## 95th Annual National Conference of Bankruptcy Judges

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# Participants – Start Your Engines: Jeopardy, The Broken Bench Edition

**Host:** **Honorable Pamela Pepper, Chief Judge, USDC, E.D. Wis.***

**Announcer:** **Honorable Rene Lastreto, II, USBC, E.D. Cal.**

**Contestants:**

- **Honorable Catherine J. Furay, Chief Judge, USBC, W.D. Wis.**
- **Professor Nancy B. Rapoport, Garman Turner Gordon Professor of Law, William Boyd School of Law, University of Nevada, Las Vegas**
- **Demetra Liggins, Partner, McGuireWoods, Houston, Tex.**

**Shepherds:** **Honorable Janet S. Baer, USBC, N.D. Ill.**

**Honorable Lisa G. Beckerman, USBC, S.D.N.Y.**

**Edward T. Gavin, Managing Director and Founding Partner, Gavin/Solmonese, Wilmington, Del.**

**Jeopardy Master:** **Naomi Kogan Dein, Law Clerk to the Honorable Janet S. Baer, USBC, N.D. Ill.**

***Understudy to Host:** **Honorable Sheri Bluebond, USBC, C.D. Cal.**

Welcome to Jeopardy! We hope that you enjoy the program and find the information presented in this game-show format both interesting and educational. The materials provided below highlight just a few of the many facts that will be discussed during the course of the program. Take a look at the categories and the materials provided and be sure to play along during the game. (But please shout out the answers only if you are watching virtually!)

## Single Jeopardy Categories:

SBRA

Bricks & Mortar

Sex & Religion

Famous Debtors

Covid-19

## Double Jeopardy Categories:

Quotable Quotes

Supremely Strange

Alphabet Soup

Ethics

Potpourri

**Enjoy the program!**

## Small Business Reorganization Act

The Small Business Reorganization Act of 2019 (“SBRA”) took effect on February 19, 2020. The SBRA established subchapter V of chapter 11 of the Bankruptcy Code, codified as new 11 U.S.C. §§ 1181–95. Despite its enactment, the SBRA did not replace the current provisions of chapter 11 which govern small business cases, such as §§ 1121(e) and 1129(e). Those remain and may still be used to reorganize a qualifying small business. However, the SBRA provides small businesses with an alternative option which is arguably a more practical and user-friendly way for eligible debtors to reorganize.

**No Disclosure Statement**

Subchapter V was designed to “streamline the bankruptcy process by which small business[] debtors reorganize and rehabilitate their financial affairs.” H.R. REP. NO. 116-171, at 1 (2019). To this aim, a subchapter V debtor is not required to file a separate disclosure statement.

Prior to the enactment of the SBRA, post-petition disclosure and solicitation of acceptances or rejections of plans for all chapter 11 debtors were governed by § 1125 of the Bankruptcy Code. 11 U.S.C. § 1125. Pursuant to that provision, a disclosure statement must give creditors “adequate information” about the debtor and the plan to allow them to make informed decisions when voting. 11 U.S.C. § 1125(a)(1). “Adequate information” is defined under § 1125 as information “that would enable . . . a hypothetical investor of the relevant class to make an informed judgment about the plan[.]” *Id.* Courts must determine the adequacy of the information by looking at the complexity of the case, the benefit of additional information, and the cost of providing that information. *Id.* Courts must then conduct hearings on the adequacy of the disclosure statement before solicitation of votes on the plan can occur.

Section 1125(f) permits a court to conditionally approve a disclosure statement in small business cases, subject to final approval after notice and a hearing. 11 U.S.C. § 1125(f)(3). In addition, the provision allows the court in a small business case to "determine that the plan itself provides adequate information and that a separate disclosure statement is not necessary." 11 U.S.C. § 1125(f)(1).

In a subchapter V case, however, a separate disclosure statement is not required unless the court orders otherwise. 11 U.S.C. § 1181(b). Instead, a debtor must file a plan that includes a brief history of the business operations, a liquidation analysis, and projections with respect to the debtor's ability to make payments under the proposed plan. 11 U.S.C. § 1190(1). Unlike § 1125, § 1190 of the SBRA does not require a plan to contain "adequate information," nor does it provide for judicial review. The plan, however, must be proposed in good faith, 11 U.S.C. § 1129(a)(3), as any material or intentional errors or omissions might provide a basis for denial of confirmation.

**Eligibility**

To be eligible to file under subchapter V, a debtor must be "engaged in commercial or business activities." 11 U.S.C. § 1182(1)(A). Courts have interpreted this phrase in various ways in cases in which businesses are no longer operating.

In *In re Thurmon,* for example, the debtors closed two pharmacies that they had been operating through a limited liability company and sold nearly all the businesses' assets, leaving a sizable debt to their primary secured creditor. 625 B.R. 417, 420 (Bankr. W.D. Mo. 2020). When the debtors subsequently filed for relief under subchapter V, the pharmacies had no employees, no customers, no vendors, and no intention of resuming business activities. *Id.* At issue was whether the debtors were "engaged in commercial or business activities" and thus eligible to file under the SBRA. *Id.* at 420–21. The Bankruptcy Court for the Western District of Missouri construed the phrase "engaged in" narrowly, finding that a business must be "actively and currently involved" at the time of filing. *Id.* at 422. Concluding that the debtors were not "engaged in" commercial or business activities on the petition date, the court held that they were not eligible to be subchapter V small business debtors, despite the fact that their LLC was in good standing under state law and that they still owned some outstanding accounts receivable and two vehicles. *Id.* at 423.

In contrast, in *In re Ikalowych*, the Bankruptcy Court for the District of Colorado took a broader approach in deciding whether the debtor was eligible to file under subchapter V. Bankr. Case No. 20-17547 TBM, 2021 WL 1433241 (Bankr. D. Colo. Apr. 15, 2021). In that case, the debtor owned an LLC that had ceased operations and surrendered its assets prior to filing. *Id.* at *1. Both before and after the petition date, the debtor had been assisting the business in "winding down" by, among other things, cleaning and turning over the leased premises, assisting with payroll issues for the LLC's former employees, dealing with tax issues, and organizing business records. *Id.* at *4. Applying the plain meaning of "commercial or business activities," the court found that the term is defined as "any private sector actions related to buying, selling, financing, or using goods, property, or services, undertaken for the purpose of earning income (including by establishing, managing, or operating an incorporated or unincorporated entity to do so)." *Id.* at *8. Based on that expansive definition, the court held that the debtor's activities in connection with the wind-down, among others, fell within the scope of the phrase. *Id.* at *14–17.

Similarly, in *In re Offer Space*, *LLC*, the Bankruptcy Court for the District of Utah employed a broad "totality of the circumstances" analysis to find that the debtor was eligible to file under subchapter V. Bankr. Case No. 20-27480, 2021 WL 1582625, at *4 (Bankr. D. Utah Apr. 22, 2021). The debtor, an LLC that provided vendor marketing solutions to direct marketers, began to suffer financially as a result of legal claims and chargebacks. *Id.* at *1. Although it took "reasonable measures" to operate its business, pay its creditors, and generate revenue, the debtor ultimately filed a bankruptcy petition under subchapter V. *Id.* The U.S. Trustee objected to the debtor's eligibility, arguing that the LLC was no longer conducting business, had no employees, and intended to liquidate its remaining assets. *Id.* at *3. Examining all of the circumstances, the court found a distinction between the terms "operations" and "activities" and explained that, while the debtor's business was no longer in operation, it had active bank accounts on the petition date, was winding down, and was taking appropriate steps to pay its creditors, all of which demonstrated that the LLC was "engaged in commercial or business activities" on the date of filing. *Id.* at *4.

Most recently, the Bankruptcy Court for the Southern District of Texas held in *In re Port Arthur Steam Energy, L.P.* that liquidating a defunct business makes a corporate debtor eligible to file under the SBRA. Bankr. Case No. 21-60034, 2021 WL 2777993, at *4 (Bankr. S.D. Tex. July 1, 2021). There, the debtor owned and previously ran an electricity and steam plant, but operations ceased after disputes arose between the debtor and its primary creditor. *Id.* at *1. In the midst of litigation with that creditor, the debtor filed a bankruptcy petition under subchapter V. *Id.* Although the debtor was no longer producing and selling electricity and steam, the court found that the company was "engaged in commercial or business activities" by, inter alia, collecting accounts receivable, maintaining its facilities, working on a plan to pay creditors, and filing reports and tax returns. *Id.* at *3. Citing *In re Offer Space, LLC,* the court "rejected efforts to conflate business operations with commercial or business activities." *Id.* at *4.

**BRICKS & MORTAR**

As online shopping has evolved and today's consumers are ditching the idea of running from store to store in favor of going from website to website, retail shopping areas are in tremendous flux. Just as the "downtown" shopping experiences of our grandparents transformed into the suburban mall excursions of our parents, things are dramatically changing again. Even before Covid-19 emerged, shopping malls and other retail stores were starting to show signs of distress. The pandemic only accelerated the situation, resulting into what can be described as a bricks-and-mortar crisis. We now find ourselves with huge malls and other shopping areas of vacant space. Big box anchor stores like Sears, J.C. Penney, Carson Pirie Scott, and Lord & Taylor are gone. Other retailers like Pier 1 Imports, Payless ShoeSource, and Stein Mart are also out of business. So, what do we do with all of these vacant storefronts and shopping malls?

**Conversion of Retail Space to Housing**

One idea that has recently arisen stems from the increasingly problematic affordable housing crisis that exists in much of the country. California, in particular, had the fourth highest population-adjusted homelessness rate of 175.8 per 100,000 people in 2020. *State of Homelessness in 2021: Statistics, Analysis, & Trends,* SECURITY.ORG (Apr. 12, 2021), https://www.security.org/resources/homeless-statistics/. More than half of California renter households are considered "cost-burdened," meaning that they pay more than 30% of their total income in rent. Monica Davalos, Sara Kimberlin, and Aureo Mesquita, *California's 17 Million Renters Face Housing Instability and Inequity Before and After Covid-19*, CALIFORNIA BUDGET & POLICY CENTER 1, 2 (Jan. 2021), https://calbudgetcenter.org/wp-content/uploads/2021/01/IB-Renters-Remediated.pdf. In fact, 25% of renters in California are "severely cost-burdened"—paying more than 50% of their income in rent. *Id.* It is estimated that California needs to build at least 180,000 new homes per year in order to address its chronic housing shortage. Greg Rosalsky, *How California Homelessness Became A Crisis,* NPR PLANET MONEY (June 8, 2021), https://www.npr.org/sections/money/2021/06/08/1003982733/squalor-behind-the-golden-gate-confronting-californias-homelessness-crisis.

One possible solution to the problem is the conversion of vacant retail and office buildings to affordable housing. Malls, shopping centers, and office spaces are attractive locations for residential development for a variety of reasons. They are typically located on main thoroughfares, have large parking lots, and are accessible by public transportation. Patrick Sisson, *The Dying Mall's New Lease on Life: Apartments,* BLOOMBERG CITYLAB (June 30, 2020), https://www.bloomberg.com/news/articles/2020-06-30/a-case-for-turning-empty-malls-into-housing. Moreover, because plans for these new developments generally include both commercial and residential spaces, the mixed-use structures create a walkable community with the potential to revitalize retail and other surrounding businesses. *Id.*

The idea of large-scale conversion of commercial spaces to residential areas, however, is not without obstacles., In particular, restrictive local zoning laws often do not permit housing at these locations. Patrick Sisson, *Could California's Shopping Centers Be a Housing Fix?,* BLOOMBERG CITYLAB (Jan. 19, 2021), https://www.bloomberg.com/news/articles/2021-01-19/how-empty-shopping-centers-could-be-a-housing-fix. More than 40% of commercial zones in California's fifty largest cities prohibit residential development. *Id.* The efforts of state legislators to pass bills allowing for residential development in commercially zoned areas have failed thus far. Residents don't want the increase in traffic. *Id.* And local governments oppose the redevelopment because sales taxes from businesses create greater tax revenues. *Id.*

Despite all the resistance, the idea of allowing homebuilding in commercial areas has reemerged in the 2021–2022 state legislative session, and this novel idea to tackle the problem of California's critical housing shortage may be gathering steam. Specifically, a few senate bills are currently being considered. Adam Beam, *California Lawmakers Eye Shuttered Malls, Big Box Retail Stores for New Housing,* THE MERCURY NEWS (June 1, 2021), https://www.mercurynews.com/2021/06/01/california-eyes-shuttered-malls-stores-for-new-housing/. One bill would provide funds to local governments that change zoning to permit affordable housing to be built on commercial land. *Id.* Another, which has already cleared the state Senate, would authorize developers to build on commercial sites without changing the zoning laws. *Id.* If these bills become law, California would be the first state to allow multi-family housing on commercial sites statewide. *Id.*

**Remember Blockbuster Video?**

Just as the advent of online shopping has led to a crisis in the bricks-and-mortar retail industry, other businesses have also suffered a similar—or even worse—fate as a result of innovative technologies. Remember Blockbuster Video? Its stores used to be found in strip malls in virtually every community in the country.

With more than 9,000 stores in all 50 states, Blockbuster was the place to get your videotapes and DVDs. Andy Ash, *The rise and fall of Blockbuster and how it's surviving with just one store left,* BUSINESS INSIDER (Aug. 12, 2020), https://www.businessinsider.com/the-rise-and-fall-of-blockbuster-video-streaming-2020-1. In the late 2000s, however, Blockbuster began losing its grip in the video rental market. Brook E. Gotberg, *Technically Bankrupt*, 48 SETON HALL L. REV. 111, 146-47 (2017). Among its competitors, Netflix cut into Blockbuster's profits by first offering a subscription-based DVD-by-mail option that eliminated late fees and allowed for unlimited movie rentals. *Id.* Subsequently, Netflix developed a streaming service that has become the leading platform for at-home viewing. *Id.* at 148. Redbox, a rental kiosk business, also ate away at Blockbuster's bottom line. *Id.* Ultimately, Blockbuster's inability to innovate with the rest of the industry, along with poor management, led to its demise. *Id.* at 148–49.

On September 23, 2010, Blockbuster and its sister corporations filed for chapter 11 bankruptcy protection. *Id.* at 149. Although it had $1 billion in assets, the company had accumulated $1.5 billion in liabilities. *Id.* Entering bankruptcy, Blockbuster tried to reorganize with a Plan Support Agreement, which had the support of 80% of its secured creditors. *Id.* at 150. The plan was to convert some of the company's debt into equity, as the business tried to both catch up to and keep pace with the innovative technologies that were being used by those in the rest of the industry. *Id.* As revenues continued to decline, however, the reorganization attempt failed. *Id.* at 151. Blockbuster's assets were then put on the auction block and ultimately sold to Dish Network Corporation for $320 million. *Id.* Subsequently, Blockbuster changed its name to BB Liquidating Inc. and converted its case from chapter 11 to chapter 7. *Id.*

In 2019, a Blockbuster store in Morley, Australia closed, and, as of this writing, there is only one location remaining in Bend, Oregon. Mark Puleo, *World's last Blockbuster booming amid heat wave,* YAHOO! NEWS (June 30, 2021) https://news.yahoo.com/worlds-last-blockbuster-booming-amid-180650800.html. That store has been in the news recently because it was featured in the Netflix documentary *The Last Blockbuster.* Tim Nelson, *The World's Last Blockbuster Is Now Listed on Airbnb,* ARCHITECTURAL DIGEST (Aug. 12, 2020), https://www.architecturaldigest.com/story/worlds-last-blockbuster-listed-airbnb. To survive the pandemic, the store rented out the site through Airbnb to allow customers to enjoy nineties-themed getaways. *Id.*

Most recently, BB Liquidating Inc., the new corporate name for Blockbuster, benefited from the stock meme craze that took place in 2021. Typically trading at about $0.0033, BB Liquidating stock increased over 700% to a high of $0.11 on January 27, 2021. Tegan Jones, *It's Not Just GameStop, Bankrupt Blockbuster Video Stock Jumps 700%*, GIZMODO (Jan. 28, 2021), https://www.gizmodo.com.au/2021/01/its-not-just-gamestop-bankrupt-blockbuster-video-stock-jumps-700/.

## SEX & RELIGION

Did you ever notice that many bankruptcy terms of art interestingly seem to fall into two categories—sex and religion? If you ever find yourself in a situation in which you have to explain some of these terms to non-bankruptcy folks, here is a little cheat sheet that you can use, organized into the two categories.

**"Sexy" Terms**

"Abstention" or "abstain" (the process by which a judge decides not to take on a case or issue and permits the case or issue to be decided by another court). *See Abstain,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Adequate protection" (the provision of payments or property that has equity or is not declining in value to protect a creditor's financial position). *See Adequate Protection,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Cram down" (to force the confirmation of a reorganization plan over the objections of creditors). 1 COLLIER ON BANKRUPTCY P 1.07 (16th ed. 2021).

"Discharge" (the release of a debtor's debts and obligations). *See Discharge,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Discovery" (the general term for the process of obtaining evidence for a case). *See Discovery,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Rejection" (the repudiation of an executory contract or unexpired lease). *See Rejection,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Solicitation" (the process by which votes are obtained in connection with the approval or disapproval of a bankruptcy plan to pay back creditors). *See Solicitation,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Strip off" or "strip down" (to eliminate or reduce the amount of a lien on a piece of property)

**"Religious" Terms**

"Confirmation" (the approval of a bankruptcy plan or arrangement to pay creditors). *See Confirmation,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Conversion" (changing a case filed under one chapter of the Bankruptcy Code to a case filed under another chapter (e.g., changing a reorganization case under chapter 11 to a liquidation case under chapter 7)). *See Conversion,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Reaffirmation" (the agreement, despite bankruptcy, to pay a debt). *See Reaffirmation,* BLACK'S LAW DICTIONARY (11th ed. 2019).

"Redeem" (to reclaim or reassert an interest in property)

## FAMOUS DEBTORS

Bankruptcy is widely viewed as a "fresh start" for those in need of financial help. Thus, it should come as no surprise that debtors include not only "average Joes," but also well-known people in fiscal distress. Among the actors, athletes, singers, politicians, and others who have filed for bankruptcy are Walt Disney, Mike Tyson, Dorothy Hamill, 50 Cent, Henry Ford, P.T. Barnum, Mark Twain, Larry King, Willie Nelson, Burt Reynolds, David Bowie, Rembrandt, Zsa Zsa Gabor, and Oscar Wilde. But perhaps the most famous debtor of all was none other than the sixteenth President of the United States: Abraham Lincoln.

Before becoming a lawyer, Lincoln and his friend William F. Berry co-owned a general store in New Salem, Illinois. *Abraham Lincoln,* USLEGAL.COM, bankruptcy.uslegal.com/profilesfamousbankruptcies/abraham-lincoln/. They bought out the inventory of other stores on credit, seeking to make a profit after re-selling the goods. *Id.* Unfortunately for Lincoln and Berry, their store's sales were bleak, even though the economy was booming. *Id.* As debts increased, Lincoln was forced to sell his interest in the store. *Id.* Subsequently, Berry died, and Lincoln became liable for $1,000 in back payments. *Id.*

Because Lincoln didn't have modern bankruptcy laws to protect him, his creditors sued him and seized his two remaining assets: his horse and some surveying gear. *Id.* Lincoln filed for bankruptcy in 1833. *Id.* He was required to repay his creditors over seventeen years, much longer than the maximum five-year period in a chapter 13 case today. *Id.* Ultimately, Lincoln paid his debts, which helped contribute to the moniker Honest Abe. Joel M. Aresty, *President Abraham Lincoln: Bankruptcy Lawyer*, AM. BANKR. INST. J., Apr. 2015, at 44. If the bankruptcy occurred now, Lincoln probably could have both kept his assets and discharged his debts. *Abraham Lincoln,* USLEGAL.COM, bankruptcy.uslegal.com/profilesfamousbankruptcies/abraham-lincoln/.

Lincoln's personal financial problems, however, were not his only foray into bankruptcy—he also practiced bankruptcy law as an attorney. Aresty, *supra*, at 45. In 1841, Congress passed the Bankruptcy Act of 1841, which allowed debtors to file voluntary petitions and obtain discharges of their debts. *Id*. at 44. The new law resulted in a deluge of filings. *Id.* at 45. Lincoln litigated nineteen bankruptcy cases in October of 1842 alone. *Id.* In all, he handled almost eighty cases under the Bankruptcy Act of 1841 before it was repealed by Congress in 1843. *Id.* Unfortunately, records of these filings were lost in the Great Chicago Fire of 1871, which destroyed most of the case files of the federal courts in Illinois. *Id.* Historians have been able to piece together information about Lincoln's bankruptcy practice through the newspaper ads that notified creditors of bankruptcy cases. *Id.*

After the repeal of the Bankruptcy Act of 1841, Lincoln continued to practice debtor/creditor law. *Id.* He was the plaintiff's attorney in more than 1,300 debt-related cases and represented debtor-defendants in 713 others. *Id.* He was not particularly successful, however, as debtor's counsel. "In a typical year, like 1853, Lincoln could claim victory, meaning that his client was not required to pay the debt or reach a settlement, in only three of the [twenty-nine] cases in which he represented a debtor." *Id.*

Lincoln's approach was always to discourage litigation. He once famously said, "Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time." *Id.* at 46. Lincoln "practiced what he preached," negotiating settlements in just over 380 of his debt-related cases. *Id*.

**COVID-19**

In March 2020, Covid-19 turned the world upside down. Many expected the global pandemic and its economic impact on the tourism, entertainment, and foodservice industries, among others, to result in a colossal increase in the number of bankruptcy filings. Certainly, various economic indicators, such as unemployment and household savings, pointed toward such an increase. Andrew Keshner, *COVID-19 has caused real financial pain. So why did consumer bankruptcies drop in 2020?,* MARKETWATCH (Jan. 17, 2021), https://www.marketwatch.com/story/covid-19-has-caused-real-financial-pain-so-why-did-consumer-bankruptcies-drop-in-2020-11610627048.

A deluge of bankruptcy filings, however, did not occur. *Id.* Rather, there were 529,071 bankruptcy cases in 2020, compared to 757,634 in 2019—a 30% decrease and the lowest number of filings since 1987. *Id.* The biggest decline occurred in consumer bankruptcy cases, which fell to 496,565 in 2020—a 31% decline from 2019. *Id.* Among the reasons for the decrease, the

Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provided those in need with stimulus money, increased unemployment compensation, and forgivable business loans. *Id.* Additionally, the moratorium on both evictions and foreclosures helped to keep people out of bankruptcy, as did the gradual reopening of businesses in the summer of 2020. *Id.*

Although the total number of bankruptcy cases fell, commercial chapter 11 filings increased. *AACER U.S. Bankruptcy Statistics and Trends*, EPIQ AACER, https://www.aacer.com/bankruptcy-statistics-and-trends (last visited July 14, 2021). In 2019, there were only 5,519 of those filings, compared to 7,129 in 2020. *Id.* There was also a pronounced increase in chapter 11 filings of public companies—with 110 cases in 2020 and only 64 in 2019. Mark G. Douglas & Charles M. Oellerman, *The Year in Bankruptcy: 2020,* JONES DAY: NEWSLETTER (Feb. 2021), https://www.jonesday.com/en/insights/2021/02/the-year-in-bankruptcy-2020. The impact of Covid-19 on those companies varied according to industry. With decreases in demand for oil and gas and increases in supply from members of OPEC, American oil and gas companies were the hardest hit. See *id.* In total, there were 51 public companies, each with at least $1 billion of assets, that filed for bankruptcy in 2020, compared to 21 in 2019. *Id.* The largest public company to file for bankruptcy in 2020 was The Hertz Corporation, with $25.8 billion in assets. *Id.*

As of June 30, 2021, the number of bankruptcy filings has continued on a downward trend, with a total of 216,931 cases—204,767 consumer filings and 12,164 commercial filings. *AACER U.S. Bankruptcy Statistics and Trends*, EPIQ AACER https://www.aacer.com/bankruptcy-statistics-and-trends. By comparison, as of June 30, 2020, there was a total of 298,121 cases—280,636 consumer filings and 17,485 commercial filings. *Id.* Chapter 11 case filings have also decreased; as of June 30, 2021, there was a total of 2,499 chapter 11 filings; at the same time in 2020, 3,982 cases had already been filed. *Id.*

**Digital Commerce**

Although the total number of bankruptcy filings declined in 2020, digital commerce steadily increased during the pandemic, which led, in turn, to an overall increase in sales in the retail industry, despite the bricks-and-mortar crisis. According to Digital Commerce 360's analysis of U.S. Department of Commerce data, the retail industry saw sales increase by 6.9%, to $4.04 trillion in 2020. Fareeha Ali, *U.S. ecommerce grows 44.0% in 2020,* DIGITAL COMMERCE 360 (Jan. 29, 2021), https://www.digitalcommerce360.com/article/us-ecommerce-sales/. While Covid-19 resulted in nonessential store closures and capacity limits, consumers and retailers alike adapted to ecommerce. *Id.* With in-store, catalog, and call center sales all declining, ecommerce's share of total retail sales increased by a whopping 44% to $861.12 billion, from $598 billion in 2019. *Id.* Though consumers were increasingly turning to ecommerce prior to March 2020, the pandemic accelerated the trend further away from bricks-and-mortar shopping. *Id.*

Not surprisingly, Amazon leads the way in ecommerce. *Id.* In 2020, the company accounted for 31.4% of all online sales. *Id.* However, that figure is down from 43.8% in 2019, which likely signals that other businesses have increased their online presence. *Id.* Nevertheless, many companies have been slow to adapt. The pandemic not only cut into the revenues of those businesses, but also increased the amounts that they had to spend on protecting both workers and customers, as well as paying employees. Inti Pacheco, *How Much Covid-19 Cost Those Businesses That Stayed Open,* WALL ST. J. (June 23, 2020), https://www.wsj.com/articles/how-much-covid-19-cost-those-businesses-that-stayed-open-11592910575. Ultimately, Covid-19 sent many retailers to bankruptcy in 2020, including Brooks Brothers, J.C. Penney, Guitar Center, GNC, Pier

1 Imports, and Neiman Marcus. Lauren Thomas, *The 10 biggest retail bankruptcies of 2020,* CNBC (Dec. 26, 2020), https://www.cnbc.com/2020/12/26/the-10-biggest-retail-bankruptcies-of-2020.html.

Interestingly, not all in-store retailers have struggled during the pandemic. Melissa Repko & Lauren Thomas, *6 ways the coronavirus pandemic has forever altered the retail landscape,* CNBC (Sept. 29, 2020), https://www.cnbc.com/2020/09/29/how-coronavirus-pandemic-forever-altered-retail.html. Big-box, one-stop retailers saw increased sales as panic-buyers stocked up on toiletries, hand sanitizer, cleaning supplies, and food items. *Id.* Home improvement stores have also benefitted from the pandemic. Matt Grossman, *Home Depot Sales Surge, Extending Growth During Covid-19 Pandemic,* WALL ST. J. (May 18, 2021), https://www.wsj.com/articles/home-depot-sales-surge-extending-growth-during-pandemic-11621335766. Businesses like Home Depot and Lowe's, for example, have seen increasing sales as people have been spending more time at home, working on do-it-yourself projects, and—with the housing boom—moving out of apartments and into larger living spaces. *Id.*

**ALPHABET SOUP**

It is often said that specialists use acronyms to make themselves look knowledgeable because only others in their industry can understand the shorthand "code." Can you say EBITDA? The use of these industry short forms has led some judges to instruct lawyers and expert witnesses to *never* employ acronyms any less common than GAAP. Of course, if you look to bankruptcy practice, you will see lots of acronyms used daily—including SBRA, one of our Jeopardy categories, and the dreaded BAPCPA. Despite a general aversion to acronyms, the prize for the most creative one of recent years has to go to PROMESA, the Puerto Rico Oversight, Management, and Economic Stability Act. Why is this such a great acronym? Because PROMESA means "promise" in Spanish. So, what is PROMESA, and what has it done for Puerto Rico?

Congress enacted PROMESA in 2016 to assist Puerto Rico with the financial hardships that its people were facing. Tina Meng, *The Perfect Storm: Puerto Rico's Evolving Debt Crises Under PROMESA,* 2019 COLUM. BUS. L. REV. 367, 370 (2019). Over the last few decades, the U.S. territory has slipped into a protracted recession. *Id.* at 369. The reasons for the fiscal turmoil are many. Back in 1996, for example, Congress repealed various tax incentives for manufacturing companies operating in Puerto Rico. *Id.* at 377. Not surprisingly, this and other policy decisions sent corporations and other businesses fleeing the island and unemployment rates soaring. *Id.* Subsequently, unemployed workers—including skilled laborers—followed, in search of jobs on the mainland. *Id.* at 377-78.

Despite its deteriorating financial condition, Puerto Rico could not file under chapter 9 of the Bankruptcy Code because of its territorial status. *Id.* at 379–380. Thus, local legislators created the Puerto Rico Public Corporation Debt Enforcement and Recovery Act ("Recovery Act"), which substantially mirrored chapters 9 and 11 of the Bankruptcy Code. *Id.* Shortly thereafter, a group of local bondholders filed suit against the Puerto Rican government, claiming that the island did not have the authority to develop its own bankruptcy statute. *Id.* at 380. The case, *Franklin California Tax-Free Trust v. Puerto Rico,* ultimately made its way to the U.S. Supreme Court, which held that: (1) Puerto Rico is *not* a "state" under the Bankruptcy Code's provision governing who is eligible to file under chapter 9, and (2) Puerto Rico *is* a "state" under the preemption provision, meaning that the federal Code preempted the Recovery Act. 136 S. Ct. 1938, 1946, 1949 (2016); *see also* Meng, *supra,* at 380–82.

After the Supreme Court's ruling in *Franklin California*, Puerto Rico's only option was to turn to the U.S. Congress for help. *Id.* at 382–83. Answering the call, the House and Senate passed PROMESA in June 2016, which was signed into law by the President the following day. *Id.* at 384. PROMESA aims to return Puerto Rico to solvency and restore its access to credit markets. *Id.* Aware of the need for governance and economic transparency, Congress also established the Financial Oversight and Management Board ("FOMB"), comprised of seven presidentially appointed members and the governor of Puerto Rico, who is a non-voting member. *Id.* at 384-85; David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.,* 87 REV. JUR. U.P.R. 862, 874 (2018). Among its primary powers, the FOMB is authorized to both restructure debt and certify fiscal plans. Skeel, *supra,* at 870–72.

The FOMB may initiate a restructuring of debt on behalf of Puerto Rico or its municipal entities according to two general frameworks. *Id.* at 872. Under Title VI, the FOMB may restructure bonds if sufficient majorities of each type of bond vote in favor. *Id.* The process is consensual and lacks most of the features that bankruptcy includes. *Id*. In contrast, Title III is very similar to bankruptcy. *Id.* at 873. Featuring an automatic stay, the process allows debtors to negotiate with their creditors over the terms of a plan, and, after the plan and a disclosure statement have been approved, the plan is submitted to each class of creditors for their approval or rejection. *Id.*; *see* 11 U.S.C. § 901(a) (incorporating 11 U.S.C. §§ 362, 1125, and parts of 1126).

As for the creation and certification of a fiscal plan for Puerto Rico, in January 2017, the FOMB gathered information, projecting annual deficits of $7 billion per year for ten years. Skeel, *supra,* at 875. To reduce that deficit, the FOMB determined that, among other things, taxes would have to be increased by $1.5 billion annually by 2019. *Id.* On March 13, 2017, a ten-year fiscal plan was approved by the FOMB. *Id.* at 875. Fiscal plans for the Government Development Bank, the Puerto Rico Highways & Transportation Authority, the Puerto Rico Aqueduct and Sewer Authority, and the Puerto Rico Electric Power Authority were certified the following month. *Id.* at 875 n.75.

Then disaster struck. Hurricanes Irma and Maria devastated the island. Meng, *supra*, at 389-90. Because of their impact—and Puerto Rico's desperate need for economic recovery—the previously certified fiscal plan was scrapped, and the FOMB began developing a new one. *Id.* Ultimately, after months of discussion, compromise, and drafting, the FOMB certified a revised fiscal plan, which anticipates a cumulative surplus of $30 billion through 2033. *Id.* at 395.

In July 2021, at the time of this writing, PROMESA and the FOMB were making progress, with confirmation hearings scheduled to take place in November of 2021. Steven Church & Michelle Kaske, *Puerto Rico Wins Bankruptcy Deal Ahead of Pension-Cut Fight (1),* BLOOMBERG LAW (July 13, 2021), https://news.bloomberglaw.com/employee-benefits/puerto-rico-wins-key-bankruptcy-deal-with-unsecured-creditors. On July 13, 2021, the FOMB and the primary group of the island's unsecured creditors struck a deal that should increase the likelihood of approval of the plan and ultimately reduce Puerto Rico's debt by $35 billion. *Id.* Not all issues, however, have been resolved. A particularly contentious one is the inclusion of pension cuts in the plan. *Id.* The FOMB has maintained that some benefit cuts are required because pensioners are unsecured creditors. *Id.* The Puerto Rican government opposes any reductions. *Id.*

## ETHICS

No program on general bankruptcy law would be complete without a little ethics thrown in. Here are a few tidbits that will be discussed during the Jeopardy program.

**Sanctionable Conduct**

Judges have the authority to impose sanctions on lawyers and litigants who leave their manners at the courthouse door. Section 105(a) of the Bankruptcy Code provides that courts may, sua sponte, "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. § 105(a). Furthermore, 28 U.S.C. § 1927 states that any attorney who "multiples the proceedings in any case unreasonably and vexatiously" can be sanctioned. And Bankruptcy Rule 9011 allows for the imposition of sanctions against lawyers who present documents "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" FED. R. BANKR. P. 9011(b)(1). In addition to monetary sanctions, judges have imposed a variety of other sanctions on errant attorneys, including barring exhibits and witnesses, dismissing cases, *see, e.g., Merch. Nat'l Bank of Chi. v. Leemac Truck & Trailer, Indus., Inc. (In re Leemac Trust & Trailer, Indus., Inc.)*, Bankr. No. 91 B 01761, Adv. No. 91 A 01073, 1992 WL 188261, at *4 (Bankr. N.D. Ill. 1992), requiring lawyers to complete continuing legal education courses in legal ethics, *see, e.g., In re Maurice*, 167 B.R. 114, 128 (Bankr. N.D. Ill. 1994), and even suspending attorneys from the practice of law, *see, e.g., In re Assaf*, 119 B.R. 465, 468 (E.D. Pa. 1990).

The recent case of *Wizenberg v. Wizenberg (In re Wizenberg)* provides an interesting example of sanctionable conduct. 838 F. App'x 406 (11th Cir. 2020). The parties there were brothers Peter and Howard Wizenberg. In the bankruptcy case, Howard had filed an adversary complaint against Peter—chapter 7 debtor and a bankruptcy attorney who appeared pro se—seeking, among other things, turnover of property and a determination of nondischargeability of a debt. *Id.* at 408–09. During the course of the litigation, Howard filed a motion for sanctions under 28 U.S.C. § 1927, asserting that Peter had unreasonably and vexatiously multiplied the proceedings. *Id.* at 409. The bankruptcy court granted the motion and ordered Peter to pay $9,850 as a sanction to Howard's attorney. *Id.* at 410–11. On appeal, the district court treated the bankruptcy court's order as a report and recommendation and adopted the lower court's imposition of sanctions. *Id.* at 411. On further appeal, the Eleventh Circuit affirmed the district court's order and awarded Rule 38 sanctions (for damages and costs in a "frivolous appeal") against Peter. *Id.* at 415

Peter argued to the court of appeals that the district court abused its discretion in sanctioning him. *Id.* at 408. The conduct that led to the sanctions order included Peter's repeated "shushing" of opposing counsel during a deposition, his contention that the bankruptcy court lacked jurisdiction to hear a dispute expressly provided for in the Bankruptcy Code, his claim that he did not know what a privilege log was, and his filing of lengthy and superfluous documents. *Id.* As to the latter, Peter filed a 69-page motion to dismiss Howard's complaint, a 153-page motion for reconsideration of the bankruptcy court's order denying him summary judgment, and a 326-page opening statement (including exhibits) prior to the trial on the adversary complaint. *Id.* at 409–10. Those documents contained accusations against Howard of domestic violence, other irrelevant details about the brothers' family life, and a "'pointless'" haiku poem, which read: "All know: talk is cheap; Liars can claim anything; No evidence?! Balk!" *Id.* at 409. Additionally, in deposing Howard, Peter asked him unprofessional and repetitive questions and "bickered" with opposing counsel on the record. *Id.* He failed to produce an exhibit register prior to the adversary trial—providing instead a "loose-leaf group of papers"—and, during the trial, impermissibly objected to Howard's answers to his own questions, asked Howard for evidence to support his statements, and ignored the bankruptcy court's rulings on objections. *Id.* at 410.

Ultimately, the bankruptcy court found that Peter had acted in bad faith throughout the pendency of the proceedings and had "suffocated [the] docket with painfully long and frivolous pleadings, many of which [were] based in neither law nor fact." *Id.* at 411. The court also noted that Peter withheld documentary evidence, that he asked "rude and repetitive" questions during depositions, and that his litigiousness caused the adversary proceeding to take "fourteen months and over 250 docket entries." *Id.*

Reviewing the conclusions of law of both lower courts de novo and the bankruptcy court's findings of fact for clear error, the Eleventh Circuit concluded that the district court did not abuse its discretion in sanctioning Peter because his "objective conduct . . . was egregious enough to rise to the level of bad faith." *Id*. at 411–13. The court of appeals also held that the sanctions motion included specific examples of sanctionable conduct and was thus "not so vague as to deprive Peter of due process." *Id.* at 413. Further, the court found that Peter had abandoned his claim that the bankruptcy court should have conducted an evidentiary hearing because he failed to adequately address the issue in his opening brief and that he waived his challenges to 22 time entries listed in Howard's motion for sanctions for failing to present those challenges to the lower court. *Id*. at 413–15. Finding that the record supported an award of attorney fees under Rule 38, the Eleventh Circuit noted that Peter, "a self-proclaimed bankruptcy attorney," filed a brief "littered with exclamation points and rants about what he view[ed] as a grave miscarriage of justice," that he failed to "coherently cite case law, though he cite[d] Bugs Bunny," that his brief was "difficult to follow," and that the need to "decipher[] and reorganiz[e] his arguments wasted taxpayer resources that otherwise could have been spent on cases 'worthy of consideration.'" *Id.* at 415.

## POTPOURRI

One of the things that bankruptcy lawyers and judges often say that they like about this area of the law is that it touches on just about every other area. In the same vein, when putting together this Jeopardy program on bankruptcy law, there was a wealth of interesting information to discuss. As a result, we included a potpourri category so that we could incorporate some of the compelling and sometimes curious material that we found in creating the program. Thus, to round out these materials, here are a few more bits of information for your review.

**Indubitable Equivalence**

You have heard the term, and you have seen it referenced in 11 U.S.C. § 1129(b)(2)(A)(iii). But where did the phrase "indubitable equivalence" come from? It is not a common term that just rolls off the tongue.

As we all know, a chapter 11 plan can be approved over the objection of an impaired class of creditors in a process known as "cramdown," as long as the plan does not "discriminate unfairly" and is "fair and equitable." *See* 11 U.S.C. § 1129(b). Cramdown is possible—with respect to the claims of secured creditors that have rejected the plan—only if the plan provides for: (1) the retention of any liens by and deferred cash payments to secured creditors, the latter equal to the present value of their claims; (2) the sale of collateral, with any liens attached to the proceeds of the sale; or (here it is!) (3) the provision to secured creditors of the "indubitable equivalent" of their claims. 11 U.S.C.A. § 1129(b)(2)(A).

The concept of indubitable equivalence was first introduced in *Metropolitan Life Insurance Co. v. Murel Holding Corp. (In Murel Holding Corp.)*, a Second Circuit opinion written by Judge Learned Hand in 1935. 75 F.2d 941 (2d Cir. 1935). In that case, Murel Holding Corporation and Abmar Holding Corporation (collectively, "Debtors") sought bankruptcy protection after Metropolitan Life Insurance Company ("MetLife") had initiated a foreclosure proceeding against them with respect to an apartment building that they owned. *Id.* at 941. Subsequently, MetLife rejected a proposed plan of reorganization in which the Debtors sought to borrow $11,000 from a second mortgagee to remodel some of the units in the building to increase rentals. *Id.* at 941–42. Under the plan, MetLife would be forced to forego amortization payments of $9,000 per year and extend the maturity date of the loan, but would receive current interest and all real estate taxes, both those in arrears and those to accrue. *Id.* at 942.

In reversing the lower court's decision which granted a stay against the foreclosure, Judge Hand explained that objecting creditors could be compelled to accept a plan only if such plan "'provide[s] adequate protection for the realization . . . of the full value of their interest, claims, or liens," which can be accomplished by: (1) maintaining the liens; (2) selling the collateral; (3) paying off the liens; or (4) allowing the judge to, if possible, "'equitably and fairly' . . . provide . . . 'adequate protection,' when the other methods are not chosen." *Id.* at 942. In discussing the fourth, Judge Hand noted:

> The last [option] is not, properly speaking, a 'method' at all; it merely gives power generally to the judge 'equitably and fairly' to 'provide such protection,' that is, 'adequate protection,' when the other methods are not chosen. It is this alone which the debtors here invoke. In construing so vague a grant, we are to remember not only the underlying purposes of the section, but the constitutional limitations to which it must conform. It is plain that 'adequate protection' must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence.

*Id.* "When Congress adopted Judge Hand's indubitable equivalent standard, its intention was to require 'completely compensatory' adequate protection of the interest of secured creditors in order to assure the realization of the full value of their secured claims without additional risk of recovery." Robert M. Fishman, Gordon E. Gouveia & Kimberly Bacher, *Revisiting the Indubitable Equivalent Standard: Undoubtedly the Same or Close Enough?,* 20 J. BANKR. L. & PRAC. 4 Art. 3 (2011). In explaining what does and does not establish indubitable equivalence under § 1129, Congress stated that abandonment of the collateral to the creditor or a lien on that collateral would "clearly satisfy" the standard but that present cash payments less than the secured claim would not, because the creditor would be "deprived of an opportunity to gain from a future increase in value of the collateral." 124 Cong. Rec. H 11,103 (Sept. 28, 1978); S 17,420 (Oct. 6, 1978).

**Debtors' Prisons**

Okay, here is an odd topic, but why not? In fact, the concept of debtors' prisons may be especially interesting today as many Americans have so much nondischargeable student loan debt hanging over their heads that they may find themselves in a debtors' prison of sorts. There is seemingly no way to get out, and, while in, the debt just keeps rising.

Traditional debtors' prisons date back to 451 B.C. during the time of the Roman Empire, although the practice of incarcerating debtors who were unable to fulfill financial obligations to their creditors is mentioned in the Bible itself. Tyler B. Myers, *Prison or Payment? Benthamism, The Modern Debtors' Prison, and Its Historical Roots,* 8 WASH. U. JURIS. REV. 263, 264-65 (2016). Back then, the principal aim of the imprisonment was to coerce debtors or their families to pay their debts—not to deter them in any way. *Id.* at 265.

The first debtors' prisons in the United States, brought to the "New World" by American colonists, were grounded in British debtor law. *Id.* at 267. In the late 1200s, that law was harsh, allowing English courts to imprison debtors until all their debts and court costs were paid in full. *Id.* at 265. The English statutes also permitted creditors to immediately have debtors arrested and imprisoned and then to sell their goods and land for repayment. *Id*. at 266. By the eighteenth and nineteenth centuries, England was imprisoning 10,000 debtors every year. *Id.* Ultimately, the Debtors Act of 1869 ended the incarceration of debtors, except those who were "fraudulent"—debtors who refused to pay their debts even though they were able to—or "non-commercial"—debtors who owed money arising out of familial obligations or certain court orders. *Id.* at 266–267.

The American colonies were initially lenient when dealing with debtors. *Id.* at 267. As the economy began to grow, increasingly wealthy creditors reinstituted England's more stringent debtor penalties to protect themselves from possible losses. *Id.* By the early eighteenth century, however, debtors' prisons in America fell out of favor. *Id.* They were expensive to build and maintain, and they "burdened the community with the cost of caring for the debtor's dependents." *Id.* at 267–68 (internal quotation omitted). Moreover, imprisonment seldom resulted in repayment because incarcerated debtors were typically insolvent. *Id.* at 267. Debtors' prisons also came to be viewed as inhumane facilities, as most debtors were considered "honest victims of misfortune or uncontrollable events." *Id.* at 269. In 1811—and continuing through 1877—most eastern states began banning debtors' prisons, except when fraud was involved or damages were owed for alimony, child support, or "wrongful behavior." *Id.* at 270 (internal quotation omitted). By the 1870s, debtors' prisons had been abolished in all states. *Id.*