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Activist Investors, Distressed Companies, and Value Uncertainty

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ACTIVIST INVESTORS, DISTRESSED COMPANIES, AND VALUE UNCERTAINTY

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ABSTRACT

Hedge funds, private equity firms, and other alternative investment funds are frequently key players in corporate restructurings. Most commentators agree that the presence of a fund can change the dynamics of a chapter 11 case. They cannot agree, however, on the impact of this change—i.e., do funds create or destroy enterprise value? This essay contributes to the dialogue by analyzing data from chapter 11 cases in which funds are in a position to influence the debtor's exit strategy. The data shed light on what such funds might achieve in chapter 11 cases and the potential implications for debtors and their other stakeholders. Although additional research is needed, the preliminary data suggest that the value of fund participation in chapter 11 cases likely depends on whom you ask and where they sit in the particular debtor's capital structure.

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INTRODUCTION

> Tribune Company, which owns the Los Angeles Times, has been in bankruptcy for…well, years. And according to recent reports, it won't be coming out of Chapter 11 any time soon. So what's the hold up?
>
> Basically, it's two very large lenders versus an incredibly tenacious hedge fund.[1]

The debate concerning the role of hedge funds and other alternative investment funds in the distressed company space is not new.[2] It also has not changed much over the past decade: some commentators view distressed investors as raiders or vultures, while others perceive value in their intervention and activism.[3] Like many robust debates, the truth likely lies somewhere in the middle, and more importantly, likely is case- and investor-specific.

Consider the chapter 11 case of the Tribune Company (Tribune).[4] It was long.[5] It was acrimonious.[6] But the company survived, and junior creditors received

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[1] Matthew DeBord, *Aurelius Capital Management: The Hedge Fund That's Keeping Tribune in Bankruptcy*, SOUTHERN CALIFORNIA PUBLIC RADIO, Jan. 4, 2012, http://www.scpr.org/blogs/economy/2012/01/04/4167/aurelius-capital-hedge-fund-s-keeping-tribune-bank/.

[2] Commentary on distressed investors and their activism has grown as funds and creditors in general have exerted an increasing level of control in chapter 11 cases. *See, e.g.*, HILARY ROSENBERG, THE VULTURE INVESTORS 25 (2000); Edith S. Hotchkiss & Robert M. Mooradian, *Vulture Investors and the Market for Control of Distressed Firms*, 43 J. FIN. ECON. 401, 404 (1996); Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673, 674 (2003); David A. Skeel, *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 918 (2003); Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1729 (2008); Michelle M. Harner, *The Corporate Governance and Public Policy Implications of Activist Distressed Debt Investing*, 77 FORDHAM L. REV. 703, 706 (2008) [hereinafter Harner, *Policy Implications*]; Michelle M. Harner, *Trends in Distressed Debt Investing: An Empirical Study of Investors' Objectives*, 16 AM. BANKR. INST. L. REV. 69, 75 (2008) (hereinafter Harner, *Trends in Distressed Debt*); Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511, 513 (2009); Marcel Kahan & Edward Rock, *Hedge Fund Activism in the Enforcement of Bondholder Rights*, 103 NW. U. L. REV. 281, 282 (2009). In addition, Edward I. Altman, the Max L. Heine Professor of Finance at the Stem School of Business, New York University, and Stuart C. Gilson, Professor of Finance at the Harvard Business School, have conducted extensive research on the distressed debt market. *See, e.g.*, EDWARD I. ALTMAN, ARE HISTORICALLY BASED DEFAULT AND RECOVERY MODELS IN THE HIGH-YIELD AND DISTRESSED DEBT MARKETS STILL RELEVANT IN TODAY'S CREDIT ENVIRONMENT?, NYU Stern Sch. of Bus., Salomon Ctr. (2006), *available at* http://people.stern.nyu.edu/ealtman/Are-Historical-Models-Still-Relevant1.pdf; STUART C. GILSON, CREATING VALUE THROUGH CORPORATE RESTRUCTURING 188–90 (2001); *see also* Harner, *Policy Implications*, *supra* note 2, at 708–09 (referencing additional works of Professors Altman and Gilson).

[3] *See* Harner, *Trends in Distressed Debt*, *supra* note 2, at 71–72 (explaining different perspectives and providing relevant citations).

[4] *See In re* Tribune Co., 472 B.R. 223 (Bankr. D. Del. 2012).

[5] Tribune filed its chapter 11 case on December 8, 2008, and it emerged from bankruptcy four years later on December 31, 2012. *See, e.g.*, Liana B. Baker & Ashutosh Pandey, *Publisher Tribune Emerges from Four-Year Bankruptcy*, REUTERS, Dec. 31, 2012, http://www.reuters.com/article/2012/12/31/us-tribune-bankruptcy-idUSBRE8BU02120121231.

something.[7] Is that success? Did the distressed investors in that case—some who held the senior debt and others who held the junior debt—help or hurt the company's restructuring efforts?[8] The answers to these questions may depend on whom you ask.

This essay contributes anecdotal and original empirical data to the debate in an effort to better inform the dialogue and any resulting policy decisions. Part I describes the Tribune chapter 11 case in more detail and explores the various parties' objectives and strategies. Part II then reviews the competing perspectives on the role of distressed investors in chapter 11 cases, including related data from several empirical studies on hedge fund activism. Part III presents the results of our empirical study that focuses on distressed investors who hold or acquire positions of influence in a distressed company's capital structure. These positions may be unsecured and in the company's fulcrum security, which often allows holders to emerge as owners of the reorganized company. Alternatively, the positions may be secured—either pre- or post-petition—and used in a loan-to-own strategy. Regardless of the starting position, the data show, among other things, that the presence of such distressed investors is significantly associated with survival of the distressed company. Whether you view this finding as value enhancement or extraction likely turns on where you sit in the company's capital structure: senior creditors and equity may feel they lost value; management ousted through the power struggle may feel the same; and junior creditors (or those pari passu with the activist investors), as well as those who continue in the company's employ, may

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[6] For one description of the intense disagreements among Tribune's creditors, *see Part Four: Bankruptcy Inc.*, BALTIMORE SUN, Jan. 16, 2013, http://articles.baltimoresun.com/2013-01-16/business/bal-tribune-bankruptcy-bankruptcy-inc-20130116_1_aurelius-capital-management-bankruptcy-judge-kevin-carey-tribune-co-s-chapter (describing disputes and observing that "[s]omewhere in the third year of Tribune Co.'s Chapter 11 proceeding, U.S. Bankruptcy Judge Kevin Carey looked out at a Delaware courtroom packed with high-priced attorneys and conceded the case had broken down into what he called a 'multiconstituent melee.'").

[7] *See*, *e.g.*, Robert Channick, *Tribune Co. Emerges from Bankruptcy*, CHICAGO TRIBUNE, Dec. 31, 2012, http://articles.chicagotribune.com/2012-12-31/news/chi-a-new-era-dawning-for-tribune-co-20121230_1_ceo-eddy-hartenstein-brands-in-major-markets-mix-of-profitable-assets (describing structure of reorganized company, recoveries to junior creditors, and noting that "[d]espite the prodigious cost and length of the bankruptcy, [Professor Douglas] Baird said it should be judged on the outcome—the successful reorganization of Tribune Co. Baird made reference to Eastern Airlines, which filed for bankruptcy in 1989, and was grounded permanently two years later while still operating under Chapter 11."); Rich Kirchen, *How Formerly Bankrupt Tribune Co. Will Buy Fox 6 and More*, MILWAUKEE BUS. J., July 1, 2013, http://www.bizjournals.com/milwaukee/blog/2013/07/how-formerly-bankrupt-tribune-will-buy.html ("Having shed its debt at the end of 2012, Tribune reported a net income of $422.5 million for the year. Revenue totaled more than $4.1 billion.").

[8] In the Tribune chapter 11 case, Oaktree Capital Management and Angelo, Gordon & Co. held a senior debt position and were at odds with junior creditors, led by Aurelius Capital Management. *See, e.g.*, Michael Oneal, *Aurelius, Others Appeal Judge's Confirmation of Tribune Bankruptcy Plan*, CHICAGO TRIBUNE, July 24, 2012, http://articles.chicagotribune.com/2012-07-24/business/chi-aurelius-appeals-judges-confirmation-of-tribune-bankruptcy-plan-20120724_1_aurelius-capital-management-junior-creditors-senior-creditors.

have a completely different assessment of the outcome. The beauty in distressed investor activism truly may be in the eyes of the beholder.

I. A CASE STUDY: TRIBUNE COMPANY

The Tribune chapter 11 case offers insights on the role of funds not only as secured and unsecured creditors, but also as pre-petition and post-petition creditors. It demonstrates the liquidity often provided by funds, and the litigation, cost, and delay that can occur when multiple funds are active in a case in different tranches of the company's debt or equity. It also is viewed by some as a successful chapter 11 case, while for others it represents weaknesses in the chapter 11 process. The following summary highlights aspects of the Tribune case relevant to the funds' positions and activities.

A. The Company and the Chapter 11 Filing

Tribune is one of the leading multimedia companies in the United States, operating in the publishing, digital media, and broadcasting spheres and reaching more than eighty percent (80%) of U.S. households through its multimedia offerings.[9] The company's broadcasting group owns or operates 23 television stations and publishes several prominent newspapers, including the Los Angeles Times, Chicago Tribune, and the Baltimore Sun, among others.[10] Founded in 1847, Tribune went public in 1983 and grew dramatically during the 1980s and 90s through a series of acquisitions.[11]

On December 8, 2008, approximately one year after the company went private in a complex, two-stage leveraged buyout transaction that saddled the company with unmanageable debt, Tribune filed for chapter 11 protection.[12] Tribune eventually emerged from bankruptcy in December 2012 after four years of acrimonious proceedings. Much of the acrimony was a result of divergent interests of various distressed investors, with one commentator noting that Tribune's extended stay in bankruptcy "all boils down to the Great Big Hedge Fund versus the Somewhat Smaller Hedge Fund."[13]

The Great Big Hedge Fund in this case is Oaktree Capital Management.[14] The Somewhat Smaller Hedge Fund is Aurelius Capital Management, which, according

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[9] General Disclosure Statement at 7, *In re* Tribune Co., 472 B.R. 223 (Bankr. D. Del. 2012) (No. 08-13141).

[10] *See Tribune Company History*, TRIBUNE.COM, available at http://corporate.tribune.com/pressroom/?page_id=2313 (last visited January 18, 2014).

[11] *See id.*

[12] *See* General Disclosure Statement, *supra* note 9, at 7.

[13] DeBord, *supra* note 1.

[14] *See id.*

to some, exhibits a "stubborn willingness to wage battle" with bankrupt companies.[15]

B. The Pre-petition Leveraged Buyout

During the fall of 2006, Tribune's board of directors formed a special committee to consider potential strategic transactions, and which quickly began exploring such transactions.[16] Over the course of the following months, the special committee considered a variety of options, including a leveraged recapitalization, a spin-off or split-off of particular segments or a sale of all or part of the company.[17] Parties interested in a potential acquisition of Tribune submitted bids in January 2007; however, none of the initial bids were satisfactory due to large shareholder preferences.[18]

Ultimately, Tribune decided to pursue the leveraged buyout transaction that would take the company private and convert it to an ESOP owned S-corp.[19] The transaction involved two stages, each including multiple transactions. In relevant part, the first stage of the leveraged buyout (LBO) involved Tribune incurring $7.3 billion in new debt and utilizing a $250 million investment by Sam Zell's private investment firm EGI to fund a cash tender offer for approximately 126 million shares at $34 per share.[20] In the second stage, Tribune incurred an additional $3.7 billion of debt and purchased the remaining public shares, including EGI's shares at $34 per share.[21] EGI purchased $225 million of subordinated notes and a warrant to purchase 40% of stock for $90 million.[22]

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[15] Michael Oneal, *New Storm Clouds Over Tribune Co. Bankruptcy Case*, CHICAGO TRIBUNE, Sept. 25, 2010, http://articles.chicagotribune.com/2010-09-25/business/ct-biz-0926-tribune-20100925_1_bankruptcy-case-centerbridge-partners-tribune-co; *see* Matt Wirz & Irene Chapple, *Aurelius Crosses the Ocean for Its Debt Bet*, WALL ST. J., Dec. 13, 2010, http://online.wsj.com/news/articles/SB10001424052748703727804576011821714853378 (discussing Aurelius's reputation).

[16] *See* Report of Kenneth N. Klee, As Examiner, Vol. 1 at 46, 101, *In re* Tribune Co., 472 B.R. 223 (Bankr. D. Del. 2012) (No. 08-13141).

[17] *See id.* at 104.

[18] *See id.* at 371. The Chandler Trusts and the McCormick Foundation together owned 33.25% of Tribune's common stock, and as a result, these Large Shareholders were invited to engage in discussions regarding the company's strategic direction. The Klee Report cites an email suggesting "it would be 'difficult to do a transaction unless the 30% shareholders are reasonably comfortable.'" *Id.* at 369. *See also* Holman W. Jenkins, Jr., *Where the Tribune LBO Went Wrong*, WALL ST. J., January 23, 2013, http://online.wsj.com/article/SB10001424127887324624404578257582356730460.html (describing demanded price as too high, deterring prospective buyers).

[19] *See* Michael Oneal & Steve Mills, *Part One: Zell's Big Gamble*, THE BALTIMORE SUN, January 12, 2013, http://articles.baltimoresun.com/2013-01-12/business/bal-tribune-co-bankruptcy-sam-zells-big-gamble-20130112_1_randy-michaels-big-gamble-buyout.

[20] *See* Report of Kenneth N. Klee, *supra* note 16, at 124.

[21] *See id.* at 194, 205–06.

[22] *See In re* Tribune Co., 464 B.R. 126, 141 n.17 (Bankr. D. Del. 2011).

The fact that the stages were consummated months apart was relevant during the bankruptcy case. During the period between the closing of stages one and two, the financial condition of Tribune deteriorated further; however, the second stage still closed despite significant concerns from the lenders' experts.[23]

C. The Funds Participation in the Chapter 11 Case

On December 8, 2008, just less than one year after the second stage of the LBO was completed, Tribune, facing significant debt service and related payments, filed a voluntary chapter 11 petition.[24] The largest senior lenders associated with the LBO loans—JPMorgan Chase Bank, Angelo, Gordon & Co. and Oaktree, the latter two as distressed debt investors—were poised to exchange their debt for equity in the reorganized company.[25] The reorganization, however, was dominated with litigation concerning the pre-petition LBO and what the various tranches of debt should receive under the plan.[26]

In April 2010, Tribune filed the first plan of reorganization, which among other things, provided for some recovery for pre-LBO bondholders and settled claims against the LBO lenders and Tribune, effectively letting them off-the-hook.[27] Shortly thereafter, the bankruptcy court appointed an examiner to investigate possible causes of action in connection with the LBO, including claims for fraudulent conveyance, breach of fiduciary duty, equitable subordination, and others.[28] The examiner's report, released in July 2010, indicated there was evidence of dishonesty by Tribune management and determined that the company's directors did not adequately discharge their oversight duties.[29] The bondholders were especially interested in the examiner's findings, hoping to find evidence that would support a claim of equitable subordination or fraudulent conveyance impacting the LBO lenders' senior claims.[30]

By September 2010, Aurelius had acquired a position as the most powerful bondholder in the case after purchasing the stake of Centerbridge Partners, another distressed-investment hedge fund.[31] Although Centerbridge had been a "chief

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[23] *See* Report of Kenneth N. Klee, *supra* note 16, at 304.
[24] *See In re Tribune*, 464 B.R. at 135.
[25] *See id.* at 184.
[26] For a summary of some of the litigation relating to the chapter 11 case, *see* Steven Church, *Tribune Lawsuit Deadline Passes as Creditor Reorganization Vote Approaches*, BLOOMBERG NEWS, Dec. 9, 2010, http://www.bloomberg.com/news/2010-12-08/tribune-creditors-face-midnight-deadline-to-sue-over-zell-led-2007-buyout.html.
[27] *See* Randall Chase, *Trustee Files Revised Lawsuits Over Tribune Buyout*, ASSOCIATED PRESS, Aug. 12, 2013, http://bigstory.ap.org/article/trustee-files-revised-lawsuits-over-tribune-buyout (describing Tribune's first reorganization plan).
[28] *See* Report of Kenneth N. Klee, *supra* note 16, at 2.
[29] *Id.* at 10–11.
[30] *See In re* Tribune Co., 464 B.R. 126, 161 (Bankr. D. Del. 2011).
[31] *See* Oneal, *supra* note 15.

agitator" pressing for legal action against the senior LBO lenders, it had also been willing to compromise until settlement talks collapsed.[32] Aurelius was actively involved in the chapter 11 case, filing, among other things, a motion for the appointment of a chapter 11 trustee "to preserve and pursue the LBO-related causes of action," a motion to disqualify the primary counsel for the official creditors' committee because of conflicts, and a plan of reorganization.[33]

In fact, four competing creditor groups filed rival plans of reorganization: one supported by Aurelius and other pre-buyout bondholders, one supported by some senior lenders, one sponsored by hedge fund King Street Capital LP (bridge-lender plan),[34] and one co-sponsored by Tribune and certain leading senior lenders.[35] The warring groups argued over the wording of disclosure statements.[36] The bankruptcy court ordered the competing plan proponents to attempt to mediate their differences.[37] The resulting litigation relating to the turn over of documents in preparation for mediation hints at the tension underlying these discussions.[38] The bridge lenders ultimately reached a settlement through mediation with Tribune and the leading senior lenders.[39] No such agreement was reached with Aurelius.

The Tribune and Aurelius plans both contemplated a debt for equity swap, but major differences existed. The Aurelius plan preserved the potential for bondholders to receive 100% of their claim depending on the results of the LBO litigation.[40] The plan thus also involved pursuing claims against the LBO lenders for

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[32] *Id.*

[33] *See* Motion of Aurelius Capital Management, LP, for the Appointment of a Chapter 11 Trustee, *In re* Tribune Co. (Bankr. D. Del) (No. 08-13141) (dk. no. 5680); Motion to Disqualify Chadbourne & Parke, LLP from Acting on Behalf of the Official Comm. of Unsecured Creditors in Matters in Which it Has Conflicts of Interest Filed by Aurelius Capital Management, *In re* Tribune Co. (Bankr. D. Del.) (No. 08-13141) (dk. 5669); *see generally* Joint Plan of Reorganization for Tribune Company and its Subsidiaries Proposed by Aurelius Capital Management, LP, *In re* Tribune Co. (Bankr. D. Del.) (No. 08-13141) (dk. no. 6184).

[34] *See* Bill Rochelle, *Tribune, Wolverine, Lehman, Downey: Bankruptcy*, BLOOMBERG NEWS, Nov. 1, 2010, http://www.bloomberg.com/news/2010-11-01/downey-tridimension-point-blank-loehmann-s-threat-to-sue-bankruptcy.html.

[35] *See* Steven Church, *Tribune Creditor Groups Submit Rival Reorganization Plans for Publisher*, BLOOMBERG NEWS, Oct. 30, 2010, http://www.bloomberg.com/news/2010-10-30/tribune-creditor-aurelius-capital-management-submits-rival-reorganization.html.

[36] *See* Steven Church, *Tribune Judge May Rewrite Bankruptcy Documents if Creditors Keep Feuding*, BLOOMBERG NEWS, Nov. 29, 2010, http://www.bloomberg.com/news/2010-11-29/tribune-judge-may-rewrite-reorganization-documents-update1-.html.

[37] *See* Order Appointing Mediator, *In re* Tribune, Co. (Bankr. D. Del.) (No. 08-13141) (dk. no. 5591); *see also* Church, *supra* note 36.

[38] *See* Steven Church, *Tribune Creditors May Be Seeking Too Many Documents, Bankruptcy Judge Says*, BLOOMBERG NEWS, Jan. 24, 2011, http://www.bloomberg.com/news/2011-01-24/tribune-judge-challenges-creditors-document-request-update1-.html; Bill Rochelle, *Vitro, Satmex, Nortel, Workflow, Lehman: Bankruptcy*, BLOOMBERG NEWS, Jan. 25, 2011, http://www.bloomberg.com/news/2011-01-25/vitro-nortel-workflow-lehman-fairpoint-javo-bankruptcy.html.

[39] *See* Bill Rochelle, *Grace, Tribune, GM, Innkeepers, AmTrust: Bankruptcy*, BLOOMBERG NEWS, Feb. 1, 2011, http://www.bloomberg.com/news/2011-02-01/wr-grace-gm-innkeepers-townsends-orchard-brands-bankruptcy.html.

[40] Steven Church, *Tribune Creditors Open Bankruptcy Court Dispute Over Buyout*, BLOOMBERG NEWS, Mar. 7, 2011, http://www.bloomberg.com/news/2011-03-07/tribune-creditors-open-bankruptcy-court-

moving forward with the buyout in light of Tribune's financial condition.[41] Unsecured creditors criticized the Aurelius plan because it would leave ownership of the company "in limbo."[42] Tribune's competing plan would distribute the company's stock more quickly, allow for the LBO Lenders to receive distributions, preserve causes of action, and result in Aurelius and other pre-buyout creditors receiving some distributions.[43] The bankruptcy judge rejected both plans in October 2011 and "compared [the] two groups of competing creditors to warring animals in a parable about a fox and scorpion who must cooperate to cross a river safely."[44]

Prior to the bankruptcy judge's ruling in October 2011, Tribune moved forward with confirmation of its plan, and Aurelius fought Tribune at every turn. For example, Aurelius asked the bankruptcy judge to postpone the confirmation process, arguing that amendments to the Tribune plan required Tribune to resolicit creditor votes.[45] Aurelius also asked the judge to reject Tribune's plan because it was proposed in bad faith. Aurelius hired Mark Prak to testify on behalf of Aurelius that the JPMorgan, Angelo Gordon, and Oaktree stake in newspaper and broadcasting would violate FCC media ownership rules.[46] Aurelius also subsequently appealed the judge's approval of Tribune's plan and sought a stay of the company's bankruptcy in order for a higher court to review the confirmation order.[47]

The bankruptcy judge denied the requested stay without bond, and Tribune's plan closed despite the appeal.[48] Nevertheless, Aurelius did win a few of its chosen battles. For example, Aurelius successfully argued that lawsuits against former

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dispute-over-buyout.html (discussing noteholder plan calling for a significant portion of Tribune stock being put into trust and not distributed until the main buyout lawsuit ends, based on who wins. "The lender lawsuit may bring more than $1.57 billion to non-LBO creditors, Aurelius said in court papers while predicting a 57 percent chance of victory. If Aurelius wins, the lenders wouldn't recover anything until the pre-buyout creditors are repaid all $2.5 billion they claim they are owed.").

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Steven Church & Karen Gullo, *Tribune Judge Rejects JPMorgan, Aurelius Reorganization Plans*, BLOOMBERG NEWS, Nov. 1, 2011, http://www.bloomberg.com/news/2011-10-31/tribune-judge-rejects-competing-jpmorgan-aurelius-reorganization-plans.html.

[45] *See* Dow Jones Newswires-Wall Street Journal, *Aurelius: Halt Tribune Confirmation Hearings*, CHICAGO BREAKING BUSINESS, Apr. 11, 2011, http://archive.chicagobreakingbusiness.com/2011/04/aurelius-calls-for-halt-to-tribune-confirmation-hearings.html.

[46] *See* Steven Church, *JPMorgan Stake in Tribune Will Violate FCC Rule, Lawyer Claims at Hearing*, BLOOMBERG NEWS, Mar. 17, 2011, http://www.bloomberg.com/news/2011-03-17/jpmorgan-stake-in-tribune-will-violate-fcc-rule-lawyer-claims-at-hearing.html.

[47] *See* Steven Church, *Tribune Creditors Appeal, Seek to Halt Bankruptcy Plan*, BLOOMBERG NEWS, Jul. 24, 2012, http://www.bloomberg.com/news/2012-07-24/tribune-creditors-appeal-seek-to-halt-bankruptcy-plan.html.

[48] *See In re* Tribune, Co., 476 B.R. 843, 866 (Bankr. D. Del. 2012); *see also* Todd Shields & Steven Church, *Tribune May Get Last Approval Needed to Exit Bankruptcy*, BLOOMBERG BUSINESSWEEK, Nov. 16, 2012, http://www.businessweek.com/news/2012-11-16/tribune-may-get-last-approval-needed-to-exit-bankruptcy.

shareholders should be allowed to proceed in state court.[49] In addition, it won access to pre-bankruptcy payment data.[50]

D. Winners and Losers?

Tribune emerged from bankruptcy in December of 2012, intending to sell many of its assets.[51] The fraudulent conveyance litigation against former shareholders of Tribune who received payouts as part of the LBO was consolidated and transferred to the Southern District of New York,[52] and remained active for quite some time. When the court finally dismissed the individual creditors' suit, the opinion indicated that such individual creditors may not pursue claims that are simultaneously being pursued by the litigation trustee appointed under Tribune's bankruptcy plan.[53] Although this may have been a victory of some sort for the defendants, this one fraudulent conveyance case lasted over two years.[54]

Only two months out of bankruptcy, reorganized Tribune hired consultants to look into the sale of the newspaper business, which has not occurred despite some interest from bidders.[55] Six months after emerging, Tribune announced that it might divide its primary business divisions, broadcast and publishing, into two companies to help avoid a large tax bill and to "allow each company to maximize its flexibility and competitiveness in a rapidly changing media environment."[56] Tribune is still in business, but looking for ways to cut expenses and improve profits.[57]

As for Tribune's creditors, the litigation trustee's lawsuits against the former Tribune shareholders, which Aurelius fought to preserve for the benefit of "innocent" non-LBO creditors, continues. The value of that litigation remains to be seen and will need to be assessed in light of the time and expense associated with the plan litigation during the chapter 11 case. In addition, note holders will

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[49] Steven Church, *Tribune Creditors Can Sue Former Shareholders, Bankruptcy Judge Rules*, BLOOMBERG NEWS, Mar. 22, 2011, http://www.bloomberg.com/news/2011-03-22/tribune-creditors-can-sue-former-shareholders-judge-says-in-delaware.html.

[50] Steven Church, *Tribune Noteholders Win Access to Shareholder Pre-Bankruptcy Payment System*, BLOOMBERG NEWS, May 17, 2011, http://www.bloomberg.com/news/2011-05-17/tribune-noteholders-win-access-to-shareholder-payment-amounts.html.

[51] *See* Baker & Pandey, *supra* note 5.

[52] *In re* Tribune Co. Fraudulent Conveyance Litig., 831 F. Supp.2d 1371, 1372 (J.P.M.L. 2011).

[53] *See In re* Tribune Co. Fraudulent Conveyance Litig., 499 B.R. 310, 325 (S.D.N.Y. 2013); *see also* Tom Hals, *Former Tribune Co. Shareholders Notch Legal Victory*, REUTERS, Sept. 23, 2013, http://www.reuters.com/article/2013/09/23/tribune-clawback-ruling-idUSL2N0HJ29320130923.

[54] *See* Civil Docket at 1, *In re* Tribune Co. Fraudulent Conveyance Litig., 291 F.R.D. 38 (S.D.N.Y. 2013) (11-MD-02296, 12-MC-2296) (stating case was filed on December 20, 2011). The cases were consolidated in December 2011.

[55] Christine Haughney & David Carr, *To Cut Taxes, Tribune is to Split into Broadcasting and Publishing Units*, N.Y. TIMES, July 10, 2013, http://www.nytimes.com/2013/07/11/business/media/tribune-co-to-split-in-two.html?_r=0.

[56] *Id.*

[57] *See* Roger Yu, *Tribune Eyes Expense Cuts in Newspaper Unit*, USA TODAY, Sept. 27, 2013, http://www.usatoday.com/story/money/business/2013/09/27/tribune-cuts/2882531/.

arguably fair better as a result of the plan litigation, ultimately receiving distributions from the litigation trust.[58] Bondholders might have achieved that value allocation earlier in the case,[59] without the full array of tactics employed by Aurelius, but such speculation becomes yet another factor creating value uncertainty in these types of fund cases.

E. Consider a Comparison

The Lyondell Chemical Co. bankruptcy was in some ways quite similar to that of Tribune: Lyondell filed only one month after Tribune; both companies had completed a leveraged buyout that contributed to their financial distress;[60] and there were allegations of fraudulent conveyance in both cases.[61] Moreover, fund involvement (including the involvement of Aurelius) was apparent in both:[62]

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[58] The EGI-TRB LLC Notes claims and the PHONES Notes claims received more in the fourth plan than they did in the initial plan, where they were to be cancelled with holders receiving nothing. By the fourth plan, these noteholders were deemed allowed claimholders for approximately $759 million for PHONES and $225 million for the EGI-TRB notes. *See* Disclosure Statement for Joint Plan of Reorganization for Tribune Company and Its Subsidiaries at 11, *In re* Tribune Co., 472 B.R. 223 (Bankr. D. Del. 2012) (No. 08-13141); Supplemental Disclosure Document Relating to Fourth Amended Joint Plan of Reorganization for Tribune Company and its Subsidiaries Proposed by the Debtors, the Official Committee of Unsecured Creditors, Oaktree Capital Management, L.P., Angelo, Gordon & Co., L.P., and JPMorgan Chase Bank, N.A. at 4, 15, *In re* Tribune Co., 472 B.R. 223 (Bankr. D. Del. 2012) (No. 08-13141). The improvement in the PHONES notes recovery was part of the Noteholder Plan and it appears to have been the result of advocacy by Aurelius and other funds, Citadel Equity Fund Ltd., and Camden Asset Management, L.P. *See* Letter from Mark D. Brodsky, Chairman, Aurelius Capital Management, A Personal Appeal to Tribune's Non-LBO Creditors, Aurelius Capital Management, LP (Nov. 23, 2010) (hereinafter Brodsky Letter), *available at* http://bankrupt.com/misc/Tribune_AureliusRSrevised.pdf. *See also* Chris Nolter, *Tribune Nears Exit from Acrimonious Chapter 11 Case*, THE DEAL PIPELINE, Jun. 1, 2012, http://www.thedeal.com/content/restructuring/tribune-nears-exit-from-acrimonious-chapter-11-case.php#ixzz2gTegFn3g (discussing arguments by Citadel and Camden).

[59] Aurelius's victories were modest considering its goals were a bit broader. Aurelius's other efforts to increase the value of the estate failed; the failed arguments included: the Bar Order was unfair and unreasonable; the Senior Lender settlement was too good/gave culpable parties a windfall; and the Stage 1 and Stage 2 LBO lenders should not receive the same treatment under the plan. *See* In re Tribune Co., 464 B.R. 126, 178, 180 (Bankr. D. Del. 2011) (Judge Carey's order denying confirmation of third plans discusses and invalidates a number of Aurelius's arguments); *see also* Brodsky Letter, *supra* note 58.

[60] *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 237–39 (Del. 2009) (discussing negotiations regarding merger/LBO); Tiffany Kary, *Blavatnik Made $1.2 Billion in Lyondell LBO, Lawsuit Says*, BLOOMBERG NEWS, Sept. 30, 2011, http://www.bloomberg.com/news/2011-09-30/blavatnik-made-1-2-billion-in-lyondell-buyout-creditors-lawsuit-says.html.

[61] *See In re* Lyondell Chem. Co., 467 B.R. 712, 715–17 (Bankr. S.D. N.Y. 2012) (discussing fraudulent transfer claims); Al Greenwood, *Lyondell Creditors Seek U.S. Suit Against Lenders, Officers*, ICIS NEWS, June 17, 2009, http://www.icis.com/Articles/2009/06/17/9225742/Lyondell-creditors-seek-US-suit-against-lenders-officers.html; Al Greenwood, *Greed Doomed Lyondell Deal—U.S. Lawsuit*, ICIS NEWS, July 24, 2009, http://www.icis.com/Articles/2009/07/24/9235043/Greed-doomed-Lyondell-deal-US-lawsuit.html.

[62] *See, e.g.*, Response of Aurelius Capital Management in Further Support of Certain of Bank of New York Mellon's, *In re* Lyondell Chem. Co., 402 B.R. 571 (Bankr. S.D.N.Y. 2009) (No.09-10023); Exhibit A to Third Amended Plan, *In re* Lyondell Chem. Co., 402 B.R. 571 (Bankr. S.D.N.Y. 2009) (No. 09-10023) (discussing Aurelius's noteholder status); Wirz & Chapple, *supra* note 15 (mentioning Aurelius's involvement with Lyondell).

Investment funds Apollo Management,[63] Ares Management, Access Industries (led by investor Len Blavatnik), and others were significant players in the Lyondell bankruptcy case.[64]

The Lyondell case had some comparable hiccups: A number of the secured lenders including Ares Management, Highland Capital Management, and others opposed the company's debtor-in-possession financing motion.[65] A major creditor opposed the retention of a new chief financial officer.[66] The creditors' committee requested the appointment of an examiner, primarily to investigate one fund's involvement in various facets of the bankruptcy case.[67] In addition, and in order to emerge from chapter 11, Lyondell negotiated a $450 million settlement with creditors during the course of the case regarding the LBO.[68]

Despite these obstacles and significant involvement from funds, however, Lyondell emerged from bankruptcy after less than sixteen months.[69] The Tribune and Lyondell reorganizations demonstrate the variance in fund investment strategies, investment horizons, and objectives. These variances and the related empirical literature are discussed in Part II, and the Tribune outcome is in many ways representative of the data presented in Part III.

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[63] Media reports indicate Apollo became Lyondell's largest secured creditor after purchasing approximately $2 billion of term loans at a discount. Nathan Vardi, *How Billionaires Lost and Made Fortunes in LyondellBasell*, FORBES, Mar. 11, 2011, http://www.forbes.com/sites/nathanvardi/2011/03/11/how-billionaires-lost-and-made-fortunes-in-lyondellbasell/.

[64] *See* Emily Chason & Chelsea Emery, *Update 2—Lyondell Settlement Paves Way for Bankruptcy Exit*, REUTERS, Feb. 16, 2010, http://www.reuters.com/article/2010/02/16/lyondellbasell-idUSN1624804820100216.

[65] Objection of Certain Senior Secured Lenders to Debtors' Motion for an Order (I) Authorizing Debtors (A) to Obtain Post-Petition Financing, *In re* Lyondell Chem. Co., 402 B.R. 571 (Bankr. S.D.N.Y. 2009) (No. 09-10023).

[66] Objection of ABN AMRO Bank, N.V. to the Debtors' Motion for an Order Approving Compensation Terms with Respect to the Retention of C. Kent Potter as Chief Financial Officer, *In re* Lyondell Chem. Co., 402 B.R. 571 (Bankr. S.D.N.Y. 2009) (No. 09-10023); Al Greenwood, *Creditor Opposes Lyondell Choice for Chief Financial Officer*, ICIS NEWS, Sept. 2, 2009, http://www.icis.com/Articles/2009/09/02/9244641/creditor-opposes-lyondell-choice-for-chief-financial-officer.html.

[67] Motion of the Official Committee of Unsecured Creditors for Appointment of an Examiner, *In re* Lyondell Chem. Co., 402 B.R. 571 (Bankr. S.D.N.Y. 2009) (No. 09-10023) (examiner request was for "limited purposes of investigating: (i) the Debtors' selection of a conflicted Rights Offering Sponsor, (ii) the Debtors' refusal to refinance the DIP Facility, and (iii) the Debtors' refusal to formulate a robust plan of reorganization with an appropriate reserve for unsecured creditors pending resolution of the Committee's litigation.").

[68] *See* Pratish Narayanan & Chelsea Emery, *Lyondell Restructuring Plan Includes Apollo Role*, REUTERS, Mar. 8, 2010, http://www.reuters.com/article/2010/03/09/us-lyondell-idUSTRE6280LG20100309.

[69] Lindsey Bewley, *LyondellBasell's Exit Strategy*, IHS CHEM. WEEK, May 14, 2010), http://www.chemweek.com/sections/companies/LyondellBasells-Exit-Strategy_26737.html; *see* James Cordrey, *Lyondell Officially Emerges from Chapter 11 Bankruptcy*, LEXISNEXIS LITIG. BLOG, May 3, 2010, http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2010/05/03/lyondell-officially-emerges-from-chapter-11-bankruptcy.aspx.

II. FUND STRATEGIES AND IMPACT IN CHAPTER 11

Fund participation in distressed situations is not a new investment strategy, but both anecdotal and empirical evidence suggest a growth in fund participation in chapter 11 cases, largely since 2000.[70] This trend reflects all investment strategies, including passive and activist strategies, as well as loan-to-loan and loan-to-own strategies.[71] Although some funds invoke only one investment strategy (e.g., day traders), many funds utilize several different strategies depending on the company, its capital structure, and the fund's desired rate of return and risk tolerance.[72]

Most commentators and practitioners agree that funds are increasingly present at the negotiating table in chapter 11 cases,[73] but they strongly disagree about the funds' impact on the company's restructuring efforts.[74] The vulture versus phoenix debate rages on in conference rooms, courtrooms, and the media.[75] Similar to the "raider" versus "white knight" characterizations in the solvent corporate takeover context, these labels are just that—superficial descriptions of outside investors colored by the emotions and the financial interests of the observer.

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[70] *See* sources cited *supra* note 2; *see also* EDITH S. HOTCHKISS ET AL., *Bankruptcy and the Resolution of Financial Distress*, HANDBOOK OF EMPIRICAL CORPORATE FINANCE, vol. 2 46 (B. Espen Eckbo ed. 2008); Wei Jiang et al., *Hedge Funds and Chapter 11*, 67 J. FIN. 513, 513 (2012); Kai Li & Wei Wang, *Creditor Governance Through Loan-to-Loan and Loan-to-Own*, 13 (Working Paper, 2013), *available at* http://ssrn.com/abstract=2275635; Jongha Lim, *The Role of Activist Funds in Financially Distressed Firms* (Working Paper, 2013), *available at* http://ssrn.com/abstract=2285884; Jared A. Ellias, *Do Activist Investors Constrain Managerial Moral Hazard in Chapter 11? Evidence from Junior Activist Investing* (Rock Center for Corp. Governance at Stanford Univ. (Working Paper No. 155, 2013), *available at* http://ssrn.com/abstract=2308994.

[71] Passive strategies include trading in and out of the debt on a periodic basis to capture value disparities in pricing and purchasing the debt (including trade claims) at a steep discount with the expectation of a higher recover under the plan of reorganization or other bankruptcy distribution scheme. Activist strategies include buying the debt or extending credit to the company with the objective of influencing the restructuring to increase value and distributions on the fund's tranche of debt or swapping the debt for equity in a loan-to-own play. For an overview of fund strategies in the distressed space, *see* MICHELLE M. HARNER ET AL., *Distressed Debt Investing*, ALTERNATIVE INVESTMENTS: INSTRUMENTS, PERFORMANCE, BENCHMARKS, AND STRATEGIES 303 (H. Kent Baker & Greg Filbeck eds., 2013).

[72] Bo. J. Howell, *Hedge Funds: A New Dimension in Chapter 11 Bankruptcy Proceedings*, 7 DEPAUL BUS. & COM. L.J. 35, 39–40 (2008).

[73] Perhaps one reason there has been more distressed debt investing by funds is that there is much more defaulting debt. *See* Edward I. Altman, *The Role of Distressed Debt Markets, Hedge Funds and Recent Trends in Bankruptcy on the Outcomes of Chapter 11 Reorganizations*, 22 AM. BANKR. INST. L. REV. 75, 80–81 (2014) (figures 3 and 4 detailing total filings and liabilities of chapter 11 filing companies show significant spikes in default amounts during early 2000s and 2008-09).

[74] Michelle M. Harner, *Activist Distressed Debtholders: The New Barbarians at the Gate?*, 89 WASH. U. L. REV. 155, 164–67 (2011) (hereinafter Harner, *Activist Distressed Debtholders*) (explaining changes around restructuring negotiating table and various characterization of funds at the table).

[75] *Id.* at 165–66 nn.33 & 34. *See also In re* Ion Media Networks, 419 B.R. 585, 588–89 (Bankr. S.D.N.Y. 2009) (describing a fund's bankruptcy tactics as aggressive); Harvey R. Miller, *Chapter 11 in Transition - from Boom to Bust and into the Future*, 81 AM. BANKR. L.J. 375, 390–91 (2007) (noting distressed debt investors are often aggressive and conduct "pernicious litigation" in bankruptcy).

Critics of funds point to their scorch-earth tactics that often involve prolonged and expensive litigation.[76] These concerns are highlighted in cases with multiple funds holding different tranches of the company's debt or equity.[77] Management also is skeptical of most funds, likely not knowing of their existence in the company's capital structure until after restructuring efforts are underway and perhaps feeling blind-sided by the funds' tactics, which tend to be different than those of traditional relationship lenders.[78] Funds also have a reputation for replacing management and wanting more of a say in governance and managerial decisions.[79]

Supporters of funds, and distressed debt investing in general,[80] emphasize the liquidity often provided by funds as the lenders of last resort.[81] They also believe fund participation disciplines management and can level the playing field between the senior secured lenders and management, particularly where the fund holds the unsecured fulcrum debt.[82] In addition, they suggest that funds generally provide

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[76] *See, e.g.*, ROSENBERG, *supra* note 2, at 89–91, 99 (discussing investor tactics that may delay restructuring process and providing case examples).

[77] *See* Harner, *Activist Distressed Debtholders*, *supra* note 74, at 188–89 (discussing delays in Tribune case as a result of diverging interests of creditor/funds); Emily Chasan, *Fight Over What Six Flags is Worth Could Get Ugly*, REUTERS, Dec. 3, 2009, http://www.reuters.com/article/2009/12/04/us-sixflags-idUSTRE5B30AR20091204 (discussing valuation disagreements between funds, which prolonged case). *See also* Jared A. Ellias, *Do Activist Investors Constrain Managerial Moral Hazard in Chapter 11?: Evidence from Junior Activist Investing* 1–2 (Stan. L. & Econ. Olin Working Paper No. 451 2013) *available at* http://ssrn.com/abstract=2308994 (stating some senior creditors perceive junior activist investors as using "terrorist litigation practices").

[78] *See* Harner, *Activist Distressed Debtholders*, *supra* note 74, at 164 nn.26 & 29; Frederick Tung, *Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance*, 57 UCLA L. REV. 115, 133–35 (2009) (explaining traditional relationship between a lender and borrower and changes in dynamics of that relationship); Charles K. Whitehead, *The Evolution of Debt: Covenants, the Credit Market, and Corporate Governance*, 34 IOWA J. CORP. L. 641, 641–50 (2009).

[79] *See* Harner, *Trends in Distressed Debt*, *supra* note 2, at 86 n.76 (data reporting that, of those respondents who invest in distressed debt, approximately 29% attempt to influence management personnel changes and approximately 37% attempt to replace certain key members of management in efforts to acquire control of company).

[80] Professor Edward I. Altman notes that distressed debt investors play an important role in the loan and bond markets, providing increased depth and liquidity. *See* Altman, *supra* note 73, at 76 (estimating there are currently "more than 200 financial institutions investing between $400-450 billion in the distressed debt market in the U.S.").

[81] *See, e.g.*, Harner, *Activist Distressed Debtholders*, *supra* note 74 at 169–70 (noting willingness of distressed investors to invest in troubled company can have very positive implications for company and its stakeholders); Paul M. Goldschmid, *More Phoenix Than Vulture: The Case for Distressed Investor Presence in the Bankruptcy Reorganization Process*, 2005 COLUM. BUS. L. REV. 191, 267–68 (2005) (noting claims trading can add beneficial market liquidity); Vikas Agarwal & Costanza Meneghetti, *The Role of Hedge Funds as Primary Lenders*, 14 REV. DERIV. RES. 241, 242–43 (2011), *available at* http://ssrn.com/abstract=1596830 (finding overall hedge fund lending adds value and financial markets view their involvement as positive).

[82] *See* Goldschmid, *supra* note 81, at 255–61 (discussing how distressed debt investor involvement often results in better outcomes because they tend to behave like shareholders interested in long-term value of company than senior lenders in a chapter 11 case).

creditors with an alternative exit strategy, and that activist funds frequently unlock value for all creditors.[83]

Interestingly, anecdotal and to some extent empirical evidence supports all of the foregoing arguments.[84] That perhaps is not surprising given the variety of funds and the unique circumstances of most chapter 11 opportunities.[85] Rather than trying to account for all of these variations, the remainder of this essay focuses on funds pursuing takeover (frequently loan-to-own) opportunities. The next section explains the parameters of the empirical study and describes certain key results relating to activist funds and the takeover/loan-to-own strategies. The data offer valuable insights and highlight additional questions we should strive to answer to better inform the ongoing debate.

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[83] *See* Jiang et al., *supra* note 70, at 515 (stating "our evidence is more supportive of efficiency gains brought by hedge funds than of value extraction from other claims. The presence of hedge fund unsecured creditors is associated with both higher total debt (including secured and unsecured) recovery . . . ."); Martin Eisenberg, *When Hedge Funds Invest in Distressed Debt*, N.Y.L.J. 11 (Oct. 15, 2007) ("A balanced assessment of the impact of distressed investing in bankruptcy proceedings demonstrates that distressed investors are beneficial to the reorganization process contributing, among other things, substantial resources in the form of capital, financial acumen and expertise.").

[84] *See* Harner, *Trends in Distressed Debt*, *supra* note 2, at 91–92 (discussing empirical study of institutional and distressed debt investors based primarily on survey responses providing insight on investment practices and investment strategies, including use of distressed debt to influence board or management and the use of investing to acquire ownership); Jiang et al., *supra* note 70 at 514 (empirical study finding that hedge funds strategically choose positions in capital structure of the company, help balance power between the debtor and secured creditors, exert power in the bankruptcy case over management and some management decisions, and bring about higher probabilities of emergence and payoffs for junior claims); Li & Wang, *supra* note 70 (empirical study finding distressed debt investors that pursue loan-to-own strategies exert influence, weaken liquidation bias of secured creditors but also improve corporate governance and operating performance of reorganized firm); Lim, *supra* note 70 (empirical study finding that hedge fund involvement in chapter 11 is associated with higher probability of completing prepackaged restructurings, faster restructurings, and greater debt reduction for the emerging firm); Ellias *supra* note 70 (finding that hedge funds in junior claimant position in chapter 11 increase the appraised value of the restructuring transaction).

[85] One example of a *unique* chapter 11 opportunity is fund investment in an obscure pool of General Motors debt that allowed the funds to recover significant amounts in the case. *See* Tiffany Kary, *Hedge Funds Used Obscure Bond Bet to Win in GM Bankruptcy*, BLOOMBERG PERSONAL FINANCE, Oct. 5, 2013, http://www.bloomberg.com/news/2013-10-04/hedge-funds-used-obscure-bond-bet-to-win-in-gm-bankruptcy.html (also noting role of Fortress Investment Group and Elliot Management Corp. in rejecting GM's last-ditch effort to avoid bankruptcy).

III. STUDY OF ACTIVIST FUNDS IN CHAPTER 11

The primary objective of the study was to analyze cases where funds were "purchasers"[86] of the debtor during the course of the bankruptcy and determine to what extent funds influenced the debtor's exit strategy.[87] Although funds can be "activist" in other respects, this study seeks to understand the dynamics and impact of funds involved in a takeover strategy. In such cases, a fund may attempt to purchase the debtor's assets outright, credit bid for the debtor's assets, invest new capital in exchange for reorganized equity,[88] or pursue a debt-for-equity exchange under the plan of reorganization.[89] Accordingly, in nearly all cases identified as a "fund case" in the dataset, the funds were positioned to own at least a majority of the company or its assets after the chapter 11 case.

A. The Dataset

The starting point for our dataset is the UCLA-LoPucki Bankruptcy Research Database (the BRD). The BRD includes all bankruptcy cases filed from 1980 to the present,[90] by or against a business debtor or group of affiliated debtors that had assets worth $100 million or more, measured in 1980 dollars. The total number of cases included in our original dataset is 917. We also further limited the dataset to cases filed between January 5, 2000 and January 28, 2013 and for which the relevant bankruptcy documents were available electronically. Our final dataset includes 490 chapter 11 cases. We continue to refine and supplement these data; the results presented here represent the dataset analysis as of August 2013.

We then supplemented the BRD data by collecting and manually coding information concerning: whether there was a "sale" of all or part of the debtor during the bankruptcy;[91] the identity of purchasing parties; whether those parties constituted a "fund" for our purposes; whether a Chief Restructuring Officer (CRO) was appointed in connection with the chapter 11 case; whether the Chief Executive Officer (CEO) was replaced in the three years prior to the chapter 11 case; and

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[86] Our initial inquiry was whether there was a "sale" of the debtor; the definition of a "sale" is broad and a case was categorized as a sale if one or more funds bought the debtor's assets or an interest in the debtor's business from the estate. However, no minimum purchase was required to classify the case as a sale. A case might be categorized as a both a sale and a reorganization if the purchaser obtained less than half of the reorganized equity in exchange for a *new* investment. The purchaser must give new value, except as noted below, in order for the case to be categorized a sale; a creditor or equity holder that receives a distribution on account of its claim or interest is *not* a purchaser; a sale did not occur. If a creditor credit-bids in an actual sale or auction, however, the case is categorized as a sale.

[87] We did not capture cases where a fund acquires control solely by purchasing a majority of the pre-petition debt and exchanging it for equity, *unless* the fund invests new capital in some form.

[88] This often, but not always, arises in the context of an equity rights offering pursuant to a plan of reorganization.

[89] *See* sources cited *supra* note 87.

[90] Much of the BRD is updated monthly to include recent filings and recent updates.

[91] *See* sources cited *supra* notes 86, 87.

certain other information concerning the funds' debt positions and the company's exit strategy.

Of the 490 cases, 126 are referred to as "fund cases," meaning that at least one of the purchasing parties was a fund.[92] This finding corresponds with other studies that find that funds pursue "loan-to-own strategies" in approximately 25-30% of chapter 11 cases.[93] The percentage of fund cases in any given year, however, varies as shown in Figure 1.

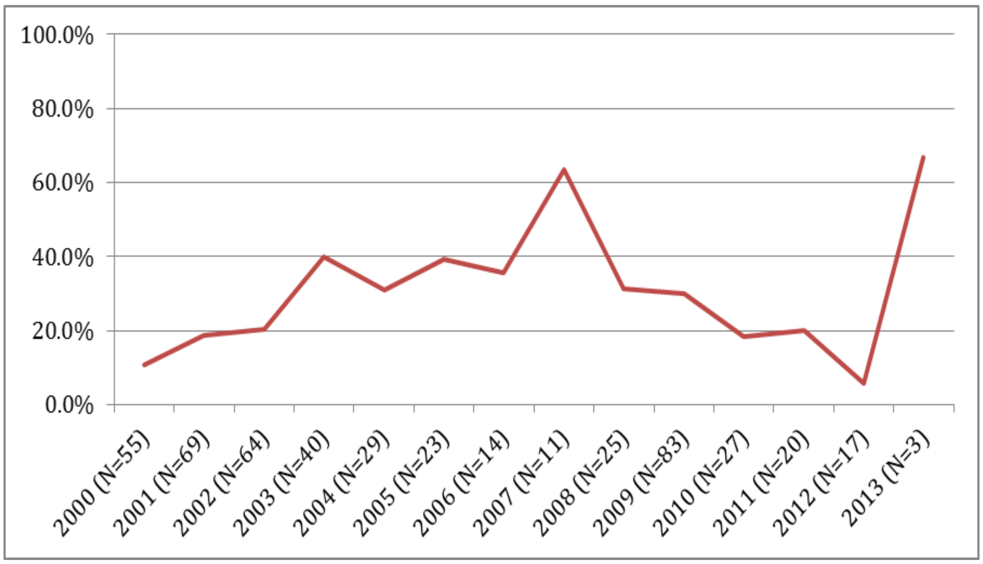

Figure 1. Percentage of cases with fund participation over time (N=490).

[92] First we identified whether the debtor sold all or part of the company during bankruptcy; the sale might be pursuant to the plan of reorganization or not. We categorized a case as a "sale" whether or not the purchaser acquired 51% or more of the assets of the reorganized company. Further variables were used to indicate the percentage acquired by the purchaser. If the purchaser received 49% or less of the company, we would have indicated "yes" to a "sale" but then we categorized the case as a reorganization plan. If the purchaser received 50% or more of the assets or stock of the reorganized company—but not through a 363 sale—it was categorized as a sale/merger, described in this essay as a change of control plan. If one or multiple purchasers received all or substantially all of the assets of the debtor through a 363 sale, and at least one division of the company remained intact and in operation we categorized the cases as a section 363 sale. Lastly, if none of the other categories applied, we labeled the case as a piecemeal liquidation. *See also supra* note 86.

[93] *See*, *e.g.*, Jiang et al., *supra* note 70, at 528 (table indicates that an average of 27.7% of funds adopt loan-to-own strategy); *See* Harner, *Trends in Distressed Debt*, *supra* note 2, at 88, 97 (noting 21 of 82 (25.9%) distressed investment funds loan directly to distressed companies in loan-to-own strategy, and 26 of 82 (31.7%) invest in distressed debt in pursuit of the strategy).

B. Key Data and Interesting Associations

Despite the high profile nature of many takeover and loan-to-own cases, as noted above, our data suggest that only 25.7 percent of cases end with a fund owning a majority position in the reorganized company or its assets. Admittedly, these data do not account for other loan-to-own scenarios, such as when the general unsecured creditors as a class receive reorganized equity under the plan and funds hold a piece of that debt.[94] Our data are important to the dialogue, however, because the cases represent true control plays—i.e., the funds in these cases were seeking and actually obtained control of the distressed company.

Of the 126 fund cases, 68 (54.0 percent) involve funds as pre-petition stakeholders of the debtor (see Figure 2 for time trend); 24 of the 126 fund cases (19.0 percent) involve funds that also extended DIP financing to the company.[95] Approximately half of the funds with a pre-petition stake in the debtor were pre-petition noteholders, suggesting that funds in the dataset frequently identified this tranche of debt as the fulcrum security.[96] Moreover, 37 (29.4 percent) of these cases involved CROs; 57 (45.2 percent) experienced a change in the CEO during the three years prior to the chapter 11 case; and 47 (37.3 percent) experienced a change in the CEO during the chapter 11 case.[97]

[94] *See, e.g.*, *supra* note 87.

[95] This percentage is likely underinclusive due to difficulties identifying participants in syndicated DIP loans.

[96] The actual data break down as follows: of the 126 fund cases, in 51 (40.5 percent) of cases, the fund had no pre-petition relationship with the debtor; 26 (20.6 percent) of the funds were pre-petition noteholders; 15 (11.9 percent) were pre-petition secured creditors; 8 (6.3 percent) were pre-petition equity-holders; 5 (3.97 percent) were unsecured creditors; 7 (5.56 percent) held multiple tranches of the debtor's pre-petition capital structure; 2 (1.59 percent) were pre-petition insiders or other; 5 (4.0 percent) were non-specific pre-petition creditors (meaning the disclosure statement indicated the fund credit-bid for the debtor's assets, without additional information, or the fund was merely described as a creditor); and in 7 cases (5.6 percent), there was insufficient data in the bankruptcy filings to determine whether there was a pre-petition relationship.

[97] The dataset includes pre-petition CEO information for 342 cases and post-petition CEO information for 375 cases.

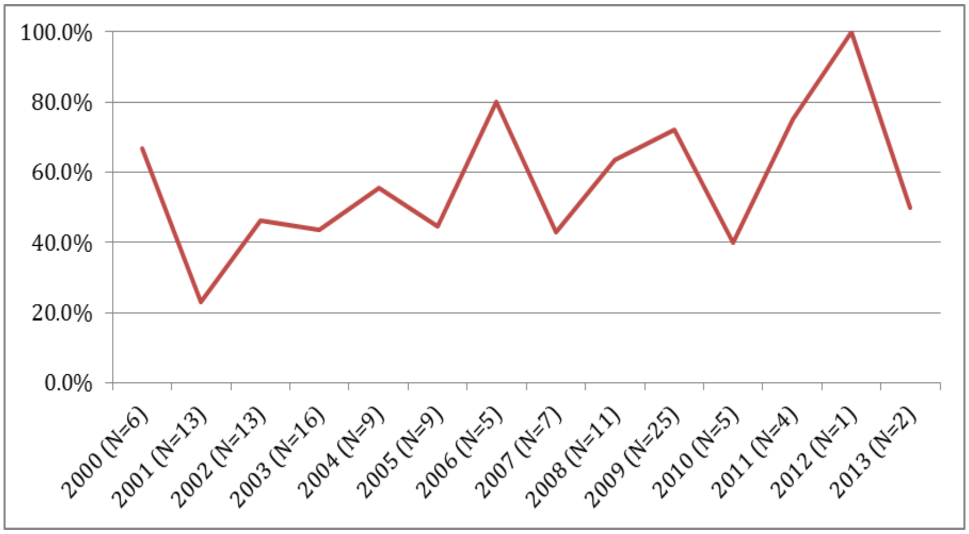

Figure 2. Percentage of fund cases with pre-petition relationship over time (N=126).

1. Fund Cases and Emergence

We started our analysis by reviewing the outcomes of the chapter 11 cases in the dataset and scrutinizing the vehicle used to facilitate those outcomes. These data focus on whether the company reorganized through a traditional stand-alone plan ("reorganization plan") or a sale or other change of control transaction under the plan ("change of control plan"); used a sale of substantially all of its assets under section 363 of the Bankruptcy Code ("section 363 sale"); or liquidated. In addition, we considered whether the debtor company "emerged" on the other side of the reorganization plan, change of control plan, or section 363 sale, meaning that at least one of the affiliated debtor companies continued in business under the same or similar name following the emergence transaction. Moreover, to assess the effectiveness of the emergence vehicle, we analyzed data on whether the emerged company refiled a bankruptcy case.

With respect to chapter 11 outcomes on the whole, 219 (44.7 percent) of the total cases ended in a plan of reorganization, 104 (21.2 percent) ended in a change in control plan, and 106 (21.6 percent) ended in a section 363 sale. Our data show, however, that funds prefer obtaining post-emergence control through a control change under a plan of reorganization; approximately 54.8 percent of the fund cases emerged through a plan of reorganization that facilitated a change in control in favor of the funds. More specifically, fund cases show lower percentages for plans of reorganization and higher percentages for change of control plans, 15 (11.9

percent) and 69 (54.8 percent), respectively, than cases without funds [204 (56.0 percent) and 35 (9.6 percent), respectively].[98] Overall, 311 (63.5 percent) of all companies in the dataset emerge in some fashion.[99] See Figure 3 for an illustration of the distribution of emergence vehicle overall and by fund status.

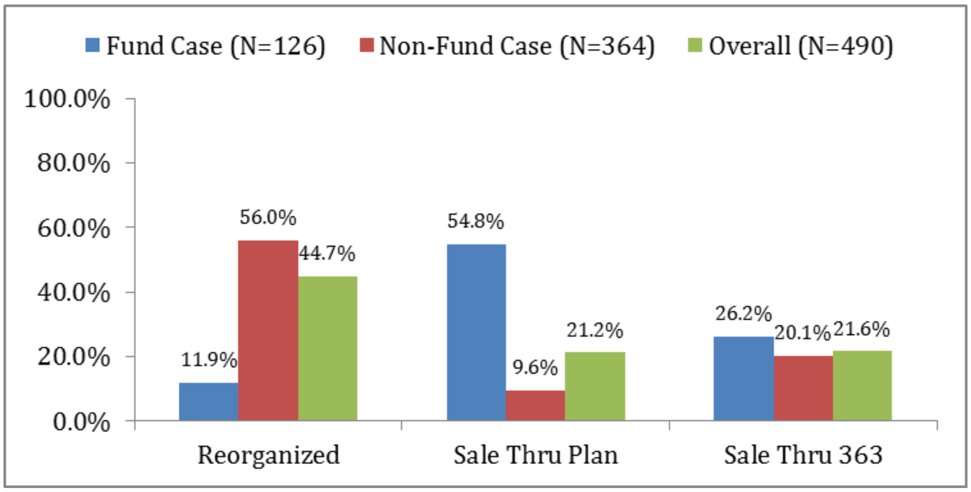

Figure 3. Emergence vehicle by fund status and overall.

The data below dive deeper into the emergence and related variables. These data provide interesting insights and support preliminary inferences concerning the role of funds in chapter 11 and the value of their activities. Notably, the data do not support causal relationships; it is difficult to isolate the impact of funds on case outcomes or the value of stakeholder distributions.[100]

a. Emergence as an indicator of success

As explained above, the study's concept of emergence focuses on the continuation of the debtor's business under the same or a similar name. Such an emergence—whether through a reorganization plan, change of control plan, or section 363 sale—possesses characteristics arguably aligned with the original policy goals underlying the Bankruptcy Code: it permits a company to rightsize its

[98] The authors recognize potential endogeneity bias and selection effect in some of the data. Accordingly, the correlations presented in this essay do not support casual findings but should be used to inform the dialogue concerning fund cases.

[99] Focusing solely on the 311 companies in the dataset that emerged in some fashion, fund cases show higher percentages both for change of control plans and section 363 sales, 61 (66.3 percent) and 16 (17.4 percent), respectively, than cases without funds [9 (4.1 percent) and 18 (8.2 percent), respectively].

[100] *See supra* note 98.

operations and balance sheet through the chapter 11 case and to continue as a productive citizen, employer, and taxpayer in the affected communities.[101]

Of the 490 total cases, 477 were identified as having emerged or not.[102] The relationship between having a fund and emerging from chapter 11 was significant (($X^2(1, N = 477) = 5.974$, $p = .015$) such that *fund cases were more likely to emerge* (74.2 percent) than non-fund cases (62.0 percent).[103] As mentioned previously, fund cases were more likely than non-fund cases to emerge via change of control plans and section 363 sales.

In light of the anecdotal evidence suggesting that funds use DIP financing to achieve their investment objectives, we also explored whether fund participation in the DIP financing was related to the vehicle for emerging.[104] Of the 33 fund cases emerging via a known vehicle and for which fund participation in DIP is known, 18 (54.5 percent) involved fund participation in the DIP financing. Due to the small number of cases available for analysis, there was limited statistical power to detect the relationship between participation in DIP financing and the vehicle for emerging. The data do suggest, however, that, compared to fund cases without fund involvement in the DIP financing, fund cases with such fund involvement may have been more likely to emerge via reorganization (16.7 percent vs. 6.7 percent, respectively), less likely to emerge via change of control plans (55.6 percent vs. 80.0 percent), *and more likely to emerge via section 363 sales* (27.8 percent vs. 6.7 percent).

Lastly, given the apparent increase in funds purchasing pre-petition debt to acquire control, we also explored whether the fund holding a pre-petition debt position was related to the vehicle for emerging (see Figure 4).[105] Of the 88 fund cases emerging via a known vehicle and with a known pre-petition debt position, 59 (67.0 percent) involved such a relationship. Compared to fund cases without a pre-petition debt position, fund cases with such a relationship were equally likely to emerge via reorganization [11.9 percent vs. 20.7 percent; $X^2(1, N = 88) = 1.203$, $p = .273$], *significantly more likely to emerge via change of control plans* [76.3 percent vs. 51.7 percent; $X^2(1, N = 88) = 5.400$, $p = .020$], and as likely to emerge via section 363 sales [11.1 percent vs. 24.1 percent; $X^2(1, N = 88) = 2.189$, $p = .139$].

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[101] Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 146–48 (2005) (discussing rehabilitative policy goals of the Bankruptcy Code).

[102] The remaining 13 cases were either pending (10), not classified (2), or had no data (1).

[103] *See supra* note 98 (discussing potential endogeneity bias and selection effect).

[104] *See, e.g.*, Lim, *supra* note 70, at 21–22 (discussing hedge fund DIP lending strategy generally) (citing Skeel, *supra* note 2, at 936–37); Aditya Habbu & Nikhil Abraham, *DIP Lending and the Death of Emergence: Reorganization Outcomes Post-Crisis*, 10, 13–14 (Working Paper, March 6, 2011), *available at* http://ssrn.com/abstract=1779509 (discussing previous research indicating DIP lending correlated with higher stand-alone reorganizations, but arguing that DIP lending post-2008 was more likely to result in a sale).

[105] *See supra* note 96.

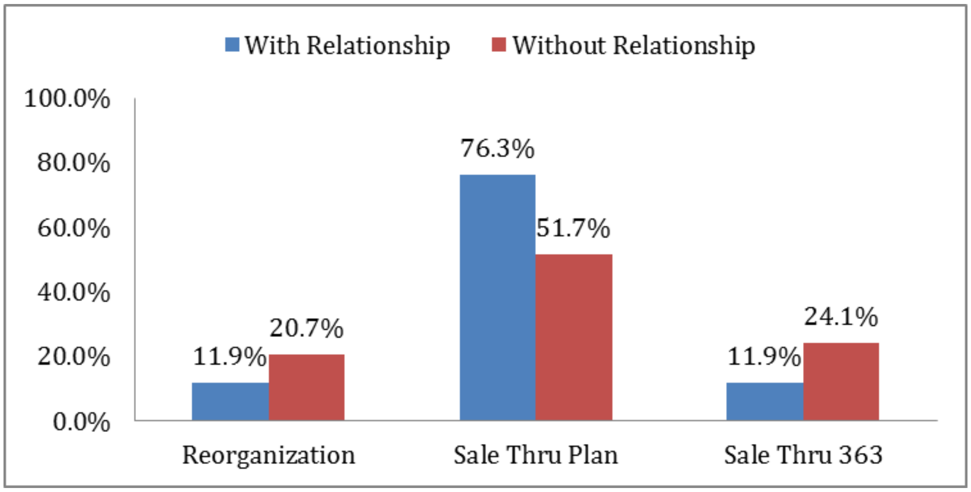

Figure 4. Emergence vehicle by pre-petition relationship status among emerging fund cases (N=88).

b. Prepackaged cases as an indicator of efficiency

The prepackaged chapter 11 case is heralded as an efficient and effective restructuring tool.[106] Nevertheless, some commentators suggest that the speed of the prepackaged case might be ill advised, producing only a temporary fix to the company's financial problems. Because the speed often is perceived as favoring, or being driven by creditors' interests, we examined the prepackaged and pre-negotiated cases in the dataset.

Of the 490 total cases, all but one had sufficient information to determine whether the case was prepackaged or pre-negotiated. For the purposes of these analyses, a case is prepackaged if the debtor drafted the plan, submitted it to a vote of the impaired classes, and claimed to have obtained the acceptances necessary for consensual confirmation before filing the case. A case is pre-negotiated if the debtor negotiates the plan with less than all groups or obtains the acceptance of less than all groups necessary to confirm before the bankruptcy case is filed (voluntarily or involuntarily). Of the 489 cases, 42 were prepackaged (8.6 percent), 106 (21.7 percent) were pre-negotiated, and the remaining 341 (69.7 percent) were neither. As more fully discussed below, only 30 of the 126 fund cases (23.8 percent) were prepackaged or pre-negotiated.

At first blush, the data might seem surprising in that the relationship between having a fund and filing a prepackaged or pre-negotiated case was marginally significant [(X^2(1, N = 489) = 3.352, p = .067] such that fund cases were *less likely*

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[106] *See* Kurt A. Mayr, *Enforcing Prepackaged Restructuring of Foreign Debtors Under the U.S. Bankruptcy Code*, 14 AM. BANKR. INST. L. REV. 469, 469–70 (2006) (noting prepackaged cases are completed quickly and efficiently).

than cases without funds to file a prepackaged or pre-negotiated case (23.8 percent vs. 32.5 percent, respectively).[107] Upon reflection, however, these data might confirm the anecdotal evidence suggesting an increase in funds purchasing pre-petition debt positions after the chapter 11 filing to pursue a loan-to-own or takeover of the company in the bankruptcy case. This possibility is further supported by our analysis of whether fund participation in the DIP financing was related to the likelihood of a case being either prepackaged or pre-negotiated.[108] Our analysis of whether funds' pre-petition debt holdings were related to the likelihood of a case being either prepackaged or pre-negotiated are inconclusive with respect to this particular inference.[109]

c. Refiling as an indicator of failure

Of the 311 emerging cases, only 38 (12.2 percent) cases involved emerging companies refiling bankruptcy. A case is coded as a refiling if more than half of the operations of the emerging company subsequently filed another bankruptcy case. Commentators have questioned whether the increased participation of funds with arguably short investment horizons has caused a spike in bankruptcy failures and refilings.[110] The data do not generally confirm these suspicions. Specifically, we explored whether fund cases were more or less likely to refile than non-fund cases (see Figure 5). As it turns out, statistically speaking, fund cases are as likely as non-fund cases to refile [15.2 percent vs. 11.0 percent; $X^2(1, N = 311) = 1.095, p = .295$)], though the data descriptively suggest that fund cases may be more likely to refile.[111]

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[107] Because of the limited number of cases in these categories, we collapsed prepackaged or pre-negotiated cases for purposes of these analyses.

[108] Of the 42 fund cases with known prepackaged/pre-negotiated and DIP participation outcomes, 10 (23.8 percent) involved fund participation in the DIP financing. As such, there was limited statistical power to detect the relationship between participation in DIP financing and the likelihood of a case being either prepackaged or pre-negotiated. The data do suggest, however, that fund cases with such a relationship may have been as likely as fund cases with no such relationship to be prepackaged or pre-negotiated (25.0 percent vs. 22.2 percent).

[109] Of the 119 fund cases with known prepackaged/pre-negotiated and pre-petition relationship outcomes, 68 (57.1 percent) involved such a relationship. Compared to fund cases without a pre-petition debt position, fund cases with such a relationship were marginally more likely to be prepackaged or pre-negotiated [30.9 percent vs. 17.6 percent; $X^2(1, N = 119) = 2.708, p = .100$].

[110] *See, e.g.*, Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1662 (2009) (discussing potential for shorter investment horizons to impact firm's reorganization).

[111] Approximately 15% of the fund cases refiled, which is slightly higher than the 11% of non-fund cases that refiled, however, the difference is not statistically significant.

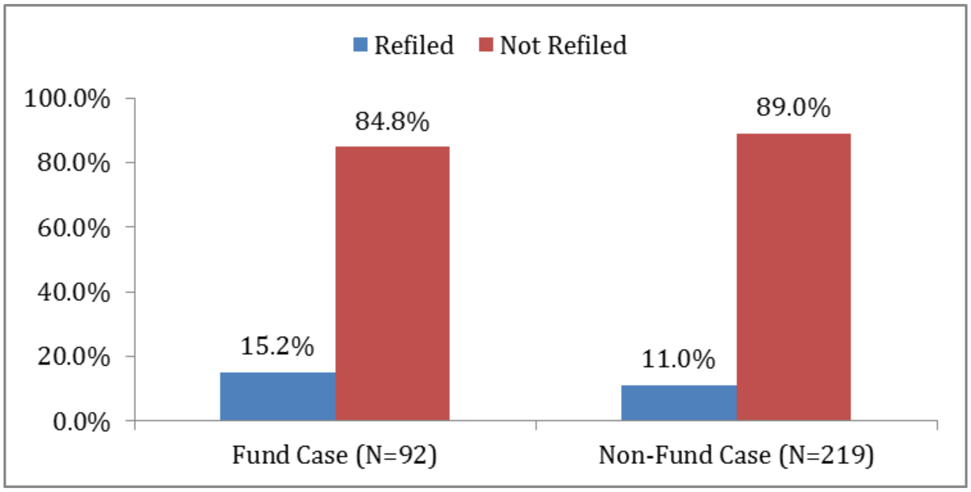

Figure 5. Percentage of emerging cases refiled by fund status (N=311).

To better understand the lack of an association between fund cases and refiling overall, we further analyzed whether fund participation in the DIP financing was related to the likelihood of refiling. Of the 33 emerging fund cases with a known DIP financing outcome, 9 (27.3 percent) involved fund participation in the DIP financing. Due to the small number of cases available for analysis, there was limited statistical power to detect the relationship between participation in DIP financing and the likelihood of refiling. The data do suggest, however, that emerging fund cases with *fund participation in the DIP financing may have been as likely as emerging fund cases without such fund participation to refile* (27.8 percent vs. 26.7 percent).

We also explored the association between prepackaged/pre-negotiated cases and refiling. Consistent with previous studies,[112] the data show that, among all cases, prepackaged and pre-negotiated cases are more likely to refile than traditional reorganizations [12.8 percent vs. 5.6 percent; $X^2(1, N = 489) = 7.602, p = .006$)]. Among only cases with funds, however, the association between prepackaged or pre-negotiated and refiling disappeared [16.7 percent vs. 9.4 percent; $X^2(1, N = 126) = 1.230, p = .267$)].

Similarly, we explored whether the presence of a pre-petition debt position was related to the likelihood of refiling. Of the 88 emerging fund cases with known pre-petition debt position, 59 (67.0 percent) involved such a relationship. Compared to fund cases without a pre-petition debt position, fund cases with such a relationship

[112] *See, e.g.*, Robert K. Rasmussen, *Empirically Bankrupt*, 2007 COLUM. BUS. L. REV. 179, 237 (2007) (critiquing LYNN LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2006)); *see also* Kenneth Ayotte & David A. Skeel, Jr., *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 427–28 (2006) (same).

were equally likely to refile [15.3 percent vs. 13.8 percent; $X^2(1, N = 88) = .033$, $p = .856$].

2. Fund Cases and Management (CEOs and CROs)

As noted above, many commentators have observed an increase in creditor control in chapter 11 cases.[113] Some argue that this shift moves the process away from a management-controlled scheme to one dominated by creditors and their objectives.[114] Others view increased creditor participation as neutralizing or better balancing the interests and control of management and creditors.[115] Regardless of the correct characterization, anecdotal and empirical evidence suggest that creditors often do seek a change in management, whether by replacing the CEO or installing a CRO.[116] The following data analyze these issues in the context of the fund cases.

a. Pre-petition change in CEO

Of the 490 cases, we were able to determine for 342 cases (69.8 percent) whether the CEO changed in the three years prior to bankruptcy. Of those 342 cases, 88 (25.7 percent) were also fund cases. We then examined whether fund involvement was related to whether the case had a relatively new CEO. The relationship between having a fund and having a relatively new CEO was not significant (($X^2(1, N = 342) = .001$, $p = .975$) such that fund cases were as likely as non-fund cases to have a relatively new CEO (64.8 percent vs. 65.0 percent, respectively). Nevertheless, from a descriptive perspective, an overwhelming majority of fund cases (64.8 percent) experienced a change at the CEO position in the three years prior to the filing of the chapter 11 case.

We next considered whether a fund's position in the DIP financing or the pre-petition debt increased its leverage over management personnel decisions. Of the 28 fund cases with known information about the CEO and DIP financing, 15 (53.6 percent) involved fund participation in the DIP financing. Due to the small number

[113] *See* Ayotte & Morrison, *supra* note 2, at 512–15.

[114] *See* Skeel, *supra* note 2, at 918 (stating chapter 11 "now has a distinctively creditor-oriented cast"); Miller & Waisman, *supra* note 101, at 155 (arguing that "[m]anagement is often unable to counterbalance the influence of creditors"); Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1211 (2006) (discussing how creditors play a larger role in corporate affairs today); Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751, 752, 778–89 (2002) (noting company's principal lenders are usually already in control prior to a chapter 11 filing and discussing control rights in depth).

[115] *See* Harner, *Policy Implications*, *supra* note 2, at 709, 760–61 (describing current restructuring model as "management-neutral" instead of "management-driven" due to debt investment); Goldschmid, *supra* note 81, at 217 (arguing distressed funds are naturally incentivized to balance interests).

[116] *See* Harner, *Policy Implications*, *supra* note 2, at 721, 723, 726 (citing case studies where CEOs were replaced and two CRO appointments); Goldschmid, *supra* note 81, at 219 (noting creditors often appoint a CRO prior to bankruptcy); Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 648, 671, n.117 (2009) (arguing creditors take control and install new officers, often a CRO).

of cases available for analysis, there was limited statistical power to detect the relationship between DIP financing and management personnel decision. Anecdotally, the data suggest that cases with fund participation in *DIP financing may be more likely to have a relatively new CEO than cases without such fund participation* (93.3 percent vs. 84.6 percent). Nevertheless, a fund's pre-petition debt position did not produce a similar effect.[117]

b. CEO leaving prior to confirmation

Of the 490 cases, we were able to determine for 375 cases (76.5 percent) whether the CEO left prior to confirmation. Of those 375 cases, 95 (25.3 percent) were also fund cases. We then examined whether fund involvement was related to whether the CEO left prior to confirmation. The relationship between having a fund and having a CEO leave was not significant (($X^2(1, N = 375) = 2.041$, $p = .153$) such that fund cases were as likely as non-fund cases to have a CEO leave prior to confirmation (49.5 percent vs. 41.1 percent, respectively).

Similar to our analysis of pre-petition changes in the CEO position, we also explored whether fund participation in the DIP financing or pre-petition debt influenced a change in CEO prior to confirmation. Of the 29 fund cases with known information about the CEO and DIP financing, 14 (48.3 percent) involved fund participation in the DIP financing. Due to the small number of cases available for analysis, there was limited statistical power to detect a relationship between changes in the CEO position and DIP financing. Anecdotally, the data suggest that cases with fund participation in DIP financing were as likely as cases without such fund participation to have a CEO leave prior to confirmation (50.0 percent vs. 46.2 percent). A similar non-result emerged when we analyzed the funds' pre-petition debt positions and post-petition CEO changes.[118]

c. Chief restructuring officers

Of the 490 total cases, 113 (23.1 percent) had a CRO listed in the disclosure statement or media reports regarding the bankruptcy. Because the appointment of a CRO often is viewed as a creditor remedy or a pro-creditor restructuring tool, we explored whether fund involvement was related to the likelihood of having a CRO (see Figure 6). In fact, the relationship was *marginally significant [($X^2(1, N = 490) = 3.799$, $p = .051$] such that fund cases were more likely than non-fund cases to have a* CRO (29.4 percent vs. 20.9 percent, respectively).

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[117] Of the 82 fund cases with a known CEO outcome, 45 (54.9 percent) involved such a relationship. Fund cases with a pre-petition debt position were as likely as fund cases without such a relationship to have a relatively new CEO (($X^2(1, N = 82) = .061$, $p = .805$); 62.2 percent vs. 64.9 percent, respectively).

[118] Of the 91 fund cases with a known CEO outcome, 50 (55.6 percent) involved such a relationship. Fund cases with a pre-petition debt position were as likely as fund cases without such a relationship to have a CEO leave prior to confirmation (($X^2(1, N = 91) = 2.464$, $p = .116$); 42.0 percent vs. 58.5 percent, respectively).

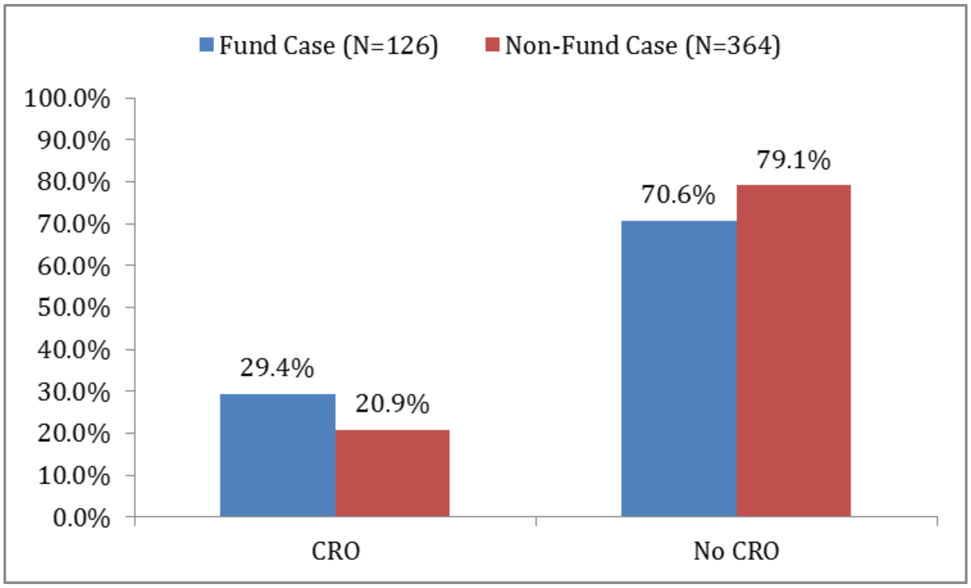

Figure 6. Percentage of cases with CRO by fund status (N=490).

The appointment of a CRO is not only a creditor remedy, but it also is frequently viewed as a senior creditor remedy, invoked as a compromise between the company and its senior lenders to resolve management personnel disputes or to provide creditors with greater comfort concerning management decisions. As such, we explored whether fund participation in the DIP financing was related to the likelihood of having a CRO. Of the 42 emerging fund cases with known CRO and DIP financing outcomes, 24 (57.1 percent) involved fund participation in the DIP financing. Due to the small number of cases available for analysis, there was limited statistical power to detect the relationship between participation in DIP financing and the likelihood of refiling. The data do suggest, however, that *fund cases with such a relationship may have been as likely as fund cases with no such relationship to have a CRO* (37.5 percent vs. 33.3 percent).

Similarly, we explored whether the presence of a pre-petition debt position was related to the likelihood of having a CRO. Of the 119 fund cases with a known CRO outcome, 68 (57.1 percent) involved such a relationship. Compared to fund cases without a pre-petition debt position, fund cases with such a relationship were marginally less likely to have a CRO [22.1 percent vs. 37.3 percent; $X^2(1, N = 119) = .3.298, p = .069$].

3. Impact on Value

The data largely track the anecdotal evidence. Debtors that have funds in their capital structures frequently emerge from chapter 11. Cases such as Tribune, Kmart, Lyondell, and Six Flags illustrate that reorganization and even post-emergence profit are attainable with fund investors.[119] What the data do not show is what some perceive as the "messy" nature of these chapter 11 cases. As discussed in Part I, cases with funds can be litigious, acrimonious, long, and expensive. Do these factors significantly affect value? Some empirical studies suggest no,[120] but further studies and analysis are needed.[121]

A critical component of these future analyses will be how the studies define value and success. Empirical data and results will vary widely depending on these definitions. For example, value/success might be assessed based on original face value of the company's debt and the chapter 11 recoveries. Alternatively, value/success might turn on the existence of an ongoing, viable business in some form post-emergence regardless of debt recoveries. Notably, the definitions have even wider fluctuation when viewed through the prism of a particular debt or equity holder or management. Although many of these definitions might be tested empirical, some are more difficult to measure. Yet, all of these definitions are relevant to the underlying policies of chapter 11.

CONCLUSION

It is apparent that funds often do matter in chapter 11 cases. The data strongly suggest that funds can influence the restructuring efforts of a distressed company. What is less certain, however, is whether that influence is positively or negatively associated with value. For example, though the data suggest that companies targeted by funds are more likely to emerge, this could be attributed to the investment selection criteria of the fund, the fund's tactics within the chapter 11 case, the fund's resources or expertise, or any other of a multitude of factors. In addition, cases with funds are more likely to have a CRO and are likely to experience a pre-petition change at the CEO position. That type of influence may

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[119] *In re* Premier Int'l. Holdings, Inc. ("Six Flags"), 423 B.R. 58, 58 (Bankr. D. Del. 2009); *In re* Lyondell Chem. Co., 420 B.R. 571, 571 (Bankr. S.D.N.Y. 2009); *In re* Tribune Co., 464 B.R. 126, 126 (Bankr. D. Del. 2008); *In re* Kmart Corp., No. 03-C-0096, 2003 WL 23162412 (Bankr. N.D. Ill. Oct. 28, 2003). *See also* Harner, *Policy Implications*, *supra* note 2, at 725–27 (discussing Kmart's restructuring); Harner, *Activist Distressed Debtholders*, *supra* note 74, at 167–68 (discussing the Lyondell restructuring). *But see, e.g.*, *In re* Am. Remanufacturers, 439 B.R. 633, 633 (Bankr. D. Del. 2010) (dispute between funds holding different tranches of company's debt arguably caused the conversion of the chapter 11 case to one under chapter 7, resulting in a fire sale of the company's assets); *see also* Harner, *Policy Implications*, *supra* note 2, at 755–756 (discussing the *In re* American Remanufacturers case).

[120] Notably, our own data reflect these assertions, at least in regard to one of these factors: case duration. The presence of a fund vying for control is significantly associated with an increase in the *median* length of chapter 11 cases from 325 days to 411 days; however, due to asymmetry in the distribution of case length, funds do not significantly increase the *mean* (average) length of chapter 11 cases.

[121] *See* Jiang et al., *supra* note 70, at 534–37 (describing how hedge funds that serve on the unsecured creditors committee often object to key plan terms, etc., and that despite these adversarial activities, hedge fund involvement on creditors' committees has a positive effect on a number of factors). *See also* Altman, *supra* note 73; Li & Wang, *supra* note 70; Lim, *supra* note 70; Ellias, *supra* note 70.

concern management but, depending on the case and circumstances, may ultimately benefit the company and all stakeholders. Moreover, a fund's presence did not on average have a significant impact on the duration of chapter 11 cases, nor did fund presence affect likelihood of failure (measured by refiling) of the chapter 11 case.

That being said, the most striking aspect to these data is the suggestion that chapter 11 can function, sometimes quite well, with fund participants. The data highlighted in this study are informative not only for the differences they show between fund and non-fund cases, but also for the non-differences; cases with funds vying for control resemble other chapter 11 cases in various ways. The challenge then for policymakers, practitioners, and academics is to identify factors that support value-enhancing activities while mitigating potentially destructive investor tactics. Notably, this challenge is not all that different from the balancing historically required of policymakers in the debtor-creditor arena. Many creditors—whether funds, banks, landlords, pension funds, or trade creditors—have the resources and sometimes the intent to delay or derail chapter 11 cases. The one potential difference is the dearth of information concerning funds' investment holdings, strategies, and objectives. Nevertheless, as more data are collected and studies are performed, policymakers should be well equipped to assess and maintain balance on the chapter 11 playing field.