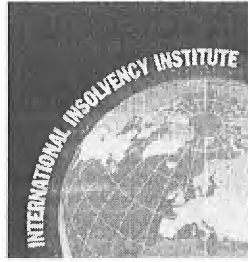

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The Success of Chapter 11: A Challenge to the Critics

Elizabeth Warren and Jay L. Westbrook

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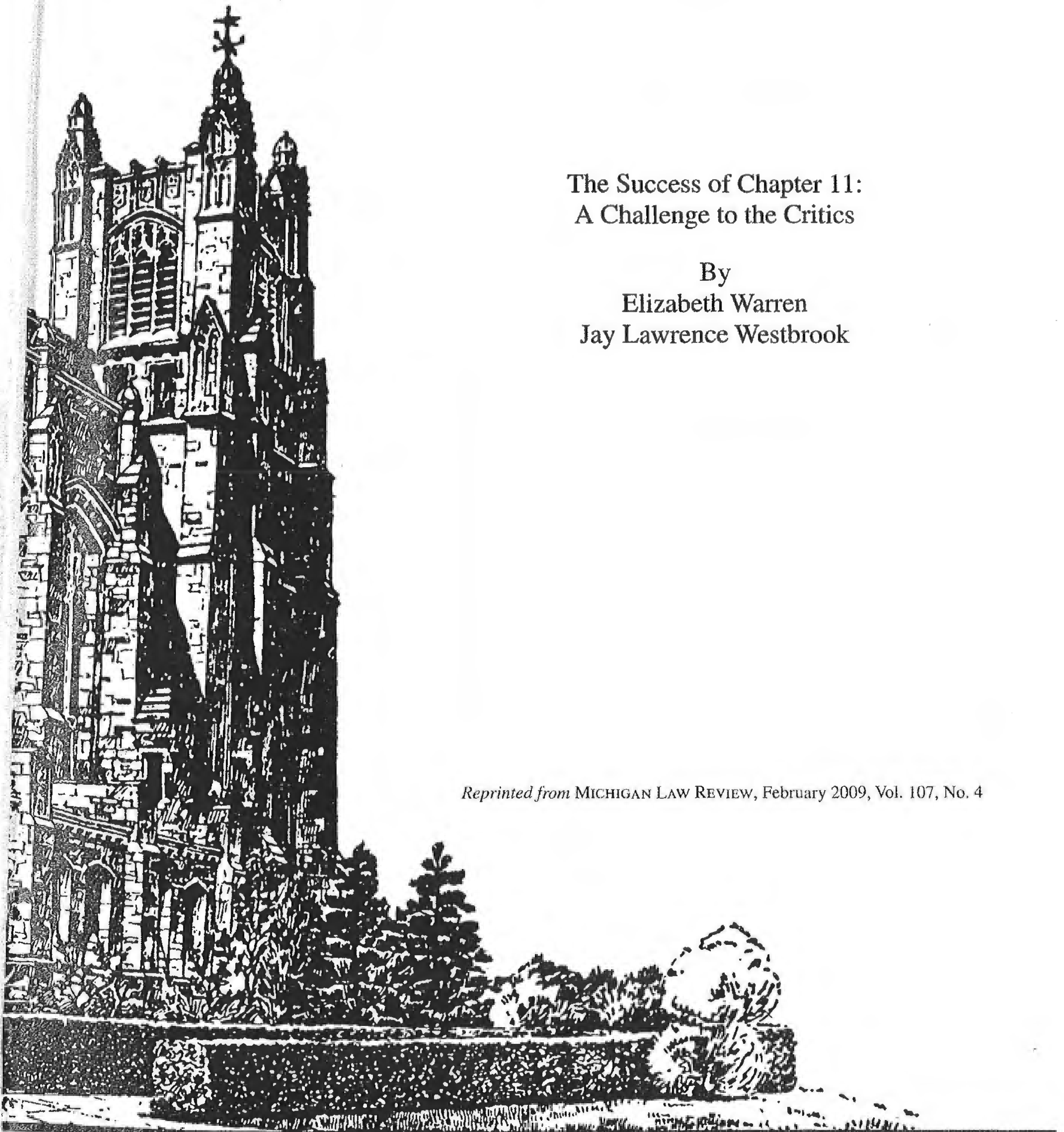

The Success of Chapter 11:
A Challenge to the Critics

By
Elizabeth Warren
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THE SUCCESS OF CHAPTER 11: A CHALLENGE TO THE CRITICS

Elizabeth Warren[*]
Jay Lawrence Westbrook[**]

Although Chapter 11 has served as a model for bankruptcy reform around the world, the conventional wisdom has been that it is characterized by a relatively low success rate and endless delay. The data from large samples of Chapter 11 cases filed in 1994 and 2002 demonstrate that this characterization is wrong. Nearly all troubled companies choose Chapter 11 over Chapter 7 liquidation, which means that the system serves a critical screening function to eliminate hopeless cases relatively quickly. Almost half the unsuccessful cases were jettisoned within six months and almost eighty percent were gone within a year. The cases that survive the early screening result in confirmed plans of reorganization around seventy percent of the time. The mistaken conventional view has not only skewed the academic debate, but also prompted changes to the statute in 2005 regarding small business reorganizations, changes that may have produced little benefit in reducing delay at the price of blocking many small business reorganizations of a sort that were succeeding prior to the amendments.

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Introduction

American law claims many innovations, from the Bill of Rights to the Superfund. In the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world, Chapter 11 of the U.S. Bankruptcy Code deserves a prominent place. Based on the idea that a failing business can be reshaped into a successful operation, Chapter 11 was perhaps a predictable creation from a people whose majority religion embraces the idea of life from death and whose central myth is the pioneer making a fresh start on the boundless prairie. So powerful is the idea of reorganization that Chapter 11 has heavily influenced commercial law reform throughout the world.[1]

Yet even as the world has turned to Chapter 11 as a model to create value for a business's creditors, workers, investors, and communities, American-style reorganization has been widely disparaged. For many years, attacks on Chapter 11 have echoed through the academic community both in the United States and abroad. The critics often insist that economic efficiency requires the near abandonment of Chapter 11,[2] and some have lately

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1. Michael E. Burke et al., *International Legal Developments in Review: 2006 Regional & Comparative Law: China*, 41 Int'l Law. 777, 784–87 (2007) (commenting on China's Enterprise Bankruptcy Law, effective as of June 1, 2007, and its incorporation of the idea of reorganization); Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276, 2278–79 nn.2–15 (2000) (describing bankruptcy reform efforts throughout the world).

2. *See, e.g.*, Barry E. Adler, *Bankruptcy and Risk Allocation*, 77 Cornell L. Rev. 439, 463–64 (1992) (criticizing risk-sharing theorists' assertion that the bankruptcy reallocative provisions reflect efficiency by claiming that bankruptcy reallocation benefits cannot outweigh its costs).

declared its imminent demise.[3] These critics concede that reorganization is a worthy goal, but they claim that the current Chapter 11 system suffers from high failure rates and endless delays that prevent the system from yielding much value.[4]

This constant derision has had a potent impact. Congress recently amended Chapter 11, promoting its changes as fixes to a defective system riddled with delays.[5] Other countries that had been attracted by the promise of Chapter 11 significantly modified their new systems by inserting features to correct for the high failure rates and delays claimed to exist in the U.S. system.[6] For its part, the academic community has invested countless hours (and pages) arguing for corrections or replacements to deal with what it sees as a broken system of business reorganization.[7]

The claim of failure has been easy to make. A few cogent anecdotes coupled with an old government report have been sufficient to shift discussion immediately to proposals for change.

But before we bury—or perform further surgery on—Chapter 11, we suggest a more systematic factual inquiry. Before another country revamps its conception of reorganization to deal with the twin flaws of high failure rates and long delays, we recommend documenting both the rate of failure and the length of delay in the U.S. system as it existed before the 2005 Amendments. Here we offer data gathered from two large studies of business bankruptcies first filed in 1994 and 2002. These data show that much of the conventional wisdom about key elements of Chapter 11 is simply wrong. Contrary to so many assertions, Chapter 11 has been far more successful than supposed.[8]

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3. Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 752 (2002) ("For the vast majority of firms in financial trouble, the traditional corporate reorganization has become increasingly irrelevant.").

4. *See* Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 COM. L.J. 297, 325 (1992) (finding that only 6.5% of debtors confirmed and completed a reorganization plan, seemingly making saving a business under Chapter 11 very unlikely); Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L.J. 509, 509 (2000) ("It has become a canonical tenet of academic discussions of corporate reorganization that Chapter 11—while not as costly as originally suspected—is substantially more expensive than other market driven methods of resolving a firm's financial distress." (footnote omitted)). *See generally* Conrad B. Duberstein, *Out-of-Court Workouts*, 1 AM. BANKR. INST. L. REV. 347, 351 (1993); Edith H. Jones, *Chapter 11: A Death Penalty for Debtor and Creditor Interests*, 77 CORNELL L. REV. 1088, 1089 (1992); James J. White, *Harvey's Silence*, 69 AM. BANKR. L.J. 467, 473–74 (1995) ("[T]he largest and most palpable costs of Chapter 11 arise from delay.").

5. H.R. Rep. No. 109-031, pt. 1, at 5 (2005).

6. *See infra* notes 76–78 and accompanying text.

7. *See, e.g.*, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 877–89 (5th ed. 2006) [hereinafter WARREN & WESTBROOK, DEBTORS AND CREDITORS] (describing literature). *See generally* Philippe Aghion et al., *The Economics of Bankruptcy Reform*, 8 J.L. ECON. & ORG. 523 (1992); Philippe Aghion et al., *Improving Bankruptcy Procedure*, 72 WASH U. L.Q. 849 (1994); Elizabeth Warren & Jay Lawrence Westbrook, *Searching for Reorganization Realities*, 72 WASH. U. L.Q. 1257 (1994).

8. Professor Morrison has arrived at the same conclusion as to delays in resolution based on his study of a portion of the Northern District of Illinois. Edward R. Morrison, *Bankruptcy*

Because the Chapter 11 hospital is explicitly designed to deal with both ailing patients and corpses, the business failure rate can be understood better if the two kinds of cases are separated. Isolating those cases with a reasonable chance of success, as measured by the debtor's ability to advance a plan—any plan—of reorganization, we discovered that the success rate soars to more than seventy percent. We also found that the courts processed the losers relatively quickly: more than half of the losers were booted out in less than six months. After the first cull, the remaining cases had a decent chance of having a plan of reorganization confirmed. If, for example, a case could survive for six months, the odds of eventual success exceeded fifty-fifty.

The 2005 Amendments to the Bankruptcy Code, which imposed stricter time limits on both large and small cases, illustrate the high cost imposed by the Chapter 11 failure myth.[9] Under the amendments, small companies have only six months to confirm a plan unless they can make a rigorous showing of likely success. But the data we analyzed for this Article show that eighty-two percent of the *successful* small business cases took longer than six months to confirm their plans.[10] On that basis, most of these otherwise-successful businesses might have faced a serious risk of failing under the new provisions. Thus the cost of the six-month statutory time limit is potentially quite high, while our data show that the benefit of reducing supposed delays is much smaller because the failures were already being processed promptly.

No single study will quell concerns about Chapter 11, nor should it. As our economy changes, as lending practices evolve, and as financial markets innovate, newly configured businesses will rise and fall. Chapter 11 will be called on to adapt and to solve new problems. As it does so, new weaknesses and new strengths will be uncovered. We do not hope to stop debate, but urge that debate go forward informed by data from many sources.

I. The Data

A. *The Business Bankruptcy Project*

We have been working for a number of years on the Business Bankruptcy Project ("BBP"). The project now consists of two very large empirical studies of the businesses that file for bankruptcy.[11] With this

Decisionmaking: An Empirical Study of Continuing Bias in Small Business Bankruptcies 4, 7, 12 (Columbia Law Sch. Ctr. for Law and Econ. Studies, Working Paper No. 239, 2006). Professor Lubben has argued that the costs of Chapter 11 have been exaggerated. Lubben, *supra* note 4, at 511.

9. *See infra* note 119 and accompanying text.

10. *See infra* Section IV.B.

11. We offered an overview of the first project in *Financial Characteristics of Businesses in Bankruptcy*. Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 Am. Bankr. L.J. 499 (1999) [hereinafter Warren & Westbrook, *Financial Characteristics*]. Data from both the first and second projects form the basis for our second report,

Article, we offer the first comprehensive look exclusively at Chapter 11, using numbers from both rounds of data collection.[12]

Unlike most recent empirical articles, this one examines a cross-section of all Chapter 11 business bankruptcies. The typical article about corporate reorganization is like a study of the sociology and economics of Park Avenue: the fabulous digs of the $100 million reorganization cases and the big firms that handle them.[13] By contrast, the total assets in our cases vary from a very modest $13 to more than $16 billion. Our set of cases thus more accurately reflects the Chapter 11 system as it operated throughout the U.S. economy. Park Avenue is here, but represented in context. We report data covering the full sweep of business reorganization in this large and richly varied country of ours, from Seattle to Orlando.

The first wave of data comes from an extensive longitudinal study of business bankruptcies originally filed in 1994. To develop detailed information about the progress of the cases, we went back to the courthouses and conducted telephone surveys with the debtors several times over a period of almost six years. The advantage of such a study is that it can report much more useful information about the progress of business cases. The disadvantage is that some of the study's findings might be considered out of date by the time they are finally compiled. In 2003, we returned to the courthouses to execute a study of business bankruptcy cases filed in 2002 to update our central findings. Because we focused on fewer data points in fewer districts

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Contracting Out of Bankruptcy: An Empirical Intervention. Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197 (2005) [hereinafter Warren & Westbrook, *Contracting Out*].

12. A colleague and former students have also analyzed parts of the data. *See, e.g.*, Jennifer Connors Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307, 324–25 (1996); Stacy Kleiner Humphries & Robert L.R. Munden, *Painting a Self-Portrait: A Look at the Composition and Style of the Bankruptcy Bench*, 14 BANKR. DEV. J. 73, 79–80 (1997); Lubben, *supra* note 4, at 522–25; Stephen J. Lubben, *Real Options and the Other Liquidation Decision* 17–18 (Seton Hall Pub. Law Research, Paper No. 31, 2005) [hereinafter Lubben, *Real Options*], *available at* http://ssrn.com/abstract=683621.

13. *See, e.g.*, Lubben, *supra* note 4, at 511 (noting that his empirical study was based on the costs associated with twenty-two large corporate bankruptcies filed in 1994). The most important source of data about these large companies is Professor LoPucki's storehouse of data concerning bankrupt companies with assets over $100 million. Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 973–74 (1999) (describing the methodology of the study that restricted cases to those filed by publicly held companies worth at least $100 million in assets in 1980 dollars). *See also* Lynn M. LoPucki & Joseph W. Doherty, *Why are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1937–38 (2002) (indicating that the study used Professor LoPucki's Bankruptcy Reorganization Database); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race To The Bottom"*, 54 VAND. L. REV. 231, 237 n.20 (2001) (describing the companies studied as large, public companies and acknowledging the use of Professor LoPucki's bankruptcy research database); Neill D. Fuquay, Note, *Be Careful What You Wish For, You Just Might Get It: The Effect on Chapter 11 Case Length of the New Cap on a Debtor's Exclusive Period to File a Plan*, 85 TEX. L. REV. 431, 431 n.1 (2006) (thanking Professor LoPucki for providing access to his bankruptcy research database).

in the second study, we were able to complete the data gathering much more quickly.[14]

The 1994 study collected nearly 200 data points from more than 3,000 business bankruptcy cases, spread across twenty-three districts across the United States.[15] The cases were selected systematically from those filed in each district in each quarter of the year 1994. They included business cases filed by both natural persons and legal entities under Chapters 7, 11, and 13. The methodology is detailed in our first article reporting on that sample.[16] For the current paper, we include the 985 Chapter 11 business cases from the 1994 study.[17]

The 2002 study was undertaken with more limited resources. We could no longer maintain representation of all eleven circuits as we had in 1994, but geographic and legal diversity remained important, so we selected cases from districts in nine different circuits.[18] Again we took systematic samples of cases from each district, but in the second data collection we examined only business cases filed in Chapter 7 or Chapter 11.[19] For the current paper, we focus on the 437 Chapter 11 business cases from the 2002 study. With one exception, we do not compare the 1994 and 2002 samples statistically or try to assess trends in this paper.[20]

The combined 1994 and 2002 data gave us 1,422 Chapter 11 business cases to work with. In order to track outcomes over time, we followed the

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14. Our return to the courthouses was mostly virtual because the 2002 study was the first time we had the chance to use Public Access to Court Electronic Records ("PACER") in our work. *See generally*, Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2148 (2002). That access helped enormously in reducing both the time and the cost of our survey. We are grateful to the bankruptcy judges who permitted access to the PACER system.

15. The districts were Massachusetts, Southern District of New York, New Jersey, Maryland, Northern District of Texas, Eastern District of Michigan, Northern District of Illinois, Minnesota, Central District of California, Colorado, Middle District of Florida, New Hampshire, Connecticut, Delaware, Eastern District of North Carolina, Eastern District of Louisiana, Western District of Tennessee, Eastern District of Wisconsin, Nebraska, Western District of Oklahoma, Hawaii, Western District of Washington, and Middle District of Georgia.

16. Warren & Westbrook, *Financial Characteristics*, *supra* note 11, at 503–17. Robert M. Lawless and Elizabeth Warren assemble substantial evidence to show that the introduction of computer-generated bankruptcy petitions has had the unintended result of undercounting the number of small business bankruptcies in Chapter 7. Robert M. Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743, 768 (2005). That undercount has a powerful effect on the Administrative Office of the U.S. Courts' ("AO") statistics, but there is no reason to believe that it persists in Chapter 11, which is the focus of this inquiry.

17. We had a total of 1,017 cases in 1994, but missing data reduced the useful sample to 985.

18. The nine districts in both samples were Central District of California, Colorado, Delaware, Northern District of Illinois, Massachusetts, Nebraska, Southern District of New York, Northern District of Texas, and Western District of Washington.

19. We took Chapter 7 cases from only four of the districts. Warren & Westbrook, *Contracting Out*, *supra* note 11, at 1209. However, that fact is not relevant to this paper, which discusses only cases filed initially in Chapter 11.

20. We made this judgment for several reasons, but the most important is that the two samples vary by the districts included and the size of the cases, variations that have a substantial impact on results for some of the data discussed in this paper. We are currently working to develop a paper that will make some of these complex comparisons.

first sample for more than five years, and, thus far, we have followed the second for four years.

The largest case in our 2002 sample, *Global Crossing*, involved $16 billion in assets.[21] In our smallest case by assets in 2002, *Meyercon, Inc.*, the company declared that it arrived at the bankruptcy courthouse with only $13 in its corporate coffers.[22] In the 2002 sample, 15% are tiny cases, with less than $100,000 in assets, while at the other end of the spectrum 6% involve over $100 million in assets. Equally important, 19% are in the middle, between $5 million and $100 million. Although most of the cases in this sample would have less impact on capital markets or employment than *Global Crossing*, in the aggregate they represent the heart of the American economy. If the most important thing about the bankruptcy system is its ex ante effects on the granting of credit,[23] then we suspect these cases may collectively dwarf in importance most of those that appear in the pages of the *Wall Street Journal*.

The study was aimed at business cases. The question of which debtors make a case a business bankruptcy case and which make a case a nonbusiness case is somewhat more complex than might be assumed at first glance. Through the years, the AO has employed differing schemes for classifying cases as business and nonbusiness. At one time the local clerks decided which cases were classified as business or nonbusiness, using whatever criteria they thought were important. Over time, that system evolved into the current practice, which relies on a checkbox on the face sheet of the bankruptcy petition.[24] To find Chapter 11 business cases for this study, we included any cases in our sample districts that were in business form (e.g., corporations, partnerships, limited liability companies), that had a business name in the title (e.g., Jane Smith d/b/a Smith Ironworks), or for which the debtor had checked the "business" designation on the face sheet of the bankruptcy petition or indicated that the debtor was not a person.[25] Because we looked at the name of the debtor, which the AO evidently does not, it is possible that we picked up some cases where the "business" designation had not been checked and therefore would not have been included in the AO statistics.[26]

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21. Voluntary Petition (Chapter 11), *In re* Global Crossing, No. 02-40188 (S.D.N.Y. Jan. 28, 2002). A brief summary of key financial data for our 2002 sample is found in the Appendix. All monetary numbers in this paper are reported in constant 2002 dollars.

22. Voluntary Petition (Chapter 11), *In re* Meyercon, Inc., No. 02-11228 (C.D. Cal. Feb. 19, 2002) (on file with authors).

23. *See, e.g.*, Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 YALE L.J. 343, 344–48 (1999).

24. The classification systems are described in greater detail in Lawless & Warren, *supra* note 16, at 757–64.

25. We also collected data on nonbusiness Chapter 11s, but those data are not included in this analysis. Instead, in this paper we work only with cases identified as business proceedings under the protocol described in the text.

26. The great difficulties with the business classifications that appear in Chapter 7 and Chapter 13 when sole proprietors are classified as consumers are discussed in greater detail in Lawless &

Our approach, like the AO method, yields some sole proprietorships and other noncorporate business entities that file for Chapter 11. An important change from 1994 to 2002 lies in the much smaller proportion of natural persons in Chapter 11 in 2002. The percentage of natural persons dropped from about twenty-five percent in 1994 to about eleven percent in 2002. It is likely that the change reflects in part the increase in the debt limits on Chapter 13 effective in late 1994, which made it possible for many more entrepreneurs to seek relief there rather than in Chapter 11.[27] Even with this difference, however, there are few variations in the data between natural-person Chapter 11 cases and corporate cases, so the overall results are not much affected.

We recognize that some other researchers exclude noncorporate debtors from their studies of business bankruptcies, instead drawing an all-corporate sample.[28] By doing so, they risk biasing the data sample so that it no longer represents an accurate picture of the Chapter 11 system.[29] While it is true that omitting these debtors does not affect the specific data points we consider here, we could not know that fact if we had not collected the data about these debtors.

B. *One Measure of Success: A Confirmed Plan of Reorganization*

A discussion of plan-confirmation rates must begin with some careful distinctions. The idea of success in an ongoing, viable business can be elusive. On the one hand, a confirmed plan does not guarantee a successful future for the business. The evidence that a number of companies return to Chapter 11 after confirming a reorganization plan suggests that not all businesses will enjoy smooth sailing post-bankruptcy.[30] Even if a company does not soon return to the bankruptcy court, the definition of "success" in this context is subject to considerable debate. How long does a company have to exist post-reorganization before it is deemed a "success"? Must it be alive for ten years? Five years? Two years? What if it shrinks in size? Must it be profitable all or part of that time to be a success? What if it is purchased in

Warren, *supra* note 16, at 772–81. They speculate that the difficulties they identified are likely to be the result of the increasing use of pre-scripted Chapter 7 forms and computerized software that automatically designates all individuals as consumers, not businesses. *Id.* at 780. Those difficulties are unlikely to be present in Chapter 11 cases where such software is less likely to be used and, when used, would be far less likely to presume that the debtor was a consumer.

27. Ed Flynn, *Bankruptcy by the Numbers: Who Is Filing Chapter 11?*, 18-1 AM. BANKR. INST. J. 30, 30 (1999); Warren & Westbrook, *Financial Characteristics*, *supra* note 11, at 534.

28. *See, e.g.*, Arturo Bris et al., *Who Should Pay for Bankruptcy Costs?*, 34 J. LEGAL STUD. 295, 308 (2005) (describing the model used to determine the efficient cost allocation in bankruptcy as including a firm that requires equity financing); Stephen J. Lubben, *Business Liquidation*, 81 AM. BANKR. L.J. 65, 70 (2007); Morrison, *supra* note 8, at 4, 20–22.

29. *See* Warren & Westbrook, *Financial Characteristics*, *supra* note 11, at 546 (demonstrating that an accurate picture of the Chapter 11 system should include sole proprietorships which are concentrated near the smaller end of the spectrum of Chapter 11 filings).

30. *See* LoPucki & Kalin, *supra* note 13, at 235 (finding that ten of thirty one companies followed in the study eventually refiled for bankruptcy). This phenomenon is often called "Chapter 22."

year three? These and many similar questions make it difficult to pinpoint what constitutes success following confirmation.

An even more complex question is the meaning of the "success" represented by a liquidating plan. Because the bankruptcy code explicitly authorizes liquidating plans,[31] confirmation of such a plan successfully resolves a case in Chapter 11, but it does not necessarily represent a salvaged business or the realization of going-concern value. In many cases a liquidating plan will mean that equity will lose its stake, but the business (and its employees) may continue under new ownership following a going-concern sale. On the other hand, a liquidating plan may contemplate piecemeal liquidation not much different from a typical Chapter 7 proceeding. We note that less than twenty-one percent of the confirmed plans in our samples were liquidating plans.[32] We do not provide a more detailed analysis here.

While it is true that not every confirmed plan would meet a refined definition of success, the reverse is equally true: not every company whose Chapter 11 case is dismissed represents a complete failure.[33] Anecdotal evidence from experienced bankruptcy lawyers and judges suggests that a fair number of cases are dismissed because debtors and creditors have worked out a settlement that they were not able to achieve prior to the Chapter 11 filing.[34] For example, the debtor may have reached an arrangement with its principal lender, but have trouble with other creditors who refuse to return phone calls or to engage in serious negotiations. A filing may bring everyone to the table and permit a negotiated resolution, followed by swift dismissal.[35] Our data do not address these variations on success. With the data we have collected, we cannot measure post-bankruptcy outcomes to sort the happy workouts from the miserable failures.

Having said all of that, plan confirmation is surely the central measure of success in Chapter 11. A system that does not lead to confirmed plans cannot achieve its objectives. For example, filing for reorganization is unlikely to produce settlement and a friendly dismissal unless the debtor has a reasonable probability of confirming a plan if it remains in Chapter 11—and the

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31. 11 U.S.C. § 1123(b)(4) (2006).

32. Sorting out the various forms of liquidating plans is not an exact science, but it appears that about 11.5% of the 1994 confirmed cases would fairly be described as liquidating plans in one form or another. By 2002 that proportion had risen to 16.6%, with another 4.2% of cases in which it was not possible to determine whether the plan reorganized a business that was in place or liquidated it. While this rise in liquidating plans gives some support for the repeated claim that Chapter 11 liquidations have been rising, it is important to look at these numbers in context. In their report of companies filing between 1976 and 1989, the AO indicated that "about 25%" of confirmed plans called for the liquidation of the business. Without more data, it would be hard to declare a trend. ED FLYNN, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, STATISTICAL ANALYSIS OF CHAPTER 11, at 13 (1989).

33. *See* Gordon Bermant & Ed Flynn, *Bankruptcy by the Numbers, Outcomes of Chapter 11 Cases: U.S. Trustee Database Sheds New Light on Old Questions*, AM. BANKR. INST. J., Feb. 1998, at 8.

34. *See* Samuel L. Bufford, *What Is Right About Bankruptcy Law and Wrong About Its Critics*, 72 WASH. U. L.Q. 829, 833 (1994).

35. *See id.*