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Restructuring Support Agreements: An Empirical Analysis

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RESTRUCTURING SUPPORT AGREEMENTS: AN EMPIRICAL ANALYSIS

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Restructuring support agreements (RSAs), or contracts that commit bankruptcy parties to supporting a plan of reorganization that will conform to certain requirements, are now a common feature of Chapter 11. Parties utilize these agreements in nearly half of all large cases. While prior literature has debated the normative value of RSAs, we take an empirical approach to look at what provisions the parties include in these agreements and how those provisions have changed over time.

Our analysis looks at all RSAs associated with large bankruptcies through the end of 2020. We characterize the types of firms with RSAs, the parties involved, and the language contained within their key sections. A significant majority of RSAs are entered into on or before the petition date. Common provisions relate to the bargaining process during the case and often commit the parties in advance to certain elements of the restructuring plan. Provisions related to control such as debtor milestones have become more frequent in the last ten years of the sample.

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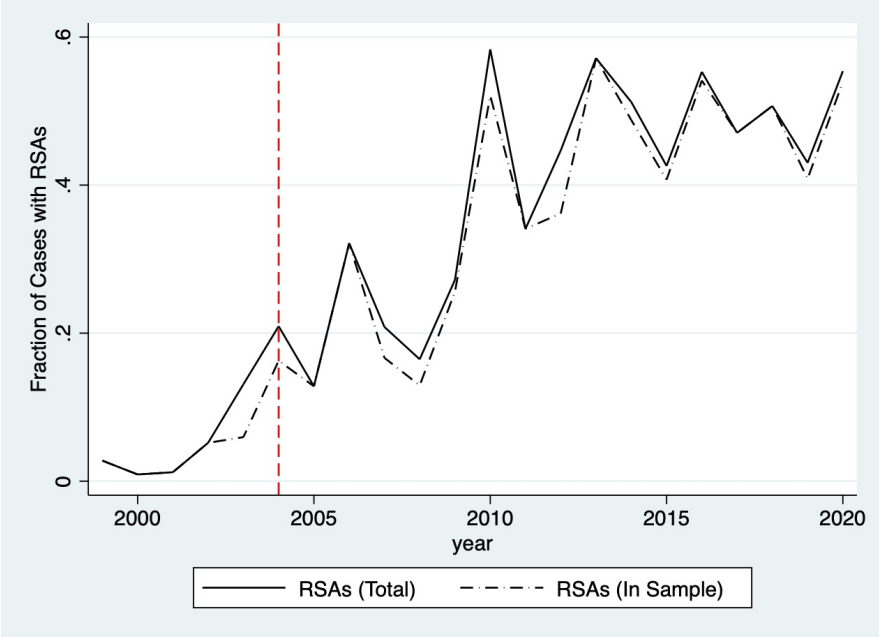
I. INTRODUCTION

Restructuring support agreements (RSAs) have become a regular fixture in Chapter 11 proceedings. Relatively uncommon prior to the mid-2000s, they now appear in nearly half of all large corporate bankruptcies. The RSA is typically in place prior to filing and reflects an agreement among parties to support a proposed plan of reorganization.

The rise in RSAs has been controversial, at least among bankruptcy scholars. The conventional story in favor is that an RSA is a commitment mechanism that prevents parties from extracting opportunistic hold-up rents during the Chapter 11 proceedings. In this way, RSAs can supplement other provisions of the Code such as voting and cram-down procedures by expediting negotiations and allowing the debtor to bind parties to their bargaining positions at the time of filing.

Figure 1: RSAs in Cases with Over $100M Assets



Those critical of the increasing use of RSAs argue that sophisticated claimholders use them as instruments to opportunistically consolidated control, impose limitations on the debtor, and lock in favorable plan features. Some also argue that RSAs give sophisticated claimholders the opportunity to form a coalition and crystallize a plan before other parties have had the chance to organize and acquire information about the case. In this sense, the value of RSAs as efficient market tools is still an open question.

The theoretical and normative discussion of RSAs is robust. Practitioner articles and memos have been increasing in frequency since the early 2000s. The legal academy

caught on more recently, with the first major analyses appearing in the last five years.[1] From this literature, conventional—albeit anecdotal—wisdom has arisen about what terms are most common in RSAs and what benefits those terms serve. That conventional wisdom generates a tentative picture of RSAs and the important issues that surround them.[2]

Despite the popularity of RSAs and the importance of the normative debate, the data about what is in these agreements, how often they are used, and how they evolved are anecdotal. Lawyers have a "sense" of what the latest trends are, but systematic data on RSAs is lacking.

This paper begins the process of collecting and analyzing that data. We rely upon a comprehensive dataset of nearly 440 RSAs collected from large cases that span over two decades. We confirm that much of the conventional wisdom is true. For example, most RSAs are executed prepetition and nearly all include the debtor as a party. RSAs usually contemplate a plan of reorganization rather than a sale. They rose in prominence during the first decade of the 21st century and are now commonplace. We also describe salient features of the agreements themselves, such as key parties and customary language.

Our second objective is to provide data about the substantive contents of RSAs, some of which may inform the normative debate. Generally, RSAs have grown longer and more complex over time, incorporating increased debtor protections in the form of fiduciary outs and litigation shields. At the same time, milestone provisions that restrict debtors and set the pace of the bankruptcy process have increased in frequency.

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[1] Isaac Sasson, *Judicial Review of Plan Support Agreements: A Review and Analysis*, 9 N.Y. UNIV. J. OF L. & LIB. 850 (2015); Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L. J. 593 (2017). Baird raised the issues surrounding these agreements at a conference with practitioners much earlier. Douglas Baird & Martin Bienenstock, *Debtor-in-Possession Financing (Pre-Petition &Lock-Up Agreements)*, 4 DEPAUL BUS. & COMMERC. L. J. 589, 599 (2003).

[2] See, for example, Sasson, *supra* note 1; Baird, *supra* note 1; Edward J. Janger & Adam J. Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 Brook. J. Corp. Fin. & Com. L. (2018); Josef S. Athanas & Caroline A. Reckler, *Lock-Up Agreements—Valuable Tool or Violation of the Bankruptcy Code?*, 15 NORTON J. OF BANKR. L. & PRACTICE 431 (2006); Ralph Brubaker, *Taking Chapater 11's Distribution Rules Seriously: "Inter-Class Gifting is Dead! Long Live Inter-Class Gifting!"*, Bank. Law Letter (April 2011) 11-12; Kurt A. Mayr. *Unlocking the Lock-up: The Revival of Plan Support Agreements under § 1125(g)of the Bankruptcy Code*, 15 NORTON J. BANKR. L. & PRAC. 6 (2006); Rachel Ehrlich Albanese & Thomas R. Califano, *Overview of Plan Support Agreements*, (2018) available at https://www.dlapiper.com/en/us/insights/publications/2018/06/overview-of-plan-support-agreements/; *Texas Bankruptcy Bench Bar Conference Best Practices of Restructuring Support Agreements*, (2017) available at https://www.statebaroftexasbankruptcy.com/resources/Documents/Conference%20Presentations/Overview%20of%20RSAs_(46659112_4).pdf; *Getting Ready for the Next Cycle: Prepackaged and Prenegotiated Chapter 11 Reorganization Strategies* available at https://www.gibsondunn.com/wp-content/uploads/2019/05/WebcastSlides-Getting-Ready-for-the-Next-Cycle-Prepackaged-and-Prenegotiated-Chapter-11-Reorganization-Strategies-25-APR-2019.pdf; *How To Negotiate A Ch. 11 Plan Support Agreement*, available at https://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1651.pdf?sfvrsn=2; Christopher M. Candon & Grant R. Gendron, *The Validity of Plan Support Agreements: Walking the Sub-Rosa Plan Line?*, available at https://www.sheehan.com/validity-plan-support-agreements-walking-sub-rosa-plan-line/.

We find that some of the more controversial RSA terms identified as "badges of opportunism"[3] in prior research are largely absent from the text of RSAs. There is little evidence, for example, of so-called death traps or Section 506(c) waivers. Despite their nonappearance within the RSA itself, however, we acknowledge that RSAs most likely play a role in shaping whether these terms enter plans and restructuring term sheets, which are beyond the scope of our analysis. We do find that RSAs sometimes refer to third-party releases. These references usually concern severability and opt-out provisions, however, leaving the substantive terms of the third-party release to the text of the plan. Perhaps the most coercive features within the text of RSAs are covenants to obstruct the formation of non-mandatory statutory committees, which have been on the rise in the past decade.

As part of our second objective, we also aim to understand RSA trends. Even though they have existed since the late 1980s, RSAs did not become popular until 2010, slightly after the surge in bankruptcies brought about by the Great Recession. It is unlikely, therefore, that the rise of RSAs is driven solely by their association with prepackaged and prenegotiated plans, which gained prominence in the early 1980s. We are also unable to identify any major shift in the composition of RSA parties or their legal counsel that coincides with their increase in popularity. While there are a handful of key judicial decisions on the acceptability of RSAs, none were during the period of the Great Recession. We do find evidence that provisions related to control, as opposed to the mitigation of bargaining frictions, became more commonplace starting in 2010. More research is needed, however, for a complete picture of why RSAs did not become a regular feature of Chapter 11 at an earlier point in time.

This paper, though descriptive, is a first step toward a data-driven normative evaluation of RSAs that may highlight appropriate areas for policy attention.

II. LITERATURE REVIEW

Contracting for bankruptcy is not a new phenomenon. Scholars over the years have offered contract-, market-, and option-based proposals to partially or completely replace Chapter 11. Mark Roe proposed that public companies in bankruptcy recapitalize into all-common-stock capital structures and then sell a "slice"—perhaps 10% of the equity—into the stock markets in order to value the firm. Such an approach would accomplish valuation and restructuring in relatively short order.[4] Lucian Bebchuk proposed an options-based approach. The distressed firm would issue options to each layer of the firm's capital structure, with the aggregate strike price for each layer of claimants equal to the total amount of debt owed to higher-priority claimants. Going from the most junior to most senior claimants, each claimant class would have to decide whether to exercise or let its option expire.[5] Barry Adler proposed to capitalize firms with "chameleon equity."[6] The capital structure would retain the conventional hierarchical structure, except that

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[3] Janger & Levitin, *supra note 2.* Skeel takes a more nuanced view suggesting that such terms in RSAs should be policed rather than banned. David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020).

[4] Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527 (1983).

[5] Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations,* 101 HARV. L. REV. 775 (1988).

[6] Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993); Barry E. Adler, *A World without Debt*, 72 WASH. U. L. Q. 811 (1994).

insolvency would trigger the disappearance of (a) the lowest level of equity, and (b) the fixed claims of the next most junior level of claimant, which would become the firm's common equity class.

In addition to these market-based ideas, Bob Rasmussen proposed a contractual menu approach, which would enable a firm's investors to decide how to deal with their firm's distress, instead of having to use the government-imposed bankruptcy system.[7] Rasmussen's menu offers five options: a "no-bankruptcy" option; a Chapter 7 petition; a Chapter 11 petition; a selective stay approach (staying all creditors except the major financial creditor); and a bespoke regime crafted by the firm.[8]

With RSAs, the market players direct the bankruptcy process by contract. Douglas Baird has fittingly characterized the advent of RSAs as "bankruptcy's quiet revolution."[9] This revolution shifts the locus of Chapter 11 negotiation from its traditional multiparty bargaining framework, substituting instead a succession of pacts among small groups of stakeholders, beginning with the major players in the case—typically the debtor and the senior creditor. This move to seriatim (often bilateral) bargains moves much of the dealing forward to a time before the judge is even involved.

In this setting, Baird has noted a concern about the plan negotiation process.[10] In particular, the move to bilateral bargaining inherent in RSAs may constrict information flow to the judge. The judge's job managing the case is much tougher if she is out of the loop because plan negotiations among major parties occur before the case is filed or among a small group of sophisticated parties behind closed doors. Unsophisticated creditors may face particular risks.[11]

That problem is not entirely new. Much of the bankruptcy process is an uneasy mix of mandatory provisions and judicial discretion in facilitating private bargains. That parties may attempt to commit to certain bargains before the case begins is not especially surprising or new. Intercreditor agreements (ICAs) are similarly used by parties to precommit to future actions or forbearance in the event of a subsequent bankruptcy. The main difference is that the ICAs are entered into long before the bankruptcy is filed, while RSAs are create with a specific filing in mind.

Skeel and Triantis have observed that bankruptcy courts treat ex ante agreements like ICAs different than ex post agreements like RSAs. Courts show a general willingness to enforce ex post agreements—like RSAs and debtor-in-possession (DIP) financing agreements—struck right around the time of a bankruptcy filing. But those same courts scrutinize ex ante agreements more closely. ICAs offer a paradigmatic case of an ex ante agreement entered into at the time of financing. In ICAs senior and junior creditors may

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[7] Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992).

[8] *Id.* at 100-107.

[9] Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L. J. 593 (2017).

[10] Getting distributions "right" may be a tricky proposition in any event: A fairly wide range of potential plans is possible. Nonmarket valuation is as much art as science, and priority may be uncertain for many types of assets—copyrights, broadcast licenses, for example. Even for more straightforward collateral, mistakes are regularly made, and perfection may be uncertain. *Id.* at 596.

[11] *Id.* at 619.

agree to constrain the junior creditor's influence in any future bankruptcy case. For example, the junior creditor may be barred from offering DIP financing without the senior's blessing. The senior may demand the right to vote the junior's claims should bankruptcy ensue.[12] Courts have taken a more restrictive approach to ICAs.

Ayotte, Casey and Skeel (ACS) also study enforcement of ex ante side agreements, primarily ICAs.[13] In their standard scenario, one party—typically a second-lien creditor[14]—has promised to waive certain rights it would otherwise enjoy in bankruptcy. For example, the second-lien lender may promise not to object to a sale that the first-lien lender favors. The bankruptcy judge may enforce the deal, or she may not. One disinclined to enforce may fall back on the notion that the waiver language in the ICA was not sufficiently clear—not "clear beyond peradventure"[15]—so the second-lien lender should retain its rights in bankruptcy. They recognize that some side agreements may involve externalities. For those that don't, the court should enforce the agreement according to its terms, including any provision for specific performance or stipulated damages. By contrast, when the court determines that value-destroying externalities are possible, it should allow the "silenced" party to breach by exercising it rights in bankruptcy, but should impose expectation damages.[16] ACS additionally note that judicial demands for greater clarity in ICA drafting will not likely prove to be a useful strategy. It will incentivize more broadly worded constraints on second-lien lenders, which may simply generate greater externalities. Better to rely on contractual remedies for breach than for courts to try to manipulate interpretive standards for determining breach.[17]

III. EARLY RSAS

Agreements that commit parties in advance to support a Chapter 11 plan of reorganization have been around since at least the late 1980s. They have been variously referred to as Restructuring Support Agreements, Plan Support Agreements, and Lock-Up Agreements. An early proto-RSA can be found in the bankruptcy of Texaco Inc. (The agreement text is reported at *In re Texaco Inc.*, 81 B.R 813 (S.D.N.Y Bankr. 1988)). Just 6,780 characters, the agreement is straightforward. While it included provisions regarding related litigation outside of the bankruptcy proceeding, the relevant plan support provision was the following:

> III. Pennzoil and Texaco will use their best efforts to obtain confirmation of the Plan in accordance with the Bankruptcy Code as soon as practicable in the Reorganization Case. Pennzoil and Texaco will take all necessary actions to achieve confirmation including, in the case of Texaco, recommending to shareholders that the Plan be confirmed. Pennzoil and Texaco shall not agree to, consent to, or vote for any modification of the Plan unless such modification has

[12] David A. Skeel, Jr. & George Triantis, *Bankruptcy's Uneasy Shift to a Contract Paradigm*, 166. U. PA. L. REV. 1777 (2018).
[13] Kenneth Ayotte, Anthony J. Casey, & David A. Skeel, Jr., *Bankruptcy on the Side*, 112 NW. U. L. REV. 255 (2017).
[14] A second-lien creditor is a secured creditor whose security interest is junior to that of the first-lien creditor.
[15] *In re* Boston Generating, LLC, 440 B.R. 302, 319 (Bankr. S.D.N.Y. 2010).
[16] Ayotte, Casey, & Skeel, *supra* note 13, at 262-63.
[17] *Id.* at 295.

> been agreed to by the other party. Neither Pennzoil nor Texaco shall vote for, consent to, support or participate in the formulation of any other plan in the Reorganization Case.
>
> *Id.* at 819-820.

Another early RSA can be found in the bankruptcy of Kellogg Square Partnership. In that case, the debtor entered into a post-petition, pre-confirmation agreement with an energy company that agreed to vote its claims in favor of the Debtor's plan of reorganization, and the parties agreed to new terms for a pre-existing supply agreement. The plan support provision was succinct: "(c) District Energy will cast a ballot in favor of Debtor's Plan."[18]

Both of these agreements produced judicial opinions on the question of whether a support agreement entered into post-petition but pre-confirmation violated the Bankruptcy Code's disclosure and solicitation rules contained in sections 1125 and 1126. That question has been debated over the years, and recent opinions have addressed it as well. While several major decisions have allowed these post-petition agreements despite potentially contrary language in section 1125 (see discussion in Baird 2017), conventional wisdom appears to be that the safest route is for the parties to execute the agreement before the petition is filed. This view has allowed RSAs to flourish in recent years.

IV. DATA

The objective of this paper is to study how RSA contracts evolve over time. While a comparison of plan features in cases with and without RSAs might be of more interest from a policy perspective, there are several key distinctions between the two modes of analysis. First, a comparison of that sort would involve data collection for the full universe of Chapter 11 bankruptcies, which is considerably more challenging for the post-2003 sample and nearly impossible for cases filed before the advent of Public Access to Court Electronic Records (PACER). It is also harder to make apples-to-apples comparisons, since not all Chapter 11 cases result in the formulation of a plan. Finally, even if it were possible to construct a standardized set of plan features across which we could compare cases, these variables would have to be collected from a number of bankruptcy documents such as plans (and their many iterations), sale agreements, DIP agreements, RSAs themselves, and all of their associated term sheets. Attempting to pin down a causal relationship between the existence of an RSA and the plan formulation process is therefore beyond the scope of this paper; nonetheless, we view this analysis as an important first step in understanding why RSAs have become a regular part of Chapter 11.

Data for this study are primarily constructed using the full text of all available RSAs associated with large Chapter 11 cases filed through the end of 2020. We limit our search to non-financial cases involving at least $100 million in assets at the time of filing.[19] Because PACER only maintains online records for cases going back to 2004, we use different search methodologies for cases before and after 2004. For cases filed after 2004,

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[18] *In re Kellogg Square Partnership,* 160 B.R. 336 (1993).

[19] For more information on the superset of cases that were searched for RSAs, see Katherine Waldock, *A Typology of U.S. Corporate Bankruptcy,* Working Paper (2020).

we identify RSAs by running keyword searches within the full text of first-day declarations, disclosure statements, and court dockets. We supplement these results with Bloomberg Law searches. We then retrieve RSA documents by searching the docket. For cases filed before 2004, we identify RSAs by running keyword searches within court dockets and supplementing these results with Bloomberg Law searches. Some RSA documents are available through Bloomberg Law or EDGAR. For early RSAs from cases filed in the Districts of Delaware or Southern New York, we retrieved RSAs directly from the court. We are able to retrieve full-text RSAs in 437 cases. We focus only on the text of the contract and exclude text from signature pages and exhibits.

Equipped with RSA documents, we convert PDFs into text and manually remove all text that does not belong to the RSA itself. We then split the RSA into paragraphs using automated methods. Next, we categorize each paragraph according to its corresponding section label within the RSA (e.g. Termination Events or Governing Law). All commitment and termination event sections are categorized by hand while other sections are categorized using automated methods.

Once we obtain categorized paragraphs, our method for extracting usable data depends on the nature of each variable. We are able to tabulate certain variables using straightforward keyword searches. For more complicated variables, we identify candidate keywords from a random set of RSAs and, after compiling a list of paragraphs that contain those keywords, we remove false positive matches by hand. Variables and their corresponding data sources and construction methodologies are listed in Appendix Table A1.

Other data for this project are collected from the UCLA-LoPucki Bankruptcy Research Database and from New Generation Research. If these variables are not populated or cases are missing from these databases, we hand collect data from first-day declarations, disclosure statements, operating reports, schedules, and web searches.

V. RSA STRUCTURE

A representative RSA has many of the features of a typical contract. In general, an RSA has the following structure:

1. Recitals and Introduction
2. Commitments
3. Termination Events
4. Representations and Warranties
5. Good Faith Negotiation
6. Miscellaneous

The commitments section contains the key covenants from the debtor to the RSA parties and vice versa. Creditors typically commit to supporting and voting for the plan as well as refraining from changing their votes, taking any action that would benefit proponents of another plan, and delaying consummation of the plan. Debtor commitments are usually more varied. Like creditors, they commit to supporting the plan and refraining from taking any action that would benefit proponents of another plan as well as delaying the consummation of the plan. However, they also usually make a number of other

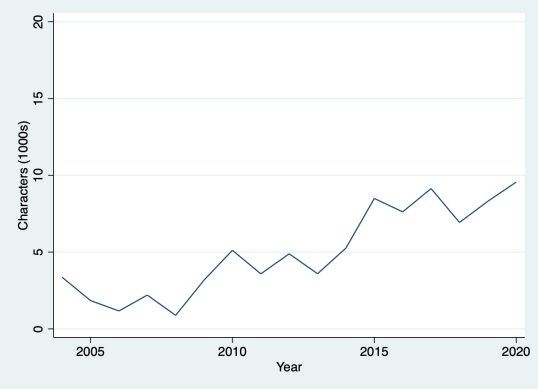
commitments such as providing counsel for the restructuring parties all material documents on an ongoing basis, maintaining good standing under the law, and not increasing the salaries of senior managers. As discussed in Section VII, more recent RSAs typically contain milestones, and these milestones often appear in the debtor commitments section. Although most RSAs contain a separate section on good faith negotiations, the commitments section usually also contains agreements to formulate future material agreements and continue negotiating in good faith.

Termination events are usually associated with specific parties, although some RSAs list a set of mutual termination events. Creditor termination events typically consist of: (i) the breach of any of the debtor's covenants or representations and warranties; (ii) the appointment by the court of a trustee or examiner; and (iii) the debtor's withdrawal of the plan contemplated by the RSA. In RSAs involving milestones, the failure of the debtor to meet any of the milestones usually gives rise to a termination event. Debtor termination events similarly include the creditors' violation of any of their covenants or representations and warranties as well as the appointment by the court of a trustee or examiner, or any official action that blocks implementation of the plan.

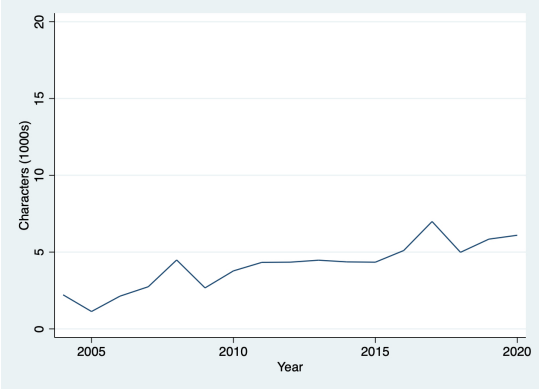
RSAs have become significantly longer over time. Compared to the average RSA filed before 2004, the average RSA filed in 2020 was approximately 250% longer as measured by total characters. This increase is partly due to the lengthening of sections and partly due to the addition of new sections.

Figure 2: Lengths of Key RSA Sections

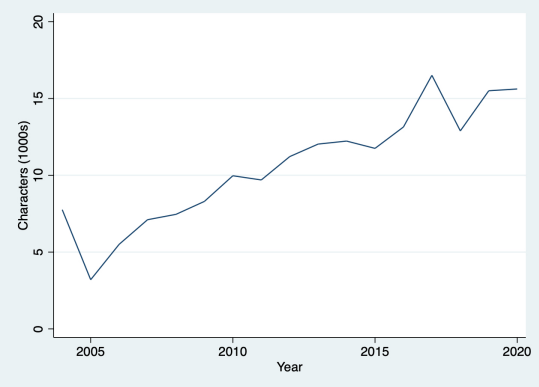
(a) Debtor Commitments



(b) Creditor Commitments



(c) Termination Events



As Figure 2 indicates, each of the key RSA sections has increased in length over time. The figures and associated analyses begin in 2004 because data were too sparse to construct meaningful yearly averages prior to 2004. While both commitments sections increased in length, debtors' commitments increased more rapidly, from approximately 2,100 characters per RSA for the years before 2010 to over 8,300 characters per RSA for the years after 2015. The corresponding increase for creditors' commitments over the same time period was from approximately 2,600 to 5,800 characters. Termination events, however increased from an average of about 7,300 characters before 2010 to nearly 14,800 characters after 2015. Larger absolute increases in the lengths of the debtor commitments and termination event sections may be explained in part by the prevalence of milestones in the later part of the sample.

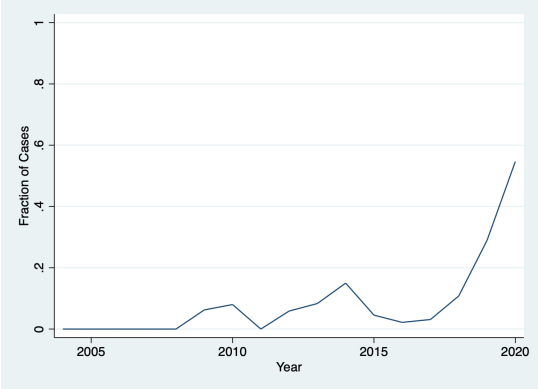
RSAs have also become longer and more complex, however, because of the addition of new sections to the agreement. In order to study how sections change, we construct an empirical "representative RSA" by period. Using the RSAs filed before PACER, i.e., before 2004, our early representative contains all the sections that appeared in at least half of the cases in that period. We do the same for the year 2020 and compare the two representatives. Most of the major sections remain the same. The two exceptions are the definitions and transfer sections. While the definitions section may seem non-substantive, it encompasses not only defined terms but also effective dates, definitive documents, and interpretation sub-sections. These additions suggest that RSAs have become more complex by referring to a larger number of documents beyond just the plan term sheet. As for transfers, these clauses are not new to later agreements, but they have become sufficiently complex that they warrant their own section. Transfer sections from the 2020 sample typically restrict the transfer of securities by consenting RSA parties unless they deliver notice and a copy of the transfer agreement to the debtor. They also create exceptions for qualified marketmaker affiliates of the consenting party.

Although the list of additional sections is too long to evaluate comprehensively, we highlight several of the sections that have become significantly more common in the past decade. Additional provisions typically appear as a subsection after each commitments section, and there are separate sets for debtors and consenting stakeholders. They qualify the commitments that precede them. For example, while consenting parties often covenant that they will not "object to, delay, impede, or take any other actions to interfere with acceptance, implementation, or consummation" [20] of the plan, the additional provisions section stipulates that the RSA will not impair their rights to "assert or raise any objection permitted under this Agreement in connection with the Restructuring Transactions[.]"[21] The debtor's additional provisions may contain a symmetric clause allowing them to raise objections in a similar fashion. To the extent that they reduce the force of each party's commitments, these additional provisions limit the ability of RSAs to prevent opportunistic hold-up.

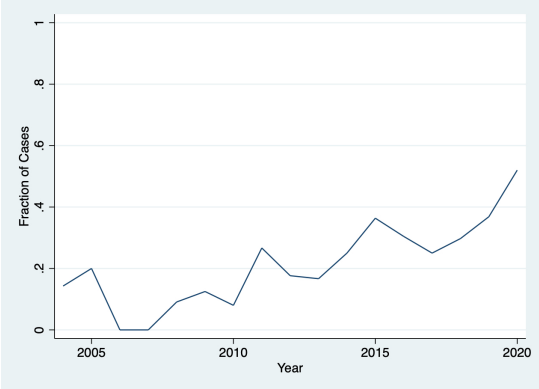
[20] *See, e.g., In re* Extraction Oil & Gas, Inc., 622 B.R. 608 (Bankr. D. Del. 2020).
[21] *Id.*

Figure 3: Examples of New Sections

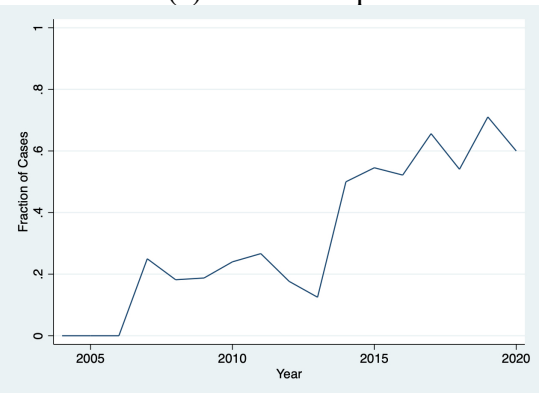
(a) Additional Provisions



(b) Independent Due Diligence



(c) Relationship



RSAs from 2020 are also more likely to contain clauses that shield consenting parties from litigation risk. 2020 was the first year in which more than half of RSAs contained independent due diligence sections, which contain language confirming that each party has made its own decisions regarding the RSA "based upon its own independent assessment of documents and information available to it."[22] Sections that specify that RSA parties do not owe duties of trust or confidence to others, shielding them from insider trading liability under misappropriation theory, also appear frequently in the later part of the sample. While these sections may reflect the tendency of contracts to expand over time to include as many litigation protections as possible, they do not reflect a fundamental alteration in the substance or purpose of RSAs.

In light of the coronavirus pandemic, we also search RSAs for material adverse effect (MAE) clauses. We use two methods to identify these clauses: (i) we search for at least one instance of "Material Adverse" as a capitalized term, and (ii) several variations of the phrase in the termination events section (see Appendix Table A1 for more detail). While both search terms yield similar results until 2008, capitalized MAE terms dropped off significantly around the time of the Great Recession. While uncapitalized variations of MAE clauses appear in a majority of RSAs for most years of the sample, they have steadily declined in popularity from 2016, when they were present in 65% of RSAs. Interestingly, in 2020, they were only present in 39% of RSAs.

[22] *See, e.g., In re* Cumulus Media Holdings Inc., No. 17-BK-13381 CJS (S.D.N.Y Nov. 29, 2017).

VI. BASIC FEATURES OF RSAS

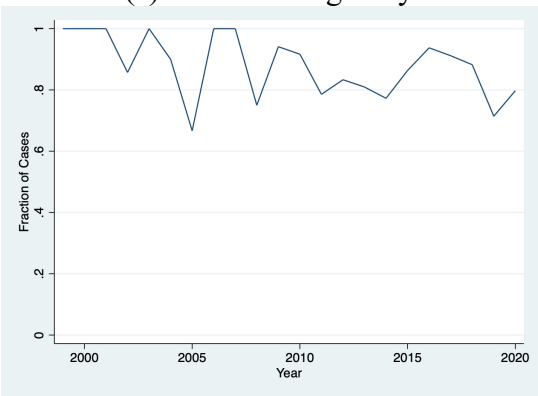
This section introduces the general features of an RSA such as its intended outcome, timing relative to the petition date, forum choice, key parties, debtors' counsel, and mechanics of assumption. While we focus on time trends, we also present statistics on the textual similarity of RSAs across courts and debtors' counsel.

Recall from Figure 1 in the introduction that RSAs were rare in the early 2000s. From 2010 through 2020, however, they were present in 50% of all large non-financial Chapter 11 cases. The single year that witnessed the highest fraction of RSAs was 2010, when they were present in 61% of all cases. While there has been a clear increase in RSAs over time, their popularity also interacts with the business cycle as well as sectoral trends.

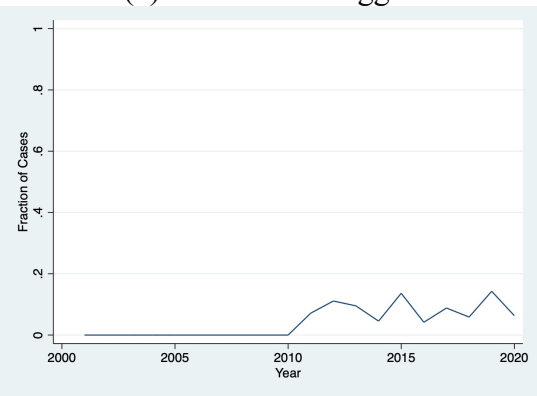
RSAs are significantly more common in reorganization than in sale cases. Figure 4 shows that the prevalence of RSAs attached to restructuring, dual track or toggle, and asset sales cases, respectively, since 2000. A dual track case is one in which the parties contemplate either a Chapter 11 filing or an out-of-court deal while a toggle case is one that pursues both a reorganization plan as well as a sale of all assets, at least until it becomes clear that one option is superior. Both types of cases are present almost exclusively in pre-petition RSAs, and did not appear until 2011. Since 2011, they have accounted for about 8% of all cases.

Figure 4: Intended Outcomes

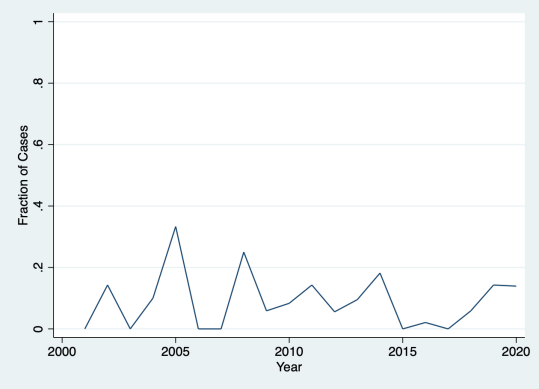
(a) Restructuring Only



(b) Dual Track/Toggle



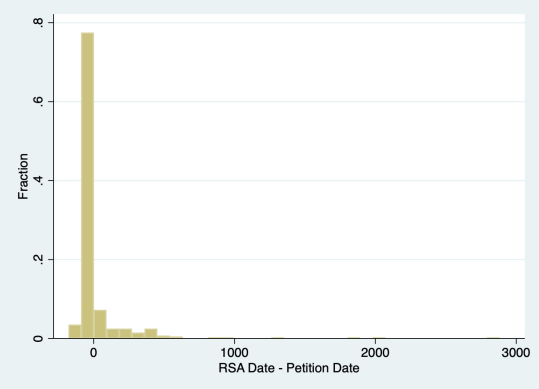
(c) Sale Only



Some RSAs, also known as sale support agreements, contemplate only asset sales. Unlike in preliminary agreements associated with M&A deals, the key parties to sale support agreements are not the buyer and the seller but claimants such as noteholders or lenders. They have existed since the early 2000s but only account for 8.5% of cases in the entire sample. The sparsity of sale support agreements may be explained by the fact that sales under Section 363 often do not require a confirmation vote, reducing at least in part the need to lock in support by creditors.

Most RSAs are entered into before the petition date. Figure 5 shows a histogram of days between the RSA date and the petition date for non-sale cases, where a negative value indicates that the RSA was filed before the bankruptcy petition. 81% of RSAs contemplating reorganization are entered into on or before the petition date, and another 7% are entered into within the first 90 days of the case. These statistics indicate that relatively few RSAs are used for the purpose of mitigating sequential bargaining frictions *during* the Chapter 11 process.

Figure 5: RSA Date Relative to Petition Date (Days)



The identities of consenting RSA parties are crucial for understanding the nature and purpose of each RSA. Lenders and noteholders are the two most common RSA parties.[23] Equityholders and private equity sponsors also appear frequently as parties to RSAs. We collect data on other parties, such as Official Committees and labor unions, but since these groups individually appear in a minority of cases, we do not tabulate those results here. Table 1 shows the frequency of combinations among major RSA parties for the full sample of identified RSAs.[24] It reveals that close to half of RSAs involve only a single major group of claimants: noteholders (96 cases), lenders (81 cases), or equity holders or private equity sponsors (24 cases). In addition to the results in Table 1, we find that the debtor is a party in 99% of RSAs.

[23] The distinction between noteholders and lenders is not always clear. Noteholders are typically described as such, and are associated with notes with a named coupon rate, e.g., 9% Senior Notes. Lenders are typically referred to as lenders or lien holders, and are often represented by an administrative or collateral agent.

[24] In most cases that involve multiple classes of RSA participants, all parties agree to a single RSA. In several cases, however, each signing party drafts its own bilateral RSA with the debtor. We reflect all classes of claimants in Table 1 but include only the longest RSA per case in the remainder of our analyses.

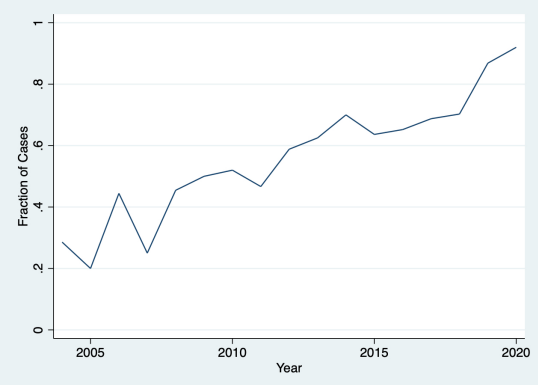
Table 1: RSA Parties

Noteholders	Lenders	Equity/PE	No. Cases
1	0	0	96
1	1	0	66
1	0	1	52
1	1	1	45
0	1	0	81
0	1	1	58
0	0	1	24
0	0	0	29

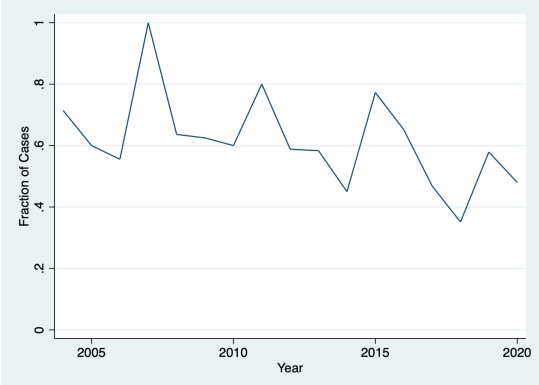
Figure 6 shows that the composition of RSA parties has evolved over time. Lenders, while signatories to RSAs in less than half of early cases, are now parties in approximately 90% of RSAs. Noteholders, on the other hand, have been on the decline, present in roughly half of all cases with RSAs since 2018. While it is beyond the scope of this paper to understand whether these trends are RSA-specific or reflect a broader shift in distressed debt markets, the rise of non-bank institutions in the leveraged loan market may suggest that these changes are structural.[25] On the equity side, there has been a rise in RSA participation by both plan sponsors, which are typically private equity funds, as well as general equityholders. While these trends might seem U-shaped, noisiness of the early part of the sample is partially to blame (i.e., there were only five cases with RSAs filed in 2005.) Panels (c) and (d) of Figure 6 reveal, therefore, that there has been an upward trend in the involvement of participants in the equity tranche of the capital structure.

Figure 6: Major RSA Parties

(a) Lenders

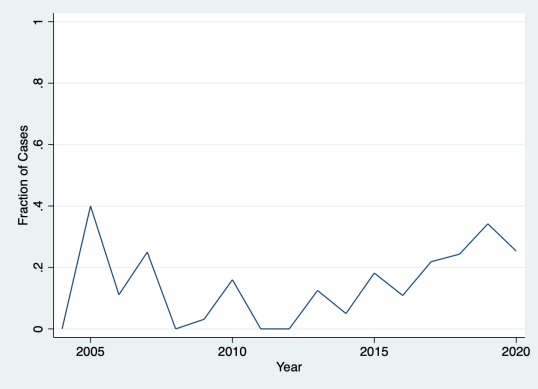


(b) Noteholders

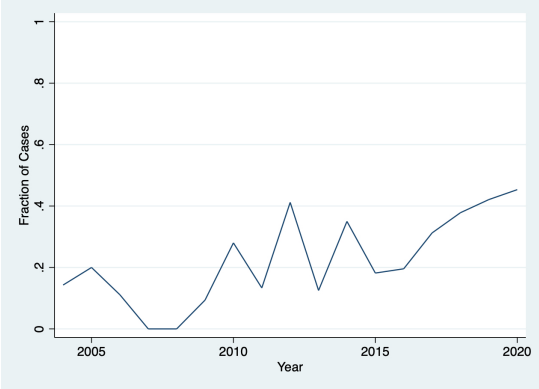


[25] *See, e.g.,* Jongha Lim et al., *Syndicated Loan Spreads and the Composition of the Syndicate*, 111 J. FIN. ECON. (2014); Victoria Ivashina & Boris Vallee, *Weak Credit Covenants* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27,316, 2020).

(c) Sponsors



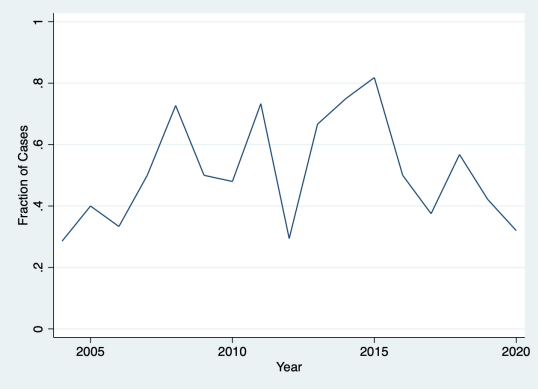
(d) Equityholders



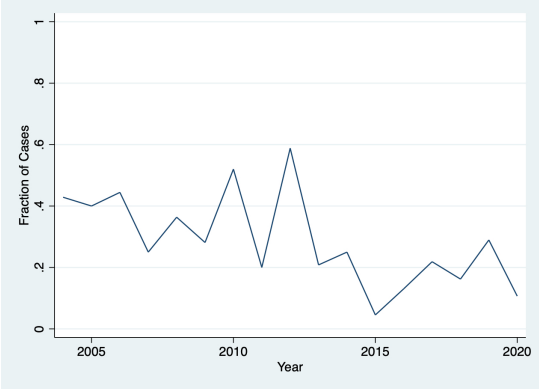
The most popular forum for RSAs in the PACER sample is Delaware, accounting for slightly less than half of all cases. About one fifth of RSA cases were filed in the Southern District of New York, with its popularity gradually waning. While the Southern District of Texas accounts for only 17% of cases with RSAs, Figure 7(c) shows that its popularity has increased dramatically in recent years, accounting for roughly half of all cases with RSAs in 2020. This phenomenon is consistent with the general rise in popularity of Texas Southern as a forum for large Chapter 11 cases.[26] No other court, aside from these top three, oversaw ten or more RSA cases in the PACER sample period. Despite the fact that only 22% of cases in the entire sample are filed in New York, RSAs select New York governing law in 93% of cases in which we are able to identify governing law clauses. Only 5% of RSAs select Delaware governing law.

Figure 7: Forum Choice

(a) Delaware

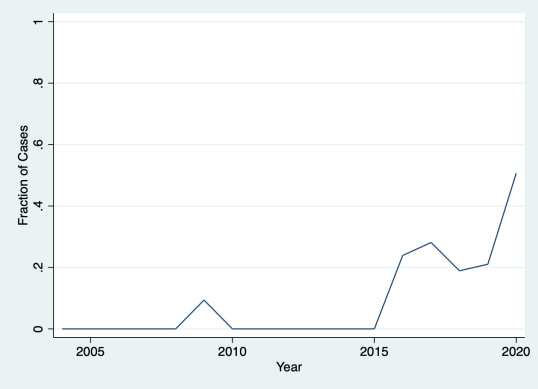


(b) New York Southern

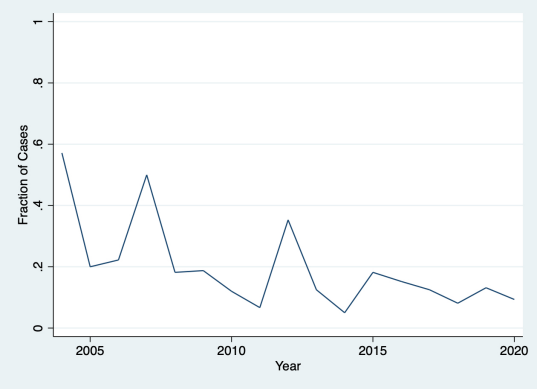


[26] *See, e.g.,* Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TX. L. REV. (2022).

(c) Texas Southern



(d) Other

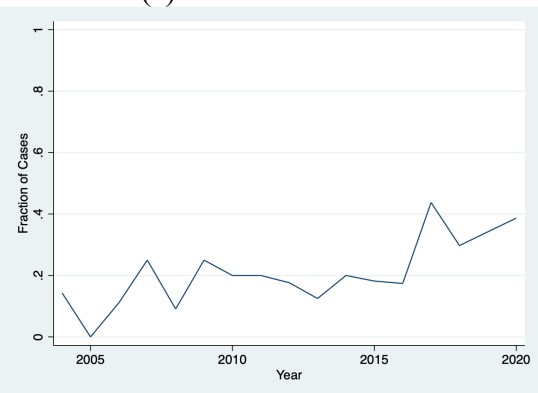


We also tabulate data on legal professionals who represent RSA parties, focusing particularly on debtor's counsel. We begin with the earliest known RSAs in order to address the possibility that one firm in particular was responsible for their rise in popularity. Unfortunately, no clear pattern emerges based on lead debtor's counsel for cases filed before 2000. Weil, Gotschal & Manges (Weil) represented the debtor in two early cases, *Texaco* and *JPS Textile*, but in neither case did parties agree to a stand-alone RSA. No other firm acted as debtor's counsel in more than one pre-2000 RSA.

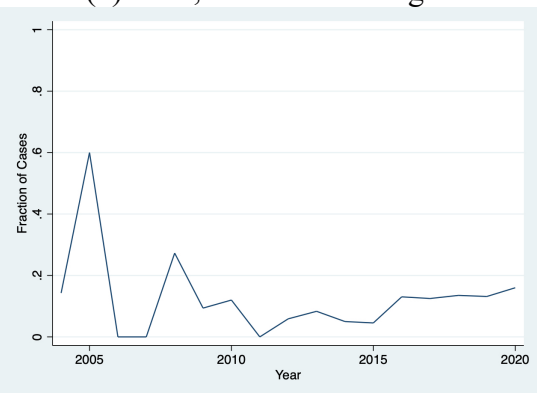
In the PACER period, the two most popular firms are Weil and Kirkland & Ellis (Kirkland). Kirkland in particular experienced a marked increase in the fraction of cases for which it served as debtor's counsel starting in 2016. In 2020, it represented the debtor in nearly 40% of all cases with RSAs. Weil, while experiencing some volatility in the early part of the PACER sample, has maintained a fairly steady share between 10% and 20% of the market since 2015.

Figure 8: Debtor's Counsel

(a) Kirkland & Ellis



(b) Weil, Gotshal & Manges



Even though we did not find evidence that a particular firm acted as the champion of RSAs in the early years of their existence, it is still possible that one court or one firm has produced RSAs that have been templates for others. As a preliminary investigation into

this hypothesis, we construct an average cosine similarity matrix within and across courts as well as the four major firms that appear as debtor's counsel. Cosine similarity is a common tool for measuring document similarity in quantitative text analysis.[27] It is calculated on a pair of documents and its range is between 0 and 1, with 1 representing perfect similarity. We construct cosine similarities for every pair of RSA contracts in the full sample, dropping only instances when a document is paired with itself. We then calculate averages by forum and debtor's counsel. Note that there is nothing constraining between-group averages to be lower than within-group averages.

Table 2: Average Cosine Similarities

(a) By Forum

	DE	NYS	TXS	Other
DE	**0.423**			
NYS	0.406	**0.392**		
TXS	0.487	0.465	**0.583**	
Other	0.417	0.400	0.479	**0.409**

(b) by Debtor's Counsel

	Kirkland	Latham	Skadden	Weil
Kirkland	**0.540**			
Latham	0.476	**0.425**		
Skadden	0.468	0.421	**0.425**	
Weil	0.468	0.420	0.415	**0.420**

The results of the cosine similarity analysis do not point to any clear RSA pioneer, either in terms of court or debtor's counsel. The Southern District of Texas has the highest cosine similarity average within its own court. In addition, Delaware, the Southern District of New York, and all other courts (as one group) all have higher between-group average cosine similarities with the Southern District of Texas than they do with themselves. As Figure 7 indicates, however, it only became a popular forum for RSAs in the last five years of the sample. The high similarity average may simply reflect the fact that these RSAs were fairly concentrated in time. Panel (b), which shows average cosine similarities for counsel, exhibits a similar pattern. Kirkland has the highest similarity with itself and each of the three other firms has a higher between-group similarity with Kirkland than they do with themselves. Again, however, Kirkland's popularity in the last several years of the sample may suggest that this result is driven by chronological clustering.

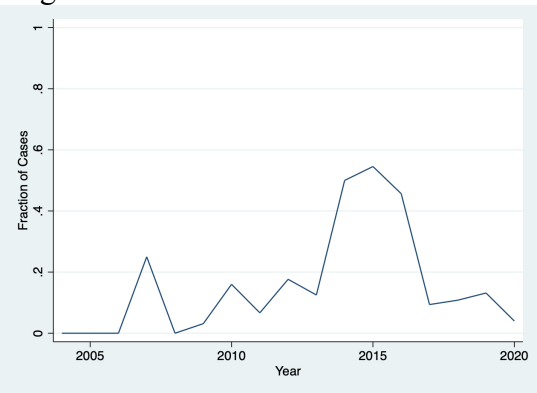
We also study the assumption of and objections to RSAs. We turn to case dockets and search for objections that contain a reference to one of our RSA terms (see Appendix Table A1). In most cases, the docket entry provides us with information about the party filing the document.

The operation of the RSA at the outset of a case and its treatment by the bankruptcy court are not straightforward. While the debtor almost always makes the RSA available to the court, either as an attachment to a first-day motion or to the plan, in most cases

[27] In order to measure cosine similarity between two documents, we first convert each RSA into a term frequency-inverse document frequency matrix. We remove stop words and stem all included words. The maximum number of matrix features is 100,000.

involving RSAs, neither the debtor nor any other RSA party files a motion to assume. This is despite the fact that an RSA is an executory contract. As Figure 9 shows, there was an anomalous three-year period from 2014 through 2016, however, when approximately half of all RSAs were submitted in a motion to assume. One explanation for this increase is Judge Shannon's relatively pro-RSA 2013 decision in *Indianapolis Downs*, which made it clear that at least Delaware would enforce post-petition RSAs among sophisticated parties.[28] While post-petition contracts do not need to be assumed in order to bind the estate, bankruptcy participants may have inferred from this decision a favorable shift in the overall attitude of judges toward RSAs. It is not clear, however, why motions to assume declined again in 2017.

Figure 9: RSAs with Motion to Assume



For pre-petition RSAs, the incentives of RSA parties may explain the relative infrequency of motions to assume. The remedy for breach for both the debtor and the non-debtor parties is typically specific performance.[29] Since rejection constitutes a breach,[30] the RSA is specifically enforceable whether or not it is assumed. Creditors and other consenting parties therefore have little incentive to insist on assumption. The debtor, on the other hand, derives little benefit from assumption that it would not otherwise receive from simply performing the contract, except when it is clear that RSA parties wish to walk away from the agreement. Under those conditions, the debtor may file a motion to assume. Absent a clear signal that RSA parties will renege on the agreement, however, submitting the RSA to the court for assumption exposes the debtor to the risk that the judge will find an element of the contract problematic.

Using data from PACER cases filed before 2018, we also study how RSAs are treated by non-consenting parties, regardless of whether the RSA is assumed. RSAs receive objections in 21% of cases. Conditional on at least one RSA objection being raised, the most common groups of objectors are the Unsecured Creditors' Committee (33%), other unofficial committees (23%), the U.S. Trustee (21%), indenture trustees (12%), and unions or professional associations (11%). Further analysis is needed to analyze the nature of these objections and whether they materially alter the plan contemplated by the RSA.

[28] *In re Indianapolis Downs, LLC*, 486 B.R. 286 (Bankr. D. Del. 2013).
[29] We have been unable to identify any litigation pertaining to the breach of an RSA.
[30] *See In re Tempnology, LLC*, 879 F.3d 389 (2018).

VII. BEYOND HOLD-UP

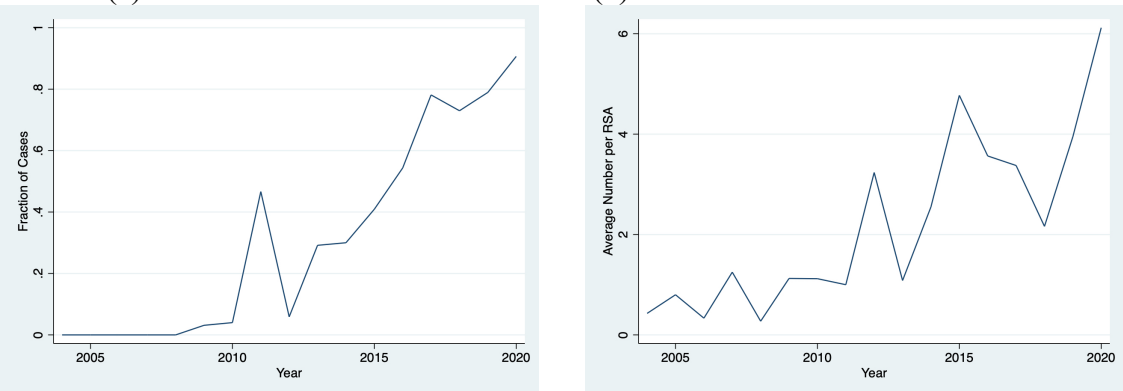
As discussed in the Introduction, the most basic function of an RSA is to prevent opportunistic hold-up by another party. If consenting stakeholders have expended time and financial resources to arrive at a consensus, the RSA prevents one party from deviating from the plan in a way that hurts all other participants. It also precludes alternative plans that make all parties except for one better off, at least to the extent that the debtor cannot use its fiduciary out to purse those plans. For example, in signing the RSA, a noteholder gives up its option to support any plan proposed by the Official Committee, even if that plan makes all creditors (but not equityholders) better off.

It is possible that RSAs are used for other purposes. They may be used by more sophisticated and concentrated parties, for example, to decide on a plan of action before unsophisticated and dispersed parties are able to coordinate and conduct their own due diligence. They may be used by RSA parties with bargaining advantages to control other RSA parties. Since we do not collect data on cases without RSAs, however, we are unable to definitively address either of these possibilities. We have also found that potentially coercive plan terms such as death traps and third-party releases are absent from or mentioned only in passing within RSAs. Still, we have identified certain clauses in RSAs that are indicative of motives beyond the reduction of hold-up frictions.

Figure 10 shows that debtor milestones have become increasingly commonplace in RSAs. We construct two measures of milestones. The first, shown in Figure 10(a), tabulates the fraction of RSAs that mention the term "milestone" at least once. The rapid increase in milestones in the later part of the sample is stark. Before the Great Recession, no RSA mentioned the term "milestone." In 2020, approximately 90% of cases mention the term "milestone." This result should also be interpreted with caution, however, because it may reflect a merely semantic change. That is, prior to 2009, some RSAs contained restrictive deadlines, but did not refer to them using the word "milestone."

Figure 10: Trends in Debtor Milestones

(a) Mentions "milestone" (b) # Times "no later than" Is Mentioned



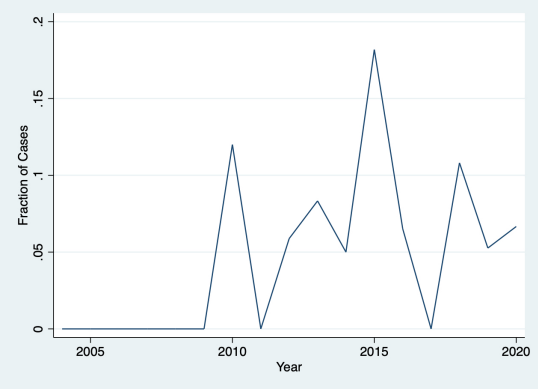
Since our first definition may be under-inclusive of milestones, we calculate as an alternative the average number of times per RSA the phrase "no later than" appears.

Although milestones use a variety of phrases to indicate deadlines,[31] we read a random sample of milestones and identified "no later than" as the most common signaling phrase. Although this measure of milestones is noisy, Figure 10(b) indicates an upward trend over the sample horizon. These results indicate that RSAs have been used increasingly, either in lieu of or in addition to other documents such as DIP agreements, as mechanisms to control timing within Chapter 11.

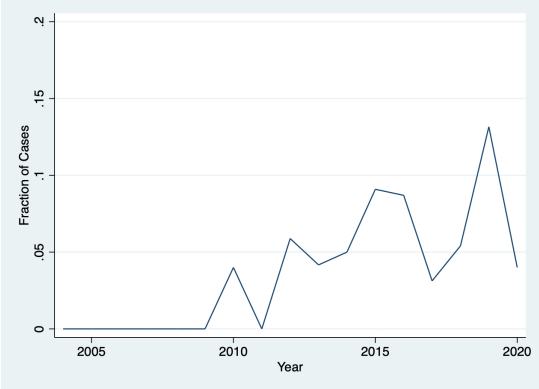
We also search the frequency of third-party releases in RSAs. To do so, we search for variations of the phrase "third party" within a 200-character range of the word "release" as well as within the same paragraph. We identify third-party release clauses in 12% of cases over the full sample period. These clauses have become more common over time, especially from 2018 through 2020. We must interpret these results with some caution, however. Rather than necessarily explaining the terms of the third-party releases that have been negotiated, these clauses are more likely to specify how they interact with RSAs. For example, some clauses seek to make releases severable and unenforceable if the court does not allow them in the plan. Others limit the scope of release opt-outs in the plan. One case provided a fiduciary out with respect to the third-party release.

Figure 11: Other Control Clauses

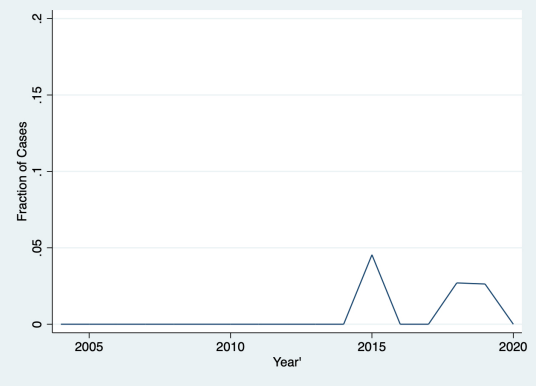
(a) Accept KEIPs/KERPs



(b) Avoid Committee Formation



(c) Inducement Fees



Management incentive plans, also known as Key Employee Incentive/Retention Plans (KEIPs/KERPs) made their way into RSAs in 2010. These clauses are typically

[31] E.g., "within 5 days of Petition Date" or "on or before August 27th, 2019".

covenants by the debtor not to "adopt any new executive compensation or retention plans, approve or pay any executive bonuses, incentive payments, or retention payments" other than those already agreed upon by RSA parties without the express consent of those parties.[32] These clauses may also restrict changes to the Board of Directors or management team of the debtor. On one hand, consenting RSA parties might use these clauses to secure positions of control over the management of the debtor. On the other hand, they may serve as a protective device to keep managers from extracting perquisites once they have locked in the support of key bankruptcy participants.

If RSA parties are motivated by their possession of outsized leverage prior to bankruptcy vis-à-vis other stakeholders, there is little evidence in the actual text of RSAs. The one exception is found in commitment clauses, typically on the part of the debtors, that seek to avoid the formation of statutory committees. Because of § 1102, few RSAs try to preclude the formation of an Official Committee of Unsecured Creditors. We only found evidence of this sort of language in one RSA, and it was associated with a prepackaged plan, where § 1102 is often waived. In most instances, these clauses require parties to object to or withhold support for efforts by third parties seeking orders "directing the appointment of an equity committee, whether pursuant to section 1102(a)(2) of the Bankruptcy Code or otherwise[.]"[33] We have identified anti-committee clauses in 21 RSAs.

Finally, we address the possibility that RSAs use fees to induce parties into signing. We do find evidence of RSA fees but only in three cases, or less than 1% of the sample. These cases were all filed between 2015 and 2019, however, so it is possible that they will become more common in future RSAs. In one instance the fee was specifically an inducement fee, "in consideration of the commitments set forth" in the RSA.[34] In the other two instances, the RSA promised a break-up fee in the event that the agreement was terminated. RSAs do mention fees frequently, but they are usually in connection with other agreements such as DIP financing or asset purchase agreements. Our analysis suggests, however, that fees are rarely tied specifically to the RSA.

VIII. DISCUSSION

Though descriptive, this study allows us to make informed speculations about RSA trends. For example, RSAs more than doubled in length, on average, during the first two decades of the 2000s. A major contributing factor in this increase relates to their complexity. Early RSAs referred only to the plan and restructuring term sheet, invoking few if any defined terms. Modern-day RSAs devote entire subsections to the definitive documents connected to the RSA, including but not limited to management incentive plans, DIP financing agreements, and asset purchase agreements. RSAs have also become longer because parties have been making a greater number of commitments to one another, while at the same time qualifying those commitments and protecting themselves through more extensive termination events. A third contributing factor, however, is the standard "bloat" that contracts accrue as they bring in more provisions to protect parties from litigation risk.

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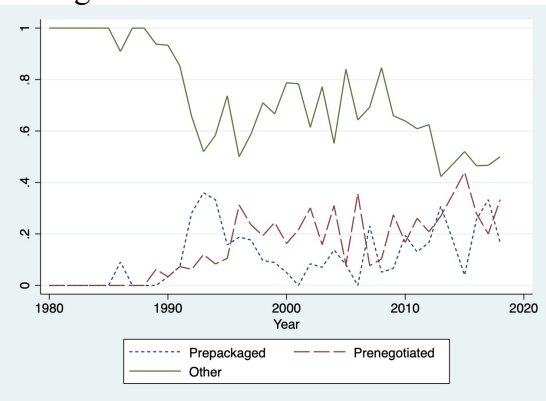
[32] *In re Vitamin Oldco Holdings Inc*, No. 20-BK-11662 CJS (D. Del. Jun. 23, 2020).
[33] *In re Gulfport Energy Corp.*, No. 20-BK-35562 CJS (S.D. Tx. Nov. 13, 2020).
[34] *In re GCX Ltd.*, No. 19-BK-12031 CSS (D. Del. Sep. 15, 2019).

It is still unclear what led to the dramatic rise in the popularity of RSAs in 2010. Between 2005 and 2009, RSAs were present in 22% of all large Chapter 11 cases. Between 2010 and 2014, this percentage more than doubled to 49%. Even though there is some variation year over year, the rolling average remains around 50% in the last decade of the sample.

One possible explanation is that RSAs are primarily useful as mechanism to ensure the success of a prepackaged or prenegotiated plan. After all, Figure 5 shows that over 80% of RSAs are entered into on or before the petition date. Historical data from the LoPucki Bankruptcy Research Database suggest otherwise, however. Prepackaged plans rose to prominence in the early 1990s, followed by prenegotiated plans several years later. Although there was surge in the overall fraction of prepackaged and prenegotiated plans in 2013, a visual inspection of Figure 12 does not suggest any obvious structural break around 2010.

Figure 12: Historical LoPucki Data



We have been unable to identify any major judicial decisions that explain why RSAs rose in popularity around 2010. Judge Walrath issued two bench rulings in 2002 that raised doubts about the enforceability of post-petition RSAs.[35] In 2003, all of the RSAs we were able to find were executed pre-petition, but there was no appreciable decline in either the fraction of post-petition RSA or the fraction of cases with RSAs overall beyond that. In December of 2010, Judge Chapman denied a motion to assume the plan support agreement on the grounds that it was excessively favorable to the major RSA party, Lehman Brothers, Inc. Since it came at the end of the year, however, this decision was more likely a consequence rather than a cause of the uptick in the share of cases with RSAs in 2010. And, although RSAs fell off slightly in 2011, they rebounded the following year. Shortly after, in 2013, Judge Shannon removed doubt about Judge Walrath's earlier opinions by issuing a favorable decision for RSA parties in *Indianapolis Downs*. At that point, however, RSAs were already commonplace, and this decision did not seem to move the needle much.

2010 encompassed bankruptcies from the later part of the Great Recession, raising the possibility that RSAs may be countercyclical. This hypothesis does not hold up when

[35] *In re Stations Holding Co. Inc.*, No. 02-BK-10882 CJS, WL 31947022 (N.D.W.Va. Sep. 30, 2002); *In re NII Holdings, Inc.*, 531 B.R. 61 (Bankr. D. Del 2002).

faced with the data, however. First, the surge in bankruptcies began in 2008, with 2009 representing the peak. In addition, while 2020 was a robust year for RSAs, so too were 2013 and 2016. There is no U-shape in RSA prevalence between 2010 and 2020, as one might expect if RSAs were more common during periods of economic crisis. Finally, Appendix Table B1 suggests that there is no significant correlation between industry shocks and RSA adoption.

While we do not observe any noticeable change in the basic features of RSAs around 2010, some of the control-related commitments started to crop up around that year. 2009 was the first year that the word "milestone" appeared in an RSA, for example, and usage of the term took off after 2012. 2010 was also the first year in which we identified commitments relating to management incentive plans. The same is true for commitments to avoid statutory committee formation. The first dual track or toggle bankruptcies also appeared in 2010, although they never constituted a significant fraction of the sample in any year. Taken as a whole, this evidence supports the possibility that RSAs became popular around the time that market participants developed contractual innovations that expanded the RSA's role beyond simply the mitigation of hold-up frictions to the exercise of control over the debtor. Without knowing more about how plan terms changed, however, this evidence is far from dispositive.

A final possibility we explore is that RSAs rose in frequency as they became more effective tools in delivering successful bankruptcy outcome. Again, the evidence does not seem to square with this hypothesis. 97% of cases with RSAs result in confirmed plans, and the few cases that did not result in confirmed plans were filed in or after 2009. In addition, to the extent that there is a positive association between RSAs and plan outcomes, the association is stronger in so called free-fall bankruptcies rather than prepackaged or prenegotiated plans. Appendix Table B2 shows that correlations between RSAs and either successful restructuring plans or sales are only positive and significant for cases that underwent a full bankruptcy process and were not prenegotiated. Appendix Table B3 shows that the same is true for durations. Of course, the lack of significant results for prepackaged and prenegotiated cases may simply reflect a lack of variation in outcomes – that is, these "quick" cases are almost entirely successful and resolved in a short amount of time. Still, these results raise more questions than they answer. If free-fall bankruptcies with RSAs have been successful, why do we not see more postpetition RSAs? Ironically, it may be that early judicial decisions made bankruptcy participants wary about postpetition RSAs while at the same time allowing prepetition RSAs, which are even further outside the court's view, to proliferate.

IX. CONCLUSION

RSAs have become a regular fixture in large Chapter 11 bankruptcies. Using a dataset of over 400 RSA contracts with labeled sections, we provide a basic description of how they have evolved over time. The most crucial element of the RSA is the commitments section, which lists the covenants that the debtor and each of the consenting RSA parties make to one another. These sections usually contain affirmative covenants to support the plan and negative covenants to avoid interfering with the plan, but may contain more. We also provide statistics on basic features of cases with RSAs such as forum choice, consenting parties, debtor's counsel, and bankruptcy objectives.

One puzzle we seek to address is why RSAs have become longer. The average RSA from 2020 was 2.5 times longer, in characters, than the average RSA filed before 2004. We identify three reasons, the first being that they have become more complex. RSAs now refer to and include defined terms from other contracts such as DIP financing agreements, management incentive plans, and asset purchase agreements, in addition to restructuring plan. The substantive sections of the RSA, i.e., the commitments and termination events sections, have also more than doubled in size. Inevitably, though, part of the lengthening of RSAs is due to the addition of standard contractual features such as litigation shields.

In terms of popularity, 2010 was the year that RSAs exploded onto the scene. We also try to understand the timing of the evolution of RSAs. Their dramatic rise does not seem to coincide with other bankruptcy innovations such as the rise of prepackaged and prenegotiated plans, which occurred nearly two decades prior. Nor does it seem to be explained by changes in the composition of RSA parties, timing of the RSA relative to the petition date, or the firms representing debtors. 2010 coincided with the period around which RSAs started to become control-oriented, however, through the inclusion of milestones, management incentive covenants, and anti-equity-committee covenants. We have found little direct evidence, however, of exploitative terms such as inducement fees and death traps. More research is needed to determine whether the existence of an RSA fundamentally changes the terms of a restructuring plan.

Appendix for RESTRUCTURING SUPPORT AGREEMENTS: AN EMPIRICAL ANALYSIS

APPENDIX A: DATA DESCRIPTION

Appendix Table A1: Variable Definitions

***Variable* or Variable Category**	**Source**	***Search Terms* (All Searches Lower Case) or Search Descriptions**
RSA	Dockets; first-day affidavits; disclosure statements; Bloomberg Law	*restructuring support agreement; plan support agreement, lock-up agreement; lockup agreement; lock up agreement; sale support agreement; rsa; psa*
Industry	NGR, LoPucki, web search	
Assets	NGR, LoPucki, declarations, disclosure statements, operating reports, schedules	
Liabilities	NGR, LoPucki, declarations, disclosure statements, operating reports, schedules	
Employees	NGR, LoPucki, declarations, disclosure statements	
Industry shock	Compustat	
Court (forum)	Case number	
Court (governing law)	RSA	Manual search - entire governing law section
Objective	First-day affidavits	Manual search - see Waldock (2020)
Pre-packaged	First-day affidavits	Manual search - see Waldock (2020)
30-day plan	First-day affidavits, dockets	Manual search - see Waldock (2020)
Milestone (count)	RSA	*no later than*
Milestone (binary)	RSA	*milestone*
Fiduciary out	RSA	*fiduciary out; fiduciary + notwithstanding; fiduciary + out; exercise of its fiduciary; exercise of their fiduciary; inconsistent with its fiduciary; inconsistent with the fiduciary; except as required by the fiduciary*
MAE (uncapitalized)	RSA	Within termination event sections: *material adverse; material disrupt; material change; material economic; material reduction; material part of the business; material event; material modific*
Third-party release	RSA	*release + {third party; third-party}* (within 200 characters or within paragraph)
506(c) charge	RSA	*506(c)*
Structural subordination enforcement	RSA	Manual search for *subordinat* excluding *subordinated note*
Preference waiver	RSA	*preference; waiv + adversary*
Fraudulent conveyance waiver	RSA	*fraudulent conveyance; fraudulent transfer; waiv + adversary*
Objection	Docket	*object* (within first 50 characters) + RSA search terms

APPENDIX B: REGRESSION ANALYSIS

Appendix Table B1: Characteristics of Cases with RSAs

	All Cases [1]	Quick Reorg. [2]	Full Reorg. [3]	Sale Only [4]
Quick	0.290			0.024
	(0.022)***			(0.026)
Industry Shock	-0.066	-0.000	-0.020	0.019
	(0.039)	(0.049)	(0.053)	(0.091)
ln(Assets)	0.055	0.014	0.044	0.008
	(0.020)**	(0.015)	(0.039)	(0.021)
ln(Sales)	0.008	0.025	0.013	0.000
	(0.007)	(0.017)	(0.002)***	(0.010)
ln(Employees)	0.020	0.010	0.008	0.014
	(0.010)*	(0.015)	(0.014)	(0.006)**
Leverage	0.017	0.049	0.036	0.011
	(0.005)**	(0.017)**	(0.025)	(0.010)
Forum: DE	0.021	-0.018	0.071	0.028
	(0.019)	(0.058)	(0.034)*	(0.036)
Forum: NYS	0.129	0.057	0.080	0.059
	(0.023)***	(0.066)	(0.038)*	(0.025)**
2004-2007	-0.236	-0.298	-0.278	-0.103
	(0.017)***	(0.080)***	(0.062)***	(0.034)**
2008-2010	-0.156	-0.198	-0.196	-0.083
	(0.045)***	(0.038)***	(0.081)**	(0.105)
2011-2014	-0.057	-0.033	0.022	0.024
	(0.031)	(0.029)	(0.081)	(0.045)
Transportation	0.048	0.162	0.124	-0.076
	(0.090)	(0.156)	(0.015)	(0.040)*
Energy	0.184	0.180	0.049	0.121
	(0.069)**	(0.090)*	(0.109)	(0.083)
Entertainment	0.064	-0.120	0.173	-0.000
	(0.073)	(0.213)	(0.131)	(0.109)
Food	-0.018	-0.045	0.041	-0.031
	(0.050)	(0.156)	(0.064)	(0.025)
Manufacturing	-0.012	0.157	-0.083	-0.019
	(0.055)	(0.076)*	(0.085)	(0.122)
Publishing	0.156	0.103	0.045	0.0020
	(0.038)***	(0.064)	(0.164)	(0.044)
Materials	0.092	0.177	0.063	0.020
	(0.055)	(0.117)	(0.068)	(0.062)
Retail	-0.102	-0.091	-0.083	-0.022
	(0.055)*	(0.054)	(0.116)	(0.026)
Technology	0.145	0.227	0.096	0.010
	(0.077)*	(0.076)**	(0.118)	(0.048)
Observations	772	212	316	244
Dep. Var. = 1 (Count)	289	175	85	29
R^2	0.239	0.195	0.192	0. 058

Sample period begins in 2004 and extends through 2017.

Appendix Table B2: Success of Outcomes

	Quick Reorg.	Full Reorg.	Quick Sale	Full Sale
	[1]	[2]	[3]	[4]
RSA	0.042	0.197	-0.126	0.361
	(0.039)	(0.030)***	(0.021)***	(0.040)***
Industry Shock	-0.123	-0.040	0.103	0.014
	(0.037)**	(0.031)	(0.033)**	(0.075)
ln(Assets)	-0.015	0.061	-0.008	0.046
	(0.027)	(0.016)***	(0.014)	(0.030)
ln(Sales)	0.021	0.025	0.020	-0.028
	(0.020)	(0.009)**	(0.014)	(0.008)***
ln(Employees)	-0.002	-0.019	0.001	0.029
	(0.009)	(0.0120	(0.008)	(0.024)
Leverage	-0.010	0.027	-0.015	0.030
	(0.026)	(0.021)	(0.030)	(0.015)*
Forum: DE	0.030	-0.027	0.069	0.057
	(0.024)	(0.054)	(0.064)	(0.044)
Forum: NYS	0.008	0.022	0.128	0.038
	(0.022)	(0.054)	(0.069)	(0.028)
Time Period FEs	Y	Y	Y	Y
Industry FEs	Y	Y	Y	Y
Observations	212	316	126	90
Dep. Var. = 1 (Count)	206	198	109	73
R2	0.217	0.457	0.122	0.352

Sample period begins in 2004 and extends through 2017.

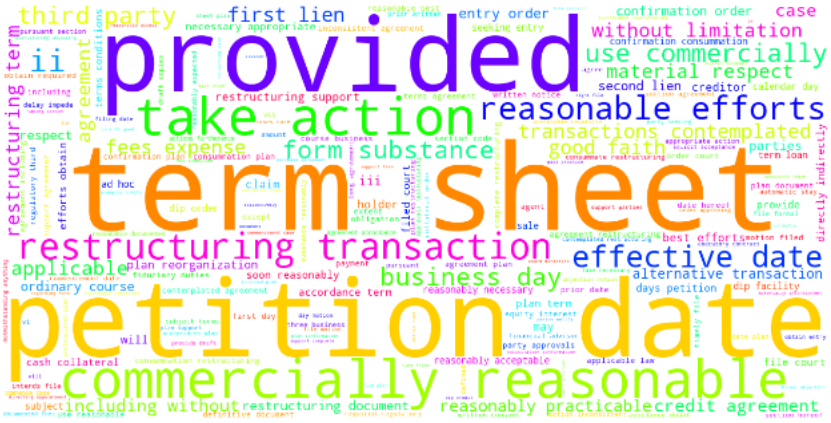
Appendix Table B3: Reorganization Durations

	Pre-Pack. Days to Confirm [1]	30-Day Reorg. Days to Confirm [2]	Full Reorg. Days to 1st Plan [3]
RSA	-10.3	-82.7	-99.4
	(6.2)	(38.3)*	(36.7)**
Industry Shock	-2.5	96.6	-17.2
	(1.2)*	(35.6)**	(28.1)
ln(Assets)	-4.7	58.4	37.3
	(3.8)	(5.8)***	(16.8)*
ln(Sales)	0.1	-22.2	-2.6
	(2.9)	(13.1)	(4.7)
ln(Employees)	0.6	-1.6	1.1
	(1.1)	(4.2)	(7.1)
Leverage	-2.9	32.6	-8.6
	(0.8)**	(25.6)	(12.1)
Forum: DE	11.8	-13.8	-43.8
	(4.7)**	(21.0)	(33.4)
Forum: NYS	7.1	-30.2	-23.3
	(5.8)	(17.2)	(35.1)
Time Period FEs	Y	Y	Y
Industry FEs	Y	Y	Y
Observations	105	105	287
Dep. Var. Mean	45.6	168.7	346.8
R^2	0.239	0.322	0.256

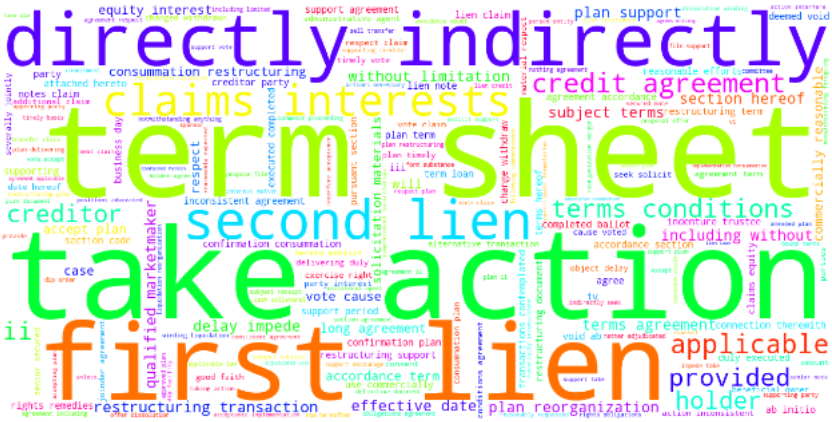
Sample period begins in 2004 and extends through 2017.

APPENDIX C: ADDITIONAL FIGURES

Appendix Figure C1: Word Clouds



(a) Debtor Commitments



(b) Creditor Commitments