CHAPTER 11 DURATION, PRE-PLANNED CASES, AND REFILING RATES: AN EMPIRICAL ANALYSIS IN THE POST-BAPCPA ERA

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ABSTRACT

This Article empirically examines and quantifies the effect of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") on three distinct aspects of the chapter 11 process: (a) the duration of traditional chapter 11 cases; (b) the use of prepackaged and prenegotiated bankruptcies; and (c) debtor refiling rates. The sample studied consists of companies with more than $100 million in assets that both filed for and exited chapter 11 between 1997 and 2014. BAPCPA is found to be associated with shorter chapter 11 case duration, and an increased use of prepackaged and prenegotiated bankruptcies. Additionally, BAPCPA is found to be associated with an increase in the proportion of firms that soon refile for bankruptcy. It seems that the 2005 amendments force the debtor to emerge hastily from its chapter 11 proceedings, ignoring operational and structural problems and, therefore, not achieving true rehabilitation.

INTRODUCTION

The consensus among scholars and practitioners has always been that the disposition of a chapter 11 case takes more time than it should, producing inefficient results for both society and the distressed firms' creditors.[1] According to this view, distressed firms use the control that chapter 11 confers to them to strategically delay the reorganization process at the expense of the rest of the constituencies involved. Indeed, there are more than a few examples of debtors that reorganized after being dragged in chapter 11 for several years, during which they sustained huge losses.[2] There are also more than a few examples of debtors that

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[1] *See* James J. White, *Harvey's Silence*, 69 AM. BANKR. L.J. 467, 473–74 (1995) ("I believe that the largest and most palpable costs of Chapter 11 arise from delay . . . . Chapter 11—at least as practiced in large cases—appears to condone and even exaggerate delay and attendant costs."). But see Elizabeth Warren & Jay L. Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 626 (2009), where they characterize this conventional wisdom as mistaken and provide data indicating that cases move forward more quickly than what is believed by most scholars and practitioners.

[2] *See* White, *supra* note 1, at 474 (citing the LTV bankruptcy, a manufacturer that was able to confirm a plan of reorganization after seven years in bankruptcy, during which it sustained significant losses).

merely delayed the inevitable, which was the liquidation of their assets.[3] This delay in the resolution of chapter 11 cases contributed to a great extent the almost unlimited exclusivity period that the debtors enjoyed before the recent reform of the Bankruptcy Code.[4] In particular, even though the initial 120-day period during which the debtor had the exclusive right to file a plan of reorganization could be extended only for cause shown,[5] courts would routinely grant extensions, providing the debtors with the opportunity to prolong their exclusivity right for even several years. During all this time, creditors were practically held hostage, since they were not able to submit a competing plan of reorganization.

This changed in 2005 with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA")[6] on October 17. One of the most important amendments effectuated by BAPCPA that intended to address the phenomenon of the protracted chapter 11 cases mentioned above refers to the cap on the extension of the exclusivity period.[7] By setting an upper threshold beyond which the debtors cannot be granted any further extension of their exclusivity right,[8] BAPCPA aimed and succeeded at reducing the duration of the usually lengthy chapter 11 cases. Indeed, as the dataset indicates, the duration of traditional chapter 11 cases in the post-BAPCPA era is reduced by 32%.[9]

Correspondingly, the proportion of prepackaged and prenegotiated bankruptcies increased.[10] To be sure, the latter was expected as a consequence of not only the exclusivity extension cap placed by BAPCPA, but of another important 2005 amendment as well: the reduced time within which the debtor can decide whether to assume or reject commercial leases in which the debtor is the lessee.[11] Under the pre-BAPCPA regime, and similarly with the previous status quo regarding the extension of the exclusivity period, the timeframe within which the debtor had to reach a decision as to whether to assume or reject commercial leases would stretch almost indefinitely. BAPCPA, therefore, put an end to this practice by setting a maximum extension of 210 days that can be extended *only* with the prior written consent of the lessor.[12]

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[3] *See id.* (asserting "as many as ninety percent" of chapter 11s are businesses that must ultimately be liquidated after spending several months in bankruptcy).

[4] This reform refers to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005.

[5] *See* 11 U.S.C. § 1121(d) (2000) (before the enactment of the 2005 Act).

[6] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

[7] *See* 11 U.S.C. § 1121(d)(2)(A) (2012) (as amended by BAPCPA, providing exclusivity period "may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter").

[8] *See id.*

[9] *See infra* Table 1.

[10] *See infra* Table 3.

[11] *See* 11 U.S.C. § 365(d)(4)(A) (requiring trustee to assume or reject commercial leases within 120 days after the order for relief or order confirming a plan).

[12] *See* 11 U.S.C. § 365(d)(4)(A), (B) (describing the initial 120-day time period and an optional extension of 90 days at the discretion of the court for a total time limit of 210 days).

From the above, it is obvious that the post-2005 debtor is under pressure to exit chapter 11 faster than before, making pre-bankruptcy planning seem essential. Indeed, the results of my study indicate that BAPCPA is negatively correlated at a statistically significant level with chapter 11 case duration, meaning that post-BAPCPA reorganization cases tend to be resolved more quickly. At the same time, BAPCPA is positively correlated at a statistically significant level with prepackaged and prenegotiated bankruptcies, suggesting that an increased proportion of companies engage in negotiations before the filing of the chapter 11 petition. This increase in the proportion of pre-planned cases can be additionally attributed to the enactment of sections 1125(g) and 341(e) of the Bankruptcy Code as part of BAPCPA, which further facilitated the use of these types of bankruptcies.

While shorter chapter 11s and pre-planned cases entail lower costs for the debtor, they have been linked with higher refiling rates.[13] Therefore, and as anticipated as a consequence of the less time spent in bankruptcy and the increased proportion of pre-planned cases, BAPCPA is also positively associated at a statistically significant level with refiling rates, a finding that suggests that the 2005 amendments force the debtor to ignore operational problems and hastily attempt to emerge from its chapter 11 proceedings.

This Article is divided into three parts: Part I reviews sections 1121 and 365 of the Bankruptcy Code and compares the relevant regimes before and after BAPCPA took effect. Reference is also made to sections 1125(g) and 341(e). Part II sets forth the hypotheses and literature review. Part III uses multivariate regression models, and demonstrates that post-2005 chapter 11 reorganization cases are disposed of more quickly. Additionally, the effect of BAPCPA on the increase of prepackaged and prenegotiated bankruptcies is quantified. The refiling rate problem associated with speedy and pre-planned bankruptcies is also examined. Finally, Part IV contains the conclusion and further research questions.

I. BAPCPA AND SHORTENED CHAPTER 11 TIMEFRAME

Lengthy chapter 11 cases were never desirable, but always present. Indeed, one of the main complaints against chapter 11 has been that it allows debtors to drag on their cases for several years at the expense of their creditors. BAPCPA attempted to put a stop to these protracted cases by amending two important sections of the Bankruptcy Code, namely sections 1121 and 365, and by placing an upper time limit after which the debtor has no other option than to accelerate its case.[14]

In order to be better able to evaluate these two amendments, one has to trace the predecessor-provisions' implementation over time, and consider the reasoning

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[13] *See infra* Table 6 (comparing rates of refiling before enactment of BAPCPA to rates of refiling after BAPCPA); *see also infra* Table 8 (highlighting the correlation between the changes made to the Bankruptcy Code by BAPCPA and the increase in subsequent refilings).

[14] *See* 11 U.S.C. § 1121 (detailing who may file a plan); 11 U.S.C. § 365 (enumerating what happens to executory contracts and unexpired leases upon filing).

underlying their enactment, which was no other than the facilitation of the survival and rehabilitation of the financially distressed business. Indeed, the House Report accompanying the 1978 Bankruptcy Reform Act tips the balance in favor of reorganization by stating that *unlike a liquidation case* "[t]he purpose of a business reorganization case . . . is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."[15] This central premise of chapter 11 has been promoted by case law as well: for example, in *National Labor Relations Board v. Bildisco & Bildisco*, [16] the Supreme Court stated that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with the attendant loss of jobs and possible misuse of economic resources."[17]

Within this general context of encouraging and promoting reorganization, the Bankruptcy Code of 1978 included section 1121. This provision attempts to reconcile two competing interests: those of the debtor and those of its creditors. In particular, section 1121 equips the debtor's management with a very important tool designed to give the debtor control over the chapter 11 case and facilitate the formulation of a viable operating plan: namely, it provides the debtor with the exclusive right to file a plan of reorganization for 120 days after bankruptcy commences.[18] If the debtor eventually files a plan of reorganization within the exclusivity period, then it is afforded an additional 60-day period to solicit acceptances.[19] This level of control over the reorganization proceeding offered pursuant to section 1121 was intended to operate as a "carrot" for debtors in order to file timely for chapter 11.[20] Additionally, providing for an exclusivity period is necessary to ensure that the distressed debtor is given long enough time to formulate a plan of reorganization without having to address at the same time competing plans submitted by creditors interested only in repayment of their debt. Indeed, one would expect that from all the constituencies involved in a chapter 11 case, the debtor is the one with the greatest interest and in the best position to craft a plan that provides for the continuation of the company as a going concern.[21] Therefore, it is only natural that the debtor is given the unfettered and exclusive right, at least for a period of time, to file a plan of reorganization.

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[15] H.R. REP. NO 595-95, at 220 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179.

[16] 465 U.S. 513 (1984).

[17] *Id.* at 528; *see also In re* Ionosphere Clubs Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) (emphasizing "the paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor").

[18] *See* 11 U.S.C. § 1121(b).

[19] *See* 11 U.S.C. § 1121(c)(3) (permitting any interested parties to file a reorganization plan only if the debtor's plan has not been accepted before 180 days).

[20] *See* H.R. REP. NO. 95-595, at 231–32 ("Proposed chapter 11 recognizes the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions in the bill until it would be too late for them to be an effective remedy.").

[21] *See* J. Bradley Johnston, *The Bankruptcy Bargain*, 65 AM. BANKR. L.J. 213, 294 (1991) ("[A] debtor seeking value maximization has the opportunity to apply its usually superior knowledge of the firm's operations, assets and debts to producing a negotiated plan acceptable to all parties . . . .").

In addition to recognizing this need of the debtor to remain in control of the chapter 11 case as long as possible, section 1121 acknowledges that there are creditor interests that should be taken into account and protected as well.[22] It is for this reason that section 1121 provides that both the debtor's exclusivity and acceptance solicitation periods can extend beyond the initial 120 and 60 days respectively, but *only* for *cause*.[23]

However, before the enactment of the 2005 amendments, this granting of exclusivity extensions was abused. Namely, consecutive requests for extension of the exclusivity period were routinely approved, dragging the exclusivity right for maybe several years. As one commentator notes, the exclusivity period merely operated "as a 120-day 'grace period' after the commencement of the case during which management *need not* file a plan."[24] In support of this argument, Lynn LoPucki and William Whitford, in an empirical study that explored corporate governance issues in reorganization cases of large, publicly held companies that confirmed a plan of reorganization before March 15, 1998, found that the exclusivity period was extended in 79% of the cases studied.[25] As a result, even though the exclusivity period was initially intended to be a value-maximization mechanism that would allow the debtor to craft a plan that would ensure the viability of the company, it ended up defeating its purpose and placing the creditors at a huge disadvantage as their hands were tied up until the debtor eventually decided to propose a reorganization plan.[26]

Addressing this abuse of the exclusivity period extension, BAPCPA amended section 1121 so as to unequivocally set forth the maximum period within which the debtor will have the exclusive right to file a plan of reorganization. In particular, pursuant to the 2005 amendments, section 1121 was modified so as to provide that any increases in the duration of the exclusivity period cannot exceed eighteen months,[27] while the period for solicitation of acceptances of the plan cannot extend beyond twenty months after the date of the order for relief.[28]

The other amendment at issue, that of section 365, which refers to the timeframe within which the debtor may assume or reject leases in which the debtor is the lessee, was triggered by the same concerns surrounding section 1121 as the latter stood before its amendment by BAPCPA. Under former section 365, the

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[22] *See id.* (discussing creditors' interests in avoiding delayed confirmation of plan, particularly the concern that delays mean suspended payments to creditors and less money for unsecured creditors).

[23] *See* 11 U.S.C. § 1121(d)(1).

[24] Johnston, *supra* note 21, at 293 (emphasis added).

[25] Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 693 (1993) ("The bankruptcy judge extended exclusivity for the duration of the reorganization case for thirty-four of the forty-three companies we studied.").

[26] *See* Johnston, *supra* note 21, at 293–94 (discussing creditors' concerns in waiting for plan to be proposed and then confirmed); *see also* LoPucki & Whitford, *supra* note 25, at 693–94 (explaining how delay in filing a plan imposes costs and adversely affects creditors).

[27] *See* 11 U.S.C. § 1121(d)(2)(A).

[28] *See* 11 U.S.C. § 1121(d)(2)(B).

initial 60-day deadline that was available to the debtor-lessor to decide whether to keep or discard a commercial lease could be extended for cause.[29] These extensions, however, similarly with what used to happen under former section 1121, were provided to the debtor routinely, stretching the corresponding deadline almost indefinitely.[30] The logic behind this was that debtors, especially retailers that may have to make decisions about a vast number of leases nationwide, needed this extended time in order to ensure the assumption of the beneficiary to their reorganization efforts leases, and rejection of the unnecessary, or even harmful, ones. The importance of this decision was intensified by the fact that a premature assumption of a lease could lead to its subsequent rejection, an action that would entitle the landlord to administrative expense priority for the entire post-petition rent owed.[31]

After the enactment of the 2005 amendments, the assumption and subsequent rejection of a commercial lease by the debtor-lessee provides the landlord again with administrative priority for the post-petition rent, but the amount of this expense is capped.[32] In particular, the landlord is entitled to administrative expense priority for the amount of rent owed for two years following the later of the rejection date or the date of the premises turnover.[33] This provision was likely enacted to counterweigh the fact that post-2005, section 365 forces debtors to reach faster a decision as to which leases to assume or reject. In particular, amended section 365 provides for an initial 120-day deadline, which can be extended for cause for another ninety days. For any extension further than this total 210-day period, the prior written consent of the landlord is necessary.[34] It is, therefore, obvious that the virtually unlimited assumption/rejection period that the debtors enjoyed before BAPCPA has given way to a 210-day period whose further extension depends upon the landlord's will.

These two provisions analyzed above and the cap they placed on the plan exclusivity and lease assumption/rejection regimes respectively, along with the rest of the BAPCPA amendments, have been the subject of much debate over their effect on the debtor's reorganization chances.[35] However, setting aside this debate, it

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[29] *See* 11 U.S.C. § 365(d)(1) (2000) (before enactment of BAPCPA).

[30] *See* Ira L. Herman, *Statutory Schizophrenia and the New Chapter 11*, 30 AM. BANKR. INST. J., Jan. 2007 at 92.

[31] *See* David R. Kuney, *Protecting the Landlord's Recent Claim in Bankruptcy: Letters of Credit and Other Issues*, PRAC. REAL EST. L., Nov. 2013, at 53 ("[P]rior to BAPCPA, case law had generally supported the notion that if a debtor assumes a lease, and then later breaches or rejects the lease, all of the damages are entitled to an administrative priority payment.").

[32] *See* 11 U.S.C. § 507 (2012).

[33] *See* 11 U.S.C. § 503(b)(7).

[34] *See* 11 U.S.C. § 365(d)(4)(B)(ii).

[35] For a more detailed discussion on exclusivity see, e.g., Kara J. Bruce, *Rehabilitating Bankruptcy Reform*, 13 NEV. L.J. 174, 202 (2012) (discussing effects of the BAPCPA exclusivity provision); Jeffrey M. Schlerf, *BAPCPA's Impact on Exclusivity Is Hard to Gauge*, J. CORP. RENEWAL, Jul. 2007, *available at* http://www.turnaround.org/Publications/*Articles*.aspx?objectID=7797. *See also* Foteini Teloni, *The Bankruptcy Abuse Prevention and Consumer Protection Act: An Empirical Examination of the Act's Business Bankruptcy Effects*, 88 AM. BANKR. L.J. 237, 267 (2014)

must be acknowledged that modified sections 1121 and 365 forced chapter 11 cases to resolve more quickly than in the past. Indeed, as the data shows, BAPCPA was able to put a halt to the rather protracted chapter 11 cases of the past by reducing the length of traditional reorganization cases by roughly 32%.[36]

Within this general tendency and desire for quicker chapter 11 cases, BAPCPA further fostered the use of prepackaged and prenegotiated bankruptcies.[37] Prepackaged and prenegotiated cases entail pre-filing negotiations between the debtor and its creditors. The difference between these two types of pre-planned cases is that in prepackaged bankruptcies creditors vote on the plan before the filing of the chapter 11 petition, while in prenegotiated bankruptcies plan voting is conducted post-petition according to "plan support agreements" that have been previously negotiated between the debtor and its significant stakeholders.[38] Naturally, these pre-planned cases are resolved much more quickly compared to traditional chapter 11s, and entail lower costs.[39] Through the enactment of sections 1125(g) and 341(e), BAPCPA further facilitated these types of cases and, therefore, made them even more attractive than they were in the past.

In particular, according to section 1125(b), an acceptance or rejection of the plan cannot be solicited *after* the commencement of the chapter 11 case absent a court-approved disclosure statement.[40] As a result, under the pre-BAPCPA regime, any pre-petition solicitation, as well as the mere signing of plan support agreements, which was completed after the filing of a chapter 11 petition without a court-approved disclosure statement could be deemed to violate section 1125(b) and result in the subsequent designation of those votes.[41] This changed with the enactment of section 1125(g) in 2005. Specifically, new section 1125(g) reads:

> [n]otwithstanding subsection (b), an acceptance or rejection of the plan may be solicited from a holder of a claim or interest if such solicitation complies with applicable nonbankruptcy law and if

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(showing a positive and statistically significant relationship between 2005 amendments and pre-plan sale of the debtor's all or substantially all assets).

[36] *See infra* Table 1.

[37] *See* Jay M. Goffman & Mark A. McDermott, *Law Fosters Prepacks in Business Reorganizations*, N.Y. L.J., Oct. 15, 2007, at 10 (noting while some provisions of BAPCPA "have made it more difficult for companies to reorganize in traditional chapter 11 cases," they have also incentivized companies to engage in more pre-bankruptcy planning and to restructure using prepackaged bankruptcies).

[38] *See* Kurt A. Mayr, *Unlocking the Lockup: The Revival of Plan Support Agreements Under New § 1125(g) of the Bankruptcy Code*, 15 NORTON J. BANKR. L. & PRACT. 729, 733–34 (2006) (explaining how section 1125(g) of Bankruptcy Code has cleared doubts surrounding plan support agreements and chapter 11 filings).

[39] Karen Lee Turner, *Prepackaged and Pre-arranged Bankruptcies*, BUS. CREDIT, July/August 2008, at 8, 9, *available at* http://www.eckertseamans.com/uploads/publications/turner_business_credit_0808.pdf (noting a prepackaged bankruptcy can be completed in 100 days, while prior to BAPCPA, debtors often spent two years in bankruptcy)

[40] 11 U.S.C. § 1125(b) (2012).

[41] *See, e.g., In re* Stations Holding Co., No. 02-10882 (MFW), 2004 WL 1857116, at *1 (Bankr. D. Del. Aug. 18, 2004) (holding post-petition "'lock-up agreements' were improper solicitations prohibited by section 1125 of the Bankruptcy Code"); *In re* NH Holdings Inc., 288 B.R. 356 (Bankr. D. Del. 2002).

> such holder was solicited *before* the commencement of the case in a manner complying with applicable nonbankruptcy law.[42]

Provided, therefore, that the requirements of subsection (g) are met, the debtor can commence the solicitation process before the filing of the chapter 11 petition and complete it post-petition even *before* there is a court-approved disclosure statement.[43]

Furthermore, the enactment of section 341(e) as part of BAPCPA provides the judge the flexibility to order the U.S. trustee not to convene a creditors meeting, something that was required in every case under the pre-BAPCPA regime,[44] if the debtor was able to solicit acceptances before the filing of the chapter 11 petition.[45] The rationale behind this is that the debtor has already negotiated and solicited acceptances from a sufficient number of creditors, and, therefore, a creditor meeting would only unnecessarily delay the process.[46]

II. HYPOTHESES AND LITERATURE REVIEW

A. Hypotheses

This study aims to empirically examine several different hypotheses relating to BAPCPA's enactment. In particular this study will quantify BAPCPA's effect on the duration of chapter 11 cases, the use of prepackaged and prenegotiated bankruptcies, as well as the debtor refiling rates.

As described above, the cap on the exclusivity extension greatly limited the debtor's ability to prolong the reorganization process by precluding its creditors from filing their own competing plans. Additionally, the debtor company now has less time to sort out which commercial leases to assume or reject, a strategic decision that can enhance the debtor's reorganization chances. I, therefore, expect to find a statistically significant difference in the duration of chapter 11 cases for the periods before and after BAPCPA. In particular, I expect to observe shorter chapter 11 cases in the post-2005 era.

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[42] 11 U.S.C. § 1125(g) (emphasis added).

[43] *See* James H.M. Sprayregen et al., *Need for Speed: Utilizing Hybrid Solicitation Strategies to Shorten Ch. 11 Cases*, 24 BANKR. L. REP. 1351, 1352 (2012), *available at* http://www.kirkland.com/siteFiles/Publications/BloombergBNA_Oct%202012.pdf. The authors cite the prenegotiated case of *Reddy Ice Inc.*, which was completed within thirty-six days from filing. The debtor, Reddy Ice, utilizing section 1125(g), was able to commence the solicitation process before the filing of the petition and complete it post-petition without having to wait for the approval of a disclosure statement, shortening, therefore, its chapter 11 case significantly. *See id.*

[44] *See* 11 U.S.C. § 341(a)–(b), (e).

[45] *See* 11 U.S.C. § 341(e) ("Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after a notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.").

[46] *See* Brian K. Tester et al., *Need for Speed: Prepackaged and Prenegotiated Bankruptcy Plans*, 17 ANN. NE. BANKR. CONF. 511, 520–21 (2010).

This shortened timeframe within which chapter 11 cases are resolved following the enactment of the 2005 amendments may have caused distressed companies to engage in extensive pre-bankruptcy planning. As a result, a rise in prepackaged and prenegotiated bankruptcies is anticipated as well. Additionally, and as mentioned above, this increase in prepackaged bankruptcies is also expected as a result of the enactment of sections 1125(g) and 341(e).

Quick resolution of chapter 11 cases is undoubtedly beneficial: the debtor incurs lower costs and is able to return to normal operations much faster, avoiding the reputational harm that a prolonged stay in chapter 11 might imply. However, quick resolution of chapter 11 cases could have negative consequences as well, as, according to previous research, less time in reorganization is associated with higher refiling rates.[47] Therefore, I additionally expect to observe a higher refiling rate for companies that filed for chapter 11 after the enactment of the 2005 amendments. Indeed, the quick resolution of chapter 11 cases, particularly through the implementation of prepackaged reorganizations, might imply that operational problems of the company have been ignored in favor of a swift confirmation of a reorganization plan that focuses solely on the firm's *financial* restructuring. It follows that the company emerges quickly from its chapter 11, but not truly rehabilitated, incurring, therefore, a greater risk to seek again bankruptcy protection.[48]

B. Literature Review

The duration of chapter 11 cases, the increased use of prepackaged and prenegotiated bankruptcies, as well as the debtors' refiling rates, have all been the subject of several empirical scholarly articles.

Indeed, from the Bankruptcy Act of 1898 to the enactment of the Bankruptcy Code in 1978 and its subsequent amendment by BAPCPA in 2005, the length of reorganization cases has always been an issue of concern. Several studies have explored whether the enactment of the Bankruptcy Code of 1978 achieved its objective of shorter cases compared to the pre-Code regime. Later studies have presented empirical evidence indicating a general tendency over the years in favor of shorter as well as prepackaged bankruptcies.[49]

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[47] *See* Lynn M. LoPucki & Joseph W. Doherty, *Why are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1976 (2002) (finding strong correlation between speed of reorganization and plan failure and refiling).

[48] *See* Mike Spector, *The Quickie Bankruptcy: More Companies Enter Court, and Exit, in a Flash*, WALL ST. J. (Jan. 5, 2010, 12:01 AM), *available at* http://online.wsj.com/news/articles/SB20001424052748704789404574636164199387026 (quoting William Snyder who was involved in Pilgrim Pride's bankruptcy).

[49] *See, e.g.*, Ronald C. Lease, John J. McConnell & Elizabeth Tashjian, *Outcomes in Prepackaged Bankruptcies*, J. CORP. RENEWAL, Mar. 2000, *available at* http://www.turnaround.org/Publications/Articles.aspx?ObjectId=1355&Mode= (studying prepackaged bankruptcy filings between 1986 and 1993).

More specifically, in his paper, *Evaluating the Chapter 11 Bankruptcy-Reorganization Process*,[50] Edward Altman evaluated the effect of the Bankruptcy Code of 1978 on the reorganization process fifteen years following its enactment. The author underlined as one of the important objectives of the Bankruptcy Code, the faster resolution of reorganization cases.[51] Within this context, Professor Altman's study found that post-1978 the average time in reorganization shortened, though still remained long.[52] In particular, the author found that under the pre-Code era, the average time between the petition date and the confirmation date was twenty-seven months, while under the Bankruptcy Code the average period was twenty-one months.[53]

Using data from other studies, Lynn LoPucki showed a 150% increase from 1964 to 1987 in the median time companies spent in chapter 11, but found that the median time that large, public companies spent in chapter 11 did not increase during that same period.[54] Instead, the enactment of chapter 11 had an impact only on smaller cases, whose time in chapter 11 proceedings doubled.[55]

In their article, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large, Chapter 11 Reorganizations*, Theodore Eisenberg and Lynn LoPucki observed that the mean time to confirmation or sale of assets has been decreasing over time.[56] In particular, the authors found that while the mean time to confirmation or asset sale for unnegotiated cases was 1,400 days in 1981, it fell to approximately 400 days in 1997.[57] Additionally, the authors underlined an increase in the use of prepackaged bankruptcies during that same period.[58]

Similarly, Gordon Bermant et al., studied the choice of venue of large public companies that emerged from chapter 11 during 1994 and 1995 and found, among other things, that cases filed in Delaware tend to be resolved more quickly than cases filed elsewhere,[59] a result also supported by LoPucki and Doherty's research.[60]

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[50] Edward I. Altman, *Evaluating the Chapter 11 Bankruptcy-Reorganization Process*, 1993 COLUM. BUS. L. REV. 1 (1993).

[51] *See id.* at 2. At this point it should be noted that under the Bankruptcy Act of 1898, debtors enjoyed an unlimited exclusivity right. As a result, chapter 11 cases were extremely lengthy. The Bankruptcy Code of 1978 addressed this issue by placing, for the first time, a limit on the debtor's exclusivity right.

[52] *See id.* at 3.

[53] *See id.*

[54] *See* Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 WIS. L. REV. 729, 729, 745 (1993).

[55] *See id.* at 745.

[56] *See* Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 968 (1999) (suggesting "prepackaged bankruptcies" is one explanation for decreasing "case-processing" time).

[57] *See id.* at 980.

[58] *See id.* at 981.

[59] *See* Gordon Bermant et al., *Chapter 11 Venue Choice by Large Public Companies: Report to the Judicial Conference Committee on the Administration of the Bankruptcy System*, FED. JUDICIAL CENTER 3 (1997), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ch11venu.pdf/$file/ch11venu.pdf (noting median time from filing to confirmation in Delaware was only 38 days compared to 765 days for cases filed in the Southern District of New York).

[60] *See* LoPucki & Doherty, *supra* note 47, at 1964–65 (demonstrating Delaware's fast recovery rate of bankruptcy cases).

Within the same context, in a later study, Gordon Bermant and Ed Flynn examined a nationwide sample of chapter 11 cases of all sizes from 1989 to 1997.[61] In that study, the authors observed that intervals from filing to confirmation have reduced and that there is a clear trend toward faster resolution of chapter 11 cases.[62]

Additionally, it has been shown that shorter chapter 11 duration is associated with the debtor securing post-petition (DIP) financing.[63] In particular, Sandeep Dahiya et al., found that companies that were able to secure DIP financing were led to emergence or liquidation more quickly compared to those that proceeded without such financing.[64] As the authors argue, DIP lenders help the company emerge from bankruptcy by investing in positive net present value projects, however, if things do not go well, these lenders do not hesitate to quickly liquidate the debtor in order to salvage as much value as possible.[65]

A more recent study that examined chapter 11 duration trends from January 1, 2008 to December 31, 2012 for companies with assets of at least $250 million found that chapter 11 cases filed in late 2012 were resolved at a faster pace than those filed in early 2008.[66] This quicker resolution is attributed by the authors to the consistently increasing proportion of prepackaged and prenegotiated bankruptcies.[67]

This fast resolution of chapter 11 cases has proven to carry costs for the debtor, translated into repeated bankruptcy filings. In their article, *Why are Delaware and New York Bankruptcy Reorganizations Failing?*, Professors LoPucki and Doherty studied a sample of large, public chapter 11 debtors that also emerged from reorganization as public companies between January 1, 1991 and December 31, 1996.[68] Among the various results of their study, the authors observed a positive and statistically significant relationship between speed of reorganization and refiling.[69] Furthermore, the data showed that firms emerging from the generally

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[61] *See* Ed Flynn & Gordon Bermant, *Outcomes of Chapter 11 Cases: U.S. Trustee Database Sheds New Light on Old Questions*, AM. BANKR. INST. J., Feb. 1998, *available at* http://www.justice.gov/ust/eo/public_affairs/articles/docs/abi98febnumbers.html.

[62] *See id.* ("In addition to a higher than expected confirmation rate, the FICS data show a clear trend toward faster confirmations in chapter 11 cases.").

[63] *See* Sandeep Dahiya et al., *Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence*, 69 J. FIN. ECON. 259, 274 (2003); *see also* Fayez A. Elayan & Thomas O. Meyer, *The Impact of Receiving Debtor-in-Possession Financing on the Probability of Successful Emergence and Time Spent Under Chapter 11 Bankruptcy*, 28 J. BUS. FIN. & ACCOUNTING 905, 906 (2001) ("We find that DIP-financed firms have a reduced probability of liquidation, and shorter time spent under bankruptcy proceedings.").

[64] *See* Dahiya, *supra* note 63, at 274 ("DIP financing is associated with a statistically significant shorter time to liquidation.").

[65] *See id.* at 261.

[66] *See* Dennis A. Meloro et al., *The Fast and Laborious: Chapter 11 Case Trends*, 33 AM. BANKR. INST. J., Mar. 2014 at 52 (concluding large chapter 11s filed at end of 2012 were resolved approximately 25% faster than those filed at beginning of 2008).

[67] *See id.* The results of the study showed a 20% increase from 2008 to 2012 in the proportion of prepackaged and prenegotiated cases. *See id.*; *see also* Tester et al., *supra* note 47, at 512 (mentioning that prepackaged bankruptcies "hit an 8-year high in the first quarter of 2009").

[68] *See* LoPucki & Doherty, *supra* note 47, at 1937.

[69] *See id.* at 1977.

speedy Delaware chapter 11 bankruptcies during that period were more likely to refile than companies emerging from other jurisdictions' reorganizations.[70]

Thus far, however, there has been no study exploring the effect of BAPCPA on chapter 11 duration, pre-planned cases, and debtor refilings. Therefore, this Article aims to add to the existing literature, summarized above, by exploring how the 2005 amendments have affected the aforementioned issues. The following sections analyze the methodology followed in the present study and set forth the results.

III. METHODOLOGY AND RESULTS

A. *Duration and Pre-Planned Cases in the Post-2005 Era*

1. Methodology

a. Sample Selection and Univariate Analyses

The starting point of this study is the examination of the effect of BAPCPA on the length of traditional chapter 11 cases as well as the increased proportion of prepackaged and prenegotiated bankruptcies. To this end, a sample of large public companies (excluding finance, insurance, and real estate companies) that both filed for and exited chapter 11 between 1997 and 2014 by confirming a plan[71] was extracted from the UCLA-LoPucki Bankruptcy Research Database ("BRD").[72] Pre-plan sales of the debtor's all or substantially all assets were excluded from the sample. The duration of each case is calculated as the number of days that came between the filing date and the confirmation date. The plan confirmation dates were not available for all companies. Further, the initial sample was reduced to include only those companies for which financial data for either the last or second-to-last fiscal year before bankruptcy were available in Compustat.[73] As a result, the final sample consisted of a total of 390 companies.

For the total of 390 companies, data regarding the type of bankruptcy (i.e. whether it was a prepackaged or prenegotiatied case, or a "free-fall" reorganization case), duration, and the filing venue were gathered from the BRD.

With the aim to gain an initial insight into BAPCPA's effect on the duration of chapter 11 cases, as well as the use of pre-planned bankruptcies, univariate tests were employed.

First, in Table 1, we observe that the duration mean for the sample of traditional chapter 11 cases dropped from 634 days in the pre-BAPCPA period to 430 days in

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[70] *Id.* at 1939.

[71] The plan confirmed could be a plan of reorganization or a liquidation plan. Plan sales were included.

[72] The BRD includes companies with assets of $100 million or more that filed under chapter 11 of the Bankruptcy Code. These companies must have also filed a 10-K form with the Securities Exchange Commission, for a year ending not less than three years prior to the filing of the bankruptcy case.

[73] Compustat is a database that provides financial data for companies worldwide and is available through the Wharton Research Data Services. Not all financial data are available for all companies.

the post-BAPCPA period.[74] As anticipated, this decrease is also statistically significant, as the two-tail t-test indicates, with a p-value less than 1%. Therefore, the null hypothesis, that there is no difference between the duration means before and after BAPCPA, can be safely rejected.

As also anticipated, this shortened timeframe within which post-2005 chapter 11 cases have to be resolved, along with the more flexible stance that BAPCPA took towards pre-planned cases, has caused distressed companies to engage in extensive pre-bankruptcy planning, and therefore we observe a rise in prepackaged and prenegotiated bankruptcies as well. Indeed, as Table 3 indicates, following the enactment of the 2005 amendments there has been a statistically significant increase in the proportion of pre-planned bankruptcy cases.[75] In particular, the proportion of prepackaged and prenegotiated bankruptcies as of the total number of cases of the sample rose to 58% after 2005, which is 23 percentage points higher than before BAPCPA.[76]

Additionally, what is interesting to note is that the mean duration for pre-planned cases has dropped in the post-2005 era as well.[77] This decrease, which is statistically significant at the 10% level, could result from the fact that, pursuant to the new section 1125(g), as discussed above, the debtor can further expedite its pre-planned case by commencing the solicitation process before the filing of the chapter 11 petition and completing it post-petition prior to a court-approved disclosure statement.[78] Furthermore, the enactment of section 341(e) as part of BAPCPA, which dispenses with the need to convene a creditor meeting if the debtor was able to solicit acceptances before the filing of the chapter 11 petition,[79] shortens even more the time to confirmation.[80]

From the aforementioned, it is obvious that BAPCPA has laid the ground for shorter chapter 11 cases and more pre-planned bankruptcies. In order, however, to reach accurate conclusions regarding BAPCPA's specific effect on these two aspects of the chapter 11 process, additional factors should be taken into account. The two subsections that follow describe the multivariate regression models used to empirically examine BAPCPA's effect on the aforementioned topics, and present the results of the studies.

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[74] *See infra* Table 1.
[75] *See infra* Table 3.
[76] *See infra* Table 3.
[77] *See infra* Table 1.
[78] *See* Sprayregen et al., *supra* note 43, at 1352. The authors cite *In re Reddy Ice, Inc.*, 12-32349 (Bankr. N.D. Tex. Apr. 12, 2012), a prenegotiated case, which was completed within thirty-six days from filing. Utilizing section 1125(g), the debtor, Reddy Ice, was able to commence the solicitation process before filing and complete it post-petition without having to wait for the approval of a disclosure statement, shortening, therefore, its chapter 11 case significantly. *See id.*
[79] *See* 11 U.S.C. § 341(e) (2012) ("Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after a notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.").
[80] *See* Tester et al., *supra* note 46, at 520–21.

b. Regression Models and Variable Selection

As mentioned above, the initial purpose of this study is to empirically examine and quantify the effect that the 2005 amendments had on the faster resolution of chapter 11 cases as well as on the increased use of prepackaged and prenegotiated bankruptcies. A simple inspection of Tables 1 and 2 suggests that post-2005 chapter 11 cases tend to be resolved more quickly, while Table 3 shows that post-2005 there has been an increase in the percentage of prepackaged and prenegotiated bankruptcies by almost two thirds of its previous value.[81] However, in order to control for factors other than BAPCPA that might have affected the length of chapter 11 cases as well as the proportion of pre-planned reorganizations, multivariate regression models are used.

The dependent variable in the first regression model is "duration." As stated before, the duration for cases that ended in the confirmation of a plan is measured in days, and was calculated as the difference between the filing date and the plan confirmation date.[82]

The independent variables included in this regression model are the categorical variables of BAPCPA, economic recession, prepackaged and prenegotiated cases, and filing venue. In particular, the following categorical variables are included in the regression:

- BAPCPA: a categorical variable that takes the value of 1 if the company filed for chapter 11 on or after October 17, 2005 (BAPCPA's effective date), and 0 if a chapter 11 bankruptcy was filed before the aforementioned date.
- Economic Recession: a categorical variable that takes the value of 1 if the company filed for chapter 11 within a period of recession, and 0 if not. In the present sample this categorical variable takes the value 1 if the chapter 11 case was filed either between March 2001 and November 2001, or December 2007 and June 2009.
- Prepackaged and Prenegotiated Bankruptcies: a categorical variable that takes the value of 1 if the case was a prepackaged or prenegotiated bankruptcy, and 0 otherwise. As mentioned before, in both types of these bankruptcies, a plan of reorganization is negotiated between the debtor and its creditors in advance of the filing of the chapter 11 petition.[83] Therefore, prepackaged and prenegotiated bankruptcies tend to proceed swiftly, allowing the debtor-company to exit bankruptcy much faster compared to a traditional reorganization process.[84]

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[81] *See infra* Tables 1–3.

[82] *See supra* Part III, Section A(1)(a). The data for duration were drawn from the UCLA-LoPucki Bankruptcy Research Database.

[83] *See* Tester et al., *supra* note 46, at 520–21.

[84] *See* Eisenberg & LoPucki, *supra* note 56, at 979 (describing changes in case-processing times, they note that "[t]his processing-time pattern is itself complicated by increasing use of prepackaged bankruptcies, which reduces case-processing time").

- Filing Venue: a categorical variable that is 1 if the chapter 11 petition was filed in Delaware, and 0 if the petition was filed anywhere else. The assumption is that the Delaware bankruptcy court, as the venue that deals consistently with complex and large chapter 11 cases, is more experienced in handling reorganization cases and, therefore, is able to resolve these cases expeditiously.[85]

Additionally, the regression model controls for the companies' pre-filing financial profile, including leverage, liquidity, and profitability. More specifically, the following independent variables are also controlled for in the regression model: total assets-to-total liabilities; current assets-to-current liabilities; and EBIT-to-total assets. Finally, the companies' size ("firm size"), calculated as the logarithm of the book value of the firm's pre-filing assets, is used as a proxy for measuring the complexity of the case. All financial data were drawn from Compustat and correspond to the last or second-to-last fiscal year before bankruptcy.

The second regression model explores BAPCPA's impact on prepackaged and prenegotiated bankruptcies. The dependent variable, "prepackaged & prenegotiated bankruptcies," is categorical, and, therefore, takes the value of 1 if the case was a prepackaged or prenegotiated bankruptcy, and 0 otherwise. Since this time the dependent variable captures only two states of the world, i.e. can either happen or not, a logistic regression model is used.

The independent variables included in the second regression model are the following:

- BAPCPA: similarly with above, this variable is a categorical variable that takes the value of 1 if the bankruptcy case was filed after the enactment of BAPCPA, and 0 otherwise.
- Filing Venue: Previous research suggests that Delaware attracts a greater proportion of prepackaged cases.[86] To control, therefore, for this possibility, a categorical variable that takes the value of 1 if the chapter 11 case was filed in Delaware, and 0 if it was filed anywhere else was included in the regression.

Finally, and similarly with above, ratios measuring the company's pre-filing leverage, liquidity, and profitability were taken into consideration. More specifically, the following variables were included in the regression model: total assets-to-total liabilities; current assets-to-current liabilities; and EBIT-to-total assets. The firm's size ("firm size"), calculated as the logarithm of the book value of total assets, is used once again as a proxy for case complexity.[87]

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[85] *See* LoPucki & Doherty, *supra* note 47, at 1965 (observing non-prepackaged Delaware cases were completed in 454 days, faster than the rest of the jurisdictions studied). The same holds for prepackaged bankruptcies as well. *See also* David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309, 327 (2001) (characterizing Delaware reorganization cases as "notably fast").

[86] *See* Eisenberg & LoPucki, *supra* note 56, at 979, 981.

[87] Once again, all financial data were drawn from Compustat and correspond to the last or second-to-last fiscal year before bankruptcy.

c. Results

Table 4 displays the results of the multivariate regression regarding BAPCPA's effect on chapter 11 duration.[88]

Initially, we observe a strong correlation between the firm's size and the duration of its chapter 11 case. As the coefficient's sign indicates, larger firms are likely to spend more time in reorganization proceedings. Considering the firm's size is a proxy for case complexity as companies with more assets are likely to have numerous classes of creditors, the result of the regression is consistent with the notion that big chapter 11 cases need time to resolve and untangle their financial affairs.

Furthermore, we observe that the EBIT-to-total assets ratio is correlated at a statistically significant level of 5% with a longer time in reorganization proceedings.[89]

This result could be interpreted as indicating that stronger firms are better able to prolong their stay in the reorganization process, and undergo the in-depth restructuring necessary to allow them to operate profitably as soon as they emerge from their chapter 11. Within this context, Kenneth Ayotte and David Skeel argue that the prospective performance of a company might very well affect its decision to undergo a quick or more elaborate restructuring.[90] In particular, Ayotte and Skeel argue that a debtor-company predicting that it will have a poor post-emergence performance might initially choose a quick and, therefore, cheap restructuring, since undertaking the additional costs of a lengthy reorganization might not be the most efficient choice at that time.[91] Therefore, companies with gloomy projections regarding their future performance are more likely to opt for a quick reorganization and postpone for a subsequent point of time a more intensive one.[92] On the other hand, stronger companies are more likely to choose to undergo a lengthier chapter 11 that will allow them to deal with all operational and structural problems, mitigating the risk of a subsequent bankruptcy filing.

Additionally, the "prepackaged and prenegotiated" variable is strongly correlated, as expected, with less time in bankruptcy. As mentioned above, in prepackaged bankruptcies a plan has been negotiated upon and votes have been solicited before the filing event. It follows that time in bankruptcy, as well as costs, are sharply reduced. The same effect holds for prenegotiated bankruptcies, even

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[88] *See infra* Table 4.

[89] *See infra* Table 4.

[90] *See* Kenneth Ayotte & David A. Skeel, *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425, 439–41 (2006) (analyzing firms' restructuring options when future success or failure is uncertain and suggesting more costly thorough restructuring or less costly and less thorough "workout" decisions result from firms' interpretation of such prospective analysis).

[91] *See id.* at 441 (positing firms with likelihood of underperformance in the future will reasonably choose a cheaper and quicker bankruptcy procedure).

[92] *See id*. As the authors characteristically note: "*The more likely the firm is to fail, the greater are the gains to waiting before attempting a full restructuring of operations*."

though generally these are slower compared to the prepackaged ones as votes are solicited after the filing of a chapter 11 petition.

Finally, and most importantly for the purposes of this Article, and consistent with the univariate results presented above, the BAPCPA variable is correlated with a decrease in time within reorganization at a statistically significant level of 1%. Indeed, the post-2005 era is characterized by shorter chapter 11 cases; fewer days come between the filing of the petition and the confirmation of the plan. This, of course, is indicative of the fact that the cap in the exclusivity extension period[93] along with the shortened timeframe within which the debtor can decide whether to assume or reject unexpired commercial leases[94] achieved their purpose of quicker chapter 11 cases.

Moving forward, Table 5 displays the results of the multivariate regression model when "prepackaged and prenegotiated bankruptcies" is the dependent variable.[95]

As anticipated, BAPCPA is correlated with the increased use of this type of bankruptcy cases at the statistically significant level of 1%.[96] It seems that after the enactment of the 2005 amendments debtors engage in pre-bankruptcy planning in order to ensure that they will be able to meet the shorter deadlines set forth by the new statute.

Additionally, we observe that the total assets-to-total liabilities ratio is negatively correlated with the occurrence of pre-planned bankruptcies at the statistically significant level of 1%.[97] More specifically, and as the sign of the ratio indicates, the more leveraged the company is, the more likely it is for a prepackaged or prenegotiated chapter 11 to take place. Indeed, as previous research has shown, "full-blown" chapter 11 firms are less leveraged than prepackaged bankruptcies and out-of-court restructurings.[98] That empirical finding was aligned with the argument made by Michael Jensen that firms with higher levels of debt have an incentive to undergo an out-of-court restructuring, because, in that case, a greater value is compromised if the firm goes into bankruptcy.[99] In particular, Jensen argues that a highly leveraged company that is unable to service its debt is also more likely to be worth much more than its liquidation value.[100] Therefore, he continues, this greater

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[93] *See* 11 U.S.C. § 1121(d)(2)(A) (2012).

[94] *See* 11 U.S.C. § 365(d)(4).

[95] *See infra* Table 5.

[96] *See infra* Table 5.

[97] *See infra* Table 5.

[98] *See* Sris Chatterjee at al., *Coercive Tender and Exchange Offers in Distressed High-Yield Debt Restructurings: An Empirical Analysis*, 38 J. FIN. ECON. 333, 343 (1995) (discussing how firms using tender offers appear to have less leverage, less severe liquidity, and sell more assets than exchange-offer firms).

[99] *See* Michael Jensen, *Active Investors, LBOs, and the Privatization of Bankruptcy*, 2 J. APPLIED CORP. FIN. 35, 43 (1989) (explaining how large potential losses incentivize parties to accomplish reorganization outside court).

[100] *See id.* at 42 (illustrating how company with 20% debt-to-value ratio has liquidation value much closer to face value of debt than company with 85% debt-to-value ratio).

value would be better preserved by avoiding the cumbersome bankruptcy proceeding in favor of a quicker and cheaper out-of-court restructuring.[101]

Another variable that seems to be strongly affecting the dependent variable of "prepackaged and prenegotiated" cases is "firm size," which is used as a proxy for case complexity. This independent variable is correlated with pre-planned chapter 11s at the statistically significant level of 1%, and, according to the coefficient sign, the more complex the case is, the less likely it is for a prepackaged or prenegotiated bankruptcy to take place.[102] Such a result was anticipated. Indeed, prepackaged and prenegotiated bankruptcies are based on negotiations that culminate in consensus before the filing of the chapter 11 petition. Such a consensus is naturally easier to be achieved when there are only few creditors that hold most of the company's debt to negotiate with.

Lastly, the "filing venue" variable is in the direction expected, as the Delaware bankruptcy court deals with a greater proportion of prepackaged and prenegotiated cases compared to other courts, but not statistically significant.[103]

B. Refilings in the Post-2005 Era

1. Methodology

a. Sample Selection and Univariate Analysis

Notwithstanding the advantage of lower bankruptcy costs that accompany a speedy reorganization or a pre-planned case, such bankruptcies usually entail costs for the debtor as the likelihood of a repeated filing increases.

Refiling rates have been used by several scholars as a measure of chapter 11 success. For example, Professors LoPucki and Doherty have used recidivism rates as one metric by which to explore whether New York and Delaware reorganizations fail more often, and find that the generally quicker Delaware chapter 11s are more likely to fail.[104] Also, in his recent article, *Revisiting the Recidivism—Chapter 22 Phenomenon in the U.S. Bankruptcy System*, Edward Altman identifies repeated filings as a problem of the current chapter 11 system and proposes the use of distress prediction techniques to help courts assess the feasibility of a reorganization plan.[107]

[101] *See id.* at 43 (arguing, for preservation of value, traditional bankruptcy process will be supplanted by "privately resolving the conflicts of interest among claimants of the firm").

[102] *See infra* Table 5.

[103] *See infra* Table 5; *see also* Douglas G. Baird & Robert K. Rasmussen, *Beyond Recidivism*, 54 BUFF L. REV. 343, 347 (2006) (observing since 1996, 80% of prepackaged bankruptcy cases occur in Delaware).

[104] *See* LoPucki & Doherty, *supra* note 47, at 1939 (showing firms filing for bankruptcy in Delaware courts are ten times more likely to refile for bankruptcy).

[107] Edward I. Altman, *Revisiting the Recidivism—Chapter 22 Phenomenon in the U.S. Bankruptcy System*, 8 BROOK. J. CORP. FIN. & COM. L. 253, 274 (2014).

Indeed, a company that hastily emerges from its chapter 11 proceedings without having addressed its operational and structural problems is most likely headed to another bankruptcy filing in the near future. Since, therefore, the 2005 amendments are positively correlated with short and pre-planned chapter 11 cases, the question that arises is whether the "successful" post-BAPCPA emergences are only temporarily successful, as another bankruptcy filing awaits around the corner.

In order to examine this hypothesis, the same sample of companies drawn from the BRD, and processed as mentioned above,[109] was used to examine BAPCPA's effect on the debtors' refiling rates. In particular, the sample consists once again of companies for which financial data for the last or second-to-last fiscal year were available in Compustat, after having excluded companies that fall under Division H of the SIC, namely finance, insurance, and real estate companies.[110] From the total of these 390 companies, those that were able to emerge from the chapter 11 process were initially identified.[111] For these companies, data regarding the debtors' refiling rate were gathered from the BRD. A debtor company is considered to have refiled if it filed for bankruptcy within five years since its emergence.[112] Therefore, the final sample consisted of a total of 233 companies that had met this five-year threshold and for which refiling data were available. Available post-emergence financial data, as well as data regarding the filing venue, were gathered from the BRD.

As Table 6 shows, we observe that of the total number of companies of the sample that filed for chapter 11 and emerged through the confirmation of a plan of reorganization, 48% refiled for bankruptcy within five years of their emergence in the post-BAPCPA era, while the corresponding proportion for the pre-BAPCPA period is 18%.[113] This increase was measured to be statistically significant at the 1% level. In order also to see whether post-BAPCPA companies emerge with a worse financial profile than the pre-BAPCPA ones, something that would possibly justify the higher refiling rate observed after 2005, the companies' post-emergence profitability and leverage ratios' means were calculated. As shown, however, in Table 7 neither of the differences in the companies' post-emergence financial profile for the periods before and after BAPCPA was statistically significant.[114]

In order to examine more rigorously BAPCPA's effect on recidivism, the companies' post-emergence profile along with the filing venue are controlled for in

[109] *See supra* Part III (A)(1)(a).

[110] Once again, section 363 sale cases were excluded.

[111] *See* Lynn M. LoPucki, *Protocols for the UCLA-LoPucki Bankruptcy Research Database*, LOPUCKI.LAW.UCLA.EDU 2, *available at* http://lopucki.law.ucla.edu/documentation/Protocols.pdf (last visited Mar. 21, 2015).

[112] According to the BRD codification for this field, for companies for which this five-year threshold is not met, the corresponding field is "pending." Partial refilings, that is, refilings where a substantial part, but not clearly over half of the emerging company filed again for bankruptcy, are indicated in the BRD. Such "partial refilings" were excluded from the regression model. Finally, refiling data for every company were not available.

[113] *See infra* Table 6.

[114] *See infra* Table 7.

a multivariate regression model. The following two sections describe briefly the type of regression used as well as the dependent and independent variables included, and set forth the results of the study.

b. Regression Model and Variable Selection

As the dependent variable ("refiling") is once again categorical, a logistic regression model is employed.

The independent variables controlled for in this regression model are the categorical variables of BAPCPA, and filing venue. These categorical variables are briefly defined below:

- BAPCPA: the categorical variable of BAPCPA defined similarly as before. Namely, this variable takes the value 1 if a company filed for chapter 11 on or after BAPCPA's effective date, and 0 otherwise.
- Filing Venue: similarly with above, this variable is 1 if the filing venue was Delaware, and 0 otherwise. As it has already been discussed, Delaware cases tend to be resolved much faster compared to other jurisdictions, and according to previous research, such a speedy chapter 11 resolution increases the likelihood of the company's refiling in the near future.[115]

Post-emergence profitability and leverage ratios are also taken into account, as the financial health of the new company could indicate the probability of another bankruptcy filing. More specifically, the EBIT-to-total assets (post-emergence), as well as the total liabilities-to-total assets (post-emergence) ratios are included in the regression model.

c. Results

Table 8 quantifies, among other things, the effect of BAPCPA, which is of main concern here, on refiling rates.[116]

As the univariate analysis initially suggested, BAPCPA has a statistically significant effect on the debtors' refiling rates.[117] Therefore, the upside of having shorter chapter 11 cases in the post-amendments era is watered down by the fact that the debtor-company has a greater likelihood to succumb to another bankruptcy filing. Indeed, in order for chapter 11 to be able to fulfill its traditional goal, that of rehabilitation of the business, then the debtor should have enough time to address the operational and other problems in order to emerge from its chapter 11 a truly stronger company. And if one measure for successful bankruptcies is their refiling rate, then BAPCPA seems to have failed in this respect.

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[115] *See generally* LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005). Based on the results of this study, Professor LoPucki accuses Delaware of administering inefficient reorganizations.

[116] *See infra* Table 8.

[117] *See infra* Table 8.

Furthermore, the sign of the coefficient of the "filing venue" variable suggests that companies that reorganize in Delaware, are more likely to refile, however this variable is not statistically significant.[118] The same holds for companies emerging with a higher profitability ratio or a lower leverage ratio. In particular, the sign of the coefficient of the EBIT-to-total assets ratio indicates that the higher the post-emergence profitability of the company is, the less likely it is to file for bankruptcy again. Additionally, and as Table 8 shows, the less leveraged the company is the less risk it is for it to refile. These results are consistent with Professor Altman's study that found that both the post-emergence profitability and leverage of the company, measured by the EBIT-to-total assets and equity-to-total liabilities ratios respectively, were worse for companies that had refiled for bankruptcy than those that had not.[119]

CONCLUSION AND FURTHER RESEARCH QUESTIONS

The aforementioned studies showed a statistically significant correlation between BAPCPA and shorter chapter 11 cases, as well as between BAPCPA and the increased use of prepackaged and prenegotiated bankruptcies. Quick chapter 11 cases are tempting, as the debtor incurs lower bankruptcy costs and is able to return to its normal operations faster. Nevertheless, the question finally begged is, in what shape does the debtor really exit bankruptcy? Contrary to what was happening in the past where the distressed company would enter chapter 11 and stay there as long as necessary to sort out its financial affairs and effectuate an operational restructuring, now companies rush out of bankruptcy having merely reduced their debt without addressing core operational issues. BAPCPA seems to have only exacerbated this trend, as evidenced by the fact that a positive and statistically significant relationship was observed between the 2005 Act enactment and the debtors' refiling rates. Therefore, while speedy and low-cost bankruptcies are a positive development, one cannot ignore the risk of a repeated filing associated with them.

Within this context, a further question to be examined would be whether section 363-sale cases tend to be resolved more quickly as well in the post-BAPCPA period, and how this new timeframe has affected sales prices. Given the fact that now creditors can submit competing plans much sooner compared to the pre-BAPCPA regime, which usually provide for the sale or liquidation of the debtor, it is expected that fewer days will come between the filing event and the entry of a sale order. This shortened timeframe can hypothetically force the debtor to accept a depressed sale price.

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[118] In a study of refiling rates between 1997 and 2004, it was shown that Delaware failure rates were similar to the failure rates of other jurisdictions. *See* Ruth Sarah Lee, *Delaware's Relevance in Chapter 22: Who Is "Courting Failure" Now?*, 31 REV. BANKING & FIN. L. 443, 443 (2011).

[119] *See* Altman, *supra* note 107, at 272.

TABLES

Table 1

Two-Tail T-test for Duration Means Before and After BAPCPA

Two-tail t-test comparing the means in duration (measured in days) before and after the enactment of BAPCPA. All relevant data were gathered from the BRD.

	Duration for Traditional Chapter 11s		**Duration for Prepackaged and Prenegotiated Cases**	
	Pre-BAPCPA	Post-BAPCPA	Pre-BAPCPA	Post-BAPCPA
Number of Observations	179	48	98	65
Mean (days)	634	430	198	137
t-stat	2.95		1.89	
P-value	0.0035		0.06	
t-critical	1.97		1.97	

Traditional Chapter 11s column: Statistically significant at the 1% level.
Prepackaged and Prenegotiated Cases column: Statistically significant at the 10% level.

Table 2

Two-Tail T-tests for Duration Means Before and After BAPCPA

Two-tail t-test comparing the means in duration (measured in days) before and after the enactment of BAPCPA. All relevant data were gathered from the BRD.

	Duration for Total Sample (including prepackaged and prenegotiated cases)	
	Pre-BAPCPA	Post-BAPCPA
Number of Observations	277	113
Mean (days)	480	261
t-stat	4.903	
P value	1.38773E-06	
t-critical	1.97	

Statistically significant at the 1% level.

Table 3

Two-Tail T-tests for Prepackaged and Prenegotiated Cases Before and After BAPCPA

Two-tail t-test comparing the proportions in prepackaged and prenegotiated bankruptcies, before and after the enactment of BAPCPA. All relevant data were gathered from the BRD.

	Prepackaged and Prenegotiated Cases	
	Pre-BAPCPA	Post-BAPCPA
Number of Observations	277	113
Number of Prepacks & Prenegotiated Cases	98	65
Proportion	0.35	0.58
t-stat	-4.098	
P value	5.08609E-05	
t-critical	1.966	

Statistically significant at the 1% level.

Table 4

Effect of BAPCPA on Duration of Chapter 11 Cases

Financial data corresponds to the last fiscal year before bankruptcy. If such data are not available, then they correspond to the second-to-last fiscal year before bankruptcy. All financial data were drawn from Compustat. The "firm size" variable, calculated as the logarithm of the book value of the firm's total assets, is used as a proxy for case complexity. Data regarding the type of case, i.e. whether it was a prepackaged or prenegotiated reorganization, as well as data regarding the filing venue, were drawn from the BRD.

	Coefficient	**P-value**
Constant	112.813	38%
BAPCPA	-180.299	0%***
Economic Recession	50.658	29%
Total Assets / Total Liabilities	-8.212	86%
Current Assets / Current Liabilities	27.459	18%
EBIT / Total Assets	167.632	3%**
Prepacks	-369.876	0%***
Firm Size	160.278	0%***
Filing Venue	41.906	26%

*** significant at 1%, ** significant at 5%, *significant at 10%

Table 5

Effect of BAPCPA on Prepackaged and Prenegotiated Chapter 11 Cases

Financial data correspond to the last fiscal year before bankruptcy. If such data are not available, then they correspond to the second-to-last fiscal year before bankruptcy. All financial data were drawn from Compustat. The "firm size" variable, calculated as the logarithm of the book value of the firm's total assets, is used as a proxy for case complexity. Data regarding the dependent variable "prepackaged and prenegotiated" cases, as well as data regarding the "filing venue" variable, were drawn from the BRD.

	Coefficient	**P-value**
Constant	3.09	0.02%
BAPCPA	0.9	0.04%***
Filing Venue	0.09	70%
Total Assets / Total Liabilities	-1.47	0%***
Current Assets / Current Liabilities	-0.065	63%
EBIT / Assets	0.514	33%
Firm Size	-0.7	1%***

*** significant at 1%, ** significant at 5%, *significant at 10%

Table 6

Two-Tail T-test Comparing Refiling Rates Before and After BAPCPA

Two-tail t-test comparing the proportions in refiling rates before and after the enactment of BAPCPA. Relevant data were gathered from the BRD. A company is considered to have refiled, if it filed for bankruptcy within five years since its emergence from its previous bankruptcy.

	Refiling	
	Pre-BAPCPA	Post-BAPCPA
Number of Observations	208	25
Proportion	0.18	0.48
t-stat	-3.583	
P value	0.0004	
t-critical	1.97	

Statistically significant at the 1% level.

Table 7

Two-Tail T-test Comparing the Debtors' Post-Emergence Financial Profile Before and After BAPCPA

Two-tail t-test comparing the post-emergence profitability and leverage ratios means (EBIT-to-total assets, and total liabilities-to-total assets respectively) for the periods before and after the enactment of BAPCPA. Financial data were gathered from the BRD.

	EBIT / Total Assets (post-emergence)		**Total Liabilities-to-Total Assets (post-emergence)**	
	Pre-BAPCPA	Post-BAPCPA	Pre-BAPCPA	Post-BAPCPA
Number of Observations	118	9	129	10
Mean	-0.007	-0.016	0.758	0.877
t-stat	0.2		-1.145	
P-value	0.84		0.25	
t-critical	1.979		1.977	

Table 8

Effect of BAPCPA on Debtors' Refiling Rates

Relevant data were drawn from the BRD. A debtor is considered to have refiled, if it filed for bankruptcy within five years since its emergence.

	Coefficient	**P-Value**
Constant	-2.66	0%
BAPCPA	3.473	0%***
Filing Venue	0.645	15%
EBIT / Total Assets (post emergence)	-1.163	48%
Total Liabilities / Total Assets (post emergence)	1.042	15%

*** significant at 1%, ** significant at 5%, *significant at 10%