

V The Bankruptcy Attorneys

In a large chapter 11 case, the single biggest source of costs are the bankruptcy attorneys, or, more precisely, their law firms. The lead debtor’s counsel is the key actor in the case, coordinating the work of all other debtor professionals while also handling the core legal work of the case.¹⁵⁹ The lead committee’s counsel plays a similar role with regard to the unsecured creditors, and the two law firms together contribute to the overall cost of a case to such a degree that they warrant separate consideration. Because committees, and lead and local counsel, are issues primarily in big case, this chapter focuses solely on the big case dataset.

A. MEASURING THE ROLE OF LEAD ATTORNEYS

In the United States, bankruptcy counsel often comes as a pair of law firms. This is because lawyers are licensed on a state-by-state basis, and large corporate debtors often hire bankruptcy counsel from a city other than where their case will be filed. The most well-known example of this involves cases filed in Delaware by law firms headquartered in one of the three largest cities in the United States.¹⁶⁰ In such a case the debtor would also have to hire “local counsel,” that is a law firm based in Delaware.¹⁶¹

Table 13A shows the breakdown between these two costs for debtor’s counsel. The number of “local counsel” entries is substantially smaller than lead counsel, because all cases must have lead debtor’s counsel, but not all cases need have local counsel. For example, a case filed in San Francisco by a California law firm, even one located 500 miles (800 km) away in San Diego, will not have local counsel.

¹⁵⁹ As used in this chapter, lead counsel is typically a law firm, rather than any individual lawyer.

¹⁶⁰ New York, Los Angeles and Chicago, respectively.

¹⁶¹ One notable exception involves Skadden, Arps, a large New York-based law firm with an office in Wilmington, Delaware. The Delaware office of the firm acts as the firm’s “local counsel.” Skadden, Arps is among the three leading debtor law firms in the United States – a group that also includes Weil, Gotshal and Kirkland & Ellis. Stephen J. Lubben, *Choosing Corporate Bankruptcy Counsel*, 12 AM. BANKR. INST. L. REV. 391 (2006).

Table 13A: Cost of Debtor’s Bankruptcy Counsel

| | <i>Obs</i> | <i>Mean</i> | <i>Std. Dev.</i> | <i>Median</i> | <i>Min</i> | <i>Max</i> |
|--|------------|----------------|------------------|----------------|-------------|-----------------|
| Debtor’s counsel (total) | 91 | \$2,809,579.00 | \$6,315,713.00 | \$1,194,498.00 | \$29,698.79 | \$55,100,000.00 |
| Debtor’s counsel (lead) | 91 | \$2,540,013.00 | \$5,657,659.00 | \$1,056,852.00 | \$29,698.79 | \$49,300,000.00 |
| Debtor’s counsel (lead) -- no prepacks | 87 | \$2,637,200.00 | \$5,768,915.00 | \$1,094,877.00 | \$29,698.79 | \$49,300,000.00 |
| Debtor’s counsel (local) | 31 | \$791,305.70 | \$1,237,460.00 | \$444,687.60 | \$10,076.50 | \$5,801,208.00 |

As shown on the Table, the bulk of debtor’s counsel cost comes from the lead debtor’s counsel, which is to be expected. Local counsel is primarily tasked with reviewing pleading generated by lead counsel for compliance with local law. I include lead counsel both with and without the prepackaged cases in the sample, to consider the effects of any time-shifting of fees into the pre-bankruptcy period in the prepackaged cases. Table 13A shows the effects of this by comparing lead debtor’s counsel costs for prepackaged cases against the traditional cases. Although the number of prepackaged cases is very small, the difference is significant ($p=0.0006$). These results suggest the need to account for this factor in subsequent models.

Table 13B: Lead Debtor’s Counsel Costs by Case Type

| | <i>Obs</i> | <i>Mean</i> | <i>Std. Err.</i> | <i>Std. Dev.</i> | <i>[95% Conf. Interval]</i> |
|-------------|------------|----------------|------------------|------------------|-------------------------------|
| Prepackaged | 4 | \$426,205.10 | \$32,214.08 | \$64,428.16 | \$323,685.50 \$528,724.60 |
| Traditional | 87 | \$2,637,200.00 | \$618,492.60 | \$5,768,915.00 | \$1,407,677.00 \$3,866,722.00 |
| Combined | 91 | \$2,540,013.00 | \$593,083.80 | \$5,657,659.00 | \$1,361,749.00 \$3,718,278.00 |

Committee counsel fees present the same issue of lead and local counsel, with the additional wrinkle that a case may have more than one committee. Prepackaged cases play less of a role here, because committees are frequently “unofficial” in prepackaged cases, preferring to be paid before the case is filed and thus avoid court oversight. Table 14 presents the lead and local counsel information for the cases in the dataset, along with the specific information for the creditor’s committee in the case.¹⁶² The difference between these figures and the overall figures represents the effects of additional committees, such as those representing equity, employees, trade creditors or subordinated bondholders. Average lead debtor’s counsel is about twice lead committee’s counsel, although there are obviously

¹⁶² There are two fewer creditors committees than cases with committees, as two cases had “unofficial” or “ad hoc” bondholders committees along with official equity committees. That is, two cases had some form of committee, but not an official committee of unsecured creditors.

some cases without committees.¹⁶³ This somewhat conflicts with Lynn LoPucki's findings that debtor lead attorneys earned four times as much as lead creditor's counsel, based on a non-random sample of 74 chapter 11 cases filed just before the cases in this study, that is, between 1998 and 2003.¹⁶⁴

Table 14: Cost of Committee Bankruptcy Counsel

| | <i>Obs</i> | <i>Mean</i> | <i>Std. Dev.</i> | <i>Median</i> | <i>Min</i> | <i>Max</i> |
|--|------------|----------------|------------------|---------------|-------------|----------------|
| Committee counsel (total) | 72 | \$1,288,754.00 | \$1,584,375.00 | \$630,421.30 | \$17,054.65 | \$9,050,715.00 |
| Committee counsel (lead) | 72 | \$1,195,763.00 | \$1,544,186.00 | \$606,360.80 | \$17,054.65 | \$8,999,914.00 |
| Unsecured creditors committee only (lead) | 70 | \$1,104,953.00 | \$1,423,621.00 | \$606,360.80 | \$17,054.65 | \$8,999,914.00 |
| Committee counsel (local) | 24 | \$278,974.90 | \$304,506.50 | \$126,228.30 | \$9,180.89 | \$1,050,523.00 |
| Unsecured creditors committee only (local) | 23 | \$245,429.40 | \$262,114.50 | \$82,761.41 | \$9,180.89 | \$1,008,527.00 |

Here we see that lead counsel for the primary creditors' committee is the most substantial piece of committee counsel costs, and between the two tables it is apparent that lead counsel is the biggest overall component of bankruptcy counsel costs. The table also indicates that the first committee – the unsecured creditors committee – is the primary committee-related expense, there being but a slight difference between the average lead counsel cost for this committee and all committees.

The relationship between these costs and the overall cost of chapter 11 is illustrated in Figure 15.¹⁶⁵ In the broader universe of cases with committees, whether or not there is local counsel, debtor and committee counsel combine to account for almost half of the total cost of a chapter 11 case. It is also clear that lead counsel for both debtor and committee is the predominant source of counsel-related expense.

¹⁶³ Debtor's counsel costs are 2.7 times committee counsel costs if the analysis is limited to those cases with committees.

¹⁶⁴ Lynn M. LoPucki & Joseph W. Doherty, *Rise of the Financial Advisors: An Empirical Study of the Division of Professional Fees in Large Bankruptcies*, 82 AM. BANKR. L. J. 141 (2008) [hereinafter, "LoPucki (2008)"].

¹⁶⁵ Note that prepackaged cases are excluded from this graph.

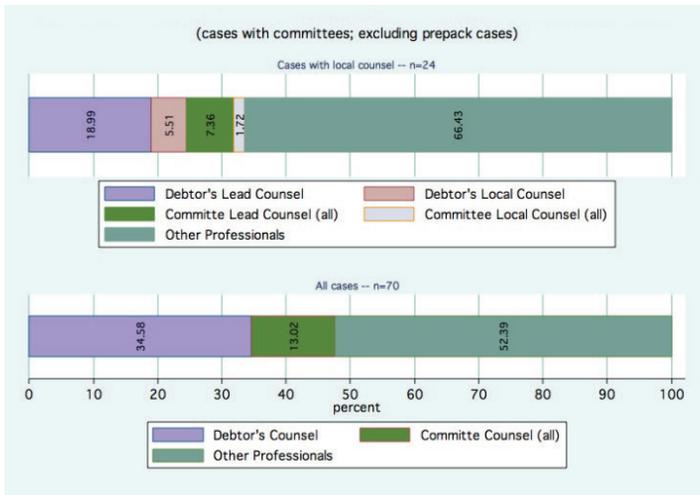


Figure 15: Mean Counsel Costs as Portion of Overall Cost

Figure 16 shows the national market that exists for lead bankruptcy counsel. While Delaware is often the focus of this discussion, the chart makes clear that debtors often file chapter 11 cases with the assistance of out of state counsel and Delaware is just the most publicized example of a larger phenomenon. Not surprisingly, New York law firms are the most likely to work on out of state matters, but firms from other cities, big and small, also show a willingness to cross state lines.¹⁶⁶ Combined with law firms from geographically large states like California and Texas, who seem to practice in judicial districts outside their own¹⁶⁷ – like Los Angeles law firms filing cases in the Northern District of California – this Figure shows that big corporate debtors can consider a broad range of law firms when approaching chapter 11.

As with general studies of chapter 11 costs, counsel costs show evidence of economies of scale. Table 17 shows that the very largest cases incurred much lower counsel costs as a percentage of overall size.¹⁶⁸

¹⁶⁶ The “home city” data in Figure 16 comes from the first three digits of the ZIP code found on the law firms’ retention application. <http://pe.usps.com/text/dmm300/L002.htm>.

¹⁶⁷ By way of comparison, California and Texas each comprise more than 150,000 square miles (more than 241,000 sq. km), whereas Poland is about 120,000 square miles. (more than 193,000 sq. km). Texas is geographically larger than any nation in the EU, and California is larger than any EU country save France.

¹⁶⁸ The number of observations on this table differ from earlier tables because of missing debtor size data.

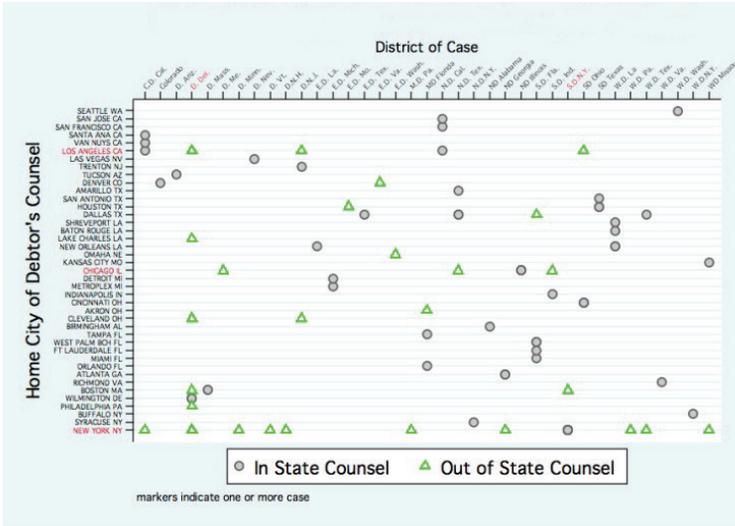


Figure 16: Case location vs. Counsel Location

Table 17: Standardized Counsel Costs by Size Quartiles

| | Mean | Std. Err. | [95% Conf. | Interval] |
|---|-------|-----------|------------|-----------|
| Debtor counsel over size (n=89) | | | | |
| (smallest) 1 | 0.049 | 0.013 | 0.023 | 0.074 |
| 2 | 0.037 | 0.006 | 0.024 | 0.049 |
| 3 | 0.010 | 0.001 | 0.007 | 0.013 |
| 4 | 0.008 | 0.003 | 0.002 | 0.014 |
| Lead debtor counsel over size (n=89) | | | | |
| (smallest) 1 | 0.048 | 0.013 | 0.022 | 0.074 |
| 2 | 0.034 | 0.006 | 0.022 | 0.045 |
| 3 | 0.009 | 0.001 | 0.006 | 0.012 |
| 4 | 0.007 | 0.003 | 0.002 | 0.013 |
| Committee counsel over size (n=69) | | | | |
| (smallest) 1 | 0.029 | 0.008 | 0.013 | 0.044 |
| 2 | 0.015 | 0.002 | 0.010 | 0.020 |
| 3 | 0.005 | 0.001 | 0.003 | 0.007 |
| 4 | 0.003 | 0.001 | 0.001 | 0.005 |
| Lead committee counsel over size (1st comm.) (n=69) | | | | |
| (smallest) 1 | 0.028 | 0.007 | 0.013 | 0.043 |
| 2 | 0.014 | 0.002 | 0.010 | 0.019 |
| 3 | 0.005 | 0.001 | 0.003 | 0.006 |
| 4 | 0.003 | 0.001 | 0.001 | 0.005 |

B. MODELING THE COST OF DEBTOR ATTORNEYS

Given the apparent scale relationship between bankruptcy counsel costs and debtor size, a regression model offers the most accurate way to estimate the expected amount that a debtor will pay to bankruptcy attorneys during a chapter 11 case. I begin by modeling the cost of debtor's lead counsel, the biggest single piece of counsel costs, before looking at committee costs.

Save for Lubben (2008), which offered some basic descriptive statistics on the breakdown of counsel costs, LoPucki (2008) is the only prior study to consider counsel costs distinct from overall chapter 11 costs. LoPucki and his co-author studied 74 debtors, all of which were publicly traded companies that filed between 1998 and 2003. They used the following factors in their model, which explained 83% of the variance in lead debtor's counsel costs for the cases in their sample:

Size (natural log of assets)

Time (natural log of days in chapter 11)

Number of debtor law firms (natural log)

Whether the case was filed in New York or Delaware (two dummy variables)

A trend variable (to capture the multi-year nature of the sample)

Whether the lead debtor's counsel was Skadden, Arps¹⁶⁹

The authors found that size, time, and the presence of Skadden, Arps were all positively related to the cost of the debtor's lead bankruptcy attorneys ($p < 0.01$). The number of law firms was significant only when measured at a lower standard ($p = 0.10$). They concluded "Skadden Arps representation cost more in these cases because Skadden, Arps billed more hours."

I begin by testing this model with my dataset. I omit the trend variable, which is inapplicable as all of the cases in my dataset were filed in 2004. Number of law firms is modeled by a dummy that indicates if the case had local counsel.¹⁷⁰ The results appear on Table 18.

Size, time and Skadden, Arps are the significant factors in this model. The overall R-squared is relatively low, suggesting that either the broader nature of the present dataset, including both public and private companies, or the difference in years studied limit the generalizability of the LoPucki model.

¹⁶⁹ Skadden, Arps, Slate, Meagher & Flom LLP, a large New York based corporate law firm. <http://www.skadden.com/> The author was employed by this firm before entering academia in 2002.

¹⁷⁰ This is slightly under inclusive of what is modeled in LoPucki (2008), since their variable also included foreign bankruptcy attorneys paid out of the U.S. bankruptcy estate. For example, if the debtor filed a parallel proceeding in Canada, and paid the professionals out of the United States entity, this would have been included. In my dataset, these professionals would appear as "additional professionals."

Table 18: LoPucki Model of Lead Debtor's Counsel Costs (Big Case Dataset)

| | (1) <i>Log of debtor lead bankruptcy counsel costs</i> |
|---|---|
| Log of debtor size | 0.408*** (0.110) |
| Log of days in chapter 11 | 0.430* (0.191) |
| Local counsel in this case | 0.180 (0.143) |
| Delaware case | -0.0719 (0.132) |
| Case from SDNY | 0.223 (0.145) |
| Lead debtor's counsel was Skadden, Arps | 0.414* (0.160) |
| Constant | 1.529 (1.185) |
| Observations | 89 |
| R ² | 0.505 |

Robust standard errors in parentheses; based on Model III, Figure 6 of LoPucki (2008)

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Thus on Table 19 I begin to develop my own model. In the first model I consider the bivariate relationship between debtor size and lead counsel cost. Theory would suggest that this relationship should be positive, but it should also diminish in importance as the model becomes more specific.

In the second model I enter variables that capture case conditions that require the debtor's lead counsel to interact with other professionals in the case, possibly increasing costs. In particular I include dummy variables to indicate if a committee was appointed and if the debtor retained several (three) additional professionals other than lead and local bankruptcy counsel. Appointment of an examiner is also included in this model. At this stage I also include a dummy variable that indicates whether the case is prepackaged, since the model only considers post-petition fees, which suggests that pre-petition cases should appear to incur lower attorneys' fees. The first three variables should be positively associated with cost, while the prepackaged case variable should be inversely related to cost.

In the next model I introduce the use of an ordinary course professional (OCP) system and a claims agent as indicators of case complexity. These variables should be positively related to counsel costs. The OCP system variable not only captures complexity itself, but also the reality that the administration of an OCP system typically falls on the lead debtor's counsel.

In the fourth model I consider the direct effect of the lead counsel's hourly rates by adding the highest hourly rate charged by debtor's lead counsel. This variable not only captures the obvious effect of this top rate, but also indicates the

overall scale of bankruptcy counsel's rate structure. This variable should have a positive relationship with cost.

The fifth model examines new factors that might specifically influence lead debtor's counsel cost. First I input a dummy variable that captures if the debtor's lead counsel was from out of state, relative to the district where the case was filed. This not only captures the information contained in the "local counsel" variable used in connection with the LoPucki model, but it also captures situations where an out of state law firm was able to file without local counsel because at least one member of the firm was admitted to the bar of the state where the case was filed. Out of state location should be associated, at the very least, with higher travel expense, and thus I hypothesize that this variable should have a positive effect on cost. Next I input a variable that indicates if the debtor's lead law firm was headquartered in New York, reflecting the common belief that New York law firms are more expensive than firms from other cities.

Given that Figure 16 has already shown that New York firms often work out of state, I also include an interaction term to indicate the joint effect of a New York firm working out of state. The common perception of New York law firms suggests that both of these variables should have a positive coefficient. On the other hand, these same firms are likely to be amongst the most experienced, which may point the other direction. LoPucki (2008) did not find any effect from retaining New York counsel or out of state counsel.

The final model replaces these three variables with the two variables that were significant in the LoPucki model on Table 18 – namely, retention of Skadden and time spent in chapter 11. Rather than an extension of the prior model, this is instead an alternative model that allows for some consideration of the robustness of the key results shown on Table 19.

The immediate take-away from Table 19 is that neither the LoPucki factors nor the out of state and New York factors add much to this model, in terms increasing the amount of variance explained. Either Model 5 or 6 is but a slight improvement from Model 4, which explains almost 77% of the total variance in costs of lead debtor's counsel. Importantly, the claims made in LoPucki (2008) regarding Skadden, Arps are not born out in a more completely specified model, suggesting that the Skadden variable was acting as a proxy for case complexity or other factors on Table 18.

The keys to explaining the costs associated with lead debtor's counsel appear to be factors that increase the number of professionals counsel has to interact with (appointment of an examiner, retention of additional professionals, use of an OCP motion) and the rate structure, with the top hourly rate positively associated with cost.

Table 19: Models of Lead Debtor’s Counsel Costs (Big Case Dataset)

| | (1) <i>Log of debtor lead bankruptcy counsel costs</i> | (2) <i>Log of debtor lead bankruptcy counsel costs</i> | (3) <i>Log of debtor lead bankruptcy counsel costs</i> | (4) <i>Log of debtor lead bankruptcy counsel costs</i> | (5) <i>Log of debtor lead bankruptcy counsel costs</i> | (6) <i>Log of debtor lead bankruptcy counsel costs</i> |
|--------------------|---|---|---|---|---|---|
| Log of debtor size | 0.437*** (0.0959) | 0.379*** (0.0916) | 0.253* (0.0982) | 0.178 (0.0974) | 0.181 (0.102) | 0.178 (0.109) |
| 3+ Professionals | | 0.429** (0.132) | 0.381*** (0.0965) | 0.385*** (0.0817) | 0.390*** (0.0882) | 0.360*** (0.0980) |
| Official comm | | 0.329* (0.139) | 0.193 (0.146) | 0.226 (0.131) | 0.229 (0.145) | 0.183 (0.133) |
| Examiner | | 0.507*** (0.0877) | 0.586** (0.172) | 0.497** (0.157) | 0.539** (0.172) | 0.466* (0.183) |
| Pre-packaged | | -0.375 (0.235) | -0.478* (0.223) | -0.558* (0.239) | -0.569* (0.247) | -0.445 (0.288) |
| Claims agent | | | 0.295* (0.116) | 0.0588 (0.0829) | 0.0499 (0.0799) | 0.0791 (0.0985) |
| OCP motion | | | 0.339** (0.104) | 0.245** (0.0856) | 0.238** (0.0863) | 0.247** (0.0895) |
| Top hourly rate | | | | 0.00130** (0.000359) | 0.00134** (0.000392) | 0.00126** (0.000391) |
| Out of state firm | | | | | 0.0187 (0.110) | |
| New York firm | | | | | 0.0396 (0.0864) | |
| NY & out of state | | | | | -0.125 (0.169) | |
| Log days in ch. 11 | | | | | | 0.135 (0.189) |
| Skadden retained | | | | | | 0.118 (0.181) |
| Constant | 2.490** (0.745) | 2.419*** (0.629) | 3.276*** (0.639) | 3.276*** (0.550) | 3.235*** (0.581) | 2.992** (0.910) |
| Observations | 83 | 83 | 83 | 83 | 83 | 83 |
| R2 | 0.380 | 0.616*** | 0.716** | 0.767*** | 0.769 | 0.772 |

Robust standard errors in parentheses; *se* adjusted for clustering by district; mean VIF (Model 5) 2.03, (Model 6) 1.71

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

As predicted, debtor size declines in importance as the models become more fully specified – in Model 4 debtor size is no longer significant ($p=0.053$).

Table 20 then examines the models developed in connection with debtor’s lead counsel in connection with the overall cost of debtor’s counsel – that is, lead and local counsel combined.

Table 20: Models of Total Debtor’s Counsel Costs (Big Case Dataset)

| | (1) <i>Log of lead and local debtor's counsel costs</i> | (2) <i>Log of lead and local debtor's counsel costs</i> |
|-----------------------|--|--|
| Log of debtor size | 0.184 (0.0987) | 0.176 (0.102) |
| 3+ professionals | 0.368*** (0.0813) | 0.381*** (0.0893) |
| Official committee | 0.227 (0.130) | 0.227 (0.143) |
| Examiner | 0.502** (0.168) | 0.532** (0.184) |
| Pre-packaged case | -0.570* (0.246) | -0.570* (0.241) |
| Claims agent | 0.0795 (0.0782) | 0.0554 (0.0750) |
| OCP motion | 0.269** (0.0757) | 0.259** (0.0731) |
| Top hourly rate | 0.00133*** (0.000361) | 0.00135** (0.000386) |
| Out of state law firm | | 0.106 (0.101) |
| New York law firm | | 0.0254 (0.0838) |
| NY and out of state | | -0.149 (0.161) |
| Constant | 3.241*** (0.555) | 3.270*** (0.581) |
| Observations | 83 | 83 |
| R ² | 0.784 | 0.788 |

Robust standard errors in parentheses; se adjusted for clustering by district; mean VIF (model 2) = 2.03
 * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Again we see that New York firms and out of state law firms contribute very little to understanding the overall cost of a debtor’s bankruptcy attorneys.¹⁷¹ Instead the key factors are those that increase the number of parties counsel has to communicate with and the rate structure of the lead law firm.

¹⁷¹ In a third model, which I don’t show, I examined the retention of Skadden, Arps. The variable was not significant ($p=0.573$) and the model little changed (R -squared = 0.79).

C. MODELING THE COST OF COMMITTEE ATTORNEYS

The costs of committee counsel should involve somewhat different factors, inasmuch as committee counsel is conditional on the existence of debtor counsel. And the variables that measure the number of additional parties to the case should have less influence here, as the committee is typically not the central party to these interactions.

Modeling committee counsel costs also presents a special challenge because there can be multiple committees within a single case, but the declining number of committees after the first does not leave sufficient numbers for separate analysis. To address this problem, I focus my efforts on lead counsel for the first committee appointed in the cases

This section represents the first effort to model committee counsel fees, as LoPucki (2008) focused solely on debtor-retained attorneys.

Model 1 on Table 20 begins with some basic factors taken from the prior debtor counsel models. Debtor size and a proxy for complexity, appointment of a claims agent, are entered at this point. Both should be positively related to the cost of lead committee counsel. I do not use OCP motions in this model, because the effects of such motions should be felt on the debtor side of the case. As will be seen, neither variable is ultimately significant.

In Model 2, I account for the hourly rate structure of lead committee counsel by including the lead law firm's highest hourly rate. This variable should also be positively related to cost. This variable is significant in both Models 2 and 3.

In the third model I consider the parties that committee counsel might have to interact with, beyond the debtor. In particular, I enter variables that indicate if there is an additional committee, if there is a financial advisor in the case (retained by any party to the case),¹⁷² and if there is an examiner. All should positively relate to cost, and all are ultimately significant in Model 3.

In the fourth and final model I examine the idea that committee counsel costs might be largely incurred in reaction to debtor counsel costs. The more active debtor's counsel is in the case, the more the committee's counsel will expend effort in monitoring and engaging with that activity. Thus, I include the log of the total fees incurred by debtor's counsel, including both lead and local counsel.¹⁷³ The variable is positive and significant ($p < 0.001$).

¹⁷² Financial advisors are used here in place of the "additional professional" variable used with regard to debtor's attorneys, as some of the additional professionals may not work on bankruptcy matters, and thus would have no reason to interact with the committee.

¹⁷³ The potential reverse causation problems are discussed, *infra* Table 22.

Table 21: Models of Total Committee Counsel Costs (Big Case Dataset)

| | (1) | (2) | (3) | (4) |
|-----------------|--|--|--|--|
| | <i>Log of total committee lead bankruptcy counsel costs (first comm)</i> |
| Log debtor size | 0.245 (0.127) | 0.154 (0.120) | 0.00576 (0.0976) | -0.0175 (0.0414) |
| Claims agent | 0.371 (0.187) | 0.202 (0.159) | 0.106 (0.117) | -0.0727 (0.103) |
| Highest rate | | 0.00145** (0.000408) | 0.00169*** (0.000361) | 0.000983* (0.000376) |
| 2d Committee | | | 0.322* (0.138) | -0.0450 (0.154) |
| F. advisor | | | 0.369** (0.124) | 0.0873 (0.102) |
| Examiner | | | 0.582*** (0.139) | 0.305 (0.191) |
| Log D. counsel | | | | 0.656*** (0.117) |
| Constant | 3.556*** (0.939) | 3.577*** (0.798) | 4.323*** (0.642) | 1.261 (0.715) |
| Observations | 61 | 61 | 61 | 61 |
| R2 | 0.364 | 0.489*** | 0.662*** | 0.814*** |

Robust standard errors in parentheses; se adjusted for clustering by district; mean VIF (model 4) = 1.88

** p < 0.05, ** p < 0.01, *** p < 0.001*

Consistent with the theory that committee counsel costs are highly influenced by the debtor and its counsel’s actions, Model 4 shows that debtor counsel fees are the most important factor in predicting lead committee counsel fees. Rate structure, represented by the highest hourly rate, is the only other significant factor in this model. Indeed, a model comprised of only these two independent variables (not shown) achieves an R-squared of 76.44%.

But there is an obvious reverse causality issue in the final model. Namely, it seems equally plausible – perhaps even more plausible, for a former debtor’s attorney like myself – that it might be committee counsel costs that are driving debtor’s counsel costs. Committee counsel might act as a kind of “back seat driver,” causing debtor’s counsel to expend extra effort. Indeed, my models of debtor counsel cost were based on a subtler version of this argument, when I included appointment of a committee as a factor that would increase the number of parties counsel must interact with. And if this is not a pure case of reverse causality, there might well be at least some degree of feedback, so that the debtor and committee counsel become self-reinforcing. If either of these factors are at play, the conclusions drawn from Model 4 must be considered with care.

To examine this specific issue, I revisit Model 4 on table 21, replacing the debtor counsel fee variable with the log of the bankruptcy-related fees paid before commencement of the case, as reported on the debtor’s statement of financial affairs (SOFA). Since the committee is not appointed until after the case is filed, these pre-bankruptcy fees are not influenced by the actions of the committee counsel, yet the pre-bankruptcy and debtor counsel cost variables are highly correlated (0.7246). In short, pre-bankruptcy fees act as a proxy for debtor counsel fees, without the interpretive conundrum.

But the combined effect of cases without committees and cases with missing SOFAs leaves but 39 cases, a very small number to work with in a multivariate regression. To overcome this problem I impute the missing values for this variable. I use the ICE module for Stata.¹⁷⁴ This software creates multiple imputed datasets for a dataset with missing values – in this case I created 15 datasets with values imputed for missing values. The imputations are created using a Bayesian approach, based on the information available in the dataset and are created to retain the covariance structure of the sample, while taking advantage of the most information possible. For comparative purposes, the non-imputed version of the same model is shown in the shaded column on Table 22.

Table 22: Imputed Model of Total Committee Counsel Costs

| | (1) <i>Log of total committee lead bankruptcy counsel costs (first comm)</i> | <i>No imputed data</i> |
|---------------------------|---|----------------------------|
| Log of debtor size | 0.00508 (0.0993) | -0.0531 (0.146) |
| Claims agent | 0.112 (0.123) | 0.0659 (0.190) |
| Highest hourly rate | 0.00169*** (0.000375) | 0.00158* (0.000733) |
| 2d committee | 0.318 (0.156) | 0.348 (0.185) |
| Financial advisor | 0.366** (0.129) | 0.218 (0.228) |
| Examiner | 0.586*** (0.140) | 0.290*** (0.0686) |
| Log, pre-bankruptcy costs | 0.00000686 (0.0466) | 0.0964 (0.189) |
| Constant | 4.331*** (0.656) | 4.438*** (0.821) |
| Observations | 62 | 39 |
| R2 | 0.664 | 0.622 |

Robust standard errors in parentheses; se adjusted for clustering by district; Mean VIF 1.44

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

174 Patrick Royston, *Multiple Imputation Of Missing Values: Update Of ICE*, 15 STATA J. 527 (2005).

This method does not attempt to estimate the exact values that are missing but instead to provide a less biased information matrix than would occur from deleting cases with any missing data through listwise deletion. Creating several imputed datasets and combining the results of the analysis with each set is considered one of the best approaches to handling missing data, and far superior to single imputation methods that artificially reduce standard errors and increase the risk of falsely concluding a significant association when none exists.¹⁷⁵

Table 22 displays the results, and strongly suggests that costs flow in the opposite direction as hypothesized in connection with Table 21. Namely since the pre-bankruptcy cost variable is not significant, Table 22 suggests that it is committee counsel that is driving debtor counsel costs. The debtor reacts to the committee.

Accordingly, Model 4 on Table 21 should be discarded and Model 3 viewed as the better method of estimating committee counsel costs. Accordingly, counsel's top hourly rate and measure of the number of parties that the committee interacts with are the key determinants of committee counsel costs. Notably, debtor size is again not a significant determinant.

Summary

Counsel costs are the most significant single component of overall chapter 11 costs, making up almost half of the total cost of a chapter 11 case.

Importantly, bankruptcy counsel for large debtors compete in a nationwide market in the United States. While Delaware is often the focus of this discussion, the chapter makes clear that debtors often file chapter 11 cases with the assistance of out of state counsel and Delaware is just the most publicized example of a larger phenomenon.

The regression models in this chapter show that the key factor in counsel costs is the size of the web of parties engaged in a chapter 11 case. The debtor's lead bankruptcy counsel stands in the middle of this web, and the more parties they have to interact with the greater the amount the debtor will have to pay to attorneys in its case. Committee counsel can particularly influence the size of debtor counsel costs.

175 J. L. Schafer & J.W. Graham, *Missing Data: Our View Of The State Of The Art*, 7 *PSYCHOLOGICAL METHODS* 147, 170 (2002).