One-Page Tentative Agenda for Empirical Study in Big Chapter 11 Cases

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Over the last decade we have observed several essentially undisputed trends in finance more broadly and chapter 11 practice more particularly:

- Strengthened senior secured creditor legal position.
- Growth in off balance sheet financing (securitization).
- Increased post-confirmation litigation through litigation trusts.
- Use of hedging and derivative contracts.
- Claims trading.

The effect of these trends on chapter 11 practice have not been quantified or otherwise studied empirically.

Some potentially testable hypotheses might be:

1. Increased secured creditor control under financing orders and through legal changes (e.g. new Article 9, limitations on exclusivity, roll-ups) leads to less deviation from absolute priority.

2. Increased off-balance sheet financing impairs reorganization prospects.

3. Increased post-reorganization litigation (as opposed to plan settlements) increases unsecured creditor recoveries.

4. Extensive use of hedging and derivative contracts coupled with claims trading leads to increased incidence of “empty” and conflicted voting on plans or manipulation of the committee process to the detriment of unsecured constituents.

I would be very interested in insights from Lynn and Joe and the larger group on how the Bankruptcy Research Database might be employed to generate data that could be used to assess these hypotheses. I am also interested in quantifying how the 503(b)(9) trade priority has altered the outcomes and division of value in retail and other cases where vendors of goods are likely to have large priority claims.