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CONSUMER BANKRUPTCY'S NEW CLOTHES: AN EMPIRICAL STUDY OF DISCHARGE AND DEBT COLLECTION IN CHAPTER 13

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I. Introduction

Consumer bankruptcy filings hit another record high in 1998, surpassing the record number in 1997, which exceeded the record number in 1996. [1] Against a backdrop of unparalleled national economic prosperity, personal bankruptcy filings increased by 79% between 1994 and 1998. [2] Incredibly, nearly 1.4 million consumers −− one of every seventy−two American households −− filed for bankruptcy relief last year.

The upward spiral in bankruptcy filings has fueled a debate in both Congress and the academy about whether and how the Bankruptcy Code should be amended to further restrict consumer debtors from discharging debt in chapter 7 when they could pay some or all of that debt from future income in chapter 13. [3] Echoing themes of the larger culture war, [4] one side argues that the increasing filings are a result of fraud or abuse by debtors who lack the moral character to make the sacrifices necessary to repay their creditors. [5] On the other side are those who contend that bankruptcy filings track the increasing levels of consumer debt as a percentage of income, implying that promiscuous lending practices explain the ever−increasing numbers of bankruptcy filings. [6]

The ongoing debate has focused on perceived abuse of the consumer bankruptcy system as a debtor relief measure, obscuring the debt collection function of the system. [7] Underlying both the debate and the legislative scheme of the current Bankruptcy Code are the premises that unsecured creditors receive greater repayment in chapter 13 than in chapter 7, [8] and that the higher costs of chapter 13 relative to chapter 7 are warranted by the greater repayment of unsecured creditors in chapter 13. However, almost no empirical evidence validates these assumptions. Past studies have examined who is filing for bankruptcy relief and the extent to which chapter 7 debtors theoretically could repay unsecured creditors in chapter 13, but this is the first to investigate how creditors fare, and what factors account for debtor success and failure, in chapter 13. This study also considers who is filing for relief under chapter 13, and, more specifically, whether many of these filers are abusing the bankruptcy system.

The findings of the study challenge basic premises of the current Code, and raise critical questions regarding the efficacy of chapter 13 and several of the pending proposals for reform. Unsecured creditors collected very little of their claims in chapter 13. Because debtors must repay secured claims in full in both chapter 7 and chapter 13, [9] the efficacy of chapter 13 as a debt collection system depends largely on the extent to which debtors repay unsecured claims. In half of all cases in the study, the debtors paid only slightly more than the current chapter 13 filing fee in unsecured debt. Even excluding the nearly 20% of the cases that were dismissed without confirmation of a plan, unsecured creditors in more than 75% of the cases collected less than the typical chapter 13 debtor's attorney's fee. Previously unreported government data corroborate these findings. Moreover, several recent developments in the law respecting debtor and secured creditor rights will further decrease −− perhaps eliminate −− distributions to most unsecured creditors in chapter 13.

In sharp contrast to unsecured creditors, secured creditors fared handsomely in chapter 13. Indeed, security played a central role in both the repayment of debt and debtor success in obtaining a chapter 13 discharge. Approximately 90% of all chapter 13 payments (excluding attorneys' fees) went to secured creditors. While only about one−third of the debtors obtained a discharge, secured creditors collected nearly two−thirds of their claims. In one of the most striking findings of the study, successful debtors tended to owe significantly *more* secured debt than the debtors who failed.

Success was almost impossible to predict, however. Successful debtors tended to propose shorter plans. Counterintuitively, successful debtors also were more likely to have filed a previous chapter 13 case. On the other hand, income, debt−income ratio, proposed distribution to unsecured creditors, and even the amount of income retained by the debtor for living expenses were not reliable predictors of case outcome.

As to abuse of the system, the study finds that the vast majority of the debtors were swamped by debt and in desperate need of debt relief. At the same time, a few debtors owed relatively little debt by comparison to annual income and so apparently did not truly need chapter 13 relief. Further, a surprisingly large percentage of debtors had filed bankruptcy previously, suggesting the possibility of abuse by petitioners who simply sought temporary protection of the automatic stay without serious hope of performing a plan.

Part II of the article is a brief overview of the consumer bankruptcy system and the chapter 7 − chapter 13 choice faced by individual filers. Part III explains the methodology of the study, which is a statistical analysis of a systematic sample of chapter 13 cases filed in the Southern District of Mississippi. Part IV reports the data on creditor collections in chapter 13, and considers the efficacy of chapter 13 as a debt collection procedure in light of the small recoveries by unsecured creditors. Part V addresses the debtor success rate in chapter 13, and attempts to identify factors which predict case outcome. In light of the record numbers of bankruptcy filings, Part VI profiles the debtors in the study, addressing whether many of them are abusing the system. Part VII is a brief conclusion. Throughout, the article considers how the data reflect on several of the proposals for consumer bankruptcy reform under consideration by Congress.

A caveat is in order as a final word of introduction. The study reported here is the first of its kind and covers only cases filed in a single judicial district. Consumer bankruptcy practices vary among judicial districts, [10] so that this study's findings are not necessarily representative of all districts. While previously unreported government data from all districts are consistent with the study's findings regarding debt collection in chapter 13, final conclusions must await further empirical study.

II. The Consumer Bankruptcy System and The Chapter 7 − Chapter 13 Choice

The Bankruptcy Code offers consumer debtors essentially two options for bankruptcy relief: chapter 7 (liquidation) and chapter 13 (debt readjustment). Congress structured the Code to encourage, and sometimes require, debtors to choose chapter 13 instead of chapter 7. The policy favoring chapter 13 filings is founded in part on the assumptions that debtors repay more unsecured debt in chapter 13 than in chapter 7, and that the amount of unsecured claims which debtors pay in chapter 13 warrants the greater costs of administering those cases. The findings of the study challenge these assumptions. As a prerequisite to discussion of the study, this Part briefly summarizes the consumer bankruptcy system and several of the proposed reforms.

A. Chapter 7 Liquidation

In chapter 7, the debtor surrenders all non−exempt property in return for an immediate discharge of pre−filing debt. [11] The discharge frees the debtor's future income from pre−bankruptcy claims. [12] The trustee liquidates the debtor's non−exempt property for the benefit of creditors. [13] However, because very few chapter 7 debtors have any unencumbered, non−exempt assets, unsecured creditors rarely receive anything from liquidation of property. [14] Secured creditors are entitled to full payment of their secured claims, [15] and generally may retake their collateral [16] unless the secured creditor and debtor agree to reaffirm the debt, in which case the debt survives the discharge. [17]

While unsecured creditors rarely realize any payment through liquidation of unencumbered, non−exempt property, they routinely receive at least some repayment through reaffirmations and nondischargeability determinations. Reaffirmations of secured and undersecured claims, both formal and informal, are commonplace in chapter 7. [18] (Furthermore, some debtors reaffirm wholly unsecured claims.) [19] Debtors naturally desire −− they are often desperate −− to keep a home, car, furniture, or other encumbered property. [20] Secured creditors frequently are willing to enter reaffirmation agreements because the foreclosure sale value of collateral is less than the creditor's total claim and the debtor will reaffirm the entire debt, with interest. [21] Creditors may perceive that chapter 7 debtors are more able to pay a reaffirmed debt after the court has granted a discharge of other debt.

In addition, some debtors make post−bankruptcy payments on unsecured claims that are nondischargeable in chapter 7. [22] Many claims that are nondischargeable in chapter 7 can be discharged in chapter 13. [23]

B. Chapter 13 Debt Readjustment

In chapter 13, the debtor may retain non−exempt and encumbered assets. [24] In return, she must perform a plan devoting all "disposable income" for a minimum of three years to the payment of unsecured claims, [25] receiving a discharge only upon completion of the plan. [26] The debtor must pay creditors at least as much as they would receive from a liquidation of assets in a chapter 7 case. [27] As in chapter 7, secured creditors are entitled to payment in full of their secured claims. [28] With respect to home mortgages, the debtor generally may obtain confirmation of a plan only by proposing to cure any arrearage and resume payments according to the original loan terms. [29] The chapter 13 debtor may modify other secured claims by reducing ("stripping down") the amount of the claim to the lesser value of the collateral, paying such claim with a market rate of interest over the life of the plan, and treating any deficiency as an unsecured claim. [30]

C. The Chapter 7 − Chapter 13 Choice

Based in part on the assumption that debtors repay more unsecured debt in chapter 13 than chapter 7, the Bankruptcy Code provides incentives for consumer debtors to file chapter 13 instead of chapter 7. By far, the most important of these incentives are the chapter 13 cramdown provisions which allow debtors to cure and reinstate home mortgages and to strip down and restructure other secured claims. [31] Much like chapter 7 debtors who pay unsecured debt as a creditor−imposed condition to retaining encumbered property through reaffirmation of undersecured debts in chapter 7, chapter 13 debtors pay unsecured debts from disposable income as a Code−imposed condition to retaining encumbered property pursuant to a chapter 13 plan. [32] The unsecured debt which debtors pay from future income in chapter 13 is the price for retaining homes and other collateral, and for discharging debts that are otherwise nondischargeable in chapter 7.

While secured creditors are entitled to payment in full of their secured claims in both chapter 7 and chapter 13, they are not indifferent to which chapter their debtors choose. Given the (almost absolute) right of secured creditors in chapter 7 to retake collateral if the debtor does not agree to a reaffirmation on terms acceptable to the creditor, secured creditors clearly prefer that their debtors file under chapter 7 than chapter 13. In chapter 7, creditors can refuse to enter a reaffirmation agreement unless the debtor agrees to pay the entire claim, including any unsecured portion, at the original interest rate. [33] In contrast, a chapter 13 debtor may strip down secured claims to the lesser value of the collateral and perhaps reduce the interest rate stated in the contract. [34]

Unsecured creditors −− that is, wholly unsecured creditors −− generally have a clear preference for chapter 13. Unless they hold a nondischargeable claim or can somehow pressure the debtor to reaffirm, they receive nothing in the overwhelming majority of all consumer chapter 7 cases in which the debtors have no unencumbered, non−exempt assets. [35]

From a collective creditors' perspective, the relative benefits of chapter 7 and 13 depend largely on the extent to which debtors repay unsecured claims in either chapter. From a policy standpoint, the efficacy of chapter 13 turns in part on whether the costs of collection in chapter 13, which are greater than the costs in chapter 7, are warranted by the results obtained for unsecured creditors.

D. Consumer Bankruptcy Reform

Inspired by the dramatic increases in bankruptcy filings, Congress has considered significant consumer bankruptcy reform in each of the past two years. Both the House of Representatives and the Senate passed consumer bankruptcy reform legislation in the 105th Congress in 1998. [36] A House−Senate conference committee agreed on a compromise bill, [37] however, only the House approved the Conference Report before adjournment. In the current session, the House passed a consumer bankruptcy reform bill, H.R. 833, by a veto−proof majority of 313 to 108. [38] The Senate is scheduled to consider counterpart legislation in this or the next session of the current Congress. [39] As discussed in subsequent sections, the data collected for this study cast doubt on the merit of several of the proposed reforms, and support the need for others.

Means−testing.

The heart of H.R. 833 is a means test. [40] The bill would amend Code section 707(b) to require dismissal of a chapter 7 case when the debtor's household income is at least equal to the regional median and the debtor can repay $6000 of nonpriority unsecured debt over five years. [41] The premise of the means test is that the system is being abused by many debtors who file bankruptcies of convenience, not of legitimate need. [42] The rationale is that debtors who fail the means−test should not be permitted to take an immediate discharge under chapter 7, but should be limited to relief in chapter 13 after making payments to creditors under a plan.

Secured Creditors' Rights in Chapter 13

. As discussed above, secured creditors generally fare better in chapter 7 than in chapter 13. Therefore, they have opposed the means test, which would force more debtors from chapter 7 to chapter 13. In order to offset the negative effect of the means test on secured creditor interests, H.R. 833 would greatly enhance secured creditors' rights in chapter 13. [43] The bill states that the value of a secured, purchase−money claim is equal to the unpaid balance of the secured debt if the collateral is personal property purchased within five years pre−petition. [44] Further, the bill would codify the Supreme Court's recent decision in *Associates Commercial v. Rash* [45] by providing that the value of all other secured claims is equal to the replacement cost of the collateral. [46] Thus, the legislation would require chapter 13 debtors to pay in full any claim secured by a purchase money security interest in property purchased within five years before filing.The change would noticeably weaken the incentive scheme encouraging debtors to file chapter 13 instead of chapter 7, and would give secured creditors rights to payment in chapter 13 that more closely resemble their rights in chapter 7. Although chapter 13 debtors would still be able to cure defaults, extend the maturity, and perhaps alter the interest rates on these claims, the Code would require payment of the full amount of the claim. [47] The enhanced rights of secured creditors would correspondingly reduce collections by unsecured creditors in chapter 13.

Restrictions on Multiple Filings

. The House−passed legislation also includes provisions aimed at discouraging bad faith serial filings. [48] Based on the premise that repeat filers are likely abusers of the system, it would amend section 362(c) to terminate the automatic stay 30 days after filing if another case of the debtor was dismissed within the preceding year (other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)), unless the debtor demonstrates that she filed the later case is in good faith. [49] Further, the legislation would deprive the debtor of any stay if the debtor had been a debtor in more than one case pending during the previous year (other than a case refiled under a chapter other than chapter 7 after a dismissal under section 707(b)), unless the debtor demonstrates by clear and convincing evidence that she filed the latest case in good faith. [50]

Debtor Education

. Finally, H.R. 833 would require the Executive Office for United States Trustees to "develop a financial management training curriculum and materials that can be used to educate individual debtors on how to better

manage their finances." [51] The curriculum would be tested in six judicial districts for eighteen months. [52]

III. Methodology of the Study

This article reports the results of a study of a systematic sample of chapter 13 cases (*n* = 71) filed in the United States Bankruptcy Court for the Southern District of Mississippi between 1992 and 1998, and closed in January through June of 1998. [53] The study relies primarily on the final report filed in each case by the chapter 13 trustee. These reports show the nature (secured, priority, and general unsecured) and amount of each allowed claim in the sample cases, and the amount of principal and interest that the debtors paid on each such claim under their plans during the case. The reports also state the dates of filing, confirmation, and discharge or dismissal. In addition, we pulled a copy of the debtor's plan in each case. The plans state each debtor's net monthly income and number of dependents, and the debtor's proposal for how much income she will devote to the plan, which creditors, if any, she will pay outside the plan, the length of the plan, and the percentage of unsecured claims to be paid. Finally, we checked each debtor's statement of financial affairs and the clerk's office's computerized docket records for information regarding previous bankruptcies. All data were analyzed at an alpha level of .05 (meaning that the there is less than a 5% chance of Type 1 error in each statistical finding).

IV. Debt Collection in Chapter 13

The dramatic rise in personal bankruptcy filings has focused attention on the consumer bankruptcy system as a debtor relief measure, obscuring the debt collection function of the system. As discussed in this Part, the findings of this study, corroborated by national data collected by the Executive Office for United States Trustees, challenge basic assumptions regarding debt repayment in chapter 13, and thus raise fundamental questions about the structure of the current consumer bankruptcy system.

A. Debt Collection in Chapter 13 [54]

Tables 1 and 2 summarize creditor collections per case and for all cases in the sample. Table 1 [55] reports the range, mean, median, standard deviation, and 25th and 75th percentile amounts paid by debtors on secured, priority, general unsecured, and total claims in 1992−1998 dollars. Most notably, general creditors collected an average of only $861 per case, and priority claimants collected a mean of only $193 per case. Unsecured creditors collected a median amount of only $146 per case; one−half of the debtors paid less than $146 of unsecured debt. The 75th percentile amount of general unsecured debt paid by the debtors was $859; that is, general creditors collected less than the mean amount in 75% of the cases.

Table 1. Creditor Collections Per Case: All Cases

Claims	Range	Mean	Median	sd	25%	75%
Secured	$0 − $66,183	$9,313	$3,914	$13,766	$28	$13,939
Priority	$0 − $4,965	$193	$0	$713	$0	$0
General	$0 − $7645	$861	$146	$1544	$0	$859
Total	$0 − $67,130	$10,367	$4,076	$14,379	$329	$16,205

Table 2 reports the amounts which all creditors collected on all claims in the chapter 13 cases in the sample. General creditors collected less than one−sixth of their claims, [56] while priority claimants collected less than a quarter. Payments to unsecured creditors comprised 10.5% of all payments to creditors, while comprising nearly 28% of all allowed debt. In contrast, secured creditors collected nearly two−thirds of their claims, an amount which appears especially great in light of the fact that only about one−third of the debtors completed a plan. [57] While secured debt comprised slightly less than two−thirds of allowed claims, payments on this debt comprised almost 90% of all payments to creditors in chapter 13. [58]

Table 2. Creditor Collections: All Cases

Claims	Total Allowed Amount	Total Payments	% of Allowed Claims Paid	% of Total Payments
Secured	$ 1,039,622	$ 661,249	63.6%	89.5%
Priority	$ 70,828	$ 13,712	19.4%	1.9%
General	$ 433,663	$ 61,119	14.1%	8.3%
Special	$ 2,448	$2,448	100%	0.03%
All Unsecured	$ 506,939	$ 77,279	15.2%	10.5%
All Claims	$ 1,546,561	$ 738,528	47.8%	100%

Even excluding cases dismissed without confirmation of a plan, debtors paid quite little unsecured debt per case. [59] As reported in Table 3, half of the debtors with confirmed plans paid less than $370 of unsecured debt. They paid a mean of $1,062 in general unsecured debt and $236 of priority debt. Indeed, 75% of these debtors paid less than $1170 of unsecured debt. And again, debtors in cases with confirmed plans paid substantially more secured debt than unsecured debt.

Table 3. Creditor Collections Per Case: Cases With a Confirmed Plan

Claims	Range	Mean	Median	sd	25%	75%
Secured	$0 − $66,183	$11,401	$6,072	$14,194	$1,220	$15,621
Priority	$0 − $4,965	$236	$0	$766	$0	$0
General	$0 − $7,645	$1,062	$370	$1,618	$0	$1,170
Total	$0 − $67,130	$12,742	$7,733	$14,777	$1,638	$18,229

Not surprisingly, as reported in Table 4, creditors collected more in cases in which the court confirmed a plan than in cases that the court dismissed without confirming a plan. Secured creditors collected approximately 70% of their claims in the cases with confirmed plan, again receiving nearly 90% of all payments to creditors. Unsecured creditors collected less than 20% of their claims, representing 10.5% of all payments. Overall, creditors collected somewhat more than half of their claims in the cases with confirmed plans.

Table 4. Creditor Collections: Cases With a Confirmed Plan

Claims	Total Allowed Amount	Total Payments	% of Allowed Claims Paid	% of Total Payments
Secured	$943,398	$661,249	70.1%	89.5%
Priority	$37,532	$13,712	36.5%	1.9%
General	$348,014	$61,119	17.6%	8.3%
Special	$2,448	$2,448	100%	0.03%
All Unsecured	$387,994	$77,279	19.9%	10.5%
All Claims	$1,331,392	$738,528	55.5%	100%

Completion of a plan made a tremendous difference in the amount of debt repaid by a debtor. [60] Successful debtors paid significantly greater amounts of debt than debtors whose cases were dismissed (either before or after confirmation). (F (2, 67) = 28.97, $p < .05$). As reported in Table 5, debtors paid on average nearly five times more debt in successful cases than in cases dismissed after confirmation. As reported in Table 6, secured and priority creditors collected essentially all of their claims in the successful cases, while general unsecured creditors collected approximately 34% of their claims, or approximately 8% of all payments to creditors. Overall, creditors collected nearly 87% of their claims in successful cases. The close correlation between success and debt repayment highlights the importance of the inquiry in Part V below regarding what factors predict success in chapter 13.

Table 5. Creditor Collections Per Case: Successful Cases

Claims	Range	Mean	Median	sd	25%	75%
Secured	$0 − $66,183	$22,056	$19,424	$16,762	$11,400	$29,016
Priority	$0 − $1,217	$122	$0	$296	$0	$0
General	$0 − $7645	$1,920	$1,147	$2,008	$499	$2,961
Total	$1,254 −$67,130	$24,204	$19,468	$16,826	$11,777	$32,888

Table 6. Creditor Collections: Successful Cases

Claims	Total Allowed Amount	Total Payments	% of Allowed Claims Paid	% of Total Payments
Secured	$ 508,989	$ 507,279	99.7%	91.1%
Priority	$ 2,803	$ 2,803	100%	.05%
General	$ 128,650	$ 44,164	34.3%	7.9%
Special	$ 2,448	$ 2,448	100%	0.04%
All Unsecured	$ 133,901	$ 49,415	36.9%	8.9%
All Claims	$642,890	$ 556,694	86.6%	100%

The data reported in Tables 1−6 above are consistent with data gathered by the EOUST regarding disbursements in chapter 13 cases nationally. The EOUST data, replicated in Table 7 below, cover all disbursements by the chapter 13 trustees in all jurisdictions, including Washington, D.C. and Puerto Rico, but excluding Alabama and North Carolina. Again, the most striking finding concerns payments to unsecured claimants. Nationally, chapter 13 produced only $523 million for nonpriority unsecured creditors in 1998. Dividing total disbursements by total filings in 1994−1998 yields an estimate that nationally, chapter 13 debtors repay an average of approximately $1,511 of general unsecured debt, and $1,015 of priority unsecured debt per case. While larger than the amounts collected by unsecured creditors in the Mississippi cases, the amounts collected by unsecured creditors nationally were still quite small. [61]

Table 7. Chapter 13 Disbursements: National

Fiscal Year	Secured	Priority Unsecured	General Unsecured	Other [62]	Total Disbursements
1998	$1,596,512,348	$322,896,817	$523,468,743	$406,670,916	$2,442,877,908
1997	$1,337,601,874	$288,794,399	$465,701,007	$351,051,610	$2,443,148,890
1996	$1,117,960,847	$257,864,422	$439,756,339	$289,082,825	$2,104,664,433
1995	$1,011,523,539	$230,189,532	$428,119,256	$246,761,491	$1,916,593,818
1994	$1,019,284,401	$223,656,042	$411,199,314	$190,610,384	$1,884,750,141

B. Debtor Income and Debt Repayment

Although the amount of debt collected in chapter 13 cases tended to increase as debtor income increased, the correlation between debt repayment and income is not statistically significant ($r = .19$, $p > .05$). The absence of a significant correlation between income and total debt repayment held true for secured ($r = .16$, $p > .05$) and general unsecured ($r = .15$, $p > .05$) debt, but not for priority debt ($r = .35$. $p < .05$).

C. Time in Chapter 13 and Debt Repayment

As set forth in Table 8, the debtors spent from one to sixty−five months in chapter 13, with an average of approximately twenty−three months and a median of seventeen months. [63] The debtors who achieved a discharge naturally spent substantially longer periods of time in chapter 13 than debtors whose cases were dismissed. For successful debtors, the median time in chapter 13 was 43.7 months and the mean was forty−one months. Unsuccessful cases pended for a median time of eleven months, with a mean of 13.3 months. The similarity of the means and medians for the successful and dismissed cases indicates that most

cases were grouped around the medians. [64] In comparison to the time actually spent in chapter 13, the debtors proposed plans with an average length of forty−nine months, and a median length of forty−eight months. [65]

Table 8. Time in Chapter 13 (in months)

	Dismissed	Discharge	All Cases
Range	1 − 48	18 − 65	1 − 65
Mean	13.3	43.7	23.7
Median	11	41	17
Sd	10.8	12.6	18.23
25th percentile	4.8	36	9
75th percentile	17.5	54	37.5

The data confirm a positive correlation between the time a debtor spent in chapter 13 and the amount of total debt she repaid ($r = .79$, $p < .05$). This correlation existed with respect to payment of secured ($r = .76$, $p < .05$) and general unsecured ($r = .49$, $p < .05$) debt, but not for priority debt ($r = .11$, $p > .05$).

D. The Efficacy of Chapter 13 as a Debt Collection Procedure

The Mississippi and national data regarding creditor collections in chapter 13 raise fundamental questions regarding the efficacy of chapter 13 as a debt collection procedure. As discussed in Part II, chapter 7 debtors, like chapter 13 debtors, typically pay at least some unsecured debt. The study's findings that debtors paid so little unsecured debt in chapter 13 raises the possibility that chapter 13 debtors pay no more on average than chapter 7 debtors. While the amounts of unsecured debt paid by chapter 7 debtors after bankruptcy would be almost impossible to ascertain, it would not take much to surpass the amounts being repaid in chapter 13. And even if chapter 13 debtors pay more unsecured debt than chapter 7 debtors, the question remains whether the greater recoveries in chapter 13 warrant the greater costs of collection in that chapter.

The costs of collection in chapter 13 consume a huge percentage of debtor plan payments. The debtor must pay a filing fee of $130, [66] and an attorney's fee typically ranging from $1200 to $1800. [67] Further, the administration of chapter 13 cases entails a substantial and expensive bureaucracy −− the Office of the chapter 13 Trustee. The chapter 13 trustee must appear and be heard on all valuation, confirmation, and plan modification matters, and collect and disburse plan payments. [68] For these services, the trustee is entitled to compensation up to 10 percent of all payments made under a plan, subject to a statutory cap. [69] According to the EOUST data, "other" disbursements in chapter 13 cases in 1998, including payments to debtors' attorneys (but excluding pre−petition payments) and chapter 13 trustees, were equal to 62% of disbursements to unsecured creditors in 1998. The estimated average payment to unsecured creditors nationally, $1511, was comparable to the typical chapter 13 debtor's attorney's fee across the country. In one−half of the Mississippi cases, the debtors paid only slightly more than the chapter 13 filing fee ($130) in unsecured debt. In more than three quarters of these cases, unsecured creditors collected less than the typical chapter 13 debtor's attorney's fee in Mississippi ($1300). [70]

Since the chapter 13 costs paid by debtors are in effect financed by unsecured creditors, the efficacy of chapter 13 as a debt collection procedure turns more on whether the government's costs are warranted by unsecured creditor collections. The taxpayer costs of administering chapter 13 would be difficult to quantify, and this study did not entail a cost analysis of bankruptcy court administration of consumer cases. Another study found that non−business chapter 13 cases require on average nearly three times more court time per case than non−business chapter 7 cases. [71] Further, chapter 13 cases pend for substantially longer periods of time (up to sixty or more months, compared to four to six months for most chapter 7 cases), imposing a greater burden on the court clerk than chapter 7 cases. As discussed in the Conclusion, Part VII, the government's costs may be justified for reasons other than the benefits derived by unsecured creditors.

The limited amounts collected by unsecured creditors stand in sharp contrast to the amounts collected by secured creditors in chapter 13. The empirical data regarding payment of secured and unsecured debt in

chapter 13 point to a simple if not obvious conclusion: As under chapter 7 and state debt collection law, creditors with leverage are more likely to obtain payment from their debtors, and secured creditors have powerful leverage in their rights to retake collateral. Debtors are highly motivated to pay secured claims in order to retain encumbered assets and, conversely, not so motivated to pay unsecured claims. The elaborate scheme of the consumer bankruptcy system to encourage, even force, debtors into chapter 13 where they supposedly will pay unsecured claims from future income fails to overcome the basic realities of secured versus unsecured debt.

Alternatively, the data may reflect that the underwriting standards for secured debt are better than those for unsecured debt. The data reveal a correlation between income and secured debt, but not between income and unsecured debt. Chapter 13 alters neither the debtor's ability to pay secured debt, nor inability to pay unsecured debt. In this interpretation of the data, the answer to the problems of unsecured debt repayment is more responsible credit assessments by unsecured creditors.

E. Future Trends in Repayment of Unsecured Debt in Chapter 13

As little as unsecured creditors recouped in the sample of Mississippi cases filed between 1992 and 1998, the future promises even lower distributions to unsecured creditors. Several recent legal developments favor secured creditors at the expense of unsecured creditors. In 1997, the Supreme Court decided in *Associates Commercial Corp. v. Rash* [72] that the proper valuation standard for collateral which the debtor proposes to retain in chapter 13 is replacement value, not liquidation value, although the meaning of "replacement value" is far from clear based on the Court's discussion. [73] (H.R. 833 would codify this rule). [74] In many jurisdictions the effect of the rule will be to increase the size of secured creditors' claims which must be paid in full in chapter 13, decreasing the income that debtors can devote to paying unsecured claims. Before *Rash* the starting point for valuation of collateral in chapter 13 cases in the Southern District of Mississippi was wholesale value. [75] Now, the courts in this and most other districts with reported decisions on the question start with the average of the wholesale and retail values. [76] Moreover, because *Rash* apparently rejected reliance on the commonly published wholesale and retail vehicle valuations, it will increase judicial costs in chapter 13. [77]

Also in 1997, the Fifth Circuit joined a growing number of courts in holding that the contract rate is presumptively the market rate of interest for purposes of the present value requirement for the payment of secured claims in chapter 13. [78] As a result, secured creditors are now presumptively entitled to interest at rates that range as high as 30 to 40% in Mississippi where there currently is no legal usury rate. [79] In practice, the Fifth Circuit's ruling is shifting far more dollars from unsecured to secured creditors' pockets than the *Rash* decision regarding valuation.

In 1998, Congress passed the Religious Freedom and Charitable Donation Protection Act, [80] which permits chapter 13 debtors to donate up to 15% of their gross incomes to charity. Again, the change will only decrease the dollars available to pay unsecured claims. There are already reports of widespread use of the provision by debtors who would rather devote disposable income to charity than to repayment of unsecured creditors. [81]

Finally, H.R. 833 would radically decrease the amounts collected by unsecured creditors in chapter 13. By forbidding strip down of debts incurred within five years before bankruptcy and secured by personal property, secured creditors will collect much greater amounts at the expense of unsecured creditors. [82] Given the already modest distributions to unsecured creditors in chapter 13, this change would very likely eliminate payments to general creditors in a large number of cases.

V. Debtor Success and Failure in Chapter 13

Consistent with other studies reporting the success rate for chapter 13 debtors, [83] this study found that approximately one−third of the chapter 13 filers completed a plan and obtained a discharge. The low success rates of the debtors in this and other studies, together with the data in the previous Part demonstrating a close relationship between debtor success and creditor collections, invite the question of what factors predict case

outcome in chapter 13. Thus, this study further examines the relationship between case outcome and factors such as the terms of the debtors' proposed plans; the types and amounts of the debtors' debts; and previous bankruptcy filings and discharges. [84] The identification of factors that predict case outcome would assist bankruptcy judges and chapter 13 trustees in reviewing plans for confirmation, creditors in objecting to chapter 13 plans, and debtors' attorneys in counseling debtors on the chapter 7 − chapter 13 choice and on formulation of a plan. In addition, data discussed in this part are relevant to the pending means−testing proposal.

A. The Chapter 13 Success Rate

Approximately 32% (23 of 71) of the chapter 13 debtors in the study sample successfully completed a plan and received a discharge. [85] The bankruptcy court dismissed 68% (48 of 71) of the cases, 18% (13 of the 71) of them before confirmation of a plan, and 49% (35 of 71) after confirmation. [86] Almost 40% (23 of 58) of the seventy−one debtors in the sample who obtained confirmation of a plan successfully completed their plans and obtained a discharge. Table 9 sets forth the dismissal and discharge rates of the debtors in the sample.

Table 9. Discharge and Dismissal Rates in Chapter 13

Dismissal	Discharge
67% (49 of 71 cases)	32% (23 of 71 cases)
Before Confirmation	After Confirmation
18% (13 of 71 cases)	49% (36 of 71 cases)

The low chapter 13 success rate tends to undercut the case for means−testing. Indeed, the lack of desire to perform a plan suggests that means−tested debtors would be less likely to succeed in chapter 13. On the other hand, the absence of any alternative to chapter 13 for debt relief might provide an extra measure of motivation to succeed. The countervailing influences of these incentives is impossible to measure, but it is clear that many, probably most, means−tested debtors would not succeed in chapter 13. [87]

B. Debtor Income, Debt−Income Ratio, and Case Outcome

Debtor income was not an indicator of success or failure in chapter 13. As reported in Table 10, there is no statistical effect of discharge status on debtor or household income (comparing cases in which the debtor obtained a discharge with cases dismissed before confirmation and cases dismissed after confirmation) (F (2, 67) = .77, p > .05). Likewise, there is no statistical effect of discharge status on debt−income ratio (again comparing cases in which the debtor obtained a discharge with cases dismissed before confirmation and cases dismissed after confirmation) (F (2, 67) = .02, p > .05).

Table 10. Debtor Income and Success in Chapter 13

	Successful Cases	Dismissed Cases
Mean Monthly Income	$1398	$1475
sd	$ 570	$ 790
Mean Monthly HH Income	$1559	$1489
sd	$ 808	$ 814
Mean Debt−Income Ratio	1.73	1.83
sd	1.0	2.55

On one level, these findings undercut the case for mean−testing. The means−test proposed in H.R. 833 would

bar certain debtors from chapter 7 based in part on income. [88] Yet, as noted, higher income debtors did not complete their chapter 13 plans at a statistically significantly greater rate than other debtors. [89] On another level, however, the point of means−testing is that debtors who can repay debt should not be allowed to discharge that debt without regard to whether they will actually repay the debt through chapter 13.

C. Debtor Plan Provisions and Case Outcome

Plan Payments and Retained Income

. Table 11 reports the amounts which the debtors proposed to devote to payment of creditor claims and to retain for payment of ordinary living expenses. Of course, the latter amount is a more relevant predictor of success; the amount of retained income, which may be determined by deducting a debtor's proposed plan payments (both under the plan and direct) from monthly net income, is the most important factor in determining the feasibility of a chapter 13 plan. [90] The greater the amount of income reserved to pay living expenses, the greater ability the debtor should have to make her proposed plan payments to creditors and achieve a discharge. (By the same token, the debtor may not reserve more than a reasonable amount of income for payment of living expenses unless the plan will pay unsecured creditors in full). [91] Conversely, the less income that a debtor reserves to pay living expenses, the less likely she may be to make the payments required by her plan.

Table 11. Proposed Plan Payments and Retained Income

	Proposed Plan Payments [92]	Retained Income [93]
Range	$126 − $2,321	<−$833> − $2,119
Mean	$553	$778
Median	$451	$723
Standard Deviation	$432	$538
25th% percentile	$268	$435
75th% percentile	$672	$1072

The data reveal no significant difference in the amounts that debtors devoted to their plans in the successful cases compared to the unsuccessful cases. [94] More importantly, and counterintuitively, Table 12 shows that there was no significant difference in the amounts of income which successful and unsuccessful debtors retained for living expenses. Twelve of thirty−five debtors −− 34% −− with reserved income below the median completed their plans and obtained a discharge. Similarly, eleven of thirty−three debtors (33%) who reserved more than the median amount for living expenses completed their plans. [95] Again, these data tend to argue against the proposed means−testing legislation, which would limit access to chapter 7 based in part on disposable income. [96]

Table 12. Retained Income in Successful and Dismissed Cases

	Case Dismissed Before Confirmation	Case Dismissed After Confirmation	Debtor Obtained Discharge
Range	$0 − $2119	<−$833> − $2545	$238 − $1957
Mean	$924	$775	$811
Median	$1007	$677	$723
Standard Deviation	$568	$637	$438
25th% percentile	$477	$424	$462
75th% percentile	$1208	$1098	$977

Distributions to Unsecured Creditors

. The debtors in the sampled cases proposed to pay from 0% to 100% of general unsecured claims, with a mean of 36% and median of 11%. Table 13 reports the numbers of debtors proposing to pay various percentages of unsecured claims. Almost one−third (20 of 68, or 30%) of the debtors proposed 100% plans. The remaining debtors who filed a plan proposed to pay a mean of 11% of unsecured claims. [97]

Table 13. Proposed Distributions to Unsecured Creditors

Proposed Distribution	Number of Debtors
0−9%	17 (21%)
10−15%	19 (28%)
25%	10 (15%)
50−100%	22 (32%)

Again, the data do not indicate a significant difference in the proposed distributions to unsecured creditors in successful and unsuccessful cases, [98] or between the proposed distributions in cases dismissed before confirmation, cases dismissed after confirmation, and cases in which the debtor obtained a discharge. That is, there is no statistical effect of discharge status on the proposed distribution to unsecured creditors. (F (2, 65) = .11, $p > .05$)

These findings are counterintuitive, and appear to contradict data collected in another survey. [99] Perhaps the absence of a significant relationship between the percentage of unsecured claims to be paid under a plan and success is explained by the fact that the bankruptcy court for the Southern District of Mississippi, unlike some other courts, does not impose a fixed percentage of general claims which must be paid. As a result, the Mississippi debtors were not faced with having to devote income to the payment of unsecured claims without regard to how much income remained after payment of living expenses.

Plan Length

. Debtors proposed plans requiring payments for thirty−six to sixty months. [100] Table 14 sets forth data regarding the length of the plans proposed by the debtors in the study sample.

Table 14. Proposed Length of Debtor Plans

	Proposed Length of Plan
Range	36 − 60 months
Mean	48.5 months
Median	48 months
Standard Deviation	10.10 months
25th% percentile	36 months
75th% percentile	60 months

Table 15 compares the proposed lengths of debtor plans in successful and dismissed cases. These data indicate a trend toward significance between the proposed length of a debtor's plan and case disposition. While statistical significance was not achieved, the data suggest that the longer the proposed length of a plan, the lower the chance of completion. (t (68) = 1.81, p = .07). [101] However, while male petitioners who obtained a discharge proposed plans that were significantly shorter (mean = 41.1 months) than males who did not obtain a discharge (mean = 57.6 months), there was no statistically significant difference for female petitioners. [102]

Table 15. Proposed Length of Plan in Successful and Dismissed Cases

	Case Dismissed Before Confirmation	Case Dismissed After Confirmation	Debtor Obtained Discharge
Range	36 − 60 months	36 − 60 months	36 − 60 months

Mean	43.38 months	51.97 months	46.09 months
Median	48 months	55 months	48 months
Standard Deviation	10.34 months	8.96 months	10.41 months
25th%	36 months	48 months	36 months
75th%	60 months	60 months	58.5 months

D. Creditor Claims and Case Outcome

In one of the most interesting revelations of the data, there was a significant difference in the amounts of secured debt in successful and unsuccessful cases. [103] The average total debt in the successful cases was approximately 20% *greater* than the average total debt in the unsuccessful cases, with almost all of the difference attributable to greater secured debt owed by the debtors in the successful cases. [104] Indeed, the mean amount of secured debt in the successful cases was approximately twice the mean secured debt in the failed cases. The mean amount of unsecured debt in successful and unsuccessful cases was roughly the same. Table 16 compares the amounts of secured, priority, and unsecured debt in the cases in which the debtors received a discharge to the cases in which the debtor's case was dismissed.

Table 16. Creditor Claims in Successful and Failed Cases

Claims	Debtor Obtained Discharge		Case Dismissed	
	Mean	Median	Mean	Median
Secured	$22,130	$19,424	$11,204	$9,295
Priority	$122	$0	$2345	$0
General	$5,593	$4,877	$5,546	$4,071
Total	$27,952	$25,062	$19,095	$15,765

In a related point, a substantial majority of the debtors who obtained a discharge were homeowners. Although the relationship between discharge and home ownership is not statistically significant, 74% (17 of 23) of the debtors who obtained a discharge were homeowners, compared to 53% (25 of 47) of the debtors who did not complete a plan. [105]

These findings regarding the relationship between secured debt and case outcome imply that debtors' desire to retain encumbered property is an important explanation for debtor success in chapter 13. The more secured debt owed by a debtor, the harder she will work to complete a plan enabling her to retain encumbered property. If so, the data validate the Code's policy to encourage debtors to file chapter 13 instead of chapter 7 in order to retain encumbered property. At the same time, there was no significant relationship between success and the ratio of secured debt to total debt. (F (1, 67) = 1.11, $p > .05$)

E. Previous Filings and Discharges, and Case Outcome

Previous Filings. The data also indicated a significantly greater probability of success in chapter 13 by debtors who had filed a single previous case. [106] Thirty−nine percent (28 of 71) of the debtors had filed at least one previous bankruptcy case, including five debtors who had filed more than one previous bankruptcy. Debtors who had filed a single prior case obtained a discharge at a greater rate than first−time filers. Forty−eight percent (11 of 23) of the debtors who had filed a single previous petition obtained a discharge, compared to the overall success rate for first time filers of 32%. By contrast, none of the debtors who had filed more than one previous case succeeded, however, there were not enough of these cases to run a valid statistical test. Table 17 sets forth data on previous filings and success in the sample cases. These data support the pending bankruptcy reform proposal for denying two−time previous filers the protection of the automatic stay, [107] but argue against the proposal to deny the stay to one−time previous filers.

Table 17. Previous Filings and Debtor Success

# of Previous Filings	# of Debtors	Discharge
0	43	12 (28%)
1	23	11 (48%)
2−5	5	0 (0%)

Previous Discharges

. Nearly 20% (14 of 71) of the debtors had obtained a discharge in a previous case. Like one−time serial filers, debtors who had obtained a previous discharge were more likely to obtain a discharge in the subsequent case than debtors who had not had a previous discharge. Fifty percent – seven of fourteen – of debtors who had obtained a discharge in a previous case obtained a discharge in the sample case, [108] compared to the 32% overall success rate. However, there were not enough instances of debtors with previous discharges to run a valid statistical test.

F. Summary

In sum, comparison of data in successful and unsuccessful cases confirms the critical role of security in debt repayment; the successful debtors had significantly more secured debt, and most debtors proposed more than the minimum three−year plan required by the Code. However, the data offer no useful predictors of case outcome. The data do not yield an amount of secured debt above which debtors are significantly more likely to succeed. The successful debtors tended to propose shorter plans, and more often were second−time filers, but certainly a court should not deny confirmation of a plan because the debtor seeks to make payments for more than three years or has not filed a previous case. Neither income nor amount of income retained by debtors for paying living expenses significantly influenced whether a debtor achieved success or failure in chapter 13.

The essential unpredictability of success in chapter 13 undermines the case for means−testing. The proposed means−testing law would bar debtors from chapter 7 based on income and disposable income, neither of which was a significant predictor of success in the sample cases. As a result, the real impact of mean−testing may be to deny debtors bankruptcy relief. [109]

VI. Profile of Chapter 13 Debtors

Consumer bankruptcy filings in the Southern District of Mississippi increased by 58% from 1992 to 1998. [110] Of the consumer cases filed in the Southern District in 1998, 5,121, or 41.4%, were filed under chapter 13, while 7,238, or 58.6%, were under chapter 7. Nationally, approximately 72% of consumer debtors filed under chapter 7, and 28% under chapter 13 in 1998. [111]

This Part reports on the income, debt, debt to income ratio, homeowner status, previous bankruptcy filings, gender, and household size of the debtors in the study sample. It also addresses whether many of the debtors may have abused chapter 13 by filing bankruptcies of convenience instead of legitimate need, or by filing only to obtain the benefit of the automatic stay without any real hope of successfully completing a plan. In addition, data discussed in this Part are relevant to the merits of the H.R. 833 provisions for termination of the automatic stay and debtor education.

A. Income and Indebtedness

Debtor Income.

Tables 18 and 19 report data on debtor and debtor household annual net income in 1992−1998 dollars. [112] The higher mean than median indicates that a few debtors with relatively higher incomes increased the overall mean. The standard deviation demonstrates the distribution of incomes around the mean. In a statistically normal distribution, 68% of all debtors will be within one standard deviation of the mean. The large standard deviation ($9,615) indicates a wide variation in debtor incomes; that approximately 34% of debtors would

have income between $8,011 and $17,626; that approximately 34% would have incomes between $17,626 and $27,241; and that approximately 68% of debtors would have incomes between $8,011 and $27,241. The 25th and 75th percentile amounts provide insight into the diversity among cases. [113]

Table 18. Debtor Annual Net Income

Range	Mean	Median	sd	25%	75%
$5832 − $48,000	$17,398	$14,400	$8,613	$11,034	$20,868

Table 19. Debtor Household Annual Net Income [114]

Range	Mean	Median	sd	25%	75%
$5832 − $48,996	$17,626	$15,468	$9,615	$10,812	$22,698

The median and mean annual incomes of the debtors in the study sample were less than one half the national and regional medians and means, although direct comparisons are not possible. [115] The median net income of $15,468 for the debtor households in the study compares to a national median gross household income of $42,300, and a southern regional median of $38,710, in 1996 dollars. [116] The mean net income of $17,626 for the debtor households compares to a national mean household gross income of $53,676, and a southern regional mean of $49,410, again in 1996 dollars. [117]

Many of the debtors had household incomes below the national poverty guidelines. The poverty line for a family of three was $12,980 in 1996, [118] only $4646 less than the mean and $2488 below the median net household income of the debtors in the study. More than one−third of the debtors actually fell below the poverty line based on the net income figures used in the study.

In sum, the data on debtor and debtor household income do not indicate abuse of chapter 13 by high income debtors filing bankruptcies of convenience. Only a tiny fraction of the debtors filing for chapter 13 relief in the Southern District of Mississippi between 1992 and 1998 can be classified as high income earners; six of the debtors had net income greater than $30,000, and one had income exceeding $40,000.

Debtor Indebtedness

. Table 20 sets forth the total amount of each type of claim and of all claims for all of the cases in the study sample. The bulk of creditors' claims in the chapter 13 cases were secured. Nearly two−thirds of all claims were secured, while unsecured claims, both priority and general, comprised approximately one third.

Table 20. Allowed Claims in All Cases

Claims	Total	% of Total
Secured	$1,046,792	65.04%
Priority	$115,382	7.17%
General	$444,784	27.64%
Other	$2,448	0.02%
Total	$1,609,406	100%

Table 21 reports the range, mean, median, standard deviation, and 25th and 75th percentile amounts of the allowed secured, [119] priority, general, and total claims against the debtors in the study sample in 1992−1998 dollars. [120] For all types of claims the mean amount was greater than the median, indicating that a few relatively large claims increased the overall averages. [121]

Table 21. Debtor Indebtedness

Claims	Range	Mean	Median	sd	25th	75th

Secured	$0−$66,183	$14,744	$10,806	$13,475	$5,587	$21,053
Priority	$0−$44,554	$ 1,625	$0	$6,184	$0	$278
General	$0−$49,933	$6,265	$4280	$7,468	$1,346	$9315
Total	$970−$77,029	$23,674	$20,746	$16,778	$9,515	$30,575

Debt−Income Ratio.

A debtor's debt−income ratio sheds some light on whether the debtor filed bankruptcy as a matter of convenience or as a response to real financial distress. A high ratio suggests that the debtor was unable to repay her debt without bankruptcy relief, while a low ratio implies that the debtor should have been able to resolve her financial problems without resort to bankruptcy protection. As reported in Table 22, a large majority of debtors carried extraordinary debt burdens in relation to income. [122] The mean debt−annual net income ratio was 1.4. That is, the average debtor in the study sample would have to devote all income for a period of more than sixteen months just to pay short−term debt, without reserving anything for payment of living expenses such as food, gas, rent, and utilities. The standard deviation indicates that 68% of debtors would have debt−income ratios between 0.5 and 2.32. [123]

The 25th percentile debt−income ratio (0.8) shows that more than one quarter of all the debtors had less short−term debt than annual net income. Nine debtors (12.7%) had short−term debts equal to less than half of annual income, perhaps indicating that they could have addressed their financial problems without filing for bankruptcy relief. In all except one of these nine cases, however, the per capita income of the household was less than $12,000, indicating a greater need for bankruptcy relief than apparent from the debtors' incomes and debts alone.

At the other extreme, the 75th percentile debt−to−annual income ratio (1.97) indicates a sizeable group of debtors with debt burdens that are almost impossible to imagine. Eight debtors (11.3%) had debts greater than three times annual net income, including two debtors with debt−income ratios greater than 10. [124]

Table 22. Debt−Annual Net Income Ratios (Excluding Long−Term Mortgage Debt) [125]

Range	Mean	Median	sd	25th%	75th%
0.06−3.73	1.41	1.23	0.91	0.8	1.97

Correlation Between Income and Debts

. Predictably, debtor income and debts were closely related, with total debts increasing as net income increased. (r = .50, p < .05.) This correlation between income and debt was largely attributable to the debtors' secured debt; secured debt increased as income increased. *(*r = .50, p < .05.) In addition, priority debt increased as income increased. *(*r = .45, p < .05.) There was no correlation between unsecured debt and income *(*r = .1539, p > .05.), nor between secured and unsecured debt. *(*r = −.09, p > .05.)

Home Ownership

. A strong majority of the debtors in the sampled cases were home owners. Sixty percent (42 of 70) of the case files reflected mortgage debt which the debtors proposed to pay in chapter 13. By comparison, the national rate of home ownership was 66.3% and the Mississippi rate was 75.1% in 1998. [126]

B. Previous Bankruptcy Filings and Discharges

A large minority of the debtors were not new to the bankruptcy system, and many had obtained a discharge in a previous case. This section reports data on previous cases, and considers whether multiple filings indicated abuse.

Previous Filings

. The filing of one or more previous bankruptcies may indicate that the debtor is abusing the system with her latest filing. Some debtors file serial petitions simply to obtain the (temporary) benefit of the automatic stay to prevent a foreclosure or repossession, without any intent or reasonable hope of performing a chapter 13 plan. For example, a debtor might file a chapter 13 petition to prevent a home foreclosure, and then, when the court dismisses the case because the debtor did not propose or adhere to a plan, file another case merely to stave off the creditor's renewed foreclosure action. [127]

A surprisingly large 39% (28 of 71) of the debtors had filed one or more previous bankruptcies. [128] A great majority of these serial filers – twenty−three of twenty−eight (32.4% of all debtors) −− had filed one previous case. Of the twenty−three debtors who had filed a single previous bankruptcy, most (15, or 65.2%) had filed under chapter 13, and the remaining (8, or 34.8%) had filed under chapter 7.

Table 23. Previous Bankruptcy Filings

No Previous Filing: 43 of 71 (60.6% of all filers)	
One Previous Filing: 23 of 71 (32.4% of all filers)	Under Chapter 7: 8 of 23 (34.8% of second−time filers)
	Under Chapter 13: 15 of 23 (65.2% of second−time filers)
More Than One Previous Filing: 5 of 71 (7% of all debtors)	

The filing of a single previous case was not a reliable indicator of abuse in chapter 13. As discussed in Part V.E. above, debtors who had filed a single previous case were significantly *more* likely to achieve a discharge in the sample case. [129] On the other hand, multiple prior bankruptcies may be a strong indicator of abuse. Five debtors −− 7% of the sample −− had filed more than one previous bankruptcy: three had filed two cases, one had filed three cases, and one debtor had filed five prior bankruptcy cases. All five of these debtors had filed all of their previous cases under chapter 13. None obtained a discharge in the sample case. However, there were not enough instances of debtors with multiple prior filings in the sample to run a valid statistical test.

Previous Discharges.

One−half of the debtors who had filed a previous case (fourteen of twenty−eight, or 19.7% of all debtors in the sample) obtained a discharge in the earlier case, six in chapter 13 and eight in chapter 7. Seven of these fourteen debtors (9.9% of all debtors in the study) went on to obtain a discharge in the sampled case. [130] While the Bankruptcy Code permits serial filings [131] and successive discharges, these repeat filers raise troubling questions concerning the behavior of both the debtors and their creditors who extended credit to them after the earlier discharge. Several bankruptcy practitioners in the Southern District of Mississippi alerted the author about debtors who are unable to manage their finances without a wage order and a chapter 13 trustee to distribute payments to creditors, and who can be counted on to file another case shortly after completing one. These data support the need for mandatory financial counseling for bankruptcy filers, which H.R. 833 proposes to implement on a trial basis. [132]

Table 24. Previous Bankruptcy Discharges

No Previous Filing: 43 of 71 (60.6% of all debtors)	
Previous Filing: 28 of 71 (39.4% of all debtors)	
Previous Discharge: 14 of 28 (50% of previous filers) Discharge Under Chapter 7: 6 of 14 (42.9% of previous discharges) Discharge Under Chapter 13: 8 of 14 (57.1% of previous discharges)	No Previous Discharge: 14 of 28 (50%

C. Gender and Household Size

Tables 25 and 26 report data on the gender and household size of the debtors in the study sample. Notably, women comprised almost half of the petitioners. [133] The average household size was 2.62 persons, [134] with a median of three. The average household size of the female debtors, 2.06, was lower than that of the male and joint petitioners. [135]

Table 25. Gender of Petitioners

Gender	Percentage of Cases Filed	Mean Household Size
Female	48.6% (34 of 70 cases)	2.06
Male	31.4% (22 of 70 cases)	2.59
Joint Petition	20% (14 of 70 cases)	3.73

Table 26. Household Size

of Petitioners

Number in Household	Percentage of Cases
1	29.6% (21 of 71 cases)
2	19.7% (14 of 71 cases)
3	22.5% (16 of 71 cases)
4	16.9% (12 of 71 cases)
5	9.9% (7 of 71 cases)
6	1.4% (1 of 71 cases)

D. Abuse of Chapter 13

The data reveal that a very small proportion of the debtors may have abused chapter 13. The debtors in the seventy−one sample cases generally had incomes that were much lower than the national and regional populations, while carrying tremendous debt burdens in relation to income. Almost half of the debtors were single women with an average of one dependent and average income of only $13,464 in 1992−1998 dollars. Seventy−five percent (75%) of the debtors had household net income of less than $23,000 in 1992−1998 dollars. More than one−third had net incomes below the poverty line. The mean debt−income ratio was 1.4; the average debtor had debts equal to more than sixteen months of income, excluding long−term mortgage debts.

While nearly 40% had previously filed bankruptcy, a single previous filing did not in itself indicate abuse. On the other hand, 7% of the debtors who had filed more than one previous case were potential abusers.

VII. Conclusion

Chapter 13 is both a debtor relief measure and a debt collection procedure. Congress designed the Bankruptcy Code to encourage consumer debtors to choose chapter 13 instead of chapter 7 in part because debtors generally will pay more unsecured debt in chapter 13. The study challenges this assumption, finding that debtors pay precious little general unsecured debt in chapter 13.

Thus, the data raise fundamental questions regarding the efficacy of chapter 13 as a debt collection procedure. [136] Given the relatively small amounts of unsecured debt repaid in chapter 13, these amounts may not be much greater, if greater at all, than what debtors pay to unsecured creditors in chapter 7. And even if chapter 13 debtors pay more debt than chapter 7 debtors, the question remains whether the greater amounts are justified by the greater costs of chapter 13. That chapter 13 produced only about $500 million for unsecured creditors in all pending cases in 1998 is strong evidence that the law is not working as intended. Moreover, recent legislative and judicial victories by secured creditors and charities will further dissipate unsecured creditor recoveries in chapter 13.

Debtors who completed their plans paid nearly five times more debt than the debtors who failed, but success in chapter 13 was almost impossible to predict. The only significant differences between successful and unsuccessful debtors were that the successful debtors had significantly more secured debt than unsuccessful debtors, tended to propose shorter plans, and more often were second−time chapter 13 filers. Neither income, nor income retained to pay living expenses, was a reliable indicator of success.

The findings that unsecured creditors recouped so little of their claims in chapter 13 and that income did not affect success tend to argue against means−testing. There is little sense in forcing debtors into an inefficient procedure based on criteria that do not correlate with successful completion of a plan.

The principal proponents of means−testing are wholly unsecured creditors −− credit card companies −− who generally receive nothing in chapter 7. Secured creditors have opposed means−testing because they are generally better off when their debtors file chapter 7, and have exacted concessions from the proponents whereby debtors' cram down rights will be drastically curtailed in chapter 13. [137] This change, if it becomes law, may spell the demise of chapter 13. It would substantially lessen the most important incentive for debtors to file chapter 13 instead of chapter 7. If they cannot strip down undersecured claims in chapter 13, many debtors will not use it. The data from the study amply demonstrate that most debtors use chapter 13 to deal with secured creditors. Further, the change would preclude some debtors who would file for chapter 13 under the current system from using chapter 13 because they could not meet the new requirements for confirmation; some debtors would need an extra measure of income to meet the requirements for paying secured claims. Perhaps most significantly, the provision would further reduce distributions to unsecured creditors in chapter 13, eliminating them in many cases. To the extent that secured creditors are entitled to more, debtors will have correspondingly less income to devote to paying unsecured creditors.

The proposition that debtors should not be allowed to discharge debt when they can pay an appreciable amount of it from future income is compelling. The government's costs in chapter 13 may be warranted because requiring financially able debtors to repay unsecured debts is a socially necessary condition to the discharge. In this view, the costs of chapter 13 are not justified solely by the amounts paid to creditors in that chapter, but as a necessary price for the extraordinary absolution of legal liability provided to debtors by the Code. Chapter 13 may also be viewed as a debtor rehabilitation provision the costs of which may be justified in part as costs of restoring debtors to financial responsibility.

Even if the costs of chapter 13 exceed unsecured creditor collections, a consumer bankruptcy regime without chapter 13 would have important effects on consumer behavior outside of bankruptcy. In the absence of chapter 13, debtors might become less responsible in the use of credit, in the knowledge that bankruptcy would not entail three or more years of payments. Conversely, credit card companies and other voluntary unsecured creditors might be forced to adopt more responsible underwriting standards. [138]

Finally, the study finds little evidence that many debtors are abusing chapter 13 by filing for convenience rather than in real need. The great majority of the debtors had very modest incomes, indeed many earned less than the poverty level. Most of the debtors had staggering debt burdens at the time they filed. At the same time, the study identifies a small cadre of debtors who may have abused the system by repeatedly filing without succeeding under a chapter 13 plan. These findings tend to support the call for limitations on serial filings. Because second−time filers succeed in chapter 13 more often than first−time filers, such reform should, however, be targeted at debtors who have filed more than one previous case.

FOOTNOTES:

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[1] There were 1,398,182 nonbusiness filings in 1998, 3.6% more than in 1997 and 24.3% more than in 1996. *See Colloquium: Consumer Bankruptcy* (Editorial Introduction), 67 Fordham L. Rev. 1311, 1313 (1999). Classified by chapter, there were 1,007,992 chapter 7 filings in 1998, 957,117 in 1997, and 779,741 in 1996. *See* Bruce L. Dixon, Consumer Bankruptcy Filngs in the U.S and Arkansas: Growth Rates and Possible Causes, 1989 Ark. L. Notes 13, 14 (1998). There were 389,398 chapter 13 filings in 1998, 391,930 in 1997, and 344,092 in 1996. Id. Statistics Compiled by the Administrative Office of the United States Courts; *see also* Ed Flynn, *Bankruptcy by the Numbers: Geographic Filing Trends*, Am. Bankr. Inst. J., Apr. 1999, at 44 (stating that total bankruptcy filings increased by about 73% over four years preceding publications of article). Back To Text

[2] There were 780,455 non−business filings in 1994. *See* Dixon, supra note 1, at 14; *see also* Carlos J. Cuevas, The Consumer Credit Industry, The Consumer Bankruptcy System, Bankruptcy Code Section 707 (B), and Justice: A Critical Analysis of the Consumer Bankruptcy System, 103 Com. L. J. 359, 359 n.2 (Winter 1998) (noting record increases in bankruptcy filings since 1992); John R. Golmant, *Bankruptcy by the Numbers: AO Study Finds Chapter 11 Filings a Strong Predictor of Bankruptcy Appeals*, Am. Bankr. Inst. J., Dec./Jan. 1999, at 14 (noting 63% increase in bankruptcy filings from 1994 to 1997). Back To Text

[3] *See* Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means−Testing Real Chapter 7 Debtors*, 7 Am. Bankr. Inst. L. Rev. 27, 28−9 (1998) (noting movement in Congress to pass means−testing reform bill which would require chapter 7 debtors with substantial ability to repay unsecured debt to repay in chapter 13 or forego discharge). Back To Text

[4] The term Kulturkampf or culture war was first used to describe German Chancellor Otto von Bismark's "war" against Roman Catholic citizens. *See* Norman Davies, Europe: A History 842 (1996). Pat Buchanan gave the English translation "culture war" broad exposure to an American television audience in his speech at the 1992 Republican National Convention. See Jay Bookman, 'Kulturkampf' Will Be Dirty Business, The Standard Times, May 28, 1996 <http://www.s−t.com/daily/05−96/05−28−96/c04op086.htm> (visited Oct. 19, 1999); William Safire, *Arrogant Abuse of Artistic License*, The Cinncinnatti Enquirer, Oct. 3, 1999, at E−2 (noting kulturkampf resulting from recent controversial anti−Christian art exhibit at Brooklyn Museum of Art). In 1996 Justice Scalia used the term in a dissent to describe the debate about gay rights. *See* Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J. dissenting). Back To Text

[5] *See, e.g.*, Edith H. Jones and Todd J. Zywicki, *It's Time for Means−Testing*, 1999 B.Y.U. L. Rev. 177, 183 (calling bankruptcy "a calculating, incentive−driven remedy that can openly be taken advantage of by the opportunistic," and arguing that increases in filing are attributable to (1) debtors who file bankruptcies of convenience rather than real need; (2) perverse economic incentives; and (3) lesser stigma of bankruptcy in recent times); 144 Cong. Rec. E88 (daily ed. Feb 4, 1998) (statement of Rep. Gekas) ("The past six years have been a period of unparalleled economic growth −− as any Wall Street broker would be happy to tell us. So obviously the growth in bankruptcy filings is not a response to the economy").Back To Text

[6] *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 84−86 (1997) [hereinafter "NBRC Report"] (explaining how increased access to consumer credit creates larger consumer debt) (Full report available in print from the United States Government Printing Office). *See, e.g.*, Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 Hofstra L. Rev. 33, 36 (1998) (noting increase in bankruptcy filings tracks debt loads of American families and correlates with deregulation of consumer credit market); Elizabeth Warren, The Bankruptcy Crisis, 73 Ind. L. J. 1079, 1082 (1998) (citing data from FDIC, CBO and Chandara and Weiss that shows correlation between consumer debt and bankruptcy filings).Back To Text

[7] An important justification for chapter 13 is that it allows creditors to collect their claims more efficiently than if left to pursue collection individually under state debt collection law. *See* In re Schiatz, 913 F.2d 452, 454 (7th Cir. 1990) (noting that chapter 13 may provide more secure method for collecting debt than if creditor were left to rely on state law collection procedures). By subjecting all of a debtor's income and property to the jurisdiction of the bankruptcy court, §§ 541, 1306, requiring debtors to commit all disposable income to repayment of creditor claims, §§ 1322(a)(1), 1325(b), and charging the chapter 13 trustee with collecting and disbursing debtor payments, § 1302, chapter 13 seeks to maximize debt repayment while minimizing creditor costs. Back To Text

[8] *See* Perry v. Commerce Loan Co., 383 U.S. 392, 396 (1996) (noting chapter 13 more feasible and equitable mehtod for debtor to pay off debt without having it discharged); *see also* In re Fulton, 211 B.R. 247, 260 (Bankr. S.D. Ohio 1997) (acknowledging unsecured creditors may receive more under chapter 13 than chapter 7 filing because debtor was free at any time to convert to chapter 7 or dismiss case altogether); *cf.* In re Festner, 54 B.R. 532, 534 (Bankr. E.D.N.C. 1985) (noting unsecured creditors may receive more under chapter 7 filing).Back To Text

[9] Secured creditors are entitled to payment in full only to the extent of the value of their collateral. *See* infra notes 13−14, 24−26 and accompanying text (regarding definition of "secured claim" and requirements for payment of secured and unsecured claims in chapter 7 and chapter 13 cases); *see also* Schultz v. Hancock Bank (In re Schultz), 143 B.R. 170, 173 (Bankr. S.D. Miss. 1998) ("Legislative history of § 1325 provides that, '[t]he secured creditors' lien only secures the value of the collateral and to the extent property is distributed of a present valued equal to the allowed amount of creditor's secured claim creditor's lien sil have been satisfied in full"). Back To Text

[10] There is variation among districts in (1) the proportions of chapter 13 and chapter 7 filings, (2) the types of plans that debtors propose, and (3) the percentages of debtors who complete their plans. *See* Jean Braucher, Lawyers and Consumer Bankruptcy: One Code, Many Cultures, 67 Am. Bankr. L. J. 501, 502 (1993) (noting that consumer bankruptcy practice is local in character, with each bankruptcy court having its own official and unofficial practices and distinct legal cultures); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 Harv. J. L. & Pub. Pol. 801, 814−16 (1994) (noting benefits and drawbacks to individuals choosing between chapter 7 and chapter 13); 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, 410−12 (1994) (reporting results of unpublished survey conducted by the National Association of chapter 13 Trustees which indicates distinct variations in chapter 13 plans by state and region). Back To Text

[11] *See* 11 U.S.C. §§ 704(1), 727(a), (b) (1994).Back To Text

[12] *See* 11 U.S.C. §§ 524(a) (stating that "effect of discharge" includes voiding of judgements against the debtor and operates as an injunction); id. §§ 541 (a) (6) (stating that included in debtor's estate are "proceeds, product, offspring, rents, or profits except such as are earnings from services performed by an individual debtor after the commencement of the case"); *see also* Perovich v. Humphrey, No. 97−3209, 1997 U.S. Dist. LEXIS 16949, at *11 (N.D. Ill. Oct. 28, 1997) (noting that § 524 (a)(2) enjoins holders of listed debts from bringing suit against discharged debtors to collect those debts); United States v. Quinones, 36 B.R. 77, 79 (D.P.R. 1983) (recognizing that bankruptcy discharge acts as injunction to continuation or commencement of suit against debtor to collect). Back To Text

[13] *See* 11 U.S.C. § 704(1) (requiring trustee to "collect…reduce to money the property of the estate…and close such estate"); id. § 541(a), 522 (stating that commencement of case creates estate); *see also* Vance v. Lester (*In re* Vance), No. 98−1470, 1998 U.S. App. LEXIS 28177, at *4 (7th Cir. Oct. 15, 1998) (stating that trustee of bankruptcy estate must collect and liquidate the property of estate in order to satisfy creditors' claims); In re Martin, 91 F.3d 389, 394 (3d Cir. 1996) (noting that bankruptcy trustee has fiduciary duty to creditors to collect and liquidate estate's assets).Back To Text

[14] *See* Michael J. Herbert and Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984−1987*, 22 U. Rich. L. Rev. 303, 311 (1988) (finding nothing was distributed to creditors in 95.6% of chapter 7 cases); Phillip Shuchman & Thomas L. Rhorer, Personal Bankruptcy Data For Opt−Out Hearings and Other Purposes, 56 Am. Bankr. L. J. 1, 8 (1982) (asserting that unsecured creditors would received nothing in chapter 7 cases in Connecticut if state law included modest homestead exemption). Back To Text

[15] *See* 11 U.S.C. §§ 506(a), 362(d)(1). Under 11 U.S.C. § 506(a), a claim secured by a lien on property of the estate is a secured claim to the extent of the lesser of the value of the property and the amount of the claim, and an unsecured claim to the extent that the value of the property is less than the amount of the claim. *See also* Marlow v. Rollins Cotton Co. (In re Julien), 202 B.R. 89, 95 (Bankr. W.D. Tenn. 1996) (noting in chapter 7 liquidation fully secured creditor entitled to receive full payment on its claim). Thus, it is only the secured portion of an undersecured claim that must be treated as a secured claim in every case. *See* Huntington Nat'l Bank v. Pees (In re McClurkin), 31 F.3d 401, 403 (6th Cir. 1994) (noting that under § 506 (a), bank's undersecured lien remained secured up to the value of the collateral); *see also* In re Julien, 202 B.R. at 95 (noting in chapter 7 liquidation fully secured creditor entitled to receive full payment on its claim); In re Hale, 15 B.R. at 567 (same); Section 506(a) further provides that the value of collateral must be "determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. § 506(a).Back To Text

[16] *See* 11 U.S.C. § 506(d), 362(c) (1994) (delineating determination of secured status and expiration of the automatic stay). *See, e.g.*, Dewsnup v. Timm, 503 U.S. 410, 414−17 (1992) (discussing § 506 (d) in relation to § 506(a)). Back To Text

[17] *See* 11 U.S.C. § 524(c) (stating agreement between holder of claim and debtor, consideration for which, in whole or in part, is based on debt that is dischargeable in case under this title is enforceable provided certain requirements are met). In law, if not in practice, a debtor also has the right to redeem personal property, which is used for personal, family or household purposes. Id. § 722. In some jurisdictions, a debtor who is current on a secured obligation may retain the collateral without reaffirming or redeeming as long as he remains current. *See, e.g.*, Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43, 53 (2d Cir. 1997), cert. denied, 522 U.S. 1117 (1998) (concluding that Bankruptcy Court did not abuse its discretion when holding chapter 7 debtor did not violate statute regarding retention or surrender of collateral securing consumer loan, when debtor, who was current on loan payments when he filed petition, filed statement of intention to retain vehicle and continued to make monthly payments; debtor was not required to elect to reaffirm debt or surrender or redeem vehicle).Back To Text

[18] *See Debtors Are Taking on Significant Amounts of Debt Via Reaffirmation Agreements, Study Finds*, Bankr. Ct. Dec., August 19, 1997, at A3−4 (hereinafter *Study Finds*) (reporting results of empirical study by Marianne B. Culhane and Michaela M. White that 50.7% of debtors indicated intention to reaffirm debt, 31.9% of cases included filed reaffirmation agreement, and 12% of cases included more than one filed reaffirmation); *see also* Marianne B. Culhane and Michaela M. White, Taking the New Consumer Bankruptcy Model for a Test Drive: Means−Testing Real Chapter 7 Debtors, supra note 3, at 60 n.118 (1998) (noting Sears alone is estimated to have failed to file 187,000 reaffirmations between 1992 and 1997); Sullivan, supra note 10, at 830−31 (reporting findings of study of cases from 1981 that on average about 80% of chapter 7 debtors emerged from bankruptcy without any personal liability for their debts).Back To Text

[19] *See* Study Finds, supra note 18, at A4 (finding 20% of reaffirmation agreements concern unsecured debts).Back To Text

[20] Perhaps they have made substantial payments on it, do not want to move to a different school district, or place sentimental value on it. Also, the post−bankruptcy debtor may find it difficult to obtain credit to purchase such items, although there is reason to believe that many chapter 7 debtors are able to quickly re−establish credit. *See* Braucher, supra note 10, at 14−15, 21−22 (discussing possible reasons why some of worst−off debtors attempt to keep possession of home or car).Back To Text

[21] *See* Bank of Boston v. Burr, 160 F.3d 843, 848 (1st Cir. 1998) (noting the fact is that most ***secured creditors*** will prefer to enter ***reaffirmation agreements*** containing identical terms to old agreements over costs associated with accepting back, and then disposing of, surrendered collateral). *See generally* Mayton v. Sears, Roebuck & Co. (In re Mayton), 208 B.R. 61, 66 (B.A.P. 9th Cir. 1997) (finding property subject to ***reaffirmation agreement*** is almost always well worn and not infrequently is stuff of which garage sales are made). Back To Text

[22] Section 727(b) specifies that, except as provided in section 523, the discharge granted under this section discharges the debtor from all debts that arose before the date of the order for relief. *See* 11 U.S.C. § 727(b) (1994). Section 532(a) lists 18 kinds of debts excepted from discharge. *See* 11 U.S.C. § 523 (a). Section 524(c) grants an exception to the discharge for debts reaffirmed in accordance with that provision. Id. at § 524 (c). Back To Text

[23] *Compare* §§ 523(a) and 1328(a). Section 727 (a) has been held to be the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant a debtor a discharge unless one of nine conditions is met. The first condition is that the debtor is not an individual. The next three grounds for denial of discharge center on the debtor's wrongdoing in or in connection with the bankruptcy case. The fifth ground for denial of discharge is the failure of the debtor to explain satisfactorily any loss of assets or deficiency of assets to meet the debtor's liabilities. The sixth ground concerns refusal to testify. The seventh ground for denial of discharge is the commission of an act specified in grounds two through six during the year before the debtor's case in connection with another bankruptcy case concerning an insider. The eighth ground for denial of discharge is derived from § 14(C)(5) of the Bankruptcy Act. The ninth ground is approval by the court of a waiver of discharge. *See* 11 U.S.C. § 727. Under § 1328(a) the court is to enter a discharge, unless waived, as soon as practicable after completion of payments under the plan. The debtor is to be discharged of all debts provided for by the plan or disallowed under § 502, except a debt provided for under the plan the last payment on which was not due until after the completion of the plan, or a debt incurred for willful and malicious conversion of or injury to the property or person of another. *See* 11 U.S.C. § 1328 (a). *See generally* infra notes 30−31 and accompanying text.Back To Text

[24] *See* 11 U.S.C. §§ 1322(b), 1325(b)(5), 1302(b), 1303; *see also* Flygare v. Boulden, 709 F.2d 1344, 1346 (10th Cir. 1983) (stating ***chapter 13*** debtors make payments to creditors out of future income over three−to−five year periodrather than having to surrender all ***non−exempt assets*** for distribution to creditors as required by chapter 7); In re Garner, 13 B.R. 799, 803 (Bankr. S.D.N.Y. 1981) (noting under ***chapter 13*** debtor attempts to keep ***encumbered asset,*** often by proposing plan that will provide for curing of defaults within reasonable time and maintenance of payments while case is pending as expressed in § 1322(b)(5)). Back To Text

[25] *See* 11 U.S.C. § 1325(b)(1)(B) (providing that any objection to bankruptcy plan precludes judicial approval of such plan unless for three years, all debtor's disposable income goes towards plan payments).Back To Text

[26] *See* Id. § 1328(a) (providing for discharge of most claims upon completion of plan).Back To Text

[27] *See* Id. § 1325(a)(4) (stating "best interests" requirement). Back To Text

[28] *See* 11 U.S.C. §§ 1325(a)(5), 506(a) (1994). In chapter 13 cases, property that the debtor proposes to retain must be valued at the "replacement value," while in chapter 7 it may typically be valued at the "liquidation value." *See* Associates Commercial Corp. v. Rash, 520 U.S. 953, 954 (1997) (stating replacement−value standard distinguishes retention from surrender and renders meaningful key statutory words "disposition or use"). Surrender and retention are not equivalent acts. When debtor surrenders property, creditor obtains it immediately, and is free to sell it and reinvest proceeds. If debtor keeps property and continues to use it, creditor obtains at once neither property nor its value, and is exposed to double risks against which Code affords incomplete protection. Id.*; see also* Holloway v. Household Auto. Fin. Corp., 227 B.R. 501, 503 (Bankr. N.D. Ill. 1998) (confirming petitioner's chapter 13 plan which provided for full payment of all secured claims).Back To Text

[29] *See* 11 U.S.C. § 1322(b)(2) (permitting chapter 13 plan to modify rights of holders of secured and unsecured claims, except claims secured only by debtor's principal residence); s*ee also* Nobleman v. American Sav. Bank, 508 U.S. 324, 330 (1993) (holding § 1322(b)(5) permits debtor to cure pre−petition defaults on home mortgage by paying off arrearages over life of plan notwithstanding exception contained in § 1322(b)); Commercial Fed. Mortgage Corp. v. Smith (In re Smith), 85 F.3d 1555, 1559 (11th Cir. 1996) (§ 1322(b)(2) does not unleash variety of ills on home mortgage industry allowing debtor to utilize chapter 13 to keep her home and eventually pay entire debt owed on it (citing In re Glenn, 760 F. 2d 1428 (6th Cir. 1985)).Back To Text

[30] *See* 11 U.S.C. §§ 1322(b)(2), 1325(a)(5) (providing that secured creditor who has met plan requirements stated in § 1325 (a) (5) can modify his rights in secured claim except when that claim is against debtor's principle residence); Green Tree Fin. Servicing Corp. v. Smithwick (In re Smithwick), 121 F.3d 211, 213 (5th Cir. 1997) (noting debtor's rights to reduce secured claim to value of collateral and pay claim over term of plan at market rate of interest are known as "cramdown" rights); General Motors Acceptance Corp. v. Jones, 999 F.2d 63, 67 (3d Cir. 1993) (stating in cramdown situation creditor is forced to continue lending relationship with debtor past point that was contemplated by parties).Back To Text

[31] *See* 11 U.S.C. §§ 1322(b)(2), (3), (5), 1325(a)(5) (setting forth requirements for content and confirmation of plan, respectively). For examples, see cases cited in notes 28−30 supra. Back To Text

[32] The Code also encourages debtors to choose chapter 13 by allowing chapter 13 debtors to retain non−exempt property, again using debtors' desire to retain property as leverage for payment of unsecured claims. Further, the chapter 13 discharge is broader than the chapter 7 discharge, encouraging debtors with debts that are nondischargeable in chapter 7 but dischargeable in chapter 13 to file under chapter 13. *Compare* 11 U.S.C. §§ 727(b), 523(a) *with* 11 U.S.C. § 1328(a). Finally, the Code places no limit on the frequency with which a debtor may obtain a chapter 13 discharge, while limiting debtors to one chapter 7 discharge every six years. Id. § 727(a)(8), (9).Back To Text

[33] *See* In re Pendlebury, 94 B.R. 120, 126 (Bankr. E.D. Tenn. 1988) (noting reaffirmation is voluntary and may be rejected by either party for any reason);. In re Edwards, 901 F.2d 1383, 1386 (7th Cir. 1990) (same).Back To Text

[34] *See* In re Byington, 197 B.R. 130, 132 (Bankr. D. Kan. 1996) (noting under chapter 13, where value of collateral is less than debt, debtor may strip down creditors' secured claim to value of collateral); In re Boodrow, 192 B.R. 57, 59 (Bankr. N.D.N.Y. 1995) (stating under chapter 13 secured creditors' claim may be reduced to value of collateral); In re Corley, 83 B.R. 848, 852 (Bankr. S.D. Ga. 1988) (stating appropriate rate of interest is prevailing market rate).Back To Text

[35] *See* Herbert & Pacitti, supra note 14, at 311 (noting most unsecured creditors receive nothing in chapter 7 cases); Shuchman & Rhorer, supra note 14, at 8 (discussing difficulty unsecured creditors have in chapter 7 cases); *see also* Jensen v. Dewey (In re Dewey), 237 B.R. 783, 788 (B.A.P. 10th Cir. 1999) (demonstrating unsecured creditor's preference for chapter 13 over chapter 7). Back To Text

[36] H.R. 3150, 105th Cong. (1998); S. 1301, 105th Cong. (1998). Back To Text

[37] H.R. 3150, 105th Cong. (1998).Back To Text

[38] H.R. 833, 106th Cong. (1999). *See generally Senate, House Panels Clear Reform Bill*, Am. Bankr. Inst. J. May 1999, at 1 (discussing recent developments in consumer bankruptcy reform).Back To Text

[39] S. 625, 106th Cong. (1999). *See generally Senate, House Panels Clear Reform Bill*, *supra* note 38, at 1 (noting recent Congressional reform action).Back To Text

[40] *See* Gordon Bermant, *Bankruptcy Reform: Finding the Best Gross Income Test*, Am. Bankr. Inst. J., Aug. 1999, at 18 (analyzing H.R. 833 and its means test). *See generally Senate, House Panels Clear Reform Bill*, *supra* note 38, at 1 (discussing H.R. 833); *Legislative Update*, Am. Bankr. Inst. J., Aug. 1999, at 6 (same). Back To Text

[41] H.R. 833, 106th Cong. § 102 (1999). *See generally* Bermant, *supra* note 40, at 18 (analyzing H.R. 833); *Senate, House Panels Clear Reform Bill*, *supra* note 38, at 1 (discussing H.R. 833).Back To Text

[42] *See* Bermant, *supra* note 40, at 18 (noting premise of means test); Karen Gross, On the Merits: A Response To Professors Girth and White, 73 Am. Bankr. L.J. 485, 485 (1999) (analyzing H.R. 833 and noting that means test would force certain debtors to file under chapter 13); Robin Jeweler, Consumer Bankruptcy Reform in the 106th Congress: Is the Past Prologue, 46 Fed. Law 30 (May 1997) (same) .Back To Text

[43] *See* H.R. 833, 106th Cong. § 122 (1) (1999) (describing requirements of chapter 13 debtor); Bermant, *supra* note 40, at 18 (noting premise of means test); Gary Klein, Consumer Bankruptcy In the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors, 5 Am. Bankr. Inst. L. Rev. 293, 322 (1997).

See alsoConsumer Bankruptcy Reform Roundtable, 7 Am. Bankr. Inst. L. Rev. 3 (1998):

> my secured creditors clients were looking at substantial losses as a result of the needs−based testing that was proposed in [H.R. 833]. To protect against those losses, we needed some kind of protection within the Code. That resulted in [the provisions] which look to ensure that we weren't crammed down. In many instances with the mix that you have in chapter 7's and 13's currently, we're unaffected by the bankruptcy process. Automobile loans get paid. We are crammed down in the 25% of chapter 13s that exist right now, but what we're talking about is the substantial increase in chapter 13s if this bill works as anticipated

Id. (citing statment of Richardo Kilpatrick, attorney with national practice representing consumer creditors, including major retailers and automobile lenders).*Back To Text*

[44] H.R. 833, 106th Cong. § 122 (1999).Back To Text

[45] 520 U.S. 953 (1997). Back To Text

[46] H.R. 833, 106th Cong. § 123 (1999).Back To Text

[47] H.R. 833, 106th Cong. § 122(2) (1999).Back To Text

[48] Id. §§ 117, 118.Back To Text

[49] Id. § 118.Back To Text

[50] Id. § 117.Back To Text

[51] Id. § 104(a).Back To Text

[52] Id. § 104 (b) (1), (2).Back To Text

[53] The Bankruptcy Court Clerk's Office closed 1,371 chapter 13 cases between January and June 1998. We chose 71 cases from this population by systematically selecting every nineteenth chapter 13 case from the monthly reports of closed cases prepared for the Statistics Division of the Administrative Office of the United States Courts. The following table reports the number of cases in the sample for each year of the period covered by the study:Back To Text

Year	Cases	Year	Cases
1992	2	1996	14
1993	7	1997	27
1994	11	1998	2
1995	8		

[54] The discussion in this section excludes one outlier secured claim, three outlier priority claims, and two outlier unsecured claims, which were more than three standard deviations greater than the mean amount of such claims. The debtors paid very little or nothing on these claims in chapter 13. Including these outliers in the calculations in this Part would greatly decrease the percentage amounts paid by debtors on their priority and general unsecured debts. The analysis also excludes debtors' attorneys' fees which may have been paid as priority claims in the cases.Back To Text

[55] Because neither the court nor the chapter 13 trustee monitors payments made outside the plan, it is not possible to know for certain the amount of such payments. Excluding the payments on direct−pay claims from the analysis would result in a significant understatement of the amount of secured debt paid by chapter 13 debtors. At the same time, because almost all of the obligations which the debtors proposed to pay outside their plans were long−term mortgage debts, which did not mature until after the conclusion of the case, including the full amount of these claims would incorrectly indicate that a significant amount of debt went unpaid.

Only seven of the debtors proposed to make payments outside the plan. In four of these cases, the debtor achieved a discharge. In these cases, the study assumes that the debtors made all of the direct, monthly payments required by the plan. Further, the analysis counts as a claim in these cases only the portion of the claims that were paid. For example, in one case the debtor listed a secured mortgage debt of $76,445, and proposed to pay $449 per month directly to the creditor. The debtor spent 36 months in chapter 13. The analysis in this Part assumes that the debtor paid $16,164 ($449 x 36) to the creditor during the course of the case, and that the creditor held an allowed secured claim in that amount (instead of the full amount of $76,445). In one of the cases in which the debtor obtained a discharge, the debtor's plan called for direct payments on an unsecured claim. The plan did not specify the amount of monthly payments that the debtor would pay directly to the creditor. The analysis assumes that the debtor paid this claim in full, and counts the full amount of the claim as an allowed claim. The other three cases in which the debtor proposed direct payments and obtained a discharge involved mortgage payments. It is assumed that these claims were fully secured.

In three of the cases in which the debtor proposed to make payments outside the plan, the debtor did not obtain a discharge. The debtors in these cases spent three, six and 28 months, respectively, in chapter 13. For the first of these cases, where the debtor was in chapter 13 for only three months, the full amount of the claim is included, and it is assumed that the debtor did not make any payments on the claim. In the second of the cases, the study assumes that the debtor made three of six payments, counting only that amount as the amount of the claim. In the third case, the study assumes that the debtor made the required monthly payments for the 28 months that she was in chapter 13, listing the claim in an amount equal to the payments.Back To Text

[56] The percentage that creditors collected on their unsecured claims is actually even lower than it appears because many creditors do not file proofs of claim; the study considered only allowed claims.

Including the outliers, *see* supra note 54, the ratio of all payments on priority claims to all priority claims was 0.3%. Including the outliers, the debtors paid a mere 0.8% of all unsecured debt, and only 29.8% of the total allowed debt.Back To Text

[57] *See* infra Part V.A.Back To Text

[58] *See* Table 20 infra. Back To Text

[59] Any payments made by the debtors to the trustee in cases dismissed without confirmation of a plan were returned to the debtors. *See* 11 U.S.C. § 1326(a)(2) (1994). Back To Text

[60] Interestingly, however, priority claimants collected more, on average, in the dismissed cases than in the successful cases. (F (2,67) = 1.05, p > .05). Back To Text

[61] The national figures show that payments on secured claims comprised a somewhat smaller proportion of total payments than in the Mississippi sample, with payments on unsecured claims comprising a correspondingly higher percentage. Payments to priority unsecured creditors comprised 11.8%, and payments to general creditors comprised 19.1% of total disbursements. *See* Unpublished Data Compiled by Executive Office for the United States Trustees: Chapter 13 Disbursements, National (covering 48 states, Washington, D.C. and Puerto Rico, excluding Alabama and North Carolina). The difference may be because the EOUST data covered only disbursements by chapter 13 trustees, and excluded payments which debtors made outside their plans, which payments are almost always to secured creditors. The data analyzed in this study includes payments made by debtors both under and outside their plans. Moreover, the Southern District of Mississippi may be atypical in the proportion of secured debt that debtors pay under their plans. In some jurisdictions, debtors generally make mortgage payments outside the plan, while in the Southern District of Mississippi, only 7 of the 42 debtors with mortgages proposed to pay their mortgages under the plan. Thus, the EOUST data may understate the ratio of payments on secured debt to payments on total debt, while the Mississippi data reflect that debtors paid more secured debt under, instead of outside, their plans than debtors nationally. Data gathered by the National Association of chapter 13 Trustees suggests that Mississippi lies at the upper end of the range among jurisdictions in payments to unsecured creditors as a percentage of payments on all debt. *See* Whitford, supra note 10, at 410−412 (stating results of unpublished survey conducted by National Association of chapter 13 Trustees reporting unweighted average of the trustees' reports of disbursements, showing U.S. Trustee Region 5 (Louisiana and Mississippi) as the region with the greatest ratio of unsecured debt payments to total payments to creditors, 33%).Back To Text

[62] "Other" includes disbursements for clerk's fees, § 503(b) awards, other administrative expenses, debtor attorneys' fees, and percentage fees transferred to expense fund.Back To Text

[63] *Cf.* Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends, Chapter 13 Dispositions (Working Paper 2),* Administrative Office of the Courts (reporting survey of chapter 13 cases filed between 1980 and 1988; finding that median time from filing to disposition for chapter 13 cases filed in 1988 was 26 months, which was 11 months shorter than the pendency period for cases filed in 1980) (on file with author).

In four cases, the court suspended the debtor's obligations to make plan payments, for two months in two cases and three months in another two cases. In three of these four cases, the debtor achieved a discharge. The total time in chapter 13 for these debtors ranged from 33 to 55 months, with the debtor who did not obtain a discharge spending 33 months, and the others 41, 52 and 55 months, respectively. Back To Text

[64] *See* id. (finding that median time from filing to dismissal for cases filed in 1988 was 16 months, which was eight months shorter than pendency period for cases filed in 1980; and that median time from filing to discharge was 45 months for cases filed in 1988, which was two months shorter than pendency period of successful cases in 1980). Back To Text

[65] *See* infra notes 100−102 and accompanying text (reporting data on proposed length of debtor plans).Back To Text

[66] *See* 28 U.S.C. § 1930(a)(1) (1994); *see also* In re Reed, 4 B.R. 486, 489 (Bankr. M.D. Tenn. 1980) (noting payment of filing fee required in chapter 13 proceeding). *Cf. In re* Sarah Allen Home, Inc., 4. B.R. 724, 725 (Bankr. E.D. Pa. 1980) (holding indigent parties in pending bankruptcy proceeding may proceed without payment of filing fee because it would be unconstitutional to deny those parties access to courts simply

because of inability to pay filing fees). Back To Text

[67] *See* David A. Lander, Essay, *A Snapshot of Two Systems That Are Trying to Help People in* Financial Trouble, 7 Am. Bankr. Inst. L. Rev. 161, 172 (1998) (collecting cases stating that typical chapter 13 attorney's fees paid under plan are in $1000−$2000 range); *see also* Braucher, supra note 10, at 581 (stating that chapter 13 debtors' attorneys' fees are much higher than chapter 7 debtors').Back To Text

[68] *See* 11 U.S.C. §§ 1302(b), 1326(a)−(c). Back To Text

[69] *See* 28 U.S.C. § 586(e) (stating Attorney General shall fix percentage not to exceed 10% payable to trustee).Back To Text

[70] By comparison, the prevailing rate for debtor representation in chapter 7 in the Southern District of Mississippi is $500. Back To Text

[71] The typical chapter 13 case (in which debtor has less than $50,000 in assets) requires 18.6 minutes of the bankruptcy judge's time, more than three times as much time than the typical, non−business chapter 7 case (in which the debtor has less than $50,000 in assets), 5.34 minutes. Gordon Bermant et al., A Day in the Life: The Federal Judicial Center's 1988−1989 Bankruptcy Court Time Study, 65 Am. Bankr. L. J. 491, 492−93 (1989).Back To Text

[72] 520 U.S. 953 (1997).Back To Text

[73] Id. at 962.Back To Text

[74] *See* H.R. 833, 106th Cong. § 123 (1999).Back To Text

[75] *See* Rule 3(b)(4), Uniform Local Bankruptcy Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi, Mississippi Rules of Court, State and Federal (West 1999).Back To Text

[76] *See, e.g.*, In re Lyles, 226 B.R. 854, 856 (Bankr. W.D. Tenn. 1998) (resorting to wholesale/retail midpoint formula despite *Rash's* seeming express condemnation of such measurement formula). *See generally* Jean Braucher, Getting It For You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After Rash, 102 Dick. L. Rev. 763, 776−79 (1998) (discussing post−*Rash* valuation decisions, including cases holding that starting point for valuation should be average between retail and wholesale values, with upward or downward adjustments made if called for by special circumstances).Back To Text

[77] *See* Winston v. Chrysler Financial Corp. (In re Winston), 236 B.R. 167, 171 (Bankr. E.D. Pa. 1999) (holding establishment of formula based on book value would not be consistent with *Rash* and court must be prepared to value collateral on case by case basis). Back To Text

[78] *See* 11 U.S.C. § 1325(a)(5); Green Tree Fin. Servicing. Corp. v. Smithwick (In re Smithwick), 121 F.3d 211, 213 (5th Cir. 1997). *Accord* General Motors Acceptance Corp. v. Jones, 999 F.2d 63 (3d Cir. 1993); Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427 (6th Cir. 1982). *See generally* 8 Collier on Bankruptcy ¶1325.06[3][b][iii][B], at 1325−38 (Lawrence P. King et al.. eds., 15th ed. rev. 1997) ("contrary to the holdings of a number of courts, it is rarely appropriate to select" the contract rate); 5 Norton Bankruptcy Law & Practice § 122:8, at 122−82 (William L. Norton, Jr. et al.. eds., 2d ed. 1997) (citing cases).Back To Text

[79] *See* Miss. Code Ann. § 75−17−1(5) (Supp. 1998).Back To Text

[80] P.L. 105−183, 112 Stat. 517 (1998). Back To Text

[81] *See* Consumer Bankruptcy Reform Roundtable, 7 Am. Bankr . Inst. L. Rev. 3, 5−6 (1998) (statement of Honorable Eugene Wedoff, United States Bankruptcy Judge for the Northern District of Illinois) (stating "If consumer debtors continue to have the ability to exclude 15 percent of gross income from what's available to pay their creditors, there will be very little money paid in few required repayment plans. I can tell you in my own court the tithing bill is being widely used. I have any number of cases every week where the monthly plan payment is dwarfed by the monthly charitable contribution"). *But see* In re Buxton, 228 B.R. 606 (Bankr. W.D. La. 1999) (holding that § 1325(b)(2) did not allow debtor to devote more income to charity in chapter 13 than he had devoted to charity before bankruptcy).Back To Text

[82] *See* id. at 13 (statement of Judge Wedoff) (stating "[i]f most secured debt must be paid in full and is allowed to be accumulated in any amount . . . then, again, there will be very little available income to pay unsecured debt").Back To Text

[83] The success rates for debtors in other studies have ranged from 20.35% to 36%. *See* Bork & Tuck, supra note 63 (reporting survey of chapter 13 cases filed between 1980 and 1988); T. Sullivan et al., As We Forgive Our Debtors 215−17 (1989) (hereinafter AWFOD) (reporting on study of chapter 7 and 13 cases filed in 1981 in ten judicial districts in Pennsylvania, Texas and Illinois); Jim Wannamaker, *The Washington Beat*, 6 National Ass'n Chap. Thirteen Trustees Newsletter, No. 1 at 7 (Oct. 1993); *see also* Whitford, supra note 10, at 410 (reporting results of unpublished survey conducted by the National Association of chapter 13 Trustees which cumulated data from chapter 13 trustees by U.S. Trustee region; the unweighted average of the trustees' reports of the percentage of chapter 13 cases which were closed as completed ranged from 3% to 49% across 22 regions); *cf*. Marjorie L. Girth, *The Role of Empirical Data in* Developing Bankruptcy Legislation for Individuals, 65 Ind. L. J. 17, 42 (1989) (reporting study of chapter 13 cases filed in Buffalo Division of Western District of New York between 1979 and 1982, finding success rate over 60% in cases in which plan was confirmed).Back To Text

[84] This Part considers only data regarding the debtors themselves, and does not examine external factors which may have influenced case outcome. For example, debtor education or the nature of the chapter 13 trustee's involvement may impact case outcome. *See* Bork & Tuck, *supra* note 63, at 6−7 (recounting explanations they received for exceptionally high and low discharge rates in several districts). A trustee from a district with a 56% success rate attributed the "high" rate to the working relationship between debtors and trustees, including meetings to identify potential problems with the plan, close communication with debtors throughout the case, and budget counseling. The exceptionally low success rate in several jurisdictions was explained to be the result of debtors using bankruptcy as a tool to prevent eviction and by the fact that many debtors filed *pro se*. Id.Back To Text

[85] As discussed supra note 53, we pulled the study sample from recently closed cases, instead of from cases filed over the past five to six years (the maximum length of a chapter 13 plan is five years, 11 U.S.C. § 1322(d)). The sample therefore did not include any cases that the court converted from chapter 13 to chapter 7. As a result, the study somewhat overestimates the success rate of chapter 13 filers and the amounts of debt they repaid. At the same time, because the numbers of chapter 13 filings increased between 1992 and 1998, the study may understate the success rate and debtor debt repayment because the sample includes a slightly disproportionate number of more recent cases, which would most likely be unsuccessful cases. It would be impossible to obtain a flawless sample of chapter 13 cases given that they may pend for five years or longer. One of the virtues of a sample chosen from closed cases is that it is more current than one chosen from initial filings. Moreover, the most critical findings regarding repayment of debt in chapter 13 were corroborated by national data. *See* supra note 61, Table 7, and accompanying text.

Assuming a conversion rate of 15%, the success rate for debtors in the study was 28%, well within the range of success rates found in other jurisdictions and studies. *See* supra note 83 (discussing success rates found in other studies). The study by Michael Bork and Susan D. Tuck, supra note 63, found that 15% of chapter 13 filings in the Southern District of Mississippi between 1980 and 1988 were converted to chapter 7.

It should be noted that some of the debtors in the study sample may have filed for chapter 13 relief for reasons other than to propose and complete a plan, for example, to frustrate a foreclosure action. Excluding these debtors, the data might show that the success rate for debtors honestly seeking chapter 13 relief was higher than approximately one−third.Back To Text

[86] Assuming a conversion rate of 15%, *see* supra note 85, the rates for total dismissals, and dismissals before and after confirmation were 59%, 16%, and 43%, respectively.Back To Text

[87] *See* Culhane & White, supra note 18, at 60 (estimating that as many as 50% of means−tested debtors could be expected to succeed in chapter 13); Sommer, supra note 6, at 44 (stating study showed 25% of chapter 7 debtors could pay 30% of their debts if forced into chapter 13).Back To Text

[88] *See* supra note 40 and accompanying text.Back To Text

[89] Excluding debtors who did not file chapter 13 in order to perform a plan, the data might show that higher income debtors succeeded at a statistically significantly greater rate than others. The same qualification would apply to this section's findings regarding the relationship between success and proposed plan payments, retained income, proposed distribution to unsecured creditors, proposed length of plan, creditor claims, and previous filings and discharges. Back To Text

[90] *See* 11 U.S.C. § 1325(a)(6) (1999) (stating court may confirm plan only if debtor can make proposed payments); *see also* In re Olp, 29 B.R. 932, 936 (Bankr. E.D. Wis. 1982) (noting burden of proof of feasibility is on debtor); 8 Collier on Bankruptcy ¶ 1325.07, at 1325−42 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (stating court must refuse to confirm plan if debtor will be unable to make payments and otherwise comply with plan).Back To Text

[91] *See* 11 U.S.C. § 1325(b)(1) (1999) (stating all debtor's disposable income must be used to make payments under plan).Back To Text

[92] These calculations include both proposed payments under the plan and direct payments; the calculations exclude one outlier case in which the debtor proposed to commit $4000 per month to his plan, more than three standard deviations greater than the mean and almost twice as much as the next greatest proposed plan payment.Back To Text

[93] These calculations exclude one outlier, a case in which the debtor retained monthly income of $2545 for payment of living expenses, more than three standard deviations greater than the mean amount of retained income.Back To Text

[94] The mean amount which debtors devoted to their plans in the successful cases was $514 per month, with a standard deviation of $365, while the mean amount in the unsuccessful cases was $616, with a standard deviation of $683. ($t$ (67) = 0.66, $p > .05$). Nor was there any statistical effect of discharge status on proposed plan payments when comparing cases in which the debtor obtained a discharge with cases dismissed before confirmation and cases dismissed after confirmation. (F (2, 67) = .31, $p > .05$).Back To Text

[95] Using a t−test to compare the amounts of income reserved by the successful debtors to the amounts of income retained by the unsuccessful debtors, there was no significant difference between the retained incomes of discharged (mean = $811, sd = $448) and nondischarged (mean = $832, sd = $635) debtors ($t$ (68) = 0.14, $p > 0.05$). Nor was there any statistical effect of discharge status on retained income comparing cases in which the debtor obtained a discharge with cases dismissed before confirmation and cases dismissed after confirmation. (F (2, 67) = .69, $p > .05$). (These calculations do not include two cases, both dismissed, in which the debtors failed to indicate proposed plan payments. As a result, the success rates discussed here appear slightly higher than the overall success rates discussed in Part V.A. above.)Back To Text

[96] *See* supra notes 40−42 and accompanying text.Back To Text

[97] *See* Whitford, supra note 10, at 410−11 (reporting results of unpublished survey by the National Association of chapter 13 Trustees which cumulated data from chapter 13 trustees by U.S. Trustee region, finding that unweighted average of trustees' reports of percentage of chapter 13 plans in each district in which debtor proposed to pay 100% of unsecured debt ranged from 6% to 52%, and unweighted average proposed payout in sub−100% plans ranged from 13% to 56%); *see also* Sullivan et al., supra note 10, at 817−30 (reporting variations in percentage of unsecured claims which debtors proposed to pay in cases filed in 1981 in judicial districts in Texas, Pennsylvania, and Illinois); Girth, supra note 83, at 42−44 (reporting on proposed percentages of repayment in chapter 13 cases filed in Buffalo Division of the Western District of New York between 1979 and 1982).Back To Text

[98] In the cases in which the debtor received a discharge, the mean proposed distribution to unsecured creditors was 40% with a standard deviation of 43%, while in the cases in which the debtor did not obtain a discharge, the mean was 37% with a standard deviation of 41%. (t (66) = .31, p > .05).Back To Text

[99] *See* Whitford, supra note 10, at 410−12 (reporting results of unpublished survey conducted by National Association of chapter 13 Trustees which cumulated data from chapter 13 trustees by U.S. Trustee region; data shows inverse correlation between proposed payout to unsecureds and likelihood of success in chapter 13).Back To Text

[100] Twenty−two debtors proposed to make payments for thirty−six months, eighteen for forty−eight months, two for fifty−five months, and one for fifty−seven months. Twenty−seven debtors proposed 60−month plans. *Cf*. Girth, supra note 83, at 43−44 (reporting results of a study of chapter 13 cases filed in Buffalo Division of the Western District of New York between 1979 and 1982, finding that successful debtors spent between three and four years, while unsuccessful debtors spent median time of less than two years in chapter 13).Back To Text

[101] However, a more powerful statistical test, an analysis of variance ("ANOVA"), comparing cases dismissed before confirmation, cases dismissed after confirmation, and cases in which the debtor obtained a discharge, shows no significant effect of case disposition on plan length. (F (2, 67) = 2.80, p > .05).Back To Text

[102] Plan lengths for female, male and joint filers were compared in a post hoc analysis using the Scheffe test. Back To Text

[103] Excluding one outlier case in which the secured debt was $163,814, more than three standard deviations greater than the mean amount of secured debt, there was a significant effect of case outcome on secured debt. The mean amounts of secured debt in cases dismissed before confirmation, after confirmation, and in which the debtor obtained a discharge were compared in a post hoc analysis using the Scheffe test. (F (2, 66) = 5.35, p < .05). The mean amount of secured debt in the successful cases −− $22,130 −− was significantly greater than the mean amounts of secured debt in the cases dismissed before and after confirmation −− $9,399 and $12,412, respectively. The difference between the mean amounts of secured debt in the cases dismissed before and after confirmation was not significant.Back To Text

[104] The mean total debt in the successful cases was $27,952, with a standard deviation of $17,433, while the mean amount in the unsuccessful cases was $19,095 with a standard deviation of $19,875. (t (68) = .59, p > .05.). Likewise, there was no significant difference between amounts of priority debt in the successful (mean = $122, sd = $303) and unsuccessful (mean = $10,149, sd = $53,323) cases ($t$ (68) = .90, p> .05), or the amounts of unsecured debt in the successful (mean = $5593, sd = $4944) and unsuccessful (mean = $14,020, sd = $49,727) cases ($t$ (68) = .81, p >. 05). The t−tests reported in this footnote include outliers, while the figures shown in the table exclude outliers in which the amount of debt exceeded the mean by more than three standard deviations: a secured debt of $163,814, a priority debt of $364,423, and two general unsecured debts of $49,933 and $342,825.Back To Text

[105] The statistical effect of homeowner status on success was tested with a chi square test. (X^2 (1, N = 70) = 2.76, p > .05).Back To Text

[106] The statistical effect of a single previous chapter 13 filing on success was tested with a chi square test. (X^2 (2, N = 70) = 5.70, p < .058). Eleven of the debtors who had not filed a previous bankruptcy obtained a discharge in the sample case, while 10 debtors who had filed a previous case did not succeed. Twenty−nine cases in which the debtors had not filed a previous bankruptcy were dismissed, while 19 cases in which the debtors had filed a previous case were dismissed.Back To Text

[107] *But see* Susan L. DeJarnatt, *Once is* Not Enough: Preserving Consumers' Rights to Bankruptcy Protection, 74 Ind. L.J. 455, 457 (Spring 1999) (arguing that "the current system fairly and effectively copes with the limited abuse that actually exists," relying in part on survey of opinions of chapter 13 trustees). In the apparently few cases in which such repeat filers would be good candidates for completing a chapter 13 plan, the legislation would permit the debtor to petition the court for a stay. *See* H.R. 833, 106th Cong. § 117 (1999).Back To Text

[108] Three of these seven had obtained their previous discharge in chapter 7, and four in chapter 13. Back To Text

[109] Although it may restrict access to bankruptcy, means−testing will not reduce filings. If fewer debtors can get bankruptcy relief, lenders may respond by further easing credit standards, which will in turn lead to increased filings. *See* Douglas G. Baird, Bankruptcy's Uncontested Axioms, 108 Yale L.J. 573, 575 n.7 (1998); NBRC Report, supra note 6, at 88 & n.142 (quoting Mark M. Zandi, *Easy Credit, Profligate Borrowing, Tough Lessons*, Regional Fin. Rev. 16, 17 (1997)). *See generally* Sommer, supra note 6, at 39. Back To Text

[110] In 1998, a total of 12,365 non−business debtors filed for bankruptcy relief in the Southern District, compared to 7,821 in 1992. Statistics compiled by the Administrative Office of the United States Courts.Back To Text

[111] *See* supra note 2 and accompanying text. The percentages of chapter 7 and chapter 13 filings vary considerably among districts. The proportion of chapter 13 filings has generally increased over the past 30 years. *See* Sullivan et al., supra note 10, at 817−30. In the Southern District of Mississippi, the proportion of chapter 13 filings increased from 1.4% in 1970 to 42% in 1980, and then decreased somewhat to 38.2% in 1990. *See* id. at 826. Nationally, the proportion of chapter 13 filings has been relatively stable since 1982, fluctuating between 25% and 31% of non−business filings. Statistics compiled by the Administrative Office of the United States Courts.Back To Text

[112] These data are derived from the debtors' chapter 13 plan summaries, instead of their Statements of Financial Affairs. Debtors must file a Statement of Financial Affairs, *see* Fed. R. Bankr. P. 1007(b)(1), reporting their gross income for the portion of the current year preceding filing, and for each of the two years before the year of filing. *See* Official Form 7. These figures, however, do not necessarily reflect the debtor's income at the time of bankruptcy, and do not include other household income. The plan summary form requires debtors to report current net income for both themselves and any spouse.

According to the debtors' Statements of Financial Affairs, the mean and median annual gross incomes of the debtors for the year before filing were $14,458 and $16,900, respectively. The mean and median gross incomes for the second year before filing were $12,557 and $14,002. (Fifty−seven of 71 debtors reported their gross income for the year before filing, and 54 of 71 reported it for the second year before filing.)Back To Text

[113] There was a significant effect of gender on monthly income. As reported in the following table, the mean income of female petitioners was significantly less than the mean income for both male and joint filers. (F (2, 67) = 4.596, p < .05).

Mean Income by Gender of PetitionerBack To Text

Gender of Petitioner(s)	Mean Annual Income
Female	$13,464
Joint	$19,512
Male	$22,392

[114] By comparison, Sullivan, Warren and Westbrook found in their 1991 study of chapter 7 and chapter 13 debtors that the average family income was $20,535 in 1991 dollars. The 25th, median, and 75th percentiles for family income were $12,078, $18,000, and $26,662, respectively. *See* Teresa A. Sullivan et al., Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981−1991, 68 Am. Bankr. L.J. 121, 128−33 (1994); *see also* Warren, supra note 6, at 1087 (stating in early 1990's typical family filed for bankruptcy with income of approximately $21,200 (1997 dollars).Back To Text

[115] The debtors in the study sample reported incomes in 1992 through 1998 dollars, which are not adjusted for inflation. Further, the available national data are for median and mean *gross* incomes, whereas the only available figures from the bankruptcy case files for current income were for "*net* income."Back To Text

[116] U.S. Census Bureau, Historical Income Tables−−Families, <http://www.census.gov/hhes/income/histinc/f06.html>. I use national and regional figures from 1996 for comparison to the debtors in the study sample because half of the cases in the study sample were filed before or during 1996 and half were filed during or after 1996.Back To Text

[117] *See* id.Back To Text

[118] 62 Fed. Reg. 10,856−10,859 (1997) <http://aspe.hhs.gov/poverty/97/poverty.htm>.Back To Text

[119] *See* supra note 55, regarding how the study addresses the allowed amount of and payments on claims paid outside the plan.

The figures in Tables 20−21 exclude one case which the court dismissed before any creditors had filed claims, and two outlier cases in which the debtors had debts totaling $342,825 and $537,398, more than three standard deviations greater than the median, and more than four and six times, respectively, the amount of the next greatest amount of total debt. Including these outliers, the average amount of allowed claims was $34,936, the median $21,073.

In one of the outlier cases, the debtor had secured debt of $163,814, more than three standard deviations greater than the mean and almost three times the next largest secured claim; and a priority claim of $364,423, more than three standard deviations greater than the mean amount of priority claims and more than eight times the next largest priority claim. In the other, the debtor had unsecured debt totaling $342,825, more than three standard deviations greater than the median, and nearly seven times the next greatest amount of unsecured debt.Back To Text

[120] These amounts were substantially less than the amounts of debt owed by the debtors in a recent survey of 1,955 non−business chapter 7 cases filed in late 1997 or early 1998. *See* Unpublished Data Compiled by Gordon Bermant & Ed Flynn: Executive Office for the United States Trustees. In that study, the debtors reported a median of $23,190 in general unsecured debt, compared to the median of $4,280 reported in this study. Unlike the present study, the EOUST survey reports scheduled debt, not just allowed claims.Back To Text

[121] There were allowed secured claims in all but five cases and allowed unsecured claims in all but six cases, excluding one case which was dismissed before the debtor filed Schedules of Assets and Liabilities. There were allowed priority claims in one quarter of the cases (18 of 71). Back To Text

[122] This study did not examine debtor assets, so there is the possibility that in some cases debtors had

sufficient assets, although not income, to pay creditor claims.Back To Text

[123] These figures actually understate the debtors' debt−income ratios because they are based on allowed claims. Undoubtedly, some creditors did not file claims which would have been allowed if filed. Thus, the debtors were in somewhat worse financial condition than evidenced by the reported ratios.Back To Text

[124] In their study of debtors who filed for relief in 1981 in 10 judicial districts in Illinois, Pennsylvania, and Texas, Professors Sullivan, Warren, and Westbrook found a mean debt−income ratio for chapter 13 debtors, excluding mortgage debt, of 1.47, with a standard deviation of 7.45, a 25th percentile of 0.36, a median of 0.62, and a 75th percentile of 1.02. *See* Teresa A. Sullivan et al., *Folklore and Facts: A Preliminary Report from the* Consumer Bankruptcy Project, 60 Am. Bankr. L.J. 293, 324 (1986). In their study of debtors who had filed for chapter 13 relief in the same districts in 1991, Professors Sullivan, Warren, and Westbrook found a mean debt−income ratio of 1.01, with a standard deviation of 0.97, 25th percentile of 0.40, a median of 0.74, and a 75th percentile of 1.32, again excluding mortgage debt. *See* Sullivan et al., supra note 114, at 142. Comparison of the Mississippi data with the 1981 and 1991 Sullivan, Warren and Westbrook data is not exact. The Mississippi study includes some mortgage debt in the computation of debt−income ratios, while the earlier studies separated it. Back To Text

[125] The figures exclude two outliers in which the debt−annual income ratios were 11.19579 and 14.77949, more than three standard deviations greater than the mean and more than three times the next greatest debt−annual income ratio. Including these outliers, the average debt−income ratio was 1.77, the median was 1.25, and the standard deviation was 2.14.Back To Text

[126] U.S. Census Bureau, as reported in The Clarion−Ledger, Mar. 28, 1999, at C1.Back To Text

[127] *See* In re McCoy, 237 B.R. 419, 421 (Bankr. S.D. Ohio 1999) (holding appropriate remedy for debtor's repeated abuse of bankruptcy process was dismissal of eighth bankruptcy petition with prejudice to refile in addition to $1,000 fine).Back To Text

[128] If this percentage can be extrapolated to the total number of chapter 13 filings in the Southern District of Mississippi in 1998, only 3124 of the 5,121 chapter 13 filers were new to the system. Notably, only 21 of the 28 debtors (75%) reported their previous filing(s) as required by the Statement of Financial affairs. Previous filings were initially checked by looking at the debtors' Statements of Financial Affairs in the case files. Because 21 of 71 debtors with previous filings seemed high, we rechecked the number using the Bankruptcy Clerk's computerized docket. This research found that even more of the debtors −− 28 of 71 −− had made one or more previous filings. It also revealed that as of November 1998, 7 of the 71 debtors had filed a subsequent bankruptcy, five of them under chapter 13 and two under chapter 7. Two of these 7 had filed one or more cases before the sample case. Perhaps the discrepancy between the debtors' Statements of Financial Affairs and the information available on the computerized docket explains the difference between the percentage of repeat filers found in this study and that reported by Susan L. DeJarnatt, supra note 107, at 480 (reporting survey of chapter 13 trustees, finding that 26−30% of total chapter 13 case load in Mississippi was comprised of repeat filers).Back To Text

[129] *See* supra note 106 and accompanying text.Back To Text

[130] Professors Sullivan, Warren and Westbrook label as "true repeaters" debtors who have received more than one discharge. In their study of consumer cases filed in 1981, they found that 4% of the sampled debtors were true repeaters. *See* AWFOD, *supra* note 83, at 194.Back To Text

[131] This is subject to the limitations in 11 U.S.C. § 109(g) (regarding refiling after certain dismissals) and § 1325(a)(3) (requiring good faith for confirmation of a chapter 13 plan). *See* In re Buchanan, 1990 WL 241937, at *10−11 (Bankr. N.D. Ohio 1990) (discussing serial filings which involved § 109 and § 1325 limitations); *see also* In re Okoreeh−Baah, 836 F.2d 1030, 1033 (6th Cir. 1988) (instructing bankruptcy courts to look at totality of circumstances in determining good faith effort on part of debtor); In re Barret, 105 B.R. 385, 388

(Bankr. N.D. Ohio 1989) (compelling dismissal of serial filing where there has been no change in circumstances).Back To Text

[132] H.R. 833, 106th Cong. § 104 (1999). Back To Text

[133] *See* Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Demographics of Chapter 7 Debtors*, Am. Bankr. Inst. J., Sept. 1999, at 24 (reporting on recent survey by Executive Office for United States Trustees of 1,452 recently closed no−asset chapter 7 cases that were filed in late 1998 or early 1999, and finding that 34.6% of the cases were filed by women, 29.5% by men, and 35% were joint filings) (copy on file with the author); Teresa Sullivan & Elizabeth Warren, *The Changing Demographics of Bankruptcy*, Norton Bankruptcy Law Advisor (Oct. 1999), at 1−7 (reporting results of study of chapter 7 and chapter 13 cases, finding nearly 40% of filings were by women).Back To Text

[134] The national mean household size was also 2.62 for 1998 (last visited Oct. 18, 1999) <http://www.census.gov/ population/socdemo/hh−fam/98ppla.txt>.Back To Text

[135] *Cf.* id. (finding overall average family size of 2.41, with average of 1.51 for male filers, 2.01 for female filers, and 3.51 for joint filers).Back To Text

[136] Professor Whitford has called for the repeal of chapter 13 based on the wide variance in the proportion of chapter 13 filings between districts. This variance indicates that local legal cultures influence many debtors to file chapter 13 although chapter 7 would be a better solution to their debt problems. *See* William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 Ind. L.J. 85 (1989). Eliminating chapter 13, Professor Whitford argues, and leaving chapter 7 as the only option for consumer debtors, would serve the best interests of most debtors; *see also* AWFOD, supra note 83, at 223, 339−40 (questioning value of chapter 13 to debtors given that relatively few succeed); Braucher, supra note 10, at 22−23 (arguing that ability of debtors to retain collateral in chapter 7 should be expanded, so that chapter 13 is more truly voluntary option, not forced by debtors' desire to retain collateral).Back To Text

[137] *See* AWFOD, *supra* note 83, at 12−13. Back To Text

[138] Of course, repeal of chapter 13 would require consideration of amending chapter 7 to restrict access to worthy debtors, and to allow debtors to retain a house, car, and other items of collateral on conditions comparable to those found in the current chapter 13. The data show that debtors effectively use the cram down rights in chapter 13 to pay secured debts and retain collateral.Back To Text