

Measuring Success in Chapter 13

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If you were to browse the Internet searching “chapter 13 bankruptcy success rate,” you would think that chapter 13 is not a very successful strategy for debtors. The articles cited usually talk about a 33% rate of success. But if you drill down to where this number comes from, you find that the articles rely on outdated and imprecise statistics to measure the “success” rates of chapter 13 cases. *And* the issue turns on how “success” is defined.

I believe that trustees and practitioners are missing opportunities to point out the real, practical “successes” that can be found from chapter 13 when relevant measurements are used. A prime example of an article critical of chapter 13 was by Professor Katherine Porter, a leader in the field of consumer bankruptcy law, published in 2011 in the *Texas Law Review*, “The Pretend Solution: An Empirical Study of Bankruptcy Outcomes,”¹ which was very critical of chapter 13. However, the article relied on three studies. Two were done in 1989 and 1994, which relied on case filings from 1980 to 1988.² And the third was her own study, which considered just 303 chapter 13 debtors across the nation from 2008 to 2010, and depends not on statistics, but on interviews with debtors about their experience.³

Part of the reason statistics are imprecise has to do with the fact that the numbers most easily available are from the United States Trustee’s annual reports of chapter 13 cases, measured by individual chapter 13 trustees, which present for each calendar year raw/gross numbers of filings, dismissals, and disbursements. The reports, though, do not measure the results of specific cohorts of cases. You cannot tell from those reports what happened to a given year of chapter 13 filings over their lifespan.

To get a better sense of how successful a more current and focused measurement of chapter 13 cases might be, recently I asked Mike Malaier, the chapter 13 trustee for the Tacoma Division of our bankruptcy court in the Western District of Washington, to make available to me statistical data for all of the chapter 13 filings in the Tacoma Division for cases filed in 2010. There were 2,358 chapter 13s filed in 2010 in the Tacoma Division. Of those, 451 were dismissed or converted prior to confirmation. The remaining 1,907 cases had confirmed chapter 13 plans. Another 523 of those cases were dismissed or converted post-confirmation. But 1,342 of the cases, or 70.4% of confirmed cases (which is almost 57% of all cases filed), had completed as of the beginning of 2015.⁴ There were still 57 cases which had not

dismissed, converted or completed by December 31, 2015 (when he gave me the statistics), but which appear likely to close within the next few months.⁵ The information provided an accurate depiction of what happened to those cases, their completion rate, the attorneys' and trustees' fees paid, and the distributions to creditors. They also show that, at least in the Tacoma Division of Western Washington, chapter 13 is much more successful than we have been led to believe in the national articles.

1. **Completion rate.** First, I believe the best measure of success in chapter 13 is the rate of cases that complete to discharge. But the measure should not be the overall completion rate for all cases filed, but the rate of completion of cases which have a confirmed plan of reorganization. For example, 177 of the 2010 filings in Tacoma were *pro se* filings. Virtually none of the cases that started out as *pro se*, and did not obtain counsel in the confirmation process, successfully completed. As people who work in chapter 13 will tell you, there is no filter stopping debtors who are ineligible, or are simply filing to gain the benefit of the automatic stay with no intent of confirming a plan, from filing one or more chapter 13 petitions. Counting only the cases that make it through the confirmation process vets those bad cases from the system.

As seen above, if you look only at Tacoma's rate of cases that reached confirmation, just over 70% of those were "successful" in that they resulted in a discharge. If the other 57 cases that were still open complete as expected, the completion rate for confirmed cases filed in 2010 will exceed 73%. These statistics are far more current and precise than the "one in three" success rate commonly quoted in the national articles about chapter 13 success.

A word should be said about the argument that some chapter 13 cases may "succeed" even though they do not complete, because they buy time for debtors or allow debtors to achieve their goals by other means. Critics of chapter 13 disparage this argument. Professor Porter intimated that those making this argument are apologists who offer no data to back up their argument that debtors benefit even when cases are dismissed.⁶ She is right that this argument is very difficult to quantify and is also very subjective. The argument also fails to acknowledge that there are occasionally cases which complete but are not truly successful, e.g., where a debtor ends up having to surrender a house which the debtor had been trying to save, but completes the plan anyway to pay their attorneys' fees incurred in the case and receive their discharge of unsecured debt. There is truly no way to measure such cases from the statistical data available, but even if

there are a number of each type – where a dismissed case gave a debtor what he or she needed or where a completed case did not – we are still looking at least a 70% or more success rate in our division based on completion to discharge, which shows there is real benefit to consumer debtors under chapter 13.

2. **Cost.** After completion success, the cost of chapter 13 to the debtors should be high on any measurement of success. That is the other criticism which Professor Porter pins on chapter 13—that it is far costlier than chapter 7.⁷ The two major contributors to the cost are attorneys' fees and trustee's fees. In the Tacoma Division, excluding the 57 cases not yet completed, the total of attorneys' fees disbursed to attorneys on the 1,342 completed cases filed in 2010 was \$4.393 million, or an average of \$3,361 per case. That represents 6.18% of all disbursements per case. The trustee's fee for completed cases averaged \$1,965 per case, or 3.71% of disbursements. So, for cases filed in 2010, the cost to debtors with completed cases in our division, between their attorney and the trustee, averaged \$5,326, or 9.89% of disbursements.
3. **Disbursements to Non-Priority Unsecured Creditors.** Many debtors, their attorneys, and some trustees would argue that paying money out to nonpriority unsecured creditors is not high on their criteria for success in chapter 13. But creditors would disagree. At a minimum, it is a statistic which might be used to compare with disbursements in chapter 7.

In the Tacoma Division, the total of disbursements to nonpriority unsecured claims on cases filed in 2010 that completed was \$17.38 million, an average of \$16,362 per completed case. These are substantial numbers.

Nationwide Comparison. In 2013, an article appeared in the ABI Journal, where the author, Ed Flynn, a highly regarded bankruptcy statistician who previously worked for the United States Trustee and now works with the American Bankruptcy Institute, attempted to use statistics from the United States Trustee's chapter 13 annual reports to extrapolate successful completions, costs, and disbursements to unsecured creditors.⁸ He analyzed cases filed between 2007 and 2013. As discussed, because he relied on EOUST trustee annual reports, his calculations are extrapolations and do not measure actual completion rates, costs, or disbursements for a given filing year.

Flynn estimated that about 70% of chapter 13 cases were confirmed nationwide over the period from 2007–13. By comparison, the 2010 statistics of the Tacoma division showed approximately 81% of chapter 13 cases were confirmed. Slightly more than 50% of confirmed cases in the 2007–2013 period completed nationally, by Flynn’s calculation. That is roughly 20% less than the completion rate in the Tacoma Division discussed above, but it is still quite a bit better than the one-third success rate cited in the general literature.

In that same period, nationally, Flynn estimated that 9.8% of the funds disbursed by trustees went to attorneys’ fees and 6% went to trustee fees and expenses. That is about 6% more than what was paid to attorneys and trustees in Tacoma, although admittedly the statistics from Tacoma are only for completed cases. Lastly, Flynn looked at the disbursements to general unsecured creditors, and calculated the average disbursement on confirmed cases to be \$7,983. The Tacoma Division statistics for 2010 showed disbursements to unsecured creditors on completed cases was an average of \$16,632, approximately double the national average for confirmed cases. The relative payouts as to general unsecured debts may vary significantly given relative mortgage costs in different areas of the country and how large a percentage of income is available for unsecured debt versus secured. In short, while Flynn’s analysis estimates lower “success” rates than the information from the Tacoma division, it does show that at least 50% of debtors with confirmed plans are receiving a discharge benefit from their filings, that it is costing them less than 16% of distributions and unsecured creditors are getting distributions over what they would receive in a chapter 7 case.

Conclusions. While I think the trustee and practitioners in my division can justly take pride in these numbers, **the primary takeaway of this article is not the success of chapter 13 in the Tacoma Division. It is that trustees and proponents of chapter 13 have been neglecting the job of measuring and promoting the success story of chapter 13.** In the process, they are ceding ground to opponents of chapter 13, who often use outdated, empirically deficient and imprecise statistics to make their case against chapter 13. Yes, there are flaws in the chapter 13 system, and we should do what we can to acknowledge and address them. Success rate, costs and disbursement rates are subject to lots of local variables. But it is possible, I submit even likely, that we will find that taking a hard look at the most meaningful and current numbers bears out what the chapter 13 community believes to be true: that chapter 13 provides an efficient and economical tool for individuals caught in difficult financial straits.

[1] Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103 (2011).

[2] See *id.* at 105 n.13 (citing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 232–33 (1989)), *id.* at 108 n.33 (citing Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13 Dispositions*, 4 graph 1 (Admin. Office of the U.S. Courts, Working Paper No. 2, 1994)).

[3] *Id.* at 111–13.

[4] Nine of those cases were hardship discharges.

[5] Cases are supposed to complete within 60 months of the date the first plan payment is due, which is 30 days after the case was filed. But when cases are close to completion, and the debtors have made their plan payments, the trustee and the court are reluctant, to dismiss those cases if they will complete in a few months.

[6] Porter, *supra* at 90 Tex. L. Rev. 108-111.

[7] Porter, *supra* note 1, at 107–08.

[8] Ed Flynn, *Chapter 13 Outcomes by State*, ABI Journal, Aug. 2014, at 41, 76–78.



Brian D. Lynch was sworn in as a United States Bankruptcy Judge for the Western District of Washington, Tacoma Division, on June 1, 2010. He served as the Standing Chapter 13 Trustee and Chapter 12 Trustee in the District of Oregon from 2004. Prior to serving as trustee, Judge Lynch was a partner in the firm of Bishop, Lynch & White, P.S. in Seattle, WA. He received his J.D. from Georgetown University Law Center in 1975.

 HOT TOPICS, JUST ADDED, MEMBER