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Chapter 11 Under Duress

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ABSTRACT

In this Article, the Business Bankruptcy Project (BBP) reports data from an empirical study of two samples of chapter 11 bankruptcies in the federal courts in Wilmington and Manhattan, two districts notably important in modern bankruptcy practice.[1] *While our study includes a number of interesting and important facts about the chapter 11 process in 2014 and 2018, this brief interim report centers around the loss of value arising from control by pre-bankruptcy lenders and the implications that arise from that fact.*[2] *Building on other recent studies, it highlights the fact that a control transaction in many chapter 11 cases has taken place outside of bankruptcy, with little effective notice and no judicial scrutiny.*

[*] Benno C. Schmidt Chair of Business Law, The University of Texas School of Law. This Article reports data from the Business Bankruptcy Project, which issued its first published report in 1999. The BBP was developed by now-Senator Elizabeth Warren and me, along with an outstanding staff of law and graduate students, especially Dr. Sarah Reed, Dr. Andrew Krebs, and Kerry Waldrep. This paper reflects the work of a number of legal research assistants, especially Thomas Beaver and Thomas Kagerer. A special thanks to two volunteer lawyers, Bryan Rochelle and Charles Trenckman. Continuation of the BBP has been sustained by the University of Texas Law School Foundation and the unwavering support of Dean Ward Farnsworth. While the Project owes debts to a long line of able people, this Article was written by me and I am solely responsible for its contents.

[1] This Article uses data limited to chapter 11 bankruptcy filings in two especially important federal judicial districts, the Southern District of New York (SDNY) and the District of Delaware in 2014 and 2018. A summary description of our sample and procedures is in the Appendix. Jared Ellias has done a recent study of these same two districts. Jared A. Ellias, *What Drives Bankruptcy Forum Shopping?*, 47 J. LEG. STUDS. 119, 128 nn.6–7 (2018).

[2] We are still running various regressions and correlations in the data. We believe the conclusions presented here will be robust to further investigation.

INTRODUCTION

As chapter 11 has achieved central importance in American commercial law and in law reform throughout the world,[3] there has been an increasing interest in control of the chapter 11 process. Prominent scholars have declared "The End of Bankruptcy" through a takeover of control of chapter 11 cases by creditors.[4] The extent of that takeover has been exaggerated, and the exaggeration has actually obscured the harmful effects of those changes and the crucial facts about their origins.[5] In particular, the literature has obscured the fact that creditor control is concentrated in lenders, especially secured lenders.

Two recent empirical studies have provided very useful data about the power of pre-bankruptcy lenders as revealed in debtor in possession (DIP) lending to publicly held companies.[6] The studies have analyzed the control over chapter 11 bankruptcies exerted by lenders through DIP financing agreements approved by the courts.[7] They have also begun to demonstrate the ill effects of that control, but they offer only limited analysis of the factors that permit lenders to obtain the DIP orders that grant that control.

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3 *See, e.g.*, Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2278-79 nn.2–15 (2000) (describing bankruptcy reform efforts throughout the world).

4 *See, e.g.*, Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 753 (2002) ("To the extent we understand the law of corporate reorganizations as providing a collective forum in which creditors and their common debtor fashion a future for a firm that would otherwise be tom apart by financial distress, we may safely conclude that its era has come to an end."); David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 919 (2003) ("To an increasing extent, lenders are using these loan contracts to influence corporate governance in bankruptcy. The fate of an asset or division of the company, even the terms of a transfer of control, has been spelled out as terms in a debtor's DIP financing agreement.").

5 *See* Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 ILL. L. REV. 831, 831 (2015) [hereinafter Westbrook, *Secured Creditor Control*]; Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 862 (2004) [hereinafter Westbrook, *Control of Wealth*]. Because the literature obscures the origins of lender control of chapter 11, the role of secured credit in the control story is both minimized and exaggerated. As our data show, lenders may use security interests to control a large number of cases, and that number may be growing. *See infra* Sections VI–VII. At the same time, our data also show that many chapter 11 cases do not show a high level of lender control through security interests, although they may achieve control in other ways. *See infra* Section VI.

6 Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REGUL. 651, 674–707 (2020); Kenneth Ayotte & Jared A. Ellias, *Bankruptcy Process for Sale*, 39 YALE J. ON REGUL. (forthcoming 2021) (manuscript at 52) (on file with author). Note that the sample of DIP loan contracts studied in the Ayotte and Ellias include all DIP loan contracts filed with the Securities and Exchange Commission for the firms that filed for bankruptcy between 1995 and 2018. *See infra* Table 2. The Ayotte and Ellias sample that provides suggestive evidence of inefficient process sales also draws heavily from our two districts, Delaware and SDNY, with 81% of their firms filing for bankruptcy in these two venues.

7 *See* 11 U.S.C. § 364 (2019) (providing for DIP finance procedures).

A serious limitation on the excellent analysis in these control studies has been their sole focus on public companies. Our data are not limited to public companies, but broadly reflect the filings in two important federal districts, Southern District of New York (SDNY) and Delaware.[8] The great majority of cases even in these two districts are nonpublic. Our thesis is that it is highly likely that many nonpublic companies are subject to the same potentially crippling financial agreements in bankruptcy as those reported in these recent studies of public companies. If so, then any reform to correct the imbalance in United States' bankruptcy procedures cannot be limited to public companies but should protect creditors and other stakeholders in all companies that face financial distress.[9]

There is much to be done to yield a full illumination of the control landscape. This report is a beginning, and we think an important one. Our central finding extends the findings of these control studies to a broad range of chapter 11 cases filed by private companies. In particular, we find evidence that the management of more and more companies filing for reorganization have given lenders control of their companies to a large extent prior to bankruptcy. As the studies mentioned above demonstrate, that control can then be exercised to obtain post-petition financial agreements and court orders that management often has to accept, and courts have little choice but to permit. The two public-company studies mentioned above provide strong evidence that creditor control produces non-optimal results for various constituencies in public company cases.[10] We have found evidence that predicts the same harmful results for many of the numerous private companies represented in our samples, including very large ones.[11]

The prediction rests on a finding of indicia of control similar to those found in public companies and thus the likelihood of similar injuries. We also find that

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[8] As discussed in the Appendix, our unit of analysis is a corporate group or a stand-alone debtor company. Because of the predominance of groups in our sample, especially in Delaware, our sample includes most of the cases filed in Delaware and SDNY in 2014 and 2018. Our sample in 2014 consists of nine public companies, seventy-nine private companies, and two individuals; in 2018, it consists of nine public companies, seventy-one private companies, and seven individuals.

[9] *See* Westbrook, *Control of Wealth*, *supra* note 5, at 843.

[10] *See* Tung, *supra* note 6, at 655. DIP loans are expensive. Tung, *supra* note 6, at 683. Yet DIP loans possess lower default rates than junk bonds. Tung, *supra* note 6, at 687. There are signs of some competition emerging, but study of that development must start with an understanding of where we are now. *See infra* note 70.

[11] In the 2018 sample, for example, the mean asset total was $293 million, and the mean debt was $471 million. The medians were check $43 million and $126 million, respectively. *See infra* Table 1. Both measures were lower if we omitted pre-packs, but still very substantial. The Delaware cases were on average much larger, but elaboration of those data must await another day.

much of the lender control in these cases likely arises from dominant security interests.[12] Thus a pre-bankruptcy control transaction may dictate the ultimate resolution of a company's financial problems regardless of its effects on employees, suppliers, tort victims, shareholders, and communities. The interests of large numbers of creditors and other stakeholders may have been pre-determined in the quiet privacy of a paneled conference room, away from most scrutiny by media and others and without consideration by a court. On that basis, the combination of the public-company findings and our broader results should encourage more focus upon control of chapter 11 debtors, including the process of secured credit reform and the regulation of pre-bankruptcy control transactions, either prior to bankruptcy or through bankruptcy look-back/claw-back provisions.[13]

I. CONTROL OF FINANCIALLY DISTRESSED COMPANIES

From time to time there is a happy convergence of research interests and results. This is one such time. Three excellent scholars have just released empirical results investigating control of chapter 11 reorganization cases by lenders.[14] Frederick Tung has focused specifically on the justifications for the exercise of lender control,[15] while Kenneth Ayotte and Jared Ellias have begun to explore the bad effects of that control in permitting the chapter 11 process to be manipulated for the benefit of one group of creditors to the detriment of the business and its many other constituencies. Both articles show harm to the debtors in the form of unfavorable financing. [16] Ayotte and Ellias also found an association between lower unsecured creditor recoveries and unsecured creditor complaints about DIP lender control.[17]

Both studies cover public companies that have filed chapter 11 reorganization cases and are based on data available through the filings such

12 Defined below. *Infra* Section VII.

13 The two articles also discuss corporate governance issues that are likely to occur in many nonpublic chapter 11 cases, especially as to the presence of controlling financing agreements and orders. Closely related to the grant of control to lenders is the agency problem where management may protect their interests at the expense of the other stakeholders in the company. Tung, *supra* note 6, at 653; Ayotte & Ellias, *supra* note 6, at 1; *see infra* note 69.

14 There is also good empirical work in the same area coming from the business schools. *See* Kai Li & Wei Wang, *Debtor-in-Possession Financing, Loan-to-Loan, and Loan-to-Own*, 39 J. CORP. FIN. 121, 121 (2016); B. Espen Eckbo, Kai Li & Wei Wang, *Rent Extraction by Super-Priority Lenders* 1 (Tuck Sch. of Bus., Working Paper No. 3384389, 2019), https://ssrn.com/abstract=3384389.

15 Tung, *supra* note 6, at 651.

16 *See* Tung, *supra* note 6, at 651; Ayotte & Ellias, *supra* note 6, at 1.

17 Ayotte & Ellias, *supra* note 6, at 47–50.

companies are required to make with the Securities Exchange Commission. Both examine the provisions of financing agreements between the debtor companies and lenders at the start of a chapter 11 case (DIP agreements), agreements that must be approved by the bankruptcy court.[18] DIP agreements include "covenants" similar in form to those in loan agreements generally, but a number of them have the purpose and effect of controlling the debtor's conduct in the chapter 11 case.[19] Following the approval of the agreements by the bankruptcy court, these covenants operate as enforceable constraints on the chapter 11 process in various ways. Perhaps the most important is that they may subject the debtor's assets—often all of its assets—to security interests that may be enforced if the debtor strays from obedience, with the effect of giving the lenders complete control of the bankruptcy process.[20] Thus the DIP orders grant effective control of the chapter 11 process to lenders without imposing corresponding duties.[21] Indeed, Ayotte and Ellias capture their effect by describing some of the effects of lender control as a "bankruptcy process sale."[22]

II. Recent Data on Control of Public Companies

The two recent public-company articles mentioned above describe some of the unfortunate results of lender control. Each of them explains, with much support in the literature, that the mechanism of control in chapter 11 is frequently a DIP financing order that gives the existing lender debt first priority in the case, often secured, with a number of covenants that give the lender de facto control of the case itself.[23]

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18 11 U.S.C. § 364 (2019).

19 *See* Tung, *supra* note 6, at 652; Ayotte & Ellias, *supra* note 6, at 12; Li & Wang, *supra* note 14, at 17; Eckbo, Li & Wang, *supra* note 14, at 10.

20 Another piece of the puzzle is that a variety of circumstances result in very few involuntary bankruptcy petitions in the United States. *See generally* Susan Block-Lieb, *Why Creditors File So Few Involuntary Petitions and Why the Number Is Not Too Small*, 57 BROOK. L. REV. 803, 803–04 (1991) ("despite this change in the applicable standard for commencement of an involuntary case, the vast majority of bankruptcy petitions are, as they historically have been, brought voluntarily by debtors rather than involuntarily by creditors."); Ayotte & Ellias, *supra* note 6, at 54. Thus, access to the immense power and benefits of chapter 11 for creditors (including nationwide and even worldwide effect) depends upon the debtor making a voluntary filing. One of the important benefits of a dominant security interest prior to bankruptcy, discussed *infra* notes 95–96, is that it permits the use of a threat of closure of the business to force a debtor to file for bankruptcy to block a dispossession action. The result is effectively an involuntary bankruptcy.

21 *See* A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875, 892–94 (2009).

22 Ayotte & Ellias, *supra* note 6, at 52. Their sample of public companies was overwhelmingly concentrated in our two districts. Of the 266 cases listed in Table A-1, 152 were from Delaware and 73 from SDNY, totaling 85% of their sample. Ayotte & Ellias, *supra* note 6, at 61.

23 Tung, *supra* note 6, at 657; Ayotte & Ellias, *supra* note 6, at 54.

Indeed, Ayotte and Ellias identify two of the covenants they study as leading to a "bankruptcy process sale" and a "bankruptcy outcome" sale.[24] Each of the studies mines a rich load of data they have obtained from SEC filings and chapter 11 dockets to show that such cases produce results that are almost certainly prejudicial to the number one goal of the bankruptcy process: obtaining maximum value for the firm, a goal that represents one of the few consensus views in the turbulent and contested literature of financial distress.[25] Yet the fact of conflicting interests among groups of creditors and between creditors and other parties (for example, shareholders or employees) means that control of the process makes it highly likely that it will be directed at maximizing the value obtained by the controlling party even if that reduces value overall.[26] That is exactly the result found in the recent studies.

Studies have found that the financing obtained by public companies in chapter 11 is more expensive than it should be.[27] Frederick Tung discusses the relationship between extraordinary lending inducements in DIP loan agreements and credit availability. Extraordinary lending inducements can be described as "sweeteners" given to a DIP lender in exchange for financing, often giving the lender substantial advantages in chapter 11 proceedings.[28] These inducements have become more prevalent in the post-financial crisis world, a development that has been justified by reduced credit availability.[29] However, Tung

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[24] Ayotte & Ellias, *supra* note 6, at 3. Ayotte and Ellias sort DIP loans into three buckets, where one bucket consists of DIP loans that give management full control over using bankruptcy powers to reorganize the firm, the second bucket involves the DIP lender limiting management's discretion and the third bucket consists of DIP loans where the DIP lender dictates the very outcome of the bankruptcy process. Ayotte & Ellias, *supra* note 6, at 12–13.

[25] Ayotte & Ellias, *supra* note 6, at 58. No matter what beneficiaries are chosen by the system of resolution, everyone wants it to distribute the maximum value consistent with other important social goals.

[26] *See* Westbrook, *Secured Creditor Control*, *supra* note 5, at 837. In this article I mention that:

> management by a dominant secured party raises serious and unresolved questions in any system that encourages the extension of credit by anyone other than a dominant secured party because a system under the secured party's control may often fail to realize full value for the debtor's assets. This point makes patent what has been only implicit in the contractualist proposals: that there will be a conflict of interest between the party appointed by contract to manage the debtor's general default and the remaining creditors and other beneficiaries.

Westbrook, *Secured Creditor Control*, *supra* note 5, at 837.

[27] Tung, *supra* note 6, at 651; Li & Wang, *supra* note 14, at 2; *see* Eckbo, Li & Wang, *supra* note 14, at 1.

[28] Tung, *supra* note 6, at 652, 667 ("[extraordinary loan] provisions are controversial because they may be inconsistent with specific Code provisions. In addition, they are often thought to increase the DIP lender's control at the expense of other stakeholders.").

[29] *See* Tung, *supra* note 6, at 655–56.

challenges this justification through empirical analysis of rollups[30] and milestones,[31] two extraordinary lending inducements in DIP financing.[32]

Tung focuses on the claim that these restrictive terms are justified by the lack of credit availability in the years he analyses (2007–2012).[33] DIP lenders have claimed that the lack of available credit for DIP loans makes extraordinary loan terms necessary to permit lending to distressed debtors.[34] To evaluate whether these claims are true, Tung examines the relationship between ordinary DIP loan terms and credit availability, and then looks for a similar relationship regarding extraordinary DIP loan terms.[35] The ordinary loan terms that Tung analyzes are price and the prevalence of restrictive covenants in DIP loans.[36] Tung's data finds a predictable and statistically significant inverse relationship.[37] For example, when credit availability increases, the price of DIP loans decreases; and when credit availability decreases, the price of DIP loans

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[30] A rollup can be described as combining pre-bankruptcy liabilities with a DIP loan, essentially allowing the DIP lender to fully secure previous liabilities through DIP financing terms. As such, the DIP lender, who is often the largest creditor, is paid "in full both secured and unsecured portions" of their claims in the early part of a case, essentially transforming the DIP lenders pre-bankruptcy claims into a "fully secured, first priority, high interest-bearing post-bankruptcy claim." Tung, *supra* note 6, at 669, 671–72. This full payment is at the expense of other creditors since it reduces the pool of money available for later unsecured claims. *See* Tung, *supra* note 6, at 668–70; *see also* Ayotte & Ellias, *supra* note 6, at 33 n.79.

[31] Milestones involve conditioning DIP financing on meeting specific deadlines such as deadlines for filing and plan approval. This allows the DIP lender to essentially set the pace of a restructuring, conflicting with Bankruptcy Code deadlines and the debtor's central role in the bankruptcy process. Tung, *supra* note 6, at 672–75; *see* Ayotte & Ellias, *supra* note 6, at 13 (analogous description of "milestones").

[32] Tung, *supra* note 6, at 656 ("I provide, to my knowledge, the first empirical evidence questioning the longstanding and widely held assumption that extraordinary provisions are a function of changing credit availability.").

[33] Tung, *supra* note 6, at 674–75. ("If credit markets are tight, then any potential negative side-effects may be insignificant compared to the benefits of the DIP loan. On the other hand, in the absence of a demonstrable association between the use of extraordinary provisions and changes in credit availability, extraordinary provisions seem hard to justify.").

[34] Tung, *supra* note 6, at 653. Tung notes that:

> In response, DIP lenders and their defenders note a simple explanation for this seeming increase in inducements: reduced credit availability during the Financial Crisis. When credit is tight, of course lenders need more sweeteners-which is why judges have explicitly relied on changing credit market conditions to justify their approval of so-called 'extraordinary' lending inducements.

Tung, *supra* note 6, at 653 (internal citations omitted).

[35] Tung, *supra* note 6, at 685 ("The Financial Crisis's shock to the credit markets facilitates investigation of the relation between changes in credit availability and the terms of DIP financing . . . This Section examines two types of 'ordinary' loan provisions: pricing and reporting covenants. The next Section examines two types of 'extraordinary' provisions: rollups and milestones.").

[36] Tung, *supra* note 6, at 695.

[37] Tung, *supra* note 6, at 688, 695.

increases.[38] This is the same relationship Tung expected to find in the loans with the control signals of rollups and milestones, but was unable to discover after a variety of tests.[39]

Specifically, the number of rollups and milestones in DIP loans was not found to correlate with credit availability at all.[40] In fact, when Tung analyzed the relationship between the size of rollups and available credit, he found that the size of rollups actually increases with the amount of credit available.[41] This positive relationship is the opposite of what was found when analyzing ordinary loan terms, and entirely conflicts with the understanding that decreased credit availability justifies the use of rollups in DIP loans.[42] As such, the common justification for extraordinary DIP finance loan terms is inconsistent with empirical analysis. As Tung explains, this makes the case for rollups entirely unjustified, while the case for milestones becomes questionable.[43] Thus, these extraordinary DIP loan terms should be subject to additional scrutiny by judges and policy makers before they are approved and afford DIP lenders greater control over the restructuring process.[44]

The authors of *Bankruptcy Process for Sale* (BPS) provide a theoretical model explaining why existing first lien lenders will usually be the firm's lowest cost capital provider[45] and why competition to provide DIP loans is unlikely to serve as a source of much market discipline.[46] They show that DIP loans

38 Tung, *supra* note 6, at 688 ("For most of the sample period, not surprisingly, the costs of DIP borrowing look to be moving inversely with Available Credit.").

39 Tung, *supra* note 6, at 696 ("[W]e would expect a negative relation between the incidence of rollups and Available Credit.").

40 Tung, *supra* note 6, at 696–98.

41 Tung, *supra* note 6, at 700.

42 Tung, *supra* note 6, at 700.

43 Tung, *supra* note 6, at 705 ("With no demonstrable association between changes in credit market conditions and the incidence of roll-ups—and to a lesser extent, milestones—the case for their continuing use seems weak.").

44 Tung, *supra* note 6, at 705–06.

45 That is a conclusion that makes even more striking the finding that DIP loans cost more. Eckbo, Li & Wang, *supra* note 14, at 2–3 (discussing the spreads of DIP loans and their high rate compared to investment grade loans).

46 Ayotte and Ellias argue that economic incentives of first lien-secured creditors make them the best provider of DIP financing. But these claims are based on observations about lending incentives rather than data. They note, correctly, that "[t]hese priority rules were more than sufficient to finance a reorganization process when capital structures were mostly unsecured debt; but as secured debt now dominates the capital structure of bankrupt companies, the ability to prime only the unsecured debt has limited utility." Ayotte & Ellias, *supra* note 6, at 57. Tung says, "A pre-bankruptcy lender also typically has pre-bankruptcy liens on all the debtor's assets by the time bankruptcy approaches, so the debtor may have no free assets to offer an outside lender as collateral," but does not report data from the cases in his sample. Tung, *supra* note 6, at 658. Both studies are right in this regard but are consistent with much of the existing literature that treats sweeping pre-bankruptcy

increasingly come with onerous control covenants. They suggest that the lack of competition for DIP loans helps to explain the current state of DIP loan contracting. They point generally to the control exerted by the pre-petition lenders who so often get the right to make those loans, even over vigorous objections by other parties with a stake in the debtor's value but make only general observations about the source and origin of that control.[47] Ayotte and Ellias further find that the lender-controlled cases may be associated with lower recoveries for unsecured creditors.[48]

III. EXTENSION OF THE PUBLIC COMPANY FINDINGS

A serious limitation on the excellent analyses in these articles is their restriction to public companies.[49] To some extent it is a question of looking

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security interests as standard, which is certainly not the case in our cross-section of cases, public and private, and is likely not true in public company cases either.

[47] Ayotte & Ellias, *supra* note 6, at 51.

[48] Ayotte & Ellias, *supra* note 6, at 42. Ayotte & Ellias further note that:

> The key statistically significant difference is that creditor control firms have a mean level of unsecured creditor recoveries that is about half of the level of non-creditor control firms. One interpretation of this correlation is that creditor control causes lower unsecured creditor recoveries, consistent with our theory; but another is that creditor control is more likely to be alleged when unsecured creditor recoveries are likely to be low for other reasons. Even under this interpretation, the correlation provides evidence that creditor control allegations are not random noise; they occur in cases with less favorable outcomes for unsecured creditors.

Ayotte & Ellias, *supra* note 6, at 42.

> Private-equity-owned Secure Home Holdings LLC filed for bankruptcy protection after its top-ranking lenders agreed to award themselves the home-security systems business, leaving unsecured creditors owed $110 million unpaid . . . A $6.8 million federal taxpayer loan that helped keep Secure Home afloat will be added to the numerous unpaid debts unless the government forgives the loan . . . .

Peg Brinkley, *Secure Home Lenders Move to Take Over Company*, WALL ST. J (Apr. 26, 2021 10:10 PM), https://www.wsj.com/articles/secure-home-lenders-move-to-take-over-company-leave-suppliers-unpaid-in-chapter-11-11619465741?page=2. Closely related is the problem of rushed sales of assets, revealing conflicts "between creditors of different priorities and between creditors and shareholders." Jordan Neyland & Kathryn St. John, *Hidden Wealth Transfers in Bankruptcy Asset Sales: A Real Option Analysis*, 19 BERKELEY BUS. LAW J. (forthcoming 2022) (manuscript at 1) ("We show large wealth-redistributive effects from early sale that can dwarf the value losses that courts use to justify early asset sales."). A recent report found that while lenders generally recovered far less from bankrupt companies during the pandemic, senior loan holders recovered at a much higher clip than subordinate debt holders. *See* Joe Rennison, *Lenders Struggle to Recoup Losses After US Corporate Debt Defaults*, FIN. TIMES (May 18, 2021), https://www.ft.com/content/9075329d-ef6b-481e-91ee-a8f02ac621d6 ("Moody's also noted a slow erosion in the amount of subordinate debt, which supported recoveries for more senior loan holders. Investors are more concentrated in the upper tiers of the capital structure, diluting claims on the company's assets.").

[49] Strictly speaking, BPS was not only a public company study. In addition to their public company sample, Ayotte and Ellias looked at a sample of firms with traded debt or equity, which included both public and private firms. For our purposes, however, it is essentially true that it was a public company study because

where the light is.[50] Public companies are required to reveal a great deal of information in filings with the SEC. While most companies are supposed to disclose a substantial amount of financial information when they file for bankruptcy, the required disclosure is not as extensive and is much less rigorously enforced than under securities laws. Unlike SEC filings, incomplete bankruptcy disclosure is not subject to civil and criminal penalties nor personal liability for corporate officers who fail to make proper disclosure.

As a result, much of the sophisticated analysis possible with bankrupt companies subject to SEC filing requirements uses types of data not generally available for non-public companies that file under chapter 11, even though there is every reason to believe that the same results may obtain for those companies.[51] Existing studies do not capture the bankruptcy experience of this far greater number of companies, including many large ones, that are not public and not subject to those filing requirements.[52]

Our data are not limited to public companies, but broadly reflect the filings in two important federal districts, SDNY and Delaware.[53] The great majority of cases even in these two districts are nonpublic. Our thesis is that it is highly likely that many nonpublic companies are subject to the same potentially crippling financial agreements in bankruptcy as those reported in these recent studies. If so, then any reform to correct the imbalance in United States bankruptcy procedures cannot be limited to public companies, but must protect creditors and other stakeholders in all companies that face financial distress.[54]

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they did not look for DIP loan contracts in their hand-gathered sample. Ayotte & Ellias, *supra* note 6, at 10 ("We use the SEC files because this enables us to identify contracts going back as far as the mid-1990s, while court docket access through PACER only goes back to 2004.").

50 The old joke is that the drunk lost his keys over *there* but is looking *here*, 'because this is where the light is.'

51 The incentive to look only to public companies is especially overwhelming because of the existence of the wonderful LoPucki database, Bankruptcy Research Database (BRD), which captures all "large" public company bankruptcy filings since October 1, 1979. A large case for BRD involves at least $100 million in assets measured in 1980 dollars (about $280 million in current dollars). *See generally* UCLA SCH. OF L., UCLA-LOPUCKI BANKRUPTCY RESEARCH DATABASE (database updated Apr. 2021), https://lopucki.law.ucla.edu/. In addition to this source of bankruptcy data, companies whose post-bankruptcy debt trades publicly give an objective basis for valuing the securities that creditors may have received against their claims. *See, e.g.*, Jared A. Ellias, *Bankruptcy Claims Trading*, 15 J. EMPIRICAL LEGAL STUD. 772, 772 (2018).

52 The median debt in our 2018 sample, for example, is about $126 million (even without pre-packed cases, it was $46 million). Only a handful of these companies are public companies. If we look only at corporate groups, the median debt, even without pre-packs, was $216 million in 2018. *See infra* Table 1. For a discussion of pre-packs, *see infra* Section VII.

53 Our sample includes most of the cases filed in Delaware and SDNY in 2014 and 2018. *See supra* note 1; *see infra* Appendix.

54 Westbrook, *Control of Wealth*, *supra* note 5, at 843.

IV. SIGNALS OF VALUE-REDUCING CONTROL

As discussed above, the control studies of public companies connect lender control and loss of estate value through two primary signals, the presence of milestones and rollups.[55] While our data cannot demonstrate the loss of value, we looked for those same signals—milestones and rollups—as evidence of the control that was found to be associated with that loss in those studies. We find those two signals in abundance in our broad sample as well, strongly suggesting similar losses.

To begin, over half of our 2018 cases have a DIP agreement, up from 44% among the 2014 cases.[56] These percentages are close to those found by the two earlier studies among public companies.[57] In the BBP sample, Delaware shows a much higher percentage than SDNY, 75% versus 25% in 2018. Both figures are increases since 2014, again with Delaware far in the lead.[58] The control studies agree that DIP agreements are at the heart of lender control and often contain milestones and rollups.[59] That view is supported by a consensus among commentators.[60] Sure enough, our data show a substantial and significant correlation between the presence of a DIP agreement and both milestones and rollups.[61]

Milestones substantially limit the flexibility of a chapter 11 DIP by imposing a timeline, which is one reason BPS describes them as part of the sale of the bankruptcy process.[62] About 40% of our cases in 2018 revealed DIP milestones, once again with a much higher percentage in Delaware.[63] Milestones are not

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55 Westbrook, *Control of Wealth*, *supra* note 5, at 843.

56 See *infra* Table 2. We report a DIP agreement if there is a DIP order or an agreement on the case docket. Li and Wang report 64% of public companies have DIP financing. Li & Wang, *supra* note 14, at 121.

57 Tung, *supra* note 6, at 674 (finding DIP loans in 62%); Ayotte & Ellias, *supra* note 6, at 52. BPS shows 94% and 100% of firms had DIP financings in their second sample, which is firms with traded debt or equity. Ayotte & Ellias, *supra* note 6, at 43 (referencing Table 4: Summary Statistics for No Creditor Control Allegation vs. Creditor Control Allegation).

58 *See infra* Table 2.

59 *See* Tung, *supra* note 6, at 654; Ayotte & Ellias, *supra* note 6, at 32.

60 Tung, *supra* note 6, at 654 ("Case milestones are covenants that set specific deadlines for important events in the case, giving lenders critical control over the reorganization process and curbing the discretion of the debtor's management and the bankruptcy court."); Ayotte & Ellias, *supra* note 6, at 13 ("DIP loan contracts with milestones force managers to move through the bankruptcy process on an accelerated timeframe."); *see* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1, 29 (2007) (concluding debtor will receive lower price if sale is made earlier in bankruptcy process); Li & Wang, *supra* note 14, at 1 (studying a sample of chapter 11 filers between 1996 and 2013).

61 *See infra* Table 3.

62 Ayotte & Ellias, *supra* note 6, at 13.

63 *See infra* Table 2. Unlike the other signals, 2018 milestones were marginally down from 2014 in our sample.

only strongly and significantly correlated with DIP agreements, but also with rollups and other control signals.[64]

Rollups are another important signal of lender control and of the likelihood of lower unsecured recoveries, given that they represent a major promotion of pre-bankruptcy debt to the highest priority.[65] We found rollups in 40% of the Delaware cases in 2018. Rollups were much less prevalent in SDNY. The overall rate in the two districts was 30%, a substantial increase from 2014.[66] Rollups are significantly correlated with both the presence of DIPs and milestones.[67]

Intuitively, there are two other indicators of control and thus a likely loss of value, although they are not explored in the control studies of public companies: restructuring support agreements (RSAs) and carveouts.[68] RSAs often impose various constraints on debtors much like milestones and rollups and thus they serve as signals of lender control.[69] We found RSAs in about the same ratios as for DIP agreements/orders and with roughly the same relationships between sample years and between Delaware and SDNY.[70] Overall, about 16% of the cases had RSAs, but 25% of Delaware cases had them compared to 5% for SDNY. While our data only show two cases in which RSAs are the only indicator of control, we find RSAs present without DIP agreements in 8% of the cases in our sample. In our sample, RSAs are significantly associated with milestones but not the other indicia of control.[71] Their lack of correlation with the other signals may mean that some of the constraining covenants are within the RSAs rather than in separate orders or agreements, but we have not examined the RSAs for those details.

Finally, we add information about carveouts. A carveout is often used in connection with a DIP agreement and is strongly correlated with those agreements. It provides for payment to various key actors in the chapter 11 case, including lawyers for the debtor and often for a creditor's committee and its lawyers.[72] A carveout sometimes gives assurance of payments for other critical

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64 *See infra* Table 3.

65 Rollups are defined above. *See supra* note 30.

66 *See infra* Table 2.

67 *See infra* Table 3.

68 Ayotte & Ellias, *supra* note 6, at 51 ("a process sale is an allegation that the 'controlling' creditor is using some method, typically debtor-in-possession financing or a restructuring support agreement, to dictate the outcome of the chapter 11 process.").

69 *See, e.g.*, Ayotte & Ellias, *supra* note 6, at 2–3 (discussing the use of Restructuring Support Agreements in the Nieman Marcus and J. Crew bankruptcies); *see* Baird & Rasmussen, *supra* note 4, at 785.

70 *See infra* Table 2.

71 *See infra* Table 3.

72 ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER, JOHN A. E. POTTOW, THE

vendors as well. It represents a control party's consent to use a limited amount of funds for those purposes. Thus, the presence of a carveout permits a strong inference of creditor control. In our 2018 sample, more than a third of the cases revealed a carveout, signaling lender control, with the great majority of them in Delaware. This was a sharp increase from about 25% in 2014 in Delaware and SDNY.[73]

We find that the prevalence of control signals has increased over time, from 53% of all cases using any of these indicia of control in our 2014 sample, to 64% of all cases in our 2018 sample.[74] Similarly, when we focus on one control signal at a time, our data show increases for each one. We find that the prevalence of cases with three or more indicia of control has increased in almost every measurement. Although we are still working on regressions relating to these control signals, we find strong and significant positive correlations among all of them, except for RSAs, which show a positive correlation only with milestones.[75]

V. THE LEVERAGE BEHIND THE DIP ORDER

If many DIP orders give lenders de facto control of chapter 11, how do they achieve that control? Ayotte and Ellias say DIP agreements transfer control, but perhaps it just ratifies and completes a pre-existing transfer.[76] Recent empirical studies explain that the lenders are able to obtain this control through financing orders because there is little competition for DIP lending even though it is very profitable.[77] They also discuss some of the possible sources of the leverage that

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LAW OF DEBTORS AND CREDITORS 428 (8th ed. 2021) [hereinafter THE LAW OF DEBTORS AND CREDITORS].

73 *See infra* Table 2.

74 *See infra* Table 4.

75 *See infra* Table 3.

76 BPS also suggests that management is induced to grant control to lenders by various personal incentives. Ayotte & Ellias, *supra* note 6, at 6. This factor clearly requires more study. It recalls the suggestion by Professor Schwartz that chapter 11 might be a good occasion for a "bribe" to management to look out for creditors. Alan Schwartz, *Bankruptcy Contracting Reviewed*, 109 YALE L.J. 343, 346–47 (1999).

77 Tung, *supra* note 6, at 687 ("This high-quality-junk-bond pricing for DIP loans is perhaps surprising because DIP loans have much lower historical rates of default than do junk bonds. To my knowledge, only two DIP loans have ever experienced a payment default."); *see* Eckbo, Li & Wang, *supra* note 14, at 1. Some signs of competition for DIP financing have emerged recently, but lack of transparency and information advantages for previous dominant security interest lenders have hindered a robust market for DIP loans. Tung, *supra* note 6, at 658 ("Given the inside lender's information advantage, as well as its incentive to make the DIP loan in order to protect its existing pre-bankruptcy loan, outside lenders seldom initiate a challenge."). BPS provides some examples of successful competition initiated by second-lien holders, with unsecured creditors on the side lines, stating:

> One cause of the inefficient process sale to the first lien in this example is the existence of conflict between secured creditor groups. In particular, one cause of creditor conflict is the presence of

permits lenders to stifle competition, but without providing data or analysis of the extent to which the leverage can be traced to pre-existing dominant security interests, data that we supply below.[78] Yet reported cases suggest that pre-bankruptcy security interests may provide the leverage that leads to a DIP order granting control.[79]

In the complete overhaul of the Bankruptcy Code in 1978, adoption of the DIP structure for all chapter 11 debtors was a radical change in business bankruptcy.[80] The DIP concept had been limited to smaller companies filing under chapter IX of the Bankruptcy Act—Mom-and-Pop bankruptcies. Trustees were appointed for larger companies that were required to file for reorganization under chapter X of that act.[81] For larger companies, the 1978 code transferred the powers of a bankruptcy trustee to the pre-existing management of the business in order to give experienced management flexibility in trying to save the business and maximize its value, despite the obvious factors (like management's prior failure) cutting the other way.[82]

Yet the purpose and effect of the covenants included in DIP agreements is to eliminate much of that management flexibility and harness management to the interests and instructions of one group of creditors.[83] In that way, a powerful

> second lien debt, which has priority over any DIP loan the first lien might make. This means the first lien cannot capture any of the continuation value after date H; it can only go to the second lien.

Ayotte & Ellias, *supra* note 6, at 30. *See generally* MAX FRUMES & SUJEET INDAP, THE CAESARS PALACE COUP: HOW A BILLIONAIRE BRAWL OVER THE FAMOUS CASINO EXPOSED THE POWER AND GREED OF WALL STREET (2021) (discussing the role of second lien holders).

[78] Tung points also to the information advantage enjoyed by pre-petition lenders versus newcomers to the business, very likely an important factor. Tung, *supra* note 6, at 658. He does not tie that advantage explicitly to the informational covenants routinely found in agreements granting security. Those covenants greatly enhance that informational advantage. Tung, *supra* note 6, at 663–65 ("The typical bank loan agreement specifies a number of financial covenants-continuing obligations relating to the borrower's financial condition that serve as tripwires should the borrower falter.").

[79] *See* Westbrook, *Secured Creditor Control*, *supra* note 5, at 835 ("All prepetition debt is rolled up into a secured package tied with a super priority bow.") (citing *In re* Michael Day Enterprises, Inc., No. 09–55159, 2009 WL 7195491, at *8 (Bankr. N.D. Ohio Nov. 12, 2009)).

[80] *See* 11 U.S.C § 1107(a)–(b) (2019). Closely related was the merger of the small business procedure (chapter XI) with the procedure for large companies (chapter X). *See* COLLIER ON BANKRUPTCY APP. PT. 4(E) (16th ed. 2020) (relating legislative history of PUB. L. NO. 95–598 (1978)); THE LAW OF DEBTORS AND CREDITORS, *supra* note 72, at 397–98.

[81] David A. Skeel, Jr., *The Past, Present, and Future of Debtor in Possession Financing*, 25 CARDOZO L. REV. 1905, 1914 ("In Chapter X cases, the trustee and SEC took the place that had been previously occupied by the Wall Street and bar. But by 1960, many large corporate debtors had begun filing their cases in Chapter XI, the chapter that was intended for small firms.").

[82] *See id.*

[83] Tung, *supra* note 6, at 657; Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L.

public process can fall into the hands of one group of creditors at the expense of the rest.[84] In those frequent cases where that group consists of secured creditors with what we call "dominant security interests" (sometimes a "blanket lien"), the result can be described as the Secured Party in Possession.[85]

When the current Code was adopted in 1978, the dominant security interest had not yet become commonplace. The drafters envisioned handing control of a Chapter 11 to the management of the debtor company, not to one group of creditors. Over recent decades blanket liens have gradually expanded, replacing loans secured by specific, limited pools of assets, like inventory or accounts receivable.[86] The result was that dominant security interests became common. Such an interest puts the secured creditor into control of the debtor to a major degree *before bankruptcy is filed*[87] and routinely leaves the debtor unable to obtain alternative financing. They are routinely fortressed with financial covenants that put debtors at the edge of default almost all the time, where default gives the secured creditor the option to take over or sell the collateral under Article 9 of the Uniform Commercial Code[88] if the lender chooses to exercise its rights.[89] That is, the lender has the power to close down the business.

REV. 625, 638–41 (1997) (discussing the advantages given to lenders in secured lending, such as limiting future borrowing, incentivizing repayment, and restraining future risk taking by the borrower.); Jonathan Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631, 686, 687–707 (2018) ("In the past twenty-five years, however, senior secured credit has exploded as a financing tool, and senior creditors have learned how to use the power of their priority to usurp control of the process.").

[84] The DIP structure puts the corporate management in the place of the traditional trustee in bankruptcy and makes the DIP a fiduciary to all of the creditors. *See* 11 U.S.C. §§ 1106(a), 1107 (2019); Dickerson, *supra* note 21, at 875. *See generally* THE LAW OF DEBTORS AND CREDITORS, *supra* note 72, at 348; 7 COLLIER ON BANKRUPTCY ¶ 1107.02[4] (16th ed. 2020) ("The debtor in possession is bound by a duty of care and a duty of loyalty.").

[85] Elizabeth Warren & Jay L. Westbrook, *Secured Party in Possession*, 22 AM. BANKR. INST. J. 12, 12, 52–53, (2003); *see* Jonathan C. Lipson, *Controlling Creditor Control:* Jevic *and the End(?) of* LifeCare, 27 NORTON J. BANKR. L. & PRAC. 563 (2018). We reported in 2015, based on a study of cases filed in 2006, that the extent of secured credit domination had been exaggerated. Westbrook, *Secured Creditor Control*, *supra* note 5, at 845. However, some concern about control was justified at that time and it has grown substantially, although it is still by no means universal. *See infra* notes 93–94.

[86] Tung, *supra* note 6, at 655 (discussing how blanket liens have increasingly provided the dominant security holder with an advantage in providing DIP financing); *see* Westbrook, *Secured Creditor Control*, *supra* note 5, at 832 (discussing the situation in the early 2000s.)

[87] *See* Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention,* 118 HARV. L. REV. 1197, 1217 (2005); Ronald J. Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 159, 234 (1997); Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 905 (1986); Grant Gilmore, *The Good Faith Purchase Idea and The Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 627 (1981); Lipson, *supra* note 85, at 564–65; Lipson, *supra* note 83, at 685–707.

[88] U.C.C. § 9-601–628. *See generally* Mann, *supra* note 87, at 638–41; Lipson, *supra* note 83, at 685–707.

[89] Mann, *supra* note 87, at 160 ("A grant of collateral to a lender enhances the lender's ability to collect

Under those circumstances, it is almost certain the debtor's management will not take any major step involving its business without the approval of the lender and will be strongly inclined to do the secured creditor's bidding. While the debtor is free to file for bankruptcy notwithstanding the dominant security interest,[90] we know that it will face great difficulty in obtaining post-petition financing from anyone other than its lenders.[91] From the recent studies, we know that the resulting DIP order will often tie it hand and foot, [92] while costing it (and its other creditors) too much. Yet bankruptcy law and scholarship has failed to connect dominant security interests and the capture of the chapter 11 process by lenders as reflected in the control studies and confirmed by our data. What happens *before* bankruptcy is often the most important part of the chapter 11 story.

For over a century prior to 2002, England had a system of lender-dominated receiverships, in which a lender with a "floating charge" on the assets of a business would obtain the appointment of a receiver. The receiver was nominally responsible to the debtor company but was in fact expected to advance the interests of the lender by liquidation or by prompt sale of the business.[93] The current situation in the United States of companies that have granted a dominant security interest or otherwise fallen into the control of their lenders in a chapter 11 proceeding may fairly be understood as a 'Lender Receivership'.[94]

VI. THE DOMINANT SECURITY INTEREST

For this study, we define a dominant security interest as one in which secured debt exceeds 75% of the stated value of the debtor's assets.[95] Our data show that

its debt by enhancing the lender's ability to take possession of the collateral by force and sell it to satisfy the debt.").

90 *See, e.g.*, Farm Credit v. Polk, 160 B.R. 870 (M.D. Fla. 1993). *See also* Marshall E. Tracht, *Contractual Bankruptcy Waivers: Reconciling Theory Practice and Law*, 82 CORNELL L. REV. 301, 305 (1997) ("A firm cannot waive its bankruptcy eligibility entirely, because the Code grants creditors the right to file an involuntary petition against a firm and there is no apparent way for a firm to extinguish this right.").

91 Tung, *supra* note 6, at 657 ("Institutional features of DIP lending give an edge to the debtor's pre-bankruptcy secured lender in capturing the DIP loan. Therefore, in the vast majority of cases, there may be no real competition to offer DIP financing. No true market exists for DIP loans."); *see* Ayotte & Ellias, *supra* note 6, at 20.

92 *See, e.g.*, THE LAW OF DEBTORS AND CREDITORS, *supra* note 72, at 424 *Cf. In re* Michael Day Enterprises, Inc., No. 09-55159, 2009 WL 7195491, at *8 (Bankr. N.D. Ohio Nov. 12, 2009).

93 Westbrook, *Control of Wealth*, *supra* note 5, at 818–20. A recent study is to similar effect. Neyland & St. John, *supra* note 48, at 30 ("With numerical examples based on the *Lionel* case, we show that the harm to shareholders from an early sale can far outweigh their gains from preserved asset value.").

94 *See* Westbrook, *Control of Wealth*, *supra* note 5, at 820.

95 We have not undertaken the detailed match between secured debt and each asset, so the measurement is of total secured debt as compared to total assets.

over half of the chapter 11 debtors in Delaware and SDNY in 2018 had granted dominant security interests prior to filing bankruptcy.[96]

Even more striking is the fact that in 2018, around 40% of all chapter 11 cases across both districts in our sample have secured debts exceeding the total value of their assets.[97] It seems safe to say that the activities of all these debtors were substantially constrained by their lenders at the time they filed, bound by a constant risk of default and closure.[98] Further, our time-series data reveal that this secured creditor control is much more pervasive than it was at the time of our last report[99] of 2006 filings.[100]

VII. THE DISTRICT EFFECT

While these control elements have risen across the board in both Delaware and SDNY,[101] there is also a very strong district effect: Delaware cases are more likely to show each of these control elements. It is tempting to infer that cases are filed in Delaware because they are control cases or, at the least, that a control case is much more likely to be filed there. For example, in 2018 almost 75% of the Delaware cases had a DIP agreement versus only 25% of the New York cases. About 57% of the Delaware cases showed a milestone agreement, but only 23% in New York, while rollups appeared in 40% of Delaware cases but only 18% of the cases filed in New York.

It is not possible to say more at the time of this writing, pending the completion of some complex regressions.[102] Nonetheless, the correlations make it clear that the district of filing may predict control of chapter 11 cases by lenders, many of them secured by dominant security interests.

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[96] *See infra* Table 5.

[97] *See infra* Table 5; Tung, *supra* note 6, at 658 ("Consistent with the information and incentive structures, inside lenders made 75% of the DIP loans in my sample, and these inside lenders enjoy pre-bankruptcy liens on all of the debtor's assets in 81% of the cases.").

[98] As explained in the Appendix, because we treat corporate groups as our units of observation, our observations cover a substantial majority of the 2014 and 2018 cases in the two districts studied. *See infra* Tables 1–5.

[99] Westbrook, *Secured Creditor Control*, *supra* note 5, at 832.

[100] For example, compared to Delaware 2006 cases, Delaware 2014 cases are 2.5 times more likely to have high security levels.

[101] *See infra* Table 2 for DIP agreements, milestones, and rollups.

[102] Another factor of importance is the effect of the size of the cases. *See infra* Table 3. Median debt is strongly correlated to all the control factors, suggesting that larger cases are more likely to be under lender control. Leaving aside the sharp contrast with traditional assumptions that smaller, weaker debtors would be the ones to grant security interest, that result may indicate that the larger size of the Delaware cases explains to some extent the district effect.

CONCLUSION

We look forward to reporting further exploration of these data and their implications. Even preliminarily, they strongly suggest that much of chapter 11 has become a Lender Receivership as under the old English law. Our data indicate three central points:

1. Lender control extends broadly beyond public company cases to a large part of the chapter 11 universe.
2. We find that the signals of lender control in DIP financing are likely to be widespread throughout chapter 11 filings, along with a consequent loss of value.
3. It is likely that much of that control arises from dominant security interests, meaning that the control of chapter 11 cases is determined prior to bankruptcy, outside effective court review, and with limited transparency to other stakeholders.

When some authors announced the end of bankruptcy, they really meant the end of publicly controlled bankruptcy. The data show that in many cases the legal power of bankruptcy has been delivered to private hands, outside public scrutiny. There is no indication that Congress in adopting the DIP system meant to install lenders as the new trustees in reorganization bankruptcy nor is there machinery in place for adequate court supervision of a system in which one group of creditors runs a system intended to be collective in its nature and purpose.[103]

In many chapter 11 cases, public and nonpublic, the debtor's management has transferred the DIP to its lenders before bankruptcy is filed. The mechanism of control is frequently a dominant security interest granted before bankruptcy. Preferences and fraudulent conveyances are among the pre-bankruptcy transactions that have been subjected to retroactive bankruptcy control. Might

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[103] Nothing in the Bankruptcy Code anticipates the need for duties to constrain a private party that has taken control of a bankruptcy proceeding. *See* Dickerson, *supra* note 21, at 932 ("a creditor should not be allowed to give control of the debtor to an entity that is not an employee of the firm, that reports to an individual creditor or creditor group, and that may have irreconcilable conflicts of interests.").

the same come to be true of pre-bankruptcy control, including dominant security interests?[104]

[104] Ayotte and Elias suggest another reform:

> Courts could allow any creditor to provide debtor-in-possession financing to cover a short period—perhaps two or three months—of expenses, with priority over all creditors, including secured creditors. This would allow for greater competition among lenders to finance the debtor, and a more fulsome exploration of plan alternatives before management is allowed to commit to a path out of bankruptcy.

Ayotte & Ellias, *supra* note 6, at 9.

Table 1. Sample of Chapter 11 cases with aggregate assets and debts.

All sample cases, with prepacks

	2014		*2018*	
	Total Assets	Total Debt	Total Assets	Total Debt
N	90	90	87	87
Minimum value	20,385	0	0	0
Mean	429,962,965	538,473,729	293,378,618	470,522,776
Median value	15,652,700	37,831,780	43,337,776	125,773,352
Maximum value	7,980,224,000	9,773,651,968	2,212,825,600	3,616,916,224

All sample cases, without prepacks

	2014		*2018*	
	Total Assets	Total Debt	Total Assets	Total Debt
N	80	80	76	76
Minimum value	20,358	0	0	0
Mean	330,091,534	442,262,639	267,483,844	391,734,300
Median value	10,718,892	16,607,780	32,319,539	46,773,804
Maximum value	7,428,400,128	9,773,651,968	2,212,825,600	3,616,916,224

Table 2. Presence of Indicia of Control

	District	2014		2018	
DIP Agreements/ Orders	Delaware	30	*66.67%*	35	*74.47%*
	SDNY	10	*22.22%*	10	*25.00%*
	Total	40	*44.44%*	45	*51.72%*
Milestones	Delaware	15	*33.33%*	27	*57.45%*
	SDNY	10	*22.22%*	9	*22.50%*
	Total	25	*27.78%*	36	*41.38%*
Rollups	Delaware	15	*33.33%*	19	*40.43%*
	SDNY	6	*13.33%*	7	*17.50%*
	Total	21	*23.33%*	26	*29.89%*
Restructuring Support Agreements	Delaware	7	*15.56%*	12	*25.53%*
	SDNY	3	*6.67%*	2	*5.00%*
	Total	10	*11.11%*	14	*16.09%*
Carveouts	Delaware	13	*28.89%*	28	*59.57%*
	SDNY	11	*24.44%*	4	*10.00%*
	Total	24	*26.67%*	32	*36.78%*
Total Cases	Delaware	45		47	
	SDNY	45		40	
	Total	90		87	

Table 3. Correlation Matrix

		DIP Agreements/ Orders	*Milestones*	*Rollup*	*RSA*	*Carveout*	*Delaware*
Milestone	*2014*	0.5935***	1.0000				
	2018	0.5315***	1.0000				
Rollup	*2014*	0.5639***	0.5376***	1.0000			
	2018	0.5805***	0.5731***	1.0000			
RSA	*2014*	0.1818	0.1754	0.2229*	1.0000		
	2018	0.1101	0.4577***	0.1241	1.0000		
Carveout	*2014*	0.4214***	0.4675***	0.3802***	0.1866	1.0000	
	2018	0.3553***	0.4723***	0.3873***	0.1200	1.0000	
Delaware	*2014*	0.4472***	0.1240	0.2364*	0.1414	0.0503	
	2018	0.4934***	0.3536***	0.2496*	0.2785**	0.5124***	
Debt at or above median	*2014*	0.5814***	0.4217***	0.3941***	0.3536***	0.2513*	0.6000***
	2018	0.4490***	0.3364**	0.2084	0.3179**	0.1518	0.4968***

* P < 0.05
** P < 0.01
*** P < 0.001

Table 4. Presence of Multiple Indicia of Control

	Indicia of Control	*2014*		*2018*		*Total*
Total cases		90		87		177
No Indicia of Control	*0*	42	*46.67%*	31	*35.63%*	73
Any Indicia of Control	*1*	14		14		28
	2	11		8		19
	3	9		16		25
	4	13		15		28
	5	1		3		4
	Subtotal	48	*53.33%*	56	*64.37%*	104
DIP Agreements/ Orders	*1*	9		7		16
	2	8		8		16
	3	9		13		22
	4	13		14		27
	5	1		3		4
	Subtotal	40	*44.44%*	45	*51.72%*	85
Milestones	*1*	0		2		2
	2	6		1		7
	3	6		15		21
	4	12		15		27
	5	1		3		4
	Total	25	*27.78%*	36	*41.38%*	61
Rollups	*1*	1		0		1
	2	2		3		5
	3	5		5		10
	4	12		15		27
	5	1		3		4
	Total	21	*23.33%*	26	*29.89%*	47

continued on next page

Table 4, continued from previous page. Presence of Multiple Indicia of Control

	Indicia of Control	*2014*		*2018*		*Total*
Restructuring Support Agreements	*1*	1		1		2
	2	2		0		2
	3	2		7		9
	4	4		3		7
	5	1		3		4
	Total	10	*11.11%*	14	*16.09%*	24
Carveouts	*1*	3		4		7
	2	4		4		8
	3	5		8		13
	4	11		13		24
	5	1		3		4
	Total	24	*26.67%*	32	*36.78%*	56

Table 5. Secured Interests

	District	2014		2018	
Total Cases	Delaware	45		47	
	SDNY	45		40	
	Total	90		87	
Security Interests at or above 75% of assets	Delaware	28	*62.22%*	25	*53.19%*
	SDNY	21	*46.67%*	22	*55.00%*
	Total	49	*54.44%*	47	*54.02%*
Security Interests at or above total value of assets	Delaware	23	*51.11%*	20	*42.55%*
	SDNY	13	*28.89%*	16	*40.00%*
	Total	36	*40.00%*	36	*41.38%*
At least 50% of secured interests in one lender	Delaware	25	*55.56%*	24	*51.06%*
	SDNY	17	*40.48%*	22	*55.00%*
	Total	42	*48.28%*	46	*52.87%*

APPENDIX

Sample Methods: Summary

The BBP data on which this Article is based are derived from a systematic sample taken from two districts, the Southern District of New York and Delaware. We enjoyed the luxury of doing the sampling from our desktops, thanks to PACER. While the acquisition of cases is electronic, coding requires a lot of old-fashioned data entry. It was done by law students under the supervision of Jay Westbrook and our graduate research assistants from the Sociology Department of the University of Texas at Austin. We coded general demographic information about the debtor companies and their financial circumstances taken from the petition and schedules. We further coded detailed information as described in the Codebook, available from the BBP. We are in process of preparing other key tables for availability with our further reports.

Reports based on other administrative datasets typically count each case in the population without accounting for the grouped status of many chapter 11 bankruptcy filings. Our methodological approach to sampling allows us to account for the grouped status of these cases. We view our sampling protocol as a defining methodological strength.

The following methodological notes provide specific detail with reference to our sampling protocol for 2014 and 2018:

2014 population parameters

- All chapter 11 cases filed between January 1, 2014, and December 31, 2014, in Delaware.
- All chapter 11 cases filed between January 1, 2014, and December 31, 2014 in the Southern District of New York.

2018 population parameters

- All chapter 11 cases filed between January 1, 2018, and December 31, 2018, in Delaware.
- All chapter 11 cases filed between January 1, 2018, and December 31, 2018, in the Southern District of New York.

Based on these parameters, we utilized PACER's Case Locator to identify:

- 424 cases were filed in Delaware in 2014;
- 421 cases were filed in the Southern District of New York in 2014;
- 576 cases were filed in Delaware in 2018; and

- 655 cases were filed in the Southern District of New York in 2018.

Using a process of systematic selection, we created a sample of 50 cases from each district in each year. When applicable, we also noted the presence of any case that is affiliated to the sample case. For example:

- If a sample case was a "lead" case, then all of its "jointly administered" cases were counted along with it as a single unit in the sample.
- If a sample case was a "jointly administered" case, then its "lead case" and all of the other "jointly administered" cases were counted along with it as a single unit in the sample.
- If a sample case was a "stand alone" case, then it was counted as a single unit in the sample and no additional cases were counted along with it.

Due to the strict protocols noted above, our samples represent a large proportion of all cases filed within the district populations.

- The 50 units we sampled from Delaware in 2014 actually represent a total of 395 cases filed in the district that year. In other words, among the population of 424 cases filed in Delaware in 2014, a total of 395 (or roughly 93%) are included in our sample.
- The 50 units we sampled from New York in 2014 actually represent a total of 255 cases filed in the district that year. In other words, among the population of 421 cases filed in New York in 2014, a total of 255 (or roughly 60%) are included in our sample.
- The 50 units we sampled from Delaware in 2018 actually represent a total of 518 cases filed in the district that year. In other words, among the population of 576 cases filed in Delaware in 2018, a total of 518 (or roughly 89%) are included in our sample.
- The 50 units we sampled from New York in 2018 actually represent a total of 478 cases filed in the district that year. In other words, among the population of 655 cases filed in New York in 2018, a total of 478 (or roughly 72%) are included in our sample.

The sample figures from Delaware in 2014 and 2018 suggest that many of the cases in the district populations are jointly administered as part of larger bankruptcy filings. However, the sample figures from New York in 2014 and 2018 represent a relatively smaller proportion of the case populations. This is because many of the cases filed in New York are "stand alone" cases, which are not jointly administered or otherwise related to other cases in the district population.

Finally, we dropped cases with incomplete data: any cases that were transferred out of the district or that reported incomplete financial information. Further, we dropped cases that were such financial outliers that they skewed our data. For example, in 2018 dropped two cases that transferred out of Delaware, the massive Sears case (NY18-23538) from the Southern District of New York, and ten cases missing financial information. Our final samples, as Table 1 reflects, include 90 cases from 2014 and 87 cases in 2018.