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Adversary Proceedings in Bankruptcy: A Sideshow

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by

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Across a broad range of cases, the civil trial is disappearing.[1] In the early 1960s, about twelve percent of federal civil cases were resolved by trial; by 2002 that percentage had fallen to less than two percent.[2] This sharp decline raises important questions about the quality and costs of decisionmaking in federal district courts. After all, these courts exist to resolve cases and controversies. It matters whether (and why) these disputes are resolved in or outside the courtroom.

Marc Galanter[3] and Elizabeth Warren[4] suggest that the same thing is happening in the bankruptcy courts and that there is likewise cause for concern. They argue that adversary proceedings are the part of the bankruptcy process that most resembles traditional civil litigation and hence the appropriate benchmark by which to determine whether there is a "disappearing trial" in the bankruptcy courts.[5] They suggest that there has been a dramatic decline in the number of adversary proceedings and that this decline, like the decline in the number of civil trials, shows important changes are afoot. We disagree on all counts.

Bankruptcy's adversary proceeding, while resembling the civil trial, is a small (even trivial) part of the bankruptcy process and, over most dimensions, tells us little about the system and how it functions. Moreover, while the dynamics of adversary proceedings may have changed somewhat over time, few changes are worthy of note. Those that are noteworthy, far from being cause for concern, reinforce the basic lesson of our previous empirical work:

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[1]Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. L. STUD. 459 (2004).

[2]*Id.* at 461.

[3]*Id.* at 498-99.

[4]Elizabeth Warren, *Vanishing Trials: The New Age of American Law*, 79 AM. BANKR. L.J. 915 (2005); Elizabeth Warren, *Vanishing Trials: The Bankruptcy Experience*, 1 J. EMPIR. L. STUD. 913 (2004).

[5]Galanter, *supra* note 1, at 498-99; Warren, *Vanishing Trials: The New Age of American Law*, *supra* note 4, at 923-25.

The modern bankruptcy process is a speedy, relatively efficient mechanism for sorting out the problems of financially distressed consumers and businesses.[6]

In this article, we draw on our prior studies[7] of the Northern District of Illinois to assess trends in and the importance of adversary proceedings. Sections 1 and 2 provide the necessary perspective, describing the features of adversary proceedings generally and our dataset in particular. Using these data, we show in Section 3 that adversary proceedings are rare in both business and consumer cases and, apart from taking less time, have changed little in recent years.

Section 4 asks what lessons can be learned from our data about the efficacy of the bankruptcy process in consumer and business cases. There are a few. We have seen a dramatic rise in the number of consumer bankruptcy filings over the last decade.[8] Some have associated this rise with an increased willingness on the part of borrowers to abuse the system.[9] Changes in adversary proceedings over this period give us some reason to think this is not the case. The most important issue—indeed, for all practical purposes, the *only* issue—at stake in consumer adversary proceedings is the dischargeability of debt, and creditors are more likely to object to discharge when the debtor has committed fraud or engaged in other bad conduct. If the rise in consumer

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[6]Of course, the line between business and consumer cases can never be drawn with certainty when the debtor is an individual, and we do not pretend to have done so here. As labor economists have long recognized, individuals in the socio-economic cohort most likely to find themselves in bankruptcy often have income from self-employment in addition to wage income. *See, e.g.*, Kevin Moore, *Comparing the Earnings of Employees and the Self Employed* 10 (Working Paper, Oct. 14, 2004). Self-employment income can be a trivial part of overall income and be entirely unrelated to an individual's financial distress, or it can be the principal source of income and the entire reason for the bankruptcy. Or it can be any gradation between the two. Any line between the two is inherently arbitrary and must be drawn taking account of the data at hand and the purpose for which the line is being drawn. We have coded an individual in Chapter 7 as a "business" only if the PACER spreadsheets (described in Section 2) listed an "employer identification number" (EIN) for the debtor or if the name of the debtor was not the name of an individual. While imperfect, this coding convention does an effective job of sorting when the focus is on adversary proceedings. No debtor among our "consumers" had adversary proceedings for any purpose other than contesting discharge. None was involved in adversary proceedings of the type associated with businesses, such as transfers of land or avoidance actions.

[7]Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310 (2005); Edward R. Morrison, *Bankruptcy Decisionmaking: An Empirical Study of Continuation Bias in Small Business Bankruptcies*, 50 J.L. ECON. __ (forthcoming 2007); Douglas G. Baird et al., *The Dynamics of Large and Small Chapter 11 Cases: An Empirical Study* (Working Paper, May 2005); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INSTITUTE L. REV. 69 (2004); Douglas G. Baird & Edward R. Morrison, *Bankruptcy Decision Making*, 17 J. LAW, ECON. & ORG. 356 (2001).

[8]During the 1990s, "nonbusiness" filings increased over 90%, from 685,429 filings in 1990 to 1,315,751 in 1999. *See* Administrative Office of the U.S. Courts, *Bankruptcy Statistics, 1987-2003 Fiscal Year Bankruptcy Filings by Chapter and District*, available at http://www.uscourts.gov/bnkrpctystats/FY1987-2003.pdf.

[9]*E.g.*, Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. REV. 177, 208.

filings is due to greater abuse of the system, adversary proceedings should have risen over the same period. They have, in fact, *fallen*. That they have declined is evidence that, far from functioning poorly, the bankruptcy system has been functioning well and that abuse is not on the rise.

In business cases, trends in adversary proceedings point to a complicated tradeoff. A principal goal of a Chapter 11 case is to identify businesses that are worth saving and those that should be liquidated. The bankruptcy process performs this "filtering" function well.[10] Nonviable businesses are shut down quickly; the rest leave bankruptcy and compete effectively. The effectiveness of the Chapter 11 process reflects, in part, the decision of the Code's drafters to allow existing managers to continue running their business (as a "debtor in possession") during the reorganization process. Small businesses frequently cannot survive without their old owner-managers. A review of adversary proceedings shows, however, that allowing the old managers to remain in place comes at a cost. The old managers rarely bring preference or fraudulent transfer actions and, in small cases, there is no one else to bring them because creditors' committees rarely become active. Hence we see the underenforcement of preference and fraudulent transfer actions in small business reorganizations. We do not think that this trade-off is necessarily bad. A focus on the adversary proceeding, however, does show how this trade-off is in fact being made.

Aside from these lessons, however, statistics on adversary proceedings tell us precious little about the quality of the bankruptcy process. The vast majority of cases generate not a single adversary, which means that adversary proceedings have no bearing on the core issues in the typical bankruptcy case—fresh start for the consumer debtor, respect for absolute priority, rehabilitation of the distressed business, etc. For anyone interested in evaluating the bankruptcy process, then, adversary proceedings are a sideshow.

I. THE NARROW DOMAIN OF ADVERSARY PROCEEDINGS

In federal civil courts, every complaint, motion, deposition, or other action is pursued with an eye toward trial. The case will typically end with a trial or a substitute for trial, such as a settlement. Not so in bankruptcy court. The primary goal is not settlement of a dispute. In consumer bankruptcy cases, it is the fresh start, coupled with the equitable distribution of any nonexempt assets. In corporate bankruptcy cases, the goal is reorganization or, failing that, efficient liquidation. Both goals can be and usually are achieved without any trial whatsoever. Indeed, the very purpose of the bankruptcy process is often to substitute a speedy and structured bargaining process for what otherwise would have been drawn-out civil litigation in

[10] *See* Morrison, *supra* note 7.

state and federal courts.[11]

The rules governing adversary proceedings were drafted with these bankruptcy goals in mind. Bankruptcy Rule 7001 defines an "adversary proceeding" narrowly to include ten types of proceedings.[12] The vast majority, however, are of two sorts. An adversary proceeding can be brought to recover money or property (e.g., voidable preferences and fraudulent transfers).[13] It can also be brought to determine the dischargeability of a debt, to object to or revoke a discharge, or to revoke an order confirming a plan of reorganization.[14] These issues constitute only a tiny fraction of the tasks performed in the typical bankruptcy case.

In every consumer bankruptcy, the debtor will file schedules, meet with creditors and the trustee outside the presence of the judge, and turn over nonexempt assets to be distributed to her creditors. For none of these tasks is an adversary proceeding or anything resembling tradition civil litigation either necessary or appropriate. The vast majority of consumers who file for bankruptcy never appear in a courtroom—and there is no reason why they should. When an individual's right to a fresh start is in dispute, a judge must make a decision. But even here what corresponds closely to a trial is not necessarily an adversary proceeding. Indeed, perhaps the most momentous decision in any consumer bankruptcy case is the decision by the United States trustee[15] to seek dismissal of the entire Chapter 7 case under § 707(b) on the ground that the debtor is abusing the system.[16] The court holds a hearing in such instances, but this hearing is on a simple motion, not an "adversary proceeding" under Rule 7001.[17] The new bankruptcy law[18] rewrites § 707(b) and may dramatically increase the number of "abuse" hearings, but it will have no effect on the number of adversary proceedings.

A similar story can be told about corporate bankruptcies. By design, most of the action takes place outside the courtroom. The drafters of the Bankruptcy Code structured it to favor bargaining over litigation.[19] Moreover, the key events in every corporate Chapter 11 case that do require judicial attention—valuation of disputed claims, approval of a disclosure statement, voting

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[11]*See, e.g.*, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW Ch. 1 (1986).

[12]FED. R. BANKR. PROC. 7001.

[13]R. 7001(1).

[14]R. 7001(4)-(6).

[15]Or a creditor under BAPCPA.

[16]11 U.S.C. § 707(b).

[17]FED. R. BANKR. PROC. 1017(e).

[18]Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title I, Pub. L. No. 109-8, 119 Stat. 23 (2005).

[19]*See, e.g.*, Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 348 (1993); Philippe Aghion, Oliver Hart & John Moore, *Improving Bankruptcy Procedure*, 72 WASH. U. L. Q. 849, 857-61 (1994); JACKSON, *supra* note 11, at Chs. 1, 9.

on a plan—are unlike traditional civil litigation and generate no adversary proceedings.

The typical bankruptcy case, then, is markedly different from civil litigation and the aspects of a bankruptcy case that do resemble litigation correspond imperfectly to adversary proceedings. Moreover, as we will see in the next section, adversaries are exceedingly rare. The overwhelming majority of cases—business and consumer—generate no adversary proceedings whatsoever. And we would expect adversaries to become even more unusual over time. During a period of relative stability in the law, such as we have seen over the past fifteen years,[20] we would expect the law to become more predictable. With greater predictability, fewer adversary proceedings should be brought and those that are brought should be more likely to succeed, implying in turn that the likelihood of settlement should rise (a defendant will rarely insist on trial when it is clear that the plaintiff will win).[21] Far from being a cause for concern, then, a decline in adversary proceedings may suggest that the system is becoming more predictable. In any event, focusing on adversary proceedings to assess how well the system is functioning is a mistake; adversaries are a sideshow. As we show in the next section, all the available empirical investigation strongly reinforces these observations.

II. DATA ON ADVERSARY PROCEEDINGS

Those who have voiced concern about the decline in the number of adversary proceedings and the number that are litigated have used aggregate data. These data, however, say nothing about what happens in the typical case. In particular, they mask their most salient feature—that the overwhelming majority of adversary proceedings are concentrated in a tiny minority of the cases.

To understand the role adversary proceedings play, we need to look at discrete cases. To do this, we examine in detail adversary proceedings in one particular bankruptcy court, the Northern District of Illinois, Eastern Division, whose jurisdiction encompasses Chicago, Cook County, and outlying areas—a large and diverse economy. As we have shown in earlier work, the filings in this jurisdiction are similar to those filed throughout the nation.[22]

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[20]Since 1994, there have been no significant amendments to the Bankruptcy Code. *See, e.g.*, Elizabeth Warren & Jay Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1254 (2005) ("The current bankruptcy system is universal and highly predictable. Most commercial lawyers can give a good account of the likely fate of various transactional structures in case of bankruptcy, and their clients can price their risks accordingly.").

[21]Priest makes a similar point about law generally: over time, experience with a legal regime increases, uncertainty over its operation declines, and the incentive to settle disputes increases. George L. Priest, *Measuring Legal Change*, 3 J. L. ECON. & ORG. 193, 201-02 (1987).

[22]Morrison, *supra* note 7, at (manuscript at 9-11, on file with authors).

We gathered information about adversary proceedings using the Northern District's PACER database, which provides access to the docket and filings in every bankruptcy case since January 1998.[23] Importantly, PACER can also generate spreadsheets containing basic information—chapter, debtor name, docket number, etc.—about all bankruptcy cases and all adversary proceedings since 1993.[24] Focusing on 1998, we merged PACER's data on adversary proceedings with its data on case filings and then supplemented the merged data with information from the docket sheets. In this way, we assembled a dataset containing information about debtors and adversary proceedings in all Chapter 11 cases, all Chapter 7 cases that bore indicia of being business-related,[25] and random samples of 150 consumer Chapter 7 cases and 150 Chapter 13 cases. Table 1 presents the number of filings and adversary proceedings associated with each case type. The table breaks out Chapter 11 real estate cases involving partnerships. As our analysis below shows, these cases have distinctive features that make their adversary proceedings somewhat different.

III. A NEW PERSPECTIVE ON ADVERSARY PROCEEDINGS

A. Overall incidence

A casual glance at the aggregate data might suggest that adversary proceedings are rare in consumer bankruptcies, but fairly common in business bankruptcies. Data from the Administrative Office, for example, show that the incidence of adversary proceedings (total proceedings divided by total filings, expressed as a percentage) was about 3% in consumer cases but 60% in business cases in 1998.[26] We find similar percentages (2.7% and 56.6%, respectively) for business and consumer cases in the Northern District, as shown in Table 1.[27]

These percentages, however, are extremely misleading. Adversary proceedings are not evenly distributed across all filings. If we account for the skewed distribution of proceedings—by looking at the number of cases with at least one adversary—we find that adversary proceedings are very much the exception in *both* consumer and business cases.

The distribution of adversary proceedings within the population of bankruptcy filings is not skewed in consumer cases. The percentage of cases with

[23]Data used in this paper are available at https://ecf.ilnb.uscourts.gov/.

[24]Limited data are available for years before 1993.

[25]As noted above, *supra* note 6, we have adopted the following convention for sorting between business and consumer cases. A Chapter 7 case is coded as a "business" case if the PACER spreadsheets listed an "employer identification number" (EIN) for the debtor or if the name of the debtor was not the name of an individual.

[26]Warren, *Vanishing Trials: The New Age of American Law*, *supra* note 4, at 938-39 figs. 13-14.

[27]Note, however, that we use a different definition of "business" filing. *See* note 6 *supra*.

Table 1
Sample Size: Case Types and Frequencies

	Number of Cases	Number of Adversary Proceedings	Incidence (adversaries/ cases, in %)
Business cases			
Corporate Chapter 11	122	130	106.6%
Individual Chapter 11	41	20	48.8%
Real estate Chapter 11	12	5	41.7%
Corporate Chapter 7	318	136	42.8%
Non-corporate Chapter 7	28	4	14.3%
Total	521	295	56.6%
Consumer cases			
Chapter 7	150	8	5.3%
Chapter 13	150	0	0.0%
Total	300	8	2.7%

at least one adversary is equal to the overall incidence of adversaries. We find adversary proceedings in only 5% of Chapter 7 filings and in *none* of the Chapter 13 filings.

Business cases are another story, as Table 2 illustrates. Whereas the overall incidence is about 57%, we find adversary proceedings in only 12% of the cases and, more strikingly, nearly half of all adversaries are clustered within only *four* cases. Put differently, fewer than 1% of all business filings account for over 50% of all adversary proceedings. The picture is more striking when we focus on corporate Chapter 11 filings, where three cases—about 2.5% of all filings—account for 70% of all adversary proceedings. A similar story is presented by corporate Chapter 7 filings. These skewed distributions are not an artifact of the year 1998 or the Northern District. In 1997, for example, one case (the bankruptcy filing of law firm Keck, Mahin & Cate) accounted for over 15% of all adversary proceedings—business and consumer—in the Northern District. And, as Warren notes, in 1992 a single case accounted for nearly 30,000 adversaries—about 30% of all adversary proceedings for the entire country.[28]

Adversary proceedings, then, are rare. They are in fact altogether absent in the typical bankruptcy case involving a corporate debtor seeking to reorganize. For the mainstream cases, trends in the average number of adversary proceedings are simply irrelevant. They are a sideshow. There are not and have never been adversary proceedings—nor indeed anything that resembles traditional civil litigation—in the *ordinary* case.

[28]Warren, *Vanishing Trials: The New Age of American Law*, *supra* note 4, at 926 n.30.

Table 2
Incidence and Clustering of Adversary Proceedings Across Different Case Types

	Incidence adversaries/cases, in %	% cases with at least one adversary	% adversaries clustered in three cases	% adversaries clustered in four cases
Business Cases:				
Corporate Chapter 11	106.6	15.6	70.0	79.2
Individual Chapter 11	48.8	29.3	.	.
Real Estate Chapter 11	41.7	41.7	.	.
Corporate Chapter 7	42.8	7.6	58.1	65.4
Non-corporate Chapter 7	14.3	10.7	.	.
All cases	56.6	12.1	43.1	48.5
Consumer Cases:				
Chapter 7	5.4	5.4	.	.
Chapter 13	0.0	0.0	.	.
All cases	2.7	2.7	.	.

Note: percentages are omitted for some categories because the number of proceedings is very small (20 or smaller) and renders percentages misleading.

B. SUBJECT MATTER

Our data allow us to look beyond the incidence of adversary proceedings and focus on the features of the adversaries themselves. A simple picture emerges: adversaries typically involve a very narrow range of issues. As Table 3 illustrates, in our sample only *one* issue—the dischargeability of a particular debt, such as a student loan or a debt incurred through false pretenses—is ever raised in adversary proceedings in consumer cases.[29] In business cases, two issues—voidable preferences and fraudulent transfers—constitute nearly 80% of all adversary proceedings. Voidable preferences alone account for more than 80% of the adversary proceedings in corporate Chapter 11 cases.[30] In corporate Chapter 7 cases, adversaries are split between voidable preferences and fraudulent transfers. This likely reflects the presence of a trustee, who manages the debtor's estate once it enters bankruptcy.[31] As we explain in more detail below, trustees are far more likely than debtors in possession to be vigorous in uncovering fraud (intentional or constructive).

The patterns of Table 3 go a long way toward explaining why some kinds of cases—Chapter 11s filed by individuals or real estate businesses and Chapter 11s resulting in confirmation or conversion to Chapter 7—generate more adversary proceedings than others. Consider, first, individual Chapter 11 filings. Here, the individual's fresh start as well as the future of her business are at stake. Individual Chapter 11s simultaneously address the future of a business and the future of a person (the owner-manager). Naturally, then, adversary proceedings generated by these cases involve issues typically associated with consumer bankruptcies (nondischargeability actions) as well as those associated with business bankruptcies (preference actions). More importantly, the profile of the person likely to file an individual Chapter 11 petition is radically different from that of the person likely to file for Chapter 7.

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[29]In our sample of 150 consumer cases, only eight adversaries were filed—two by debtors (seeking discharge of student loans and tax debts) and six by creditors. A larger sample would likely yield a few instances of other adversary proceedings in consumer cases, in particular ones involving a sale of real property under § 363(h) and avoidance actions. Anecdotally, the latter often involve fraudulent transfers and angry ex-spouses.

[30]Outside of corporate Chapter 11 cases, we see slightly more variety in proceedings, with dischargeability issues (naturally) more frequent in individual Chapter 11 cases and with disputes over priority (usually mortgage interests) and contractual liability in real estate cases.

[31]11 U.S.C. §§ 701, 702.

Table 3
Characteristics of Adversary Proceedings, by Case Type (%)

	Avoiding preferences	Avoiding fraudulent transfers	Contesting dischargeability	Disputing claim priority	Selling assets	Disputing contract
Business cases						
Corporate Chapter 11	83.1	0.8	0.0	1.5	0.0	5.4
Individual Chapter 11	20.0	0.0	45.0	15.0	0.0	10.0
Real Estate Chapter 11	0.0	0.0	0.0	20.0	20.0	20.0
Corporate Chapter 7	41.9	44.1	1.5[32]	1.5	0.0	2.2
Non-corporate Chapter 7	0.0	0.0	100.0	0.0	0.0	0.0
All cases	57.3	20.7	5.1	2.7	0.3	4.4
Consumer cases						
Chapter 7	0.0	0.0	100.0	0.0	0.0	0.0
Chapter 13	0.0	0.0	0.0	0.0	0.0	0.0

[32]Such an adversary proceeding is, of course, frivolous, as corporations are not entitled to a discharge in Chapter 7. But nothing prevents such complaints from being filed, and hence they appear in our data.

The median Chapter 7 filer is a lower-middle class person fallen on hard times.[33] The Chapter 11 individual filer is an entrepreneur who, in many cases, engages in multiple business transactions (including real estate deals) over the course of her lifetime and often has a number going on at any one time.[34] The two debtors also incur different types of debt. A self-employed entrepreneur, for example, is much more likely to have significant unpaid IRS obligations than the typical Chapter 7 debtor, who is not self-employed and for whom income taxes are withheld automatically.[35] These factors make it more attractive to bring a proceeding to deny discharge in an individual Chapter 11 case, holding all else equal. In addition, their more complicated financial lives also make an adversary proceeding more likely, especially with respect to real property. Sales of real property under § 363(h), for example, require an adversary proceeding, as do disputes involving liens on real property and disputes between joint owners of real property.

Similar observations can be made about real estate Chapter 11s, although our analysis must be tentative given the small sample size here (twelve filings and five adversary proceedings). Not only do they raise numerous business-related issues (reorganizing a business, disentangling the affairs of a partnership), they also raise unique property-related issues. We also see frequent disputes over the priority of liens and the terms of contracts, typically contracts involving the sale of real estate.

Table 4
Adversary Proceedings in Corporate Chapter 11 Cases, By Outcome

Outcome	Number of cases	Number of adversaries	Cases with at least one adversary
Confirmation	31	106	29.0%
Conversion to Chapter 7	24	20	25.0%
Dismissal	67	4	6.0%
All outcomes	122	130	15.6%

The patterns *within* corporate Chapter 11 cases are more interesting. Table 4 shows that adversaries are far more common in cases ending in confirmation of a plan of reorganization (30%) or conversion to Chapter 7 (26%) than in dismissal (6%). Adversaries are more common in Chapter 11 cases

[33] *See, e.g.*, Elizabeth Warren, *Bankrupt Children*, 86 Minn. L. Rev. 1003, 1005-06 (2002); TERESA A. SULLIVAN ET AL., THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 27-59 (2000).

[34] *See* Baird & Morrison, *supra* note 7, for evidence of this "serial entrepreneurship" phenomenon.

[35] As noted above, some Chapter 7 consumer debtors are, given our coding convention, self-employed. Our point here is merely that the typical Chapter 7 consumer debtor is not.

converted to Chapter 7 than they are in business cases that begin in Chapter 7 *in the first instance.*[36] This pattern is likely an artifact of speedy judicial decisionmaking in Chapter 11: Bankruptcy judges usually know within a few months that a business will not be able to reorganize successfully and dismiss the case before any preference action is brought.[37] If, however, potential preference actions exist, the bankruptcy judge will convert the case to Chapter 7 rather than dismiss it outright. Cases that are converted from Chapter 11 to Chapter 7 tend to be those of substantial businesses where the potential for a successful preference action exists. By contrast, businesses that file Chapter 7 cases initially have little in the way of assets. Moreover, in corporate Chapter 7 cases as well as in corporate Chapter 11s, the debtor is required to report, as part of its Statement of Financial Affairs, any transfers made to insiders within a year of the petition.[38] A trustee, at least in Chicago, is likely to investigate such transfers and to bring an avoidance action if it bears the indicia of a fraudulent transfer. The prospect of such scrutiny is a disincentive for filing a corporate Chapter 7 initially.[39] Scrutiny by the U.S. Trustee may also dampen corporate Chapter 11 filings, but Chapter 11 holds the prospect of greater benefits for the old owners of the business that can offset this risk.[40]

Table 5
Characteristics of Adversary Proceedings, by Case Type (%)

	Initiated by debtor	Initiated by creditor or trustee
Business Cases		
Corporate Chapter 11	14.6	85.4
Individual Chapter 11	55.0	45.0
Real Estate Chapter 11	60.0	40.0
Corporate Chapter 7	0.0	100.0
Non-corporate Chapter 7	0.0	100.0
All cases	11.2	88.8
Consumer cases		
Chapter 7	25.0	75.0
Chapter 13	0.0	0.0

[36]Table 2 shows that the incidence of proceedings in business Chapter 7 cases (about 7%) is less than half the incidence in other business cases (for example, about 15% in corporate Chapter 11 cases).

[37]*See* Morrison, *supra* note 7.

[38]*See, e.g.*, the annotated Statement of Financial Affairs available at <http://www.usdoj.gov/ust/r19/colorado/documents/AnntdStatement_Schedules.pdf> (visited July 6, 2005).

[39]Interview with Karen Porter of The Law Offices of Karen J. Porter, Chicago, IL (Oct. 29, 2004).

[40]*See* Baird & Morrison, *supra* note 7, at 2349-65.

The patterns in Tables 3 through 5 also explain why most of the adversary proceedings in business cases are concentrated in a handful of cases. These cases usually involve relatively large businesses in which a creditors' committee is active.[41] In cases involving small businesses, too little is usually at stake to justify either the formation of a creditors' committee or the pursuit of prepetition transfers. Indeed, if the prepetition transfers are small enough the adversaries must be brought in the district where the defendant resides.[42] More importantly, the debtor in possession trying to keep its business alive usually has little incentive to bring a preference action against the typical recipient of a voidable preference, such as a crucial supplier paid out of the ordinary course on the eve of the debtor's bankruptcy filing. And if there is no active creditors' committee (and in the typical small business Chapter 11 there is not), no one has an incentive to take action. The beneficiaries of an adversary proceeding—trade creditors and other creditors with small claims—have little to gain. The party bringing the action, however, has much to lose (it bears litigation costs if it loses and must share any recovery with all unsecured creditors, thanks to *Moore v. Bay*[43]). As Table 5 shows, the vast majority of adversaries (i.e., preference actions) in Chapter 11 are brought by the trustee or creditors, usually a creditors' committee, not by the debtor in possession.

In a large case, by contrast, an active creditors committee is likely to exist and funds are often available to pay for the litigation. Moreover, it is much cheaper to initiate an adversary proceeding than to defend against one. Much of the action involves affirmative defenses (such as the payment being made in ordinary course[44]) that impose burdens on the defendant. Each defendant must hire its own lawyer, someone who would not otherwise be in the bankruptcy court. By contrast, the creditors' committee will already have a lawyer who is appearing in the bankruptcy court. And each adversary proceeding typically raises similar (often identical) allegations; once the lawyer has drafted one complaint, it is cheap to draft new ones. In short, a case needs to be large enough before a preference action makes sense, but once this threshold is crossed, it usually makes sense to bring multiple actions.

A typical example of how preference actions (and hence adversary proceedings) tend to proliferate in cases above a certain size is *Andriana Furs*,[45]

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[41]The person bringing the preference action in Chapter 11 is so rarely a trustee or the debtor in possession that it underscores cases such as *In re Cybergenics Corp.*, 226 F.3d 237 (3d Cir. 2000), which raise the question of whether anyone other than the trustee or debtor in possession can bring avoidance actions. Were a court to find that only the trustee or debtor in possession could bring preference actions, the dynamics of preference litigation in Chapter 11 would change dramatically.

[42]*See* 28 U.S.C. § 1409(b).

[43]Moore v. Bay, 284 U.S. 4 (1931).

[44]11 U.S.C. § 547(c)(2).

[45]*In re* Andriana Furs, Inc., No. 98-4715 (Bankr. N.D. Ill. Feb. 17, 1998).

a large fur retailer with multiple locations throughout Chicago, including one on the Magnificent Mile. After its plan of reorganization was confirmed, a creditors' trust was formed[46] for the purpose of bringing over forty-five virtually identical[47] adversary proceedings against suppliers who received voidable preferences. In some adversaries, the complaint named dozens of defendants.[48]

This case follows a standard pattern. The preference actions are completely separate from the reorganization of the business. The plan puts the preference actions in a trust and provides for the distribution of any proceeds. Through this technique, the preference litigation takes place after the plan is confirmed and after the business leaves bankruptcy.

C. Time Trends

So far, we have identified patterns in cases filed at a particular moment in time, the year 1998. There is little reason, however, to think that different patterns would characterize cases filed in any other year during the past decade. Indeed, the drafters of the Bankruptcy Rules predicted precisely these patterns.[49] When we do look at national data from 1993 to 2002, we see remarkably little variation.[50]

In business cases, total adversary proceedings in business cases, expressed as a percentage of business filings, have dropped modestly from about 70% in 1993 to just over 65% in 2002. The percentage of adversary proceedings that terminate during or after trial[51] fell from about 7% to about 3%, but this change was to be expected. Preference law was altogether refashioned in

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[46]Disclosure Statement at 3-4.

[47]All 45 complaints seek "avoidance and recovery of preferences." Only the names of the defendants vary. Twelve were filed on August 17, 1999; another 33 were filed between February 16 and 23, 2000.

[48]*See, e.g.*, Complaint for Avoidance and Recovery of Preferences, Creditor Trust of the Estate of Andriana Furs, Inc. v. KDAF-TV (*In re* Andriana Furs, Inc.), No. 00-221 (Bankr. N.D. Ill. Feb. 16, 2000) (naming 29 defendants).

[49]Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Suggested Interim Bankruptcy Rules, Rule 7001, 82 F.R.D. 487 (1979) ("[A] very high percentage of the actions which will be brought under the new jurisdictional grant will be to recover money or property").

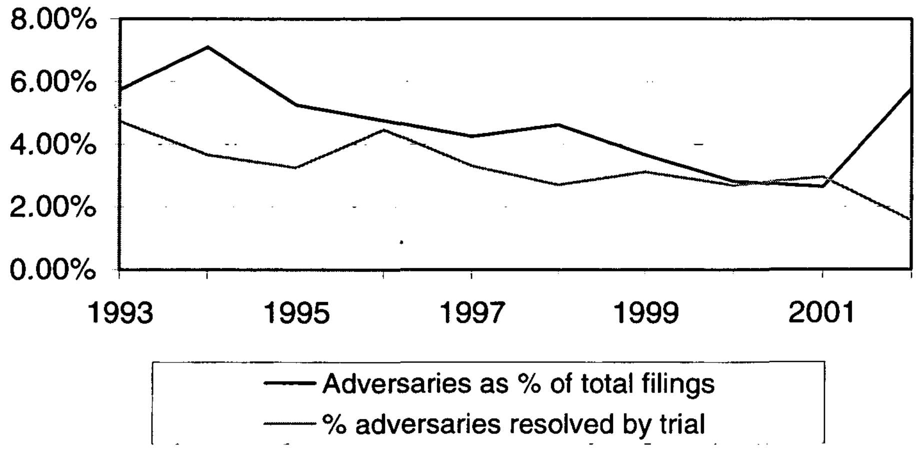
[50]Data are available for adversary proceedings as far back as 1985, but we are skeptical that much can be gleaned. Bankruptcy practice was still taking shape in the decade or so after the enactment of the Bankruptcy Reform Act and the fall-out from Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Consider, for example, the data on adversary proceedings in business cases. Between 1985 and 2002, adversaries (expressed, again, as a percentage of total business filings) rose substantially, from 40% to over 65%. But, as Warren's plot of the data reveals, the pre-1993 data are substantially different from the post-1993 data. Warren, *Vanishing Trials: The New Age of American Law*, *supra* note 4, at 938 fig. 13. From 1985 to 1992, adversaries remained fairly constant, hovering around 40%. Suddenly, in 1993, adversaries shot up to 70%. Since then, they have generally hovered between 60% and 70%. This pattern offers compelling reason for focusing on the 1993-2002 period. This 10-year period has a further advantage in that we can use the richer data from the Northern District as a benchmark. (For Northern District data, PACER files are complete only after 1992.)

[51]Warren, *Vanishing Trials: The New Age of American Law*, *supra* note 4, at 940 fig. 16.

1979 and substantially reformed in 1984.[52] Open issues continued to be litigated for several years and it took time for practices to become stable. As issues to litigate have disappeared and predictability increased, the amount of litigation should decline and it has.

For consumer cases, the national data again show little variation over time. Adversary proceedings (expressed again as a percentage of total consumer filings) fell, from about 4% during the early 1990s to about 2.5% in 2002. But the overall incidence of adversary proceedings is so low that we question whether much can be made of this drop.[53] The same can be said for adversary proceedings terminating during or after trial. As a percentage of cases filed, they fell from about .55% in 1993 to about .25% in 2002. That is a 55% decline, but it is also a reduction of only .3 percentage points in absolute terms—a drop of only 130 cases. This number is vanishingly small relative to the total number of adversary proceedings filed in consumer cases. Such a small change could reflect a slight shift in the composition of debtors, in the kinds of debts they held, or in the U.S. Trustee's enforcement policy.[54]

Figure 1: Frequency and Resolution of Adversary Proceedings, 1993-2002



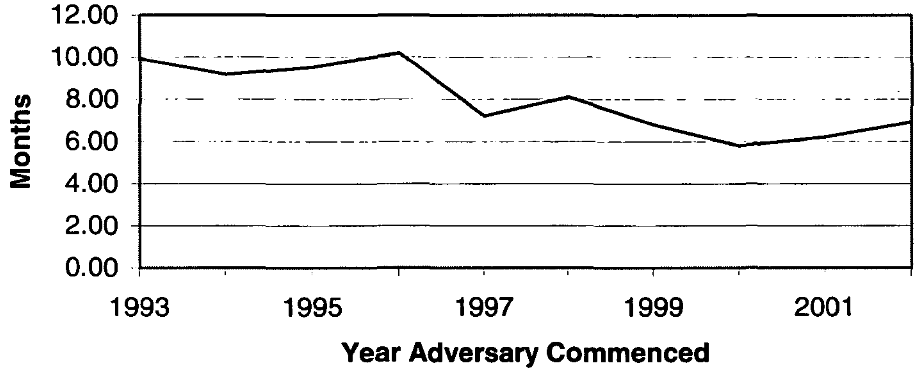
[52]In particular, before 1984 the ordinary course defense to preference actions applied only to debts incurred within 45 days of the petition. 11 U.S.C. § 547(c)(2), amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 462(c), 98 Stat. 333, 378. The effect of the change was to decrease the number of transfers that were preferences, but to increase the arrearage cost of litigating a preference action, as more preference actions would turn on whether a payment was made in ordinary course, a question that is necessarily fact dense.

[53]A reduction from 4% to 2.5% is a large change in percentage terms (a 38% drop) but a very small change in absolute terms (a drop of only 1.5 percentage points).

[54]If the trustee, for example, became slightly more aggressive in bringing § 707(b) motions for substantial abuse (which are not adversary proceedings) during this period, a few creditors who otherwise would have brought independent adversary proceedings to contest the dischargeability of particular debts would not have needed to do so.

The absence of meaningful time trends is evident in the Northern District data as well. Here we draw on PACER spreadsheets for the period 1993-2002. Figure 1, for example, shows that the volume of adversary proceedings, expressed as a percentage of total bankruptcy filings, was about 6% in 1993, fell to about 3% in the late 1990s, and recently jumped back up to about 8%. Over a ten-year period, then, little has changed in the rate with which adversary proceedings are filed. The same is true for the percentage of cases resolved by trial. Figure 1 shows that this percentage has fallen by over 50%, from 4.7% in 1993 to 1.6% in 2002. This parallels the drop in the national data, and the same caveat applies: a drop of only 3.1 percentage points may reflect only a small change in the way the docket as a whole is managed.

Figure 2: Average Duration of Adversary Proceedings, 1993-2002



There is one change over the last decade that may be of some moment. Adversary proceedings take less time to resolve. As Figure 2 illustrates, the average length of an adversary proceeding from time of filing until resolution has fallen by over 25%, from about ten months in 1993 to about 7.5 months in 2002. The average duration even dipped below six months in 2000. These statistics might be viewed as evidence of undue haste in the bankruptcy courts. After all, six months is a blink of the eye for ordinary civil litigation. But it would be a mistake to reach this conclusion. Six months is an eternity in bankruptcy court. Even in corporate Chapter 11 cases, nearly 45% of all dismissals and conversions occur within the first three months.[55] That adversary proceedings are becoming shorter is merely additional evidence that bankruptcy judges are managing their dockets effectively.

[55]*See* Morrison, *supra* note 7, (manuscript at 13-14, on file with authors).

IV. INTERPRETING THE EMPIRICAL PATTERNS

The absence of trials is neither good nor bad in the abstract. To interpret the patterns observed here, we must ask whether current practice—including the absence of traditional litigation—advances the goals of bankruptcy law, which vary with the type of bankruptcy case. The following analysis focuses on the two types of cases—consumer (section 4.1) and corporate Chapter 11 (4.2)—where the implications of the "disappearing trial" are fairly clear.

A. CONSUMER CASES

Our data show that adversary proceedings in consumer cases are virtually synonymous with objections to discharge under § 727 and complaints that particular debts are nondischargeable under § 523. The longstanding policy of the bankruptcy laws is to give the honest but unfortunate individual who is hopelessly in debt the right to a fresh start.[56] All the evidence suggests that the overwhelming majority of those who file individual bankruptcy petitions are in fact entitled to a fresh start.[57] Hence, we should expect the number of adversary proceedings in individual Chapter 7 cases to be small and virtually nonexistent in Chapter 13.[58] When the individual debtor's right to a fresh start is not in dispute (and, at least under existing law, it rarely is), there is nothing to have a trial about.[59]

Against this backdrop, an apparent decline in the number of adversary proceedings in consumer cases is not a cause for concern. To the contrary, it suggests that bankruptcy abuse, far from being on the rise, is falling. If the dramatic rise in the filing rate brought into the system more debtors who were not entitled to a discharge, the number of adversary proceedings should have gone up, everything else equal.[60] One cannot, of course, support this thesis merely by looking at the numbers. As we noted in Section 1, the bankruptcy process has become sufficiently predictable that few adversary proceedings need to be filed and those that are filed never go to trial (when an adversary is filed, its outcome is clear). Indeed, it is *theoretically* possible that abuse has increased and, absent such an increase, the greater predictability of the process would have led to an even greater decline. But there is *no* evidence to support this hypothesis. In short, nothing suggests anything is amiss

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[56] *See, e.g.,* Local Loan v. Hunt, 292 U.S. 234, 244 (1934).

[57] *See generally* TERESA A. SULLIVAN, ET AL., AS WE FORGIVE OUR DEBTORS (1999).

[58] Chapter 13 gives a broader discharge than Chapter 7. With fewer opportunities to object to discharge, we should expect fewer adversary proceedings in Chapter 13. In our sample of 150 cases, we found none. A larger sample might produce some. And as the broad discharge in Chapter 13 is cut back over time, the total number may increase.

[59] Interestingly, we find the same patterns (few adversary proceedings, but all of them addressing nondischargeability issues) in *business* Chapter 7 filings by individuals.

[60] Adversary proceedings might not have increased if the U.S. Trustee became much more vigorous in seeking dismissal under § 707(b), but we have no evidence of this either.

with respect to adversary proceedings in consumer bankruptcy cases. The vanishing trial is not cause for concern.

B. CORPORATE CHAPTER 11 CASES

Corporate Chapter 11 cases can be evaluated along at least two dimensions: (1) the effectiveness of the system in ensuring that viable businesses survive and others are swiftly liquidated, and (2) the system's effectiveness in vindicating the rights of creditors, especially unsecured creditors, and providing them with a recovery on their claims.

1. *Distinguishing Viable and Non-Viable Businesses*

Adversaries are exceedingly rare in cases that get dismissed, but this is to be expected. As noted above, cases are often dismissed precisely because the debtor business has insufficient assets to justify the expense of the bankruptcy process, including adversary proceedings.[61] Beyond this, there is little or no correlation between Chapter 11 outcomes and the incidence of adversary proceedings. Adversaries are about as common in cases leading to reorganization (30%) as they are in cases converted to Chapter 7 (26%). Closer analysis of the data leads to the same conclusions: in regressions not reported here, we found no correlation between bankruptcy outcomes and the incidence of adversary proceedings.

This should be unsurprising. The most important issues in adversary proceedings (avoidance of preferences and fraudulent transfers) have little bearing on the most important issue in a Chapter 11 case (whether the business is viable). Indeed, most adversaries in our sample were brought by a creditors' committee or trustee *after* the fate of the business had been decided (after a plan had been confirmed or the case converted to Chapter 7). And again, adversary proceedings are rare. They are altogether absent in the vast majority of corporate Chapter 11s. If anything, the absence of adversary proceedings provides further evidence supporting what we already know about Chapter 11. It is a highly expeditious procedure for resolving the financial distress of businesses and their owner-managers.

The typical corporate case involves a small business owned, operated, and inextricably tied to a single person, such as an electrical subcontractor, a travel agency, or a small restaurant.[62] The corporate Chapter 11 process offers no fresh start for the owner-manager. Nevertheless, her personal financial affairs are caught up in the affairs of the corporation. In 85% of the cases, the owner-manager is personally liable for the debts of the corporation.[63] In

[61]But even this pattern is less clear than it seems. About 10% of all dismissals involve businesses that cut deals with major creditors, voluntarily moved to dismiss their petitions, and continued operations outside of bankruptcy. *See* Morrison, *supra* note 7 (manuscript at 51 tab. 4, on file with authors).

[62]*See generally* Baird and Morrison, *supra* note 7.

[63]*Id.*, at 2362 tab. 17.

more than 60% of small corporate Chapter 11 reorganizations, the case centers around the tax obligations of the corporation that are also the personal obligations of the owner-manager.[64] She keeps the business afloat temporarily by using money withheld from paychecks and earmarked for the Internal Revenue Service to keep suppliers, landlords, and others at bay. The Chapter 11 case consists of negotiations in which the owner-manager tries to keep the business alive while at the same time trying to escape personal liability for these personal obligations.[65]

Regardless of why the owner-manager of a financially distressed small business has decided to use Chapter 11, the bankruptcy judge faces the challenge of distinguishing between the businesses that can survive as going concerns and those that cannot. If a business is to survive, the sorting process should be done quickly. And it is done quickly. Among businesses that are continued, nearly two-thirds exit in less than one year.[66] More surprisingly, the Chapter 11 process identifies over 70% of all non-viable businesses within six months; 44% are identified within three months. Only 8.5% of cases are still ongoing after one year. Complaints about the unwillingness of judges to do their jobs and act decisively have no place here.

In short, the Northern District of Illinois data show that judges exercise control over a process that works well without ordinary civil litigation. Indeed, by any measure it works quickly. The Northern District permits the parties to a case to schedule motions (e.g., a debtor's motion to use cash collateral, a creditor's motion to lift the automatic stay). The typical judge sets a time each week to hear motions on any Chapter 11 case on her docket. A party can file a motion on Thursday, give the required notice, and ask to raise the matter at the regularly scheduled time for Chapter 11 motions the next Tuesday.[67] Opposing lawyers need not draft a response. They simply attend the hearing and present argument orally to the judge. As a result, the judge's decision will be based not only on the paper record, but also on open-ended discussion with the parties in open court. Judges typically rule on the spot.[68] Relative to ordinary civil litigation, the typical bankruptcy matter in the

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[64] *Id.*

[65] There are also cases in which the debtor needs to sort out claims of a landlord, a former employee, or some other third party. In one case, for example, the Chapter 11 was brought to stay an employment discrimination action that was just about to go to trial. *In re* Myron & Phil's Steakhouse, No. 98-726 (Bankr. N.D. Ill. Jan. 12, 1998). In these cases too, however, the Chapter 11 is used to resolve a discrete problem.

[66] The observations in this paragraph are based on Morrison, *supra* note 7 (manuscript at 13-14, on file with the authors).

[67] When there is personal service, only two-days notice is required. Bankr. N.D. Ill. R. 9013-1-9013-9 (the notice period is enlarged to 20 days for motions proposing the sale of assets outside the ordinary course, conversion to Chapter 7 or dismissal, and other significant events; see Fed. R. Bankr. P. 2002).

[68] Interview with Chief Judge Eugene R. Wedoff, United States Bankruptcy Court for the Northern District of Illinois (Dec. 3, 2002). *See also* Judge John Q. Squires' description of the practice, John Q.

Northern District moves at the speed of light.[69]

The sorting process is not only quick; it is also accurate. Viable businesses are saved; failures are shut down. In cases leading to shutdown, nearly 80% of the businesses exhibited some indicator of "economic" distress, such as failing to pay ongoing expenses in bankruptcy or violating court procedures.[70] These indicators characterize businesses without prospects, rather than businesses suffering from temporary reverses. By contrast, 71% of businesses that were reorganized exhibited classic indicators of "financial," not economic, distress. Forty percent were recovering from overexpansion. Notably, in only *one* of these overexpansion cases did the business fail after reorganizing. Another 9% suffered temporary cash shortages from the loss of customers (who had gone bankrupt or breached contracts), and about 11% of the businesses suffered temporary cash shortages because they had underestimated the costs of reconfiguring assets (e.g., converting a restaurant to a lounge). Among businesses that exited bankruptcy with a with a new capital structure, less than 22% failed within one year and less than 37% within two years. Given that the annual probability of discontinuing a business is around 20% even for businesses over ten years old,[71] nothing in the data here implies that the Chapter 11 process erroneously reorganized any of the businesses that survived more than one or two years.

To the extent that procedure matters, we should not be bound by the conventional paradigms of civil litigation. The absence of adversary proceedings—or anything else resembling the tradition civil trial—gives us no reason to doubt the efficacy of the bankruptcy process in quickly identifying businesses that cannot succeed and allowing those that can to reorganize. Far from being a pathology of modern adjudication, the process harkens back to the piepowder courts and the venerable law merchant strand of the common law tradition.[72]

Squires, *Fifteen Common Bankruptcy Practice Errors and How to Avoid Them*, DCBA BRIEF ONLINE, Jun. 1998, available at http://www.dcba.org/brief/judpractice/0698.htm (visited July 6, 2005).

[69]Other bankruptcy courts may be less effective, as this motions practice is distinctive. In other jurisdictions, motions are filed with the court clerk. Opportunity is given for opposing counsel to draft a response, and the judge often renders a decision without conducting a hearing. Weeks or months can pass before a motion is considered. For a discussion of these procedures and their likely effect on the overall efficiency of Chapter 11 practice, see Morrison, *supra* note 7.

[70]The observations in this and the following paragraph are based on Morrison, *supra* note 7 (manuscript at 18-20, on file with authors).

[71]Thomas J. Holmes and James A. Schmitz, *On the Turnover of Business Firms and Business Managers*, 103 J. POL. ECON. 1005 (1995).

[72]*See, e.g.*, Charles Gross, *The Court of Piepowder*, 20 QUART. J. ECON. 231 (1906) ("A striking feature of the court of piepowder was its summary procedure. . . . Formalities were avoided . . . and an answer to the summons was expected within a day, often indeed within an hour.").

2. *Creditors*

Bankruptcy is supposed to promote goals in addition to reorganization. Many accounts of Chapter 11 reorganizations assume that its beneficiaries should include general creditors. That is, one of bankruptcy's goals is distributional. In the typical Chapter 11, however, general creditors end up with nothing.[73] After secured creditors are paid and administrative expenses covered, tax claims typically exhaust whatever is left.[74] Only in the largest cases can general creditors expect a significant recovery. While this outcome may be troubling, the problem has little to do with the relative absence of anything resembling traditional litigation. Litigation cannot create assets where none exist.

The absence of adversary proceedings is troubling in one respect, however. In addition to enabling viable businesses to survive, bankruptcy also prohibits debtors from favoring some creditors over others when bankruptcy is looming. Moreover, an effective bankruptcy law should also ensure recovery of fraudulent transfers for the benefit of the creditors as a group. In the typical small business bankruptcy, however, no trustee is appointed. The old managers act as debtor-in-possession and assume the powers and duties of the trustee, including the bringing of avoidance actions. As a practical matter, the debtor in possession rarely brings them. It wants to reorganize and has no incentive to go after money paid to someone favored before the bankruptcy petition was filed. Indeed, those whom the debtor favored are especially likely to be those with whom she wants to continue to do business.

The debtor in possession might bring an avoidance action if prodded by the creditors' committee or a particular creditor, but in the typical small business Chapter 11 there is no active creditors' committee and no creditor is likely to push for it either. In general, there is not going to be a distribution to the general creditors. Spending time and incurring the costs of serving on a committee of unsecured creditors is usually a waste of time. To be sure, one creditor might have a dominant role in the reorganization. But that cred-

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[73]*See* Baird et al., *supra* note 7, at 24.

[74]There are, of course, exceptions. Now and again a solvent debtor will use the bankruptcy process to sort out a lawsuit. Our sample included a restaurant that filed for bankruptcy a few minutes after a sexual harassment/age discrimination trial brought by a former employee went to trial. The Chapter 11 lasted only as long as it took to negotiate a settlement with this employee and another who had brought a race discrimination action. See Baird & Morrison, *supra* note 7, at 2353. Alternatively, the debtor's fortunes may take an unexpected turn for the better. One distressed business in our sample, another restaurant, discovered that its leasehold interest was valuable. The landlord wanted to sell the real estate to a third party, but the buyer refused to go through with the transaction unless the restaurant surrendered possession of the premises. By filing for bankruptcy and curing defaults, the restaurant ensured that it could share in the premium that the landlord obtained from the sale. *Id.*, at 2354. But these cases are unusual. If we focus on the *typical* debtor (in other words, if we look at the median statistics in aggregate data), the current process is not one that can be justified on the ground that it better protects the general creditor than the alternatives. Neither is likely to yield them anything.

itor likely had power before the bankruptcy and would either have received the preference or blessed it. The United States Trustee might identify a preference and pressure the debtor in possession to bring the action, but rarely will the stakes be large enough. The burden of litigating various issues (including whether the payment was made in ordinary course) may not justify the costs. Nevertheless, the nature of the typical debtor's finances—showing an invasion of trust funds used to pay taxes—strongly suggests many preference and other voidable transfers did in fact occur.

The current system, then, seems to favor reorganization at the expense of vindicating the bankruptcy norm of equality among general creditors and, in particular, its policy against voidable preferences. The debtor-in-possession concept is central to vindicating the first, but antithetical to vindicating the latter. Such a trade-off may be inevitable. The typical small business will not continue without the current owner-manager in place, and the current owner-manager is not going to bring preference actions.

CONCLUSION

Modern bankruptcy practice is not a story about vanishing trials at all. Bankruptcy's adversary proceeding, while resembling the civil trial, is a small part of the bankruptcy process and over most dimensions tells us comparatively little about the system and how it functions. It is a sideshow. Moreover, adversary proceedings have not changed in important ways over the years. The overall picture, however, does reinforce the message that emerges when viewing the data from other vantage points. Honest but unlucky individuals are getting their fresh start. Viable businesses are able to reorganize. Nonviable businesses are quickly identified. The system is working as intended. The vanishing trial raises fundamental issues about federal civil litigation, but not about bankruptcy judges or the legal institution they administer so ably.