

HEINONLINE

Citation: 90 Tex. L. Rev. See Also 9 2011-2012



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Fri Sep 5 01:09:20 2014

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0040-4411](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0040-4411)

Texas Law Review

See Also

Response

Small Ball

William C. Whitford*

I. Introduction

Professor Katherine Porter is doing some of the most important empirical research on consumer bankruptcy in a generation. The most difficult research to conduct is longitudinal—research that traces the effects of a bankruptcy case over time. When debtors are individuals, there are tremendous difficulties in locating them and getting information from them sometime after a case is over.¹ Debtors are not required to file postbankruptcy financial information with the bankruptcy court, meaning that they must be interviewed personally.² And they are not required to cooperate with a researcher. Porter has conducted several such studies that are methodologically sophisticated and that involve a large number of respondents. One study, already published, concerned Chapter 7 debtors who received a discharge.³ She found that up to one-third of these

* Emeritus Professor of Law, University of Wisconsin School of Law. I thank Ken Doran, Esq., a friend and outstanding bankruptcy debtor attorney in Madison, Wisconsin, for lending me his wisdom in helpful discussions as I prepared this and other articles on consumer bankruptcy.

1. See Katherine Porter, *Life After Debt: Understanding the Credit Restraint of Bankruptcy Debtors*, 18 AM. BANKR. INST. L. REV. 1, 8 (2010) (recognizing the difficulty of locating individual Chapter 7 debtors even after they have filed for bankruptcy).

2. See *id.* at 6 (explaining that the Chapter 7 bankruptcy process ends for most debtors within a few months and that there is no ongoing trustee or judicial supervision of the debtor's credit activities after discharge).

3. Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67 (2006). For another longitudinal consumer bankruptcy study, see Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L.

discharged debtors were again in financial difficulty as soon as one year after bankruptcy.⁴ In her most recent study of Chapter 13 “dropouts”—who make up approximately two-thirds of the Chapter 13 debtors⁵—Porter also comes to dismal conclusions. The vast majority of Chapter 13 dropouts have not permanently improved their life situations by their bankruptcy experience.⁶ There is reason to believe that most of them would be in a better position if they had filed under Chapter 7 rather than under Chapter 13.⁷ At least then they probably would have received a discharge of most of their unsecured debts.

These conclusions should cause policy makers to take notice. The United States was the first country to adopt the discharge as a feature of individual bankruptcy (though it has recently been widely copied in Western countries). The discharge has often been defended as providing a “fresh start.”⁸ Though the fresh-start policy is often understood as motivated by relief of hardship—as a feature of our social safety net—it can also be justified as a tool for increasing the efficiency of the nation’s economy.⁹ An individual burdened with overwhelming debt has reduced incentives to maximize her economic potential, as a large percentage of her earnings and gains will go to creditors. Repayment of debt increases net worth, but for the heavily indebted individual, any benefit of that adjustment in net worth in the form of increased consumption is not likely to be enjoyed in the short term. In such circumstances, increased leisure, which can be enjoyed immediately, can appear to be an attractive alternative. And such a result is deleterious to any policy that seeks to maximize the material wealth and productivity of the United States.¹⁰ Especially in these discouraging economic times, restoring the value of a bankruptcy discharge so as to regain the maximum economic

REV. 1369 (2008). In that article, Porter examines the market for postbankruptcy lending, based on reports by discharged Chapter 7 debtors of solicitations for loan applications. *Id.* at 1391–92.

4. See Porter & Thorne, *supra* note 3, at 69 (reporting that in the year following their Chapter 7 filings, more than one-third of debtors reported that their financial situation was the same as or worse than at the time of bankruptcy).

5. Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEXAS L. REV. 103, 107 (2011).

6. See *id.* at 162 (characterizing the Chapter 13 system as a “pretend solution” in part because of the outcome of many Chapter 13 bankruptcies—many entail the loss of assets and “aspirations for middle-class prosperity”).

7. See *id.* at 107 (comparing the success rates of Chapter 7 and Chapter 13 bankruptcies, which are approximately 95% and 33%, respectively).

8. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (describing the bankruptcy discharge as designed to give “the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt”).

9. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 700 (1997).

10. For one of the most forceful statements of this rationale for a bankruptcy discharge, see Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420–24 (1985).

productivity of overindebted individuals should be an attractive objective for policy makers.

In her article, Professor Porter addresses one important part of the bankruptcy system's failure to fulfill the goals of the fresh-start policy. Though Chapter 7 is far from perfect, Chapter 13 is far worse.¹¹ Her proposed solution is basically to throw out Chapter 13, substituting a single chapter for individual bankruptcy that would incorporate some of Chapter 13's features while retaining Chapter 7's right to a discharge subject to relatively few conditions.¹² In making that recommendation, Porter is aware that there are currently circumstances in which Chapter 13 can and does provide a superior alternative to Chapter 7 for debtors, largely because of the former's provisions for dealing with secured debt. A single-chapter consumer bankruptcy system may sacrifice some of those benefits. But whatever the benefits of Chapter 13, Porter thinks that they are overwhelmed by the costs of having debtors file Chapter 13 when Chapter 7 would be more in their interests.¹³

In concluding that the costs of Chapter 13 exceed its benefits, Porter joins a very limited number of previous commentators who have reached a similar conclusion. As she graciously recognizes,¹⁴ I am in that group.¹⁵ And my views have not changed. I endorse the position that she advocates in this article and am grateful for the additional and updated data that she provides, all of which support her (and my) position.

11. See *supra* note 7 and accompanying text.

12. See Porter, *supra* note 5, at 154 n.203 (arguing that a single-chapter consumer bankruptcy system that would allow consumers to write down secured debts, but that would not mandate a repayment plan or long-term court supervision, could provide a means of permanently reducing consumers' debts without the complexity and choice that exist under the current dual-chapter system).

13. Because of the "means test" adopted by the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Chapter 7 is not today an available procedure to some debtors. See 11 U.S.C. § 707(b) (2006) (providing that for the purpose of a bankruptcy court's decision regarding whether to dismiss the Chapter 7 claim of an individual debtor "whose debts are primarily consumer debts," or whether to convert such a case to either a Chapter 11 or Chapter 13 case, a presumption of Chapter 7 abuse arises when the debtor's monthly income, reduced by a statutorily calculated amount, exceeds a defined minimum). Porter's recommendation of a single chapter for the individual bankruptcy system would need to include modification of the means test to make that chapter procedure available to all individuals, though perhaps there could be more conditions attached to the right to a discharge for higher income individuals.

14. Porter, *supra* note 5, at 155.

15. See William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85, 104-05 (1989) (arguing that eliminating the Chapter 13 procedure will best serve the material interests of the greatest number of debtors); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 415 (1994) [hereinafter Whitford, *Ideal of Individualized Justice*] (positing that the Bankruptcy Code could be simplified to reduce the number of choices that consumer debtors must face and that this is best accomplished through a repeal of Chapter 13).

II. The Small-Ball Response and Research Agenda

While I agree with Professor Porter's conclusion, anybody who observed the painful legislative process that preceded the enactment of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)¹⁶ has to be skeptical about the realization of Porter's vision in the foreseeable future. It would require an Act of Congress. Porter promisingly reports that she is working, with others, to draft a single-chapter consumer system under the auspices of the National Bankruptcy Conference, a body that was quite influential with respect to bankruptcy legislation before the BAPCPA was enacted.¹⁷ All power to Professor Porter and her colleagues, but I remain dubious that this Congress or any other in the near future will enact a proposal that would eliminate Chapter 13.

Which leads me to consider what I will call "small ball" responses to the depressing information about Chapter 13 results that Porter reports. Porter's sample size was insufficient to allow her, in a statistically significant way, to examine differences in Chapter 13 outcomes by geographic location of the debtor,¹⁸ and she does not attempt to do so. However, it is well-known and documented that, prior to the BAPCPA's enactment, the uses of Chapter 13 varied dramatically by judicial district.¹⁹ These differences included the percentage of total consumer filings that were made under Chapter 13, the kinds of Chapter 13 plans that were filed, and the percentage of Chapter 13 plans that were completed.²⁰ As an example, there is often a "floor percentage" of payments to unsecured creditors, not mandated by statute, that must be proposed in a Chapter 13 plan before the Chapter 13 trustee will not object to confirmation of that plan, and this floor percentage varies dramatically among Chapter 13 trustees.²¹ Further, it is quite clear that these

16. Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). For histories of the legislative process, see Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1095-106 (2004), and Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 562-67 (2005).

17. Porter, *supra* note 5, at 154 n.203.

18. *See id.* at 128-30 (describing the nongeographic demographic characteristics of the 303 interview respondents in her study). In a previous study, Professor Porter noted limitations to her conclusion based on a sample of 359 interviewees. Porter & Thorne, *supra* note 3, at 81, 98-99. With twenty-two U.S. Trustee Regions amongst which to divide Professor Porter's 303 cases in the instant study, Whitford, *Ideal of Individualized Justice*, *supra* note 15, at 411 tbl.2, the sample in each Region would become thin.

19. Whitford, *Ideal of Individualized Justice*, *supra* note 15, at 403-16.

20. Porter correctly represents that the percentage of discharged Chapter 13 plans has been about 33% nationally, a figure that has remained steady for years. Porter, *supra* note 5, at 153. However, there has been geographical variance in this percentage by judicial district. Whitford, *Ideal of Individualized Justice*, *supra* note 15, at 410. In an earlier article, I reported Chapter 13 completion rates by U.S. Trustee Region. The percentages varied from 3% to 49%. *Id.* at 411 tbl.2.

21. *See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 532, 534 (1993) (reporting on the study of Chapter 13 practices in four cities,

differences did not arise because of differences in individual debtor preferences about the type of bankruptcy relief that they desired.²² Instead, these differences arose because debtors needing and requesting some kind of bankruptcy relief were generally “steered” to a particular chapter proceeding, and in the case of Chapter 13, to a particular kind of plan.²³ The person actively steering the debtor was usually his attorney, but debtor attorneys faced varying incentives to steer their clients one way or the other.²⁴ It was those incentives that have been importantly responsible for the extreme variance in Chapter 13 practice that existed,²⁵ which came to be called “local legal culture.”²⁶

I am not aware of any studies of the effects of the BAPCPA on this extreme geographic variance in Chapter 13 practice. I have prepared a simple table, which is in Appendix A to this Response, which demonstrates that the geographic variance in the percentage of total individual filings that are made in Chapter 13 extends post-BAPCPA.²⁷ This continued geographic variance, reflecting continued variance in local legal culture, suggests a nonlegislative means of redressing some of the ugliest consequences of Chapter 13 practice that have been documented by Professor Porter. One might attempt to influence changes in local legal culture in high Chapter 13 areas so that debtor attorneys are more likely to steer debtors into Chapter 13 only in appropriate circumstances. This is what I call small ball.

The data reported in Appendix A does not demonstrate whether post-BAPCPA, there also remains a considerable geographic variance in the kinds of Chapter 13 plans filed and in their success rates. Further research is needed to determine whether such variation remains post-BAPCPA, though the evidence of continued variance in local legal culture strongly suggests that is the case. Any effort to change local legal culture should focus on

finding that floor percentages varied from 10% to 100%, and recognizing that the floor percentage can be understood as an “administrative rule of thumb”). The more that is proposed in a Chapter 13 plan for payments to unsecured creditors, the more money the debtor must contribute to the plan before it is successfully completed, which probably increases the likelihood of failure. *See id.* at 531 (recognizing that debtors must meet a legal test to avoid repayment of their debts in full to unsecured creditors).

22. *See id.* at 521–22 (deducing that patterns in filing practices can arise from the interaction between the financial interests and social concerns of lawyers and their clients).

23. *Id.* at 555.

24. Whitford, *Ideal of Individualized Justice*, *supra* note 15, at 406–12.

25. Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL’Y 801, 806–07 (1994).

26. This term was coined by Teresa A. Sullivan, Elizabeth Warren, and Jay Lawrence Westbrook in their pathbreaking empirical study of consumer bankruptcy. *Id.* at 803–04.

27. Appendix A shows variance by judicial district. It is important to remember that there is often not homogeneity within a judicial district. Chapter 13 practices can vary considerably even within a single judicial district. *See Braucher*, *supra* note 21, at 580–81 (identifying variation in floor percentages between Austin and San Antonio, among other cities).

these problems as well. In the past, far too many debtors have been steered to propose 100% plans, promising full payment to all unsecured creditors and making successful completion of the plan less likely than it needed to be.²⁸

Nobody can say that it will be easy to alter local legal culture in the ways that I have suggested. Appendix A shows that Chapter 13 filings as a percentage of total nonbusiness filings have remained very persistent in almost all judicial districts over time. Key figures in shaping local legal culture are local public figures, such as the bankruptcy judges and the Chapter 13 trustee.²⁹ No doubt these officials believe that the practices in their respective districts are the appropriate ones. Any effort at small ball may have to begin by persuading them otherwise, and here research like Porter's may prove helpful. And there may be other small-ball strategies besides influencing bankruptcy judges and Chapter 13 trustees. Appendix A also reveals that there are judicial districts in which, post-BAPCPA, there has been a notable decline in Chapter 13 filings as a percentage of total nonbusiness filings. The Middle and Western Districts of North Carolina and the Northern District of Georgia stand out in this respect.³⁰ An investigation of bankruptcy practices in those districts may be helpful in devising other small-ball strategies.

III. Conclusion

Small ball is not incompatible with Professor Porter's efforts to get Congress to enact a single-chapter procedure for consumer bankruptcy. Both efforts can proceed simultaneously. However, the importance of small ball is amplified by a forthcoming study by Professors Dov Cohen and Robert Lawless.³¹ Using the sophisticated statistical techniques that characterize their work, Cohen and Lawless have presented persuasive evidence of apparent race-based discrimination against African-Americans in the administration of consumer bankruptcy laws. Holding a number of variables constant, including geographical variables,³² they find that African-

28. In a pre-BAPCPA study of variance in Chapter 13 plans by U.S. Trustee District, I found that the percentage of full payment plans varied from 6% in two districts to 52% in one district (KY and TN). Whitford, *Ideal of Individualized Justice*, *supra* note 15, at 411 tbl.2.

29. *See supra* text accompanying notes 24–26.

30. There have also been notable increases in Chapter 13 filing rates in districts that have always had rates above the national average. All three Louisiana districts stand out in this respect. It is hard to believe that these increases have been socially desirable.

31. Dov Cohen & Robert M. Lawless, *Less Forgiven: Race and Chapter 13 Bankruptcy*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 175 (Katherine Porter ed., forthcoming 2012).

32. It is well-known that the highest percentages of Chapter 13 filings are in judicial districts in the South with high African-American populations. *See* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Who Uses Chapter 13?*, in CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 269, 269–70 (Johanna Niemi-Kiesiläinen et al. eds., 2003) (chronicling the origins of Chapter XIII in the South). Hence, it is important to control for geography in any statistical study of racial discrimination in consumer bankruptcy.

Americans are more likely to file Chapter 13 proceedings than other debtors.³³ And Porter's research has shown that debtors, on average, are more likely to be disadvantaged by filing for bankruptcy under Chapter 13 rather than Chapter 7. The kind of research into local legal culture that will be required to plan a sophisticated effort at small ball may help to reveal whether the continued importance of local legal culture accounts for this unfortunate result, as well as how we might rectify this apparent discrimination.

33. Cohen & Lawless, *supra* note 31, at 181.

Appendix A: Chapter 13 Filings as a Percentage of
Total Nonbusiness Filings by District³⁴

CIRCUIT	DISTRICT	1993	2002	2009	2010
D.C.		38	29	32	32
1ST	ME	13	8	15	14
	MA	18	15	18	23
	NH	8	9	18	20
	RI	7	8	14	15
	PR	80	70	72	65
2ND	CT	15	16	12	10
	NY, N	18	20	24	23
	NY, E	22	23	16	15
	NY, S	11	13	16	17
	NY, W	30	24	27	27
	VT	3	11	23	20
3RD	DE	28	38	28	27
	NJ	27	36	24	23
	PA, E	45	45	31	32
	PA, M	16	23	28	29
	PA, W	16	17	23	24
	VI	26	37	35	25
4TH	MD	27	34	25	26
	NC, E	55	50	62	62
	NC, M	74	58	44	47
	NC, W	59	48	29	27
	SC	47	57	52	51
	VA, E	24	30	32	34
	VA, W	15	15	30	30
	WV, N	8	6	10	12
	WV, S	13	5	8	9

34. This information was compiled from statistics reported in Table F-2 for relevant years at Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics*, U.S. COURTS, <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>, and earlier reports.

CIRCUIT	DISTRICT	1993	2002	2009	2010
5TH	LA, E	36	33	46	47
	LA, M	33	28	43	45
	LA, W	50	46	74	71
	MS, N	36	32	48	48
	MS, S	42	35	44	42
	TX, N	46	51	53	54
	TX, E	50	45	45	46
	TX, S	46	45	54	59
	TX, W	49	43	47	47
6TH	KY, E	17	13	24	24
	KY, W	22	20	24	26
	MI, E	27	32	17	16
	MI, W	23	24	12	13
	OH, N	21	18	18	17
	OH, S	30	23	29	30
	TN, E	54	38	37	37
	TN, M	52	37	41	40
	TN, W	79	70	70	69
7TH	IL, N	27	29	24	24
	IL, C	11	14	21	20
	IL, S	26	28	38	39
	IN, N	14	16	20	21
	IN, S	15	22	30	29
	WI, E	12	19	22	22
	WI, W	12	11	11	12
8TH	AR, E	47	47	49	49
	AR, W	32	32	40	39
	IA, N	3	4	5	5
	IA, S	11	6	10	10
	MN	29	17	14	13
	MO, E	44	33	26	28
	MO, W	15	19	25	27
	NE	23	22	27	27
	ND	2	4	11	11
	SD	3	5	10	9

CIRCUIT	DISTRICT	1993	2002	2009	2010
9TH	AK	8	8	15	17
	AZ	20	20	17	16
	CA, N	24	29	32	34
	CA, E	20	14	17	19
	CA, C	17	17	23	23
	CA, S	27	18	18	19
	HI	5	10	20	22
	ID	29	13	11	12
	MT	14	12	15	14
	NV	23	25	27	24
	OR	32	12	22	22
	WA, E	17	24	20	20
	WA, W	23	19	23	22
	GUAM	12	10	4	19
	NMI	0	18	13	12
10TH	CO	25	12	15	16
	KS	20	19	30	30
	NM	17	9	8	8
	OK, N	17	9	9	10
	OK, E	12	7	11	10
	OK, W	18	14	23	23
	UT	27	34	36	34
	WY	8	6	13	15
11TH	AL, N	67	53	51	49
	AL, M	67	48	70	71
	AL, S	34	57	69	66
	FL, N	10	20	14	12
	FL, M	15	28	26	25
	FL, S	16	29	25	27
	GA, N	62	53	37	40
	GA, M	61	56	59	60
	GA, S	73	73	75	76
U.S. Total		30	29	28	28