**Testimony Submitted to the American Bankruptcy Institute Commission**

**To Study the Reform of Chapter 11**

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**November 1, 2013**

My name is Anne Lawton, and I am a law professor at Michigan State University College of Law. My scholarly work focuses on the predictors of chapter 11 success, as measured by plan confirmation rates, and on the impact of BAPCPA’s changes on chapter 11 debtors, in particular those qualifying as small business debtors under the Code.

My scholarly work is empirically based and largely focused on BAPCPA’s “small business debtor” reforms. In order to study the effects of BAPCPA, I created two large datasets. The first contains all chapter 11 cases filed in calendar year 2004; there are 10,163 cases in that dataset. The second contains all chapter 11 cases filed in calendar year 2007; that dataset has 6,376 cases in it. I drew a 12% random sample from each dataset.

Depending on the hypothesis under investigation, the number of cases in the 2004 random sample ranges from 782 to 799. I am in the process of coding the cases in the 2007 random sample.

The overarching theme of my work is that reform should be undertaken only if the reform effort is informed by well-defined problems and well-articulated objectives. Otherwise, we end up solving problems that, in fact, are not actually problems, and creating solutions that do not fit the problems that do exist.

One or both of the following two objectives underlie not only BAPCPA’s small-business reforms but also the various proposals suggested in this testimony. The first objective is the expeditious exit from chapter 11 of the so-called “dead-on-arrival” debtor.[[1]](#footnote-1) The second is the reduction in chapter 11’s complexity and cost so as to improve plan-confirmation rates for those small business debtors with reasonable prospects for reorganization.[[2]](#footnote-2) My recommendations and analysis, therefore, are framed in terms of these two objectives.

Before proceeding to a detailed examination of my suggestions for reform, it is necessary to ask: what do we know about chapter 11 small business debtors? Small business debtors file the majority of chapter 11 cases.[[3]](#footnote-3) Yet, for some time now, we have known that outcomes for small business debtors, i.e., plan-confirmation rates, are quite poor.[[4]](#footnote-4)

First, debtors with larger liabilities confirm plans at significantly higher rates than do debtors with smaller liabilities. A recent study of chapter 11 cases filed in 2004 (the “Lawton Triage study”) found that 49% of debtors with liabilities in excess of $2 million – the liability cutoff for small businesses in 2004 – confirmed plans, while only 27% of debtors with liabilities of $2 million or less did so.[[5]](#footnote-5) Second, the Lawton Triage study also found that 62% of cases with committees confirmed plans while only 27% of those without committees did so.[[6]](#footnote-6)

If only these two criteria – creditor committee formation and total liability size – are used to determine small business status, then more than 60% of chapter 11 debtors are small businesses.[[7]](#footnote-7) Yet, another recent study of chapter 11 cases filed in 2004 (the “Lawton ABI study”) found that only 26% of small business debtors confirmed plans, while approximately 48% of non-small business debtors did so.[[8]](#footnote-8) This difference in confirmation rates was statistically significant.[[9]](#footnote-9)

What is not clear, however, is *why* small business debtors fare so poorly in chapter 11. With BAPCPA, Congress instituted a number of small-business reforms without first examining why such a disparity in outcomes exists between small and non-small business debtors. The mere fact of disparate outcomes drove the reform effort. But, reforming the Code only makes sense if it is the *Code* that creates impediments to success for small business debtors. If a significant failure rate is inevitable for small business enterprises, then reform may do little besides waste time, money, and effort.

My testimony is divided into two parts. In Part I, I propose simplifying the Code’s current small business debtor definition. The proposal is based on the results of my analysis of the 2004 random sample data. If Congress decides that some or all of BAPCPA’s reform efforts are worth keeping, then it makes sense to make the identification of small and non-small business debtors an easier task. The current definition is loaded down with unnecessary qualifiers that accomplish little at potentially great cost.

In Part II, I present data, once again drawn from the 2004 random sample, about the average time to disposition – confirmation, conversion, or dismissal – for pre-BAPCPA chapter 11 cases. I have not finished coding and analyzing the cases from the 2007 random sample and, thus, cannot conclude that BAPCPA’s 300-day plan-proposal deadline for small business debtors did not significantly change the average time to disposition post-2005. Nonetheless, I can say that the 300-day plan-proposal deadline was a solution largely in search of a problem. Moreover, 99% of the small business debtors that did confirm a plan in 2004 would not have satisfied the 45-day plan-confirmation deadline now codified at 11 U.S.C. §1129(e).

**Part I – A Proposal to Simplify the Small Business Debtor Definition**

I propose simplifying the Code’s small business debtor definition by (1) deleting the requirement that debtors be engaged in business; (2) changing the computation of debtor liabilities; (3) including real property debtors as small business debtors; and (4) changing the Code’s language to exclude as a small business debtor any case in which a committee forms in North Carolina or Alabama, where the U.S. trustee does not operate.

My proposed change to the Code’s current definition reads as follows:

The term "small business debtor"–

(A) subject to subparagraph (B), means a person that has secured and unsecured debts as of the date of the petition or the order for relief in an amount not exceeding $2,490,925 for a case in which a committee of unsecured creditors has not been appointed under section 1102(a)(1) or the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate secured and unsecured debts in an amount greater than $2,490,925.

A. Description of the Problem

The Code’s small business debtor definition should provide a simple method for identifying early in the case those debtors whose cases qualify for small business treatment. The reason for early identification lies in the Code’s requirements. The small business debtor must append certain financial documents to the voluntary petition, and the Office of the United States trustee (“OUST”) has additional monitoring requirements in small business cases.[[10]](#footnote-10) As described more fully *infra* in Part II of this report, plan-proposal and plan-confirmation deadlines also apply to the small business debtor. Thus, the debtor and other parties in interest must be able to correctly identify which debtors fall within the Code’s small business provisions and they must be able to do so early in the chapter 11 case.

The current small business debtor definition at §101(51D) is needlessly complex. It includes qualifiers that make early sorting of debtors more difficult. The definition’s complexity creates uncertainty about which debtors qualify for small business treatment, thereby increasing the chances for litigation about small business status. Its exclusions from small business coverage make little sense in light of the reasons for Congress’ adoption of the small business provisions in BAPCPA. The problem is more thoroughly described in the Lawton ABI study.[[11]](#footnote-11)

The following summary, however, highlights the portions of the Code’s current definition that are problematic:

1. The exclusion from coverage of debtors not engaged in “commercial or business activities.”
2. The deduction from debtor liability totals of any contingent, unliquidated, affiliate, and insider debt.
3. The exclusion from coverage of any debtor whose “primary activity is the business of owning or operating real property”; and
4. The exclusion from coverage of any case in which an official creditor committee is appointed, but only if the United States trustee appointed the committee.

B. The Empirical Evidence

The findings in this portion of my testimony are taken from the Lawton ABI study and are based on a random sample of chapter 11 cases drawn from the population of all chapter 11 cases filed in calendar year 2004.[[12]](#footnote-12) The Lawton ABI study found that two elements in the Code’s current small business debtor definition – total liabilities and official creditor committee formation – do a very good job of identifying those debtors at risk for chapter 11 failure, i.e., not confirming a plan.[[13]](#footnote-13)

The Lawton ABI study used total liabilities and official creditor committee formation to categorize chapter 11 cases as small versus non-small business debtors. Any debtor with total liabilities in excess of $2 million[[14]](#footnote-14) - without deducting contingent, unliquidated, affiliate, or insider debt – automatically was excluded from the pool of small business debtors.[[15]](#footnote-15) The same held for official creditor committee formation. If an official committee formed in the debtor’s case, then the case did not qualify as a small business. Thus, any debtor with total liabilities of $2 million or less in a case in which no official creditor’s committee formed was counted as a small business debtor. More than 60% of the debtors in the 2004 random sample qualified as small business debtors using only these two easily identified criteria.

This simple definition of a small business debtor worked quite well at sorting those debtors with high and low prospects for plan confirmation in chapter 11. The plan-confirmation rate for non-small business debtors was 48%; for small business debtors it was only 26%.[[16]](#footnote-16) This difference in confirmation rates was statistically significant.[[17]](#footnote-17)

A simpler definition is both more over-inclusive and under-inclusive than the Code’s current small business debtor definition. It is more over-inclusive because individual consumer debtors and those whose primary activity involves real estate may be counted as small business debtors under the simpler definition. It is under-inclusive because some debtors on the cusp of the liability cutoff will avoid small business coverage if contingent, unliquidated, affiliate, and insider debt is included when computing debtors’ liabilities.

But, as explained in the following section, the Code’s current definition is difficult to apply and undermines the goal of early sorting of debtors. “[A] bright-line definition minimizes litigation and enables the court and counsel to focus on the merits of the Chapter 11 case.”[[18]](#footnote-18) In addition, some of Congress’s definitional choices – the United States trustee language and the “primary activity” exclusion – appear to be drafting errors.

C. The Findings Applied and the Legislative History

*1. Chapter 11 Consumer Debtors*

BAPCPA’s legislative history provides no explanation for why Congress chose to exclude chapter 11 consumer debtors from small business coverage. Congress, however, did express concern about the “lack of creditor oversight” in small business cases.

Although the Bankruptcy Code envisions that creditors should play a major role in the oversight of chapter 11 cases, this often does not occur with respect to small business debtors. . . . The resulting lack of creditor oversight creates a greater need for the United States trustee to monitor these cases closely.[[19]](#footnote-19)

Creditor committee formation does predict plan confirmation. The Lawton Triage study found that cases with official creditor committees confirmed plans at a rate of 62%.[[20]](#footnote-20) The rate of plan confirmation was 27% for cases without committees.[[21]](#footnote-21) This difference in confirmation rates is statistically significant.[[22]](#footnote-22)

Creditor committees, however, rarely form in chapter 11 consumer cases. In fact, in the Lawton ABI study, a committee formed in only 1 of 102 cases in which the debtor identified itself on the petition as having primarily consumer/non-business debts.[[23]](#footnote-23) If one goal of BAPCPA was to increase monitoring of those cases without active creditor participation, then Congress’ decision to exclude consumer chapter 11 cases from the small business reforms makes little sense.

*2. Computation of Liabilities*

The current liability cutoff for small business debtors is $2,490,925. But, in computing liabilities a debtor must deduct contingent, liquidated, affiliate and insider debt. There are two reasons to abandon the complicated system of liability computation created by BAPCPA’s definition of a small business debtor.

First, the current bankruptcy forms do not provide an easy way to verify the debtor’s calculations. The forms do not require the debtor to separately itemize and describe its (1) contingent; (2) unliquidated; (3) affiliate; and (4) insider debt. There is a check box on the petition for chapter 11 cases telling the debtor to “Check if: Debtor’s aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,490,925.” That box, however, simply repeats the Code’s language. It does not provide a simple way to determine whether the debtor’s liability calculation is correct. Without itemized totals for each form of debt deduction required, how is the OUST to verify the debtor’s calculations? If the purpose of the debt limit is to trigger inquiry about whether a debtor is indeed a small business debtor,[[24]](#footnote-24) complicating the computational process undermines that goal.

Second, the Lawton Triage study found that debtors with more than $2 million in liabilities – the statutory debt limit in 2004 – confirmed plans at a significantly higher rate statistically than did debtors with less than $2 million in liabilities, regardless of whether liability totals included or excluded contingent and unliquidated debt.[[25]](#footnote-25) The Lawton ABI study found that deduction of affiliate and insider debt affected small business status in less than 2% of the cases in the 2004 random sample.[[26]](#footnote-26)

Moreover, debtors and their counsel do not always understand what constitutes “contingent” or “unliquidated” debt.[[27]](#footnote-27) The Code’s definition of an affiliate also creates problems for debtors.[[28]](#footnote-28) Complicating calculations even more is the fact that affiliate and insider debt must be subtracted even if the affiliate or insider has not filed for bankruptcy. How is a creditor to verify the debtor’s liability calculations without knowing all of the debtor’s affiliates and insiders? Debtors do not always describe liabilities on their schedules as “affiliate loan,” “intercompany loan,” or “insider compensation.”

Thus, the current method for calculating liabilities is needlessly complicated. One solution is to amend the bankruptcy forms to require separate itemization of contingent, unliquidated, affiliate and insider debt. But, the empirical evidence strongly suggests that simplifying the calculation of debtor liabilities will not affect the ability to identify those debtors with reduced prospects for chapter 11 success.

*3. Primary Activity: Real Property*

The Code excludes from small business coverage any debtor “whose primary activity is the business of owning or operating real property or activities incidental thereto.” There are at least two problems with retaining the Code’s “primary activity” exclusion.

First, Congress failed to define what constitutes a debtor’s primary activity. While the Code does define “single asset real estate” (“SARE”), the term “primary activity” and SARE are not co-extensive.[[29]](#footnote-29) As a result, courts must define the term, thereby opening the door to litigation about the exact contours of the “primary activity” exclusion. Uncertainty about definitional terms, however, undermines the goal of early identification of those debtors most at risk of failure in chapter 11.

Second, it is unclear what purpose is served by excluding from small business coverage those debtors whose primary activity is the business of owning or operating real property. The 1997 Commission included all single-asset real estate cases, regardless of the amount of the debtor’s liabilities, in its definition of a small business debtor.[[30]](#footnote-30) Congress had no data indicating that real-property debtors that otherwise would qualify for small business treatment were more successful in chapter 11 than other small business owners. The legislative histories for BAPCPA and for the 1994 amendments – when Congress created the small business election – offer no insight as to why Congress carved out these debtors from the pool of potential small business cases.[[31]](#footnote-31)

*4. United States Trustee and Bankruptcy Administrators*

The Code’s small business debtor definition excludes from its coverage any case in which the United States trustee has appointed an active and representative committee of unsecured creditors. The problem is that the United States trustee does not operate in the six judicial districts in North Carolina and Alabama. Suppose a debtor with $2 million in liabilities files for chapter 11 in the Southern District of Alabama. If the Bankruptcy Administrator recommends and the bankruptcy court appoints an official creditors’ committee in the case, the Code says that the case is a small business case because the United States trustee “has not appointed” the committee.

This language no doubt is a drafting error. Congress was concerned with the lack of oversight in small business cases, not with the mechanics of creditor committee appointment.

**Part II - BAPCPA’s Small Business Time Frames**

The empirical evidence shows that more than half of all chapter 11 cases filed pre-BAPCPA were dismissed, converted, or had plans confirmed within 300 days of the order for relief. In addition, between 63% and 67% of the pre-BAPCPA chapter 11 cases reached initial disposition, i.e., plan confirmation, conversion, or dismissal, within one year of the order for relief. Given the speed with which bankruptcy courts disposed of chapter 11 cases pre-BAPCPA, it is unclear what problem Congress was solving by imposing the 300-day plan-proposal deadline now codified at §1121(e)(2).

The 45-day plan-confirmation deadline is unworkable. Data from the 2004 random sample demonstrates that in less than 3% of confirmed-plan cases was a plan confirmed within 45 days of its proposal. That figure is even more dismal for small business cases; less than 1% of small businesses that confirmed a plan in 2004 did so within 45 days of first-plan proposal. Had BAPCPA’s 45-day deadline existed in 2004, 112 small business cases would not have confirmed a plan had debtor’s counsel not sought and the bankruptcy court granted, pursuant to §1121(e)(3), an extension of the 45-day period.

A. Description of the Problem

With BAPCPA, Congress created plan-proposal and plan-confirmation time frames applicable only to small business debtors. The small business debtor has a 180-day exclusivity period compared with the 120-day period for non-small business debtors.[[32]](#footnote-32) The longer exclusivity period, however, is the only time provision in BAPCPA that favors small business debtors.

The Code provides that in a small business case, “the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief.”[[33]](#footnote-33) The Code also provides that in a small business case the bankruptcy court must confirm the plan “no later than 45 days after the plan is filed.”[[34]](#footnote-34) Neither the 300-day plan-proposal nor the 45-day plan-confirmation time frame applies to a non-small business debtor.

The bankruptcy court may extend the 300-day and/or the 45-day periods, but the extension order must be signed prior to the expiration of the relevant time frame.[[35]](#footnote-35) The debtor also must demonstrate by a preponderance of the evidence that “it is more likely than not that the court will confirm a plan within a reasonable time frame.”[[36]](#footnote-36)

As one bankruptcy court observed, the interplay of the 300-day and 45-day deadlines creates “virtually insurmountable obstacles, particularly when the plan is amended after filing.”[[37]](#footnote-37) For example, if the bankruptcy court does not combine the hearing on the disclosure statement with that for plan confirmation,[[38]](#footnote-38) “there is absolutely no possibility of even considering confirmation within the 45-day period” given the Bankruptcy Rules’ 28-day notice period.[[39]](#footnote-39) But, as one bankruptcy court observed, “[t]he notion that a debtor must routinely file a motion to extend time for confirmation *with* its plan produces less efficiency rather than more.”[[40]](#footnote-40)

These two provisions have created “interpretive problems for the courts . . . and traps for unwary counsel.”[[41]](#footnote-41) The interpretation issues are legion, and the courts are not of one mind on many of the questions raised by BAPCPA’s new time frames. Some of those questions include the following:

1. If a small business debtor improperly designates itself as a non-small business debtor on the petition and the U.S. trustee or other party in interest successfully challenges that designation, does the 300-day plan-proposal period run from the order for relief *or* from the date on which the bankruptcy court determines that the debtor is indeed a small business debtor?[[42]](#footnote-42)
2. Does the 300-day deadline apply only to the small business debtor or does it also apply to any party in interest in the small business case?[[43]](#footnote-43)
3. Is the debtor’s only obligation to “submit any plan within 300 days, and after doing so, debtor can submit plans after 300 days if none have been confirmed?”[[44]](#footnote-44) In other words, does the 300-day plan-proposal period apply to amended plans or only to the debtor’s initially filed plan?[[45]](#footnote-45)
4. Does failure to propose a plan within 300 days of the order for relief mandate dismissal of the small business case?[[46]](#footnote-46)
5. Does failure to confirm a plan within 45 days of plan proposal mandate dismissal of the small business case?[[47]](#footnote-47)
6. Does filing an amended plan within the 300-day plan-proposal period re-set the 45-day clock for plan confirmation?[[48]](#footnote-48)
7. May a court extend the 45-day plan-confirmation period absent entry of a signed order within those 45 days?[[49]](#footnote-49)

Having bankruptcy courts determine the answers to these questions on a case-by-case basis undermines both uniformity and efficiency. Before eliminating the deadlines, however, it is important to understand the reasons Congress instituted them in the first place. If the deadlines are accomplishing Congressional goals, then modifications of the current time frames to achieve greater uniformity may be in order.

B. The Legislative History

Why did Congress create the 300-day plan proposal and 45-day plan-confirmation time frames in BAPCPA? The legislative history provides little guidance. But, the House Report accompanying BAPCPA states that the bill “includes provisions with respect to small business . . . debtors largely derived from recommendations of the National Bankruptcy Review Commission.”[[50]](#footnote-50) Thus, judges and commentators often turn to the Commission’s report for guidance.

The National Bankruptcy Review Commission (“Commission”) identified two types of chapter 11 debtors: (1) “the relatively small proportion” of debtors with a reasonable chance of reorganizing and (2) the “much larger proportion of cases in which the debtor has no reasonable prospect of rehabilitation.”[[51]](#footnote-51) In reaction to studies that chapter 11 debtors “often live under the protection of the Bankruptcy Code for literally years, often without providing any meaningful return to unsecured creditors,”[[52]](#footnote-52) the Commission recommended an outside time limit for plan confirmation of 150 days from the order for relief and a 90-day plan-proposal period.[[53]](#footnote-53)

Congress did not adopt the Commission’s suggested time frames. Instead, Congress significantly lengthened the plan-proposal period – from 90 to 300 days – while effectively shortening the time to confirmation from plan proposal – from 60 to 45 days. Nonetheless, Congress’s imposition of plan-proposal and plan-confirmation time frames attests to the impact of the Commission’s articulated concern about debtors languishing in chapter 11.

C. The Evidence

The findings in this section of my testimony are based on (1) a published study of 1,422 chapter 11 cases filed in 1994 and 2002 and drawn from a sampling of federal judicial districts (the “Warren & Westbrook study”);[[54]](#footnote-54) and (2) a preliminary descriptive analysis of 799 chapter 11 cases drawn from a random sample of all chapter 11 cases filed in calendar year 2004 (the “Lawton Time study”).[[55]](#footnote-55)

The empirical evidence belies the Commission’s portrait of the small business debtor languishing in chapter 11. Both the Warren & Westbrook study and the Lawton Time study found that pre-BAPCPA bankruptcy courts generally disposed of chapter 11 cases in an expeditious manner.

The Warren & Westbrook study found that the average times to confirmation, conversion or dismissal “in the 1994 and 2002 studies were 329 and 327 days, respectively.”[[56]](#footnote-56) The Lawton Time study found that for the 2004 cases the average time from the order for relief in chapter 11 to the initial disposition of the case[[57]](#footnote-57) was 371 days or just slightly longer than one year.

Significant outliers, however, make averages potentially misleading. In the Warren & Westbrook study, the median time to disposition was 264 days for the 1994 cases and 274 days for the 2002 cases.[[58]](#footnote-58) The median time to disposition in the Lawton Time study was 280 days. Thus, half of the chapter 11 cases in the Warren & Westbrook, and Lawton Time, studies had confirmed a plan or were dismissed or converted in less than 10 months – the outer time limit currently allowed small business debtors to propose a chapter 11 plan.

Using BAPCPA’s maximum 300-day plan-proposal time and its 45-day plan-confirmation time, the data from the Lawton Time study shows that 60% of the pre-BAPCPA cases had been disposed of within that 345-day period. Moreover, between 63% and 67% of the chapter 11 cases in the Warren & Westbrook,[[59]](#footnote-59) and Lawton Time, studies were disposed of within one year’s time. Table I presents data from the Lawton Time study broken down by time to disposition. The figures in Rows (2) through (6) of Table I are cumulative; they include all cases disposed of by the time period indicated.

**Table I: Order for Relief to One year**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Time to Disposition** | **Number of Cases** | **Percentage of Sample** |
| (1) | 90 days (3 months) | **123** | **15.4%** |
| (2) | 180 days (6 months) | **258** | **32.3%** |
| (3) | 270 days (9 months) | **389** | **48.7%** |
| (4) | 300 days | **427** | **53.4%** |
| (5) | 345 days | **483** | **60.5%** |
| (6) | 365 days | **507** | **63.5%** |

What happens after one year? The Warren & Westbrook study found that at least three-quarters of the cases had been disposed of within 15 months, between 83% and 85% within a year and a half, and more than 92% within 2 years’ time.[[60]](#footnote-60) The disposition percentages were slightly lower for each time frame in the Lawton Time study, but not substantially different from those in Warren & Westbrook’s study. For example, the Lawton Time study found that approximately 72% of the 2004 cases had been confirmed, converted or dismissed within 15 months of the order for relief. *See* Table II for more detailed findings from the Lawton Time study. In both the Warren & Westbrook, and the Lawton Time, studies, almost 90% of the chapter 11 cases reached disposition within 2 years’ time. Thus, the pre-BAPCPA data simply does not support the Commission’s description of chapter 11 debtors “living under the protection of the Bankruptcy Code . . . literally for years.”

**Table II: One Year and Beyond**

|  |  |  |
| --- | --- | --- |
| **Time to Disposition** | **Number of Cases** | **Percentage of Sample** |
| Up to 15 months | **575** | **72%** |
| Up to 18 months | **638** | **80%** |
| Up to 2 Years | **713** | **89%** |
| Greater than 2 Years | **799** | **100%** |

Of those cases without a disposition after one year’s time, what percentage would qualify as small business debtors? The Warren & Westbrook study did not analyze the data in this fashion. But, Table III provides data from the Lawton Time study using the simplified definition of a small business debtor proposed in Part I – any debtor, whether engaged in business or not, in which total liabilities were $2 million or less (the statutory debt limit in 2004) and in which no official creditors’ committee had formed. The analysis in Table III is based solely on the total liabilities of *each* debtor in the sample. It does not take into account liability totals for groups of affiliated debtors, as provided for by §101(51D)(B). That data is presented in Table IV.[[61]](#footnote-61)

**Table III: Small Businesses 346 Days and Beyond**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **A** | **B** | **C** | **D** | **E** |
|  | **Time to Disposition** | **Small Business (SB) Cases reaching disposition** | **Total Chapter 11 Cases reaching disposition** | **SB as % of all cases reaching disposition** | **SB as % of initial 799-case sample** |
| (1) | 346 Days to 1 Year | 14 | 24 | 14/24 = 58% | 14/799 = 1.8% |
| (2) | 366 – 456 Days (15 mos.) | 44 | 68 | 44/68 = 65% | 44/799 = 5.5% |
| (3) | 457 – 547 Days (18 mos.) | 26 | 63 | 26/63 = 41% | 26/799 = 3.3% |
| (4) | 548 Days to 2 Years | 42 | 75 | 42/75 = 56% | 42/799 = 5.3% |
| (5) | More than 2 Years | 36 | 86 | 36/86 = 42% | 36/799 = 4.5% |
| **(6)** | **Totals: 346 Days & Beyond** | **162** | **316** | **162/316 = 51%** | **162/799 = 20.3%** |
| **(7)** | **Totals: 366 Days & Beyond** | **148** | **292** | **148/292 = 51%** | **148/799 = 18.5%** |

Table III provides both the number of small business cases and the total number of cases remaining without disposition in chapter 11 for more than 345 days. (The 345 days is the combination of the 300-day plan-proposal and 45-day plan-confirmation periods established for small business debtors in BAPCPA.) The figures in Rows (1) through (5) are not cumulative; they represent the number of debtors reaching disposition within the particular time frame indicated. Rows (6) & (7) provide total number of cases reaching disposition on Day 346 and beyond.

Table IV presents data from the Lawton Time Study, using the same simplified definition of a small business debtor but also taking account of groups of affiliated debtors, as provided for by §101(51D)(B) of the Code’s small business debtor definition. The change in number of small business debtors was small. Adding liabilities of pending affiliated debtors to random sample debtors’ liabilities changed the status of 12 debtors in the random sample from small to non-small business debtors.

**Table IV: Small Business Debtors Including Groups of Affiliates**

**346 Days and Beyond**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | **A** | **B** | **C** | **D** | **E** |
|  | **Time to Disposition** | **Small Business (SB) Cases reaching disposition** | **Total Chapter 11 Cases reaching disposition** | **SB as % of all cases reaching disposition** | **SB as % of initial 799-case sample** |
| (1) | 346 Days to 1 Year | 14 | 24 | 14/24 = 58% | 14/799 = 1.8% |
| (2) | 366 – 456 Days (15 mos.) | 43 | 68 | 43/68 = 63% | 43/799 = 5.4% |
| (3) | 457 – 547 Days (18 mos.) | 22 | 63 | 22/63 = 35% | 22/799 = 2.8% |
| (4) | 548 Days to 2 Years | 38 | 75 | 38/75 = 51% | 38/799 = 4.8% |
| (5) | More than 2 Years | 33 | 86 | 33/86 = 38% | 33/799 = 4.1% |
| **(6)** | **Totals: 346 Days & Beyond** | **150** | **316** | **150/316 = 47%** | **150/799 = 19%** |
| **(7)** | **Totals: 366 Days & Beyond** | **136** | **292** | **136/292 = 47%** | **136/799 = 17%** |

Tables III and IV demonstrate two things. First, a little more than half of those debtors remaining in chapter 11 after 345 days, and 1 year, from the order for relief were small business debtors. *See* Table III, Column D, Rows (6) & (7). When groups of affiliated debtors were taken into account, however, those percentages declined to 47%. *See* Table IV, Column D, Rows (6) & (7). Keep in mind, however, that the Lawton ABI study identified more than 60% of the ABI sample as being small business debtors, using the simplified definition proposed in Part I.[[62]](#footnote-62) Thus, it does not appear that small business debtors are disproportionately represented in the group of debtors remaining without disposition in chapter 11 at 345 days and 1 year, respectively, from the order for relief.

Second, at Day 346 from the order for relief, there were 162 small business debtors remaining in chapter 11. *See* Table III, Column B, Row (6). Those 162 debtors comprised approximately 20% of the original 799-case sample. If liabilities of affiliated debtors are included in the liability calculations, the number of “small business debtors” remaining in chapter 11 more than 345 days drops to 150. *See* Table IV, Column B, Row (6). Therefore, whether the measure of liabilities is limited to those of *each* debtor in the sample or aggregated to include those debtors filing as part of a group of affiliated debtors, pre-BAPCPA, when no plan-proposal or plan-confirmation deadlines were in place, somewhere between 19-20% of the chapter 11 cases were small business debtors that failed to reach disposition within 345 days.

Were these small business debtors languishing in chapter 11? The short answer is “no.” Tables V and VI provide data about the number of small business debtors proposing and confirming plans more than 345 days from the order for relief. Table V’s data is based on liability totals for *each* debtor in the random sample without aggregating liabilities of affiliated entities. Table VI, on the other hand, includes affiliate liabilities in liability totals for those debtors comprising a group of affiliated debtors. Rows (1) through (5)’s data in each table is for the time period specified. Cumulative totals are provided in Rows (6) & (7).

Of the small business debtors remaining without disposition after 345 days, at least one plan was proposed in 71% of the cases. *See* Table V, Column E, Row (6); Table VI, Column E, Row (6). The plan proposal rate increases, albeit slightly, to 73% if the time frame is moved out 20 days to one year’s time from the order for relief. *See* Tables V & VI, Column E, Row (7).

**Table V: 346 Days and Beyond – Small Business Plan-Proposal**

**and Plan-Confirmation Rates**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **A** | **B** | **C** | **D** | **E** | **F** |
|  | **Time to Disposition** | **No. of SB\* Cases** | **No. proposing plans** | **No. of confirmed plans** | **% proposing plans** | **% of all SB confirming plans** |
| (1) | 346 Days to 1 Year | 14 | 7 | 1 | 7/14 = 50% | 1/14 = 7.1% |
| (2) | 366 – 456 Days (15 mos.) | 44 | 30 | 16 | 30/44 = 68% | 16/44 = 36% |
| (3) | 457 – 547 Days (18 mos.) | 26 | 18 | 12 | 18/26 = 69% | 12/26 = 46% |
| (4) | 548 Days to 2 Years | 42 | 34 | 26 | 34/42 = 81% | 26/42 = 62% |
| (5) | More than 2 Years | 36 | 26 | 16 | 26/36 = 72% | 16/36 = 44% |
| **(6)** | **Totals: 346 Days & Beyond** | **162** | **115** | **71** | **115/162 = 71%** | **71/162 = 44%** |
| **(7)** | **Totals: 366 Days & Beyond** | **148** | **108** | **70** | **108/148 = 73%** | **70/148 = 47%** |

\*SB = small business

**Table VI: 346 Days and Beyond – Small Business Plan-Proposal**

**and Plan-Confirmation Rates Taking Account of Groups of Affiliated Debtors**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **A** | **B** | **C** | **D** | **E** | **F** |
|  | **Time to Disposition** | **No. of SB\* Cases** | **No. proposing plans** | **No. of confirmed plans** | **% proposing plans** | **% of all SB confirming plans** |
| (1) | 346 Days to 1 Year | 14 | 7 | 1 | 7/14 = 50% | 1/14 = 7.1% |
| (2) | 366 – 456 Days (15 mos.) | 43 | 30 | 16 | 30/43 = 70% | 16/43 = 37% |
| (3) | 457 – 547 Days (18 mos.) | 22 | 14 | 8 | 14/22 = 64% | 8/22 = 36% |
| (4) | 548 Days to 2 Years | 38 | 30 | 23 | 30/38 = 79% | 23/38 = 61% |
| (5) | More than 2 Years | 33 | 25 | 16 | 25/33 = 76% | 16/33 = 48% |
| **(6)** | **Totals: 346 Days & Beyond** | **150** | **106** | **64** | **106/150 = 71%** | **64/150 = 43%** |
| **(7)** | **Totals: 366 Days & Beyond** | **136** | **99** | **63** | **99/136 = 73%** | **63/136 = 46%** |

\*SB = small business taking account of groups of liabilities for groups of affiliated debtors

The confirmation rate, of course, was lower than the plan-proposal rate. Of those small business cases remaining in chapter 11 more than 345 days, a plan was confirmed in 43-44% of the cases. *See* Tables V & VI, Column F, Row (6). The plan-confirmation rate moved up slightly to 46-47% for those small business cases remaining in chapter 11 more than one year. *See* Tables V & VI, Column F, Row (7). While fewer than half the small business debtors remaining in chapter 11 after one year confirmed plans, the confirmation rate for one year and beyond was much higher than the 26% overall plan-confirmation rate for small business debtors found in the Lawton ABI study.[[63]](#footnote-63) As Warren and Westbrook noted in their study of debtors from 1994 and 2002,

[o]nce the courts had done some early culling of the DOA [dead-on-arrival] cases, confirmation rates rose sharply. Cases that survived the initial screening were far more likely to confirm a plan of reorganization.[[64]](#footnote-64)

To put this data into perspective, less than 11% of the cases from the original sample (86 of 799) involved (1) small business debtors (2) that never *confirmed* a plan (3) yet remained in chapter 11 more than 345 days.[[65]](#footnote-65) *See* Table VI, Column F, Row (6). Even more startling is the realization that less than 6% of the cases in the original 799-case sample (46 of 799) involved (1) small business debtors (2) that never *proposed* a plan yet (3) remained in chapter 11 more than 345 days. *See* Table VI, Column E, Row (6).

In other words, the small business debtors remaining in chapter 11 after 345 days were not languishing. Regardless of the method of calculating liabilities, more than 70% had proposed plans. S*ee* Tables V & VI, Column E, Row (6). For those cases in which a plan was proposed, the confirmation rate was high – approximately 60% (64/106). *See* Table VI, Columns C & D, Row (6).

What about the 45-day plan-confirmation deadline? The Warren & Westbrook study did not examine this aspect of BAPCPA’s changes to the Code, but preliminary analysis of data from the Lawton Time study shows the detrimental impact that the 45-day deadline would have had on pre-BAPCPA cases.

I ran the data two ways. Table VII contains time-to-confirmation figures based solely on total liabilities of *each* debtor in the 799-case random sample. The first row of the Table presents data only for small business debtors, using each debtor’s scheduled total liabilities. Row 1 of Table VIII provides time-to-disposition figures for small businesses, as well, but takes account of liability totals for groups of affiliated debtors. In other words, in Table VIII, a case without a committee in which the debtor’s scheduled total liabilities fell below $2M counted as a small business *unless* the debtor was part of a group of affiliated debtors whose aggregate total liabilities, as scheduled, exceeded $2M.

**Table VII: Time to Confirmation in Days from First Plan Proposal**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Type of Debtor** | **1-45** | **46-60a** | **61-90** | **91-180** | **181 days to 1 Year** | **>1 Year** | **Average** | **Median** |
| Small | 2 | 3 | 12 | 51 | 32 | 23 | 224 | 161 |
| All Debtors | 7 | 9 | 36 | 100 | 69 | 44 | 220 | 150 |

aSixty days was the 1997 Commission’s recommended time frame.

**Table VIII: Time to Confirmation in Days from First Plan Proposal**

**Taking Account of Groups of Affiliated Debtors**

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **Type of Debtor** | **1-45** | **46-60a** | **61-90** | **91-180** | **181 days to 1 Year** | **>1 Year** | **Average** | **Median** |
| Small | 1 | 3 | 12 | 48 | 29 | 20 | 221 | 157 |
| All Debtors | 7 | 9 | 36 | 100 | 69 | 44 | 220 | 150 |

aSixty days was the 1997 Commission’s recommended time frame.

For the 265 cases with confirmed plans, the average time from first plan proposal to confirmation was 220 days. Median time was 150 days. Thus, half of the debtors with confirmed plans obtained confirmation within 5 months of first proposing a plan.

Using the figures from Table VIII, 113 of the 265 confirmed-plan cases involved small business debtors. Average time to plan confirmation for the subset of small business debtors was 221 days, while more than half obtained confirmation within 157 days (or a little more than five months) of first plan proposal. *See* Table VIII, Average and Median Figures in Row (1).

To put this data into perspective, in only 7 of the 265 cases with confirmed plans did the debtor obtain confirmation within 45 days of first proposing a plan.[[66]](#footnote-66) *See* Table VIII. Only 1 of those 7 cases involved a small business debtor. Thus, had BAPCPA’s 45-day plan-confirmation deadline existed in 2004, only 1 small business debtor would have satisfied that deadline. Debtors’ counsel would have had to move for an extension in the other 112 small business cases in which a plan was ultimately confirmed. The failure to do so would have mandated dismissal in some jurisdictions, thereby derailing any further attempts to move toward plan confirmation.[[67]](#footnote-67)

In conclusion, the Lawton Time study data demonstrates the following:

1. Without any plan-proposal or plan-confirmation deadlines, 60% of chapter 11 debtors pre-BAPCPA had reached confirmation, conversion, or dismissal within 345 days of the order for relief. At least 63% of chapter 11 debtors had done so within a year of the order for relief. *See* Table I, Rows (5) & (6).
2. Of the random-sample cases still pending in chapter 11 after 345 days, approximately 20% of the original 799-case sample qualified as small businesses, using the simplified small business definition proposed in Part I. *See* Tables III & IV, Column E, Row (6).
3. A plan was proposed in 71% of the small business cases remaining in chapter 11 after 345 days. *See* Tables V & VI, Column E, Row (6).
4. A plan was confirmed in approximately 43-44% of the small business cases remaining in chapter 11 after 345 days. *See* Tables V & VI, Column F, Row (6).
5. Of those small business cases remaining in chapter 11 more than 345 days and proposing a plan, confirmation occurred in 60% of the cases. (Table VI, Row (6): 64/106 cases.)
6. Had BAPCPA’s 45-day plan-confirmation deadline existed in 2004, only 1 of 113 small business debtors would have satisfied that deadline. *See* Table VIII. Absent an extension of the 45-day deadline or some other mitigating doctrine employed by the courts, 112 small business cases would not have reached confirmation in 2004.

Of course, it’s always possible to move cases more quickly through the system. The issue is the costs versus the benefits of further speeding up the process. The 2004 data demonstrates that BAPCPA’s deadlines would affect at most 20% of all chapter 11 cases. Yet, the time deadlines and the increased monitoring necessary to enforce those deadlines affect all small business debtors.

There currently is no post-BAPCPA data on the impact of the small-business deadlines on time to disposition for small business cases.[[68]](#footnote-68) Given the fact that only 20% of all chapter 11 cases filed in 2004 were (1) small businesses (2) still in chapter 11 (3) without disposition after 345 days, it is possible that an analysis of post-BAPCPA data will find no statistically significant difference in time to disposition pre- and post-BAPCPA. But, even if a statistically significant decrease in disposition times does exist, the question is at what cost? As the 2004 data demonstrates, bankruptcy courts confirmed plans in 64 cases after the 345-day mark, for a confirmation rate among small business debtors of 43% during this time frame. Debtors may move for, and courts may grant, extensions of the 300-day or 45-day deadlines. But, given the speed with which the vast majority of cases moved through the chapter 11 system pre-BAPCPA, requiring debtors to file such motions and courts to consider them needlessly increases the cost of chapter 11.

As for the 45-day time-confirmation deadline, it is unworkable. Only 1 of 113 small business cases that confirmed a plan did so within that 45-day period. Absent a radical change in debtor behavior, the only thing accomplished by the 45-day deadline is increased cost to the debtor in the form of routine filing of motions to extend the plan-confirmation deadline.

In addition, what purpose does the 45-day requirement serve?[[69]](#footnote-69) If the goal is to set an outside time limit for plan confirmation for small business debtors, then why not simply establish 345 days or one year or 15 months as that outer limit?[[70]](#footnote-70) But, as noted before, even with the shortest of these time frames – 345 days – only 20% of chapter 11 debtors that are small businesses remain without disposition eleven and a half months after the order for relief. While the data is not yet in on the 2007 cases, the Commission should consider recommending eliminating both the 300-day plan-proposal and 45-day plan-confirmation deadlines as unnecessary, given the speed with which the vast majority of cases move through the system, and the increased cost and uncertainty associated with the Code’s current time deadlines for small business debtors.

**Conclusion**

Small business debtors comprise a significant proportion of chapter 11 cases. Yet, the empirical evidence clearly shows that chapter 11 success rates, at least as measured by plan confirmation, are significantly lower for small business debtors than they are for non-small business debtors.

There is very little evidence that explains this success-rate disparity. Proposing reform measures without data, however, is problematic. Congress did so with BAPCPA, and now the empirical evidence shows that forcing small business debtors into tight plan-proposal and plan-confirmation time frames was simply unnecessary. As Warren and Westbrook noted in their study of chapter 11 disposition times, “[t]he result is yet another lesson in what can happen when a solution precedes a clear grasp of the problem.”[[71]](#footnote-71)

Thus, prior to amending the Code to “solve” the weak performance of chapter 11 small business debtors, more data is needed. The cost and complexity of chapter 11 may play a significant role in the failure rate for small business debtors. It is possible, however, that a significant proportion of small business debtors will fail regardless of the system created for their rehabilitation. Therefore, figuring out the causes of small business failure is critical. Without a clear grasp of the reasons for small-business failure in chapter 11, it is impossible to evaluate proposals for reform.

Thank you for providing me with the opportunity to testify before the Commission and share my work with its members.

1. *See* H. Rep. No. 109-31, Part 1, at 19 (2005) [hereinafter “BAPCPA Report”] (stating that the “variety of time frames and enforcement mechanisms [were] designed to weed out small business debtors who are not likely to reorganize”); Nat’l Bankr. Review Comm’n, Small Business Proposals 609 (1997) [hereinafter “1997 Commission Report”] (stating that for the large group of debtors with “no reasonable prospect for rehabilitation . . . the primary goal is to reduce the amount of time they consumer in Chapter 11”). [↑](#footnote-ref-1)
2. *See* 1997 Commission Report, *supra* note 1, at 609-10*.*  [↑](#footnote-ref-2)
3. *See, e.g.,* BAPCPA Report, *supra* note 1, at 19. [↑](#footnote-ref-3)
4. *See* 1997 Commission Report, *supra* note 1, at 610-11; *see also infra* notes 16-17 and accompanying text. [↑](#footnote-ref-4)
5. *See* Anne Lawton, *Chapter 11 Triage: Diagnosing a Debtor’s Prospects for Success,* 54 Ariz. L. Rev. 985, 1014 (2012) [hereinafter “Lawton Triage”]. For this study, I ran the data using only each debtor’s scheduled liabilities. The impact on liability totals for “groups of affiliated debtors” was not analyzed. [↑](#footnote-ref-5)
6. *See id.* at 1008. [↑](#footnote-ref-6)
7. *See* Anne Lawton, *An Argument for Simplifying the Code’s “Small Business Debtor” Definition,* 21 ABI L. Rev. 55, 92 (2013) [hereinafter “Lawton ABI”]. I use the term “small business” even though the data used in the Lawton ABI study also includes consumer chapter 11 cases. *See infra* Part I for a discussion of the current small business debtor definition and why consumer debtors should be included in the Code’s “small business” coverage. As with the Lawton Triage study, *see supra* note 5, I used only each debtor’s scheduled liabilities in determining small business status for the Lawton ABI study. [↑](#footnote-ref-7)
8. *See id.* at 93. [↑](#footnote-ref-8)
9. See id. [↑](#footnote-ref-9)
10. *See* 11 U.S.C. §1116(1), (2) & (7). [↑](#footnote-ref-10)
11. *See* *generally* Lawton ABI, *supra* note 7. [↑](#footnote-ref-11)
12. For an explanation of the methodology used to create the population of cases and the random sample on which the findings in this report are based, *see* Lawton Triage, *supra* note 5, at 995-1004. [↑](#footnote-ref-12)
13. *See* Lawton ABI, *supra* note 7, at 93. [↑](#footnote-ref-13)
14. Two million dollars was the liability cutoff in 2004. [↑](#footnote-ref-14)
15. Liability totals were for *each* debtor in the sample, not for groups of affiliated debtors. Had liability totals for groups of affiliated debtors been used, *see* §101(51D)(B), the number of small business debtors would be slightly smaller. Liability totals for groups of affiliated debtors were included, however, in the time-to-disposition analysis in Part II, *infra.*  [↑](#footnote-ref-15)
16. *See* Lawton ABI, *supra* note 7, at 93, Chart 1 & Table 2. [↑](#footnote-ref-16)
17. *See id*. [↑](#footnote-ref-17)
18. 1997 Commission Report, *supra* note 1, at 628. [↑](#footnote-ref-18)
19. BAPCPA Report, *supra* note 1, at 19. [↑](#footnote-ref-19)
20. *See* Lawton Triage, *supra* note 5, at 1008. [↑](#footnote-ref-20)
21. *See id.* [↑](#footnote-ref-21)
22. *See id.* [↑](#footnote-ref-22)
23. *See* Lawton ABI, *supra* note 7, at 70. [↑](#footnote-ref-23)
24. *See* Fed. R. Bankr. P. 1020(b) (providing a 30-day period after the conclusion of the §341 hearing for objections by the U.S. trustee or any party in interest to the debtor’s designation as a small or non-small business). [↑](#footnote-ref-24)
25. *See* Lawton Triage, *supra* note 5, at 1012, 1014. [↑](#footnote-ref-25)
26. *See* Lawton ABI, *supra* note 7, at 88 n. 164. [↑](#footnote-ref-26)
27. *See id.*  at 85 n.146 [↑](#footnote-ref-27)
28. *See id.* at 95 n. 189. [↑](#footnote-ref-28)
29. *See id.* at 73. [↑](#footnote-ref-29)
30. *See* 1997 Commission Report, *supra* note 1, at 618. [↑](#footnote-ref-30)
31. It appears that the “primary activity” exclusion may have been carried over from proposals to create a separate chapter 10 for small business debtors. For a more detailed explanation of the history of the exclusion, *see* Lawton ABI, *supra* note 7, at 74-75. [↑](#footnote-ref-31)
32. *Compare* 11 U.S.C. §1121(b) (120 days) *with* 11 U.S.C. §1121(e)(1) (180 days). [↑](#footnote-ref-32)
33. 11 U.S.C. §1121(e)(2). [↑](#footnote-ref-33)
34. 11 U.S.C. §1129(e). [↑](#footnote-ref-34)
35. 11 U.S.C. §1121(e)(3)(C). [↑](#footnote-ref-35)
36. 11 U.S.C. §1121(e)(3)(A). [↑](#footnote-ref-36)
37. *In re Save Our Springs Alliance, Inc.,* 388 B.R. 202, 226 (Bankr. W.D. Tex. 2008). [↑](#footnote-ref-37)
38. *See* 11 U.S.C. §1125(f)(3)(C). [↑](#footnote-ref-38)
39. Transcript, ABI Annual Spring Meeting Field Hearing, April 19, 2013, at 20 [hereinafter ABI Meeting] (testimony of the Honorable Dennis Dow); *see* Fed. R. Bankr. P. 2002(b); *see also* Hon. James B. Haines, Jr. and Philip J. Hendel, *No Easy Answers: Small Business Bankruptcies after BAPCPA,* 47 B.C. L. Rev. 71, 80 (2005) (footnote omitted) (noting that “[c]onditional approval of disclosure statements, and combined plan/disclosure statements, will likely become the norm for small business debtors” given the bankruptcy rules’ prescribed notice periods for the hearings on the disclosure statement and plan confirmation”). [↑](#footnote-ref-39)
40. *In re Mississippi Sports and Recreation, Inc.,* 483 B.R. 164, 167 (Bankr. W.D. Wis. 2012) (emphasis in original). [↑](#footnote-ref-40)
41. ABI Meeting, *supra* note 39, at 20 (testimony of the Honorable Dennis Dow). Judge Dow outlines a number of the problems presented by BAPCPA’s time deadlines for small businesses in his testimony. *See id.* at 19-22. [↑](#footnote-ref-41)
42. For a discussion of this problem, *see* Lawton ABI, *supra* note 7, at 81-83. The obverse is also a problem. What if a debtor incorrectly checks the box on the petition indicating that it is a small business debtor when, in reality, it is not? *See In re Swartville,* 483 B.R. 453, 458 (Bankr. E.D. N.C. 2012) (holding that the small business deadlines did not apply to debtor that had mistakenly and in “good faith” checked the wrong box on the petition when that mistaken designation neither benefitted debtor nor prejudiced creditors). [↑](#footnote-ref-42)
43. *See In re Florida Coastal Airlines, Inc.,* 361 B.R. 286, 292 (Bankr. S.D. Fla. 2007) (holding that the 300-day plan proposal period in §1121(e)(2) “applies only to plans filed by the debtor and that there is no statutory deadline for the filing of such a reorganization plan by any party in interest other than the debtor”); *cf. In re Randi’s, Inc.,* 474 B.R. 783, 786 (Bankr. S.D. Ga. 2012) (dismissing case and holding that 300-day deadline applied to plan filed by debtor’s sole shareholder outside the 300-day deadline because shareholder plan was virtually identical to debtor’s untimely filed plan). *Contra* 7-1121 Collier on Bankruptcy P 1121.07[2] (2013) (footnote omitted) (stating that after the small business debtor’s exclusivity period expires, “any party in interest may file a competing plan . . . so long as the party files its plan before the expiration of 300 days from the order for relief”); *accord In re Castle Horizon Real Estate, LLC,* 2010 WL 3636160, at \*2 (Bankr. E.D. N.C. Sept. 10, 2010) (citation omitted)(stating that “if no party files a plan within 300 days, then no relief is available”). [↑](#footnote-ref-43)
44. *Castle Horizon,* 2010 WL 3636160, at \*1. [↑](#footnote-ref-44)
45. *See id.* at \*\*1, 2 (holding that the 300-day deadline applies to amended plans that are not “’cleaned up version[s] of the original”). *Cf. In re Florida Coastal Airlines, Inc.,* 361 B.R. 286, 290 (Bankr. S.D. Fla. 2007) (holding that debtor’s amended plan, filed more than 300 days after order for relief, related back to original plan filed within the 300-day period because the amended plan was “fundamentally a cleaned-up version of [debtor’s] original plan”). [↑](#footnote-ref-45)
46. *In re Randi’s, Inc.* 474 B.R. 783, 786 (Bankr. S.D. Ga. 2012) (citation omitted) (holding that “[o]nce the 300-day time period ends and there is no plan filed by any party in interest, ‘cause’ for dismissal exists”). [↑](#footnote-ref-46)
47. *See In re Mojica,* 2013 WL 2180740, at \*2 (Bankr. D. P.R. May 20, 2013) (denying debtor motion for reconsideration of dismissal and holding that “if a small business plan is not confirmed within the deadline, the court has no choice other than to dismiss the case, except for perhaps in rare circumstances not applicable here”); *In re J & J Fritz Media, Ltd.,* 2010 WL 4882601, at \*2, \*3 (Bankr. W.D. Tex. Nov. 24, 2010) (noting that while BAPCPA was “a pernicious piece of legislation . . . that lays a trap for the unwary” it was the law and required that “[a] small business case [ ] be confirmed within 45 days after the filing of the plan”); *In re Caring Heart Home Health Corp.,* 380 B.R. 908, 910-11 (Bankr. S.D. Fla. 2008) (noting that court was “bound by the inflexible mandate imposed by Congress” and dismissing case for failure to confirm plan within 45 days of its proposal even though bankruptcy court had set disclosure statement hearing for 60 days after the date of plan proposal); *contra In re Maxx Towing, Inc.,* 2011 WL 3267937, at \*4 (Bankr. E.D. Mich. July 27, 2011) (holding that failure to confirm within 45 days did not mandate dismissal when delays in process “were not due to want of prosecution” and where adherence to the 45-day deadline would leave debtors in some cases “little, if any, time to deal with any objections to confirmation and the statutory scheme would be frustrated and rendered impractical, requiring dismissals and re-filings for no particular reason”). [↑](#footnote-ref-47)
48. *See In re Crossroads Ford, Inc.,* 453 B.R. 764, 769-70 (Bankr. D. Neb. 2011) (holding that debtor’s failure to confirm initially filed plan within 45 days did not preclude debtor from filing an amended plan within 300 days and obtaining confirmation of that plan within 45 days of its filing); *cf. In re Save Our Springs Alliance, Inc.,* 388 B.R. 202, 225 (Bankr. W.D. Tex. 2008)(holding that the 45-day confirmation period runs from filing of the original plan, “at least when an amended plan is not substantially different from the original plan”). [↑](#footnote-ref-48)
49. *See In re Mississippi Sports and Recreation, Inc.,* 483 B.R. 164, 168 (Bankr. W.D. Wis. 2012) (finding “sufficient compliance with §1121(e)(3)” because the initial confirmation hearing had occurred within 45 days, no party in interest had opposed subsequent adjournments of the confirmation hearing, and the Code required only “notice to parties in interest which is sufficient under the particular circumstances,” not a filed motion to obtain an extension of the 45-day plan-confirmation period); *In re Save Our Springs Alliance, Inc.,* 388 B.R. 202, 228-29 (Bankr. W.D. Tex. 2008) (finding that “BAPCPA’s small business confirmation deadlines provisions . . . [were] simply unworkable under the facts of [the] case” and concluding that debtor should not bear “the full consequences of a failure to meet §1121(e)’s deadline,” given debtor’s diligence in trying to obtain an extension and the “impossibility” of rendering a decision within the statutory time frame). [↑](#footnote-ref-49)
50. BAPCPA Report, *supra* note 1, at 19. [↑](#footnote-ref-50)
51. *See* 1997 Commission Report, *supra* note 1, at 609. [↑](#footnote-ref-51)
52. *Id.* at 613. [↑](#footnote-ref-52)
53. *See id.* at 621 §2.5.5. [↑](#footnote-ref-53)
54. *See* Elizabeth Warren and Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics,* 107 Mich. L. Rev. 603 (2009). [↑](#footnote-ref-54)
55. The sample in this portion of my testimony is based on 799, not 782, cases. The difference in sample sizes is due to two things. First, the 799-case sample includes several cases that had no disposition as of early 2012, when the Lawton Arizona articlewent to press, but for which there has been a subsequent plan confirmation, conversion, or dismissal. Second, the 782-case sample excluded a number of cases with no reliable liability information. Reliable liability information was critical in the 782-case sample in order to identify small from non-small business debtors. Small business identification was only important for the 799-case sample for cases that remained in chapter 11 more than 345 days. [↑](#footnote-ref-55)
56. Warren and Westbrook, *supra* note 54, at 628 n.93. [↑](#footnote-ref-56)
57. The Lawton study includes involuntary cases, as well as cases converted *to* chapter 11 from another chapter of the Code. For involuntary cases, time to disposition runs from the order for relief, while for converted cases the time to disposition runs from the order converting the case *to* chapter 11. The time frames are for initial disposition. Thus, if a plan failed and the bankruptcy court dismissed the case post-confirmation the findings here do not include that second disposition. In addition, there was a small subset of cases in which the bankruptcy court granted a debtor’s motion to re-open the case post-dismissal or in which the court set aside or vacated an order of conversion or dismissal. The findings in the Lawton study do not include those additional time frames in the figures reported here. [↑](#footnote-ref-57)
58. *See* Warren & Westbrook, *supra* note 54, at 628 n.912. [↑](#footnote-ref-58)
59. In the Warren & Westbrook study, 66.7% of the 1994 cases and 65.2% of the 2002 cases were disposed of within one year’s time. *See* Warren and Westbrook, *supra* note 54, at 628 n.91 [↑](#footnote-ref-59)
60. See id. [↑](#footnote-ref-60)
61. What constitutes a “group of affiliated debtors?” The Code does not define the term, and timing questions arise. For this study, I counted affiliated debtors that filed for relief on the same day or within several days of each other as a “group.” I did not count affiliated debtors that filed weeks or months apart as a “group.” For example, Shore Golf Management filed for chapter 11 on June 23, 2004. *See In re Shore Golf Mgt., LLC,* No. 04-04972 (Bankr. E.D. N.C. June 23, 2004). Three affiliates filed for relief under chapter 11 approximately nine months later. At the time of filing, *Shore Golf* had liabilities under $2M. Thus, had BAPCPA’s changes been in effect, *Shore Golf* would have designated itself as a small business and been subject to the Code’s plan-filing requirements at the time of its petition filing. [↑](#footnote-ref-61)
62. It was not possible to accurately calculate the total number of small business debtors in the Lawton Time study, because debtors without reliable liability information were included in the 799-case sample. *See supra* note 55. Those debtors, however, reached disposition within 345 days and, hence, do not affect the results in Tables III and IV. [↑](#footnote-ref-62)
63. *See* Lawton ABI, *supra* note 7, at 91, 93 Chart 1 (showing initial success rate of 25.56% for small business debtors). The ABI sample included only 782 debtors, in part, because reliable liability information did not exist for some cases. *See supra* note 55. Of the 799 debtors studied in this report, reliable liability information exists for all debtors whose cases remained in chapter 11 after one year. Warren & Westbrook sorted the debtors in their 1994 and 2002 samples using the rough metric of median debt for each year’s sample. They found that the plan-confirmation rate for debtors falling below the median debt level of $643,490 in 1994 was 24.6%, and for those debtors below the median of $1.8 million in 2002 the confirmation rate was only 21.3%. *See* Warren and Westbrook, *supra* note 54, at 635-636. [↑](#footnote-ref-63)
64. Warren & Westbrook, *supra* note 54, at 621-22. [↑](#footnote-ref-64)
65. These figures are based on liability totals that included liabilities for groups of affiliated debtors. [↑](#footnote-ref-65)
66. There were two other cases with confirmed plans but reliable liability information did not exist for either case. [↑](#footnote-ref-66)
67. *See supra* note 47 and accompanying text for cases mandating dismissal for failure to satisfy the 45-day plan-confirmation deadline. [↑](#footnote-ref-67)
68. I currently am working on coding and analyzing a random sample of approximately 765 debtors drawn from all chapter 11 cases (6376) filed in calendar year 2007. [↑](#footnote-ref-68)
69. *See* ABI Meeting, *supra* note 39, at 21-22 (testimony of the Honorable Dennis Dow) (asking whether the 45-day period “serves any useful purpose” and stating that “the mere lapse of time between the date on which the plan is filed and its confirmation is not particularly relevant”). [↑](#footnote-ref-69)
70. *See id.* at 22 (testimony of the Honorable Dennis Dow) (suggesting “an absolute limitation on the date of filing or confirmation would be better designed to achieve this objective”). [↑](#footnote-ref-70)
71. Warren & Westbrook, *supra* note 54, at 639. [↑](#footnote-ref-71)