

## ASSESSING FAILURE IN BANKRUPTCY

Visiting Associate Professor Katherine Porter  
UC Berkeley Law

### I. INTRODUCTION

Chapter 13 bankruptcy requires consumers to complete all court-mandated payments in a three- to five-year repayment plan in order to receive a discharge of the remaining amount of unsecured debt. The principle of means-based repayment in exchange for generous debt relief enjoys widespread support. In practice, however, only one in three chapter 13 bankruptcy cases proceeds as contemplated in the law, ending with plan completion and discharge. The modal outcome is dismissal of the bankruptcy case and denial of the discharge that is supposed to give the debtor a fresh start. For decades, scholars and policymakers have lamented this low completion rate.

Yet, defining the success or failure of a chapter 13 bankruptcy based on the legal metric of a discharge may oversimplify the range of real outcomes from a bankruptcy filing. No research documents why two in three debtors exit the chapter 13 system or what these debtors' financial prospects and life circumstances are. This project provides the first empirical data on the trigger events for debtors ending their bankruptcies and on debtors' perceptions about their cases. These data highlight the limitations of relying on a narrow definition of end-results to assess a law's efficacy and reveal how more complex measures may better reflect the variety of outcomes from legal systems.

### II. A PRIMER ON CHAPTER 13

America has the most generous consumer bankruptcy system in the world. About two in three households in bankruptcy file chapter 7 cases and receive an immediate discharge of their unsecured debts in exchange for turning over all non-exempt assets for distribution to their creditors. Because of relatively generous exemption levels, about 96% of consumer chapter 7 cases are "no-asset" distributions,<sup>1</sup> with debtors receiving a discharge of their unsecured debts about two months after filing bankruptcy.

Chapter 13 is the repayment form of bankruptcy in American law. About one in three households files chapter 13 bankruptcy instead of chapter 7 bankruptcy. Chapter 13 is open only to individuals (not entities or businesses) with debts below statutory thresholds.<sup>2</sup> Eligibility for chapter 13 also requires that the debtor have "regular" income. For this reason, chapter 13 is often called "wage-earner" bankruptcy, although most courts permit people to file chapter 13 even if their income is from a non-wage source such as government benefits or family support.<sup>3</sup> Chapter 13 permits debtors to retain all assets, regardless of whether they are exempt under law, in return for paying their "disposable income" to their unsecured creditors and making payments on their secured obligations.<sup>4</sup> The repayment period is between three and five years.<sup>5</sup>

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<sup>1</sup> Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Chapter 7 Asset Cases*, AM. BANKR. INST. J. (2002), available at [http://www.justice.gov/ust/eo/public\\_affairs/articles/docs/abi122002.htm](http://www.justice.gov/ust/eo/public_affairs/articles/docs/abi122002.htm).

<sup>2</sup> 11 U.S.C. § 109(e). As of the date of the bankruptcy petition, a chapter 13 debtor must have noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400.

<sup>3</sup> See, e.g., *In re Murphy*, 226 B.R. 601 (Bankr. M.D. Tenn. 1998) (finding that woman's live-in boyfriend could fund her chapter 13 repayment plan because he provided her with stable income).

<sup>4</sup> 11 U.S.C. § 1325(b)(1)(B), and (b)(2) and (3) (defining disposable income).

<sup>5</sup> It appears that the majority of chapter 13 debtors proposes plans of five years (60 months) in length. See Scott F. Norberg & Nadja Schrieber Compo, *Report on an Empirical Study of District Variations, and the Roles of Judges, Trustees, and Debtors' Attorneys in Chapter 13 Bankruptcy Cases*, 81 AM. BANKR. L.J. 431, 453 (2007) (reporting that median and modal plan length were 60 months for sample of chapter 13 cases filed in 1994 in seven judicial districts.)

To be effective, the repayment plan must be confirmed by a bankruptcy court. The terms of repayment are extremely complex, reflecting an interaction of legal requirements and negotiations with creditors. Generally, chapter 13 debtors are required to live on modest budgets, which are reviewed by courts and chapter 13 trustees at the time of plan confirmation. Chapter 13 debtors can retain any assets that are collateral (homes, cars, boats, etc.) only if they can continue to make the ongoing payments on those debts during the repayment plans. For collateral other than the debtor's principal residence, chapter 13 permits a debtor to restructure the terms of secured debts, typically by writing down the obligation to the value of the collateral. Home mortgage debt may not be modified (this is the so-called "cramdown" prohibition). Chapter 13 does have an explicit home-saving purpose and is widely used by homeowners facing foreclosure. Debtors are permitted to cure missed mortgage payments over the years of their repayment plan, with foreclosure stayed during that period as long as a debtor makes all ongoing payments as required by the original terms of the mortgage loan and catches up on all missed payment as set forth in the repayment plan.

A chapter 13 trustee administers the case, collecting payments from the debtor and making distributions to creditors. At the end of the repayment plan, the debtor receives a discharge of any remaining amount of unsecured debts. The discharge does not affect liens on property, so that if a debtor fails to make future payments after bankruptcy on secured obligations such as homes and cars, they can lose that property. However, the discharge would prevent the creditor from suing the debtor for any deficiency outstanding after the collateral is sold and the proceeds applied to the debt. The scope of the chapter 13 discharge is a bit broader than the chapter 7 discharge, most notably in providing additional relief from past tax debts, but the primary exceptions to discharge such as student loans and domestic support obligations, apply in both chapters.

### III. STATEMENT OF PROBLEM

The idea of debtors repaying their creditors a portion of the debt owed has both theoretical and political appeal. Some have suggested that bankruptcy relief could create a moral hazard unless consumers are required to repay debts to the extent their means permit.<sup>6</sup> Politicians repeatedly express concern that "can-pay" debtors actually do pay their creditors.<sup>7</sup> In theory, efforts to repay obligations in bankruptcy are thought to serve both moral and economic purposes. There may be less social stigma or credit market penalty for those who made efforts to repay. In nearly all cases, chapter 13 bankruptcies recover more money for creditors than if the debtors had filed chapter 7 bankruptcies. These reduced loss severities should lower the overall cost of credit. The 2005 bankruptcy reforms solidified the role of chapter 13 in the American bankruptcy system, seeking to screen debtors out of chapter 7 (and presumably into chapter 13) based on their incomes,<sup>8</sup> and adding formulaic calculations to determine the contours of chapter 13 plans.<sup>9</sup> Although chapter 13 had always offered "carrots" to encourage debtors to chose to repay,<sup>10</sup> the 2005 bankruptcy reform put in place a "stick" to force some people to file chapter 13 if they wanted any bankruptcy relief. Although relatively few families appear to be excluded from chapter 13,<sup>11</sup> the preference of Congress for repayment bankruptcy is unmistakable.

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<sup>6</sup> See e.g., Edith Jones & Todd Zywicki, *It's Time for Means Testing*, 1999 BYU L. REV. 177, 181 (1999).

<sup>7</sup> Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 567 (2005).

<sup>8</sup> 11 U.S.C. § 707(b).

<sup>9</sup> 11 U.S.C. § 1325(b)(3)–b(4).

<sup>10</sup> These include the ability to retain assets regardless of exempt status, the ability to cure missed payments on secured debts including home mortgages, and a slightly broader set of debts that can be discharged.

<sup>11</sup> It appears that only a small number of people have chosen to file bankruptcy since the 2005 law are truly "forced" into chapter 7. About one-half of one percent of all chapter 7 debtors is forced to convert to chapter 13 after failing the means test and then losing litigation to rebut the means-test presumption that their chapter 7 case is an abuse of the system. The effects may operate primarily as a sorting mechanism to screen people before filing into chapter 7 or chapter 13 or to discourage any bankruptcy filing. The initial empirical evidence, however, suggests that the inflation-adjusted median income of chapter 7 and chapter 13 filers did not change between 2001 and 2007. See

Yet, chapter 13 has its flaws. One of the most enduring empirical findings about the chapter 13 system is that only one in three cases results in a discharge.<sup>12</sup> The other two in three cases end in dismissal or less commonly, conversion to chapter 7. Cases that are dismissed do not receive a discharge; the chapter 13 debtor remains obligated for the entire amount of debt owing at the time of filing bankruptcy, less the amount of any actual payments made during the repayment plan. Cases that are converted may receive a chapter 7 discharge. The concerns about converted cases are the delay in receiving such relief while the debtor spent time in chapter 13 and the fact that chapter 13 cases usually require higher attorneys' fees (typically double the attorneys' fees for chapter 7).<sup>13</sup>

Leading scholars, including Elizabeth Warren and William Whitford, have relied on the fact that only one in three cases ends in discharge to support arguments that chapter 13 should either be eliminated or reformed.<sup>14</sup> To its critics, the low rate of plan completion and discharge is evidence that chapter 13 fails to supply meaningful relief to most of its debtors. These assertions have been hotly debated. Advocates for chapter 13, including chapter 13 trustees, some bankruptcy judges, and at least to some degree, Congress and financial institutions, have suggested that the discharge may be a poor measure of chapter 13's usefulness.<sup>15</sup> Putting aside that some dismissed/converted chapter 13 cases may generate modest recovery for creditors,<sup>16</sup> some have noted that chapter 13 may permit a debtor to cure a default on a secured debt even though a repayment plan is not completed and unsecured debts are not discharged. Debtors may also benefit from the temporary stay of foreclosure or repossession actions during the pendency of their chapter 13 cases, even if the ultimate outcome is dismissal that permits creditors to take and sell the property.<sup>17</sup>

There is no systematic research on what actually happens to the debtors who file the two-thirds of chapter 13 cases in which the debtors do not complete a repayment plan and receive a chapter 13 discharge. Even the most comprehensive study, the Chapter 13 Project of Professor Scott Norberg, relies on discharge as the measure of debtor success, claiming that discharge is "[t]he best, and perhaps only

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Robert M. Lawless, Angela K. Littwin, Katherine M. Porter, John A.E. Pottow, Deborah K. Thorne & Elizabeth Warren, *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 361 (2008).

<sup>12</sup> See Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 505 & n.70 (2006) ("The overall discharge rate for the debtors in the seven districts covered by the Project was exactly the oft-repeated statistic of one-third."); Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, 19 AM. BANKR. INST. J. 22, 22 (July–Aug. 2000); Henry E. Hildebrand, III, *Administering Chapter 13—At What Price?*, 13 AM. BANKR. INST. J. 16, 16 (July–Aug. 1994).

<sup>13</sup> Bankruptcy courts must approve the payment of all attorneys' fees, including in chapter 13. Most courts have a "no-look" fee system, in which the court does not provide individual review of the fees and work performed if the attorney charges below an amount fixed by court order. These "no-look" fees vary but are usually between \$2500 and \$4500, with an average of about \$3500.

<sup>14</sup> See e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *What We Really Said About Chapter Thirteen*, 5 NACTT QUARTERLY 18, 19 (1992) ("Based on the districts we studied, at the time we studied them, it appeared too many 'can't pay' debtors were filing in chapter 13."); William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85 (1989) (developing the argument for repeal).

<sup>15</sup> Gordon Bermant, *What is "Success" in Chapter 13? Why Should We Care?*, 23 AM. BANKR. INST. J. 20, 65 (Sept. 2004) ("Arguments are made that completion is neither necessary nor sufficient for success.").

<sup>16</sup> In part because of the high rate of dismissals and conversions, recovery to nonpriority unsecured creditors in chapter 13 appears to be quite low. The 2007 Consumer Bankruptcy Project data show that only two in three chapter 13 plans even proposed to make payments to unsecured debtors. Data from the U.S. Trustee Program for 2009 show that there was zero payout to unsecured creditors in 32% of all chapter 13 filings.

<sup>17</sup> Bermant, *supra* note 15, at 3 (noting that alternate measure of success in chapter 13 could include debtors retaining their collateralized property); Sullivan et al., *supra* note 14, at 19 ("The two-thirds statistic does not mean that these chapter 13 were total failures—for example, foreclosure of a home may have been forestalled, or the petitioners might have learned more about household budgeting by developing a plan.")

reliable, measure of debtor fresh start . . . .”<sup>18</sup> The collective knowledge of the outcomes of chapter 13 largely can be reduced to one enduring statistic: only one in three cases ends in a chapter 13 discharge. There is simply no evidence on whether the majority of chapter 13 cases, those in which debtors do not complete a repayment plan, can be fairly labeled “successes” or “failures” in providing meaningful relief to debtors from financial distress.

#### IV. RESEARCH HYPOTHESES

The primary goals of this study are to document why debtors exit the chapter 13 system and how they perceive their cases ending. These empirical data may offer fresh insights to invigorate the stale debate about chapter 13’s efficacy. The study will rely primarily on in-depth telephone interviews of a random sample of chapter 13 debtors whose cases were dismissed or converted to chapter 7. The methodology is described in the next section. Here, I describe the key research questions.

The interviews focus on understanding why a chapter 13 bankruptcy case ended— not merely in legal terms (i.e., stopped paying the trustee) but also in terms of life events. As a matter of practice, almost all dismissed cases are officially terminated by a trustee’s motion to dismiss for failure to make payments. But this procedural outcome merely reflects the fact that attorneys do not go to the expense and hassle of filing motions to dismiss cases, even when debtors could pay and affirmatively want to end their cases. This project documents the underlying reasons for the case terminations. In the telephone interview, debtors are asked if their cases ended because they could not make their plan payments. If so, they are asked to report the underlying causes of their inability to pay. Did they become too ill to work? Was the budget set out in the repayment plan unrealistic and unsustainable? Did they marry or find a partner and become more capable of managing their debts as a two-income household? Debtors are asked whether their case ended because they found an alternative solution that they preferred to bankruptcy (such as negotiating outside of bankruptcy with a creditor, committing to a debt management plan, etc.) and what, if any, advantages they see to such an approach compared with chapter 13. In part because of the insular legal nature of bankruptcy as a judicial process, almost nothing is known about the non-bankruptcy alternatives that debtors consider or use. Because these processes do not require the participation of a lawyer or court, they are much harder to observe.

Empirical data on the trigger events for debtors dropping out of chapter 13 is a critical element to looking behind the dismissal rate. Prior studies have relied exclusively on debtors’ bankruptcy court records and have used regression techniques to identify economic or demographic qualities that are correlated with completion of a repayment plan and discharge. For example, David Evans and Jean Lown found that neither the amount of a debtor’s income nor the amount of a debtor’s monthly income remaining after making chapter 13 payments was a significant predictor of discharge for chapter 13 debtors in Utah.<sup>19</sup> Scott Norberg’s multi-district study found that a higher amount of unsecured debt and a higher debt-to-income ratio were positively associated with attaining discharge.<sup>20</sup> Jean Braucher examined how local variations in the chapter 13 legal process may be associated with higher rates of plan completion, concluding that use of wage garnishment by the trustee to collect the plan payments improved the discharge rate.<sup>21</sup> These data are useful for predicting plan completion but they do not themselves reveal whether the failure to complete a plan is a negative outcome.

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<sup>18</sup> Norberg & Velkey, *supra* note 12, at 504; *see also* David A. Evans & Jean M. Lown, *Chapter 13 Bankruptcy: Successful Versus Unsuccessful Debtors*, 18 Papers of Western Family Econ. Assn. 33 (2003) (“With the dismal track record of chapter 13, it is important to understand why plans fail (cases are dismissed) or how debtors who succeed in chapter 13 differ from debtors who fail to complete their plans.”)

<sup>19</sup> David A. Evans & Jean M. Lown, *Predictors of Chapter 13 Completion Rates: The Role of Socioeconomic Variables and Consumer Debt Type*, 29 J. FAM. ECON. ISS. 202, 214 (2008).

<sup>20</sup> Norberg & Velkey, *supra* note 12, Tbl. 27.

<sup>21</sup> Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 558 (2001).

The interview assesses the consequences of dropping out of chapter 13 for debtors' financial prospects. Can one fairly characterize some portion of debtors as having achieved a meaningful fresh start regardless of not receiving a discharge? For example, debtors may have filed primarily to cure a delinquency on a secured debt and have dropped out after the number of months required to cure those missed payments. Or did time in chapter 13 worsen some debtors' financial problems? If so, in what ways? For example, debtors may conclude that their goal of trying to honor their obligations was misguided or a "mission impossible" and that they should have sought immediate debt relief in chapter 7. Debtors are asked to evaluate their prospective financial situation, including the likelihood of filing bankruptcy again and how they are doing at making ends meet as compared to before and during their bankruptcy.

The interview contains a series of measures designed to identify whether dismissed/converted chapter 13 cases are successes or failures from the debtors' perspectives. To do so, debtors are asked to recall the problems they wanted to address in bankruptcy. Prior research has shown that a large majority of chapter 13 debtors are homeowners who are delinquent on their mortgage payments. From a legal standpoint, this is thought to be the principal reason for choosing chapter 13 over chapter 7.<sup>22</sup> Debtors are asked if they filed bankruptcy to avoid losing a home to foreclosure, and if so, whether they still own the home? If the debtor plans to retain a home, how was chapter 13 useful in that regard (*e.g.*, used it to cure all arrears, used it to obtain additional time to negotiate a loan modification, etc.?) If the debtor lost the home to foreclosure, does he or she still think that chapter 13 was beneficial? For example, some debtors may be using chapter 13 primarily to delay a foreclosure that they perceive is inevitable at the time of bankruptcy filing because they need additional time to locate alternate housing. This may be a positive outcome for the debtor compared to not filing bankruptcy even though the end-result was dismissal of the case. The wealth effect was loss of the house but debtors may experience the process of voluntary surrender as a more positive outcome than foreclosure.

Along these lines, the interview queries debtors about their psychological and social well-being, such as self-perceptions of stress and spousal relations, before, during, and after bankruptcy. These are non-financial benefits of bankruptcy. Collection calls and dunning letters appear to be a primary reason that consumers decide that they should seek bankruptcy relief.<sup>23</sup> Bankruptcy may provide a useful breather from that pressure, even if it resumes after a case's dismissal. Knowing the goals that debtors have for their chapter 13 cases reveals the limits of relying on the legal end-result of a discharge. More nuanced views of outcomes permit more reliable assessment of the usefulness of chapter 13 to consumers in financial distress.

## V. METHODOLOGY AND PROGRESS TO DATE

This is a survey research project, with supplementary data gathered from debtors' bankruptcy court records. The primary instrument is a telephone interview with debtors whose chapter 13 cases have just been terminated without discharge. I have contracted with a data service, AACER, to provide a series of list samples of face sheet and case status information for all chapter 13 cases in the United States (excluding Puerto Rico) that end without a discharge for a given time period.<sup>24</sup> Eligible cases will include cases that were dismissed (regardless of whether by debtor's motion, trustee's motion, etc.) or converted to chapter 7. Pending cases and cases that end in a discharge, either a hardship discharge or upon completion of all plan payments, are excluded from the sample.

Because AACER monitors the dockets of all bankruptcy cases in the nation every day, it can generate lists of very "fresh" cases that were just terminated. However, the cases themselves will have

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<sup>22</sup> As a practical matter, many people may file chapter 13 primarily because they cannot afford the upfront attorneys fees that must be paid in advance for a chapter 7 case.

<sup>23</sup> Ronald J. Mann & Katherine Porter, *Saving up for Bankruptcy*, 98 GEORGETOWN L.J. 289, 328 (2010).

<sup>24</sup> AACER is an acronym for Automated Access to Court Electronic Records. AACER also provided the lists for the 2007 Consumer Bankruptcy Project and is affiliated with the Harvard Bankruptcy Data Project, with which I am a fellow. I thank Mike Bickford, Anna Biggs, and other AACER staff for their assistance.

been filed over a five-year period. Some cases terminate shortly after filing and others may not convert or dismiss until near the end of their repayment plan. Research suggests that the typical case that does not end in discharge terminates within two years of the case being filed.<sup>25</sup> Thus, I expect that majority of cases will have been filed in the latter half of 2008 or 2009. However, the sampling procedure gives all terminated without discharge cases an equal chance of being in the sample, regardless of the duration of time between filing and non-discharge termination.

This sampling strategy is a new and innovative approach to studying outcomes in chapter 13. Prior research has interviewed an entire sample at the same moment in time (*e.g.*, one year after the bankruptcy cases were filed), with the result that debtors were at all different points in their cases—some still trying to confirm a repayment plan, some having dropped out of bankruptcy without a discharge, some making payments under a plan, etc.—when the data were gathered. Unless the study was conducted five years after all the cases were filed, such samples are not representative of the full panoply of cases that end without discharge. The sample for this study contains cases drawn in the same time period but that ended after different amounts of time in bankruptcy. Longer or shorter cases may reflect very different outcomes and debtor experiences. Drawing samples from lists of recently terminated cases allows me to interview debtors within a few weeks of their cases ending. This reduces problems in memory distortion from interviewing people about events that occurred in the past.

The lists of debtors will be drawn by random sampling in the first half of 2010, preventing any single-month effect from overwhelming the data.<sup>26</sup> To date, I have drawn three random samples of 100 cases from three lists—one in each month of 2010. I anticipate drawing larger random samples of 500 cases in April, May, and June to complete the project. The goal is to complete 300 to 400 telephone interviews with debtors, with the final number of draws determined by the response rate and funding.

After the random sample is drawn from all cases dismissed in a given week, the debtors are contacted by mail to invite them to participate in a study. The addresses come from the debtors' bankruptcy court records and to date have produced only 1% undeliverables. The letter contains the required elements of consent for academic research on human subjects and explains the purpose of the study. The reverse side of the letter is a Spanish-language version. Enclosed with the letter are a participation return form and an addressed stamped envelope for the return of the participation form. The form also provides a toll-free number that debtors may call to contact an interviewer.

About two weeks after the initial mailing, we try to contact the debtors by telephone. Telephone phone numbers are not provided on bankruptcy court records except for *pro se* debtors. We have used public search engines and a for-fee service to locate telephone numbers, but we are unable to find valid phone numbers for about half of debtors (see below). We call the debtors to follow-up on the letter and invite them to complete the telephone interview at that time. If we do not reach anyone by phone, we call again. If an answering machine is available, we leave a message that contains a toll-free number for the debtor to call back if they wish to participate. For debtors who agree to participate, some are interviewed on the spot and others are scheduled for an interview at a time that is convenient for them in the upcoming days. About four to six weeks after the initial mailing, those who have not been reached by phone (and either refused or agreed to participate) are sent a follow-up reminder letter.

The response rate is always a concern in survey research, and rates are particularly low in telephone surveys.<sup>27</sup> Following the widely-adopted protocols of the American Association for Public

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<sup>25</sup> See Norberg & Velkey, *supra* note 5, at 529 (reporting that cases that were dismissed or converted *after* plan confirmation lasted on average less than two years and cases that were dismissed or converted *before* plan confirmation lasted on average less than six months).

<sup>26</sup> Research does not seem to show any strong single-month or seasonal effects in chapter 13 filings. Such effects are much more common in chapter 7 cases where the tax refund seems to be a major driver of when cases are filed. See Mann & Porter, *supra* note 23, at 320-321.

<sup>27</sup> Charlotte Steeh, Nicole Kirgis, Brian Cannon & Jeff DeWitt, *Are They Really as Bad as They Seem? Nonresponse Rates at the End of the Twentieth Century*, 17 J. OFFICIAL STAT. 227, 228 (2001) (reporting that the Council for Marketing and Opinion Research reports an average 25 percent response rate for all samples and a 12 percent response rate for random-digit dialing samples for commercial telephone surveys).

Opinion Research, I have collected information to present several metrics for response rate. Nonrespondents are divided into three groups: those never reached (noncontacts), those unwilling to cooperate (refusals), and all others (mainly those for whom it would have been difficult or impossible to participate (hearing barrier, hospitalized, etc.)) The total sample for Weeks 1 and 2 combined is 195 debtors (five cases from the 200 initial sample will be replaced with randomly drawn alternates from the initial lists; 2 debtors had undeliverable addresses and 3 debtors were from Puerto Rico). However, we have confirmed that we have no valid telephone numbers for 105 debtors, over half the random list sample.<sup>28</sup> Because this is a telephone survey and the mailed letter is a requirement of the University of Iowa Institutional Review Board rather than a part of the study design itself, I calculate the response rates using two different denominators: the 195 debtors who were mailed letters and the 95 debtors for whom we have valid or possibly valid telephone numbers. (This latter group includes those where no telephone contact (in-person or answering machine) has been made but the number does ring and may be valid for that debtor.)

To date, the participation rate is 17% for the mailed sample and 37% for those with valid or possibly valid phone numbers available to the research team. As some of the noncontacts are still being called to follow up on reminder letters and small improvements are being made in the survey procedure, the final participation rate may reach 20% for the mailed list sample and 40% for the valid/possibly valid phone sample. Only 25 debtors have refused to participate when contacted by phone.<sup>29</sup> I consider this refusal rate to be remarkably low, especially for research on a population that can be considered to be stigmatized from their bankruptcies and financial distress.

Table 1. Response Rates as of 4/7/10 (Week 1 and 2 samples only)

	Mailed sample (n=195)	Valid or possible valid phone sample (n=90)
Participation Rate (n=33)	17%	37%
Refusal Rate (n=25)	13%	28%
Noncontact Rate	68% (n=133)	33% (n=30)
Other noninterviews (n=2)	1%	2%

The major source of nonresponse is noncontacts. Debtors whose phone numbers have proven impossible to obtain may differ from those with valid phone numbers. Younger debtors may be more likely to have only cell phones, which are generally unlisted. In the general population, it is estimated that 20% of households rely exclusively on cell phones.<sup>30</sup> Another source of response bias might be that debtors who are particularly angry or disappointed about the bankruptcy process are more likely to refuse to participate. Finally, debtors who face the most intense collection pressure or the most severe hardships may have cut-off their phone lines to avoid dunning calls or to save money. To provide some measure of the nature and extent of response bias in the telephone survey, I will code bankruptcy court record data for a random sample of debtors who did not complete the interviews but who were eligible for the study. Comparing those data to the data from the sample of respondents will allow me to examine whether debtors who could be contacted and were willing to participate differed from those who could not be

<sup>28</sup> For this group, we either could locate no number at all, any numbers that we could locate are disconnected, or we have confirmed by in-person conversation or answering machine messages that the number is not for the debtor household.

<sup>29</sup> Although there is little guidance on what to count as a refusal, I include as refusals the three debtors who have three times either scheduled but have not completed interviews or who have postponed are counted because such behavior can be understood as a “passive refusal.” One message is left reminding these debtors that if they do wish to participate they can call the toll-free number but they are not contacted again.

<sup>30</sup> John Boyle, Faith Lewis & Brian Tefft, *Cell Phone Mainly Households: Coverage and Reach for Telephone Surveys Using RDD Landline Samples*, Survey Practice (2009) available at <http://surveypractice.org/2009/12/09/cell-phone-and-landlines/>.

located or refused to participate along the variables captured in the court records, including age, income, dependents in household, total debts, and homeownership. While these checks on response bias provide an unusually large amount of data on nonrespondents, there may still be unmeasured sources of response bias, such as by race or educational attainment.

The average telephone interview is about 45 minutes in length. I repeatedly revised and tested the questions, including having them reviewed by a sociologist with expertise in surveying bankruptcy debtors and by the UC-Berkeley Center for Survey Research. After revisions, the questions were tested by the field interviewers and revised further. While the main goal of the telephone interview was to address the research questions of interest, I paid considerable attention in writing the questions and responses to ensuring that the interview was logically organized and that its content could be understood by people of high-school education without any legal training. The questions are primarily closed-ended but the interviewers also code all additional comments by debtors and all responses to open-ended questions into overflow spreadsheets. The interviews are conducted using a computer-assisted telephone interview database permitting all data to be coded simultaneous to the interviews. To date, refusals and missing information (captured by “don’t know” and “no answer” responses) to individual interview items are extremely rare. The data set will be almost fully complete for interview participants.

The project will gather a second type of data to complement the interviews. For each completed interview, I will code data from that debtor’s bankruptcy court records. The court records will be downloaded from PACER, which contains full records for all bankruptcy cases in all jurisdictions. These data will provide a more complete profile of each debtor and will permit analysis of how factors that exist at the time of bankruptcy may relate to the triggers for a case terminating without discharge. Specific variables of interest are the existence, chapter, and date of a prior bankruptcy, the amount of assets and debts, homeownership status, dependents, occupation, current and historic income, and expenses. I will also code details about the length, structure, and repayment details of the chapter 13 plans, including whether a wage order was entered, and information about payments to the debtor’s attorney. I estimate that approximately 100 data points will be coded for each case. To ensure the accuracy of the court record coding, ten percent of the cases will be recoded blind—that is, without the first coding—and the two will be compared and any necessary corrections made.

The data from the court records and the telephone interviews will be matched for each participant and merged together and then transferred into a software package for statistical analysis.

## VI. PRELIMINARY FINDINGS

At this point, I have not conducted any statistical analysis on the 33 completed cases and the sample remains small. Although the final data may be significantly different, I have identified some trends in the initial data.

From a simple count, it appears that keeping one’s home is the most common response to the inquiry about the single most important goal debtors had for their bankruptcies. Some debtors think they will keep their houses despite their bankruptcy case ending and some are facing foreclosure or planning to surrender their homes. Other common important goals for bankruptcy were stopping harassment and trying to get control of one’s finances. These latter explanations suggest the importance of the automatic stay to families in financial distress. A few debtors report trying to repay their unsecured debts as their most important goal for bankruptcy.

A notable minority of debtors believe they have accomplished their goals without completion of their bankruptcy repayment plan. Some of these people negotiated or plan to negotiate with their creditors to achieve a loan modification or a workout outside of bankruptcy and believed this solution imposed fewer burdens on them than the repayment plan.<sup>31</sup> Others noted that they did pay off some of their debts in chapter 13 before their case was dismissed and that at least at the time of the interview, many creditors had not resumed contacting them to collect remaining amounts.

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<sup>31</sup> Respondent W2-102M (“I’m in the process of getting a loan modification. Our mortgage company is willing to work with us.”)

Generally, debtors were glad to be relieved of their trustee payments, complaining that the payments were too high or unrealistic on their budgets. One debtor explained, “If the payment had been what it was going originally, we would have been okay, but they try to push you to the max. It shouldn’t be that way.”<sup>32</sup> Some noted a short-term improvement in their financial situations without the trustee payment but feared the longer-term consequences of their case ending, such as creditors resuming collection or a lender taking property.

The debtors’ perceptions of the legal actors in the bankruptcy system offer new insights on how individuals experience a high-volume legal process. Many feel that the system was set up against them. One respondent explained her view of the bankruptcy professionals she encountered: “There needs to be a law to protect people from being screwed over by attorneys. We payed everything up front and it just made it easier for them to take advantage of us. I think the trustee needs to be held accountable to return phone calls too. It is very frustrating when nobody calls you back.” Debtors also had strong, and varying, opinions about their lawyers.<sup>33</sup> Several debtors had found another lawyer after their case was dismissed and planned to file bankruptcy again. Debtors who had filed *pro se* also frequently said that they were going to hire a lawyer and refile. Negative attitudes toward the bankruptcy trustee in their cases were common, with some debtors characterizing the trustee as an adversary or as a person getting “rich” off their financial distress.<sup>34</sup> These perceptions are not necessarily incorrect.<sup>35</sup>

Perhaps the most fruitful area for qualitative research was the inquiry that asked debtors: “Do you have any advice for other people who are in similar financial circumstances and might be considering chapter 13 bankruptcy?” These responses reflected the wide disparities in outcomes among cases that from a purely legal view have the same end-result. A few debtors were quite positive about their bankruptcies and would recommend bankruptcy to other people who were in serious financial trouble. One respondent offered this advice: “I think they should file immediately and don’t worry about their credit being bad. Because if they have to file then their credit is already bad. It is an opportunity to get help for your problems.”<sup>36</sup> However, the majority of debtors advised viewing chapter 13 as a “last resort,”<sup>37</sup> with many advising consideration of more alternatives and obtaining more information before bankruptcy. One respondent suggested: “Try at all costs to work with your creditors before filing Chapter 13. The way that the system is set up, it is not made for you to be able to be able to afford the payments.”<sup>38</sup> Another debtor explained that he would recommend chapter 7 after alternatives were exhausted: “If you have tried to pay everybody and have tried to renegotiate and the answer is no, I highly recommend you go Chapter 7 and get rid of these people. I hope you don’t think I’m a bad person, but

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<sup>32</sup> Respondent W2-054S; *see also* Respondent W2-034S (“Try at all costs to work with your creditors before filing Chapter 13. The way that the system is set up, it is not made for you to be able to be able to afford the payments.”)

<sup>33</sup> *Compare* Respondent W2-029I (“He is the best!”) *with* Respondent W2-082B (“[The attorneys] have very little compassion and don’t really care what their clients situation is. Just because you are filing for bankruptcy doesn’t mean you have no self-worth. Don’t treat us like nobodys. When I went to court there was a couple there with all this gold jewelry on and expensive stuff, I could barely afford the gas to get to court. No one is above financial difficulties. It just takes one catastrophe, it could happen to these attorneys too.”).

<sup>34</sup> Respondent W2-100B (“The bank became more rigid as the trustee became more rigid. I felt like the bank was in conspiracy with the trustee.”); Respondent W2-029I (“They [the trustee] just don’t care. They don’t care if your income goes down or if you have unexpected expenses. They just don’t care! Why can’t they look at the cases on a more individual basis? All they do is say make your payments, or your case will be dismissed. . . . It’s really discouraging when someone who is supposed to be helping you and instead they kick dirt in your face when you’re down.”).

<sup>35</sup> Trustees object to plans that do not comply with the law, which often benefits the creditors by ending in case dismissal and no discharge. Trustees receive a percentage of the debtors’ payments under the repayment plan as their fee; this fee varies but cannot exceed 10% and is more typically thought to be 5%.

<sup>36</sup> Respondent W1-055N.

<sup>37</sup> Respondent W1-046S.

<sup>38</sup> Respondent W2-034S.

that's about the only way to stop them from harrassing you. Since I'm not covered by the bankruptcy, credit cards are already sending me offers. They even want me to take my own money and load it on their credit cards, like \$300 or something. That's not right.”<sup>39</sup> The debtors’ experience in chapter 13 bankruptcy reflects the complex nature of the consumer bankruptcy system and the difficulty, even at the end of the process, in determining whether bankruptcy was a good decision. As a middle-aged man with a family explained: “Be prepared for a rocky road. It's not an easy thing to go thru. It's a longer process than what we thought it would be and there is unbelievable amounts of paperwork. We had creditors telling us that bankruptcy wouldn't solve our problems. We wanted to believe it would help us, but maybe they were telling us the truth.”<sup>40</sup>

## VII. POTENTIAL IMPLICATIONS

Discharge is the terminal point in the bankruptcy process as set out in formal law. This contemplation of a discharge powerfully shapes our perceptions as legal scholars about how to understand the “outcome” of chapter 13 bankruptcy. But as Daphna Lewinsohn-Zamir explains in a recent paper, “[o]ften, only a broader, nuanced outlook can accurately capture the true state of affairs.”<sup>41</sup> The focus of the existing literature on the discharge as the measure of success in chapter 13 bankruptcy projects the system’s final outcome as the “positive end-result” onto a diverse set of human experiences. Moreover, the dominance of the law-and-economics approach, particularly in business law, has probably helped to reinforce discharge as a useful measure because it concretely determines whether a debtor’s literal wealth improved as a result of the bankruptcy case.

Yet, events with the same end-result may be perceived to be different outcomes by participants.<sup>42</sup> Even in a utilitarian framework, the satisfaction of one’s preferences may turn on factors other than the end-result, for example if the process that produces the end-result is viewed as corrupt. This kind of thinking about outcomes seems a useful frame for analyzing the findings from my study. In addition to providing a more nuanced measure of the end-result (keeping one’s house versus losing one’s house—both possibilities in a discharged case), the data suggest that individuals in bankruptcy value or decry aspects of the process that are not determinative of the end-result. Outcomes for these debtors include their satisfaction with knowing that they tried to repay their debts or their feelings that the system did not give them any chance. The findings from this bankruptcy study can illuminate the variety of outcomes that might be hidden in a single legal end-result. Scholars in other areas, particularly those where individuals are involved in a lengthy and sustained legal proceeding (such as divorce or disability determinations) may draw ideas for other studies that explore the ways in which perceptions about outcome are not aligned with legal end-results.

The findings also should advance the longstanding debate about whether it is appropriate to characterize chapter 13 cases that end without discharge as “failures.” The data will suggest new measures for assessing the real-life (not merely legal) outcomes of chapter 13 cases against its system goals and against debtors’ goals in filing bankruptcy. Such findings may provide new and important insights on how the consumer bankruptcy system could be improved. For example, the findings may support efforts to change the extent to which debtors must decide at the moment of bankruptcy filing between chapter 7 and chapter 13, typically only with the advice of their attorney. Instead, debtors could be offered a single chapter of bankruptcy with diversion to repayment occurring later in the case. The findings may also provide some evidence to buttress critics that the bankruptcy system is too complex and needs simplification.<sup>43</sup> Alternatively, the study’s results may create a new recognition about the

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<sup>39</sup> Respondent W2-029I; *see also* Respondent W1-045S (“For your families’ sake, do what you have to do.”)

<sup>40</sup> Respondent W2-075N.

<sup>41</sup> Daphna Lewinsohn-Zamir, *Beyond the Bottom Line: The Complexity of Outcome Assessment 2*, available at <http://ssrn.com/abstract=1479051>.

<sup>42</sup> *Id.* at 4. (“Individuals regard various factors, in addition to end-results, as part of the ensuing outcome itself.”)

<sup>43</sup> Mann & Porter, *supra* note 23, at 338.

benefits of chapter 13 filings that end in dismissal or conversion and may suggest ways to refine chapter 13 to encourage such cases regardless of the low rate of discharge.