

## DATA COMPILATION AND DISSEMINATION

There is a dearth of timely, accurate bankruptcy data. Of the data that exist, little is available to the public. Further, there is no consistency in the data that are reported, and the reports that are available are splintered among several federal agencies and 94 bankruptcy districts (in which, collectively, 200 separate clerks' offices keep records). About the only data accurately reported are the number of bankruptcy cases actually filed. The data extracted from the debtors' petitions and reported to the Administrative Office of the United States Courts ("AO") are often inconsistent with the data contained in the same debtors' schedules and statements of financial affairs. A recent study documented the extent of these inconsistencies and some of the causes<sup>2389</sup>, but no study has yet been done to test the accuracy of the data as initially reported by the debtors. As a consequence of this (and other factors discussed below) data that in turn are reported by the various central reporting agencies to the public are likewise inaccurate, to an unknown extent.

The data problem is further exacerbated by the fact that the central reporting agencies are in two separate branches of government<sup>2390</sup>. The Executive Office of the U.S. Trustee ("EOUST") is a part of the executive branch in the United States Department of Justice, and the AO is a part of the judicial branch. Each of the two central reporting agencies follows its own statutory mandate, as each should, but the

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<sup>2389</sup> See Jennifer C. Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*, 101 COM. L.J. 307 (1996).

<sup>2390</sup> In compliance with Recommendation 73 of the *Long Range Plan for the Federal Courts*, approved by the Judicial Conference in December, 1995, the AO undertook two major projects to implement the bankruptcy-related mandate of Recommendation 73. They included (1) an audit of 11 bankruptcy courts, including the Central District of California, to determine the accuracy and completeness of statistics currently gathered, and (2) a review of the present and future statistical information needs of the judiciary and third-party users of bankruptcy data. The EOUST also has undertaken efforts to define the accuracy and completeness of its data and improve the collection, analysis and distribution of bankruptcy data. For example, the EOUST, in conjunction with the RAND Institute for Civil Justice, held a symposium in April, 1997 attended by over 40 leading members of the bench, bar, academic community, government, organizations and businesses interested in the bankruptcy system.

result is that the data that are available are reported in piecemeal fashion or not reported at all. Because of this structure, there is no centralized data bank from which statistics based on all the data are available.

The following Proposals are intended to deal with a central problem identified by the Commission: bankruptcy data collection is currently highly decentralized and local, with little means available to aggregate the data from various sources. Data about bankruptcy cases now come from five different sources:

- The clerks of the bankruptcy courts (there are approximately 200 separate clerks' offices);
- The United States Trustees (there are 21 regional U.S. Trustees, each with its own set of files);
- The Washington, D.C., based AO (which oversees the clerks' offices);
- The Washington, D.C., based EOUST (which provides general supervision of the United States Trustees); and
- The private trustees who act in Chapter 7, 11, 12 and 13 cases.

Each of the nearly 200 bankruptcy clerks, and each of the 21 regions of the U.S. Trustee Program ("USTP"), maintains their own separate databases to facilitate their operations. The 1200 Chapter 7 trustees and the 180 Chapter 12 and 13 trustees each maintain records and data in the offices for the cases they handle. The AO collects, reports, and analyzes on a national basis a small fraction of the data collected by the clerks; similarly, the EOUST collects a small amount of information from the regional United States Trustees.

Upon the basis of these findings, and other relevant considerations, all as more fully described below, the Commission hereby proposes the following:

## RECOMMENDATIONS

- 4.1.1** Establish as policy that all data held by bankruptcy clerks in electronic form, to the extent it reflects only public records as defined in Bankruptcy Code § 107, should be released in electronic form to the public, on demand.
- 4.1.2** Establish and fund a pilot project to aggregate the data from their various sources, particularly bankruptcy clerks, and make that data available to the public in electronic form, on demand.
- 4.1.3** Secure limited-duration appointment of a coordinator, who, with the head of the AO's office and the head of EOUST, would be charged with the duty of:
- (1)** making recommendations to increase the accuracy of the debtor's petitions, schedules and statements;
  - (2)** setting the data-collection goals;
  - (3)** coordinating the bankruptcy data-collection efforts of the central reporting agencies; and
  - (4)** reporting on an annual basis to the Congress, the Chief Justice, and the President.<sup>2391</sup>
- 4.1.4** Establish a bankruptcy data system in which (1) a single set of data definitions and forms are used to collect data nationwide and (2) all data for any particular case are aggregated in the same electronic record.

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<sup>2391</sup> This report envisions the creation of a temporary joint data committee composed of three members, including the heads of the AO and the EOUST, and a third member who would chair the committee on the appointment for a non-renewable five-year term of the Chief Justice. The chair would report to Congress on an annual basis on the progress of the data committee. Reservations about this concept, based on separation-of-powers concepts, were expressed to the Commission. However, the Commission determined to persevere with the concept on the theory that the long-term benefits of improved data management outweigh creation of a short-term working group that, for a time, crosses governmental agency lines.

**4.1.5 Maximize the number of documents filed electronically and maximize open-to-the-public remote electronic access to all data for free, or at the lowest possible cost.**

## DISCUSSION

### BACKGROUND

Since the 1970's, there has been a recognized need for detailed, accurate, and reliable information about the bankruptcy system. Unfortunately, this need is still largely unfulfilled.

The commission report of 1973, which in part led to the current Bankruptcy Code,<sup>2392</sup> found that such information was necessary to efficient bankruptcy administration. As one study noted at the time: "Because of such extensive variations in local practice and financial conditions, we feel that the performance of the current bankruptcy system will continue to defy all but the crudest analysis until more uniform policies and practices are established and essential data elements can be collected as a routine part of processing each case."<sup>2393</sup> The commission included in its recommendations to Congress, therefore, the creation of a national system of bankruptcy administration that would have among its duties the collection and dissemination of empirical data about the bankruptcy system.<sup>2394</sup>

Almost a quarter century has passed since this Recommendation. In that time, Congress has passed three major pieces of bankruptcy legislation and created a national bankruptcy administrator in the form of the United States Trustee System. Nevertheless, the evidence is clear that there is still a dearth of timely, accurate bankruptcy data.

There is a need for more timely, accurate and consistent bankruptcy data. While a relatively small amount of centrally reported information is readily available, those interested in more detailed data must seek it separately from several federal agencies and 94 bankruptcy districts. Not surprisingly, this diversity of sources brings with it inconsistencies among data cited in support of various observations about the

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<sup>2392</sup> 11 U.S.C. § 101, *et seq.*

<sup>2393</sup> Dreyfus, Greenwood & Fiorello, *The Impact of Proposed Changes in Bankruptcy Administration*, 7-8, Rand, WN-8131-COBL (March 1973), *quoted in* Report of the Commission on the Bankruptcy Laws of the United States, 111, H.R. Doc. 93-137, 93d. Cong., 1<sup>st</sup> Sess., Pts. I and II (1973) (the "1973 Report").

<sup>2394</sup> Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No.93-137, 93d Cong. 1st Sess., at 120 (1973).

operations of the bankruptcy system. Also, the expense of the effort means that many highly useful studies cannot be conducted. Thus, data-related information received by the Commission reflected numerous examples of conflicts in existing data. There appears to be no method under the current system of resolving these conflicts, according to the various proponents of enhanced data.

This lack of data imposes severe limitations on assessments of the bankruptcy system. This information, if capable of national collection and aggregation and made widely available, would serve a wide variety of purposes. For example, it would provide an additional tool for judicial decision-making, it would assist in scholarly research about the bankruptcy system, it would aid in the development of bankruptcy policy, the allocation of bankruptcy resources and the formulation of bankruptcy legislation. Now, policy and decision-makers are too often left largely with anecdotes as the primary basis for their conclusions and proposals. The empirical studies that do exist are based on a small sampling that has been manually and laboriously compiled, and the conclusions of these studies cannot be updated without similar effort.

Also, this information would be of immense use to all who are involved in the bankruptcy system. The absence of reliable information about the bankruptcy “marketplace” leaves parties unable to develop reasonable expectations about what they can expect from the process.

In short, the bankruptcy system operates behind a veil of darkness created by the lack of reliable data about its operations. The lack of information about “what is going on” in the bankruptcy system leads to a distrust of its results—a belief by some that creditors, debtors and professionals within the system are all somehow taking advantage of one another and the public at large, and that the system suffers from widespread fraud, abuse and inefficiency.

Accurate and reliable bankruptcy data are essential to understanding and evaluating the operation of the nation’s bankruptcy laws.<sup>2395</sup> Accurate data could assist in answering such questions as whether bankruptcy enhances distributions to unsecured creditors, whether Chapter 11 debtors fully perform under their plans, how much particular types of cases cost or whether cases are expeditiously processed by the courts. Accurate centralized data also could shed light on other important

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<sup>2395</sup> Janet L. Norwood, *Organizing to Count: Change in the Federal Statistical System 1* (1995):

In a democratic society, public policy choices can be made intelligently only when the people making the decisions can rely on accurate and objective information to inform them of the choices they face and the results of the choices they make.

questions of interest to Congress, the judiciary and other users of the bankruptcy system -- debtors, creditors, scholars and even future commissions.

The quality and completeness of available bankruptcy data and statistics have recently undergone significant review by the two central reporting agencies. As required by statute, each agency collects and produces data culled from the bankruptcy petition, schedules and statements to evaluate its performance and provide feedback to certain users, such as Congress, the judiciary and bankruptcy trustees.<sup>2396</sup>

Certain data collected by these agencies are identical. For example, each agency gathers information on the debtor's name and address as well as summary information on the debtor's estimated assets and liabilities as of the petition date.<sup>2397</sup> Although the clerk of each bankruptcy court provides U.S. Trustee offices with limited electronic data on case filings on a regular basis, each of hundreds of offices maintains its own separate databases, and there are some difficulties with compatibility even among clerks' offices and among U.S. Trustee offices. Consequently, it is prohibitively expensive to access all available data and difficult even to compare data from one clerk's office with data from another. Both organizations are aware of these problems and are working toward solutions that would allow for the free exchange of data.

Sophisticated software now in use in many bankruptcy clerks' offices can capture huge amounts of data. The database in use in the clerk's office in the U.S. Bankruptcy Court for the Western District of Wisconsin, for instance, has categories ("fields," to the computer literate) for the preservation of approximately 1,000 different items of information about each case.

The Commission has not ascertained how extensively this software is used — in Wisconsin or elsewhere. The important thing is this: the capability is there. Given the 1.3 million bankruptcy filings this year in the United States, the magnitude of public use of the bankruptcy system demands that the maximum amount of data be collected and that it be available for systematic study. Given the existence of the sophisticated software, the courts and their clerks ought to do at least two things with it:

- Use it to the fullest extent its capability permits; and

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<sup>2396</sup> The AO primarily gathers data, such as case dispositions, to measure judicial and administrative efficiency of the courts. The EOUST collects financial information designed to evaluate its performance in complying with its duties under title 28 of the U.S. Code.

<sup>2397</sup> However, little data are reported for third-party users seeking to evaluate the overall efficiencies of the bankruptcy system.

- Make the data in it electronically available to anyone in the public who wants to view it and study it.

Given this software, the data in the computers of the bankruptcy clerks is (or, relatively easily, could be) extensive and may be accurate. The problem is that it is not accessible. The Commission's strongly held view is that more data should be collected, and all of it should be easily and publicly accessible electronically. Other significant problems are the absence of any clear statutory mandate to release information and the lack of any formal coordination in the data collection efforts of the AO and the EOUST.

### **ACCURACY-OF-DATA ISSUES**

The problems of the fragmented collection of data, the lack of centralization of data and the lack of electronic access by the public to existing data are compounded by persistent problems with the accuracy of the data that do exist.

To a certain extent, the very nature of bankruptcy makes it difficult to obtain accurate data from debtors, especially at the beginning of the case. Debtors often file for bankruptcy on the eve of foreclosure or under other severe financial pressures, which are likely to be accompanied by poorly maintained financial records. Thus, debtors may simply lack financial information that even begins to approach accuracy. There is no meaningful procedure or penalty for inaccurate information unless it rises to a criminal violation. Lawyers who sign the petitions are rarely disciplined under Rule 9011 of the Federal Rules of Bankruptcy Procedure. There is no real incentive for either the debtor or the lawyer to ensure the accuracy of the initial documents that are filed. As this report describes, there are chronic inconsistencies, in the same case, between the initial data filed with the petition and the data filed in the schedules and statements of affairs. But more of the data that are (or easily could be) in clerks' computers do not come from debtors -- it is generated by the operation of the court itself. No thorough study of the accuracy of these court data has been made.

There is no point in expanding the gathering and dissemination of data unless the data are reliable. Accordingly, the Commission recommends that data filed with petitions, schedules and otherwise (such as disclosure statements in Chapter 11) be reviewed by random audits conducted under the supervision of the U.S. Trustee. Further the Commission recommends that the bankruptcy courts be empowered to impose appropriate sanctions in appropriate cases on those responsible for filing false, inaccurate or misleading data. However, the Commission does not recommend that lawyers be held responsible for false information provided by clients and others, as long as the lawyer complies with any applicable rules, including those requiring a reasonable basis for what lawyers file with courts.



## **BANKRUPTCY DATA TODAY: WHO COLLECTS IT, WHY THEY DO IT, AND HOW**

### 1. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Since 1948, the AO has been charged with the responsibility of, *inter alia*, reporting on the business transacted by the 94 bankruptcy districts, examining the state of the courts' dockets, securing information on courts' needs, and preparing and transmitting, semiannually, statistical data to the chief judges of the various circuits.<sup>2398</sup> These statistical data are reported annually to the Judicial Conference of the United States, the Congress and the Attorney General. These data are used by the judiciary to forecast case filings, ascertain needs of the judiciary for people and other resources, allocate staff and resources, and assist in case management.<sup>2399</sup> These data<sup>2400</sup> are published in a variety of formats, including in the "F-Tables" of the *Judicial Business of the United States Courts*, the *Federal Judicial Caseload Statistics*, and *Statistical Tables from the Federal Judiciary*. Notwithstanding these publications, the AO also receives approximately 150-250 requests each month for additional data from many third-parties. Although not required to do so, the AO makes every effort to satisfy these requests.

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<sup>2398</sup> 28 U.S.C. §§ 604(a)(2), (13) (1948). Prior to 1948, statistical gathering obligations for bankruptcy cases rested largely with the Attorney General of the United States. *The Statutes at Large of the United States of America from March 1897 to March 1899*, 559 (1899). For a description of how the AO gathers bankruptcy data, see Frasier, *Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics*. 101 COM. L.J. at 312.

<sup>2399</sup> *Bankruptcy Statistics Task Force of the Administrative Office of the U.S. Courts, Report of the Bankruptcy Statistics Task Force* (not dated), p. 2 (on file with the Administrative Office of the U.S. Courts). The Statistics Division and the AO collect the following case-opening information: (1) District/Docket Number; (2) Date of filing; (3) Name of the first listed petitioner or company; (4) County code and judge assigned to the case; (5) Name of trustee; (6) Type of case (voluntary or involuntary); (7) Chapter under which petition is filed; (8) Financial data (estimated number of creditors, estimated assets, and estimated liabilities); (8) Nature of case (business or nonbusiness/consumer); (9) Organizational structure of business, if applicable; (10) Type of business (farming, professional, manufacturing); (11) Estimated number of employees; and, (12) Estimated number of equity security holders (Chapters 11 and 12 only).

<sup>2400</sup> The case opening data are electronically transmitted on a daily basis by the bankruptcy clerks' offices to both the AO and the U.S. Trustee offices. Case-closing data, culled in part from case trustee reports, are provided by the bankruptcy clerks' offices to the AO. These data include: (1) Case disposition (e.g., discharge granted or denied, petition dismissed); (2) Chapter under which case terminated; (3) Chapter 11 confirmation information; (4) Chapter 11 percent dividend to be paid; (5) Future payments contemplated under Chapter 11 plan; (6) Case closing date; and, (7) Financial data, including fees and expenses of trustee, trustee attorney, and other professional fees and distributions to creditors and equity security holders.

Improvements over the last 25 years in available technology have enhanced the ability of the AO to collect and disseminate its bankruptcy data. For example, nearly all of the bankruptcy courts offer electronic public access to their records through the PACER Service Center, which is headquartered in San Antonio, and functions through separately operated affiliate service centers.<sup>2401</sup> PACER access typically brings to the users' screens only the name of the case, the case number, and a few other items of information in many districts. In certain districts, the user can access docket sheets. The AO plans to centralize the search capabilities of the PACER system by creating the U.S. Party/Case Index, which will be a national index for the federal appellate, district, and bankruptcy courts. For 60 cents a minute, users will be able to search this system by name or social security number in the bankruptcy index, name or nature of the suit in the civil index, defendant name in the criminal-case index and party name in the appellate index.<sup>2402</sup> Despite the vast improvements in data accessibility, however, the amount and quality of the data continue to suffer from lack of inter- and intra-agency uniformity as well as the failure to aggregate data.<sup>2403</sup> In addition, by statute, the AO collects data for its own internal administrative purposes, not for the purpose of monitoring the efficient operation of the Bankruptcy Code. Although the AO has no statutory duty to collect data for extra-agency purposes, it is imperative that such "public interest" data are collected on a regular and aggregate basis.

## 2. THE UNITED STATES TRUSTEE PROGRAM

The United States Trustees gather a variety of data to support their statutory responsibilities under 28 U.S.C. § 586 in the administration of bankruptcy cases and oversight of private trustees appointed in cases under Chapters 7, 11, 12 and 13 of the Bankruptcy Code. The United States Trustees gather case-related information and docketing information. They also collect information about how assets and monies are marshaled and distributed in bankruptcy cases, such as information on the financial operations of Chapter 11 debtors, distributions to creditors (mostly in Chapter 7 and

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<sup>2401</sup> *United States Courts Pacer Service Center, User Manual for the Pacer U.S. Party/Case Index* (not dated) (on file with the Administrative Office of the U.S. Courts). Anyone with a computer and a modem with 9600 baud speed can access the PACER system.

<sup>2402</sup> *Id.*

<sup>2403</sup> Some contend that the present AO data posting is slow and, therefore, impairs research. This posting, through the University of Michigan, occurs one to two years after the year in which the data are generated by the courts. The AO does not post the bankruptcy database at all. See Letter from Lynn M. LoPucki to Commissioner John Gose dated August 5, 1997 (on file with the Commission).

13 cases) and amounts paid to attorneys, trustees and other appointed professionals compensated out of bankruptcy estates.<sup>2404</sup>

A small portion of this information is reported to the Executive Office for United States Trustees, where it is aggregated and national statistics compiled. Except for the data centrally gathered by the EOUST, there is no national or multi-regional compilation of data collected by the United States Trustees outside of their individual regions. Each of the 21 regions maintain a separate data base, known as the Automated Case Management System (“ACMS”).<sup>2405</sup> On older systems, ACMS has a limited number of fields in which to collect and retain data. Also, it does not have all of the data-management flexibility of more modern databases. Each ACMS database is regularly purged every several years because of limitations in storage capacity.

In its current budget, the United States Trustee Program is seeking funding to redesign its case management system, link the regional databases, and establish a National Bankruptcy Research Database for improved collection and reporting of information from the 21 United States Trustee regions. However, like the courts and the Administrative Office of the United States Courts, the collection of data by the U.S. Trustees is currently almost entirely decentralized, the data systems in each office lack the ability to communicate with one another, and the collection and reporting of information varies somewhat from region to region. These factors make it extremely difficult to collect and analyze information nationally. These data are not regularly published in any format, moreover, but are available only upon request to a regional office.<sup>2406</sup>

In summary, the data collection efforts of the AO and the EOUST are divided among, respectively, nearly 200 clerks’ offices and 21 regions. To the extent that these offices use data protocols to enhance the reliability of their data, these protocols are not uniform among the other offices, and the offices’ computer systems lack the ability to communicate with one another. Although the AO and the EOUST each use

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<sup>2404</sup> Chapter 7 and 13 trustees also separately collect a wealth of data that are used to evaluate their performance and calculate the administrative costs of each case, such as the amount of money received and disbursed in a Chapter 7 or 13 case, and the amount received by each class of creditors (secured, unsecured nonpriority, professionals). As with the data of the AO and the U.S. Trustees, the panel and standing trustees maintain their data in separate databases. These data are not publicly available. The data maintained by the Chapter 13 trustees are available only to certain auditors, the U.S. Trustees, and certain creditors who sign privacy agreements.

<sup>2405</sup> It takes approximately 18 months to add a field to ACMS. Telephone conversation with Marcy J.K. Tiffany, U.S. Trustee for Region XVI, Central District of California (Nov. 1, 1996).

<sup>2406</sup> In a pilot project, several regions will be connected to one another on a local area network in September, 1997. By 1999, all 21 districts will be connected by a wide area network.

one primary operating system in their field offices, these systems are not used in all districts. The quality and accessibility of the bankruptcy data greatly suffer from this decentralization and lack of uniform protocols.

Legislation recently proposed by Congressmen Bill McCollum (R-Fla.) and Rick Boucher (D-Va.) would greatly augment the gathering of statistics in consumer cases. It would require clerks to gather data under guidelines from the AO about (1) total assets, liabilities, income and expenses of debtors as reported in the schedules; (2) aggregate debt discharged, (3) average length between commencement and closing of cases; (4) data about reaffirmations; (5) in Chapter 13 cases, the incidence of judicial findings that collateral was worth less than the secured debt and the number of cases dismissed for failure to make payments; and (6) the incidence of filings by debtors who had filed other cases for themselves within the preceding six years.<sup>2407</sup> While the data called for by this legislation are data that should be collected, the legislation could — and in the view of the Commission should — go further in three respects: (a) it should adopt the electronic filing and remote access concepts described in this report -- *i.e.*, the data as recorded should be electronically available to everyone, not just reported by the AO, (b) it should endorse and expand the requirement that data in databases maintained by the clerks be electronically accessible by the public, and, (c) the amount and type of data covered should be greatly expanded.

### **DIVERSITY OF VIEWS ABOUT THE FUTURE: HOW MUCH IS ACHIEVABLE? HOW SOON?**

The Commission has found, in numerous conversations with government officials and with non-governmental observers, a remarkably wide diversity of views about the subject of bankruptcy data and what ought to be — and can be — achieved.

Everyone consulted endorsed the need for more data, better data and more quickly available data. However, below this abstraction, strong differing views present themselves.

#### **1. IMPRESSIVE IDEAS FROM THE NON-GOVERNMENTAL SECTOR**

Currently available data technology could revolutionize access to data about the bankruptcy system. A principal opportunity to enhance data availability exists at the most fundamental levels: the lawyers and others who file papers in the bankruptcy

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<sup>2407</sup> See H.R. 2500, Sec. 201 (105th Cong., 1st Sess.).

courts and the clerks of court.<sup>2408</sup> Other enhancement opportunities abound. For instance, the Bankruptcy Code and Rules require every debtor to file extremely detailed schedules and statements of financial affairs. Right now, these are typically filed with the courts on paper (even if they exist in machine-readable form in the word processors of the lawyers who prepare them). Today, access to these data usually requires a researcher to procure the “hard copy” from the courthouse, photocopy it and then do her or his own data entry into the researcher’s software to study and process it.

On a pilot basis, some bankruptcy courts now permit documents like these to be filed by electronic transmission from the debtor’s lawyers’ office -- the debtor’s lawyer would use a modem to transmit the filing directly into the court clerk’s computer. The AO expects that the electronic method of filing papers will be nationwide in a short number of years.<sup>2409</sup> Also, as noted above, through the PACER system, in certain districts the full text of at least some docket sheets and certain other limited data in bankruptcy cases are accessible on the screen of any computer where the user has arranged access to PACER.

Despite PACER, the most serious problem with the bankruptcy data system is lack of offsite, electronic access to data that are already (or easily could be) computerized. To solve the problem does not require more money, better computers, or more programming. It requires merely that the bankruptcy clerks release the contents of their databases to the public. Copies of the databases could be made from the clerks’ own nightly backups (collecting for backup purposes in one file all the data input during the day using the existing, 1,000-field software), by anyone in the public who wanted it. For instance, entrepreneurs might obtain it, and redistribute—or even resell it—over the Internet or otherwise<sup>2410</sup>. Such entrepreneurs could recover the cost of copying through user fees or advertising. Given the tremendous value of the data in the clerks’ databases, private firms will compete to reformat and customize the data for use by numerous constituencies. The data would then be available to judges, parties to cases, credit reporting agencies, journalists,

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<sup>2408</sup> See *supra* at 2202 11, 12 (list of limited data now collected and computerized by court clerks when cases are filed and closed).

<sup>2409</sup> See letter of June 30, 1997 from Leonidas Ralph Mecham, Director of the Administrative Office of the U.S. Court to the National Bankruptcy Review Commission, p. 2 (on file with the Commission).

<sup>2410</sup> A service somewhat like this, using the files of the Federal Election Commission, gives extensive data about who contributes to campaigns for federal elections, by address, by employer and by several other criteria. It is accessible on the Internet, for free, at [www.tray.com](http://www.tray.com).

scholars, and members of the public -- with real-time access to customized data at astoundingly low cost and amazing speed.<sup>2411</sup>

Subject to a full opportunity for public debate about the privacy issues that inevitably will arise, the Commission without reservation endorses the release of those portions of the clerks' databases that reflect matters of public record—that is, substantially all of them.

## 2. VIEWS EXPRESSED BY PUBLIC OFFICIALS

All of the government entities consulted expressed concern that precise statutory mandates about data collection and dissemination would become outdated quickly as technology changes faster than statutory law. They also expressed concern that statutorily-mandated increases in data collection and distribution would not be adequately funded. Additional concerns were expressed that joint data collection and distribution by agencies of the executive and judicial Branches would impinge on important separation-of-powers issues -- both in the abstract, as precedent-setting matters, and in practice, as to who has authority to do what, as between separate branches.

Another concern expressed by public officials involves personal privacy issues. For instance, individual debtors who file bankruptcy often have unpaid bills to physicians and health-care institutions. These creditors file proofs of claim with bills attached. Sometimes, these bills describe in detail the services provided to the debtor. They can reveal information about medical and mental-health conditions, medical procedures and medication that many individuals would strongly prefer to be confidential.

Today, nearly all information in court files is open to the public, including these medical records. However, access requires citizens to appear at the courthouse, wait in long lines, request the papers, wait for them to be found in the files and then inspect them in the courthouse. Making photocopies often requires waiting in additional lines and using coin-operated copying machines. These factors create practical barriers to easy public access to sensitive personal information, such as medical bills, as well as to critically-necessary information to which the public has a legitimate need for access. In discussions with the Commission, public officials expressed concern, on the one hand, that making too much sensitive information like this available to anyone with a computer terminal might result in intense Congressional scrutiny. On the other hand, the maintenance of these economically-

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<sup>2411</sup> Recommendation 73 of the *Long Range Plan of the Federal Courts*, at 3, (attached to letter of Leonidas Ralph Mecham (on file with the Commission)): “. . . wherever feasible, statistics should be generated as by products of automated Court transactions including docket entries, electronic filing of documents and automated financial transactions.”

wasteful barriers to information cannot possibly be considered a reasonable long range solution to the problem. A bankruptcy data system for the information age requires, first, a determination of the information that should be publicly available and, then, a determination to make it available with maximum ease and minimum cost.

Concerns about medical bills attached to proofs of claim ought to have no ultimate bearing on the determinations made by Congress. Attachments to proofs of claims are not digitized under current practice, so they would not be included in the databases the Commission proposes to release. Nor is the Commission aware of any information that is digitized under current practice that should not be released for reasons of privacy. The facts of bankruptcy cases and their processing by the courts are legitimate matters of public interest, and the availability of bankruptcy data can play an important, positive role in commerce.

### **TYPES OF REPORTING**

Various Proposals have been made for a wealth of additional reporting. These include concepts and data categories such as the following, catalogued from Recommendation 73 of the *Long Range Plan for the Federal Courts*:

- Pro Se Cases
- In Forma Pauperis Cases
- Payments of Filing Fees in Installments
- Whether a Case is a Business Case or a Consumer Case
- Refinement of the “Nature of Business” Classifications
- Adjustment of the Creditor, Asset and Liability Ranges
- Demographic Information on Debtors
- Better Breakdown of Types of Debts
- Reasons Why the Debtor Filed
- Section 707(b) Motions to Dismiss
- Reaffirmation Agreements
- Adversary Proceedings
- Contested Matters
- The Operation and “Success” of Chapter 11 Cases
- Chapter 12 and 13 Cases
- Disposition of Cases
- Appeals
- Professional Fees Requested and Awarded
- Distributions to Creditors
- Information to Detect Fraud
- Information for Administrative Purposes
- Information on Visiting Judges and Retired Judges

The Commission believes that specific determinations as to the foregoing should be made by the task force the Commission proposes. The Commission notes, however, that nearly all of this information could be culled from the existing databases of the bankruptcy clerks if those databases were made available.

One specific matter calls for comment. It is now a fairly widespread practice for trustees in Chapter 7 and 11 cases to file final reports including data about amounts collected and distributed to creditors, among other things. Present law already may require final reports in all Chapter 11 cases – through a complex chain of provisions scattered throughout the statute. Bankruptcy Code Section 1107 imposes on the debtor in possession the “duties” of a chapter 11 trustee under, among other things, Section 1106(a)(1). The duties under Section 1106(a)(1) include a duty to perform the Section 704(9) duties imposed on a Chapter 7 trustee. In turn, Section 704(9) requires the Chapter 7 trustee to “make a final report and file a final account of the administration of the estate with the court and with the United States trustee.”

Some courts explicitly require these reports under their local rules. However, the Commission is aware anecdotally that these reports are rarely filed in large Chapter 11 cases in the Northeastern states, but that they are routinely filed in other areas. In any event, the Commission believes that a clear statutory requirement for filing final reports based on uniform reporting forms, would be a beneficial addition to the administration of Chapter 11 cases.

The Commission believes that the task force it proposes should examine the establishment of national standard forms for these reports and the means to make them accessible and searchable on the Internet along with the rest of the contents of the clerks’ databases. The Commission is suggesting that the regular (usually monthly) reports now filed by most Chapter 11 debtors on locally-prescribed forms be changed to a uniform national form -- with requirements for cumulative reporting on the same matters that the Commission recommends for the final report in small business cases. The background, the basis for and the benefits of this are more fully discussed in Annex A.



## Annex A

### CUMULATIVE REPORTING IN CHAPTER 11 CASES

#### *Introductory Note*

1. Uniform Monthly Reporting for all Chapter 11 Debtors. Most Chapter 11 debtors today file monthly reports. These are filed on locally prescribed forms. The National Bankruptcy Review Commission has proposed nationally uniform monthly and other reporting forms for small-business debtors. It seems reasonable to forecast the possibility of nationally uniform monthly-reporting forms for all Chapter 11 debtors.

2. Have the Monthly Reports Present Certain Data on an Inception-of-the-Case-to-Date Basis. Based on that forecast, certain data (*e.g.*, suggested below) should be shown on the monthly forms *on a cumulative basis from inception of the case to the end of the most recent reporting period*. This will make every monthly report into a “final” report on the state of the case through the end of the most recent reporting period.

3. Discard (For Now) the Concept of an End-of-the-Case Report from all Chapter 11 Debtors. This approach would replace an idea previously considered by the Commission that all Chapter 11 debtors be required to file a final report after the plan has been consummated or the case dismissed or converted. This would bring Chapter 11 into conformity with Chapter 7 and Chapter 13 cases, where most U.S. Trustees and Bankruptcy Administrators require end-of-the-case reports on locally prescribed forms. While all commentators agreed that this would be a good idea for Chapter 11, the idea met with skepticism based on two important, practical factors: How would the duty to file it be enforced? And how could the quality of the data reported be assured?

While various answers to these questions were “kicked around,” none of the solutions attracted any consensus. Accordingly, the Commission has concluded that most of what would be contained in the prior concept of a mandatory final report could be captured if cumulative information were reported on a monthly basis. This would have the added advantage of allowing anyone at any time to obtain the most recent monthly report and know quickly how the case was progressing. In addition, the last monthly report would automatically function, on a *de facto* basis, as the “final report” for the case, at least for all of the data reported on a cumulative basis.

The Commission does not think the idea of a mandatory final report should be abandoned. After all, if these reports are now being filed in virtually all Chapter 7 and 13 cases, it seems odd that they are not required in Chapter 11 cases. Accordingly, the Commission recommends that, in due course, when and as

appropriate, as the bankruptcy system makes progress in developing broadened skills and practices about collection and reporting of data, that mandatory end-of-the-case Chapter 11 reporting be instituted. Until such time as that becomes practical, the cumulative reporting described below will fulfill many of the purposes addressed by the concept of the mandatory final report.

*Data To Be Reported on a Cumulative Basis*

Each monthly report for each Chapter 11 debtor would be required to respond to each of the following interrogatories, which would be part of the standard form for monthly reporting. Most of the answers would stay the same for each monthly reporting period. Hence, once the first report was filed, there would be relatively little incremental work in updating it each month.

The interrogatories would be:

1. State whether the case was a voluntary case or an involuntary case.
2. State the date of the order for relief.
3. State the number of full months elapsed since the order for relief.
4. Set forth the U.S. Department of Commerce SIC classification for the debtor's business, together with a brief narrative description of the principal business activities being conducted as of the date of the order for relief and changes, if any, since such date.
5. Set forth the number of full-time employees of the debtor(s) as of the following dates: one year prior to the date of the order for relief; the date of the order for relief; and, the end of the reporting period covered by this report.
6. Set forth the number of part-time employees of the debtor(s) as of the following dates: one year prior to the date of the order for relief; the date of the order for relief; and, the end of the reporting period covered by the report.
7. Set forth the date the schedules and statement of financial affairs were first filed.
8. Set forth the following with respect to all professionals engaged by the debtor(s):

Name of Professionals Engaged by Such Debtor (Use Name of Firm, Not Individual Professionals Working on Case)	Date of Entry of Order of Engagement	Type of Professional Service Provided by Each Such Professional (E.g., accounting, appraisal)	Aggregate <u>Cumulative</u> Amounts of Compensation and Disbursements Reported Pursuant to Rules for Pre-petition and Allowed by Court Order since Commencement of Case (With Percentage Actually Paid to Date Shown in Parenthetical next to the Dollar Amount Allowed)	Bankruptcy Only Portion of Amounts Shown in Preceding Column (i.e., Amounts Which Would Not Have Been Incurred Had the Debtor(s) Not Been Debtors in a Bankruptcy Proceeding)
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9. Set forth the following with respect to each committee, examiner, trustee, mediator or other similar person functioning in the case pursuant to orders of the court:

Name of Committee, Examiner, Mediator, Trustee or Other Similar Person	No. of Members of Committee	Date of Entry of Order Approving Creation or Appointment	Names of Professionals Engaged by Such Committee, Examiner, Trustee or Similar Person (Use Name of Firm, Not Individual Professionals Working on Case)	Type of Professional Service Provided by Each Such Professional (E.g., accounting or appraisal)	Aggregate, <u>Cumulative</u> Amounts of Compensation and Disbursements Allowed by Court Order since Commencement of Case to each Committee Professional, Trustee, Examiner, Mediator or Other Similar Person (With Percentage Actually Paid Shown in Parenthetical next to the Dollar Amount Allowed)
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10. If any trustees, examiners, mediators or other similar persons have been appointed, set forth the name of each party who filed the motion for the appointment.

11. State whether or not the case has been dismissed or converted to another chapter of title 11, U.S. Code.

12. If “yes” describe briefly the relief provided for in such order.

13. If “yes,” state the date of entry of the order producing such dismissal or conversion and the name(s) of the party(ies) who moved for the order granted and whether or not any appeal was taken from such order.

14. If such an appeal was taken describe briefly its status as of the end of the most recent reporting period and if it has been resolved, state what the resolution of the appeal was and the date of such resolution.

15. State whether any disclosure statements have been filed.

16. If “yes,” set forth the name of such disclosure statement, state on whose behalf it was filed and the date of filing, state whether or not it has been approved by the court and the date or dates on which the same was approved or on which a hearing has been scheduled and attach a complete copy of each (incorporation by reference to prior filings is permitted if there is set forth the name and date of filing of the prior filing and there have been no supplements or amendments to the prior filing).

17. State whether any plans of reorganization have been filed.

18. If “yes,” state on whose behalf it was filed and the date of filing, state whether or not it has been approved by the court and the date or dates on which it was approved or on which a hearing has been scheduled and attach a complete copy of each (incorporation by reference to prior filings is permitted if there is set forth the name and date of filing of the prior filing and there have been no supplements or amendments to the prior filing).

19. With respect to each plan filed:

Class of Claims or Interests	Indicate for Claims Whether Secured, Unsecured, Partly Secured or Subordinated, for Interests Indicate, for Stock, Whether Preferred or Common, for Partnerships Whether Limited or Preferred Or, If Other, Describe Briefly	Aggregate Allowed Amount of Claims or Interests	Approximate, Estimated Recovery of Class, Expressed as a Per Cent of Allowed Amount	Mode of Payment (E.g, All cash; Part Cash and Part Debt; Part Cash and Equity; Part Cash, Part Debt and Part Equity	Approximated Anticipated Time in Months from Effective Date of Plan to Last Due Date for Making of All Distributions to this Class
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20. State whether any appeal has been taken from any order approving or disapproving any disclosure statement or plan.

21. If such an appeal was taken, describe briefly its status as of the end of the most recent reporting period and if it has been resolved, state what the resolution of the appeal was and the date of such resolution.

Much or all of the data required by these interrogatories may already be in the clerks' databases. With regard to these data, the clerks' databases are considerably more accurate than these debtor-composed reports are likely to be. Hence the Commission regard's these reports as an interim measure, to be required only until such time as the clerks' databases are effectively made public.

## **DATA RECOMMENDATIONS: A CONCURRING NOTE**

**Lynn M. LoPucki, Senior Adviser, Data Study Project**

I fully concur in the report of the Data / Statistics Working Group to the National Bankruptcy Review Commission. Implementation of the recommendations in that report will result in a system capable of almost instantly delivering to users any information in the bankruptcy system digitized more than 24 hours earlier. Such a system can (1) provide virtually instant feedback to policy makers on nearly any aspect of the operation of the system, (2) give judges a new and powerful tool for determining what works and what doesn't, (3) replace PACER and inquires to the clerks' offices as the primary means for lawyers and parties to obtain information about their cases, and (4) replace a labyrinth of systems currently planned by the agencies involved for communicating among themselves. Three of the recommendations are worthy of highlight and elaboration.

*1. The policy that the bankruptcy clerks' databases should be released to the public.* Congress already has established a strong policy in favor of public access to bankruptcy data. Bankruptcy Code § 107 provides that, with certain minor exceptions, "a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." Some public officials have nevertheless argued that the policy should not apply to bankruptcy data in electronic form and that we should attempt to maintain the "practical obscurity" of bankruptcy data. Our report rejects those arguments.

The mechanism we recommend for giving public access to bankruptcy data is the same as that proposed by the Article 9 Drafting Committee for giving public access to data on Uniform Commercial Code filings: the governmental unit in possession of the database will be required to release copies of the database to the public. Because the governmental units are not required to prepare the data for release, the recommendations will not unduly burden the governmental units and there need be no delay in making the required releases. The problem of formatting and linking data from disparate computer systems for a wide variety of uses will be considerable. We anticipate, however, that private firms with the necessary technological sophistication will format and link the data and make it available directly to the public on a competitive fee basis.

*2. The long-term project of aggregating bankruptcy data.* Currently, each bankruptcy clerk and U.S. Trustee keeps his or her own database. Within broad limits, each determines what data will be collected and in what form. The effect is to make the compilation of national statistics impossible with regard to much of the

data. The solution is to establish a single set of data definitions and forms and mandate their use in all districts and regions.

Once the same data is being collected in all parts of the United States, the next step will be to aggregate that data in a single database. This will mean, for example, joining the bankruptcy court's record of a case with the records of the U.S. trustee and those of the panel trustee for the same case. On the completion of this project, researchers will be able to conduct nationwide studies of the operation of the bankruptcy system from a single database.

*3. The establishment and funding of a pilot project to aggregate bankruptcy data from various databases.* Because we cannot predict all of the obstacles that will be encountered, we cannot know for certain how long this project will take. What we can do is to *begin* now, with the establishment and funding of an inexpensive pilot project designed to discover those obstacles and enable us to estimate the size of this undertaking. The pilot project might include, for example, the posting of a single clerk's database on the Internet (to determine what technological problems might be encountered), the comparison of clerks' databases from different districts (to determine the nature and extent of incompatibility of the data), or the joining of data from the U.S. Trustee's database with data on the same debtors from the bankruptcy clerk's database (to determine how difficult it will be to match records). Taking these actions will also reveal the nature and extent of the human problems involved, such as those relating to the privacy of the people described in the data, the effects on employee morale in the bankruptcy system, and the impact of the new understanding we will gain of how the bankruptcy system actually works. The only way to finish is to begin.