPA’s passage, plan confirmation discharged the debtor’s pre-confirmation debts. Now, the individual chapter 11 debtor does not obtain a discharge “until the court grants a discharge on completion of all payments under the plan.” Thus, pre-BAPCPA, an individual debtor confirming a plan in chapter 11 obtained a discharge at the time of plan confirmation. Post-BAPCPA, the debtor generally must await the discharge of his pre-confirmation debts until he finishes making the payments provided for by the plan.

B. COMPARING INDIVIDUAL DEBTOR FILINGS: 2004 VERSUS 2007

The combination of these changes to the Code makes chapter 11 a less attractive option for individual debtors post-BAPCPA compared with pre-BAPCPA. Thus, I would expect to see at least two differences between the 2004 and the 2007 samples of individual debtors.

First, if chapter 11 is more burdensome, then the number of individual debtors as a proportion of the entire random sample should fall in 2007 from

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41 The disposable income requirement for chapter 13 differs from that in chapter 11 in several ways. For example,

§ 1325(b) precludes confirmation upon objection of an unsecured creditor unless that creditor’s claim is paid in full or the debtor commits all of his disposable income over the plan’s time frame to paying his unsecured creditors. Section 1129(a)(13)(B) requires only that the debtor commit all of his disposable income to plan payments over the plan’s time frame, not that he commit all disposable income to his unsecured creditors.


45 A bankruptcy court may grant the debtor a “hardship” discharge prior to completion of payments under the chapter 11 plan. See 11 U.S.C. § 1141(d)(5) (2012).

46 See Hon. Paul W. Bonapfel, Individual Chapter 11 Cases under BAPCPA, 25 AM. BANKR. INST. J., July/Aug. 2006, at 1 (stating that “Chapter 11 is even more difficult for individuals after the BAPCPA amendments than it was before”).
2004. Second, the percentage of debtors eligible for chapter 13 who nonetheless file for relief under chapter 11 should drop in 2007 from 2004.

As expected, the proportion of Chapter 13-eligible debtors in chapter 11 did indeed fall in 2007. But, surprisingly, the overall number of individual chapter 11 debtors increased from 2004 to 2007. I explore these findings further below.

Before delving further into the data, an introductory caveat is in order. It is important to recognize that the individual samples for 2004 and 2007 are adjusted for related entity filings in order not to distort the impact of large consolidated cases on chapter 11 success rates.\(^47\) Each firm that files for bankruptcy, however, counts as a separate case for purposes of the Administrative Office of the United States Court’s (“AO”) figures on annual chapter 11 filings. For example, in 2004, the AO reported that debtors filed 10,132 chapter 11 cases.\(^48\) Yet, 2529 of those debtors filed on the same date in the Southern District of New York, and the bankruptcy court substantively consolidated these cases under the lead case of Footstar, Inc.\(^49\) Counting Footstar as a single case, as I did for the 2004 sample, reduces the total number of chapter 11 cases filed, thereby increasing the relative proportion of individual debtors in the 2004 random sample. As a result, the data in Tables 1 and 2 below could be said to overstate the percentage of individual debtors when compared with all cases filed during the relevant calendar year. Counting all filed cases, however, creates misleading results because it treats related cases operating as a single entity inside bankruptcy as if they were operating as unrelated and independent business entities.\(^50\)

Therefore, the data in Tables 1 and 2 below are based on random samples adjusted for related entity filings. The adjusted samples provide a more accurate picture of the relationship between the number of individual chapter 11 cases and the number of all other unrelated “independent business entities” that filed for relief under chapter 11 in 2004 and 2007.\(^51\)


Contrary to expectation, the proportion of debtors in the sample who

\(^{47}\)See supra notes 20-25 and accompanying text, explaining reasons for culling related cases from the two case populations.


\(^{49}\)See supra notes 9-13 (discussing the Footstar case).

\(^{50}\)See Ed Flynn & Gordon Bermant, Bankruptcy by the Numbers: Related Chapter 11 Filings, AM. BANKR. INST. J., June 2004 (emphasis added) (stating that “raw [filing] numbers are misleading” and “sometimes do not represent the activities of independent business entities”).

\(^{51}\)The data in the remaining tables in the Article are based only on the subset of individual chapter 11 debtors, not all chapter 11 filers, and, hence, are not subject to the same criticism.
identified as individual filers increased in 2007 from 2004. As Table 1’s data reveal, 22.7% of the random sample debtors identified as individual filers in 2004, while in 2007 that figure jumped to 27.2%. This difference in the proportion of individual debtors in the 2004 and 2007 random samples is statistically significant ($p=0.042$).52

Table 1: Comparison of Individual Filings 2004 & 2007

<table>
<thead>
<tr>
<th></th>
<th>(A) 2004</th>
<th></th>
<th>(B) 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>Percentage</td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>182</td>
<td>182/802 = 22.7%</td>
<td>188</td>
<td>188/690 = 27.2%</td>
</tr>
</tbody>
</table>

Table 1, however, masks an important difference between individual business and individual consumer debtors. As Table 2 shows, there are twenty-nine more individual business cases in the 2007 random sample than in the 2004 random sample. Had chapter 11 filings increased in 2007 compared with 2004, a concomitant increase in the number of individual debtors might make sense. But, chapter 11 filings, while up compared with calendar year 2006,53 were down relative to calendar year 2004. Thus, while individual business debtors comprised slightly less than 10% of the 2004 random sample, they comprised slightly more than 15% in 2007. Compare Column (A), Row (1) with Column (B), Row (1) of Table 2.

At the same time, the proportion of individual consumer debtors fell, albeit slightly from 13.2% in the 2004 random sample to 12% in the 2007 sample.54 Compare Column (A), Row (2) with Column (B), Row (2) of Table

52 The $p$-values reported throughout the text are those obtained from conducting Pearson’s chi-square test, using the IBM SPSS Statistics Data Editor, Version 21. 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). Pearson’s chi-square test, simply put, compares “the frequencies you observe in certain categories to the frequencies you might expect to get in those categories by chance.” ANDY FIELD, DISCOVERING STATISTICS USING SPSS 688 (3d ed. 2009). For the textual analysis, I do not rely on the $p$-values obtained from using the Yates Continuity Correction. Nonetheless, I will report those values in the footnotes. The $p$-value using the Yates Continuity Correction for the data in Table 1 is 0.049. I do not rely on Yates’s correction for continuity because it is problematic. While its purpose is to correct for Type 1 errors—finding a significant result when there is none—it is not universally endorsed, however: some researchers feel it may be an over-correction leading to a loss of power and false negative results.” SARAH BOSLAUGH & PAUL ANDREW WATTERS, STATISTICS IN A NUTSHELL 195 (2008); see also ANDY FIELD, DISCOVERING STATISTICS USING SPSS 691 (3d ed. 2009) (stating that while “it’s worth knowing about [the Yates Continuity Correction], it’s probably best ignored”).


54 The 2007 statistical report issued by the Administrative Office of the United States Courts found that consumer cases comprised approximately 10% of chapter 11 cases filed in 2007. See Administrative Office of the United States Courts, 2007 Report of Statistics Required by the Bankruptcy Abuse Prevention
2. Thus, the increase in individual debtors in the 2007 random sample is attributable to an increase in the number of filings by individual business, not consumer, debtors.

Table 2: Individual Business and Consumer Filings: 2004 & 2007 Random Samples

<table>
<thead>
<tr>
<th></th>
<th>(A) 2004</th>
<th></th>
<th>(B) 2007</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>(1) Business</td>
<td>76</td>
<td>76/802 = 9.5%</td>
<td>105</td>
<td>105/690 = 15.2%</td>
</tr>
<tr>
<td>(2) Consumer</td>
<td>106</td>
<td>106/802 = 13.2%</td>
<td>83</td>
<td>83/690 = 12.0%</td>
</tr>
<tr>
<td>(3) Totals:</td>
<td>182</td>
<td></td>
<td>188</td>
<td></td>
</tr>
</tbody>
</table>

The increase in individual business filings reported in Table 2, in turn, altered the composition of the individual debtor sample for 2007. As Table 3 shows, slightly more than four in ten (42%) individual chapter 11 debtors identified as business filers in 2004. That number increased to more than five in ten (56%) in the 2007 sample. Compare Column (A), Row (1) with Column (B), Row (1) of Table 3.

Table 3: Individual Business and Consumer Filings: 2004 & 2007 Individual Samples

<table>
<thead>
<tr>
<th></th>
<th>(A) 2004</th>
<th></th>
<th>(B) 2007</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>(1) Individual Business</td>
<td>76</td>
<td>76/182 = 41.8%</td>
<td>105</td>
<td>105/188 = 55.9%</td>
</tr>
<tr>
<td>(2) Individual Consumer</td>
<td>106</td>
<td>106/182 = 58.2%</td>
<td>83</td>
<td>83/188 = 44.1%</td>
</tr>
<tr>
<td>(3) Totals:</td>
<td>182</td>
<td></td>
<td>188</td>
<td></td>
</tr>
</tbody>
</table>

The data raise an important question. If chapter 11 is indeed less attractive for individual debtors post-BAPCPA, then why would individual filings, specifically business filings, increase in 2007? As I explain in the next section, neither BAPCPA’s changes to chapter 7 nor chapter 13’s eligibility rules adequately explains the increase.

2. Chapter 11 Is Not Always a “Choice”

For the individual debtor, chapter 11 may not be a choice. Instead, the Code may relegate him to chapter 11 because he fails chapter 7’s new means test or does not satisfy chapter 13’s eligibility requirements.

a. Chapter 7’s “Means” Test

Congress created the means test in order to shift the so-called “can pay” debtor from chapter 7 to the Code’s reorganization chapters, in particular chapter 13.55 The goal of BAPCPA’s reform of chapter 7’s eligibility rules was to increase the amount paid out to creditors by denying certain debtors access to chapter 7, thereby moving those in need of bankruptcy protection from the Code’s liquidation chapter to its reorganization chapters, i.e., chapter 11 or 13.56

To accomplish this goal, Congress created a complicated statutory formula by which a debtor determines his eligibility for chapter 7. If the debtor “fails” the statutory means test, his filing for chapter 7 creates a mandatory presumption of abuse.57 Unless the debtor rebuts this presumption of abuse, which is difficult to do,58 the Code requires either dismissal of his case or, with the debtor’s consent, conversion to chapter 11 or 13.59

Does BAPCPA’s new means test account for the increase in individual chapter 11 filings in 2007? No, it does not, for a very simple reason. The means test applies only to individual chapter 7 debtors “whose debts are primarily consumer debts.”60 The increase in chapter 11 filings in 2007 is attributable to debtors who checked the “Debts are primarily business debts” box on the voluntary petition.61 The proportion of individual consumer debtors in the 2007 random sample fell slightly from 2004. Thus, the uptick in individual chapter 11 filings post-BAPCPA did not result from a shifting from chapter 7 to chapter 11 of individual debtors who failed the means test.

b. Why Not Chapter 13?

Conventional wisdom has it that most individual chapter 11 debtors file for chapter 11, rather than chapter 13, because chapter 13’s debt limits pose a barrier to entry.62 As the data in subsection (ii) below demonstrate, the

55 See H.R. Rep. No. 109-31, pt.1, at 12 (2005) [hereinafter House BAPCPA Report] (stating that the House’s Committee on the Judiciary had “received testimony explaining that if needs-based reforms and other measures were implemented, the rate of repayment to creditors would increase as more debtors where shifted into chapter 13 . . . as opposed to chapter 7”).
56 See id. at 2 (stating that the “heart of the bill’s consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism (‘needs-based bankruptcy relief or ‘means testing’), which is intended to ensure that debtors repay the maximum they can afford”).
58 The debtor may rebut the presumption of abuse, but it is difficult to do so. He must satisfy the statutory requirement of “special circumstances.” See 11 U.S.C. § 707(b)(2)(B) (2012).
60 Id.
62 See Mark E. Hall & Tara J. Schellhorn, A Fish Out of Water: Streamlining Plan Confirmation for Individual Chapter 11, Am. Bankr. Inst. J., June 2014, at 52 (noting that chapter 13’s debt limits are “[o]ne of the most common reasons for an individual debtor to file for chapter 11”).
conventional wisdom is a good, but incomplete explanation for why 13-eligible individual debtors opt to file for relief under chapter 11. In both 2004 and 2007, some group of debtors eligible for chapter 13 nonetheless filed for relief under chapter 11. Yet, if Congress’s chapter 11 reforms made chapter 11 a less attractive option post-BAPCPA for individual debtors eligible to file for relief under chapter 13, then the proportion of 13-eligible chapter 11 debtors in the 2007 individual sample should be smaller than that in the 2004 individual sample. As explained more fully below, that indeed is the case.

I begin this portion of the analysis with a description in subsection (i) below of the Code’s requirements for chapter 13, as well as the method I used to determine each debtor’s eligibility to file for relief under chapter 13. In subsection (ii), I provide the data, which shows a statistically significant decrease in the proportion of 13-eligible debtors in the 2007 sample of individual debtors when compared with the 2004 individual debtor sample. As the data show, however, individual consumer debtors are responsible for the overall decline in 13-eligible debtors in 2007. None of this data, therefore, accounts for the increase in chapter 11 business filings post-BAPCPA. Finally, in subsection (iii), I briefly discuss the reasons why, even post-BAPCPA, some debtors who are eligible to file for relief under chapter 11 still opt to file for relief under chapter 11.

i. Chapter 13’s Eligibility Requirements

With the exception of family farmers, most individual debtors wishing to reorganize will file under either chapter 11 or chapter 13. Given the cost and complexity of chapter 11, why would an individual debtor choose to file for chapter 11 rather than 13? One reason may be that chapter 13, unlike chapter 11, has several barriers to entry. Unlike chapter 11, only an individual may file for relief under chapter 13, and that individual must have “regular income.” The ensuing analysis, however, is limited to an examination of the impact of the debt limits on chapter 13 eligibility. The reason is simple: the Code’s “regular income” requirement posed no barrier to entry for those debtors whose liabilities fell below the relevant chapter 13 debt limits.

See, e.g., Daniel M. Press & Brett Weiss, Chapter 11 for Individual Debtors: A Collier Monograph § 2 ¶ 3 (2014) [hereinafter Collier Monograph] (stating that chapter 11 filing fee is “nearly quadruple” that for filing chapter 13, and that while the no-look fee in many jurisdictions for a chapter 13 case ranges between $2500 and $5000, “total fees generally run between $10,000 and $20,000” for a simple individual chapter 11 case with “little or no litigation”).

See, e.g., Robert J. Landry, III, Individual Chapter 11 Reorganizations: Big Problems with the New “Big” Chapter 13, 29 U. Ark. Little Rock L. Rev. 251, 279 n.167 (2007) (stating that the “incentive to choose Chapter 11 over Chapter 13 so as to avoid trustee fees has been largely curtailed” by the “advent of Chapter 11 quarterly fees, which can be quite costly to individual Chapter 11 debtors”).


In three cases in which the debtor’s total liabilities fell below chapter 13’s two debt limits, the debtor filed no Schedule I, listed “0” on Schedule I for his monthly income, or simply left Schedule I blank.
Chapter 13 has two debt limits—one for secured and the other for unsecured liabilities. An individual debtor who wanted to file for chapter 13 during the period starting January 1, 2004, and ending March 31, 2004, had to have non-contingent, liquidated, unsecured debts less than $290,525 and non-contingent, liquidated, secured debts less than $871,550.67 The debt ceilings changed on April 1, 2004.68 Thus, any individual debtor interested in filing a petition under chapter 13 during the period starting on April 1, 2004, and running through December 31, 2004, had to have non-contingent, liquidated, unsecured debts less than $307,675, and non-contingent, liquidated, secured debts less than $922,975.69

An individual debtor who wanted to file for chapter 13 during the period starting January 1, 2007, and ending March 31, 2007, had to have non-contingent, liquidated, unsecured debts less than $307,675, and non-contingent, liquidated, secured debts less than $922,975.70 Just as in 2004, the debt ceilings changed in April of 2007. Thus, any individual debtor interested in filing a petition under chapter 13 during the period starting on April 1, 2007, and running through December 31, 2007, had to have non-contingent, liquidated, unsecured debts less than $336,900, and non-contingent, liquidated, secured debts less than $1,010,650.71 Exceeding either of the debt ceilings of §109(e) would disqualify an individual debtor from filing for relief under chapter 13.72

In order to determine which debtors were eligible for chapter 13 at the time of chapter 11 filing, I coded the cases in both individual debtor samples using the first-filed schedules or Summary of Schedules. I did not count


68 See 11 U.S.C. § 104(b) (2012) (providing for adjustments at three-year intervals of dollar amounts in various Code provisions, including § 109(e)).
69 See Dollar Revisions, supra note 67.
71 See id.
72 I did not deduct contingent or unliquidated debt from the debtors' liability totals. Thus, the figures in the text likely understate the number of 13-eligible debtors in both samples.
amendments to the schedules filed during the pendency of the chapter 11 case, because I sought to capture chapter 13 eligibility at the time that the debtor filed for relief under chapter 11.73 Not all cases in the samples started in chapter 11. For these cases, I used the following rules of thumb for determining the first-filed set of schedules.

If a debtor initially filed for relief under chapters 7, 12, or 13 and then converted to chapter 11, I used the schedules or Summary of Schedules that the debtor filed upon conversion to chapter 11.74 If the debtor did not file a full set of schedules in the chapter 11 case, then I relied on the schedules or Summary of Schedules from the original case filing under chapter 7, 12, or 13, along with any amendments filed prior to the conversion to chapter 11.75 In a few cases, the debtor’s case converted to another chapter of the Code before the debtor filed chapter 11 schedules. In these cases, I used the schedules filed in the converted case.76 Finally, in some cases, the totals on the Summary of Schedules did not match the totals provided on the individual schedules filed by the debtor. In these cases, I used the amounts provided on each liability schedule, rather than the contradictory amounts listed on the Summary of Schedules.77

Schedules were not available for all debtors in the samples—fourteen in

73In very few cases did schedule amendments filed during the chapter 11 case change the determination of the debtor’s eligibility for chapter 13. But compare All Schedules and Statements Filed, In re Mosley, No. 04-32080 (Bankr. S.D. Fla. May 26, 2004) (Docket No. 6) (Summary of Schedules listing total liabilities of $3,402,192 with secured debt of $3.319 million, thereby putting debtor over chapter 13’s secured debt limits at time of filing) with Amended Schedules D and Summary of Schedules, In re Mosley, No. 04-32080 (Oct. 11, 2005) (Docket No. 48) (Summary of Schedules listing total liabilities of $511,944, with secured debt as $223,772 and unsecured liabilities of $288,172, both of which were under the chapter 13 debt limits at the time). This enormous discrepancy in secured debt between the initial and amended schedules appears to be the result of listing the same debt owed to the IRS eleven times on Schedule D in order to show the various forms of collateral securing the same debt. See id.


75See, e.g., Summary and Schedules A-J, In re Olsen, No. 04-27197 (Bankr. E.D. Cal. July 29, 2004) (Docket No. 6) (only schedules were those filed during pendency of chapter 7 case prior to conversion to chapter 11).


2004, and seven in 2007\textsuperscript{78}—and, therefore, these debtors are not included in the analyses for this portion of the paper. Thus, the sample sizes for the analyses in this section of my Article are 168 and 181 cases for 2004 and 2007, respectively.

\textit{ii. The 13-Eligibles}

Approximately one in four debtors were eligible for chapter 13 in 2004 or 2007, yet opted to file for relief under chapter 11. See Column (C), Row (1) of Table 4. As the data in Table 4 demonstrate, however, the percentage of individual debtors eligible for chapter 13 who nonetheless filed for relief under chapter 11 fell substantially from 2004 to 2007. In 2004, more than three in ten individuals qualified for chapter 13 but filed for chapter 11 (31\%), while in 2007 slightly less than two in ten did so (18\%). \textit{Compare} Column (A), Row 1 with Column (B), Row (1) of Table 4. This difference between 2004 and 2007 in the percentage of chapter 11 individual debtors eligible for chapter 13 is statistically significant ($p = 0.006$).\textsuperscript{79}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
 & \textbf{(A)} & & \textbf{(B)} & \\
 & 2004 & & 2007 & \\
\hline
\textbf{(1) 13-Eligible} & 52 & 52/168 = 31.0\% & 33 & 33/181 = 18.2\% \\
\hline
\textbf{(2) Not eligible} & 116 & 116/168 = 69.0\% & 148 & 148/181 = 81.8\% \\
\hline
\textbf{(3) Totals:} & 168 & & 181 & \\
\hline
\end{tabular}
\caption{Chapter 13 Eligibility 2004 \& 2007}
\end{table}

Once again, however, the figures in Table 4 mask an important difference between individual business and individual consumer chapter 11 debtors. As the data in Table 5 show, the reason for the overall decline in 13-eligible debtors in 2007 is the substantial drop in chapter 11 filings by individual consumer debtors who were eligible to file for relief under chapter 13. \textit{Compare} Table 5, Column (D), Row (1) with Column (B), Row (1).

\textsuperscript{78}In 2004, access to documents on PACER was limited for eight judicial districts in which there were random sample cases. See Chapter 11 \textit{Triage}, \textit{supra} note 7, at 1001 n.91. Unlike 2007, then, the absence of schedules for the 2004 cases was due, in part, to the inability to obtain such information, not to debtor failure to file the documents.

\textsuperscript{79}The $p$-value using the Yates Continuity Correction for the data in Table 4 is 0.008. See \textit{supra} note 52 for an explanation of the purpose of and problems with the Yates Continuity Correction.
Table 5: Chapter 13 Eligibility by Business/Consumer 2004 & 2007

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(A) Business</td>
<td>(B) Consumer</td>
</tr>
<tr>
<td></td>
<td>No.</td>
<td>%</td>
</tr>
<tr>
<td>(1) 13-Eligible</td>
<td>15</td>
<td>21.7%</td>
</tr>
<tr>
<td>(2) Not eligible</td>
<td>54</td>
<td>78.3%</td>
</tr>
<tr>
<td>(3) Totals</td>
<td>69</td>
<td></td>
</tr>
</tbody>
</table>

In 2004, approximately 37% of individual consumer debtors in chapter 11 qualified for chapter 13 at the start of the chapter 11 case. In 2007, however, the percentage of 13-eligible debtors among chapter 11 consumer debtors was about 17%. **Compare Column (D), Row (1) with Column (B), Row (1) of Table 5.** The change between 2004 and 2007 for chapter 11 individual business debtors was far smaller—approximately 22% were eligible for chapter 13 in 2004 versus approximately 19% in 2007.

This finding—that a smaller number of 13-eligible debtors filed for relief under chapter 11 in 2007—makes sense. If BAPCPA’s changes to chapter 11, on balance, made it less attractive for individual debtors, then those debtors with the choice of filing for relief under chapter 11 or chapter 13 would opt for the latter, not the former.

What is left unexplained, however, is why the proportion of individual chapter 11 cases increased in 2007. I expected that a drop in the proportion of 13-eligible chapter 11 debtors would cause a concomitant drop in overall chapter 11 filings by individual debtors. Yet, that is not the case.

Is it possible that the increase in individual filings in 2007 is little more than random variation in filings from year to year? The number of bankruptcy filings as a whole fluctuates from year to year, and “historic data demonstrate that bankruptcy filings are increasing about two-thirds of the time and decreasing the other one-third of the time.” Moreover, in their first article using data from the Business Bankruptcy Project, then-Professor Warren and Professor Westbrook found that in their twenty-three-district sample of bankruptcy cases filed in 1994 “about 31% of all the Chapter 11 cases—both businesses and nonbusinesses—were filed by natural persons.” Yet, that figure dropped to 20-23% after 1994. At first blush, this data

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81 Financial Characteristics, supra note 2, at 534.

82 See id. (citing Ed Flynn, *Who is Filing in Chapter 11?, AM. BANKR. INST. J.* 30 (1999)).
seems to support the idea of large, chance variations in individual chapter 11 filings.

The finding of a statistically significant difference in individual chapter 11 filings in 2004 and 2007, however, militates against a conclusion of chance variation. In other words, something, for example changes in the economy or the law, caused the increase. In fact, the large drop in individual chapter 11 filings post-1994 likely resulted, as Warren and Westbrook hypothesized, from “the sharp increase in Chapter 13 debt limits effective October 22, 1994,” which drew “noncorporate businesses away from Chapter 11 into Chapter 13.” The post-1994 higher debt limits meant that more individual debtors qualified for chapter 13 and, hence, opted to file for relief under chapter 13 rather than chapter 11. Similarly, BAPCPA’s changes to chapter 11 made chapter 13 relatively more attractive for those debtors with the option to file for chapter 11 or 13. But, as the data demonstrate, while fewer 13-eligible debtors filed for relief under chapter 11 in 2007 than in 2004, the overall numbers of individual chapter 11 filings increased.

Does the state of the economy explain the increase in individual chapter 11 filings in 2007? Data from the Executive Office of the U.S. Trustee show that individual chapter 11 filings increased in both 2007 and 2008, year over year.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Individual Chapter 11 Cases Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>(stable)</td>
</tr>
<tr>
<td>2003</td>
<td>(stable)</td>
</tr>
<tr>
<td>2004</td>
<td>(stable)</td>
</tr>
<tr>
<td>2005</td>
<td>(stable)</td>
</tr>
<tr>
<td>2006</td>
<td>(stable)</td>
</tr>
<tr>
<td>2007</td>
<td>(highest)</td>
</tr>
<tr>
<td>2008</td>
<td>(highest)</td>
</tr>
</tbody>
</table>

The number of individual chapter 11 cases filed was fairly stable between 2002 and 2005, declined in 2006, and rose sharply in 2007 and 2008. After a low of 883 individual chapter 11 cases filed in 2006, both 2007 and 2008 had the highest number of individual chapter 11 cases filed in the past seven years.

There are two problems, however, with the state-of-the-economy argument. First, if a weakened economy explains the uptick in individual chapter 11 filings in 2007, then why is there no increase in individual consumer filings in the 2007 individual sample? As the 13-eligible data demonstrate, it is possible that more of these consumer debtors opted for chapter 13 instead of chapter 11, due to BAPCPA’s changes to chapter 11. The flaw in this explanation, however, is that while chapter 13 filings did increase by 29% from 2006 to 2007, they were approximately 28% lower in 2007 than in 2004.

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83 A statistically significant result means that the difference in proportion of individual chapter 11 filings in 2004 and 2007 is unlikely to result from mere chance. See Field, supra note 52, at 53-54 (explaining statistical significance).
84 Financial Characteristics, supra note 2, at 534.
86 See 2007-2011 Trends, supra note 53, at 73 Tbl. 3.
87 There were 449,129 chapter 13 filings in 2004, but only 324,771 such filings in 2007. See Table F-2.
The second problem with the state-of-the-economy argument is that the National Bureau of Economic Research identified December 2007 as the start of the Great Recession. If the Great Recession did not start until December of 2007, then why would chapter 11 individual business filings increase prior to that time?

Is it possible that the increase in individual business filings was the equivalent of the proverbial canary in the coal mine? In the immediate aftermath of BAPCPA's passage, bankruptcy filings fell across the board, with "Chapter 11 filings reach[ing] a historical low in 2006." Debtors with a choice no doubt shied away from filing for bankruptcy due to the uncertainty posed by many of BAPCPA's changes to the Code. The volatility in post-BAPCPA filing rates reflects this uncertainty.

But, as the economy began to sputter, the smallest and weakest businesses needed the protection of the bankruptcy laws. The vast majority of the individual business debtors in the 2007 random sample run very small enterprises without the financial wherewithal to ride out drops in consumer spending and a weakening economy. These are small, often family-owned businesses that do not have revenues coming in from multiple business lines, related divisions, or subsidiaries. For example, average asset values for the individual business debtors in the 2007 sample was just under $2 million and the median or midpoint of the asset range for these debtors was less than $1.2 million. In 2007, only 2 of the 100 individual business debtors with useable asset data reported assets in excess of $10 million, while only 9 reported more than $5 million in assets. Thus, it is possible that even though the Great Recession began in December of 2007, the uptick in individual chapter 11 business filings in 2007 was an early warning sign of trouble ahead in the economy.

None of these explanations for the increase in chapter 11 filings, in particular those of individual business debtors, is completely satisfying. Further research is needed to determine whether this study's finding of increased filings by individual business debtors holds true beyond calendar year 2007.

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88Economist Justin Wolfers contends that the Great Recession began as early as late 2006. See Justine Wolfers, We're Halfway to a Lost Decade, FREAKONOMICS: THE HIDDEN SIDE OF EVERYTHING, June 8, 2011, available at http://freakonomics.com/2011/06/08/were-halfway-to-a-lost-decade/.

89Chapter 11 Filing Trends, supra note 85, at 1.

Recently, the Anthony H.N. Schnelling Endowment of the American Bankruptcy Institute ("ABI") funded a large-scale study about the reasons why individuals file for relief under chapter 11 and how they decide whether to file for chapter 11 or chapter 13. The project—in its formative stages—will provide data invaluable to determining whether the increase in individual chapter 11 filings found in 2007 persisted after the economy improved.

iii. The 13-Eligibles: Why File for Chapter 11?

As noted earlier, the conventional wisdom is a good, but far-from-complete, explanation of why individual debtors file for relief under chapter 11 as opposed to chapter 13. As the data in subsection (ii) above demonstrate, approximately 18% of individual chapter 11 debtors in 2007 could have filed for relief under chapter 13 but elected chapter 11 instead. The question is: why?

Even post-BAPCPA, there are several reasons why a 13-eligible debtor might file for relief under chapter 11. First, attorney error cannot be ignored. Individual chapter 11 cases have sometimes been called nothing more than "big chapter 13's. This is a gross—and in some ways, even a dangerous—oversimplification. . . . Nevertheless, there is enough that is the same [in chapter 11 and chapter 13] to have prompted many chapter 13 practitioners to wrongly assume that they can handle a chapter 11 case in the same manner as a chapter 13 case, resulting in significant problems for counsel and their clients.

Second, unlike chapter 13, there is no trustee in most chapter 11 cases. Instead, the debtor, as debtor-in-possession, performs the duties of a trustee in a chapter 11 case. In addition, the vast majority of chapter 11 cases do not have an official committee of unsecured creditors. In an earlier study of the chapter 11 cases in the 2004 random sample, I found that an official committee of unsecured creditors formed in only 18% of cases. Official committees are even rarer in individual chapter 11 cases. Of the 370 individual chapter 11 cases in this study, an official committee of unsecured creditors

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91 See supra note 3.
92 See, e.g., Disclosure Statement at 2, In re Novotny, No. 04-16322 (Bankr. E.D. La. Dec. 17, 2004) (Docket No. 19) (stating that "Debtor was not entitled to file for relief under Chapter 13 of the New Bankruptcy Code" even though debtor filed as an individual consumer, had regular income as a mortgage broker, and had secured debts of only $230,200, and unsecured debts of $288,815, when the unsecured debt limit at the time of filing the chapter 11 case on August 18, 2004 had increased to $307,765).
93 Collier Monograph, supra note 63, ¶ 2 at 1.
94 See 11 U.S.C. § 1107(a) (2012) (stating that with exception of right to compensation, debtor-in-possession has all the rights and powers of a trustee).
95 See Chapter 11 Triage, supra note 7, at 1006.
formed in only 13, or 3.5%, of the cases. 96 Thus, while the United States trustee has special duties in small business cases 97 and general oversight obligations in chapter 11 cases, including monitoring plans, disclosure statements, and creditors' committees, 98 the debtor in a chapter 11 case is subject to far less "detailed oversight" than a debtor in a chapter 13 case. 99

Third, a debtor seeking control over avoidance actions would prefer to file for relief under chapter 11. "Because the chapter 13 trustee controls [preference and fraudulent conveyance] claims pursuant to section 1302, trustee permission must be obtained before the debtor can take action to recover these claims. 100 Not so in the typical chapter 11 case. The debtor-in-possession has the powers and rights of a trustee and, hence, controls the initiation (or not) of avoidance litigation. 101

Fourth, chapter 13 imposes time restrictions on the debtor's right to a discharge if the debtor received a discharge in a prior bankruptcy case. Suppose a debtor needs to file for bankruptcy protection in 2007, but he previously filed for relief under chapter 7 and received a discharge in September of 2004. If the debtor files for relief under chapter 13 at any time during calendar year 2007, he will not receive a discharge in his chapter 13 case. Section 1328(f)(1) of the Code provides that the "court shall not grant a discharge [in a chapter 13 case] . . . if the debtor has received a discharge . . . in a case filed under chapter 7, 11, or 12 . . . during the 4-year period preceding the date of the order for relief" in chapter 13. 102 Chapter 11, by comparison, does not restrict the right to discharge based upon the entry of a discharge order in a prior bankruptcy case. 103 Thus, the 13-eligible debtor with a prior bank-

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96 There were eight cases with official committees in 2004 (4.4% of the 2004 individual sample) and five such cases in 2007 (2.7% of the 2007 individual sample).
98 See 28 U.S.C. § 586(a)(3)(B), (E) (2012) (stating that the United States trustee shall "supervise the administration of cases . . . under . . . chapter 11 . . . by . . . monitoring plans and disclosure statements . . . and monitoring creditors' committees").
99 See COLLIER MONOGRAPH, supra note 63, ¶ 5 (noting that the "detailed oversight" provided by the chapter 13 trustee is "largely lacking in chapter 11 cases").
100 Id.
101 See, e.g., Motion by Edan, LLC Pursuant to 11 U.S.C. § 1112(b)(1) to Convert Case to A Case Under Chapter 7 ¶ 15, In re Alberino, No. 07-10606 (Bankr. D. Mass. Nov. 9, 2007) (Docket No. 155) (stating, in support of its motion to convert debtor's case from chapter 11 to chapter 7, that "there may be preferential transfers or fraudulent conveyances that a chapter 7 trustee could recover for the benefit of the unsecured creditors of the estate"); First Modified Disclosure Statement at 9, In re Grillo, No. 04-23121 (Bankr. D.NJ. May 19, 2006) (Docket No. 86) (stating that married chapter 13 debtors moved to convert their case to chapter 11 after creditor claimed that chapter 13 debtors, unlike chapter 11 debtors, did not have the powers of a trustee and, thus, lacked "standing to make arguments to void an unrecorded mortgage under Section 544").
103 The Code does restrict the right to a discharge in chapter 11, however, if (1) the plan provides for liquidating all or substantially all estate property; (2) the debtor does not engage in business after plan
Bankruptcy discharge may opt for chapter 11 in order to avoid chapter 13's more restrictive rules on discharge.

Finally, perhaps the most important feature of chapter 11, left largely unchanged by BAPCPA's reforms, is its flexibility, compared with chapter 13, with regards to the timing of plan proposal and confirmation, as well as the making of plan payments. The Code provides that in a chapter 13 case the plan confirmation hearing be held "not earlier than 20 days and not later than 45 days" after the § 341 meeting. The debtor also must start making payments under the plan "not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier." Even small business debtors in chapter 11 have a longer time frame within which to propose and confirm a plan: 300 days for plan proposal and 45 days from plan proposal to confirmation, absent the court's granting of an extension of the relevant time period. In addition, there is no comparable provision in chapter 11 setting a deadline by which individual debtors must start making plan payments.

There also is greater flexibility with regard to plan length. The Code currently sets an outer time limit of five years on chapter 13 plans. In 2004, the Code provided that payments under a confirmed chapter 13 plan could not exceed "a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." Chapter 13's time limitations on plan length "can cause particular difficulty when trying to modify the terms of a nonprincipal residence first mortgage or other large debt." The Code provides no such constraints on the length of a chapter 11 plan.

The combination of an extended period within which to propose a plan and no established date for the start of payments in chapter 11 allows the individual chapter 11 debtor some "payment breathing room" at the start of the case. Payments to general unsecured creditors may not commence for a year or more from filing of the chapter 11 petition. The absence of time...
restrictions on the payment period under chapter 11 plans also provides some debtors with much-needed flexibility in structuring payouts to creditors.

In conclusion, as the data on 13-eligible debtors show, BAPCPA's changes to chapter 11 made it a less attractive option for individual debtors. Yet, 18% of the 13-eligible chapter 11 debtors in the 2007 individual sample still filed for relief under chapter 11. The reason is that even post-BAPCPA Chapter 11 offers advantages for some individual debtors that they cannot obtain in a chapter 13 case.

III. SUCCESS AND THE INDIVIDUAL CHAPTER 11 DEBTOR

Defining what constitutes success is difficult. The simplest definition accounts for only those cases in which the court confirms and the debtor successfully consummates a plan—whether of reorganization, partial liquidation, or liquidation. But, judges and commentators alike question whether this simple definition adequately captures other less obvious kinds of success, for example, cases in which chapter 11 provides the debtor with the ability to resolve financial problems with his creditors without the benefit of a confirmed plan.

Success comes in many forms. To say that confirmation and consummation is the appropriate use of Chapter 11 ignores, among other things, that the essential purpose of the process is to rehabilitate the debtor while treating creditors fairly. If that can be accomplished with the aid of Chapter 11, but without consummating a plan, is it appropriate to condemn the result?113

In this section, I compare success rates for the individual chapter 11 samples for 2004 and 2007 using two definitions of success. The analyses in this portion of the paper do not depend on whether the debtor filed schedules. Hence, the sample size is 182 and 188 cases for 2004 and 2007, respectively.

In Section A, I use a narrow definition of success, counting only those cases in which the plan was confirmed and successfully consummated. Successful performance under this narrower definition means that the chapter 11

case was neither converted nor dismissed post-confirmation, and the debtor did not refile for bankruptcy in the same judicial district prior to completing the payments contemplated by the plan.\textsuperscript{114} I include a refiling criterion because cases with failed plans do not always have post-confirmation orders of dismissal or conversion.\textsuperscript{115}

In Section B, I use a broader definition to compare the success rates of the individual cases in the 2004 and 2007 samples. In addition to counting cases with successfully performed plans, I also include as a "success" the following types of cases:

1) The debtor moved for dismissal because he sold property and paid his creditors without benefit of a plan, so long as the debtor did not refile for bankruptcy in the same district within five years of the order-of-dismissal date; and

2) The debtor moved for dismissal because he either settled the dispute that precipitated the filing of the chapter 11 case or reached a settlement with a major creditor or creditors, so long as the debtor did not refile for bankruptcy in the same district within five years of the order-of-dismissal date.

I selected a five-year refiling limitation because the Code, in both chapters 11 and 13, directly references a five-year payment period for individual debtors.\textsuperscript{116}

Under this broader definition, the debtor does not receive a discharge and, as a result, such cases do not satisfy a discharge-centric model of success. Nonetheless, because the debtor initiates the dismissal, this measure of success accounts for what the debtor hoped to accomplish by filing for chapter 11. As the National Bankruptcy Review Commission noted in its 1997 report to Congress, dismissal does not necessarily denote failure in chapter 11.

Many of the practitioners who testified noted that Chapter 11 cases that were dismissed did not necessarily fail. They explained that once the debtor and its principal creditors reached an agreement, they often would voluntarily dismiss

\textsuperscript{114}I and my research assistants searched for subsequent bankruptcy filings only in the same district in which the debtor originally filed. The time and labor required to search for subsequent filings in the remaining ninety-three districts necessitated this geographic search limitation.

\textsuperscript{115}See, e.g., In re Quiñero, No. 07-33404 (Bankr. N.D. Tex. July 17, 2007) (debtor defaulted on payment of allowed secured claims of bank holding mortgage on his homestead, thereby resulting in termination of automatic stay pursuant to a pre-confirmation agreed order resolving mortgage holder's motion for modification of the stay).

\textsuperscript{116}See 11 U.S.C. § 1129(a)(15)(B) (2012) (stating that in an individual chapter 11 case one way to confirm a plan over the objection of an unsecured creditor is to pay value not less than the debtor's disposable income "to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer"); 11 U.S.C. § 1322(d) (2012) (providing that "the court may not approve a period that is longer than 5 years").
the pending bankruptcy case. Some of the most successful Chapter 11 cases appear in the data under the heading “dismissed.”

Thus, if some creditors are better off due to a settlement and none are worse off—a form of creditor Pareto improvement—then the insistence on a confirmed plan elevates form over substance.

Moving away from a plan-oriented definition of success requires exercises of judgment not at play when the determinations are binary: Did the court confirm or not confirm a plan? Did the debtor complete or not complete payments under the plan? Thus, I count as a success only those cases with evidence on the docket of creditor payment (or a payment schedule), or a settlement agreement. In a few cases, neither the motion to dismiss nor the order of dismissal sheds light on the reasons for dismissal and, therefore, I count these cases as failures.

In addition, I do not count as a success those few cases in which the debtors simply stated a preference “to pay their creditors off on their own” or an expectation of some future settlement in their motions to dismiss. A


118 See Richard A. Epstein, Modern Environmentalists Overreach: A Plea for Understanding Background Common Law Principles, 37 HARV. J.L. & PUB. POL'Y 23, 27 n. 18 (2014) (emphasis in original) (citations omitted) (stating that “[w]hen resources are initially allocated among a group of individuals, a change in the allocation that makes at least one individual better off without making any other individual worse off is called a Pareto improvement. . . . An allocation is Pareto optimal when no further Pareto improvements can be made, meaning that there is no possibility of redistribution in a way where at least one individual would be better off while no other individual ends up worse off”).

119 For two sides of the debate on structured dismissals, compare Nan Roberts Eitel, T. Patrick Tinker & Lisa Lambert, Structured Dismissals, or Cases Dismissed Outside the Code's Structure, AM. BANKR. INST. J., March 2011, at 20-21, 59 (highlighting several problems with structured dismissals, including their resemblance to sub rosa plans, and concluding that “[c]ases should be administered according to the structure set forth in the Code and not concluded in a summary manner that is 'structured, but flawed'”) with Normal L. Pernick & G. David Dean, Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Assets Sales, AM. BANKR. INST. J., June 2010, at 1, 56-58 (discussing statutory bases and factual showings required for a structured dismissal and concluding that a structured dismissal “may now be the quickest and most cost-effective way to conclude your chapter 11 case”).

120 See, e.g., In re Griffey, No. 8:07-11728 (Bankr. C.D. Cal. June 11, 2007) (nothing in motion or order to indicate reason for dismissal, although possible that debtor mistakenly filed for relief under chapter 11, as debtor filed motion to dismiss only four days after filing petition); Dismissal Order, In re Graham, No. 04-28072 (Bankr. E.D.N.Y. Apr. 4, 2005) (Docket No. 13) (order of dismissal that states that dismissal was appropriate based on the hearing held on the United States Trustee's oral application for dismissal of the case).

121 Motion to Dismiss, In re DuPont, No. 04-31275 (Bankr. W.D. Mo. Feb. 1, 2005) (Docket No. 29).

122 Motion for Voluntary Dismissal, In re Colbert, No. 07-07281 (Bankr. M.D. Tenn. Nov. 20, 2007) (Docket No. 21) (stating that bankruptcy protection was no longer needed as “[d]ebtors expect[ed] to enter into an agreement with First National Bank with regard to the debt secured by their five duplexes”). The Colverts filed again for bankruptcy protection, this time under chapter 7, just shy of four years after dismissal of their 2007 chapter 11 case. See In re Colbert, No. 11-11938 (Bankr. M.D. Tenn. Nov. 30,
debtor who files for bankruptcy imposes costs on his creditors by delaying their ability to collect. A settlement provides a benefit that may offset the cost of bankruptcy. A vague yet hopeful statement of future intention does not.

Finally, I do not include as a success those cases converted to another chapter of the Bankruptcy Code, typically chapter 7, even if the debtor’s creditors received some payout in the converted case.123 Some may argue that by failing to consider some converted cases as “successes,” I define success too narrowly. After all, a debtor may confirm a liquidating plan in chapter 11, thereby accomplishing much the same result as in a chapter 7 case pre-confirmation.124 But, obtaining confirmation of a liquidating plan is a viable strategy that a debtor may contemplate when filing for relief under chapter 11. By comparison, a debtor does not file for chapter 11 with the intent of converting the case to chapter 7. Conversion, therefore, amounts to a failure of the chapter 11 case.

A. PLAN PROPOSAL AND CONFIRMATION

As the data in Table 6 show, approximately 47% of individual chapter 11 debtors in 2004 and 2007 proposed a plan. See Column (C), Row (1) of Table 6. While the plan-proposal rate increased from 45.1% in 2004 to 49.5% in 2007, this difference is not statistically significant (p>0.05).

Table 6: Plan Proposal 2004 & 2007

<table>
<thead>
<tr>
<th></th>
<th>(A) 2004</th>
<th>(B) 2007</th>
<th>(C) Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>%</td>
<td>Number</td>
<td>%</td>
</tr>
<tr>
<td>(1) Plan proposed</td>
<td>82</td>
<td>82/182 = 45.1%</td>
<td>93</td>
</tr>
<tr>
<td>(2) No plan proposed</td>
<td>100</td>
<td>100/182 = 54.9%</td>
<td>95</td>
</tr>
<tr>
<td>(3) Totals:</td>
<td>182</td>
<td></td>
<td>188</td>
</tr>
</tbody>
</table>

The somewhat higher rate of plan proposal in 2007 is largely attributable to the higher rate of plan proposal (54.3%) among individual business debtors.

Notes:
123 There was one converted case in 2007 that some may argue constitutes a success because allowed claims were paid in full in the chapter 7 case. See Chapter 7 Trustee’s Final Account and Distribution Report Certification that the Estate Has Been Fully Administered and Application to be Discharged (TDR) ¶ 3, at 2, In re Kaib, No. 07-27770 (Bankr. W.D. Pa. Nov. 15, 2011) (Docket No. 437) (showing allowed claims of $740,230 and distributions to creditors of $740,230). The case, however, was in chapter 11 for twenty months prior to conversion and was pending in bankruptcy for almost four years. See id. ¶ 4, at 2.
124 See 11 U.S.C. § 1123(a)(5) (2012) (stating that the plan may provide for the “sale of all or any part of the property of the estate”).
See Column (B), Row (1) of Table 7. Notwithstanding this uptick in 2007 in the plan-proposal rate among individual business debtors, the rate of plan proposal overall among individual debtors in the 2004 sample is not significantly different from that among individual debtors in the 2007 sample (p > 0.05).

Table 7: Plan Proposal by Business or Consumer Status 2004 & 2007

<table>
<thead>
<tr>
<th></th>
<th>(A) 2004 (n = 182)</th>
<th>(B) 2007 (n = 188)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
</tr>
<tr>
<td>(1) Business</td>
<td>34</td>
<td>34/76 = 44.7%</td>
</tr>
<tr>
<td>(2) Consumer</td>
<td>48</td>
<td>48/106 = 45.3%</td>
</tr>
<tr>
<td>(3) Totals:</td>
<td>82</td>
<td>82/182 = 45.1%</td>
</tr>
</tbody>
</table>

Tables 8 and 9 provide data on rates of successful plan performance for 2004 and 2007, respectively.125 While there is a marked decline in success across all measures in 2007, the overall rate of success is still quite low in 2004. The highest rate of success is among individual business debtors in 2004, and even that rate means that two of every three individual business cases failed in 2004. See Column (C), Row (1) of Table 8.126

Column (B) of both Tables 8 and 9 shows the success rates for only those cases in which the debtor proposed a plan. Thus, the denominators in Column (B) of both Tables represent the number of cases in which the debtor proposed a plan, broken down by individual business (Row (1)) and individual consumer (Row (2)) debtors.

There is a striking difference in success rates between 2004 and 2007 among those debtors proposing plans. In 2004, 61% of individual debtors who proposed a plan went on to achieve confirmation and successfully perform the plan. See Column (B), Row (3) of Table 8. By comparison, only 34% of debtors who proposed a plan in 2007 obtained confirmation and successfully performed that plan. See Column (B), Row (3) of Table 9. Thus, individual debtors who proposed plans in 2004 confirmed and successfully performed plans at a statistically significant higher rate than their 2007 counterparts (p < 0.001).127 As I explain later, it is not the difference in confirma-

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125 Included in both tables are a very small number of cases in which the five-year-period used for determining plan success has not yet expired. See, e.g., See Order Confirming Chapter 11 Plan, In re LaVigne, No. 06-30090 (Bankr. N.D.N.Y. July 21, 2014) (Docket No. 529). In re LaVigne was filed in June of 2004. See In re LaVigne, No. 04-64078 (Bankr. N.D.N.Y. June 4, 2004). On January 12, 2007, the LaVigne case was transferred intra-district and now bears a 2006 docket number. See In re LaVigne, No. 06-30090 (June 4, 2004).

126 An approximate 32% success rate means a 68% (more than two of every three cases) failure rate.

127 For this analysis, the sample is comprised of only those cases in which the individual debtor proposed a plan. The sample is 175 cases: 82 for 2004, and 93 for 2007. The p-value with the Yates Con-
tion rates that accounts for the difference in successful performance; instead, it is the high plan-failure rate in 2007 that does so. See infra Table 10.

Table 8: Successful Plans by Business or Consumer Status—2004

<table>
<thead>
<tr>
<th></th>
<th>2004</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(A)</td>
<td>(B)</td>
<td>(C)</td>
</tr>
<tr>
<td></td>
<td>Number</td>
<td>Percentage of Successful Cases of Plan-Proposed Cases</td>
<td>Percentage of Successful Cases in Individual Sample</td>
</tr>
<tr>
<td>(1) Business</td>
<td>n = 76</td>
<td>24</td>
<td>24/34 = 70.6%</td>
</tr>
<tr>
<td>(2) Consumer</td>
<td>n = 106</td>
<td>26</td>
<td>26/48 = 54.2%</td>
</tr>
<tr>
<td>(3) Totals</td>
<td></td>
<td>50</td>
<td>50/82 = 61.0%</td>
</tr>
</tbody>
</table>

Column (C) of both Tables 8 and 9 provides the success rates by entity type for all individual cases in the samples. In 2004, while approximately 32% of individual business debtors successfully performed a plan, only about a quarter of individual consumer debtors did so. Compare Column (C), Row (1) with Column (C), Row (2) of Table 8. This difference in plan success rates for 2004 between individual business and consumer debtors, however, is not statistically significant (p > 0.05). Similarly, the difference in plan success rates in 2007 between individual business (16.2%) and consumer debtors (18.1%) is not statistically significant (p > 0.05). Compare Column (C), Row (1) with Column (C), Row (2) of Table 9.

Table 9: Successful Plans by Business or Consumer Status—2007

<table>
<thead>
<tr>
<th></th>
<th>2007</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(A)</td>
<td>(B)</td>
<td>(C)</td>
</tr>
<tr>
<td></td>
<td>Number</td>
<td>Percentage of Successful Cases of Plan-Proposed Cases</td>
<td>Percentage of Successful Cases in Individual Sample</td>
</tr>
<tr>
<td>(1) Business</td>
<td>n = 105</td>
<td>17</td>
<td>17/57 = 29.8%</td>
</tr>
<tr>
<td>(2) Consumer</td>
<td>n = 83</td>
<td>15</td>
<td>15/36 = 41.7%</td>
</tr>
<tr>
<td>(3) Totals</td>
<td></td>
<td>32</td>
<td>32/93 = 34.4%</td>
</tr>
</tbody>
</table>

But, there is a statistically significant difference in successful plan-performance rates between the individual debtors in the 2004 sample and those in the 2007 sample. While approximately 28% of individual debtors in the 2004 sample successfully performed a plan, only 17% did so from the 2007 sample of individual debtors. Compare Column (C), Row (3) of Table 8 with continuity Correction is 0.001. See supra note 52 for an explanation of the Yates Continuity Correction and the problems with its use.
Column (C), Row (3) of Table 9. In other words, chapter 11 debtors in the 2004 individual sample successfully performed plans at a statistically significant higher rate than did their counterparts in the 2007 individual sample ($p = 0.016$). 128

Do BAPCPA’s changes to the treatment of individual debtors in chapter 11 account for this difference in successful plan-performance rates? The data in Table 10 suggest that the answer to that question is “no.” If BAPCPA made plan confirmation more difficult, then plan-confirmation rates should be significantly different in 2004 and 2007. Yet, they are not. As Table 10 demonstrates, fifty-three individual debtors confirmed plans in 2004 for a confirmation rate of 29.1%, while in 2007, forty-eight debtors confirmed plans for a confirmation rate of 25.5%. Compare Column (A), Row 1 with Column (B), Row (1) of Table 10. While the confirmation rate is lower in 2007 than in 2004, the difference in confirmation rates is not statistically significant ($p > 0.05$).

<table>
<thead>
<tr>
<th></th>
<th>2004 ($n = 182$)</th>
<th>2007 ($n = 188$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number</td>
<td>Percentage</td>
<td>Number</td>
</tr>
<tr>
<td>(1) Confirmed Plans</td>
<td>53</td>
<td>53/182 = 29.1%</td>
</tr>
<tr>
<td>(2) Failed Plans</td>
<td>3</td>
<td>3/53 = 5.7%</td>
</tr>
<tr>
<td>(3) Successful Plans</td>
<td>50</td>
<td>50/182 = 27.5%</td>
</tr>
</tbody>
</table>

It is plan performance not plan confirmation that explains the difference in success rates in 2004 and 2007. As Row (2) of Table 10 shows, very few plans failed in 2004—less than 6% of the confirmed plans. 129 In 2007, how-

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128 The $p$-value with Yates’s Continuity Correction is 0.022. In other words, the result is statistically significant regardless.

129 See In re Ranyak, No. 04-37090 (Bankr. N.D. Tex. July 1, 2004) (debtor refiled for chapter 11 one month shy of five years from confirmation of original plan that provided for payment of the claims of various taxing authorities and the general unsecured creditors over a period of six years from the plan’s effective date); In re Ramirez, No. 04-12390 (Bankr. D.N.M. Apr. 1, 2004) (married debtors refiled for chapter 13 in 2010, a month shy of four years from plan confirmation, when plan provided for payment over a period of five years to various creditors holding security interests in trucks, ATVs, and equipment, and when bankruptcy court dismissed debtors’ 2010 case in April of 2011, debtors filed another chapter 11 case a month later, which case also was dismissed after debtors had confirmed yet another plan); In re Taylor, No. 3: 04-01431 (Bankr. M.D. Fla. Feb. 13, 2004) (bankruptcy court confirmed plan using Code’s cramdown provisions, but subsequently dismissed case a month shy of five years from plan confirmation for debtor’s failure to pay quarterly fees and provide the United States trustee with disbursement information, and then upon creditor motion to reconsider its dismissal order converted the case to chapter 7).
ever, one in three confirmed plans failed. It is this difference in plan-failure rates that results in a statistically significant difference in the rate of successful plan performance in 2004 and 2007.

What accounts for such a large difference in plan-success rates pre- and post-BAPCPA? One explanation is the Great Recession. Many of the individual debtors from the 2007 sample confirmed and performed plans in 2008 and beyond, during the largest downturn in the economy since the Great Depression. Unlike their counterparts from 2004, the individuals in the 2007 sample confronted a collapsing real estate market and sharp declines in consumer spending.

Imagine the debtor who intended to fund his plan, in whole or in part, by selling off real property. Consider the debtor who filed for relief under chapter 11 in order to reorganize his business affairs, relying on growth in

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130 I ran the analysis two ways, because it is debatable whether the 2007 case of In re Quillian, No. 07-20199 (Bankr. S.D. Tex. Apr. 2, 2007) qualifies as a success or failure. Either way, the rate of successful plan performance for 2004 is significantly different than that for 2007. The bankruptcy court granted the United States trustee's motion to dismiss the debtor's case approximately thirty-two months after plan confirmation. Order Dismissing Case, In re Quillian, No. 07-20199 (Aug. 8, 2011) (Docket No. 211). The United States trustee noted in the motion to dismiss that per debtor's plan the liquidating trustee had "liquidated the estate in its entirety and distributed all of its assets to creditors." Motion of the United States Trustee to Dismiss Case, In re Quillian, No. 07-20199 (July 12, 2011) (Docket No. 209). Thus, while the debtor did not receive a discharge, his creditors were paid according to the plan's terms.

131 In fifteen of the sixteen failed-plan cases in 2007, the case either converted to chapter 7 or was dismissed post-confirmation. The time between plan confirmation and conversion or dismissal ranged from a low of eight months to a high of three and a half years. Compare Order of Conversion of Chapter 11 to Chapter 7, In re Warren, No. 07-70375 (Bankr. E.D. Va. Dec. 19, 2008) (Docket No. 75) (converting case to chapter 7 only eight months after order of confirmation) with Order of Conversion, In re Hackney, No. 07-40952 (Bankr. N.D. Ala. Feb. 12, 2013) (Docket No. 901) (converting case to chapter 7 forty-two months after plan confirmation order). While there was no order of conversion or dismissal in the sixteenth case, married debtors' plan failed approximately a year and a half after confirmation, because debtors defaulted on payment to the sole member of Class 5 of the plan—the holder of the mortgage on their homestead—and the automatic stay was lifted pursuant to the terms of an agreed order setting forth the terms of payment and curing of arrearages on their mortgage. See Notice of Termination of Automatic Stay Due to Failure to Cure Default, In re Quinterno, No. 07-33404 (Bankr. N.D. Tex. Dec. 10, 2009) (Docket No. 217); Agreed Order Modifying Automatic Stay, In re Quinterno, No. 07-33404 (Apr. 16, 2008) (Docket No. 121).

132 See, e.g., First Amended Disclosure Statement with further corrections at 5, In re Funes, No. 07-53303 (Bankr. N.D. Cal. May 2, 2009) (Docket No. 160) (stating that debtors will implement their plan from earnings and proceeds of sale of two pieces of real property); Second Amended Disclosure Statement at 1-7, In re Larsen, No. 07-11234 (Bankr. N.D. Cal. Apr. 10, 2008) (Docket No. 114) (describing debtor's business as "primarily associated with real property," offering housing market decline and adjustable rate mortgages as two of three reasons for debtor's bankruptcy filing, and explaining that "debtor will implement a plan to market her real properties such that the values realized will provide cash flow and the sales will occur as soon as possible"); cf. Motion to Dismiss ¶¶ 5, 7, at 2, In re Shortes, No. 07-31170 (Bankr. N.D. Tex. Nov. 14, 2007) (Docket No. 79) (debtor stating in his motion to dismiss that he had hoped to reorganize by selling several of his income-generating properties but that "the proverbial 'bottom' has dropped out of the market" and that because "it does not appear that the real estate market has bottomed out" debtor would be unable to confirm a feasible plan of reorganization).
consumer spending to revitalize flagging sales. As the real estate market soured and consumer spending plummeted individual debtors whose plans depended on a robust market for real property or on increased consumer spending no doubt faced problems making scheduled plan payments.

But, it also is possible that the discharge rules pre-BAPCPA masked the true rate of plan failure among individual chapter 11 debtors in the 2004 sample. Prior to BAPCPA's passage, an individual debtor in chapter 11 who confirmed a non-liquidating plan received a discharge upon plan confirmation. Suppose a debtor who filed in 2004 confirmed a plan calling for a 25% dividend to his unsecured creditors. If the debtor had no non-dischargeable debts, then at confirmation he would receive a discharge and his unsecured creditors no longer could seek to collect payment for the 75% of their claims not provided for in the plan. What happened, however, if the debtor defaulted on his plan? An unsecured creditor could request that the bankruptcy court order the debtor to comply with the terms of the plan, but for most unsecured creditors there would have been little incentive to do so pre-BAPCPA. After all, plan default did not unwind the debtor's discharge. The debtor still only owed the creditor whatever remained unpaid of 25% of his claim.

Post-BAPCPA, however, a chapter 11 debtor with a confirmed non-liquidating plan who proposes to pay his unsecured creditors 25% of their claims obtains a discharge not upon plan confirmation but upon completion of payments under the plan. As a result, upon default, an unsecured creditor

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133 See, e.g., Original Chapter 11 Plan at 1, In re Edwards, No 11·41028 (Bankr. E.D. Tex. July 27, 2012) (Docket No. 79) (stating in chapter 11 plan filed in 2011 bankruptcy case that the economy "created a drag" on the debtor dentist's practice and that while he "was generally current with his obligations to creditors under the plan, [he] was unable to satisfy his post-confirmation income tax liabilities in tax years 2008·2010, while at the same time servicing his obligations under the Plan"); Fourth Amended Disclosure Statement at 3, 5, In re Harris, No. 07·30586 (Bankr. D. Conn. Aug. 18, 2010) (Docket No. 230) (stating that debtor intends to fund plan using post-petition earnings and noting that debtor "expects to derive significant income" from his bus touring firm, which has "relationships with various casinos to transfer customers").


135Both pre-and post-BAPCPA, an individual chapter 11 debtor did not receive a discharge of debts excepted from discharge under § 523 of the Bankruptcy Code. See 11 U.S.C. § 1141(d)(2) (2012). With BAPCPA, Congress altered the language of § 1141(d)(2), but only to accommodate the fact that the individual debtor no longer obtained a discharge upon plan confirmation. For a comparison of the text of § 1141(d)(2) pre-and post-BAPCPA, see HOUSE BAPCPA REPORT, supra note 55, at 289.

136For an excellent discussion of the various problems that creditors faced in trying to obtain relief when a debtor defaulted on plan payment pre-BAPCPA, see The Hon. Alan M. Ahart & Lisa Elaine Meadows, Deferring Discharge in Chapter 11, 70 AM. BANKR. L.J. 127 (1996).

137See 11 U.S.C. § 1141(d)(5) (2012). Cf. COLLIER MONOGRAPH, supra note 63, at ¶ 9 (explaining that the "otherwise for cause" exception to § 1141(d)(5)'s rule of discharge upon completion of payments "has been used, although not universally, to allow a discharge after payments to general unsecured creditors have been completed, but before the completion of payments to modified secured creditors (which might not be completed for 30 or 40 years)").
under this plan would not be limited to recovery of the balance of 25% of its
claim. Instead, assuming it obtains stay relief or the case is dismissed, the
creditor may pursue the debtor for 100% of its original claim, or whatever
remains of its original claim after taking account of any plan payments. Thus,
the change in the rules on discharge shifted the risk of non-payment from
creditor to debtor post-BAPCPA, and upon debtor default modified creditor
incentives to pursue a motion to dismiss the case for cause, pursuant to
§ 1112(b)(4), or a motion for relief from the automatic stay, pursuant to
§ 362(d).138

What this means is that the difference in plan-failure rates pre- and post-
BAPCPA actually may not be significantly different. It is possible that indi-
vidual chapter 11 plans failed at similar rates pre- and post-BAPCPA, but
that a pre-BAPCPA cost-benefit analysis made it less likely that a creditor
would file a motion in the bankruptcy court to dismiss the case based on the
debtor’s default.139 In other words, it is possible that the different discharge
rule in effect in 2004 obscured the true rate of pre-BAPCPA plan failure
among individual debtors.

Unfortunately, based on the limited data from this study, it is not possi-
bile to determine the reason why plan-failure rates increased significantly in
2007. Data from the upcoming ABI study, however, may prove helpful.140
For example, if the ABI study finds significant declines in plan-failure rates as
the economy improved, then those findings lend credence to the argument
that the Great Recession caused the significant increase in plan failure among
the individual debtors in the 2007 sample.

In conclusion, the current data show no statistically significant difference
in plan-proposal or plan-confirmation rates between the individual debtors in
the 2004 and 2007 sample. The difference in success between the two sam-
ples is attributable to the significantly higher rate of plan failure among the
debtors in the 2007 sample. Determining empirically the reasons for this dif-
ference, however, must await further study.

138Cf. Ahart and Meadows, supra note 136, at 129 (in an article written pre-BAPCPA, noting that
"the risk of the debtor’s nonperformance following confirmation [was] on the unsecured creditors").

139Post-BAPCPA, the issue still remains as to what assets the chapter 7 trustee has to administer in a
case converted to chapter 7 after confirmation of a chapter 11 plan. Unless the debtor’s plan provides to
the contrary, upon plan confirmation all estate property vests in the debtor. See 11 U.S.C. § 1141(b)
(2012). As some courts have pointed out, however, “there simply is no provision in the Code to effectuate
the revesting of the reorganized debtor’s property in the conversion [sic] estate.” In re L&T Machining,
Inc., 2013 Bankr. LEXIS 2693, at *20 (Bankr. D. Kan. July 3, 2013). In other words, there are no assets for
the chapter 7 trustee to administer. In such a case, dismissal is really the only sensible option because
conversion to chapter 7 is futile. See id. at 22 (noting that while cause existed to convert to chapter 7,
doing so was futile, thereby leaving dismissal as the only option).

140See supra note 3 and accompanying text for a very brief description of the ABI study.
B. Broader Definition of Success

Does broadening the definition of success to include settlements and creditor payments without the benefit of a plan significantly increase individual success rates? As the data below demonstrate, the short answer to this question is “no.”

Table 11 presents the data for 2004 and 2007 using the broader definition of chapter 11 success articulated earlier in this Article. Broadening the definition of what constitutes success results in a statistically significant difference in the rate of success between individual business and consumer debtors \((p=0.044)\), but only for calendar year 2004. Compare Column (A), Row (1) (40.8%) with Column (A), Row (2) (27.4%) of Table 11. For 2007, the success rate for individual business debtors is not significantly different from that for individual consumer debtors \((p>0.05)\). By comparison, there was no statistically significant difference in the rates of success, using the narrower definition of successful plan performance, between individual business and consumer debtors for either 2004 or 2007. See supra Tables 8 and 9.

Table 11: Success by Business or Consumer Status 2004 & 2007

<table>
<thead>
<tr>
<th></th>
<th>(A) 2004</th>
<th></th>
<th>(B) 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Percentage</td>
<td>Number</td>
</tr>
<tr>
<td>(1) Business</td>
<td>31</td>
<td>31/76 = 40.8%</td>
<td>20</td>
</tr>
<tr>
<td>(2) Consumer</td>
<td>29</td>
<td>29/106 = 27.4%</td>
<td>16</td>
</tr>
<tr>
<td>(3) Totals</td>
<td>60</td>
<td>60/182 = 33.0%</td>
<td>36</td>
</tr>
</tbody>
</table>

Using a broader definition of success, however, does not change the fact that the success rate in 2004 is significantly different from that in 2007 \((p = \ldots\).

\(^{141}\)The chi-square test (with Yates Continuity Correction) indicated no significant association between debtor status (consumer versus business) and success rates \((p = 0.064)\).

\(^{142}\)This number does not include the case of In re Dilling, No. 04-35474 (Bankr. N.D. Ill. Sept. 23, 2004). Elizabeth Dilling, the debtor, filed for relief under chapter 11 when she was unable to stay execution pending appeal of a $2 million state court judgment. See Memorandum Opinion ¶¶ 6-7, at 3, In re Dilling, No. 04-35474 (Feb. 24, 2005) (Docket No. 107) (explaining efforts debtor made prior to filing for bankruptcy to obtain an appeal bond or letter of credit, or to provide “alternative security” pursuant to Illinois Supreme Court Rule 305(a) in order to stay execution of the state court judgment). During her bankruptcy case, Dilling obtained a letter of credit satisfactory to the bonding company that issued a $2.4 million bond. See Motion to Dismiss Chapter 11 Petition, In re Dilling, No. 04-35474 (Mar. 22, 2005) (Docket No. 116). She then moved to dismiss her chapter 11 case and the bankruptcy court granted her motion. See Order Dismissing Chapter 11, In re Dilling, No. 04-35474 (Mar. 29, 2005) (Docket No. 120). Because there was no settlement of the creditor’s debt, I did not include Dilling as a success. Even had I done so, however, it would not have affected the finding that the success rate for individual debtors in 2004 is significantly higher than that of their counterparts in the 2007 individual sample.
A comparison of Column (A), Row (3) of Table 10 with Column (A), Row (3) of Table 11 shows that using a broader definition of success increases by ten the number of successful cases for 2004. As a result, the success rate for 2004 jumped from 27.5% when counting only successful plans to 33% when counting successful plans and "successful" dismissals. By comparison, for 2007, the success rate increased only 2% from 17% to 19%.

Even though more individuals filed for chapter 11 in 2007, the number of successful cases increased by only four—from thirty-two to thirty-six. Compare Column (B), Row (3) of Table 10 with Column (B), Row (3) of Table 11. Once again, while the success rate for 2004 is significantly higher than that for 2007, it is important to recognize that even with an expanded definition of success only one in three individual debtors succeeded in chapter 11 in 2004.

As the broader definition of success includes successful plan performance, it is not entirely surprising that the success rate for debtors in the 2004 individual sample is significantly higher than that for the individual debtors in the 2007 individual. But, "successful" dismissals also were lower in 2007 than in 2004. The difference in numbers is quite small (ten versus four), but one question to explore in later research is whether settlements and creditor resolutions without benefit of a plan fell substantially post-BAPCPA. If so, an examination of the time spent in chapter 11 is critical. BAPCPA ushered in drop-dead dates for plan proposal and confirmation for small business debtors. Not all individual chapter 11 debtors qualify as small business debtors.

143 The chi-square test (with Yates Continuity Correction) indicated a significant association between success rate and year of debtor filing ($p = 0.004$).

144 It is possible that this number slightly understates the number of additional successful cases for 2004, because access to documents on PACER was limited in 2004 for eight judicial districts with cases in the random sample. See Chapter 11 Triage, supra note 7, at 1001 n. 91. See, e.g., In re Doumani, No. 8:04-13625 (Bankr. C.D. Cal. June 3, 2004) (order of dismissal does not provide reasons for dismissal and United States trustee's motion to dismiss not available on PACER).

145 In one case that I counted as a success, the married debtors filed a motion for dismissal, which the court granted, based on a settlement with the debtors' principal creditor. See Memorandum Decision on Debtor's Motion to Dismiss, In re Kent, No. 07-03238 (Bankr. D. Ariz. Sept. 23, 2008) (Docket No. 514). But, approximately eighteen months later, that creditor filed a motion to reopen the case to "enforce certain terms of a Settlement Agreement which the Court ha[d] previously approved." Motion to Reopen Bankruptcy Proceedings, In re Kent, No. 07-03238 (Feb. 12, 2010) (Docket No. 537). The court reopened the case and ruled in favor of the creditor, requiring married debtors to transfer funds in their § 529 accounts to creditor to effectuate the terms of the parties' settlement. See Order Denying Debtors' Motion for Reconsideration, Overruling Debtors' Objection to Form of Order, and Granting Kent & Wittekind, P.C.'s Request to Vacate Order to Show Cause, In re Kent, No. 07-03238 (Apr. 12, 2010) (Docket No. 558). The creditor in this case had to return to bankruptcy court to enforce the terms of the settlement, which could be interpreted as a failure of the settlement. But, the court ruled in favor of the creditor and there were no further proceedings in the case, suggesting that debtors ultimately complied with the terms of the settlement agreement. In addition, as of the writing of this Article, debtors had filed no other bankruptcy cases in the same district.
and, thus, the various deadlines for proposing and confirming a plan do not apply to all individual chapter 11 debtors. Nonetheless, did BAPCPA set a tone of expedited handling for all chapter 11 cases, such that debtors had less time to deal with creditors prior to facing conversion or dismissal motions from the United States trustee? Negotiation and settlement take time. If bankruptcy courts dismissed and converted individual chapter 11 cases more quickly post-BAPCPA than pre-BAPCPA, then fewer cases would reach settlement and qualify as successes.

IV. CONCLUSION

The findings from this study provide a starting point for evaluating how individual debtors perform in chapter 11. More than one in five chapter 11 debtors in both the 2004 and 2007 adjusted random samples was an individual. Moreover, as chapter 11 filings decreased post-BAPCPA relative to filings in 2004, individual chapter 11 filings increased, largely due to an upswing in filings by individual business debtors. At the same time, however, the success rate for individual debtors plunged post-BAPCPA. Individual debtors in the 2004 sample successfully performed plans at a significantly higher rate than their counterparts in the 2007 sample. Expanding the pool of successful cases to count dismissals with settlements or other creditor resolutions did not change the relative success rates of the 2004 and 2007 individual debtors. Debtors in the 2004 individual sample still outperformed those in the 2007 individual sample.

Why the difference between 2004 and 2007? There are two explanations, which are not necessarily mutually exclusive.

First, a debtor who filed for relief under chapter 11 in 2007 did so anywhere from approximately a year to two years after BAPCPA's effective date. There was a “mini-surge in chapter 11 filings” preceding BAPCPA's effective date, followed by a “bottom[ing] out” of chapter 11 filings in calendar year 2006. While the number of chapter 11 filings increased 23% from 2006 to 2007, there still were significantly fewer chapter 11 cases filed in 2007 than in 2004. The sharp decline in chapter 11 filings post-BAPCPA suggests reluctance on the part of prospective debtors to file for relief under chapter 11, no doubt due to the uncertainty about the impact of BAPCPA's changes to chapter 11 practice. With time came greater certainty, as bankruptcy courts interpreted new provisions in the Code. But, for debtors filing in 2007, uncertainty no doubt prevailed. Did this uncertainty affect the com-

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146 See 4-503 COLLIER ON BANKRUPTCY ¶ 303.05 n. 1, Alan N. Resnick & Henry J. Sommer, 16th ed. (2014) (stating that October 17, 2005, was BAPCPA’s effective date).
147 See 2007-2011 Trends, supra note 53, at 73 Tbl. 4.
position of debtors filing for relief under chapter 11 in 2007? In other words, did firms in financial trouble seek other alternatives to bankruptcy, leaving only those individuals and firms with no other options to seek relief under chapter 11?

Second, while most individual debtors who filed for relief under chapter 11 in 2007 did so before December—the official onset of the Great Recession—they proposed, obtained confirmation of, and performed plans, as well as attempted settlements with creditors, during the worst economic downturn since the Great Depression. Thus, the dismal success rate for the debtors in the 2007 individual sample may be nothing more than a reaction to a major economic shock.

What does this all mean? Firm conclusions are not possible, given the confounding effects of the economic downturn. Nonetheless, even in 2004, individual debtors fared poorly in chapter 11. Only one in three debtors was successful, and that one-third figure is based on a more generous definition of success that includes case dismissals with a settlement or other creditor resolution. Thus, further research is needed to examine the reasons why individual debtors fare so poorly in chapter 11. It is possible that the reasons are exogenous or largely unrelated to chapter 11 practice. Therefore, understanding the reasons for changes in filing and success rates is critical. Diagnosis must precede solutions or we risk enacting reforms that simply exchange one problem for another.