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Bankruptcy Boom or Bust – How Far Is Too Far and Is the Day of Reckoning Here?

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I. Introduction to RSAs

While chapter 11 provides debtors with various tools to facilitate business operations and successfully reorganize, traditional chapter 11 cases can certainly be costly and time-consuming and materially disruptive for the debtor's business and operations. In a traditional chapter 11 case, the reorganizing debtor will try to negotiate a reorganization plan with its creditor constituencies and solicit votes in favor of the proposed plan. This process often takes several months, if not significantly longer, depending on the circumstances. However, with Bankruptcy Code amendments that reduced debtors' plan exclusivity period and the time for assumption and rejection of contracts, among other factors, debtors have been increasingly incentivized to expedite the chapter 11 process.

After occasional use in the 1980s and 90s, restructuring support agreements (RSAs) (also called at times lock-up agreements or plan support agreements) began to be used more often in the early 2000s. The Delaware bankruptcy courts started more substantively addressing these agreements early on, in the 2000s.[1] For the past decade or so, RSAs have become much more frequently used in large chapter 11 cases. Debtwire monitors larger and other notable chapter 11 cases, and its database shows more than 360 chapter 11 cases involving RSAs or similar plan agreements from 2016 to early/mid 2022.

Restructuring support agreements are agreements negotiated by debtors and their key creditors (some or all) (usually funded debt, instead of trade debt) to secure their votes on a pre-negotiated chapter 11 plan of reorganization. Under these agreements, debtors agree to propose a certain plan or a plan with certain materials terms specified in the RSA. In turn, the participant creditors agree to support that plan, subject to various terms and conditions. The parties are bound to support the deal, even though the underlying plan and disclosure statement have not yet been filed. However, as noted, RSAs typically include a detailed term sheet containing the basic terms of the proposed plan, or a draft of the plan. RSA proponents say that getting an RSA in place early will enhance the confidence of everyone directly or indirectly involved with the debtor, by demonstrating to vendors, suppliers, employees, and potential new customers that there is a strategy in place supported by at least some key creditors, so that the debtor will promptly emerge as a more viable business.

In practice, RSAs are often entered into prepetition regarding a prenegotiated bankruptcy, but they have also been increasingly entered into postpetition. If the RSA is finalized before the case filing and the relevant plan is not finalized and filed on or shortly after the petition date,[2] the

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[1] *See, e.g., In re NII Holdings, Inc.,* 288 B.R. 356 (Bankr. D. Del. 2002); *In re Stations Holding Co*., 2002 WL 31947022 (Bankr. D. Del. 2002).

[2] If there is a plan that has been negotiated pursuant to an RSA and the debtor solicited votes from impaired classes before the bankruptcy filing (in accordance with federal and/or state securities laws or any other applicable nonbankruptcy laws), such plan is a "prepack." In contrast, a "prenegotiated plan" may involve prepetition negotiations, but there is no formal solicitation of votes prepetition. Expedited prepack cases are expressly contemplated by Code section 1126(b), and the solicitation and confirmation processes are conducted in accordance with the requirements set forth in the Bankruptcy Code and Bankruptcy Rules. Smaller stakeholders, including trade creditors and landlords holding general unsecured claims, are typically left unimpaired and receive a full recovery under a prepack. As examples, prepacks were confirmed within 9 days or less in *In re HighPoint Resources Corp.*, Case No. 21-10565 (CSS) (Bankr. D. Del.); *In re Belk, Inc.,* Case No. 21-30630 (MI) (Bankr. S.D.Tex.); *In re Mood*

debtor often requests the bankruptcy court to be permitted to assume the contract under Bankruptcy Code section 365; if it is finalized during the case, the parties typically treat it as a settlement subject to approval under, *inter alia*, Bankruptcy Rule 9019. Notably, more debtors are seeking approval of postpetition RSAs as reasonable transactions under section 363(b) (subject to the lenient business judgment standard).[3] Prepetition RSAs are generally enforceable.[4] However, until judicial decisions like that of the Bankruptcy Court for the District of Delaware in *In re Indianapolis Downs, LLC*, the enforceability of postpetition RSAs was not as certain (*see* 486 B.R. 286 (Bankr. D. Del. 2013)).

There are certainly variations of RSAs with some less and some more extensive in scope as to participants' performance requirements under the RSA. However, typically, the main provisions of an RSA include (i) the creditors' agreement to support the plan (typically by a vote in favor of a conforming plan) and not undertake an activity that could impede or delay confirmation; and (ii) the creditors' agreement not to assign the claims subject to the RSA, unless the assignee agrees to be bound by the RSA's terms, so that, for example, a distressed debt buyer cannot accumulate claims that previously supported the RSA and then renege on it. Typically, creditors are willing to agree to RSAs in exchange for favorable treatment under the negotiated plan concerning, for example, payment terms, interest rates, timing of payments, debt-to-equity conversions (including through rights offerings that give the creditor participants the right to buy the reorganized equity at a favorable set price[5]), and debtor and third party releases for the RSA parties.

II. Nuts and Bolts of RSAs

RSAs are contracts between a distressed company and certain constituents:

Media, Case No. 20-33768 (MI) (Bankr. S.D. Tex.); *In re Sheridan Holding Company I, LLC,* Case No. 20-31884 (DRJ) (Bankr. S.D.Tex.); *In re FULLBEAUTY Brands Holdings Corp.,* Case No. 19-22185 (RDD) (Bankr. S.D.N.Y.). While postpetition RSAs contemplate a plan timeline longer than prepacks (since the debtor must build in additional time for postpetition approval of a disclosure statement and solicitation of votes on a plan), cases with postpetition RSAs are nonetheless typically of shorter duration than chapter 11 cases with no RSAs (potentially 3-4 months for plan confirmation).

[3] *See*, *e.g.*, *In re TK Holdings Inc.*, No. 17-11375 (BLS) (Bankr. D. Del. 13, 2017) [Dkt. No. 1359] (order approving postpetition plan support agreement pursuant to sections 363(b) and 105(a)); *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del. Sept. 19, 2016) [Dkt. No. 9584] (same); *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del. Sept. 18, 2015) [Dkt. No. 6097] (same); *In re Tronox Inc.*, No. 09-10156 (ALG) (Bankr. S.D.N.Y. Dec. 23, 2009) [Dkt. No. 1030] (same).

[4] The bankruptcy court will likely show a great amount of deference to the debtor that is seeking to assume an RSA that was created pre-filing. Generally, a business judgement standard will be utilized by the court. While courts generally will not second-guess the debtor's business judgment, the involvement of insiders, if applicable, will trigger heightened scrutiny. There have been instances in which a debtor has entered into a prepetition PSA but does not seek to assume it under section 365. In such case, the nondebtor parties would be bound by the terms of the RSA, but the debtor technically would not, although as a practical matter, the debtor would likely continue to comply with the RSA since it would believe the RSA is in the estate's best interest.

[5] In some RSA cases, a select group of creditors may backstop the offer of equity securities in the reorganized debtor, which is a promise, in exchange for a fee or other consideration, to purchase any remaining equity if the offering is undersubscribed. Because securities in chapter 11 rights offerings are commonly offered at a substantial discount to the value attributed to the reorganized debtor in the plan, there is usually only a minimal risk that the backstop will ever come into play, thus raising the question of whether RSA parties may be overly benefitting in some cases.

- Can include entire classes of creditors or just a few key creditors.
- Typically includes a term sheet describing the contemplated restructuring.
- Commonly includes milestones for, as applicable, both out-of-court events (*e.g.*, dates for debt exchanges, votes, and solicitation) and in-court events (*e.g.*, filing a petition, filing a plan, obtaining plan confirmation).
- Agreement to support the plan but typically there are express "fiduciary outs" for the debtor and/or other participating parties.

A. Benefits of RSAs

The benefits of RSAs typically include:

- Helping build a consensus on a plan of reorganization, leading to a speedier exit from bankruptcy.
- Helping build momentum in the bankruptcy case, again leading to a quicker chapter 11 case.
- Providing cost savings and efficiency by reducing the costs and duration of the bankruptcy case.
- Minimizing disruptions to the debtor's relationships with customers, employees, vendors, and business partners.
- Providing some certainty to an uncertain situation/process by establishing a framework for a plan before or early in the case, thereby assuring the market that the debtor will emerge relatively quickly from bankruptcy.

In addition to generally providing more certainty about a restructuring timeline and exit strategy, potential concessions and other benefits creditors may receive under the RSA, to encourage their participation, include (i) expedited milestones for the debtor to achieve important chapter 11 events (such as approval of postpetition financing, approval of a disclosure statement, and confirmation of a plan); (ii) favorable payment terms, interest rates and/or payment schedules; (iii) debt-to-equity conversions; (iv) liability releases by the debtor and estate, and often by third parties (either consensually or, in special circumstances, nonconsensually depending on the jurisdiction); (v) other potential consideration for the participating creditors such as special signing and other fees; and (vi) payment of the creditor's professional fees and expenses related to the case. At times, a key lender or creditor party to the RSA is also proposed to be the debtor-in-possession (DIP) lender, in which case that lender would receive additional benefits (like fees) associated with the DIP financing.

Further, RSAs with arguably disruptive provisions (such as significant signing or other fees for RSA parties) may sometimes be appropriate to counteract adverse holdout activity by a minority of creditors. Depending on the circumstances of the case, a relatively small minority of creditors could otherwise block a deal beneficial to the debtor and most or all of the various stakeholders (although on the other hand, a majority could run over the minority, forcing the minority to take unduly large losses where the majority strikes a deal with the debtor).

B. Problems with RSAs

Critics of RSAs point to several potential adverse incentives and results relating to RSAs:

- RSAs may in some cases short-circuit productive interaction or distort beneficial negotiations among the various stakeholders. For example, some creditors may lose leverage if a substantial percentage of the other parties-in-interest are locked up by the RSA (*e.g.*, trade creditors versus noteholders).

- The often-accelerated nature of RSA cases may result in less oversight by the bankruptcy court, the U.S. Trustee, and smaller stakeholders.

- Notwithstanding "fiduciary out" clauses, RSAs may unduly limit the options of both debtors and key creditors and lead to problems regarding fiduciary duties.

- The RSA process may constitute impermissible solicitation of votes on the plan under section 1125.

- Some creditors, not parties to the RSA either by choice or involuntarily (by not being asked to participate by the debtor[6]), may be effectively disenfranchised in the plan process. Thus, a minority of creditors could be rolled over by the RSA parties (whose votes for the plan could be cynically viewed as votes bought by the debtor), forcing the minority to incur unduly large losses, while the RSA parties may unduly benefit by virtue of the RSA.

Many critics focus on the disenfranchisement concerns, but it is debatable whether such criticisms are valid. In some cases it may just be impractical to negotiate RSAs with, for instance, trade creditors, particularly prepetition. Further, arguably, other parties like a creditors' committee may adequately represent those who are not involved in negotiations. Moreover, it is unclear in many cases whether creditors disenfranchised in relation to an RSA would be any less likely to be disenfranchised in "regular" plan negotiations. Notably, RSA participants tend to be large, sophisticated financial creditors that likely would have substantial leverage in normal plan negotiations as well (often they are also undersecured creditors with liens on substantially all of the debtor's assets or significant portions thereof).

As a matter of policy, arguably, it is not crystal clear that even an RSA deal which may allow senior creditors to potentially be overcompensated at the expense of the junior creditors

[6] As an example, if a group of creditors is "out of the money" (*i.e.*, the value of the enterprise is insufficient to repay any portion of their claim), arguably, it would not serve the debtor's goal to obtain an impaired accepting class for plan confirmation by entering into negotiations with them.

should be especially troubling. The ability to reorganize a debtor more quickly and cheaply through an RSA has direct efficiency benefits. And, while some creditors will receive more and others less, sophisticated creditors should be responsible for their ultimate return.

C. "Fiduciary Outs" Provisions

A party who signs an RSA but then finds itself with interests adverse to the terms of the plan may no longer be obligated to support the plan if such support violates its fiduciary duties. *See, e.g., In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 464 (Bankr. S.D.N.Y. 2014) ("the [PSA] provides a fiduciary out that gives the Debtors the ability to receive, review and negotiate unsolicited proposals for any better alternative transaction"). Examples of "fiduciary outs" language include:

- "The Debtors' Covenants: As long as a Support Termination Event has not occurred, or has occurred but has been duly waived in accordance with the terms hereof, the Debtors shall, to the extent not inconsistent with the fiduciary obligations of any of the Debtors or any of their respective subsidiaries, use their commercially reasonable efforts to [file the Disclosure Statement, obtain from the Bankruptcy Court an order confirming a Qualified Plan, and effectuate and consummate this Plan]." (Citadel Broadcasting Corp. Plan Support Agreement, § 5.)

- "Fiduciary Duties. Notwithstanding anything to the contrary herein, nothing in this Agreement shall require (i) the OCC or any of its members or professionals, or (ii) the Debtors, their professionals or any directors or officers of any of the Debtors, in such person's capacity as a director, or officer, professional, or member (as applicable), to take any action, or to refrain from taking any action, that such person determines in good faith, after consultation with counsel, is inconsistent with its or their fiduciary obligations under applicable law, and no action or failure to take action, including any disclosure that the board of directors of the Company so determines is required by its fiduciary duties shall be deemed to have been so required." (Chemtura Corporation Plan Support Agreement, § 26.)

Questions that may be asked about such RSA provisions include whether such provisions in many cases highlight form more so than substance in that the debtor embarks on a case strategy and plan confirmation process in furtherance of the RSA, allocating substantial resources and time, and absent highly unusual circumstances, deviation from this process is very unlikely.

D. Potential Section 1125 Issues

Section 1125(b) prohibits soliciting votes on a plan prior to the court approving the disclosure statement. Arguably, an RSA is not a plan *per se*, but is a precursor to a plan agreed to by the debtor and key creditors.

Most courts define solicitation narrowly as to constitute only a specific request for an official vote either accepting or rejecting a plan.[7] *See, e.g.*, *In re Snyder,* 51 B.R. 432, 437 (Bankr. D. Utah 1985)); *In re Dow Corning Corp.,* 227 B.R. 111, 118 (Bankr. E.D. Mich. 1998); *In re Kellogg Square P'ship,* 160 B.R. 336, 340 (Bankr. D. Minn. 1993). In such courts' view, "solicitation" does not include negotiation over the terms of a plan or disclosure statement. As one court explained, solicitation does "not encompass discussions, exchanges of information, negotiations, or tentative arrangements that may be made by the various parties in interest in a bankruptcy case which may lead to the development of a disclosure statement or plan of reorganization, or information to be included therein." *In re Snyder*, 51 B.R. at 437.

In such courts' opinion, to interpret solicitation more broadly would "seriously inhibit free creditor negotiations"; and there is "no principled, predictable difference between negotiation and solicitation of future acceptances" (*Century Glove, Inc. v. First Am. Bank of NY,* 860 F.2d 94, 101-02 (3d Cir. 1988)). A narrow interpretation of solicitation furthers clear Congressional intent to encourage negotiations among creditors and other stakeholders in chapter 11 cases which, if successful, would allow the parties to memorialize their agreements (in RSAs) and move the case forward, saving time and reducing costs for all stakeholders.

Arguably, in the typical RSA case where sophisticated financial players are involved, there is little real need for protection of creditor voters through burdensome disclosure requirements, and moreover, in any event, the RSA creditors cast their actual votes only after the disclosure statement is approved. As explained by one bankruptcy court:

> "[T]he interests that § 1125 and the disclosure requirements are intended to protect are not at material risk in this case. The Code's robust disclosure requirements were designed to end the 'undesirable practice ... of soliciting acceptance or rejection at a time when creditors and stockholders were too ill-informed to act capably in their own interests.' [citation omitted]. The Restructuring Support Parties, by contrast, are all sophisticated financial players and have been represented by able and experienced professionals throughout these proceedings. It would grossly elevate form over substance to contend that § 1125(b) requires designation of their votes because they should have been afforded the chance to review a court-approved disclosure statement prior to making or supporting a deal with the Debtor."

In re Indianapolis Downs, LLC, 486 B.R. 286 (Bankr. D. Del. 2013) (denying motion to designate votes of parties to postpetition RSA).

E. RSA Parties' Fees and Costs

To encourage stakeholders' participation in an RSA, the debtor will very often include the benefit of payment of the creditor's professional fees and expenses related to the RSA and chapter 11 case. *See, e.g., In re Mallinckrodt PLC*, Case No. 20-50850 (JTD) (Bankr. D. Del. Feb. 1, 2021) [Dkt. No. 1250] (approving reimbursement agreements for counsel to ad hoc committee of unliquidated tort claimants under sections 363(b) and 105(a) in connection with support for

[7] At the very top of every or nearly every postpetition RSA, there will be a clear disclaimer that the RSA is not soliciting votes on a plan for purposes of section 1125.

unassumed restructuring support agreement); *In re Purdue Pharma, L.P.*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. Dec. 2, 2019) (authorizing assumption and entry of reimbursement agreements under sections 365 and 363 with counsel to ad hoc group of unsecured tort victims); *In re MPM Silicones, LLC*, No. 14-22503 (RDD) (Bankr. S.D.N.Y. June 23, 2014) (Dkt. No. 507) ("The obligation to pay fees and expenses set forth in Section 1.1(xi) of the RSA constitutes an actual and necessary cost and expense to preserve the Debtors' estates and is reasonable and warranted on the terms set forth in the RSA in light of, among other things, (i) the significant benefit to the Debtors' estates of having a definitive and binding restructuring support agreement providing for an equity commitment to fund the Debtors' proposed chapter 11 plan, and (ii) the substantial time, effort, and costs incurred by the Plan Support Parties in negotiating and documenting the Backstop Commitment Agreement and the RSA and reserving the funds to make the equity investment pending confirmation and effectiveness of a chapter 11 plan.").

While this is often done under RSAs, serious questions can be raised as to whether such benefits are justified under the Bankruptcy Code. In particular, it can be argued that section 503(b) is the sole provision governing administrative expenses including professional expenses for an entity seeking an expense request for substantial contribution. *In re Lehman Bros. Holdings Inc.*, 508 B.R. 283, 290 (S.D.N.Y. 2014). And, compensation is said by some courts to be limited to extraordinary actions that lead to an "actual and demonstrable benefit to the debtor's estate, the creditors, and to the extent relevant, the stockholders." *In re Randall's Island Family Golf Ctrs., Inc.*, 300 B.R. 590, 598 (Bankr. S.D.N.Y. 2003)

Further, active participation alone will be likely insufficient to give rise to a substantial contribution claim. *See, e.g., In re Granite Partners, L.P.*, 213 B.R. 440, 446 (Bankr. S.D.N.Y. 1997). Active participation includes, for example, involvement in negotiation, drafting and confirming a plan of reorganization. *In re Baldwin-United Corp.*, 79 B.R.321, 340-41 (Bankr. S. D. Ohio 1987); *In re Sentinel Mgmt.*, 404 B.R. 488, 496 (Bankr. N.D. Ill. 2009) (noting that negotiation, even when hard fought by parties involved, of a provision in chapter 11 plan is an expected and routine activity, that does not give rise to a substantial contribution to the estate).

III. Case Examples

(i) Successful Case: Many RSA cases have been successfully concluded, but one case cited by various commentators is the Guitar Center case. Prepetition, this music gear retailer entered into an RSA with its key stakeholders, including its equity sponsor (a fund managed by Ares Management Corporation), new equity investors Brigade Capital Management and a fund managed by The Carlyle Group, as well as supermajorities of its noteholder groups. The RSA included new financing from existing creditors and provided for $165 million in new equity from Ares, Brigade and Carlyle Group under a confirmed plan. Just over a month after the petition date, in December 2021, the debtor's prepack plan was confirmed and became effective, which eliminated more than $800 million in existing debt. In connection with the plan, the debtor raised $350 million in new senior secured notes and obtained a $375 million secured asset based financing facility. Numerous observers have opined that the Guitar Center case was well-managed, demonstrating how a well-managed RSA / prepack process can lead to successfully reorganized debtors in an expedited manner. One possible concern though is the collective costs in terms of the substantial fees and other benefits for RSA parties through one or more ways (as DIP lender, as new noteholder, as exit lender, etc.).

(ii) No Rubberstamp Approval: In *In re Innkeepers USA Trust*, 442 B.R. 227 (Bankr. S.D.N.Y. 2010), the court considered a prepetition RSA that was filed with "the support of only one creditor among the critical mass of creditors needed to support a successful restructuring in these cases." While the court noted that the heightened scrutiny/entire fairness standard may apply due to the involvement of an insider, it concluded that "the debtors have failed to meet their burden for assumption of the PSA under either 'heightened scrutiny' or under the less stringent 'business judgment' test." The court found significant that the proposed deal was not "shopped" and that most constituents were excluded from the process. The debtor was found not to have acted in good faith because, among other things, it failed to consider alternatives. Other factors that the court found important were that the objecting creditors were not an "out of the money" constituency which was objecting to the RSA for hold-up value, but rather had real economic value at stake, and that the debtors made no attempt to value the equity preserved for an affiliate.

(iii) Ex-Post Handling of Due Process and Other Objections: In the Belk's chapter 11 case (*In re Belk, Inc.,* Case No. 21-30630 (MI) (Bankr. S.D.Tex.)), the U.S. Trustee filed an objection to plan confirmation, citing due process concerns regarding Belk's prepetition noticing procedures. More specifically, the U.S. Trustee argued that the debtors' proposed confirmation schedule was too quick to provide parties-in-interest with time to evaluate and respond to the proposed plan, notwithstanding the debtors' compliance with Bankruptcy Rule 2002(b). The court found that Belk's noticing procedures were sufficient to satisfy due process requirements, but it expressed concerns regarding certain parties who may have misunderstood the notice process. Given such concerns, the court entered a "due-process preservation order," which extended the deadline for parties-in-interest to opt out of the releases contained in the plan and raise objections regarding due process or the assumption of executory contracts or unexpired leases. The court's entry of the due-process preservation order enabled Belk to resolve the objections raised by the U.S. Trustee, while obtaining confirmation of its plan on an expedited timeline. Belk successfully emerged from chapter 11 only 21 hours after filing for bankruptcy. Notably, after the entry of the due process preservation order, Belk did not receive any due process objections.

A similar approach was used in *HighPoint Resources'* chapter 11 case in Delaware (*In re HighPoint Resources Corp.*, Case No. 21-10565 (CSS) (Bankr. D. Del.). The debtor filed for chapter 11 on March 14, 2021, and obtained confirmation of its plan within four days thereafter. In anticipation of an objection from the U.S. Trustee, the debtor incorporated language and concepts from Belk's due process preservation order in its proposed confirmation order. HighPoint Resources' proposed confirmation order (i) preserved the rights of any party alleging that it had inadequate due process by extending the deadline to file an objection to 30 days after the petition date; (ii) extended the deadline to opt out of the third party release to 30 days after the confirmation date; and (iii) provided contract counterparties a period of 30 days after the effective date to dispute proposed cure amounts or adequate assurance of future performance.

Query whether such an approach by these courts sets up an implicit bias in favor of accelerated confirmation and against any later, successful objection raised by a party pursuant to the due-process preservation orders. Under this approach, debtors subject to RSAs may be incentivized to push through and rationalize an expedited confirmation process, and deal on a case-by-case afterwards with dissenting parties in interest.

(iii) Evolving Process of RSAs: Certainly one of the more widely discussed chapter 11 filings during the COVID-19 pandemic was the Hertz bankruptcy (*The Hertz Corp*., Case No. 20-11218 (MFW) (Bankr. D. Del. May 22, 2020). Of particular note is that the debtors had entered into a postpetition RSA (more specifically a Plan Support Agreement (PSA)) with, among other parties, the "PE Sponsors" (Centerbridge Partners, L.P., Warburg Pincus and Dundon Capital Partners) in early April 23, 2021. That agreement did not become the operative one undergirding the later confirmed plan.

Instead, an offer by a group led by Knighthead Capital Management, Certares Opportunities LLC and Apollo Capital Management was ultimately accepted by the debtors through the "fiduciary out" provision in the PSA, after a bidding war, to provide the equity capital required to fund Hertz's revised reorganization plan and emergence from chapter 11. Equity holders ended up getting material compensation due to a turnaround in Hertz while they were in Chapter 11.

Specifically, postpetition, the debtors had been negotiating with several potential sponsor groups, and in early March 2021, the debtors determined that a proposal set forth in the initial plan was the most favorable proposed transaction available at that time and thereafter filed the first plan. Subsequently, several bouts of enhanced proposals occurred, and the plan was correspondingly modified, culminating in the final plan that improved on the initial proposal. The creditors' committee ultimately agreed to support the plan in mid-April 2021, executing a joinder agreement to the PSA. Consistent with their fiduciary duties to maximize the value of the estates, the applicable boards of directors, among other acts, concluded that the applicable proposals were bona fide proposals that could reasonably be expected to result in a "Superior Transaction" within the meaning of such term in the prior Plan Support Agreement, and that failure of the boards to pursue such alternative transaction proposals would reasonably be expected to result in a breach of such boards' fiduciary duties.

The foregoing illustrates how an RSA (or a PSA in the Hertz case) can be important in setting up a starting point and an initial framework, from which further beneficial negotiations can springboard.

IV. Recent Issues and Criticisms

- **David Skeel, Jr., "Distorted Choice in Corporate Bankruptcy," 130 Yale L.J. 366 (Nov. 2020):**

  ".... Two strategies now routinely used in big cases are intended to distort, and clearly do distort, the voting process. Restructuring support agreements (RSAs) and 'deathtrap' provisions remove creditors' ability to vote for or against a proposed reorganization simply on the merit.

  ".... One possible solution is simply to ban distortive techniques, as several scholars advocate with RSAs that offer joinder bonuses. Although an antidistortion rule would be straightforward to implement, I argue this would be a mistake. The distortive techniques respond to developments that have made reorganization difficult, such as claims trading and a greater need for speed. Further, Chapter 11's baseline was never intended to be neutral: it nudges the parties toward confirming a reorganization plan. There also are independent justifications for some distortive techniques, and the alternative to using them might be even worse--possibly leading to more fire sales of debtors' assets.

"How can legitimate use of the new distortive techniques be distinguished from more pernicious practices? To answer this question, I outline four rules of thumb to assist the scrutiny. Courts should consider whether holdouts are a serious threat, the magnitude of the coercion, the significance of any independent justifications, and whether the holdout threat is an intentional feature of the parties' contracts....

"I do not mean to suggest there is no reason for concern about the new distortive techniques. There is. But the potential benefits of counteracting holdout problems and reducing free-riding, as well as creditors' ability to coordinate, suggest that distortive techniques should be scrutinized in a more nuanced fashion, not simply disallowed.

"A signing-fee RSA is more coercive. Because joiners receive different--and higher--overall consideration than those who do not join, there is greater pressure for creditors to join, akin to a structurally coercive tender offer in corporate law. The inclusion of a fee alters creditors' entitlements, since it means they will get one payout if they sign the RSA (their pro rata recovery plus the fee and another if they do not (just their pro rata recovery)). As a result, even a creditor who believes the payout proposed by the RSA is too low may feel pressured to join, lest she be left with the worst possible outcome: enough of her fellow creditors join the RSA to provide a vote in favor of the proposed reorganization plan, and she doesn't get the RSA fee."

(footnotes omitted).

- **Edward Janger & Adam Levitin, "Badges of Opportunism: Principles for Policing Restructuring Support Agreements," Brooklyn Law School Legal Studies (March 2020):**

"The key question in thinking about RSAs, and the dividing line between the good and the bad, is whether an RSA is being used to overcome coordination problems, or whether it is being used to exploit situational leverage in order to hold the resolution of value maximization issues hostage to redistributional demands. Is an RSA facilitating the bargaining in the shadow of entitlement that the Bankruptcy Code contemplates? Or is it facilitating opportunistic distortion of the Code's priority scheme or process for policing bargains through plan confirmation? We suggest some 'badges of opportunism' that can be used as a rubric for identifying when RSAs are problematic.

"The badges of opportunism come in two flavors, procedural and distributive, though the two are often linked. On the distributive side, a clear sign of opportunism is when an RSA is used to reallocate reorganization surplus to its supporters. Thus, certain provisions in an RSA such as those that waive preference or fraudulent conveyance recoveries, that release third parties, that waive section 506(c) charges, or that enforce structural subordinations, should send up red flags as badges of opportunism.

"On the procedural side, badges of opportunism are present in provisions that:

(1) reward the signer of the RSA at the expense of non-signers, particularly where the non-signers are in the same class or a junior class (unless disinterested members of the junior class also support the plan); or

(2) seek to commit parties to supporting a plan notwithstanding later developments in the case.

"Thus, the absence of a fiduciary out or a no-material modification provision might be fatal. Similarly, coercive features … ought to be carefully scrutinized with an eye toward whether they are being used in good faith.

"Finally, and this bears particular mention, where an RSA provides for a sale of the company, the distributive and procedural concerns are magnified because the sale will be accomplished well before the plan process—the Bankruptcy Code's contemplated mechanism for policing bargains—can be completed. Therefore, the distributive questions in a sale should be subject to the procedural protections associated with the plan process or the equivalent.

"…. If there is to be a sale of substantially all the debtor's assets outside the context of a confirmed plan, sufficient assets should be retained in the estate to assure that any distribution will satisfy the statutory requirements for 'cramdown.'"

(footnotes omitted).

- **Douglas Baird, "Bankruptcy's Quiet Revolution," Law School of Univ. of Chicago, April 2016.**

--- "Restructuring support agreements allow the debtor to give larger shares to the creditors capable of causing the most trouble. The restructuring support agreement enhances the debtor's ability to shape the reorganization and coral the various creditor groups. As long as the firm reorganizes successfully, everything else is a detail.

"But it is a mistake to suggest that bargaining is desirable for its own sake. Bargaining by itself in inherently wasteful. There is no reason to do it unless it serves some purpose. If the bargaining is done in pursuit of a plan of reorganization, it seems desirable. What about such bargaining should be suspect? The most obvious consequence of using restructuring support agreements is that they leave creditors with the greatest ability to put the reorganization off course with more and creditors who lack such power with relatively less. But this alone may not be cause for concern."

--- "[Ensuring the integrity of the process beyond the distributional rules] is best done not by trying to determine how much value is leaking or how large each creditor's share would be in a different bargaining environment, but rather by trying to ensure that the negotiations are done in a way that ensures enough information flows to the judge so that she can apply the Code's substantive rules. The way to incorporate [the applicable case law authorities] then is not to worry about where money ended up or whether money passed hands, but process. If the debtor is not there to press for a different valuation or point to a deficiency in the senior creditor's lien, someone else needs to be there. A plan is not 'fair and equitable' if it keeps the bankruptcy judge in the dark—even if the substantive terms of the plan itself are unobjectionable."

--- "In deciding whether to approve the assumption of a restructuring agreement reached outside of bankruptcy or to bless one reached inside of bankruptcy, the bankruptcy judge should assess the integrity of the process as much as the terms itself."

--- "Ultimately, the question of how to police the bargaining can be put simply. The question is how the bankruptcy judge should assess the trade-off between getting the information and keeping the case on track. Moreover, the bankruptcy judge does not need that much information to figure out what is going on. She is a skeptical recipient of knowledge. She can draw inferences from what contesting parties tell her. [footnote omitted]

"What the court must do, however, is resist the temptation to unmoor the 'fair and equitable' principle and similar language from history and theory. Any general review for 'fairness' risks a degenerative process that begins with some law clerk inventing a vacuous laundry list of factors to be considered. Such tests are seductive because they give the illusion of certainty, but such tests are always hopelessly malleable and indefinite. They invite those who adopt them to replace careful thinking with mechanical recitation and hand-waving. The judge should instead take direct measure of the agreement and the path that led to it. Any support agreement that forces the hand of the judge too much or keeps her from understanding the lay of the land should be suspect."

Equitable Mootness – Should Confirmation Orders Be Subject to Meaningful Appellate Review?

Equitable mootness has attracted a significant amount of criticism from courts and commentators over the years,[1] and has recently become the subject of renewed focus due to its potential to shield controversial rulings (such as, for example, those in the context of third-party releases under chapter 11 plans, which have increasingly become a hot-button issue) from meaningful appellate review. Nevertheless, the equitable mootness doctrine persists and remains a key tool for debtors seeking to limit appellate challenges to confirmation orders and other key rulings in bankruptcy cases. These materials provide some brief background on the equitable mootness doctrine and discuss recent developments in the case law, which continues to evolve in the absence of guidance from the U.S. Supreme Court.

Background

Equitable mootness is a judicially-created doctrine "by which an appellate court deems it prudent for practical reasons to forbear deciding an appeal when to grant the relief requested will undermine the finality and reliability of [certain key transactions in a bankruptcy cases (typically, confirmation of plans of reorganization)]." *In re Tribune Media Co.*, 799 F.3d 272, 277-78 (3d Cir. 2015), *cert. denied sub nom. Aurelius Cap. Mgmt., L.P. v. Tribune Media Co.*, 577 U.S. 1230 (2016); *see also, e.g.*, *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012) ("Equitable mootness occurs when a comprehensive change of circumstances has occurred so as to render it inequitable for [an appellate] court to consider the merits of the appeal." (quotation marks omitted)). "Equitable mootness often applies in bankruptcy appeals because 'bankruptcy judgments frequently result in complex business reorganizations or distributions of assets that would be difficult for an appellate court to unravel.'" *Wilmington Tr., Nat'l Ass'n v. Lord & Taylor LLC*, Civ. Act. No. 3:20cv878, 2021 WL 3089105, at *8 (E.D. Va. Jul. 22, 2021) (quoting *Huntington Nat'l Bank v. Shawnee Hills, Inc. (In re Shawnee Hills, Inc.)*, No. 2:02-0872, 2002 WL 31681538, at *2 (S.D. W. Va. Nov. 19, 2002)).

The equitable mootness doctrine is premised on the notion that under certain circumstances, it would be inequitable to "unscramble the egg" – e.g., by overturning a confirmed plan of reorganization, even if there is a still a live "case or controversy" such that the appeal is

[1] For example, in *City of Detroit*, U.S. Circuit Judge Karen Nelson Moore wrote a lengthy dissent criticizing the "ill-reasoned equitable mootness doctrine," which, she asserted, was not justified by the Bankruptcy Code, "undermine[d] the delicate constitutional balance on which bankruptcy adjudication is based," and should not be applied in the chapter 9 context (if in any context). *Ochadleus v. City of Detroit (In re City of Detroit)*, 838 F.3d 792, 807, 811, 814 (6th Cir. 2016) (Moore, J., dissenting), *cert. denied*, 137 S. Ct. 1584 (2017). Similarly, in *One2One Communications*, U.S. Circuit Judge Cheryl Ann Krause wrote a lengthy concurrence in which she agreed with "the majority's equitable mootness analysis, which we are compelled to undertake under our controlling precedent," but noted her significant concerns about both the "legitimacy" and the "efficacy" of the equitable mootness doctrine (which she described as a "legally ungrounded and practically unadministrable 'judge-made abstention doctrine'"), and urged her fellow judges "to revisit or at least reform the equitable mootness doctrine." *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438, 454 (3d Cir. 2015). *See also, e.g.*, Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377 (2019).

not strictly moot under Article III of the United States Constitution. *See, e.g.*, *In re City of Detroit*, 838 F.3d at 798 ("Equitable mootness is not technically 'mootness' – constitutional or otherwise – but is instead 'a prudential doctrine that protects the need for finality in bankruptcy proceedings and allows third parties to rely on that finality' by 'prevent[ing] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract.'"); *R^2 Invs., LDC v. Charter Commc'ns, Inc. (In re Charter Commc'ns, Inc.)*, 691 F.3d 476, 481 (2d Cir. 2012) ("Unlike constitutional mootness, which turns on the threshold question of whether a justiciable case or controversy exists, equitable mootness in the context presented here is concerned with whether a particular remedy can be granted without unjustly upsetting a debtor's plan of reorganization. Equitable mootness in the bankruptcy setting thus requires the district court to carefully balance the importance of finality in bankruptcy proceedings against the appellant's right to review and relief." (citations omitted)), *cert. denied sub nom. Law Debenture Trust Co. of N.Y. v. Charter Commc'ns, Inc.*, 569 U.S. 968 (2013).

While the precise standard for invoking equitable mootness varies across jurisdictions, courts generally focus on whether the appellate court can fashion effective and equitable relief, and consider some or all of the following factors: (1) whether the plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments. *See, e.g.*, *In re Phila. Newspapers, LLC*, 690 F.3d 161, 168 (3d Cir. 2012) (citation omitted), *cert. dismissed sub nom. Gureghian v. Phila. Newspapers, LLC*, 568 U.S. 1151 (2013); *see also, e.g.*, *Search Market Direct, Inc. v. Jubber (In re Paige)*, 584 F.3d 1327, 1339, 1348 (10th Cir. 2009) (applying six-factor test including "a quick look at" the merits of the appeal); *JPMCC 2001-C1 Grasslawn Lodging, LLC v. Transwest Resort Props., Inc. (In re Transwest Resort Props., Inc.)*, 801 F.3d 1161, 1167-68 (9th Cir. 2015) (applying four-factor test); *TNB Fin., Inc. v. James F. Parker Ints. (In Matter of Grimland, Inc.)*, 243 F.3d 228, 231 (5th Cir. 2001) (applying three-factor test).

As discussed below, while the equitable mootness doctrine continues to be applied across jurisdictions, its legitimacy and precise scope remain the subject of ongoing debate.

Recent Denials of Certiorari by U.S. Supreme Court

To date, the U.S. Supreme Court has yet to review the doctrine of equitable mootness, leaving the parameters of the doctrine to be defined by lower courts. Within the last year alone, the Supreme Court has denied certiorari with respect to equitable mootness challenges no fewer than five times:

- *KK-PB Fin., LLC v. 160 Royal Palm LLC (In re KK-PB Fin., LLC)*, Case Nos. 20-1261, 20-12368, 2021 WL 5605085 (11th Cir. Nov. 30, 2021) (per curiam) (affirming dismissal of related bankruptcy appeals by purported creditor based on findings that (i) appeal from confirmation order was equitably moot because creditor had failed to obtain (despite seeking) a stay pending appeal and debtor's plan, although it did not "involve unusually complex transactions," had been substantially consummated and (ii) appeal from bankruptcy court's order estimating creditor's claim at \$0 for all purposes was constitutionally moot under Article III because "[t]here is no way to modify the plan, as [appellant] suggests, if the appeal of the plan's confirmation is equitably moot"), *cert. denied*, No. 21-1197, 142 S. Ct. 2778 (2022).

- *Clark v. Council of Unit Owners of 100 Harborview Dr. Condo.*, 857 Fed. App'x 729 (4th Cir. 2021) (per curiam) (holding that appeal by condo owner claimants challenging bankruptcy court's ruling on the amount of their allowed claims against a property manager debtor (for breach of its duty to maintain and repair claimants' unit) as equitably moot where claimants had not attempted to stay implementation of debtor's plan of reorganization, debtor had paid more than $2.8 million to creditors under its confirmed plan, and relief sought by creditors would "both 'nullify the success that ha[d] already been achieved under the Confirmed Plan' and 'harm the interests of third-party creditors and other unit owners'"[2]), *cert. denied*, 142 S. Ct. 772 (2022).

- *In re Nuverra Envtl. Sols., Inc.*, 834 Fed. App'x 729 (3d Cir. 2021) (dismissing appeal by individual creditor alleging that debtors' confirmed chapter 11 plan of reorganization unfairly discriminated against unsecured creditors as equitably moot; acknowledging that a "court may fashion whatever relief is practicable instead of declining review simply because full relief is not available" and that appellant sought "a relatively small sum," but finding that appellant's requested relief was in fact "a personal payout that was disallowed by" the Bankruptcy Code and that any other form of relief "would require unwinding the

[2] The claimants in *Clark* had argued that their appeal was not equitably moot because the "limited relief" they were requesting – a ruling that the amount of their claims against the debtor was greater than the amount allowed by the bankruptcy court – would not require "a complete reversal of the reorganization plan." *See Clark v. Council of Unit Owners of 100 Harborview Dr. Condo.*, Civ. Case. No. SAG-18-03542, 2019 WL 4673434, at *6 (D. Md. Sept. 25, 2019). However, the district court found that this position was "belied by the nature of their appeal," as the claimants were seeking more than $25 million in damages (versus the $731,000 plus $6,000 per month in ongoing damages allowed by the bankruptcy court), which amount "would dwarf the total owed to other creditors" and "might require disgorgement of all, or a significant portion of, the $2.8 million already paid." *Id.* The district court noted that because one of the classes under the plan had transferred a condominium unit to the debtor's designee in exchange for payment of their claims as part of a settlement under the plan, disgorgement of funds paid to that class "would necessitate the transfer of title – for [the unit] – back to the creditors, which may prove practically impossible." *Id.* Moreover, the district court observed, granting the claimants' requested relief would "undermine the interests of other unit holders," who had continued to pay their annual and special assessments (the primary funding source for the confirmed plan) in reliance on the plan's finality. *Id.*

confirmed plan"[3]),[4] *cert. denied sub nom.*, *Hargreaves v. Nuverra Envtl. Sols., Inc.*, 142 S. Ct. 337 (2021).

- *GLM DFW, Inc. v. Windstream Holdings, Inc. (In re Windstream Holdings, Inc.)*, 838 Fed. App'x 634 (2d Cir. 2021) (rejecting argument that equitable mootness only applied to appeals from confirmation orders, and holding that appeal from order authorizing certain payments to critical vendors was equitably moot where purported critical vendor had failed to seek a stay pending appeal, debtors' plan of reorganization had been substantially consummated, and granting requested relief "could cause tens of millions of dollars in previously satisfied claims to spring back to life, thereby potentially requiring the bankruptcy court to reopen the plan of reorganization"; explaining that "[o]ur precedent is clear that equitable mootness can be applied 'in a range of contexts,' including appeals involving all manner of bankruptcy court orders" and that "an appeal does not need to directly challenge a plan of reorganization to impact that plan"), *cert. denied*, *GLM DFW, Inc. v. Windstream Holdings, Inc.*, 142 S. Ct. 226 (2021).

- *Pinto-Lugo v. Fin. Oversight & Mgmt. Bd. for P.R.*, 987 F.3d 173 (1st Cir. 2021) (finding that doctrine of equitable mootness was not abrogated by *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019)[5] and applied in title III proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"),[6] and

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[3] The appellant in *Nuverra* was an unsecured noteholder. Under the confirmed plan, creditors in the noteholder's class were only receiving a 6% recovery on the face value of their notes, whereas certain unsecured trade and other creditors in a separate class "whose debts ar[o]se out of the debtor's day to day operations" were receiving payment in full pursuant to a "gift" from secured creditors. *See In re Nuverra Sols., Inc.*, 834 Fed. App'x at 731. The Third Circuit found that the appellant's requested relief, i.e., paying his $450,000 unsecured claim in full, would run afoul of section 1123(a)(4) of the Bankruptcy Code, which prohibits plans from preferring certain creditors over others in the same class. *Id.* at 734. Thus, the Third Circuit concluded, "the only way to give [the appellant] the money he wants is to give all [creditors in his class] a 100% refund on their $40.4 million in unsecured 2018 notes, which would fatally scramble the Plan and significantly harm third parties." *Id.* at 736.

[4] In a concurring opinion in *Nuverra*, U.S. Circuit Judge Krause reiterated the concerns stated in her prior concurrence in *One2One Communications*, lamenting that "[t]oo often, . . . we and other courts have allowed the doctrine itself to short-circuit the merits analysis," and asserted that "this problematic doctrine has lured us into abdicating our jurisdiction when we should be exercising it, and 'stunt[ing] the development' of our bankruptcy jurisprudence when it's our duty to promote it." *See In re Nuverra Envtl. Sols., Inc.*, 834 Fed. App'x at 736-37 (Krause, J., concurring). Judge Krause therefore concurred only in the judgment, explaining that she would have resolved the appeal in favor of the reorganized debtors on the merits rather than on equitable mootness grounds. *Id*. at 737.

[5] In *Mission Product Holdings*, the U.S. Supreme Court considered whether the case before it was moot, and noted that "[u]nder settled law, we may dismiss the case for that reason only if 'it is impossible for the court to grant any effectual relief whatever' to [the petitioner] assuming it prevails." *Mission Prod. Holdings, Inc.*, 139 S. Ct. at 1660. The First Circuit reasoned in *Pinto-Lugo* that *Mission Product Holdings* involved Article III mootness and was "inapplicable here, where the issue at hand turns not on jurisdiction but on the merits of what is in form and substance a request for equitable relief." *Pinto-Lugo*, 987 F.3d at 182.

[6] Certain of the appellants in *Pinto-Lugo* had argued that "even if the [equitable mootness] doctrine fits will within the context of commercial bankruptcy case, it does not apply in a municipal bankruptcy proceeding,

holding that equitable mootness justified dismissal of multiple appeals from order confirming plan of adjustment in title III case where appellants had not sought a stay pending appeal and their appeals went "to the heart of the Plan" such that granting appellants' requested relief "would trigger a hopeless effort to unscramble the eggs"[7]), *cert. denied sub nom. Elliott v. Fin. Oversight & Mgmt. Bd. for P.R.*, 142 S. Ct. 74 (2021).

Other Recent Developments

Courts Applying Equitable Mootness

As noted above, a number of circuit courts have dismissed bankruptcy appeals on equitable mootness grounds in recent years. Other recent decisions applying equitable mootness to dismiss appeals include:

- *Biondo v. Gold, Lange, Majoros & Smalarz, P.C. (In re Biondo)*, Case No. 21-11462, 2022 WL 2512789 (E.D. Mich. Jul. 6, 2022) (dismissing individual chapter 7 debtor's appeal from order granting first and final fee application for counsel to chapter 7 trustee (for fees totaling $10,002.50) as equitably moot where debtor failed to seek stay, trustee had fully administered debtor's solvent estate, and bankruptcy case had been closed; rejecting debtor's argument that allowing her to recover disputed professional fees "'w[ould] not affect the success of the Chapter 7 case'" as "ignor[ing] that the surplus in the present bankruptcy matter was *only* $2,727.33, so even the relatively modest additional administrative [cost] resulting from reopening the case carries the very real possibility of pushing the bankruptcy estate from a surplus to a deficit, at which point the claims of third-party creditor[s] could be implicated"), *appeal filed*, Case No. 22-1666 (6th Cir. Aug. 1, 2022).

- *Talarico v. Ultra Petroleum Corp. (In re Ultra Petroleum Corp.)*, Case No. 21-20049, 2022 WL 989389 (5th Cir. Apr. 1, 2022) (dismissing shareholder's appeal from confirmation order – which sought "full relitigation of the bankruptcy proceedings," including, among

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and certainly not in a Title III proceeding under PROMESA." *Pinto-Lugo*, 987 F.3d at 182. The First Circuit noted that "[a]s to municipal bankruptcy proceeding, every circuit that has considered the doctrine's applicability to Chapter 9 adjustment plans has uniformly treated it as applicable." *Id.* Reasoning that the key question was "whether the reasons for making the doctrine applicable to Chapter 11 reorganizations apply with equal or even greater force to adjustments under PROMESA," the First Circuit answered this question in the affirmative. *Id.*

[7] The First Circuit "recognize[d] the possibility that, in some cases, it might be possible to modify a stand-alone component of a plan to satisfy an idiosyncratic claim without upsetting the interests of third parties, and without setting a precedent that would trigger a cascade of such claims." *Pinto-Lugo*, 987 F.3d at 185. However, the First Circuit found that the relief sought in the appeals before it – in which the appellants argued "that [the confirmed plan of adjustment for the Puerto Rico Sales Tax Financing Corporation ("COFINA"), a public corporation,] unlawfully abrogated their rights as junior COFINA bondholders, that the plan confirmation procedures were unlawful, and that the plan confirmation should not have been implemented because the Commonwealth violated the Puerto Rico Constitution in enacting implementing legislation" – was "neither legal nor practical" and could not be granted without unwinding the now-consummated plan of adjustment. *Id*. at 176, 184-86.

other things, appointment of equity holders' committee, discovery and litigation regarding value of certain assets, and deletion of certain release provisions from plan and confirmation order, based on debtor's alleged bad faith[8] – as equitably moot on grounds that (i) shareholder had not obtained a stay pending appeal, (ii) plan had been substantially consummated, and (iii) granting the requested relief would impact "the entire confirmation order" and "affect the rights of parties not before [the court]").

- *Adventist Health Sys./W. v. Fire Victim Tr. (In re Pac. Gas & Elec. Co.)*, No. 21-15447, 2022 WL 911780 (9th Cir. Mar. 29, 2022) (affirming dismissal of confirmation appeal by creditors challenging their treatment under debtors' confirmed and substantially-consummated plan of reorganization (specifically, application of provisions permitting trustee for fire victims' trust established under plan to (i) reduce payments to fire victims by amount reasonably recoverable by victims from insurers and (ii) require victims to exhaust their available insurance recoveries before seeking compensation from trust) as equitably moot, reasoning that "any effective relief would either be inequitable or would undermine the Plan" because "[e]xempting only Appellants from the challenged [plan] provision could reduce distributions to all other fire victims, and exempting all creditors from the provision would 'knock[] the props out from under' the Plan's two-trust structure").[9]

- *NGL, LLC v. Horizon Hosp. Group, LLC (In re Hazan)*, 10 F.4th 1244 (11th Cir. 2021) (rejecting creditor's argument that equitable mootness "only applies in cases involving large corporation bankruptcy, not in individual bankruptcies," and affirming district court order dismissing creditor's appeal from order confirming individual chapter 11 plan as equitably moot).

- *Drivetrain, LLC v. Kozel (In re Abengoa Bioenergy Biomass of Kansas, LLC)*, 958 F.3d 949 (10th Cir. 2020) (recognizing that "a liquidation masquerading as a reorganization likely will not implicate the same concerns that animate determinations of equitable mootness in cases where a going concern emerges from the bankruptcy process," but

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[8] The appellant in *Ultra Petroleum* did not dispute that he had not sought a stay pending appeal or that the plan had been substantially consummated, but argued that "any 'substantial consummation' [wa]s subject to revocation or rescission' because the issues he raised '[we]re rooted in fraud and deceit' and thus [we]re consequential to the integrity of the Chapter 11 process," and that "because 'virtually all of' the affected parties were sophisticated investors, there were 'no innocent third parties at risk.'" 2022 WL 989389, at *1 (quotations omitted). The Fifth Circuit rejected these arguments. Noting that "rather than pointing to errors made by the district court in its equitable mootness dismissal or to errors made by the bankruptcy court with discrete solutions that we could solve through fractional recovery," the appellant was asserting "broad procedural complaints" that effectively sought to "bring the parties back to square one," the Fifth Circuit concluded that granting the appellant's requested relief at the present stage of the proceedings (after multiple requests for extensions of time by the appellant) "would be to throw the reorganization into chaos." *Id*. at *5.

[9] The Ninth Circuit similarly affirmed the dismissal of a separate confirmation appeal by a *pro se* fire victim as equitably moot and subsequently denied that appellant's petition for rehearing *en banc*. *See McDonald v. PG&E Corp.*, No. 20-17366, 2022 WL 1657452, at *1 (9th Cir. May 25, 2022), *reh'g denied*, *McDonald v. PG&E Corp.*, No. 20-17366, slip op. at 1 (9th Cir. Aug. 23, 2022).

nevertheless affirming dismissal of subordinated creditor's appeal from order confirming chapter 11 plan of liquidation as equitably moot).

Courts Declining to Apply Equitable Mootness

The equitable mootness doctrine is not without limits, however, and a number of courts in recent years have demonstrated a willingness to probe whether effective and equitable relief is truly unavailable under the facts presented and/or to prevent potential attempts by appellees to shield rulings from appellate review on equitable mootness grounds. Recent decisions declining to apply or otherwise restricting the use of the equitable mootness doctrine include:

- *NextPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P. (In Matter of Highland Cap. Mgmt., L.P.)*, No. 21-10449, 2022 WL 3571094 (5th Cir. Aug. 19, 2022) (noting prior criticisms of equitable mootness doctrine and declining to dismiss various appeals from order confirming chapter 11 plan of reorganization as equitably moot despite fact that plan was substantially consummated and appellants had "only a minor economic stake and questionable good faith"; rejecting appellants' arguments that equitable mootness did not apply because plan of reorganization was disguised liquidating plan and because debtor was estopped from asserting the doctrine by virtue of having joined in appellants' motion to certify appeal,[10] but likewise rejecting debtor's argument that granting appellants' requested relief "would generate untold chaos" and reversing confirmation order as to exculpation of certain non-debtors[11]).

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[10] The Fifth Circuit rejected the appellants' characterization of the confirmed plan as a liquidating plan, but further noted that even if the plan were a liquidating plan, that fact would not categorically bar application of the equitable mootness doctrine. *See In Matter of Highland Cap. Mgmt., L.P.*, 2022 WL 3571094, at *6. The Fifth Circuit likewise rejected the appellants' argument that the debtor's decision to join in the motion to certify the appeal estopped the debtor from asserting equitable mootness, noting that appellants "cite[d] no legal support for that approach." *Id.*

[11] The appellants in *Highland Capital* raised numerous challenges to the confirmed plan, including (i) violation of the absolute priority rule, (ii) improper exculpation of nondebtors in violation of 11 U.S.C. § 524(e) (and related injunctive provisions), (iii) noncompliance with Rule 2015.3 of the Federal Rules of Bankruptcy Procedure, and (iv) inaccurate factual findings regarding ownership and control of certain nondebtor entities, the first two of which the debtor argued were equitably moot. *See In Matter of Highland Cap. Mgmt., L.P.*, 2022 WL 3571094, at *6-7. The Fifth Circuit rejected the debtor's argument that the court could not "surgically excise" the challenged provisions of the plan, finding that restrictions on post-confirmation modifications to plans (e.g., under 11 U.S.C. § 1127(b)) did not limit appellate review of confirmation orders nor prevent appellate courts from granting relief in such appeals without upsetting the reorganization. *Id.* at *6. Although the Fifth Circuit ultimately rejected all of the appellants' arguments on the merits other than the challenge to the exculpation provisions, it explained that the absolute priority rule challenge was not equitably moot because there was no evidence that the junior classes allegedly granted improper distribution rights under the plan had actually received any distributions yet, and, thus, "the relief would not affect third parties of the success of the plan." *Id.* at *7. With respect to the exculpation provisions, the Fifth Circuit was unpersuaded by the debtor's argument that the nondebtor exculpated parties (various plan participants, including the debtor and its employees and chief executive officer, the independent directors appointed to govern the debtor during the bankruptcy case, the board appointed to oversee the claimant trust established under the plan, professionals retained in the bankruptcy case, and all "Related Persons") would resign rather than be exposed to litigation from the debtor's highly-litigious co-

- *Patterson v. Mahwah Bergen Retail Group, Inc.*, 636 B.R. 641 (E.D. Va. 2022) ("*Ascena*") (rejecting equitable mootness as basis for denying review of appeal challenging third-party releases and exculpation in confirmed plan and reversing and remanding with instructions to redraft exculpation clause and sever voided third-party releases; citing to the following "threshold issues" weighing against a finding of equitable mootness: (i) vacating the confirmation order eliminates the relevant final judgment such that the court was not faced with "'the passage of time after a judgment in equity and implementation of that judgment,'" (ii) the appeal was brought by the U.S. Trustee in an effort to fulfill "its duty of protecting the public interest and preventing the abuse of the bankruptcy system (which effort would be thwarted by a finding of equitable mootness), (iii) the ruling had significant constitutional implications, and (iv) the facts did not suggest that effective judicial relief was impossible, as the third-party releases could be severed from the plan notwithstanding the "boilerplate" non-severability provision therein).

- *Harrington v. Purdue Pharma L.P. (In re Purdue Pharma L.P.)*, 634 B.R. 240 (S.D.N.Y. 2021) (referencing prior issuance of a temporary restraining order enjoining debtors from implementing confirmed plan (to bolster equitable mootness arguments) pending argument on motion for stay pending appeal; denying appellant's motion for stay pending appeal on the condition that debtors and other plan supporters file a written stipulation providing that "they would not ever argue to any court that the pending appeals had been rendered equitably moot by the actions undertaken pursuant to [a prior bankruptcy court order authorizing the debtors to undertake certain actions in furtherance of the plan]," and emphasizing, "I am on the record as stating that I will not allow this appeal to be equitably mooted").[12]

- *FishDish, LLP v. VeroBlue Farms USA, Inc. (In re VeroBlue Farms USA, Inc.)*, 6 F.4th 880 (8th Cir. 2021) (emphasizing that dismissal on equitable mootness grounds should be "rarely granted" and reversing district court decision dismissing appeal of confirmation order on equitable mootness grounds with instructions that district court undertake "at least a preliminary review of the merits" of the appeal "to determine the strength of [the appellant's] claims, the amount of time that would likely be required to resolve the merits of those claims on an expedited basis, and the equitable remedies available – including possible dismissal – to avoid undermining the plan and thereby harming third parties" before invoking equitable mootness).[13]

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founder and his affiliates, and found that regardless, "'equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process.'" *Id.* at *3, *13-14 (quoting *Hilal v. Williams (In re Hilal)*, 534 F.3d 498, 500 (5th Cir. 2008)).

[12] The district court in *Purdue* subsequently vacated the confirmation order, finding that the bankruptcy court lacked statutory authority to impose the third-party releases granted under the debtors' plan. *See In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021).

[13] On remand, the district court in *VeroBlue Farms* denied the appellees' renewed motion to dismiss the appeal on equitable mootness grounds, but ruled against the appellant on the merits and affirmed the various bankruptcy court orders being appealed from). *See FishDish, LLC v. VeroBlue Farms USA, Inc.*, No. 19-CV-3026-CJW-KEM, 2022 WL 1093271, at *4, *12 (N.D. Iowa Apr. 12, 2022) (noting that "the Court

- *Off. Comm. of Unsecured Creditors of Walker Cnty. Hosp. Corp. v. Walker Cnty. Hosp. District (In Matter of Walker Cnty. Hosp. Corp.)*, 3 F.4th 229 (5th Cir. 2021) (noting, in affirming dismissal of creditors' appeal from § 363 order as statutorily moot under § 363(m), that district court had also found creditors' appeal equitably moot, but reasoning that "there was no bankruptcy plan ever proposed in this case, let alone a plan confirmation order, so the doctrine of equitable mootness cannot apply").

- *Norio, Inc. v. Casey (In re Downs)*, 835 Fed. App'x 262 (9th Cir. 2021) (affirming bankruptcy appellate panel decision rejecting chapter 7 trustee's argument that creditor's appeal from order disallowing creditor's $50,000 secured claim (on grounds that debtor lacked authority to pledge relevant collateral because it was owned by another entity) had been rendered equitably moot by consummation of sale of purported collateral; finding that appeal was not moot because creditor was seeking to recover its claim from sale proceeds, not to unwind sale, and proceeds were more than sufficient to cover creditor's claim if allowed as secured).

Conclusion

An increasing number of appellate courts appear to be inclined to provide meaningful review of bankruptcy court orders even where a plan has been substantially consummated, particularly in circumstances such as disputes over third-party releases in the mass tort context where there are strong public policy considerations at play. Given this development, practitioners are well-advised to promptly seek a stay pending appeal and diligently pursue the appeal in all instances in which appellate review is desired by their clients, thereby bolstering their defenses to equitable mootness arguments.[14] The real question is whether the U.S. Supreme Court will finally take an interest and grant certiorari on the issue of equitable mootness, thereby providing guidance to the courts below.

finds that the strength of the appellant's claims is weak and will dispose of them without invoking the doctrine of equitable mootness").

[14] As illustrated in recent case law, the failure to seek a stay pending appeal is a significant factor and will weigh against the appellant under an equitable mootness analysis, as will the appellant's failure to expeditiously pursue the appeal. *See, e.g.*, *In re Windstream Holdings, Inc.*, 838 Fed. App'x at 637 (identifying appellant's failure to diligently pursue a stay pending appeal as "most notabl[e]" factor supporting equitable mootness analysis finding, and also noting appellant's failure to seek expedited appeal); *Clark*, 857 Fed. App'x at 731 (citing appellants' failure to seek stay pending appeal in affirming dismissal of appeal on equitable mootness grounds); *Pinto-Lugo*, 987 F.3d at 183-185 (citing appellants' failure to seek stay pending appeal, expedite appeals, or object to requests for extension of briefing schedule in appeals in dismissing appeals on equitable mootness grounds).

Bankruptcy Boom or Bust –
How Far Is Too Far and Is the Day of Reckoning Here?

2022 National Conference of Bankruptcy Judges
October 20, 2022, 8:45 am

The description of this panel asks, "[a]re the bankruptcy pros zealously advancing the economic interests of their clients or pushing the edge of the envelope past the point of no return with long-term consequences that could permanently change the course of bankruptcy cases?" The following four relatively short journal articles frame and speak to this question.

The first two articles, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*,[1] and *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*,[2] consider two sides of a law reform coin: the bankruptcy system undergoes significant change without statutory amendment, but that also means that any statutory change is going to be filtered through, and potentially blunted by, the system's actors and institutions. A third article, *Shocking Business Bankruptcy Law,*[3] considers the strategic use of crisis to drive the law further away from the rule of law in the big business bankruptcy context. One should not assume that practices "snap back" after the crisis subsides.

The fourth article, *Corporate Bankruptcy Hybridity*,[4] characterizes bankruptcy as a public-private partnership measured by funding, standard setting, and forms of oversight. That characterization drives home the importance of system accountability for a variety of legal, constitutional, and democratic objectives that go beyond the common mantra of "maximizing economic value." Because economic value maximization, as well as these other objectives, are very difficult to measure in an adversarial setting in real time, this framework makes it more important to adhere to the rule of law and limit discretion rather than less. The article further notes how various trends in bigger business bankruptcy, including equitable mootness, weaken the system's ability to fulfill these values, as does the homogeneity of the bankruptcy profession.

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[1] 78 American Bankruptcy Law Journal 221-245 (2004).
[2] 79 American Bankruptcy Law Journal 169-190 (2005).
[3] 131 Yale Law Journal Forum 409-427 (2021).
[4] 166 University of Pennsylvania Law Review 1715-1747 (2018).

THE YALE LAW JOURNAL FORUM

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Shocking Business Bankruptcy Law

Melissa B. Jacoby

ABSTRACT. The intersection of major crises and financial distress generates no shortage of stock stories. This Essay offers one more: how shocks can be used opportunistically in big Chapter 11 cases to unravel bankruptcy law, and to shift the system further away from the objective of responding to overindebtedness.

> "To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court."
> — Justice Sotomayor[1]

INTRODUCTION

The founders of my favorite ice-cream shop, Ample Hills Creamery, named it after a Walt Whitman poem.[2] Perhaps with more knowledge of poetry and ice cream than of business and finance, the owners expanded production and scoop shops beyond a sustainable point.[3] On March 15, 2020, Ample Hills filed for

1. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 683 (2015).
2. Declaration of Phillip Brian David Smith at 3, *In re* Ample Hills Holdings, Inc., No. 20-41559 (Bankr. E.D.N.Y. Mar. 15, 2020), https://www.bloomberglaw.com/product/blaw/document/X4CBB5CN0JO9VJAPROSK7T52LG9/download [https://perma.cc/9MP4-7HA3].
3. *See* Courtney Rubin, *The Shocking Meltdown of Ample Hills—Brooklyn's Hottest Ice Cream Company*, MARKER (Feb. 3, 2021), https://marker.medium.com/the-shocking-meltdown-of-ample-hills-brooklyns-hottest-ice-cream-company-66b27dc1791d [https://perma.cc/77ZZ-CKLH].

bankruptcy.[4] The COVID-19 pandemic did not prompt this filing, but it shaped what happened next. In the midst of the uncertainty and shutdowns this crisis fostered, the bankruptcy court approved the only proposal on the table: sale of Ample Hills to an Oregon gas-tank manufacturer for a disappointing one-million dollars.[5] The founders not only would lose all equity and leave the company but would also have to file for bankruptcy themselves to get relief from obligations they had personally guaranteed.[6]

The intersection of financial distress and major crises generates no shortage of stock stories. In a global pandemic, failure might seem all but inevitable among concert venues, cruise lines, airlines, hotels, and the like. Or one might think of the oil and gas industry, struggling with excess supply as demand plummeted.[7] But other stories that intersect with crises take different trajectories, and they too should be told.

In recent work, I considered how a shock like the global financial crisis prompted *formal* government responses, such as the creation of new administrative agencies.[8] Other work has highlighted how profound changes develop through routine acts of repeat players within a legal system.[9] One does not need Congress, an executive order, or a major Supreme Court decision to alter the law.

4. Chapter 11 Voluntary Petition for Non-Individuals at 4, *In re Ample Hills Holdings, Inc.*, No. 20-41559 (Mar. 15, 2020), https://www.bloomberglaw.com/product/blaw/document/X1AMNUGB0VO8J58E3N8D0M6VILE/download [https://perma.cc/TC8H-THDD].

5. Exhibit A of Order of July 8, 2020, Asset Purchase Agreement art. 2, cl. 3, *In re Ample Hills Holdings, Inc.*, No. 20-41559 (July 8, 2020), https://www.bloomberglaw.com/product/blaw/document/X29KB1G1FBD9VOOV6KFEKG7T63I/download [https://perma.cc/G4DU-54WM]; *About Schmitt Industries*, SCHMITT INDUS., https://www.schmittindustries.com/about-schmitt [https://perma.cc/4EAG-SEC2].

6. Voluntary Petition for Individuals Filing for Bankruptcy at 1-2, *In re* Smith, No. 1:20-BK-43292 (Bankr. E.D.N.Y. Sept. 12, 2020), https://www.bloomberglaw.com/product/blaw/document/X2C6LOIKSDB8PCQV3QAU94UG24K/download [https://perma.cc/8543-7YKR].

7. Camila Domonoske, *We're Barreling Toward an Epic Glut of Oil*, NPR (Mar. 20, 2020, 1:02 PM EST), https://www.npr.org/2020/03/20/818457109/were-barreling-toward-an-epic-glut-of-oil [https://perma.cc/43DQ-UNA2] ("With millions of people not taking trips, commuting or flying, the world's appetite for oil has come crashing down, thanks to the coronavirus. At the same time, a price war between giant producers Saudi Arabia and Russia has caused the oil supply to swing up.").

8. Edward J. Balleisen & Melissa B. Jacoby, *Consumer Protection After the Global Financial Crisis*, 107 GEO. L.J. 813, 815, 818 (2019) (describing the concept of policy shock and exploring the creation of the Bureau of Consumer Financial Protection following the global financial crisis).

9. Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 176 (2005) (describing the particularly strong influence of day-to-day actors in bankruptcy that shape the impact of statutory reform); Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 223, 236 (2004) (explaining that Congress can exclude bankruptcy professionals from the drafting

This Essay considers how a shock fuels problematic models of business bankruptcy, particularly the practices I label "bankruptcy à la carte" and "off-label bankruptcy." I focus on the liberties taken with Chapter 11 of the Bankruptcy Code by enterprises much larger than my favorite ice-cream shop. Bankruptcy à la carte extracts the tools of Chapter 11 meant to be available only as part of a package deal and redistributes the benefits.[10] These tools override state law on matters of contracts, asset sales, and loan priority. To the extent that these tools are valid exercises of federal law through the Constitution's Bankruptcy Clause,[11] they make sense only as part of Chapter 11's package deal. Standing alone, they are suspect. Whatever the legal foundation, proponents of bankruptcy à la carte (including financial institutions, hedge funds, private- equity funds, and their restructuring professionals) misappropriate value meant for a more diffuse group of stakeholders and capture it for themselves.[12] Major shocks help them get away with it.

In off-label bankruptcies, parties use the system to solve problems other than unpayable debt loads (such as litigation management), and these parties demand additional perks that the Bankruptcy Code does not authorize (such as protecting a wide range of nondebtors during and after the bankruptcy). Proponents of off-label cases tout the broader policy benefits of their proposals and warn that the deal will unravel like a wool sweater if any thread is picked, putting the court and potential objecting parties in a bind. Either courts and stakeholders reluctantly sign off on the deal with these add-ons, perhaps demanding modest concessions, or they call off-label bankruptcy proponents on their bluff, risking the loss of any benefits the deal was expected to bring. Of course, major shocks increase the pressure to keep the deal together.

One prominent add-on is called a "nondebtor release" or "third-party release." It uses bankruptcy to insulate third parties from liability even though they have not undertaken the burdens of bankruptcy.[13] A particularly high-profile example comes from the case of Purdue Pharma, the OxyContin producer purporting to use the bankruptcy system to resolve a national crisis it fueled: widespread

of statutes, but not from exerting influence in implementing those changes or other nonstatutory avenues of reform).

10. Melissa B. Jacoby, Bankruptcy à la Carte: An Autopsy 6-7 (unpublished manuscript) (on file with author).

11. U.S. CONST. art. I, § 8, cl. 4.

12. Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 895-910 (2014).

13. Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. (forthcoming 2022), https://ssrn.com/abstract=3817530 [https://perma.cc/37PV-5V9H].

opioid addiction and overdose.[14] Purdue Pharma and its owners, members of the Sackler family, aggressively marketed opioids and downplayed addiction risks. Yet, the Purdue Pharma Chapter 11 case provided members of the Sackler family, and over a thousand other parties, with full insulation from liability without filing for bankruptcy themselves.

This Essay unfolds as follows. Part I establishes the baselines for understanding Chapter 11 as a package deal with diffuse stakeholder beneficiaries. Part II introduces the role of shocks in the financial distress world and explores multiple paths by which shocks influence Chapter 11, with an emphasis on the bankruptcy-á-la-carte and off-label models. Part II further recognizes the logistical costs of a major shock, including impeding in-person negotiations. This Essay concludes by noting the need for significant structural changes to restore Chapter 11 as used by large enterprises.

I. BUSINESS BANKRUPTCY: A PUBLIC-PRIVATE PARTNERSHIP AND A PACKAGE DEAL

Business bankruptcy is a public-private partnership. This characterization comes from how the system is funded, who oversees it, and who sets the substantive rules.[15] Meant to facilitate the reorganization and preservation of for-profit and nonprofit enterprises, Chapter 11 bankruptcy is funded, for better or worse, from a mixture of public and private sources.[16] Liabilities come from diverse legal doctrines, including contract, tort, statutory, regulatory, and sometimes even constitutional law.[17] The Bankruptcy Code allocates oversight responsibilities to both public parties (e.g., judges and a government watchdog) and private parties (e.g., creditors' committees and sometimes trustees).[18] Many of Chapter 11's requirements are mandatory, but the Bankruptcy Code also allows parties some latitude to craft the terms of a restructuring deal.[19]

In creating the architecture of this system, lawmakers balanced competing concerns rather than promote a single interest. Normative pluralism is an

14. *See generally* BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA (2018); PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021).

15. Melissa B. Jacoby, *Corporate Bankruptcy Hybridity*, 166 U. PA. L. REV. 1715, 1719-21 (2018).

16. *Id.* at 1726-27.

17. *Id.* at 1723.

18. *Id.* at 1742.

19. *Id.* at 1727.

acknowledged feature in other areas of law.[20] The resulting statute is supposed to respect a variety of public values regardless of whether they are expressly named. The very short clause in Article I of the U.S. Constitution that authorizes Congress to enact uniform laws of bankruptcy—known as the Bankruptcy Clause—generally should not override other constitutional protections.[21] We do not discard fundamental considerations of due process and equal protection, for example, simply because of financial difficulty. Rather than provide a license to do anything and everything in the name of advancing one policy or another, conceptualizing business bankruptcy as a public-private partnership supports bankruptcy minimalism by strictly adhering to the law as written to focus on the system's core function: resolving overindebtedness.

To address overindebtedness, the bankruptcy system includes potent powers: a temporary injunction to provide a breathing spell from collection,[22] allowance of the majority of creditors to bind a minority to a new deal,[23] and a permanent injunction against debt collection.[24] To increase the odds of a confirmed Chapter 11 plan, thought to be particularly important when an enterprise is worth more alive than dead, Congress provided legal perks not available in other laws. These include incentives to provide financing,[25] incentives to buy assets of the bankruptcy estate with more legal certainty,[26] and alterations to the state-law baseline regarding the treatment of contracts and leases.[27] These perks, which have significant distributional consequences, are hard to justify, and indeed make little sense, if delinked from the Chapter 11 package deal. Standing alone, they are federal subsidies in strong tension with federalism. In addition,

20. *See, e.g.*, Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation of Powers Jurisprudence*, 126 YALE L.J. 346, 351, 382 (2016) (discussing how normative pluralism shapes separation-of-powers doctrine).

21. U.S. CONST. art. I, § 8; *see* Jacoby, *supra* note 15, at 1723 ("Constitutional and quasi-constitutional matters cannot be kicked to the curb simply because a company experiences financial distress and initiates a Chapter 11 case.").

22. 11 U.S.C. § 362(a) (2018) (enjoining the enforcement of prebankruptcy claims temporarily).

23. *Id.* § 1126(c) (accepting the plan if favored by creditors holding at least two-thirds in dollar amount and more than half in the number of allowed claims).

24. *Id.* § 1141 (conditioning a Chapter 11 debtor's discharge of debt); *id.* § 524 (defining the discharge injunction generally).

25. *Id.* § 364 (listing escalating incentives to loan money to debtors).

26. *Id.* § 363(b), (c), (f) (authorizing sales of bankruptcy estate property and determining the extent to which such sales are free and clear of existing interests).

27. *Id.* § 365 (authorizing the assumption, rejection, and assignment of leases and contracts under particular conditions); *id.* § 502 (limiting damage claims for certain rejected leases).

while the statutory language is far from perfect, Congress wrote these perks with limits and standards that day-to-day practice and court decisions have eroded.[28]

Two core features of Chapter 11 should also be flagged. First, relief is supposed to be premised on extensive and prompt disclosure. For example, when the gun and bullet maker Remington Outdoor Company filed for a second bankruptcy, grieving parents who lost children in the Sandy Hook murders wanted more time to gather information about the company's finances.[29] Remington protested, "[J]ust because we filed for bankruptcy doesn't give [the Sandy Hook families] a right to sort of walk around and look and snoop around our business."[30] But it was wrong. Bankruptcy entitles claimants to do exactly that.[31]

Second, access to Chapter 11's package deal is premised on having a good-faith reason to file for bankruptcy in the first place. A particularly high-profile example is the National Rifle Association (NRA), which filed for bankruptcy in 2021 in order to exert leverage over state regulators, rather than to address over-indebtedness or some other financial problem.[32] Although the NRA received four months of bankruptcy protection and multiple opportunities to explain why it was a valid candidate for federal bankruptcy relief (including a twelve-day

28. Jacoby, *supra* note 10, at 6-7.

29. Objection of the Sandy Hook Families to Debtors' Motion for (I) An Order Establishing Bidding Procedures and Granting Related Relief and (II) An Order or Orders Approving the Sale of the Debtors' Assets at 19-23, *In re* Remington Outdoor Co., No. 20-81688 (Bankr. N.D. Ala. Aug. 7, 2020), https://www.bloomberglaw.com/product/blaw/document/X43USEE14NG9TNPH0D3K2KP3L44/download [https://perma.cc/84V8-UTH9].

30. Transcript of Motions Hearing at 29, *In re Remington Outdoor Co.*, No. 20-81688 (Aug. 18, 2020), https://www.bloomberglaw.com/product/blaw/document/X4F947002PQ8CDRFSU83FHEUM8K/download [https://perma.cc/6HJB-J2AK]. Skeptical that the Sandy Hook families might be on a fishing expedition for their wrongful-death lawsuit rather than to pursue their creditor rights in the bankruptcy, the presiding judge accepted this argument to a surprising extent. *See* Transcript of Applications for Employment at 51, *In re Remington Outdoor Co.*, No. 20-81688 (Aug. 19, 2020), https://www.bloomberglaw.com/product/blaw/document/X3JJFHKH9LO9NQAQMVH5R4JHQ2D/download [https://perma.cc/B5DY-C4AU] ("And this is another example of what I see as an attempt to bring the state court litigation into the bankruptcy court process when the focus here is different and the issues here are different.").

31. *E.g.*, 11 U.S.C. § 521(a) (2018) (requiring disclosures for all debtors); *id.* § 1125 (requiring adequate information before allowing debtors to solicit votes on a Chapter 11 plan); FED. R. BANKR. P. 2004 (permitting examinations relating to "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge").

32. Nathan Bomey, *The National Rifle Association Says Its Finances Are Solid. So Why Is It Filing for Bankruptcy?*, USA TODAY (Jan. 28, 2021, 4:29 PM ET), https://www.usatoday.com/story/money/2021/01/28/nra-bankruptcy-national-rifle-association-chapter-11/6657581002 [https://perma.cc/T2KD-S5ZR].

trial), it was ultimately thrown out of the system because it was unable to show that it had a valid financial reason to be there.[33]

Overall, the Bankruptcy Code offers a balanced process to reorganize or sell a company as a going concern through a Chapter 11 plan. It includes disclosures, creditor voting, and a list of substantive standards by which to measure a plan's propriety, including that the plan be "fair and equitable."[34] The integrated package is meant to promote due process, as well as more accurate valuation and distribution.[35] As we will see in Part II, shocks and crises create leverage to alter the package deal, both by unbundling it and adding consequential extralegal ornaments.

II. CRISES REMAKE BIG-BUSINESS BANKRUPTCY

Never is there a dull moment for a teacher and scholar of bankruptcy law, but some moments are more consequential than others. So far, my academic career has spanned the 9/11 terrorist attacks, the global financial crisis, and the COVID-19 pandemic—events that materially changed the financial landscape and context of debtor-creditor relationships, along with everything else. In looking back on my own publications, it is striking how many have been reactions to a major crisis.[36] This timeframe has also covered localized disasters such as Hurricane Katrina in August 2005, Hurricane Maria in September 2017, and the polar-vortex storm in Texas in February 2021.

I avoid the qualifier "exogeneous" to describe shocks, as it can bring more heat than light. A business's existing financial state affects how it bears a major shock. Even when a company blames the pandemic for its bankruptcy, we should

33. Order Granting Motions to Dismiss, *In re* Nat'l Rifle Ass'n of Am., 628 B.R. 262 (Bankr. N.D. Tex. 2021) (No. 21-30085).

34. 11 U.S.C. § 1126 (2018) (describing voting requirements); *id.* § 1129 (outlining plan-confirmation standards, including distribution of value).

35. Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 706-07 (2018).

36. In addition to those already mentioned, see, for example, Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261 (2008), which explains that the financial crisis revealed how mortgage-delinquency management needs to be a more enduring part of housing policy rather than just a crisis response; Melissa B. Jacoby, *The Value(s) of Foreclosure Law Reform*, 37 PEPP. L. REV. 511 (2010), which discusses how financial-crisis responses revealed the need for disaggregating the type of housing tenure from housing stability and addressed the mistaken narrow scope of mortgage-foreclosure reform; and Melissa B. Jacoby, *Bankruptcy Reform and the Financial Crisis*, 13 N.C. BANKING INST. 115 (2009), which cites the need to integrate bankruptcy law with mortgage-delinquency management and discusses legislative proposals to permit home-mortgage modification in personal bankruptcy as a foreclosure-crisis response.

ask whether it was in stable condition beforehand, or whether it kept itself afloat by using easy access to cheap credit.[37] As rank-and-file employees of high-touch industries suffered health-wise and financially during the pandemic, companies found creative ways to further boost the compensation of their wealthiest executives.[38]

Bankruptcy is meant to make the best of a bad situation. However, its potent tools do not always align with the problems brought to its door. We should look closely when large enterprises with the highest-compensated professionals—as well as their lenders and potential acquirers—use a crisis to justify cutting corners or pushing legal boundaries. In this Part, I explore how crises influence Chapter 11, focusing on bankruptcy à la carte, off-label models, and the logistical impact of major shocks.

A. Bankruptcy à la Carte

Congress balanced a variety of concerns in creating Chapter 11's package deal, and its beneficiaries are diffuse. By contrast, professionals and repeat-player lenders and investors who shape big Chapter 11 bankruptcies today are highly concentrated and relatively homogenous.[39] If they can extract Bankruptcy Code perks without having to endure the oversight, checks and balances, and potentially longer timeline the package deal requires, why would they do otherwise?

To accomplish this unbundling, they are assisted by modern-day big-business bankruptcy practice, which flattens many legal issues into the objective of maximizing economic value. That is an unduly simplistic view of the objectives of the normatively pluralistic Chapter 11. Only a few provisions of Chapter 11 specifically mention something akin to value maximization. Other provisions of the Bankruptcy Code concern themselves with matters such as due process, the right to vote, discrimination, and distributional concerns.[40] Even if these

37. Sheila Bair & Lawrence Goodman, *Corporate Debt 'Relief' Is an Economic Dud*, WALL ST. J. (Jan. 6, 2021, 6:30 PM ET), https://www.wsj.com/articles/corporate-debt-relief-is-an-economic-dud-11609975810 [https://perma.cc/36XA-Y5JU] (critiquing the Federal Reserve intervention in corporate-credit markets).

38. Sarah Anderson & Sam Pizzigati, *Pandemic Pay Plunder: Low-Wage Workers Lost Hours, Jobs, and Lives. Their Employers Bent Rules to Pump up CEO Paychecks*, INST. POL'Y STUD. 1 (May 2021), https://ips-dc.org/wp-content/uploads/2021/05/report-executive-excess-2021-PDF.pdf [https://perma.cc/VZM4-9M4W] (reporting on the $56 million compensation package of Hilton's CEO); *id.* at 5 (showing that Carnival Cruiseline paid consultants to find ways to beef up the CEO's retention bonus).

39. Jacoby, *supra* note 15, at 1743-46.

40. *E.g.*, 11 U.S.C. § 1125 (2018) (requiring disclosure-statement approval before soliciting votes); *id.* § 1126 (voting rules); *id.* § 1129(b)(1) (requiring consideration of unfair discrimination toward a dissenting class).

transactions always maximized economic value (and that proposition is dubious) nothing in these Bankruptcy Code provisions suggests that economic-value maximization trumps statutory requirements. A common variant, especially in the face of crises, is to flip around value maximization and warn that the entity is a melting ice cube.[41] To the bankruptcy court, repeat-player lenders and investors essentially say, "give me what we want or all the money and jobs will go away," picking and choosing among the perks of Chapter 11, using the ones that benefit them and finding creative ways to invalidate the rest.[42] They transform the value maximization mantra into a subsidy for themselves.

Unbundling also is fueled by embracing the potential of market forces in their theoretically perfect form rather than in their reality. Some judges understandably want to believe that the presence of private parties and assertions of arms-length bargaining will generate a market-rate transaction.[43] But private structuring of transactions does not necessarily yield market value, inside and outside bankruptcy.[44] From the perspective of some lenders and acquirers, the key objective is to produce a transaction that is not actually market rate. And it is hard to blame them. They are entitled to represent their own interests and they lack fiduciary duties to the bankrupt enterprise.

A key example involves distressed business buyers' insistence on acquiring companies in standalone going-concern sales within a bankruptcy, rather than as part of a Chapter 11 plan or outside of the bankruptcy system. That insistence is typically fueled by a lender willing to fund the case as a bridge to a sale but nothing more.[45] The standalone sale avoids subjecting it to creditor voting, as would be necessary in a Chapter 11 plan, or complying with all of the substantive

41. Jacoby & Janger, *supra* note 12, at 866-67.

42. A more detailed explanation of the operation of bankruptcy à la carte begins in Jacoby, *supra* note 15, at 1731, 1735, and continues in Jacoby, *supra* note 10, pt. I. For a thoughtful look at when job saving should tip the scale toward reorganization, see Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461 (2016).

43. LYNN M. LOPUCKI, COURTING FAILURE 73 (2005) (critiquing judges who assumed that agreements of parties reflect the market at work); *see also* Transcript of Motions Hearing, *supra* note 30, at 40 ("[W]hen you have a sale under 363 in a Chapter 11 the best evidence of value is the audit and sale – or auction and sale process. So I'm still struggling with why valuation of the assets from 2018 to present is relevant to an objection to a sale in 2020.").

44. *See, e.g.*, Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 HARV. L. REV. 1215, 1253-54 (2020) (describing investment bankers' conflicts of interest in which they are better off favoring buyers, particularly private-equity buyers, than getting a higher price for the seller); Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 BYU L. REV. 759 (2013).

45. Jacoby, *supra* note 10; Melissa Jacoby, *Loans and Liens: The Weinstein Company Chapter 11 Hearing #3*, CREDIT SLIPS (Apr. 27, 2018, 11:34 AM), https://www.creditslips.org/creditslips/2018/04/weinstein-hearing-3.html [https://perma.cc/5UTL-Y5D9].

plan requirements. The Bankruptcy Code anticipates going-concern sales to be accomplished through plans, and does not protect buyers of companies from potential successor liability in standalone sales.[46] Indeed, bankruptcy policy is widely assumed to respect state and other applicable non-bankruptcy-law baselines unless it is imperative to do otherwise.[47] Some federal circuit courts nonetheless have upheld broad orders protecting acquirers in standalone sales, fearing that the acquirer will simply walk unless it gets what it wants—even if walking would be economically irrational.[48] Bankruptcy therefore presents a loophole to the seriousness with which federal and state courts otherwise take successor liability.[49] Insistence on bending the rules to preserve economic value is not neutral. In practice, it tends to suppress the legal rights of individuals with less political, economic, and social power, while the dollars flow elsewhere.

What do major shocks have to do with bankruptcy à la carte? Both nothing and everything. The global financial crisis played a significant role in institutionalizing bankruptcy à la carte. After all, the Obama Administration coopted Chapter 11 to complete quick sales, stripped of the typical protections, to "save" Chrysler and General Motors.[50] When the financial crisis came into the rear-view mirror, bankruptcy à la carte did not. Arguments that value will be lost if the deal is deferred have been in active rotation during the COVID-19 pandemic.[51]

46. George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 272-73 (2002).

47. The idea came from *Butner v. United States*, 440 U.S. 48 (1979), although it has little to do with what actually happened in that case. *See* Juliet M. Moringiello, *When Does Some Federal Interest Require a Different Result: An Essay on the Use and Misuse of* Butner v. United States, 2015 U. ILL. L. REV. 657, 663 (2015); Juliet M. Moringiello, *(Mis)use of State Law in Bankruptcy: The Hanging Paragraph Story*, 2012 WIS. L. REV. 963, 985-93.

48. *E.g.*, *In re* Trans World Airlines, Inc., 322 F.3d 283 (3d Cir. 2003); *In re* Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996). *But see* Brief for Federal Appellants at 15, *In re Trans World Airlines, Inc.*, 322 F.3d 283 (No. 01-1788) (casting doubt on the prediction that the buyer would walk away if required to honor employment-discrimination settlements and observing that the value of the discrimination claims, relative to the sale price, would "represent, at most, not even the tail, but the flea wagging the dog").

49. *See, e.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 544 (1964) (labor law); Brzozowksi v. Corr. Physician Servs., 360 F.3d 173, 175 (3d Cir. 2004) (Title VII); Einhorn v. M.L. Ruberton Constr. Co., 632 F.3d 89, 94-95 (3d Cir. 2011) ("[T]his court . . . has extended the labor law successorship doctrine to employment discrimination claims under Title VII."); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1090, 1093 (6th Cir. 1974) (sex and race discrimination under Title VII).

50. Jacoby & Janger, *supra* note 12, at 883-84.

51. *E.g.*, Transcript of Emergency Status Conference at 13-14, *In re* Remington Outdoor Co., No. 20-81688-CRJ-11 (Bankr. N.D. Ala. Aug. 6, 2020), https://www.bloomberglaw.com/product/blaw/document/X38LR0F4QH39B890CJV8Q3QFQDB/download [https://perma.cc/JA6A-3PMD] (stating that according to a government watchdog, "this has to be a fast sale because of their lenders . . . and . . . potential purchasers which we understand have also

Threatening a loss of economic value and layoffs can also be effective during more placid times, but it becomes especially persuasive during a crisis for fear of making a bad situation worse. Major shocks increase the power and leverage of the arguments that the Chapter 11 package deal, with its emphasis on creditor voting and specific distributional entitlements, is an unaffordable luxury.[52]

The Bankruptcy Code is not perfect. But bankruptcy à la carte's strategic unbundling of Chapter 11's benefits and obligations is an even less satisfying exercise of federal law, redistributing the perks in ways that tend to favor Wall Street and disfavor Main Street. The tail of COVID-19-related bankruptcies is destined to be long, so it is not too late to issue a warning: if powerful parties are permitted to cite shocks to justify bankruptcy à la carte, the existence of Chapter 11 will become even more difficult to justify.

B. Off-Label Bankruptcy

In the previous Section, we learned that when larger enterprises knock on the bankruptcy-court door, what they request often does not match what the Bankruptcy Code offers. A second category of creative Chapter 11 use intersecting closely with major shocks involves expansive add-ons to bankruptcy relief purported to be essential to keeping the deal together. In other words, while some Chapter 11s unbundle the package deal, cherry-picking among the perks, other Chapter 11s add perks to the package.[53]

A notable expansion is seeking to protect third parties against liability without requiring them to file for bankruptcy themselves. The Bankruptcy Code expressly authorizes nondebtor releases only in the context of asbestos claims, and there, only in a narrow set of circumstances.[54] Circuit courts are not permissive on nondebtor releases if you read the fine print; they recognize that a nondebtor

requested a fast sale"); Transcript of Evidentiary Hearing at 93, *In re Remington Outdoor Co.*, No. 20-81688-CRJ-11 (Sept. 29, 2020), https://www.bloomberglaw.com/product/blaw/document/X5TPCPTMQJE81JOPO44LGD5UB5F/download [https://perma.cc/4LZL-Q7QZ] ("[T]he only way in which they were willing to move forward would be by a M&A transaction via a 363 process in Chapter 11."); *id.* at 125 (discussing other potential buyers who said they would consider purchasing only through a 363 sale). Ample Hills reported more or less the same thing. *See* Declaration of Phillip Brian David Smith, *supra* note 2, at 10.

52. Jacoby & Janger, *supra* note 12 (discussing games of chicken played in big Chapter 11 cases during and after the global financial crisis).

53. Some cases involve both techniques. In the case of gun and bullet maker Remington Outdoor, the attorneys found another euphemism when referring to releases: "It's really a composite deal." Transcript of Motions Hearing, *supra* note 30, at 22.

54. 11 U.S.C. § 524(g) (2018) (directing claims against insurance to a trust through a channeling injunction).

release is essentially a discharge without the rest of bankruptcy.[55] Requesting nondebtor releases nonetheless has become common.[56] Sometimes the potential recipients of releases will even evoke sympathy, particularly if a shock is involved. But sympathy does not make these releases a good policy extension of the federal bankruptcy system.

For example, in February 2021, a polar-vortex storm generated a massive power emergency in the state of Texas, resulting in huge price increases and massive power outages, ill-timed for the extreme cold weather.[57] Brazos Electric Power Cooperative, a nonprofit wholesale provider of energy, and Griddy Energy, LLC, a retail electric provider, both filed Chapter 11 in March 2021.[58] Griddy used bankruptcy to close its doors after an oversight entity had already transferred away all of its customers. Griddy nonetheless intended for its Chapter 11 plan to result in a release of liability for a variety of third parties, including its customers.[59] When the court asked what benefit would flow to the creditors and

55. *See, e.g.*, *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 141 (2d Cir. 2005) (explaining that nondebtor releases are expected to be rare and need to play an "important part in the debtor's reorganization plan" (quoting SEC v. Drexel Burnham Lambert Grp. (*In re* Drexel Burnham Lambert Grp.), 960 F.2d 285, 293 (2d Cir. 1992))); *id.* at 142 ("[A] nondebtor release is a device that lends itself to abuse. . . . [I]n effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code."); *id.* at 143 (determining that the bankruptcy court's findings were insufficient to support a nondebtor release and dismissing the appeal as equitably moot); *see also In re* Cont'l Airlines, 203 F.3d 203, 212 (3d Cir. 2000) (invalidating a nondebtor release at issue in the appeal and reporting that releases have been permitted only in "extraordinary cases").

56. Simon, *supra* note 13.

57. *See* Declaration of Clifton Karnei in Support of Chapter 11 Petition and Emergency First-Day Motions at 23-27, *In re* Brazos Elec. Power Coop., No. 21-30725 (Bankr. S.D. Tex. Mar. 1, 2021), https://www.bloomberglaw.com/product/blaw/document/X1DL0FQ4OBV9J7Q7JQS05U6D88B/download [https://perma.cc/TZ2H-MUM2].

58. Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Griddy Energy, LLC, No. 21-30923 (Bankr. S.D. Tex. Mar. 15, 2021), https://www.bloomberglaw.com/product/blaw/document/X86KR8LI6M9B39CHTLF6GTJIE5/download [https://perma.cc/2XUR-YYZM]; Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re Brazos Elec. Power Coop.*, No. 21-30725 (Mar. 1, 2021), https://www.bloomberglaw.com/product/blaw/document/X248NQGNQ3088PO6134JSDG3E9L/download [https://perma.cc/7Q2V-8MCE].

59. Indeed, the term "release" or "releases" appeared in one version of Griddy's disclosure statement 194 times. Notice of Filing of Disclosure Statement for the Second Amended Plan of Liquidation for Griddy Energy LLC Under Chapter 11 of the Bankruptcy Code (Proposed Disclosure Statement to Second Amended Plan), *In re Griddy Energy, LLC*, No. 21-30923 (Apr. 27, 2021), https://www.bloomberglaw.com/product/blaw/document/X7V1V3S0PJP94RARBG1MI1EI91S/download [https://perma.cc/ZBM6-HGUZ]; *see* Vince Sullivan, *Griddy's Chapter 11 Customer Release Plan Approved in Texas*, LAW360 (July 7, 2021), https://www.law360.com/articles/1401120/griddy-s-ch-11-customer-release-plan-approved-in-texas [https://perma.cc/57HB-JRDW] ("In Griddy's case, the releases go both ways as the estate from these releases, Griddy did not answer directly, instead emphasizing that the releases of nondebtor affiliates were "part and parcel" of the entire deal; if the affiliates do not get the release, the other terms of the deal would fall apart.[60] Griddy and the judge directly tied this argument to the extraordinary storm that precipitated the liability.[61]

Like bankruptcy à la carte, off-label bankruptcy does not arise solely from large shocks. But shocks fuel its use. Recall Purdue Pharma, the OxyContin producer that went bankrupt in response to the opioid crisis. Personal-injury claimants and state attorneys general representing more than half the population of the United States repeatedly objected to Purdue's restructuring plans, arguing they did not comport with the law.[62] From the outset, though, Purdue warned that this integrated deal, including releases for the Sackler family and over a thousand other parties, was the only way to ensure resources could be directed to opioid-crisis abatement.[63] In other words, if public or private claimants opposed this plan, it would be the *objectors'* fault that resources went to litigation and lawyers instead of to abatement (not to mention compensation for grievous harm).

The Sacklers' expectation to be protected by the bankruptcy of the company they owned stands in stark contrast to the owners of my favorite ice-cream place. The Ample Hills Creamery founders devoted all their financial resources to the business and provided personal guarantees on business loans, like so many

customers won't have to pay their bills, and Griddy won't face any claims from those customers whose power was out for several days or who incurred large electric bills.").

60. Transcript of Status Hearing/Motion Hearing (via Zoom) at 30-32, *In re Griddy Energy, LLC*, No. 21-30923 (Apr. 29, 2021), https://www.bloomberglaw.com/product/blaw/document/X6G014RL7CJ8VRPFUE2UMBC6U5R/download [https://perma.cc/QHA7-GCXL].

61. *Id.* at 31 (stating that, in light of the winter storm, Griddy's argument was "certainly a fair argument that it's the right thing to do").

62. For a later example, see Ad Hoc Group of Non-Consenting States' Objection to the Debtors' Motion to Approve (I) the Adequacy of Information in the Disclosure Statement, (II) Solicitation and Voting Procedures, (III) Forms of Ballots, Notices and Notice Procedures in Connection Therewith, and (IV) Certain Dates with Respect Thereto at 1-5, 9, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Apr. 29, 2021), https://www.bloomberglaw.com/product/blaw/document/X7IKVHL54RD8PF8JITMU50KL8D9/download [https://perma.cc/Z237-4P3B]. For an early example, see The States' Coordinated Opposition to the Debtors' Motion for Preliminary Injunction of States' Law Enforcement Actions Against the Sacklers at 1-2, Purdue Pharma, L.P. v. Massachusetts (*In re* Purdue Pharma, L.P.), No. 19-08289 (Bankr. S.D.N.Y. Oct. 4, 2019), https://www.bloomberglaw.com/product/blaw/document/X5SCIAP8IA49NLA5TFUOJ73NR0V/download [https://perma.cc/R9F6-XZRS].

63. Debtors' Informational Brief at 3-5, 44-45, 49, *In re Purdue Pharma, L.P.*, No. 19-23649 (Sept. 16, 2019), https://www.bloomberglaw.com/product/blaw/document/XSB00DA59U9A58LC0O88KO743U/download [https://perma.cc/UV9G-A7AV].

small-business owners do.[64] To get debt relief, the founders had to file for bankruptcy themselves—a reminder that small-business owners often do not enjoy the largess extended to bigger businesses.[65]

I highlight nondebtor releases because they are a common yet extraordinary off-label demand, as well as one that Congress has expressed interest in reforming.[66] But the potential irregularities that an off-label bankruptcy might incorporate in the name of achieving a far-flung policy objective are virtually unlimited. For example, a settlement agreement in the Purdue Pharma bankruptcy required that the judge appoint a "special master" to carry out particular tasks,[67] even though special masters are explicitly disallowed in bankruptcy cases.[68] However nitpicky this observation might seem, it reflects a larger issue: the belief that the bankruptcies of large enterprises can continuously override existing law and rules in the name of responding to crises.

C. *Logistical Effects of a Shock*

The unintended consequences of shocks can have powerful logistical implications. For example, the COVID-19 pandemic has complicated federal courts' strong preference for settlements and the means courts use to reach them. Like federal courts generally, the bankruptcy system greatly values negotiations and settlements.[69] To the extent that a court is experiencing a high volume of cases, or that a crisis makes it more difficult for a court to handle those cases, the pressure to settle might increase.[70] Judges are not always subtle about conveying

64. *See generally* Ruth Simon & Heather Haddon, *Small-Business Owners Feel Weight of Personal Debt Guarantees*, WALL ST. J. (Apr. 4, 2021, 1:07 PM ET), https://www.wsj.com/articles/small-business-owners-personal-debt-guarantees-coronavirus-pandemic-11617555245 [https://perma.cc/47NY-GZYB] (discussing the impact of personally guaranteeing business debt during the pandemic).

65. For the criminal-law analogy, see JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME (2020).

66. SACKLER Act, H.R. 2096, 117th Cong. (2021).

67. Exhibit B to Mediator's Report at 15, *In re Purdue Pharma L.P.*, No. 19-23649 (July 7, 2021), https://www.bloomberglaw.com/product/blaw/document/XRFG32BHD48FS83LKFHQP6UPO7/download [https://perma.cc/QF2U-ANAF] (noting the appointment of a special master for disclosure oversight as a term to be added to the Purdue Pharma plan).

68. FED. R. BANKR. P. 9031 (making Federal Rule of Civil Procedure 53 inapplicable in bankruptcy cases); Paulette J. Delk, *Special Masters in Bankruptcy: The Case Against Bankruptcy Rule 9031*, 67 MO. L. REV. 29 (2002).

69. Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 ILL. L. REV. 571, 574-81 (comparing the settlement-promotion history of bankruptcy courts and federal district courts).

70. In an interview during the financial crisis, Chief Judge Mary F. Walrath of the Delaware bankruptcy court observed, "If I feel that the parties can resolve this or should resolve this on a their view that litigation is an unaffordable luxury or that failure to reach agreement will disappoint them.[71]

Although a major shock might increase the perceived need for nontrial resolution, a crisis can itself alter the process of negotiating toward majority support. For example, when governments mandated social distancing in response to COVID-19, technology allowed the show to go on to some extent. But Zoom negotiations and in-person negotiations are not the same, as a lawyer representing Purdue Pharma made clear:

> Unfortunately, one of the realities we all face in this situation and others is that the new remote environment . . . takes away many of the pressurization tools normally open to mediators, including hauling senior principals to meetings or keeping parties sequestered in conference centers, sometimes with no food or water, to facilitate resolution.[72]

The lawyer continued that "with no ability to be dragooned and stared down by mediators and forced to stay until two in the morning," lawyers and parties would "need some external help pressurizing this phase of the mediation [to] go on to the next phase."[73] The presiding judge ultimately ordered parties to

business basis, I feel my obligation is to push them toward that . . . But I'm ready to make a decision based on the evidence they present if they cannot agree." Ann Farmer, *Bankruptcy Judges Feel the Pain*, 18 PERSPECTIVES 10, 14 (2009); *see also* Maria Chutchian, *Delaware's Chief Bankruptcy Judge Wants to Stay out of Your Business*, REUTERS LEGAL (Feb. 26, 2021) ("Chief Judge Christopher Sontchi, who oversees Delaware's bustling bankruptcy court, has determined that the best way to handle messy commercial bankruptcies is to encourage the key players to work out their issues for themselves.").

71. *E.g.*, Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REGUL. 55, 74, 81-88 (2016).

72. Transcript at 29, *In re Purdue Pharma, L.P.*, No. 19-23649 (July 23, 2020), https://www.bloomberglaw.com/product/blaw/document/X5E4IAK4AD9SCPM5882NG3VVDA/download [https://perma.cc/NN9K-RGM4]. The impact of the pandemic on settlement dynamics was mentioned in other large cases. Transcript at 13, Century Indem. Co. v. Boy Scouts of Am. (*In re* Boy Scouts of Am.), 630 B.R. 122 (Bankr. D. Del. March 18, 2021) (No. 20-10343) ("[W]e're particularly frustrated that because of the impact of COVID we have been unable to have in-person face to face mediation sessions. . . . Well that has been extremely frustrating from a mediation experience. And that has made our bankruptcy mediation, which as you will recall kicked off in the middle of COVID, extraordinarily challenging. And I don't think that is putting it mildly."); Notice of Submission of Written Remarks of Chief Judge Barbara J. Houser, Mediation Team Leader, During November 15, 2017 Omnibus Hearing, *In re* Fin. Oversight & Mgmt. Bd. for P.R., 432 F. Supp. 3d 25 (D.P.R. Nov. 15, 2017) (No. 17-3283) (noting "Hurricane Maria has caused some disruption to our mediation process").

73. Transcript, *supra* note 72, at 50. Purdue Pharma's lead lawyer later said that it was the presiding judge who strongly suggested using a judicial mediator. *See* Notes on Telephonic Hearing of May 20, 2021, *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y.) (on file with author).

participate in lengthy in-person negotiations overseen by a fellow sitting judge, after which fifteen long-opposed parties agreed to drop their fight.[74]

The moral of this story: those of us interested in how shocks affect the operation of legal systems must keep our eyes open for the little things as well as the big ones. By shifting the logistics, shocks may also alter negotiations and how matters get resolved.

CONCLUSION

By the time this Essay went to press, the founders of my favorite ice-cream shop had opened The Social, a new ice-cream and donut business.[75] New York's senior U.S. Senator Chuck Schumer attending the grand opening, pronouncing that "Brooklyn always gets better."[76] Even after having to file their own personal bankruptcy to accompany the Ample Hills bankruptcy, they beat the odds and started fresh.

The impact of major shocks on the lives and livelihoods of real people—from a global financial crisis to a catastrophic storm or hurricane, to a pandemic that has generated death, illness, and financial despair—is profound. When risks are too vast to be privately insurable, we often look to public institutions or public-private partnerships to manage crises.[77] Bankruptcy for individuals and small businesses has its own share of problems in need of reform, but sometimes better options are not in sight.

Big-business bankruptcy is a different world. This Essay has observed how crises dovetail with the melting ice-cube arguments that big companies and their

74. Mediator's Report, *In re Purdue Pharma, L.P.*, No. 19-23649 (July 7, 2021), https://www.bloomberglaw.com/product/blaw/document/X1Q6O4E0J382/download [https://perma.cc/46JZ-AUCR] (reporting on one twelve-hour in-person mediation and a second sixteen-hour in-person mediation); Order Establishing the Terms and Conditions of Mediation Before the Honorable Shelley C. Chapman at 3, *In re Purdue Pharma, L.P.*, No. 19-23649 (May 18, 2021), https://www.bloomberglaw.com/product/blaw/document/X1Q6O4E0J382/download [https://perma.cc/RUR3-LWKD] (ordering in-person mediation if needed).

75. Robb Mandelbaum, *How the Founders of a Failed Ice Cream Chain Plotted Their Return*, BLOOMBERG (Oct. 3, 2021), https://www.bloomberg.com/news/articles/2021-10-03/ample-hills-creamery-founders-on-making-a-comeback-after-bankruptcy [https://perma.cc/CD3W-95BG].

76. Jake Samieske, *Ample Hills' Founders Open a New Shop, Called the Social*, BROOKLYN (July 26, 2021), https://www.bkmag.com/2021/07/26/ample-hils-founders-open-a-new-shop-called-the-social [https://perma.cc/69ZR-UKQS]; Scott Lynch, *The Ample Hills Founders Open Their New Ice Cream Shop "The Social" in Prospect Heights*, GOTHAMIST (July 26, 2021), https://gothamist.com/food/ample-hills-founders-open-their-new-ice-cream-shop-social-prospect-heights [https://perma.cc/2UZG-SNHF].

77. Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323, 323.

lenders and acquirers use to remix the system, redistributing costs and benefits. The federal government already subsidizes the beneficiaries of bankruptcy à la carte and off-label bankruptcy. It does not need to do so through the bankruptcy system.

It will take more than words, tinkering around the edges, or even a lack of shocks to reverse these trends. The financial plumbing of Chapter 11 is at the heart of the problem. For example, so long as a lender to a bankrupt company can dictate by contract how much or little of Chapter 11 can be used, or can attach other strings, it will be difficult to halt the unbundling of modern bankruptcy cases. A roster of alternative financing ideas is out there. In other areas, scholars have argued that the public or nonprofit sectors should offer services to compete with, rather than replace, private options.[78] Exploration of alternative Chapter 11 financing, including the use of government guarantees and crowdfunding, has grown in recent years.[79] But ultimately, something even more far-reaching might be required to sever the power of funders and buyers to determine which parts of bankruptcy are used and which lie dormant.

We might also consider a different structural question: how many judges should oversee a very large bankruptcy case in the first instance? When a troubled enterprise is on the front page of national news-media outlets, with the effects of the crisis flowing fast and furious, judges can be put in an impossible position, and their cases can feel unduly personalized.[80] Bankruptcy courts

78. *See* GANESH SITARAMAN & ANNE ALSTOTT, THE PUBLIC OPTION 6 (2019) (defining public options as the government offering quality products for a guaranteed price); Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES L. 47, 60 (2018); ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 88 (2019) (discussing the importance of dissent to disrupt norm entrenchment among professionals); Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 76 (2014) (proposing publicly funded policy-research consultants to ameliorate the impact of lobbyists for private industry on legislative development).

79. *See* Jacoby, *supra* note 15, at 1742-43 (proposing a Sunlight Fund); Jonathan Gordon, *Government Guaranties for Corporate Bankruptcies*, 43 VT. L. REV. 251, 287-300 (2018); Anthony Tamburro, Comment, *Far from the Madding Crowd: Crowdfunding a Small Business Reorganization*, 34 EMORY BANKR. DEV. J. 521, 522 (2018); David McGrail, *Crowdfunding a Chapter 11 Plan*, Feature, 32 AM BANKR. INST. J, Feb. 2013, at 1 (describing exit financing); Jon Henes, *Why the Feds Should Step into Bankruptcy Loans*, CNBC (Oct. 22, 2008), https://www.cnbc.com/id/27319457 [https://perma.cc/E9XL-GC8S] (proposing the "Distressed Company Loan Guaranty Program of 2008"); Mitt Romney, Opinion, *Let Detroit Go Bankrupt*, N.Y. TIMES (Nov. 18, 2008), https://www.nytimes.com/2008/11/19/opinion/19romney.html [https://perma.cc/L982-LBRR] ("The federal government should provide guarantees for post-bankruptcy financing and assure car buyers that their warranties are not at risk.").

80. Jacoby & Janger, *supra* note 12, at 886-89.

already have the authority to hold hearings jointly on the trial level.[81] In some circuits that have authorized Bankruptcy Appellate Panels, they sit in groups to hear appeals.[82] Rather than asking judges to simply try harder to resist personalization of responsibility to avert the alleged consequences of denying the relief powerful parties request, judges could sit jointly in panels, operating en banc, to oversee particularly high-profile cases.

Finally, meaningful reform will hinge on demography. Crises tend to be regressive, hitting hardest the communities already left behind. COVID-19 offered a potent reminder that crisis interventions can double down on existing inequalities.[83] The homogeneity of elite restructuring professionals makes it especially problematic for bankruptcy to be the inevitable catchall crisis response.[84] This dynamic cannot be solved from the outside in; the restructuring world needs to examine and improve itself from the inside out.

81. *See, e.g.*, *In re* Outen, 220 B.R. 26, 26 n.1 (1998) ("[B]ankruptcy judges in a given district may promulgate rules to divide cases and business as they deem appropriate." (citing 28 U.S.C. § 154(a) (2018))); *In re* Iron-Oak Supply Corp., 162 B.R. 301, 305 (1993) (equating express authorization for joint hearings under Federal Rule of Civil Procedure 42 with the power to hold en banc hearings); *In re* Ludwick, 185 B.R. 238, 239-40 (1995) (exemplifying an en banc hearing for attorney misconduct).

82. *BAP Court Information*, U.S. CTS. NINTH CIR., https://www.ca9.uscourts.gov/bap/court-information [https://perma.cc/S3T4-N7TZ].

83. Stacy Cowley, *Minority Entrepreneurs Struggled to Get Small-Business Relief Loans*, N.Y. TIMES (Apr. 4, 2021), https://www.nytimes.com/2021/04/04/business/ppp-loans-minority-businesses.html [https://perma.cc/7VGM-ZZSK] (reporting on Small Business Administration data and reporting that interviews indicate "Black- and other minority-owned businesses were disproportionately underserved by the relief effort, often because they lacked connections to get access to the aid or were rejected because of the program's rules"); Jonnelle Marte, *Minority-Owned Businesses Struggle to Access Credit During Pandemic, Fed Survey Finds*, REUTERS (Feb. 3, 2021), https://www.reuters.com/article/us-usa-fed-smallbusiness/minority-owned-businesses-struggle-to-access-credit-during-pandemic-fed-survey-finds-idUSKBN2A32OS [https://perma.cc/LFX8-9PRL] ("For instance, the first round of funding in PPP loans issued last spring went disproportionately to non-minority businesses, according to a research published in January by Robert Fairlie from the University of California at Santa Cruz and Frank Fossen of the University of Nevada."); Adhiti Bandlamudi & Matthew Green, *Unequal Distribution: How Businesses in East Oakland and Other Communities of Color Missed Out on PPP Loans*, KQED (May 11, 2021), https://www.kqed.org/news/11872011/unequal-distribution-how-businesses-in-east-oakland-and-other-communities-of-color-missed-out-on-ppp-loans [https://perma.cc/6DQX-4VG5] ("Yet, a Reveal analysis of more than 5 million PPP loans issued during the first two rounds of funding from April through August found sweeping racial disparities in how that money was distributed, with businesses in largely white neighborhoods receiving loans at a far greater rate than those in neighborhoods with significant minority populations.").

84. Jacoby, *supra* note 15, at 1743-46.

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ARTICLE

CORPORATE BANKRUPTCY HYBRIDITY

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INTRODUCTION

Spend a day in a busy bankruptcy court and your research agenda could be set for life. Bankruptcy is crisis management for individuals, business entities, and even governments. The entities that file for bankruptcy come in all shapes and sizes, as do their troubles. In addition to basic capital structure problems, bankruptcy dockets and courtrooms contain allegations of sexual harassment, race discrimination, systemic financial risk, First Amendment issues, toxic and defective products (medical devices, airplanes, and automobiles), global warming litigation, and pyramid schemes. This catastrophist's dream has the potential to provoke engagement from scholars spanning the law school curriculum.[1]

That breadth of engagement, however, is missing. In a public lecture, commercial law scholar and teacher Jay Lawrence Westbrook lamented the lack of "public interest" concerns in corporate bankruptcy scholarship.[2] That term signals something more than the aggregation of individual rights-based interests and arguments, to encompass the system's broader effects—matters that cannot simply be waived by creditors when they settle their own claims. In addition, the scholarship insufficiently attends to claimants whose rights against a bankrupt company arise through pathways other than the fine print of a contract.

In short, the field of corporate bankruptcy has been redistricted to wealth maximization, voluntary lenders, and investors.[3] Academic careers have

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1 That is, after all, how the field of consumer bankruptcy has unfolded. The contributors to consumer bankruptcy debates are trained or otherwise steeped in law, sociology, economics, psychology, history, and political science. The consumer scholarship draws on a wider spectrum of law and economics than has typically been the case in corporate bankruptcy. Both empirical and theoretical, the scholarship explores connections between overindebtedness and domestic violence, racial and ethnic identity, medical problems, overconsumption, fringe credit products, overpromotion of homeownership, tax policy, aging, education, natural disasters, and beyond. Leading contributors are diverse by demographic as well as methodological and ideological measures.

2 Jay Lawrence Westbrook, *Commercial Law and the Public Interest*, 4 PENN ST. J.L. & INT'L AFF. 445, 450 (2015).

3 This Article does not contain extended critiques of the creditors' bargain or contractualism because they have been evaluated thoroughly elsewhere. Recommended analysis and critiques include Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy Case*, 42 AM. U. L. REV. 337, 430 (1993) (concluding that model is unhelpful as applied to voluntary case commencement); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503, 508 (2001) (identifying and explaining ways in which academics' arguments favoring simple contractarian bankruptcy models are "incoherent"); Susan Block-Lieb, *The Politics of Privatizing Business Bankruptcy Law*, 74 AM. BANKR. L.J. 77 (2000) [hereinafter *Politics*] (critiquing neo-libertarian bankruptcy theorists' political economy analysis); Jonathan C. Lipson, *Bargaining Bankrupt: A Relational Theory of Contract in Bankruptcy*, 6 HARV. BUS. L. REV. 239, 241 (arguing that contractarians "offer neither doctrinal nor theoretical accounts of the instrument and institution they laud"); *id.* at 242 ("Contractualism tends to rely on what Robert Ellickson would call a 'cardboard' Coasean theory of contract."); *id.* at 265 (documenting how creditors' bargain founder "made questionable statements of law in the service of efficiency"); Lynn M. LoPucki, *Contract Bankruptcy: A Reply to Alan Schwartz*, 109 YALE L.J. 317 (1999) (critiquing view that contract bankruptcy is superior to the current system); Lynn M. LoPucki, *Team Production Theory of Bankruptcy*

flourished characterizing Chapter 11 as a mere corporate control transaction among investors, shuffling pieces of the company's capital structure.[4] Whether due to this framing, the lack of a popular alternative, or both, the redistricters tend to ignore scholarly contributions that construe the field more broadly.[5]

This Article is an invitation to explore an alternative model: corporate bankruptcy as a public–private partnership. In this model, allocating responsibilities to private parties can improve regulatory functioning, but parties cannot redefine system goals purely for their own benefit. The application of this framework is supported by an institutional analysis of the bankruptcy system, drawing on privatization and administrative law scholarship that has received too little attention in bankruptcy debates.[6] Scholars of the regulatory state understand that efficiency is not the exclusive objective: "the public law perspective asks not whether privatization is efficient, but whether it erodes the public law norms that these constitutional and statutory limits are designed to protect."[7] Private contributions to a system must be solicited and managed in ways that improve, not undermine, public regulatory objectives.[8]

Reorganization, 57 VAND. L. REV. 741, 747-48 (2004) (illustrating how changes over time in creditors' bargain description left it "with no foundation" and "useless").

4 I have discussed this phenomenon in prior work. *See* Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401, 430 (2006) (identifying transactional model of Chapter 11 as "prevailing conception"); Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571 (2015) [hereinafter *Chapter 11*] (arguing that current views overemphasize the corporate law elements of Chapter 11 to the exclusion of other elements).

5 *See* Lipson, *supra* note 3, at 261 ("While the contractualist project has been criticized for many reasons, no alternative vision of contract in bankruptcy has emerged."); Westbrook, *supra* note 2, at 446 ("One of the reasons that other public interest considerations have been elbowed aside is that those who are concerned with public interest factors do not have a church as do the public choice and contractualist scholars."); *see also* Ronald J. Mann, *Bankruptcy and the Entitlements of the Government: Whose Money Is it Anyway*, 70 N.Y.U. L. REV. 993, 1057 (supplying a political philosophy justification for the government using the bankruptcy system "as an instrument of social policy" more generally, but expressly reserving and deferring the task of articulating the scope of such policy for another day).

6 For (scarce) prior uses of administrative law scholarship to aid analysis of other bankruptcy issues, see Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875 (2015) (considering applications of nondelegation doctrine and re-delegation theory to practices in consumer bankruptcy); Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384 (2012) (proposing changes to reduce policymaking by courts in bankruptcy); Robert Kenneth Rasmussen, *Bankruptcy and the Administrative State*, 42 HASTINGS L.J. 1567, 1568 (1991) ("seeking to integrate the administrative state into bankruptcy theory," focusing on questions of forum); Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1241 (2013) (comparing bankruptcy to other financial regulatory processes within the administrative state).

7 Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1302 (2003).

8 Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000) ("This realization suggests the possibility of harnessing private capacity to serve public goals."); *id.* at 551 ("Private actors are deeply involved in regulation, service provision, policy design, and implementation."); *id.* at 569 n.96 (emphasizing the potential of private contributions and objecting to assumptions that "deny the possibility of collaborative, public-oriented, accountable regulatory

In addition to enlivening academic debates, the public–private partnership model sheds new light on real-world problems. And problems abound. The American Bankruptcy Institute Commission on Chapter 11 recently released a report cataloging the ways in which Chapter 11 no longer functions in accordance with its original legislative mandate.[9] The public–private partnership model not only helps diagnose shortcomings in Chapter 11 as it operates on the ground, but expands the range of options for addressing them.

This Article unpacks these ideas as follows. Part I defines corporate bankruptcy's public–private partnership, interrogating the common assumption that bankruptcy is private law, using the analytical tools of administrative law and privatization scholarship. Topics include the nature of liabilities addressed in Chapter 11, the funding of the bankruptcy system, and the standard-setting and oversight regime set forth in black-letter bankruptcy law.

Part II explores features of modern Chapter 11 that distort the balance in the public–private partnership. The first is the most well-established: financing in Chapter 11 as a means of shifting control to private parties for private gain. The discussion then turns to features that connect to the public–private partnership in subtler ways, including case venue and equitable mootness doctrine (which combine to concentrate cases and court authority); disabling the threat of trustee appointment as a disciplinary backstop; and shifting major debtor-in-possession obligations to creditors' committees.

Part III offers ideas, still in germinal form, for improving the system inspired by the public–private partnership model. First, all repeat players that shape the system, including powerful private actors, must attend to procedural justice to maintain the system's legitimacy. Social psychology research conducted in nonbankruptcy settings shows that procedural justice (the sense that the process was fair) is more critical to maintaining public confidence than economically efficient outcomes.[10] A legal procedure thought to be efficient (by whatever measure) cannot stand if the procedure imposes intolerable procedural justice costs. In a public–private partnership,

regimes"); *see also* Block-Lieb, *Politics*, *supra* note 3, at 91-92 (discussing law-and-society research on the recursive influence of private actors on the public sphere).

9 AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: FINAL REPORT AND RECOMMENDATIONS (2014).

10 The work of Rebecca Hollander-Blumoff canvasses this research and applies it to court and dispute resolution settings. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 134, 137 (2011) ("When people feel that they have received fair treatment, they are more likely to adhere to, accept, and feel satisfied with a given outcome, and to view the system that gave rise to that outcome as legitimate."). For applications to complex litigation, see Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 27 (2009) (applying procedural justice theory to nonclass aggregate litigation); Judith Resnik, Dennis E. Curtis, & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 372-76 (1996) (exploring the role of procedural justice and representation in aggregate litigation).

procedural justice is not the sole responsibility of public officials. Private parties that dominate Chapter 11 cases also must be held accountable.

Second, I propose the Sunlight Fund, a not-for-profit enterprise. To moderate the leverage of private lenders, the Sunlight Fund could be tapped to finance portions of Chapter 11 cases with the potential to enhance the bankruptcy estate, or achieve other public objectives.

Returning to the academic realm, Part III lastly calls for a reckoning with the field's homogeneity—in ideology (traditional law and economics),[11] and demography (white and male).[12] Making readers more attentive to whom they cite and invite could reset the boundaries of not only who counts as a "leading scholar," but of the field itself, allowing the kind of engagement with a broader set of problems and methods that Jay Westbrook has endorsed.

I. PRIVATE ACTORS, PUBLIC GOALS: THE PUBLIC–PRIVATE PARTNERSHIP

A. *What Is It?*

Governments and private parties collaborate on public projects in seemingly infinite patterns.[13] The nature and intensity of private involvement in any regulatory enterprise can vary. The public–private partnership is one

11 Law and economics is, or could be, a large umbrella but the scholarship on corporate bankruptcy generally reflects just a subset. *Cf.* Jean Braucher, *Toward a Broader Perspective on the Role of Economics in Legal Policy Analysis: A Retrospective and an Agenda from Albert O. Hirschman*, 13 L. & SOC. INQUIRY 741, 745-46 (1988) (identifying Hirschman's appreciation for cooperation and moral obligation in a successful market economy and the need to consider the broader social context); Jean Braucher, *Bankruptcy Reorganization and Economic Development*, 23 CAP. U. L. REV. 499, 512-14 (1994) (explaining the broader possibilities of bankruptcy reorganization for economic development); Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297, 300 (2016) (discussing the "current cramped confines" of the dominant strand of law and economics).

12 As discussed later, the challenge of demographic homogeneity in this field transcends scholarly methods or ideology. *See infra* Part III.

13 *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1395 (2003) (discussing public–private collaborations in modern administrative state); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1257 (2003) (explaining the intersecting trends in privatization involving public government actors); *see also* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816 (2000) (discussing the role of non-government actors in standard setting, implementation, and enforcement); Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 518 (2016)("[P]rivatization typically involves enlisting private actors to perform, on the government's behalf, functions that otherwise would be carried out by government employees."); *id.* at 522 (discussing hybridity across variety of arrangements). Examples include industrial codes and product settings, and arise even in traditional command-and-control frameworks. Freeman, *supra* note 13, at 827, 835-36.

way of expressing such collaborations. An early publication using the term defines the concept this way:

> a legal hybrid which possesses some characteristics of a purely private corporation and others of a purely governmental corporation. It may be owned jointly by government and private interests or owned privately and financed jointly with public and private funds. But however it is structured, it is formed to accomplish a public purpose.[14]

This framework recognizes that private actors may offer expertise, efficiency, and innovation.[15] But there is an important catch: the partnership is meant to promote public values. Achieving those objectives requires planning, not merely a handover of the keys to willing profit seekers.[16] Private provision of public goods, without sufficient safeguards, risks end runs around constitutional obligations of state actors.[17] Erosion of the public foundation imposes stress on democracy, accountability, and general welfare.[18] Gillian Metzger notes that "[t]he concerns raised by privatization are not merely free-floating normative or policy concerns; they emanate from the basic constitutional accountability premise that government is subject to certain constraints in the way it operates."[19] Delegations to private actors must be "adequately structured to preserve constitutional accountability."[20] Left to their own devices, private actors may underinvest in socially useful activities and overinvest in activities with little or no social utility.[21] When governments use market mechanisms, they can and should advance public values.[22]

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14 Robert S. Amdursky, *A Public–Private Partnership for Urban Progress*, 46 J. URB. L. 199, 199 (1969).

15 *See* Freeman, *supra* note 13, at 846 (explaining that the "private role in regulation is even more pervasive and longstanding than the literature suggests," even in command-and-control settings); Minow, *supra* note 13, at 1230, 1240-42, 1245 (describing market-style competition and innovation among justifications to move public functions into private hands).

16 *See* Freeman, *supra* note 7, at 1327 (explaining the focus on enlisting private sector entities to protect democratic norms).

17 *See, e.g.*, Minow, *supra* note 13, at 1246 ("Government agencies act not only as purchasers of goods and services but also as guarantors of freedom and equality."); *id.* at 1246 n.60 ("Due process, equal protection, freedom of information, and public participation are leading public values jeopardized by privatization of public services."); *id.* at 1267 (encouraging transparency to promote accountability of private providers of public goods).

18 *See* Audrey G. McFarlane, *Putting the "Public" Back into Public–Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 45-46 (2007) (discussing how partnerships have become increasingly private).

19 Metzger, *supra* note 13, at 1456.

20 *See Id.*; Freeman, *supra* note 7, at 1301 (expressing concern about privatization's impact on "liberal democratic norms of accountability, due process, equality, rationality, and the like"); Minow, *supra* note 13, at 1259 (discussing accountability as the key element to delegating public functions).

21 Lemos, *supra* note 13, at 525-26.

22 MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD (2002). Minow gives the example of the government auctioning off the electromagnetic spectrum: "To think in public terms would require viewing the sale of the public asset as a resource with the potential

Defining "the public interest" can be a contested exercise. Recognizing that the public interest is unlikely to be boiled down to just one thing is an important step. Martha Minow's work on privatization offers an illustrative list of public goals and values key to collaborations of many kinds:

- Achieving social provision—human needs, redressing inequality;
- Freedom of self-expression and political practice;
- Pluralism—cultivate "participation, self-governance, mutual aid, and care for others";
- Democracy;
- Division of labor; and
- Accountability.[23]

The last point, accountability, is particularly critical, says Minow, to assess fulfillment of other values.[24] As the list suggests, the values need not be specific and exclusive to the substantive focus of the partnership and need not be winnowed to a single overriding purpose. We should speak of public values instead of "the public interest" as a monolith.[25]

B. *Utility for Corporate Bankruptcy*

Corporate bankruptcy's frequent characterization as private law, rather than public law or a hybrid, is curious and overdue for interrogation. Limited liability and other features associated with a corporate charter are forms of government largess, state-conferred public benefits.[26] Business restructuring and failure affect more than the coffers of voluntary investors; they impair the rights of individuals who made no conscious choice to dabble in distressed debt and yet may not be

for enhancing a public good—but only if the proceeds from the auctions are preserved for distinctive purposes" rather than simply handing the money over to the Treasury to pay the deficit. *Id.* at 19.

23 *Id.* at 45-46 (explaining that "prevent[ing] abuse, fraud, and waste, and . . . enhanc[ing] learning and improvement, transparent and effective means of accountability, in the day-to-day administrative settings as well as through formal public elections" should be a key goal of public–private partnerships).

24 *Id.* at 150-51.

25 *Id.*

26 *See* Metzger, *supra* note 13, at 1462 (classifying "[l]icenses, corporate charters, and rights of property and contract . . . [as] 'delegations' of state power to private actors"); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1013, 1015 (2013) (stating that corporations are public in the sense that they are "entities that exist with the permission of the government").

able to absorb the loss without further consequence.[27] Business restructuring and failure produce ripple effects in communities and society at large.[28]

Contractualist scholars do not deny the presence of involuntary creditors but marginalize their significance to corporate bankruptcy theory. Proposals to repeal Chapter 11 in favor of full private ordering often concede that involuntary creditors might warrant special treatment.[29] Yet, National Involuntary Creditor Reflection Day has yet to arrive. When scholars raised questions of the broader public interest in bankruptcy several decades ago, critiques on institutional competence grounds quickly emerged, expressing doubt that judges in an adversarial system could identify the public interest.[30] And that was that.

Stepping back from the particulars of this field, it is far from clear that law should attribute much significance to the highly contested labels "private" and "public."[31] Ascribing law to one or the other of these realms is a function of

27 *See* Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1211, 1225, 1237 (2005) (identifying potentially involuntary and non-adjusting creditors in Chapter 11 bankruptcy); *id.* at 1238 ("In 1994, more than one in every four dollars of claims listed in bankruptcy was owed to a maladjusting creditor . . . . Based on the 2002 projection, about one-fifth of the dollar amount of claims in bankruptcy is held by creditors that could be classified as maladjusting.").

28 *See* Karen Gross, *Taking Community Interests into Account in Bankruptcy: An Essay*, 72 WASH. U. L.Q. 1031, 1034-35 (1994)(describing the community-wide negative impact of the bankruptcy of a contractor on Asbury Park, New Jersey); Westbrook, *supra* note 2, at 457 (noting that factors like "community stability" are typically not considered in bankruptcy law, and distinguishing between aggregation of claims and "significant secondary effects of commercial law rules"); Mary Jo Wiggins, *Finance and Factionalism: The Uneasy Present (and Future) of Special Interest Committees in Corporate Reorganization Law*, 41 SAN DIEGO L. REV. 1373, 1374, 1383 (2004) ("Corporate bankruptcy cases have wide social, economic, and political reach . . . . Issues of voice, representation, legitimacy, and transparency become key policies that must be considered . . . ."); *see also* Hillary A. Sale, *The New "Public" Corporation*, 74 L. & CONTEMP. PROBS. 138, 144-46 (2011) (discussing the social effects of seemingly private corporate decisionmaking, such as setting executive compensation).

29 Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 714 n.165 (2018) (discussing examples).

30 *See* Christopher W. Frost, *Bankruptcy Redistributive Policies and the Limits of the Judicial Process*, 74 N.C. L. REV. 75, 77 (1995) (contending that "the bankruptcy process is institutionally incapable of resolving the loss distribution issues among all who are interested in the outcome of the case . . . the judicial system is particularly ill-equipped . . .").

31 *See, e.g.*, Freeman, *supra* note 8, at 550 (discussing the "linguistic conundrum" of "public" and "private" and the importance of these terms as signifiers—they are associated with "different capacities, cultures, and priorities, for example, and respond to different incentives"); *id.* at 551 (discussing "[y]ou know it when you see it" definitions of public and private); Freeman, *supra* note 20, at 1287 (arguing that private refers to a host of arrangements rather than a single thing); Metzger, *supra* note 13, at 1443 (arguing that "every instance of economic and social legislation could be seen as a private delegation of power" and noting that "Legal Realists . . . [made] the claim that it was impossible to draw a neutral or objective line between public and private for constitutional purposes"); Minow, *supra* note 13, at 1229 n.1 (discussing the difficulty of making meaning of these terms and their interconnections); *see also* Lemos, *supra* note 13, at 519 ("Understanding these questions, not as discrete policy dilemmas but as part of the broader privatization phenomenon, helps clarify the interests at stake and suggests useful avenues for normative assessment."); Julie A. Nice, *The New Private Law: An Introduction*, 73 DENV. U. L. REV. 993, 998 (1996) (categorizing features of "new private law" and "new public law").

historical context and social construct; private parties once dominated exercises of power now identified as governmental.[32] The public–private dichotomy also risks circularity: just as the nature of an activity affects the label, the label affects perceptions of its nature. The distinction persists, however, in scholarship, in the law school curriculum, and in appellate court decisions, particularly on state action doctrine.[33] Refusing to use the terms would not save bankruptcy law from their consequences.[34] But we should use them more constructively—focusing, as Jody Freeman recommends, on the negotiated relationships between public and private *actors*.[35]

In any event, it is a mistake to conflate involvement of private actors and contractual liabilities with the nature of bankruptcy law. Even a minimalist government-provided system—the automatic stay, a permanent injunction on debt enforcement without unanimous consent—involves coercive government power.[36] At the very least, the public has a stake in who makes the key decisions in corporate bankruptcy and whether that process comports with basic constitutional and democratic norms. The interests of the public grow alongside the scope of a government-supplied bankruptcy system. Constitutional and quasi-constitutional matters cannot be kicked to the curb simply because a company experiences financial distress and initiates a Chapter 11 case.

Congress's exercise of its constitutional authority to create uniform bankruptcy laws thus triggers the need for accountability and due process safeguards. This is the case whether or not responsibilities are undertaken by public officials or outsourced to private parties.[37]

C. *Contracts and Other Liabilities*

Chapter 11's identity crisis arises in part from the integral role of contracts in the establishment of debt. Even scholars who have opposed limiting bankruptcy's

32 *See, e.g.*, Lemos, *supra* note 13, at 524, 572 (noting examples of shift from private to public authority, and vice versa).

33 For discussion of the continued doctrinal role of the private and public distinction in constitutional and administrative law, see Freeman, *supra* note 13, at 841; Metzger, *supra* note 13 at 1370, 1448.

34 Because the analysis in this Article largely is independent of the bankruptcy court's non-Article III status, I do not rely on the "public rights" question regarding the constitutional authority of non-Article III tribunals, an issue recently addressed in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,138 S. Ct. 1365 (2018).

35 Freeman, *supra* note 8, at 548, 565; *see also* Freeman, *supra* note 13, at 857 (suggesting a focus on the "*regulatory regimes* in which agencies are in dynamic relationships with private actors" rather than distinguishing between private and public law).

36 As an example of a minimalist bankruptcy, consider the proposal to add Chapter 16 to the Bankruptcy Code. NATIONAL BANKRUPTCY CONFERENCE, PROPOSAL FOR A NEW CHAPTER FOR RESTRUCTURING BOND AND CREDIT AGREEMENT DEBT (CHAPTER 16) 1 (2014) (creating stripped-down bankruptcy to bind holdouts in bond indentures).

37 *See* Freeman, *supra* note 15, at 824 ("Concern about accountability and legality . . . arise with almost every example of contracting out").

role to creditor wealth maximization, such as now-Senator Elizabeth Warren, frequently have highlighted the system's contractual elements.[38] Separate from calls for consideration of the public interest, Jay Westbrook has written foundational works on the treatment of contracts in bankruptcy.[39]

These scholars, however, also have documented the pervasiveness of involuntary and non-adjusting creditors.[40] As Kate Heidt wrote before her untimely death, liabilities such as those arising from environmental harm sometimes rise to the level of worldwide politics and public health concerns.[41] Bankruptcy cases involve debts arising from police brutality,[42] employment discrimination,[43] and, as exemplified in The Weinstein Company bankruptcy, sexual harassment and assault.[44]

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38 Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 368-69 (1993) [hereinafter *Bankruptcy Policymaking*] (discussing how Chapter 11 is privately initiated and monitored with the state providing only a forum and procedures); *id.* at 364-65 (bankruptcy reduces pressure on Congress to fund bailouts, indicating that government participation in bankruptcy is "largely" or "partially" self-supported by the parties, not publicly funded); Elizabeth Warren, *What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 53 (2002) ("The perception of bankruptcy as a 'government program' is flatly wrong. Bankruptcy is about commercial debt and the allocation of losses among parties who enter into contracts voluntarily."); *id.* at 55 ("[B]ankruptcy is the privately funded part of the social safety net. No debtor gets a handout or a government guaranteed loan from the bankruptcy court . . . .[A] large portion of the services . . . are paid for by user fees."); Elizabeth Warren, *"Why Have a Federal Bankruptcy System?"*, 77 CORNELL L. REV. 1093, 1096 (1992) ("Is the bankruptcy system socialization of risk? No. My sense is that the reason bank failures and bankruptcy are stitched together in this panel is that the bankruptcy system is what happens when we do not socialize the risk, and bank failure is what happens when we do.").

39 Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989).

40 Warren & Westbrook, *supra* note 27; Kathryn R. Heidt, *The Changing Paradigm of Debt*, 72 WASH. U. L.Q. 1055, 1058 (1994) ("[T]he traditional concept of debt has been expanded to include not only consensual obligations but also obligations that arise from nonconsensual transactions.").

41 Heidt, *supra* note 40, at 1062 n.28 ("Some believe that environmental matters affect world political stability . . . contributing to violent conflicts in parts of the world and hav[ing] the potential to contribute to conflict and social instability in the future in poorer nations."); Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347, 359 (1990) (using toxic waste as an example of initial harm having an impact for decades, if not centuries).

42 Melissa B. Jacoby & Mary Ellen Goode, *Who Pays for Police Misconduct in Bankrupt Cities?* (Sept. 20, 2016)(U.N.C. L. Stud., Research Paper No. 2796582).

43 *See* Joanne Gelfand, *The Treatment of Employment Discrimination Claims in Bankruptcy: Priority Status, Stay Relief, Dischargeability and Exemptions*, 56 U. MIAMI L. REV. 601, 601 (2002) ("Low dollar distributions on discrimination claims eviscerates the rehabilitative and deterrent goals of [civil rights laws].").

44 *See* Libby Lewis, *How Bankruptcy Law Could Keep Money—and the Truth—from Weinstein's Victims*, WASH. POST, May 2, 2018, https://www.washingtonpost.com/outlook/how-bankruptcy-law-could-keep-money—and-the-truth—from-weinsteins-victims/2018/05/02/88f29b12-4e3f-11e8-84a0-458a1aa9ac0a_story.html?noredirect=on&utm_term=.8f0bdcf88ea0 [https://perma.cc/7E62-NAJG].

These liabilities make it hard to characterize bankruptcy as simply a species of private law.[45] Civil rights claims are quasi-constitutional at the very least.[46] If it is true that "Americans now believe that a core function of the federal government is to prohibit discrimination in the public and private sectors,"[47] then federal court cases should reflect those concerns even in the context of bankruptcy.

Even with respect to consensual contractual obligation, no liability that depends on formal legal enforcement can be truly private. Contract and property rights are creatures of the state, with teeth sharpened by the threat or reality of government assistance with debt collection.[48] A court adjudicating contract law must be, and will be, evaluated as a public institution and measured against norms of legitimacy and accountability.[49] Debtor-creditor law relies on coercive power of government actors to an even greater extent than mere adjudication of liability. For example, state law permits private parties to direct sheriffs to levy on a debtor's property after a court awards a judgment, diverting time and resources from other law enforcement tasks.[50] Settlements of disputes over liability present elements of private transacting but harness public power when they are promoted by courts, or if the law requires court approval due to third-party consequences.[51]

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45 Rasmussen, *supra* note 6, at 1567 ("Although bankruptcy law is generally conceived to be a private law regime, the filing of a bankruptcy petition does not remove a debtor from the reach of public law . . . ."); *id.* at 1578 ("The creditors' bargain model fails to recognize any meaningful difference between a private party pursuing a dispute against the debtor and the government doing so."). *See generally* Freeman, *supra* note 7, at 1303 (describing characteristics of public law perspective to include accountability, due process, and rationality, as well as "a preference for deliberative, disinterested, and expert decisionmaking that does not merely serve the interests of a special few.").

46 *See* Metzger, *supra* note 13, at 1455, n.307 ("[C]ore federal antidiscrimination statutes such as Title VII have been described as 'quasi-constitutional.'").

47 Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after* Morrison *and* Kimel, 110 YALE L.J. 441, 502 (2000).

48 *See* Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1240 (1996) ("The importance of this deconstruction of the public/private dichotomy is to demonstrate that government regulates even when it claims not to"); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 3, 11 (1992) (distinguishing between critiques of public–private distinction and examining indeterminacy arguments); Minow, *supra* note 13, at 1267 ("[C]ontract law is no less dependent upon public enforcement"); Nice, *supra* note 31, at 993-94 (discussing overlap of what has been traditionally characterized as private and public law).

49 *See* Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 2 (Katharine G. Young, ed., forthcoming 2018) (distinguishing between courts as a place where social and economic rights are considered and enforced and "courts themselves as *services* that governments must provide to individuals"); *id.* at 3 ("[S]eeing courts as economic and social rights clarifies the utility of government services committed to norms of fairness.").

50 *See* Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J. L., MED. & ETHICS 560, 565-66 (2002) (describing the government's role in enforcing private debt obligations); *see also* Mann, *supra* note 5, at 1053-56 (discussing the redistributive nature of the government system of dealing with bankruptcy).

51 *See* Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 67 (2016) [hereinafter *Federalism*] ("With varying levels of enthusiasm, scholars have documented

In summary, based on liabilities, even a minimalist form of bankruptcy is best understood as a hybrid form of law. This hybridity increases the salience of the public–private partnership model.

D. *Follow the Money*

Sources of funding shape the extent to which a system or function is seen as privatized.[52] Particularly through filing fees, private parties in bankruptcy cases fund not only significant portions (an estimated three quarters) of the bankruptcy system but other government functions as well.[53] Much of the money comes from fees for initiating bankruptcy cases.[54] Fees associated with filing particular motions or adversary proceedings within a case contribute a smaller, but nontrivial, amount.[55] The bankruptcy system also generates private fees when parties or members of the public pay to access electronic court records.[56] Chapter 11 cases require quarterly fees, calibrated to disbursements, payable to an administrative watchdog within the U.S. Department of Justice known as the U.S. Trustee.[57] Between 2010 and 2014, quarterly fees generated about $138 million per year.[58] In 2017, Congress not only increased the amount owed for cases with greater disbursements, but directed a portion of the resulting revenues to the Treasury.[59]

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courts' heavy use of informal and non-adversarial techniques to expedite proceedings, discourage litigation, direct fact-gathering, and encourage settlement."); Jacoby, *Chapter 11*, *supra* note 4, at 585 ("[B]ankruptcy courts are neither unique in straddling the worlds of deals and litigation, nor alone in being foisted into the delicate position of policing a negotiated outcome under conflicting expectations.").

52 *See* Lemos, *supra* note 13, at 518 (describing reliance on user fees as form of privatization); *id.* at 523 (providing examples of reliance on private payments).

53 *See* Ed Flynn, *Is Bankruptcy the Red-Headed Stepchild of the Judiciary?*, 34 AM. BANKR. INST. J., OCT. 2015, at 36, 58 [hereinafter *Stepchild*] (estimating the total annual administrative costs of bankruptcy (not limited to the courts) to be over $1.5 billion, and reporting that "nearly one quarter of filing fees are paid to the Treasury); *id.* at 59 (stating that over $100 million a year "are diverted into a general government fund"); Ed Flynn, *Chapter 13 Revisited: Can it Help Solve the Judiciary's Fiscal Problems?*, AM. BANKR. INST. J., Dec. 2013, at 11, 73 (proposing a one-percent surcharge on Chapter 13 disbursements to be allocated to federal judiciary).

54 Case filing fees provided about $375 million annually between 2010 and 2014. The fee for filing a non-railroad Chapter 11 petition is currently $1717. Flynn, *Stepchild*, *supra* note 53, at 58. The U.S. Supreme Court cited the need for those fees to run the system when it declined to recognize a constitutional right to access bankruptcy in the absence of the ability to pay. U.S. v. Kras, 409 U.S. 434, 449 (1973).

55 Flynn, *Stepchild*, *supra* note 53, at 58 (noting that fees for filing motions for relief from the automatic stay and adversary proceedings raised at least another $50 million per year).

56 *Id.* (describing how fees from accessing bankruptcy court records generate at least $60 million a year). As with other sources, these revenues are not necessarily funneled back into the bankruptcy system.

57 28 U.S.C. § 1930(a)(6) (2012); U.S. DEP'T. OF JUSTICE, CHAPTER 11 QUARTERLY FEES (2014). On the low end, cases with quarterly disbursements between $0 and $14,999.99 owe a $325 quarterly fee. On the high end, cases with $30,000,000 or more owe a $30,000 quarterly fee.

58 Flynn, *Stepchild*, *supra* note 53, at 58.

59 Bankruptcy Judgeship Act of 2017, H.R. 2266, 115th Cong. § 1004 (2017) (explaining that for fiscal years 2018-2022, "if the balance in the United States Trustee System Fund as of September 30

Private parties also keep businesses financially afloat during their stay in the bankruptcy system.[60] The drafters of the Bankruptcy Code anticipated the possibility that distressed businesses would need third parties to fill the liquidity gap, and the Bankruptcy Code accordingly incentivizes lenders to offer debtor-in-possession ("DIP") financing.[61] As Part II will explore, however, the drafters may not have anticipated the extent to which prebankruptcy lenders would be permitted to use DIP financing to cherry-pick the activities and litigation the bankruptcy estate could undertake.

In summary, the bankruptcy system relies heavily on private sources of funds rather than drawing exclusively or even dominantly from the Treasury. In retrospect, it should not be surprising that this funding structure tempts private parties to try to operate the system purely in self-interest. But, given the structure of public oversight and standard-setting discussed below, drafters may have expected more tempering of those private incentives than we see today.

E. *Oversight and Standard-Setting*

In creating the bankruptcy system, policymakers engaged in considerable and deliberate balancing between public control and private outsourcing. As written, the Bankruptcy and Judicial Codes invite ongoing involvement of private actors in pursuit of the system's public functions. Yet, textbook bankruptcy law implicitly and explicitly anticipates that public actors plus substantive standards in the Bankruptcy Code will cabin private party influence. This approach is consistent with the need for checks and balances in any public–private partnership to ensure maintenance and promotion of public values.

For the most part, private actors formally initiate bankruptcy filings.[62] Reliance on private initiation is not free from problems, but proposed responses tend to tweak the incentives rather than reallocate the responsibility to a public official.[63] Also, the Judicial Code expressly allocates

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. . . is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000").

60 Third parties cannot be required to lend new money on a prebankruptcy agreement once a bankruptcy case is commenced. 11 U.S.C. § 365(c)(2) (2012).

61 *Id.* § 364.

62 Chapter 9 municipal bankruptcy filings present an exception and require state approval and voluntary action by whoever has authority to make decisions for the municipality. Jacoby, *Federalism*, *supra* note 51, at 61-64.

63 *See generally* A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN. L. REV. 875 (2009); *see also* Warren, *Bankruptcy Policymaking*, *supra* note 38, at 368-69 (discussing preference for private over public initiation).

to private parties the ability to select the case's venue.[64] Both initiation and venue are coupled with the possibility of public official review.[65]

The two key public officials in corporate bankruptcy cases are the court and the administrative watchdog.[66] In addition to specific grants of oversight, the Bankruptcy Code gives courts many pockets of discretionary authority and the right to raise issues sua sponte.[67] Use of this authority is complicated by not only the non-Article III status of bankruptcy judges, but the shared sense that rules and standards in the Bankruptcy Code are calibrated to promote bargaining, negotiation, and settlement.[68] Thus, while some judges read the law as imposing a duty to independently evaluate the elements of plan confirmation even in the absence of objections,[69] others are reluctant to intervene when parties profess harmony with one another.[70] In between case initiation and plan confirmation in a traditional Chapter 11, the Bankruptcy Code anticipates ongoing court oversight for matters such as hiring and paying professionals, incurring new debt, rejecting or assuming contracts, and selling assets outside the ordinary course of business.

The administrative watchdog,[71] which has its own list of oversight responsibilities, was created in response to concerns about a "Bankruptcy Ring."[72] The watchdog can participate directly in all types of bankruptcy

64 28 U.S.C. § 1408 (2012). For more discussion, *see infra* Section II.B.1.

65 A court may dismiss a Chapter 11 case if it was not filed in good faith. *See, e.g.*, *In re* SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999). And a court may transfer a case to another venue in the interest of justice or for the convenience of the parties. *See, e.g.*, *In re* Patriot Coal Corp., 482 B.R. 718 (Bankr. S.D.N.Y 2012) (interpreting 28 U.S.C. § 1412).

66 *See infra* note 71. Another government entity, the U.S. Securities and Exchange Commission had a significant role in the earlier corporate bankruptcy system, but its role was dramatically reduced in 1978. *See* DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 19 (2001).

67 11 U.S.C. § 105 (2012).

68 *See* Frederick Tung, *Confirmation and Claims Trading*, 90 NW. U. L. REV. 1684, 1694 (1996) ("[F]ormal rules of plan confirmation, then, create a bargaining regime in which leverage is distributed among the parties in such a way that each and all may influence the terms of reorganization."); *see also* Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 884 (2014).

69 *See* Jacoby, *Federalism*, *supra* note 51, at 77 (describing inquisitorial techniques and expectations); Jacoby, *supra* note 6, at 883 (discussing the *Everett v. Perez* and *Alabama Department of Economic and Community Affairs v. Lett* (*In re Lett*) decisions, in which appellate courts heard issues on appeal that were not argued in the lower courts).

70 *See* Jacoby, *Chapter 11*, *supra* note 4, at 583 n.82 (giving examples).

71 In addition to the Executive Office of U.S. Trustees in Washington, D.C., Congress established twenty-one regions and regional offices that cover everywhere but districts in Alabama and North Carolina. *See* 28 U.S.C. § 581 (2012)(delineating the regions). In districts in Alabama and North Carolina, U.S. Trustee responsibilities are performed instead by the Office of the Bankruptcy Administrator, which is part of the federal judiciary. The legislation and rulemaking to implement this alternative system are documented in Pardo & Watts, *supra* note 6, at 396-97.

72 *See* SKEEL, *supra* note 66, at 76-77, 133, 146; Karen Gross & Patricia Redmond, *In Defense of Debtor Exclusivity: Assessing Four of the 1994 Amendments to the Bankruptcy Code*, 69 AM. BANKR. L.J. 287, 296-97 (1995); *see also* Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381, 395

cases, including Chapter 11.[73] It can weigh in on substantive and logistical matters including compensation of Chapter 11 professionals.[74] Also within its portfolio are the appointment and supervision of a variety of private individuals and entities, both nonprofit and for-profit, to perform statutorily required roles. These roles include case trustee, providers of credit counseling briefings and debtor education in individual debtor cases, consumer privacy ombudsperson, health care ombudsperson, and examiner.[75]

The power to select a Chapter 11 trustee is particularly consequential. Unlike in Chapters 7, 12, and 13, trustee appointment in Chapter 11 is not automatic and is meant to be an exception rather than the rule. But structural discipline flows from the possibility that the court will authorize trustee appointment and the administrative watchdog will select the person to fill that role.[76] The resulting structural discipline could affect not only the debtor company but other parties with strong economic or legal leverage, such as lenders with security interests in key assets of the debtor.

F. *Implications*

By statutory design, the U.S. business bankruptcy system can be conceptualized as a public–private partnership. In addition to handling claims arising from a variety of legal theories, the bankruptcy system depends on a mixture of private and public funds to operate. Whatever running room the Bankruptcy Code gives private parties to craft resolutions is balanced against

(2015) (comparing historic concerns about a bankruptcy ring to perceptions of elite Chapter 11 professionals). As I have written elsewhere, "bankruptcy referees were appoint*ees* of friendly district court judges, and appoint*ers* of case trustees who also were parties in litigation," producing concerns about patronage that cast a shadow on the system. Jacoby, *Chapter 11*, *supra* note 4, at 577. This concern is not unique to bankruptcy, of course. *See generally* Lemos, *supra* note 13, at 543 ("The federal government and some states have instituted reforms designed to combat cronyism in the award of government litigation work.").

73 28 U.S.C. § 586(a)(3)(A)–(I), (5), (7)–(8) (2012).

74 *Id.* § 586(a)(3)(A).

75 *See* 11 U.S.C. § 111(b) (2012) (setting forth parameters for approving the use of nonprofit budget and credit counseling providers or instructional courses on personal financial management); 28 U.S.C. § 586(a)(1), (2), (b), (d) (2012); (delineating responsibilities of each U.S. Trustee and the extent to which a U.S. Trustee can establish requirements for panel trustee service); *id.* § 586(f) (authorizing hiring of auditors); *see also* 11 U.S.C. §§ 332, 333 (2012) (describing the procedure for U.S. Trustee appointment of a patient care ombudsperson or a consumer privacy ombudsperson); *id.* § 1104 (providing the substantive grounds and procedure for appointment of a Chapter 11 trustee or examiner).

76 Although creditors can elect a trustee under 11 U.S.C. § 1104(b), enacted in 1994, few published cases discuss the process, which seems to be rarely invoked. *See, e.g.*, *In re* Petters Co., 425 B.R. 534, 540 (Bankr. D. Minn. 2010); *In re* Nat'l Farm Fin. Corp., No. 07-31580, 2008 WL 410236, at *6 n.8 (Bankr. N.D. Cal. Feb. 12, 2008); *In re* Aspen Marine Grp, 189 B.R. 859, 861 (Bankr. S.D. Fla. 1995). See generally AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: FINAL REPORT AND RECOMMENDATIONS 29-30 (2014) (discussing trustee election option and calling it "unsatisfactory").

a double-branch dose of public official oversight and substantive standards meant to condition use of Chapter 11's extraordinary legal tools.

II. MODERN DEVELOPMENTS THAT SKEW THE PARTNERSHIP

As previously discussed, a hybrid system that privatizes some public functions requires safeguards to protect constitutional and democratic norms, as well as particular objectives of that system.[77] This is as true for bankruptcy as elsewhere.

In the bankruptcy system, however, institutional actors have moved the "baselines" incrementally, one motion and court order at a time.[78] Whereas Part I showed how the textbook version of the American bankruptcy system draws on a combination of public and private actors to advance public interests, features of modern Chapter 11 distort the public–private balance and delink extraordinary legal tools from public standards and oversight. The example in subpart A, below, is fairly well recognized. But the public–private partnership has become dysfunctional in other, quieter, ways, as detailed in subsequent linked examples.

A. *Control by Lending Agreement*

In modern Chapter 11 cases, parties often argue that the ordinary rules of Chapter 11 are unaffordable due to urgency, whether real or manufactured. This framing facilitates DIP financing (often bridges to quick all-asset sales) with terms considered "odious" even by restructuring professionals.[79] However high the cost of these loans, a perhaps bigger concern is how

77 *See* Freeman, *supra* note 8, at 589.

78 For research on how legal institutions can be remade without statutory amendment, see Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221 (2004) (presenting examples of changes to the bankruptcy system while the statute remained static, and identifying alternative non-statutory channels of reform); *see also* Lipson, *supra* note 3, at 266 (2016) (noting that although contractualist proposals did not get enacted in legislation, "it seems more than mere coincidence that Chapter 11 has become an increasingly contractualized process").

79 Marc J. Heimowitz, *Government as Rescue Financier: Not Just a Private Lender*, 19 U. PA. J. BUS. L. 49, 51 (2016) ("Restructuring professionals understand and generally accept the proposition that when there is no better alternative even odious private rescue financing should be accepted on proffered terms."). Academics agree. *See, e.g.*, Adrian J. Walters, *Statutory Erosion of Secured Creditors' Rights: Some Insights from the United Kingdom*, 2015 U. ILL. L. REV. 543, 545 ("[A]ccording to the prevailing conventional wisdom, Chapter 11, in the general run of cases, has become little more than a glorified nationwide foreclosure process through which secured creditors can exit via a quick section 363 sale or an outright liquidation."); Elizabeth Warren & Jay Lawrence Westbrook, *Secured Party in Possession*, 22 AM. BANKR. INST. L. REV. 12 (2003) ("American lawyers are now creating the SPIP (secured-party-in-possession)."). *See generally* Charles W. Mooney, Jr., *The (Il)legitimacy of Bankruptcies for the Benefit of Secured Creditors*, 2015 U. ILL. L. REV. 735, 764 (forum shopping into bankruptcy for secured creditors' benefit has the capacity for "mischief"); Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEXAS L. REV. 795, 860-61 (2004) (identifying control as the central concept in models of dominant secured lending and the distributional impact of this control).

prepetition lenders use DIP lending to direct the activities of the bankruptcy estate. For example, lenders abhor funding lawsuits against themselves.[80] Thus, lenders use the promise of DIP financing to prevent being sued, or to deter other steps that might promote public values. With heightened knowledge of the debtor's financial condition, the DIP lender is in a unique position to run out the clock.

To be sure, one can find examples of courts pushing back and refusing to sign overreaching proposed orders.[81] Seemingly more often than not, though, courts sign orders supported by key parties and a string of citations showing that whatever it is has been done before, haunted by the worry that resistance will reduce creditor returns.[82] Such rulings implicitly subordinate other public objectives to (mostly voluntary) creditor wealth maximization.

B. *Court Concentration, Squared*

A second mechanism destabilizing bankruptcy's public–private partnership involves the reduction of the number and types of courts overseeing larger Chapter 11 cases. The two components of this concentration are addressed separately.

1. The Initial Forum

Larger Chapter 11 cases are concentrated in a handful of judicial districts. The governing statute is partially responsible. Bankruptcy venue law allocates forum selection to the private party that initiates the bankruptcy case. Departing from other federal venue laws, the statute provides several options based on geographic connections of the *debtor* rather than creditors or other stakeholders.[83] Bankruptcy's affiliate venue rule gives even more latitude,

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80 *See, e.g.*, Czyzewski v. Jevic Holding Corp. 137 S. Ct. 973, 983 (2017) ("Sun insisted upon a settlement that gave petitioners nothing only because it did not want to help fund petitioners' WARN lawsuit against it.").

81 *See, e.g.*, *In re* Fisker Auto. Holdings, 510 B.R. 55, 61 (Bankr. D. Del. 2014) (capping a lender's credit bid in light of evidence of misbehavior); Melissa B. Jacoby & Edward J. Janger, *Bankruptcy Sales*, in CORPORATE BANKRUPTCY HANDBOOK (Barry Adler ed., forthcoming 2019) (discussing *Fisker* case).

82 *See* Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L.J. 663, 690 (2009) ("So very much of Chapter 11 practice . . . has become bankruptcy court ratification of whatever deal is worked out among secured lenders, the debtor and the unsecured creditors' committee in the context of settlements, sales, and financings, that those deals pretermit or predetermine the terms of any reorganization plan."); Jacoby & Janger, *supra* note 68, at 889. For example, the committee's lawyer in *Jevic* said, "This is hardly the first case where such an arrangement has been approved by the Court. It's not the first case where this Court has approved such an arrangement, and it's not the first case this month where this Court has approved an arrangement of this kind." Transcript of Hearing at 101, *In re* Jevic Holding Corp., 526 B.R. 547, (D. Del. Nov. 13, 2012) (No. 75); *id.* at 109 ("Court has approved in another context a gifting or class gifting arrangement where some priority creditors benefited and other that this [sic.] priority creditors did not. So we don't think that this is, again, breaking new ground.").

83 28 U.S.C. § 1408 (2012).

allowing a corporate parent debtor to file a Chapter 11 petition in a forum based only on the contacts of a tiny subsidiary.[84] The statutory foundation notwithstanding, the drafters likely did not anticipate the level of concentration that developed.[85]

Venue patterns present several challenges for the public–private partnership. First, the unevenly distributed volume of large corporate cases severely taxes busy courts' institutional capacity to exercise the oversight that both appellate courts and the Bankruptcy Code expect.[86] With the volume of documents filed in a typical large Chapter 11 and the expedited timeframe that certain lenders favor, it can be literally impossible for courts to gain the familiarity necessary to fulfill public–private partnership obligations. The court and administrative watchdog instead engage in ongoing triage. That time crunch and need for triage may be among the elements lenders and others consider when seeking to influence a debtor's venue selection.[87]

Second, recall that bankruptcy's public purposes need not be unique to the subject matter; they include constitutional and democratic values. Based on the non-bankruptcy law of venue and personal jurisdiction, corporate bankruptcy venue law seems out of step. Personal jurisdiction doctrine outside of bankruptcy prevents a parent company from being sued in a jurisdiction selected only because it has a subsidiary "at home" there.[88] Recent U.S. Supreme Court decisions emphasize the burden on parties involuntarily brought to court.[89] Filers of civil actions cannot choose a venue based solely

84 *Id.*

85 *See* Coordes, *supra* note 72, at 390, 399 (looking at history, comparing to tax and international trade courts, and arguing that Congress intended to decentralize the bankruptcy system). Lynn LoPucki's Bankruptcy Research Database has the most comprehensive venue information for large publicly held companies. *UCLA–LoPucki Bankruptcy Research Database*, UCLA SCH. L., http://lopucki.law.ucla.edu [https://perma.cc/YU9B-PH33].

86 Coordes, *supra* note 72, at 404 ("Instead of depending on the experience of judges sitting in only two courts with crowded dockets, a national array of experienced judges would provide more efficient and effective resolutions to a larger number of bankruptcy cases."); Jacoby, *Chapter 11*, *supra* note 4; Jacoby, *supra* note 6 (discussing expectations of bankruptcy courts held by the U.S. Supreme Court and courts of appeal); *see also infra* note 116 (citing appellate courts calling for bankruptcy court oversight of derivative standing).

87 Coordes, *supra* note 72, at 407-08. For commentary on whether lender selections more generally can be assumed to be efficient, see Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 B.Y.U. L. REV. 759 (2013) (analyzing how market mechanisms do not necessarily produce efficient outcomes, to the detriment of creditors, equity holders, and the public).

88 *See* Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014) (holding that even if the defendant's subsidiary was considered at home in California, it would not be sufficient to find the parent corporation at home there).

89 *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Court of California, 137 S. Ct. 1773, 1780 (2017). Personal jurisdiction decisions involving state court actions prompt Fourteenth Amendment concerns not present in bankruptcy, although Jackie Gardina has argued that the parallel Fifth Amendment analysis should increase in rigor. *See* Jackie Gardina, *The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code*, 16 AM. BANKR. INST. L. REV. 37, 39 (2008) ("The Supreme Court has yet to define the parameters of the Fifth Amendment

on *their own* places of incorporation; the key question is where the defendant resides.[90] In multidistrict litigation, life-tenured judges, not private parties, decide whether and in what district to consolidate a matter.[91] These comparisons further call into question whether the current corporate bankruptcy system is sufficiently attentive to public values underlying federal courts and procedure jurisprudence.

2. Access to Appellate Review: Equitable Mootness and More

Limiting appellate review of bankruptcy court decisions further reduces public oversight in Chapter 11 and intensifies the authority of bankruptcy courts.[92] Bankruptcy court decisions are more insulated than district court decisions from circuit-level appellate review because, in most instances, they must be appealed first to a district court or Bankruptcy Appellate Panel.[93] The Bankruptcy Code expressly limits the ability to unwind DIP loans and sales, which reduces objectors' incentives to appeal related court orders.[94] The

due process clause or sanction the current analysis adopted by the federal courts. Its silence is deafening in circumstances in which Congress has allowed for nationwide service of process.").

90 *See* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 137 S. Ct. 1514, 1514 (2017) (interpreting 28 U.S.C. § 1400(b) for patent cases); 28 U.S.C. §§ 1391(a)–(b) (2012). As reflected in *TC Heartland*, corporations have been known to resist being sued in their place of incorporation. *See also* Report of the National Bankruptcy Review Commission 783 (1997) ("[N]o plaintiff anywhere else in the system may commence a lawsuit based on its *own* place of incorporation."). A plaintiff was formerly permitted to choose a venue in diversity jurisdiction cases based on the plaintiff's residence, but Congress eliminated that option in 1990. Judicial Improvement Act of 1990 § 311, 28 U.S.C. 1391 (2012).

91 Although they are assigned for pretrial purposes only, that assignment almost always is dispositive. *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017); Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEG. STUD. 424, 426 (2013) ("nearly all cases are resolved in the transferee court"). The Judicial Panel on Multidistrict Litigation has assigned at least one multidistrict litigation to sixty-three of the ninety-four federal judicial districts in the country. *Id.* at 443.

92 *See* Roe & Tung, *supra* note 6, at 1276-77 ("Because of the dearth of bankruptcy appeals, bankruptcy judges enjoy autonomy in administering their cases."). As discussed elsewhere, delegations in *consumer* bankruptcy cases also have escaped notice of appellate courts. Jacoby, *supra* note 6, at 887-88 (noting, based on courtroom observations, that trustees, rather than judges, functionally preside over Chapter 13 confirmation hearings in some districts). *Superdelegation* emphasized the cross-government-branch nature of this activity, but the application of the (relatively dormant) nondelegation doctrine to bankruptcy is also worth considering. *See* Freeman, *supra* note 13, at 840 ("Despite the . . . fact that numerous delegations to private bodies have quietly survived judicial scrutiny, private delegations are still likely to be more troubling to courts than even broad delegations to public agencies.").

93 Bussel & Klee, *supra* note 82, at 684.

94 *See* 11 U.S.C. §§ 363(m), 364(e) (2012) (noting circumstances under which a reversal or modification on appeal will not alter the bankruptcy court's order, allowing the sale or loan to stand).

definition of a final order, a predicate to be appealable as of right, also limits appellate review,[95] as does appellate standing doctrine.[96]

Pragmatic considerations further reduce the odds appellate courts will scrutinize activity in a bankruptcy case. To the extent that judges encourage settlement and discourage parties from litigating a decision on the merits, neither the merits nor a court's efforts in encouraging settlement end up being subject to appellate review.[97] And the ability to pursue multiple layers of appeal is likely constrained when one of the parties is bankrupt.

Appellate courts have added the doctrine of equitable mootness to this already-daunting list. The doctrine, which has captured majorities in all circuit courts that have considered it, allows an appellate court to dismiss an appeal without considering the merits.[98] The court instead asks whether a confirmed Chapter 11 plan has been substantially consummated.[99] Consummation is likely when an objecting creditor has not obtained a stay pending appeal—either because no stay was requested or the creditor cannot afford the bond. If the plan has been consummated, the equitable mootness analysis continues by considering whether granting the requested relief "will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation."[100] The larger and more complicated the case, the more likely the appeal will be equitably moot.[101]

Notwithstanding the formidable talents of the judges who preside in America's bankruptcy courts, equitable mootness doctrine fosters an environment in which alterations of the public–private partnership can flourish with fewer public institutional checks. Debtors and associated parties are incentivized to rush to consummate a restructuring plan to insulate the deal from further judicial scrutiny. Because the doctrine reduces the leverage of parties financially unable

95 *See* Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1692 (2015) (holding that an order denying confirmation of a proposed Chapter 13 repayment plan is not a final appealable order); Bank of New York Mellon v. Watt, 867 F.3d 1155, 1157 (9th Cir. 2017) (ruling that the court lacked appellate jurisdiction to review a district court's order vacating a bankruptcy court order confirming a Chapter 13 plan because it was not a final appealable order).

96 *See In re* Combustion Engineering, Inc., 391 F.3d 190, 215 (3d Cir. 2004) (noting that "[a]ppellate standing in the bankruptcy context is more restrictive than Article III standing" and citing other circuit cases similarly limiting appellate standing).

97 *See, e.g.*, Porter v. Chicago Bd. of Educ., 981 F. Supp. 1129, 1131-32 (N.D. Ill. 1997) (rejecting a party's claim of being rushed and coerced into accepting settlement agreement). *But see In re* A.T. Reynolds & Sons, Inc., 452 B.R. 374, 381 (S.D.N.Y. 2011) (reversing sanction awarded by a bankruptcy court after finding a party failed to participate in good faith, noting that "inquiry into the parties' conduct in a mediation, backed by the threat of sanctions, may exact a coercive influence on the parties to settle").

98 *See, e.g.*, *In re* City of Detroit, 838 F.3d 792, 807 (6th Cir. 2016) (Moore, J., Dissenting) (observing that the doctrine has been adopted by every circuit to consider it).

99 *See, e.g.*, *In re* Tribune Media Co., 799 F.3d 272, 278 (3d Cir. 2015), *cert denied sub nom.* Aurelius Capital Mgmt. v. Tribune Media Co., 136 S. Ct. 1459 (2016).

100 *Id.*

101 *Id.*

to post the bond required to obtain a stay pending appeal, the balance among various private parties is further skewed as well.

Equitable mootness doctrine affects the maintenance of underlying public values in other ways. The doctrine is in tension with Supreme Court case law directing judges to hear and decide cases and controversies within their subject-matter jurisdiction.[102] The prospect of appellate review by a multi-judge court fosters confidence in the system.[103] Indeed, "the value of the appellate system's ability to increase public trust in judicial outcomes may exceed the amount of error correction actually accomplished."[104] Judith Resnik has emphasized the importance of public participation (including observation) in adjudicatory processes as a democratic practice.[105] As a result of equitable mootness, even fewer people get to tell their stories to a court of higher authority, or to observe an appellate court considering the matter.

C. *Disabling a Disciplining Backstop*

Like removing the batteries from a kitchen smoke alarm while preparing a special dish, a risky act often starts with good intentions and the belief that the risks are both minimal and manageable. But habituation to disabling the alarm can lead to disaster—inability to cope with crisis when the need arises. In Chapter 11, the threat of trustee appointment has similarly been disabled in larger corporate cases.[106]

Repeat players in the bankruptcy system have developed a sense that trustee appointment is intolerable.[107] Professionals doubt the qualifications of

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102 *See* Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (noting the "virtually unflagging" obligation of a federal court to hear and decide cases within its jurisdiction); Sprint Communications, Inc. v. Jacobs, 134 S. Ct. 584, 588-91 (2013) (noting that "federal courts are obliged to decide cases within the scope of federal jurisdiction" and "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given") (citation omitted); *see also* Melissa B. Jacoby, *Presiding over Municipal Bankruptcies: Then, Now, and Puerto Rico*, 91 AM. BANKR. L.J. 377, 387-88 (2017) (discussing critiques of equitable mootness as extended to municipal bankruptcy).

103 *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1239, 1263 (2013).

104 *Id.* at 1272.

105 Resnik, *supra* note 49, at 16-17 ("States *need* their members and residents to participate in adjudicatory processes, both to maintain peace and security as well as to generate and to reinforce their own authority to do so.").

106 *See* Dickerson, *supra* note 63, at 875-76 (tracing the substitution of creditor-selected managers for trustees and arguing that the former should have the same duties as the latter).

107 *See* Michelle M. Harner, *The Search for an Unbiased Fiduciary in Corporate Reorganizations*, 86 NOTRE DAME L. REV. 469, 520 (2011) (arguing that expanded trustee appointment "would meet intense resistance"); Dickerson, *supra* note 63, at 902 (discussing secured creditors' resistance to trustee appointment). As LoPucki has highlighted, if a trustee could not get appointed in a case with as much fraud as Enron, would there ever be a suitably egregious circumstance to warrant appointment? *See* LYNN M. LOPUCKI, COURTING FAILURE 148 (2005). For a parallel analysis regarding Chapter 11 examiners, see Lipson, *supra* note 3.

trustee candidates and seem to believe that the statutory alternative of electing a Chapter 11 trustee is infeasible.[108] They have taken insufficient heed of the analysis of Kelli Alces, who has contended that courts have considerable discretion to tailor the scope of a trustee's duties, suggesting that trustee displacement need not be as drastic a remedy as is sometimes suggested.[109]

The restructuring world has coalesced around a private workaround, such as the chief restructuring officer (CRO)—discussed in scholarship by both Mechele Dickerson and Michelle Harner[110]—that operates almost entirely outside the governance architecture in the Bankruptcy Code and Judicial Code. CROs are selected by someone other than the administrative watchdog, appointed under different (and contested) statutory authority, and may not even be subject to court oversight of their compensation.[111]

In addition to resisting trustee appointment in Chapter 11, restructuring professionals and repeat player lenders may limit the odds of trustee appointment in other ways, and for other reasons. Businesses destined for sale nonetheless tend to file Chapter 11, the "reorganization" chapter, rather than Chapter 7 petitions. The standards for conversion to Chapter 7 from Chapter 11 are lighter, or at least more varied, than Chapter 11 trustee appointment.[112] Yet, at least for larger cases, the threat of conversion to Chapter 7 also seems to have collapsed, at least until all actions of consequence have been taken. Professionals have a financial stake in this fight. Upon conversion from Chapter 11 to Chapter 7, professionals' Chapter 11 fees are subordinated to Chapter 7 trustee fees.[113] It is hardly irrational for professionals to be concerned about getting paid. But the question here is the impact of these private party preferences on the overall public–private balance and the system's integrity.

By incrementally but systematically weakening the trustee backstop, private parties have shifted the balance of power. Potent tools and powers have been substituted with private-party-supplied alternatives that are qualitatively different.

108 *See supra* note 107.

109 Kelli A. Alces, *Enforcing Corporate Fiduciary Duties in Bankruptcy*, 56 KAN. L. REV. 83, 106-107 (2007) (giving examples of limited trustee appointments that did not require complete elimination of management and explaining legal basis for these acts); *see also* AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: FINAL REPORT AND RECOMMENDATIONS 31 (2014) (supporting the idea that a Chapter 11 trustee should be able to retain managers and employees deemed necessary to the reorganization process).

110 Dickerson, *supra* note 63, at 917 (describing the "new private trustee"); *id.* at 921 (documenting the frequency of chief restructuring officers in large cases); Harner, *supra* note 107.

111 Dickerson, *supra* note 63, at 918, 921.

112 11 U.S.C. § 1112 (2012) (delineating circumstances under which a Chapter 11 should be converted to Chapter 7).

113 *Id.* § 726(b) (giving administrative priority claims incurred in Chapter 7 priority over administrative claims incurred in Chapter 11 before conversion).

D. *Shifting Litigation Responsibility*

Bankruptcy empowers a trustee to scrutinize and seek to unwind certain pre-bankruptcy transactions.[114] Absent trustee appointment, this scavenger hunt obligation rests with the debtor-in-possession. Debtors-in-possession in larger Chapter 11 cases have transferred these responsibilities in yet another off-script alternative: statutory committees of creditors.[115]

In some cases, this delegation might seem logical. A committee of sexual abuse claimants, for example, might be well situated to pursue litigation against a bankrupt diocese.[116] Yet, given that committees are creatures of the Bankruptcy Code,[117] it is notable that the Bankruptcy Code itself does not assign avoidance actions to committees directly.[118] Committee members' interests may not overlap well enough with those of the bankruptcy estate as a whole.[119]

Committee composition is bound to affect the extent to which avoidance actions are pursued, abandoned, or settled in ways that may be consistent with obligations to unsecured creditors but depart from what a true estate fiduciary would have done. For example, committees have advocated in some cases for full

114 Leveraged buyout transactions are a frequent target. Danielle D'Onfro, *Limited Liability Property*, 39 CARDOZO L. REV. 1365 (2018) (discussing doctrines to prevent dissipation of assets to creditors' detriment); Marie T. Reilly, *The Latent Efficiency of Fraudulent Transfer Law*, 57 LA. L. REV. 1213, 1248-51 (1997) (discussing application to leveraged buyouts).

115 *See* Bussel & Klee, *supra* note 82, at 690 ("Indeed, it has increasingly become the practice for courts simply to authorize the committee to prosecute or settle much estate litigation, particularly avoiding power litigation and claims against insiders."); *id.* at 736 ("The Bankruptcy Code, however, does not expressly contemplate the current practice of looking to the committee to give de facto binding consent to preplan case-dispositive settlements, financings and sales."); *see also* Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 580 (3d Cir. 2003) (en banc) (holding that bankruptcy courts have sufficient authority to authorize derivative standing); *In re* Commodore Int'l Ltd., 262 F.3d 96, 99-100 (2d Cir. 2001) (discussing circumstances where a creditors' committee can acquire standing to pursue claims of the bankruptcy estate). Even before the Third Circuit authorized the practice, derivative standing was used frequently. *In re* W.R. Grace Co., 285 B.R. 148, 155 (Bankr. D. Del. 2002) (discussing cases treating derivative standing as a settled issue). Bankruptcy professionals were likely influential in the *Cybergenics* en banc reversal. Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 238-40 (2004). For a court less accepting of derivative standing, see, e.g., *In re* Fox, 305 B.R. 912, 915-16 (B.A.P. 10th Cir. 2004)(upholding bankruptcy judge ruling that only a trustee or DIP can pursue avoidance actions).

116 Thanks to Pamela Foohey for highlighting this example.

117 *See* 11 U.S.C. § 1102 (outlining the appointment of a creditors' committee).

118 *See id.* § 1103 (discussing the powers and duties of committees).

119 *See In re* SPM Mfg. Corp., 984 F.2d 1305, 1315 (1st Cir. 1993) ("[T]he committee is a fiduciary for those whom it represents, not for the debtor or the estate generally.").

payment of priority claims,[120] but supported skipping priority claims in others.[121] Some committee members may be eager to prevent certain avoidance actions from being litigated rather than zealously pursuing them.[122] For all of its supposed benefits, granting derivative standing to committees gives them extra leverage to compromise the rights of some creditors while advantaging others.[123]

Recognizing the potential divergence of interests between committees and the bankruptcy estate, appellate case law calls for bankruptcy courts to fill the gap through monitoring.[124] Judges may not have the information and infrastructure to fulfill this responsibility under even the best of circumstances. But the aforementioned concentration of large cases, producing the need for the triage discussed above, makes court oversight of this redelegation of litigation authority even more unrealistic. Furthermore, the routine allocation of avoidance actions to committees may be accompanied by a broader sense of freedom of the debtor-in-possession, on the theory that the committee is now the stand-in for the estate. Offloading estate responsibility while benefitting from debtor-in-possession status, largely free of fear of trustee appointment, again distorts the system's balance.

120 *See e.g.*, Transcript at 4, *In re* Allen Family Foods, No. 11-11764 (Bankr. D. Del. June 24, 2011). Four supplier members of the Allen Family Foods creditors' committee asserted supplier priority claims: Archer Daniel Midland, Interstate Corpack, Tri-Gas & Oil, and Wye Mills Grain. Claims Register, *In re* Allen Family Foods, Inc., 11-11764 (Bankr. D. Del. Oct. 14, 2014), ECF No. 1025; Notice of Appointment of Committee of Unsecured Creditors, *In re* Allen Family Foods, Inc., 11-11764 (Bankr. D. Del. June 17, 2011), ECF No. 53. The committee in Sports Authority's Chapter 11 advocated for suppliers asserting priority claims, which ultimately accepted less than full payment. Several members of the Sports Authority creditors' committee (Nike, Realty Income Corp., and GGP) asserted priority claims. Notice of Appointment of Committee of Unsecured Creditors, *In re* TSAWD Holdings, 16-10527 (Bankr. D. Del., Mar. 10, 2016), ECF No. 262; Claims Register, *In re* TSAWD Holdings, Inc., 16-10527 (Bankr. D. Del. Mar. 2, 2016), ECF No. 3549. For earlier iterations of this issue, see Stephen J. Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839, 854 (2004).

121 *See, e.g.*, Czyzewski v. Jevic Holding Corp. 137 S. Ct. 973 (2017) (holding that a structured dismissal order that skips a priority claimant in allocating funds is not permitted under the Bankruptcy Code, but does not necessarily foreclose other priority-skipping practices). Sally Henry has uncovered a variety of creative ways in which parties try to skip priority; committees are involved in many examples. *See* Sally McDonald Henry, *Chapter 11 Zombies*, 50 IND. L. REV. 579 (2017).

122 Sometimes such avoidance actions can be buried through asset sales with the understanding that the buyer will not pursue those suits. Transcript of Hearing, *In re* Allen Family Foods, Inc., No. 11-11764, (Bankr. D. Del. June 27, 2011) (ECF No. 88).

123 *See* Diane Lourdes Dick, *Valuation in Chapter 11 Bankruptcy: The Dangers of an Implicit Market Test*, 2017 U. ILL. L. REV. 1487, 1498 (discussing impact of relying on committees to conduct investigations in other contexts).

124 *In re* Adelphia Commc'ns Corp., 544 F.3d 420, 423-25 (2d Cir. 2008) (holding that the court's withdrawal of derivative standing and transfer of management of litigation was not abuse of discretion); *id.* at 424 ("[A] court's role [is to] . . . oversee the litigation and 'to check any potential for abuse by the parties'."); *In re* Commodore Int'l Ltd., 262 F.3d 96, 99-100 (2d Cir. 2001) (upholding withdrawal of derivative standing and discussing the court's role in balancing and oversight).

III. THREE STEPS TOWARD RESTORING HYBRIDITY

So far, this Article has done the following. Part I established the grounds for conceptualizing corporate bankruptcy as a public–private partnership and documented the hybridity of bankruptcy that makes this model a good descriptive and normative fit. Part II identified aspects of corporate bankruptcy practice that distort the partnership. Part III will float three ideas to both promote and take advantage of the partnership model in the real world and the legal academy.

A. *Procedural Justice*

Debates about corporate bankruptcy tend to coalesce around outcomes. How much money did creditors receive? How many companies reorganized?[125] Yet, parties and the public evaluate systems on criteria other than (financial) end results.[126] The bankruptcy system's very premises—not enough to go around, changing legal entitlements without consent—make its procedures particularly vulnerable to public distrust.

Even if increasing the influence of private parties in Chapter 11 guaranteed efficiency (far from a foregone conclusion),[127] public–private partnerships can ill afford to use efficiency as the exclusive metric.[128] Increasing efficiency would not inevitably serve the system if the efficiency-promoting steps led the public to question the system's legitimacy.[129]

Procedural justice theory is relevant to maintaining the legitimacy of legal systems and individuals' compliance with them. Theoretical and empirical research since at least the 1970s has examined how individuals perceive the fairness of

125 Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to Its Critics*, 107 MICH. L. REV. 603, 611 (2009) ("[P]lan confirmation is surely the central measure of success in Chapter 11. A system that does not lead to confirmed plans cannot achieve its objectives.").

126 Gross, *supra* note 28, at 1033 (recognizing the importance of community interests in the bankruptcy process); Gillian K. Hadfield, *Framing the Choice between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645 (2008) (emphasizing interest in values other than financial compensation, such as information forcing and attainment of justice); Tamara Relis, *"It's Not about the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 341, 342, 373 (2006) (discussing plaintiffs' non-monetary motivations).

127 *See* Dick, *supra* note 123, at 1491 (describing the dangers of relying on private negotiations to produce accurate valuations, given that some relevant parties may be excluded from the negotiation process); Roe & Tung, *supra* note 6, at 1244, 1271 (2013); Warren & Westbrook, *supra* note 27, at 1253 (observing that the assumption that upping reliance on private parties to increase efficiency "ignores basic economic theory, including the problems of pricing inefficiencies and high transaction costs").

128 *See* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN PUBLIC 122 (2017) (describing how privatization promoters "assume without explaining why economic efficiency is an unalloyed good or why it translates well into the public arena. Specifically, they fail to reconcile this celebration of efficiency with an underlying constitutional culture that is decidedly skeptical of efficiency arguments"). Michaels observes that separation of powers is intentionally inefficient. *Id.*

129 *See* Lemos, *supra* note 13, at 520 (noting concerns about private financing of public action raised in circumstances "marked by substantial externalities and where distributive concerns are strongest").

systems of authority, distinct from the outcome.[130] Although the reasons remain contested, "[r]obust findings suggest that individuals value decisionmaking processes that they deem fair, are more willing to accept and adhere to decisions made via fair processes, and believe that authorities are more legitimate when they have used fair processes."[131] Procedures, rather than outcomes, may be the largest contributors to public dissatisfaction with the legal system.[132]

Rebecca Hollander-Blumoff summarizes the studies this way:

> Simply put, the empirical evidence suggests that individuals value fairness of process, separate and apart from outcome, because of the special message that fairness of process sends to its recipients: an authority who acts in a fair manner is an authority who is legitimate and cares about the dignity and social standing of those who stand before it.[133]

Consistent among demographic and economic backgrounds, the fairness of process has been the *primary* factor shaping willingness to accept decisions—both for parties in interest and the public.[134]. Evaluation of perceptions is generally ex post rather than ex ante.[135] Key elements shaping perceptions of procedural justice include neutrality of the decisionmaker (aided by transparency), respect afforded to the party, and trustworthiness of the decisionmaker, with voice (the opportunity to tell one's side of the story in one's own words) being an indirect contributor.[136]

The bankruptcy system has not undergone rigorous procedural justice assessment.[137] Nonetheless, Elizabeth Gibson's work suggests that experiences

130 For the history, see Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 384 n.7 (2010). John Thiebaut and Laurens Walker are credited with the early model propelling this research based on social exchange theory. *See generally* Tom Tyler, Peter Degoey & Heather Smith, *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913, 913 (1996) (testing "whether fair procedures, in fact, communicate . . . identity-relevant information and whether it is this information that mediates the influence of procedural justice on general group-oriented behaviors").

131 Hollander-Blumoff, *supra* note 130, at 388. *See* Hollander-Blumoff, *supra* note 10, at 129 ("[W]hen people feel that they have been treated fairly by decisionmaking authorities, they are more likely to accept and comply with decisions, feel satisfied with outcomes, and believe in the legitimacy of the authority.").

132 *See generally* Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 323 (2016) (citing empirical literature regarding unfair procedures as "the single most important source of popular dissatisfaction with the American legal system").

133 Hollander-Blumoff, *supra* note 10, at 137-38.

134 *See* Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 28-29 (2007); *see also* Burch, *supra* note 132, at 330 (noting forum shopping as example in which "procedures can drift away from their procedural justice moorings").

135 Burch, *supra* note 10, at 27 ("Empirical research has demonstrated that the two vantage points are distinct: ex ante evaluations do not necessarily predict ex post satisfaction.").

136 *See id.* at 28; Hollander-Blumoff, *supra* note 130, at 390-91; Hollander-Blumoff, *supra* note 10, at 135; Tyler, *supra* note 134, at 30-31.

137 Efforts to uncover prior applications to bankruptcy have produced only one source. *See The Chapter 11 Bankruptcy Venue Reform Act of 2011: Hearing on H.R. 2533 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 57-58 (2011) (statement of Melissa

with other forms of aggregate litigation are relevant to bankruptcy.[138] Procedural justice is critical to legitimacy maintenance in aggregate litigation.[139] Resnik, Curtis, and Hensler have observed that welfarist evaluations of aggregate litigation's cost, accuracy and utility of outcomes are incomplete without inclusion of procedural justice concerns.[140] Aggregate litigation's procedural justice weak spots include reduced attention to individuals, privatized governance, and increased amounts of non-public activity.[141] These are important lessons for corporate bankruptcy.

Public actors can more readily implement the lessons of procedural justice than assess welfare implications on the spot. Thus, systematically attending to procedural justice is itself a way to promote public values.[142] Currently, federal courts are far from uniform on logistical matters that affect public access, including

B. Jacoby, Professor of Law, Univ. of N.C. at Chapel Hill, Chapel Hill, NC). Of course, others have made similar points without using the term procedural justice. *See, e.g.*, Jay Lawrence Westbrook, University of Texas School of Law, Testimony to the American Bankruptcy Institute Commission on Chapter 11 Reform: Venue: Domestic and International at 3 (Nov. 22, 2013) ("[T]he removal of proceedings to a distant place seems to defy common sense and may leave local citizens suspicious of the motives behind it.").

138 *See* S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS AND BANKRUPTCY REORGANIZATIONS (2000) ("An examination of . . . class action settlements as a group in contrast to . . . bankruptcy reorganizations . . . allows some comparisons about the fairness and effectiveness of these two means of achieving global resolutions of mass tort liabilities."); S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2107 (2000) ("Stating the differences in the requirements [between class actions and bankruptcy] . . . merely begs the question why typicality, adequacy of representation, and predominance are concerns of class actions and not also of bankruptcy."). *See generally* Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. TORT LAW 59 (2012)(deeming the relationship between bankruptcy and aggregate litigation as one of transformation); Troy McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012) (noting that bankruptcy provides a useful lens for aggregation).

139 *See* Burch, *supra* note 132, at 326 (focusing on "securing and curtailing participation rights through both aggregating and pleading"); Burch, *supra* note 10, at 5 (noting "procedural justice's significance by observing its symbiotic relationship with institutional legitimacy and voluntary compliance"); Resnik, Curtis, & Hensler, *supra* note 10, at 307 (noting the dearth of scholarship on issues such as "aggregation, the financing of litigation, the role of lawyers, or how to shape aggregate cases to enable any of that to which they aspire—voice, participation, rights seeking, empowerment—to occur").

140 Resnik, Curtis & Hensler, *supra* note 10, at 307, 372, 376.

141 *See* Burch, *supra* note 10, at 10-11.

142 In the General Motors bankruptcy, several years after the company was sold and litigation continued on various matters, the presiding judge permitted retirees, located around the country, to tell their stories by telephone in open court. Melissa B. Jacoby, Professor of Law, Univ. of N.C. at Chapel Hill, Notes on Visit to S.D.N.Y. (June 14, 2012) (on file with author). By contrast, at least two books on the A.H. Robins bankruptcy indicate that the presiding *district* judge was dismissive of concerns that women who were adversely affected by the company's birth control product lacked access to the courtroom and to information. *See* KAREN M. HICKS, SURVIVING THE DALKON SHIELD IUD: WOMEN V. THE PHARMACEUTICAL INDUSTRY 51, 97, 174 (1994); RICHARD SOBEL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 180 (1991) ("Not only would Judge Mehrige not let injured women testify, he did not even want them in the courtroom . . . . [He] evidenced his disdain toward both the claimants and their lawyers: . . . 'I will try to explain to the ladies, there isn't any need for them to stay around, but I don't think that will chase many of them away until maybe the first recess, and then [they'll] get tired.'").

even availability of daily hearing calendars,[143] and posting digital recordings of hearings on court dockets.[144] The necessary approvals for the latter within the federal judiciary are in place.[145] Bankruptcy courts on the whole probably use this technology more than other federal trial courts but still vary greatly.[146]

The public–private partnership model suggests an important expansion to the circle of parties responsible for procedural justice. References to evaluation of the "decisionmaker" in the procedural justice literature should apply to the administrative watchdog as well as judges. More significantly, in a hybrid system, it would be wrong to assign all procedural justice responsibility to public officials. For both theoretical and instrumental reasons, private parties (including lenders, debtors-in-possession, and creditors' committees) also are responsible for the construction of a fair process and should be assessed accordingly.

B. *The Sunlight Fund*

Recognizing corporate bankruptcy's hybridity with the public–private partnership label is not merely a matter of semantics. It presents avenues to think differently about the process of reform as well as its objectives. For example, other

143 *See, e.g.*, Melissa B. Jacoby, *What's On at a Courthouse Near You*, CREDIT SLIPS (July 17, 2012), http://www.creditslips.org/creditslips/2012/07/whats-playing-at-the-bankruptcy-court-near-you–bankruptcy-court-calls-revisited.html [https://perma.cc/56TK-UZFF] (describing the "variation in the website availability of daily calendars for U.S. bankruptcy courtrooms").

144 *See* Jacoby, *supra* note 6, at 883-84 (describing the use of audio recordings to conduct research on the *City of Detroit* bankruptcy).

145 In 1999, the Judicial Conference of the United States approved digital audio recording as a method of taking the official court record. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2005). In 2007, the Judicial Conference authorized a pilot project in the district and bankruptcy courts to make digital recordings of hearings available on PACER. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2007). That pilot was extended and expanded in 2009. *See* JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6 (2009) (noting that the pilot program was extended by one year, "so that data from up to five additional courts" could be included). In 2010, the Judicial Conference endorsed a proposal to allow courts to provide access to digital audio through PACER at the discretion of the presiding judge. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 9-10 (2010).

146 Looking at a one-year period, I identified three dozen bankruptcy courts that posted digital audio recordings on PACER at least once. Based on that search, some bankruptcy courts seem to be regular users of the technology, such as the District of Puerto Rico, the Eastern and Middle Districts of North Carolina, and the Eastern District of Michigan, while others used it rarely. Magnet districts for large Chapter 11 cases were not among the users, although the District of Delaware has recently amended its policy. *See News & Announcements: Digital Audio Files Available over the Internet Beginning November 6, 2017*, U.S. BANKR. CT., D. DEL. (Oct. 31, 2017), http://www.deb.uscourts.gov/sites/default/files/forms/DEB_CourtSpeak_Notification_10-31-2017.pdf [https://perma.cc/HWA7-CMMV]. A broader search produced a small number of audio recordings in the Southern District of New York bankruptcy court in 2011–2012 for *General Motors* and in 2009 for *Chrysler*.

public–private partnerships involve a range of institutions, such as nonprofit special purpose corporations, which assist in furthering public goals.[147]

So let us consider the Sunlight Fund as a way to advance the goals of corporate bankruptcy by providing an alternative and competing source of capital for businesses in bankruptcy. The types of actions eligible for the Sunlight Fund should be up for debate,[148] but overall the goal would be designed to reduce the ability of private parties with leverage to deter estate-enhancing and public-value–promoting activity. For example, it could reduce the leverage of pre-petition lenders to condition DIP lending on refraining from estate- and transparency-promoting activities, including certain causes of action. Or it could be used to fund a bond that must be posted to obtain a stay of an order pending appeal when that bond otherwise would be out of financial reach for the objector.

As this cursory description suggests, the details and competing considerations have yet to be worked out. Most prominent is how to capitalize the Sunlight Fund itself. One possible, albeit limited, source is bankruptcy filing-fee revenue currently being diverted to other parts of the federal government. It also will be necessary to think through what controls should be imposed on tapping this fund, such as requiring that the litigation at least survive a motion to dismiss.

The general takeaway for now is this: conceptualizing bankruptcy as a public–private partnership allows proposals of this nature to flow more readily, providing a richer set of materials and perspectives for the bankruptcy world to consider.

C. *Rewriting the Invitation List*

If the next major symposium on corporate bankruptcy law focuses on the Sunlight Fund, or on procedural justice, who will be invited to present papers and discuss ideas? The introduction to this Article posited that the field of corporate bankruptcy has been redistricted to a narrow range of issues and methods. Much of this Article has sought to expand the questions and methods used to evaluate and improve corporate bankruptcy.

Left to be addressed is the homogeneity of those often asked to chart bankruptcy's next frontiers. Will a new model of corporate bankruptcy also beget demographic diversification? To achieve the objectives discussed in this Article, both ideological and demographic expansions are necessary.

147 Some cities have established nonprofit organizations to accept donations to fund public interest litigation. *See* Lemos, *supra* note 13, at 534.

148 For example, Lipson has proposed mini-examinations consistent with experimentalist regulatory theory. Lipson, *supra* note 3, at 252.

Research supports the commonsense inference that a diverse team produces better results.[149] "Groups of cognitively diverse people can make more accurate predictions, solve problems, improve performance, and aggregate information."[150] Homogeneity breeds cognitive bias: cascade and conformity effects, confirmation bias, and group polarization.[151] Diverse groups not only might create better products but also have an easier time convincing others to accept them.[152] The population affected by bankruptcy cases is heterogeneous by many measures, increasing the relevance of diversity as a legitimacy-promoting tool.[153]

In the legal academy, white men, particularly those associated with traditional law and economics, tend to dominate high-profile publications and events about

149 *See* Amanda Bayer & Cecelia Elena Rouse, *Diversity in the Economics Profession: A New Attack on an Old Problem*, 30 J. ECON. PERSP. 232-33 (2016) (noting that the "range of views among economists is likely to be biased by the relative lack of women and minority economists" and "racially diverse groups significantly outperform other groups in solving complex problems"); Debbie Chachra, *To Reduce Gender Biases, Acknowledge Them*, 548 NATURE 373, 373 ("[D]iverse teams of engineers do better engineering . . . . [I]f you value rationality and objectivity, you need to engage with gender bias."); Diane Coyle, *Economics Has a Problem With Women*, FIN. TIMES (Aug. 28, 2017), https://www.ft.com/content/6b3cc8be-881e-11e7-afd2-74b8ecd34d3b [https://perma.cc/GW29-DQLU] ("It is just as bad to have mainly male economic research and policy advice as it is to test medicines mainly on men."); *Inefficient Equilibrium: Women and Economics*, THE ECONOMIST (Dec. 19, 2017), https://www.economist.com/christmas-specials/2017/12/19/women-and-economics [https://perma.cc/3LDK-S2V8] [hereinafter *Inefficient Equilibrium*] ("There is every chance that this lack of diversity [in economics] constrains or distorts the field's intellectual development.").

150 Burch, *supra* note 132, at 349. *See also* Martha T. McCluskey, Frank Pasquale & Jennifer Taub, *Law and Economics: Contemporary Approaches*, 35 YALE L. & POL'Y REV. 297, 300 (2016) ("[W]e need more, not fewer, accounts of how law can improve economic justice and economic policy.").

151 *See* Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1008, 1014, 1051-52, 1055 (2016) ("[S]ocial science teaches that such a homogeneous group of individuals is predisposed to act in a biased fashion.").

152 An American Bar Association resolution tied the demographic make-up of the bankruptcy bench to public confidence in the judiciary. Resolution 102, AM. BAR ASS'N 4-6 (Aug. 8-9, 2016) ("Diversity on the bankruptcy bench is particularly important in relation to perceptions of justice."). A New York State Bar Association task force report notes the "well-documented benefits of diversity in decision-making processes for all stakeholders," and that when "members of group notice they are socially different from one another, . . . they assume they will need to work harder to come to a consensus," which can produce better outcomes. N. Y. STATE BAR ASS'N, IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND ADR (2017). In the courtroom, "a team with diverse voices may be more capable of communicating in terms that resonate with a broader spectrum of courtroom decision-makers." *Id.* at 29. See also STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 3 (2015) (noting that a lack of women in lead roles results in "less diversity of thinking, less effectiveness in front of a broad range of judges and jurors, and less creative energy brought to bear on client matters").

153 *See e.g.*, Tyler, *supra* note 134, at 28-30 (2007) (discussing diversity of ethnic and social backgrounds amongst those who bring problems to court).

corporate bankruptcy.[154] Examples include *Bankruptcy Law Stories*,[155] a forthcoming corporate bankruptcy handbook,[156] a 2014 conference on creditors in corporate governance at the University of Chicago,[157] a 2017 conference at the University of Pennsylvania,[158] and a 2017 joint NYU/Penn law and finance conference.[159]

Events organized by scholars or organizations with other orientations have not escaped homogeneity. Examples include a conference on Chapter 11 reform and secured credit sponsored by the American Bankruptcy Institute and the Illinois Law Review,[160] the Rethinking Chapter 11 conference held on Capitol Hill by the National Bankruptcy Conference in 2015,[161] and panels on corporate bankruptcy and financial institutions during a conference at the University of Texas in 2018.[162]

Dozens of female scholars have written on business bankruptcy topics.[163] Judging by research in other fields, however, they probably are cited less than

154 For evidence of bias, whether implicit or otherwise, in the academic field of economics, see generally Bayer & Rouse, *supra* note 149; Coyle, *supra* note 149; *Inefficient Equilibrium*, *supra* note 149; Amanda Bayer & David Wilcox, *The Unequal Distribution of Economic Education*, (Fin. & Econ. Discussion Series, Working Paper No. 2017-105); Erin Hengel, *Publishing While Female: Are Women Held to Higher Standards? Evidence from Peer Review.*(Dec. 2017) (unpublished manuscript) (available at http://www.erinhengel.com/research/publishing_female.pdf [https://perma.cc/X2PE-DWK3]; Alice H. Wu, *Gender Stereotyping in Academia: Evidence from Economics Job Market Rumors Forum* (Dec. 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051462 [http://perma.cc/9Ql7-8VZY].

155 BANKRUPTCY LAW STORIES, (Robert K. Rasmussen ed., 2007) (featuring nine male-authored chapters and one female-authored chapter).

156 Sixteen authors are male, two authors are female, and all but about five of the authors (including one of the women) do work falling within law and economics.

157 *Creditors and Corporate Governance*, BECKER FRIEDMAN INST., https://bfi.uchicago.edu/events/creditors-and-corporate-governance-0 [https://perma.cc/F69L-PFY5] (featuring eleven male academic presenters and one female academic presenter).

158 *Symposium Schedule: Bankruptcy's New Frontiers*, U. PA. L. REV., https://www.pennlawreview.com/symposium/schedule/ [https://perma.cc/8UQF-PD79] (featuring discussion of seven papers in total: one authored by a white woman and six coauthored by eleven white men, nearly all law-and-economics scholars, nine of whom have coauthored with each other in various combinations over the years). *See* Symposium, *Bankruptcy's New Frontiers*, 166 U. PA. L. REV. 1571 (2018).

159 *The Thirteenth Annual NYU/Penn Conference on Law and Finance*, N.Y.U. L., http://www.law.nyu.edu/node/29462 [https://perma.cc/6C8G-NG2A] (including presentations only by men).

160 Three of nineteen paper presenters at the live event were women. Published papers (with a slightly different mix of contributors—but still three women) are captured in *Illinois ABI Symposium on Chapter 11 Reform*, 2015 U. ILL. L. REV. 401, 507-863 (2015).

161 Conference Schedule, National Bankruptcy Conference: Rethinking Chapter 11 (May 28–29, 2015), https://jenner.com/system/assets/assets/8700/original/NBC_20Rethinking_20Chapter_2011_20Schedule_20_as_20revised_203-25-15_.pdf [https://perma.cc/KYU8-SFZ7] (among twenty-five speakers, three were academics, and all three were white men associated with law and economics).

162 *Symposium: Bankruptcy's Universal Pragmatist: Celebrating the Work of Jay Lawrence Westbrook*, TEX. L. REV., https://texaslawreview.org/symposium/ [https://perma.cc/5YEJ-5C3R] (including one woman on the corporate bankruptcy panel out of five panelists, plus a male panel chair, and one woman on a financial institutions restructuring panel out of six panelists, plus a male panel chair). The honoree of this symposium played no role in selecting the participants.

163 The sources cited throughout this Article do not exhaust the list.

men even after controlling for important variables.[164] It is not a neutral practice to cite only authors and papers that first come to mind.[165] It is not a neutral practice to express explicit disagreement with some authors and overlook others as unworthy of even a "but see."

These dynamics do not exist in a vacuum. Corporate bankruptcy law practice is "disproportionately male."[166] The academic field of economics has received significant attention for multiple signs of bias.[167]

Whatever the context, whatever the cause, the odds of conceptualizing the field as a public–private partnership are reduced without diversifying the voices contributing to the debate.[168] If high-profile conferences and publications continue defining the field in its narrower, redistricted form, they at least should strive for truth in advertising on the scope of the enterprise. Individual authors should be mindful that selecting who and what to cite in their scholarship shapes the field and its inclusiveness footnote by footnote, line by line, article by article.

164 Molly M. King et al., *Men Set Their Own Cites High: Gender and Self-Citation Across Fields and over Time*, 3 SOCIUS, 2017, at 1, 2 (noting a disparity in citations between men and women across disciplines even after controlling for variables such as institution, journal, and tenure status). Self-citation, which boosts overall citation counts through several pathways, occurs at higher rates among men. *Id.* at 15.

165 Emily Beaulieu et al., *Women Also Know Stuff: Meta-Level Mentoring to Battle Gender Bias in Political Science*, AM. POL. SCI. ASS'N 779, 780 (2017) ("[M]en and women alike hold implicit biases about gender that shape their attitudes and behavior, including the tendency to think of—and reference—men rather than women as experts.").

166 David A. Skeel, Jr., *Rediscovering Corporate Governance in Bankruptcy*, 87 TEMP. L. REV. 1015, 1025 (2015). In 2014, 30.6% of bankruptcy judges were women and under 3% were African American. AM. BAR ASS'N, *supra* note 152, at 4-5; *see also* Laurel M. Isicoff, *Judicial Fellows Diversity Initiative: It's Just a Beginning*, C. COLUMNS (Am. Coll. Of Bankr., Stanardsville, Va.), May 2017, at 10-11 (sharing that ABA reported two years earlier that "the bankruptcy bench is the least diverse of the federal judiciary" and describing resulting initiatives). This demography is in line with that of related fields: for example, in the more readily measured litigation realms, white men dominate as lead counsel in corporate and commercial law litigation, and in so-called bet-the-company litigation and high-stakes alternative dispute resolution. N. Y. STATE BAR ASS'N, *supra* note 152, at 10 ("The more high-stakes the case, the lower the odds that a woman would be involved.") (quoting Noah Hanft, *Making Diversity Happen in ADR: No More Lip Service*, 257 N.Y. L.J. S6 (2017)); *see also* Daniella Isaacson, *Where Do We Go From Here? Big Law's Struggle with Recruiting and Retaining Female Talent*, LAW.COM (Apr. 17, 2017, 7:03 AM) https://www.law.com/sites/ali/2017/04/17/where-do-we-go-from-here-big-laws-struggle-with-recruiting-and-retaining-female-talent/?slreturn=20180309141735 [https://perma.cc/A32M-Y8KC], (discussing low representation of female attorneys in corporate and banking law). Some studies find low rates of women as lead counsel in class actions as well. Scharf & Liebenberg, *supra* note 152, at 12 (reporting that in a study of cases filed in 2013 in the U.S. District Court for the Northern District of Illinois, men were lead counsel in eighty-seven percent class actions).

167 *See supra* note 154.

168 *See generally* June Carbone & Naomi Kahn, *Unequal Terms: Gender, Power, and the Recreation of Hierarchy*, 69 STUD. L., POL. & SOC'Y 189, 211 (2016) ("The elite of our new gilded age valorizes competition, individualism and hierarchy . . . . The hierarchies rewarding competition at the top create vicious cycles that block more substantive change."). As just one example, scholars who have experienced discrimination throughout their own lives are less likely to see the civil rights implications of bankruptcy as an extraneous issue.

CONCLUSION

This Article had both descriptive and normative aims. Characterizing the existing corporate bankruptcy system as a public–private partnership facilitates the goals expressed by Jay Westbrook that began this Article—to bring a broader range of considerations to dominant scholarly discourse on corporate bankruptcy. The model helps diagnose problems in current practice, as well as to get new purchase on problems already on the radar screen. The model fosters solutions that are "out of the box" for corporate bankruptcy because it has been insufficiently influenced to date by scholars of the regulatory state.

One need not be wedded to the problems and solutions in this Article to find value in the model. The ideas expressed here have only scratched the surface of an expanded and reconceptualized field. What the academy and the bankruptcy system can ill afford, however, is maintenance of the status quo.

Presiding over Municipal Bankruptcies: Then, Now, and Puerto Rico

by

*Melissa B. Jacoby**

INTRODUCTION

In 2016, a bankruptcy law for the Commonwealth of Puerto Rico was born.[1] Although PROMESA, the new law, is housed outside of Title 11 of the United States Code,[2] Title III of PROMESA builds substantially on the existing bankruptcy system. Title III imports sections of the Bankruptcy Code by cross-reference and incorporation.[3] It also uses the Federal Rules of Bankruptcy Procedure.[4] Almost certainly, many of the legal and financial professionals likely to work on a Title III action will be drawn from the municipal and corporate restructuring world.[5] Yet, such a restructuring will be missing a central actor in the bankruptcy world: the bankruptcy judge. PROMESA puts a district judge in charge of the biggest government bank-

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[1]The Puerto Rico Oversight Management and Economic Stability Act [hereinafter PROMESA], S. 2328, Pub. L. No. 114-187 (2016). Title III of PROMESA is the restructuring section.

[2]Section 6 of PROMESA instructs that the new provisions be placed in Title 48 of the U.S. Code.

[3]Section 301(a) of PROMESA lists over 90 sections or subsections of the Bankruptcy Code that apply to a Title III restructuring.

[4]Section 310 of PROMESA says "The Federal Rules of Bankruptcy Procedure shall apply to a case under this title and to all civil proceedings arising in or related to cases under this title."

[5]The Puerto Rico government recently retained Dentons for its restructuring work, presumably based in part on Dentons' performance representing the official committee of retirees in Detroit's chapter 9 bankruptcy. Press Release, Dentons Selected by Fiscal Agency and Financial Advisory Authority of Puerto Rico as Outside Legal Counsel to Assist in Puerto Rico's Unprecedented Restructuring and Revitalization (Jan. 15, 2017), http://www.dentons.com/en/whats-different-about-dentons/connecting-you-to-talented-lawyers-around-the-globe/news/2017/january/dentons-selected-by-fiscal-agency-and-financial-advisory-authority-of-puerto-rico.

ruptcy case in American history,[6] even though district judges have not presided over municipal bankruptcy cases since the 1970s and the system has changed dramatically since then.

This decision creates an opportunity to review the history of municipal bankruptcy judicial selection. The life of the municipal bankruptcy system largely corresponds to the life of the National Conference of Bankruptcy Judges, whose birthday is celebrated in the pages of this journal.[7] The article proceeds in the following parts. Parts I and II, respectively, identify who presided over municipal cases, and the stakes of that work allocation, at key historical junctures: the 1930s and early 1940s, and the 1970s through the mid-1980s. Part III considers the central role of bankruptcy judges today in municipal bankruptcy and beyond. Part IV considers PROMESA's somewhat regressive choice in light of this history.

I. 1930S-1940S

Congress first adopted a municipal bankruptcy law as temporary emergency legislation in 1934.[8] After the Supreme Court invalidated that law in 1936,[9] Congress quickly enacted a new version in 1937, again temporary, that the Supreme Court upheld.[10] Municipal bankruptcy became a permanent part of bankruptcy law in 1946.[11]

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[6]PROMESA § 308(a)("For cases in which the debtor is a territory, the Chief Justice of the United States shall designate a district court judge to sit by designation to conduct the case.").

[7]In special deference to the ninetieth anniversary of the NCBJ, the research effort included a concerted search for references to municipal bankruptcy in the archives of the NCBJ's signature publication, the American Bankruptcy Law Journal, and its predecessor, the American Journal of Referees in Bankruptcy. The NCBJ is recognized as coming into being in 1926. Hon. Russell L. Hiller, *A Conference Anniversary—Fifty Years in Retrospect*, 51 AM. BANKR. L. J. 31 (1977). Professor Gebbia notes in her article in this volume that it took the traction of Judge Paul King and other colleagues in the 20s to maintain the organization and further its goals. But referees engaged in some collective activity earlier shortly after the Bankruptcy Act of 1898 and created an office of the bankruptcy referee. *Id.* at 31 n.1 (reporting on earlier activity). *See also Report of the Executive Committee of the National Association of Referees in Bankruptcy Concerning Proposed Amendments to the Bankruptcy Act of 1898* (1900).

[8]Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH. & LEE L. REV. 403, 440-447 (2014) (explaining the reason for this emergency legislation and volume of municipal defaults). According to Moringiello, 88 municipalities filed petitions under that law before it was invalidated. *Id.* at 448. A Bond Buyer survey reported in the Congressional Record put the number of filings under the 1934 law at 85, 28 of which were city filings and 4 of which were school districts. *Hearings Before the Special Subcommittee of Bankruptcy and Reorganization of the Committee on the Judiciary on H.R. 6912*, 77th Cong., 2nd Sess. 8-9 (1942).

[9]Ashton v. Cameron County Water Improvement Dist., 298 U.S. 513 (1936) (invalidating Act of May 24, 1934), Pub. L. No. 251, 48 Stat. 798 (1934).

[10]Act of Aug. 16, 1937, Pub. L. No. 302, 50 Stat. 653 (1937) (upheld by United States v. Bekins, 304 U.S. 27 (1938)). According to a Bond Buyer survey submitted to the Congressional Record in 1942 as part of testimony, the 1937 law was used 241 times between enactment and mid-1942, 102 of which were city filings and 20 school districts. *Hearings Before the Special Subcommittee*, *supra* note 8, at 8-9, 14.

[11]Joseph Patchan & Susan B. Collins, *The 1976 Municipal Bankruptcy Law*, 31 U. MIAMI L. REV.

Publications in the 1930s of NCBJ's predecessor journal demonstrate interest in municipal bankruptcy developments.[12] There is little evidence, however, that referees had direct contact with municipal filings in this phase.[13] A referee might have seen a municipal case if appointed as a special master for a discrete query, but research reveals no concrete examples.[14]

The institutional costs of having district judges preside over the early municipal bankruptcy cases surely were much lower than would be true today. In the early law, the number of statutory provisions was small.[15] The cases were essentially prepackaged bond restructurings.[16] As noted by

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287, 289 (1977) (reviewing history and citing relevant legislation, 60 Stat. 409, that repealed termination clause).

[12]*E.g.*, *Strengthening our Bankruptcy Law*, 7 J. NAT'L ASS'N REF. BANKR. 157 (1933) (describing climate in Washington at the height of the Great Depression, including a sense that something must be done to give municipalities access to bankruptcy relief); *Municipal Bankruptcy*, 7 J. NAT'L ASS'N REF. BANKR. 162, 164 (1933) (reporting on municipal bankruptcy bill, including House Judiciary Committee reports' prediction on impact of bill); Hon. Clarence J. McLeod, *Municipal Debt Moratorium Legislation*, 8 J. NAT'L ASS'N REF. BANKR. 11, 11-12 (1933) (printing the comments of Detroit member of Congress on municipal bankruptcy legislation). By 1933, 46% of referees were members of what is now the NCBJ. *Proceedings of the Eighth Annual Conference of the Nat'l Association of Referees in Bankruptcy*, 8 NAT'L. ASS'N REF. BANKR. 3, 3 (1933) (secretary's report reporting that nearly 46% of 506 referees in bankruptcy in the continental United States were members). See also *National Chamber of Commerce Committee Reports*, 8 J. NAT'L ASS'N REF. BANKR. 84, 89-90 (1934) (reporting Chamber of Commerce analysis of and opposition to federal municipal bankruptcy legislation); E. Fleetwood Dunstan, *Federal Legislation to Help Defaulting Municipalities*, 8 J. NAT'L ASS'N REF. BANKR. 73-74 (1934) (printing comment of Bankers Trust representative discussing need for municipal bankruptcy legislation); L. Earl Curry, *Our President's Message*, 9 J. NAT'L ASS'N REF. BANKR. 1, 1 (1934) (regarding pending legislation that included a municipal bankruptcy law, "I deem it our duty, as soldiers in this common cause and as citizens of the United States, to contribute what we can to bring about a plausible and practicable solution of our financial readjustments and to help our country reach its goal"); Joe H. Schneider, *Corporate Reorganization and Municipal Debt Readjustment Amendments*, 9 J. NAT'L ASS'N REF. BANKR. 148-150 (1935) (referee from Little Rock commenting on constitutional challenges to the municipal bankruptcy law and other related issues); *Symposium, Bankruptcy Report of Credit Men's Association*, 8 J. NAT'L ASS'N REF. BANKR. 135, 136 (1934) (demonstrating that the ABLJ was critical in the beginning of H.R. 5950, Municipal Bankruptcy Bill).

[13]*E.g.*, Herbert M. Bierce, *Secretary's Report*, 21 J. NAT'L ASS'N REF. BANKR. 3, 6 (1946) (expressing opinion on municipal legislation but noting that amendments on municipal bankruptcy and railroads "are not of immediate consequence to us as Referees"); Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 DUKE L.J. 1157-1164 (1977) (section 81(2) of the Bankruptcy Act made it clear that a Chapter IX case is to be conducted by the district court, before a district judge, rather than a referee in bankruptcy).

[14]Referee William J. Kuertz, *Open Forum on Bankruptcy Practice*, 12 J. NAT'L ASS'N REF. BANKR. 3, 32-33 (1937-1938) (discussing how district judges could use referees as special masters for certain matters). In general, district courts were courts of bankruptcy and could assign matters to referees, but with many limits. Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After Stern v. Marshall*, 86 AM. BANKR. L. J. 121, 129 (2012).

[15]Hon. Thomas B. Bennett, *Consent: Its Scope, Blips, Blemishes, and a Bekins Extrapolation Too Far*, 37 CAMPBELL L. REV. 3, 9, 11 (2015).

[16]Patchan & Collins, *supra* note 11, at 289-290 (reviewing history and citing relevant legislation); Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L. J. 1150, 1174-1175 (2016).

Patchan and Collins several decades later:

> In view of the voluntary nature of the proceeding and the required pre-petition agreements, the court basically had an after-the- fact supervisory rather than an adjudicatory role. The Commission on the Bankruptcy Laws of the United States in its 1973 report characterized the requirement for pre-petition creditor approval of the plan as the submission of a "fait accompli to the judge, thereby creating substantial pressure on the judge to confirm the plan."[17]

Characterized by consensual arrangements among a subset of stakeholders and limited interaction with the federal court, early municipal bankruptcies bear little resemblance to today's chapter 9 cases in which bankruptcy judges play an essential role.

II. 1970s-1980s

The 1970s are well known as a key transition time for the bankruptcy judiciary and system overall. In 1973, the Federal Rules of Bankruptcy Procedure adopted the term "bankruptcy judge" and defined it in a way that would include referees.[18] As the late Professor Lawrence P. King explained:

> Another basic approach [of the 1973 rule changes] was to enhance the stature of the office of referee in bankruptcy which had undergone much change in the 1940s to 1960s. Not only did Rule 901(7) change the title of the office from referee to bankruptcy judge (a matter of some subsequent controversy), but Rule 102(a) provided for automatic reference of bankruptcy cases to the bankruptcy judge and deleted the authority of the district judge to direct otherwise.[19]

Professor King further commented:

> One can easily glean from these near revolutionary ideas a thoroughly considered intent to upgrade the bankruptcy court as it has now come to be known. The goal was not

[17]Patchan & Collins, *supra* note 11, at 290.

[18]Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part 2: The Third Branch Reacts*, 81 AM. BANKR. L. J. 165, 169 (2007) (citing and discussing Federal Bankruptcy Rule 901(7), which provided that "'Bankruptcy judge' means the referee of the court of bankruptcy in which a case is pending, or the district judge of that court when issuing an injunction. . . and when acting in lieu of a referee. . .").

[19]Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 AM. BANKR. L. J. 217, 222 (1996).

> only to provide more efficient and inexpensive justice to the parties involved in a bankruptcy case, but also to make the bankruptcy bench sufficiently attractive that highly qualified individuals would be inspired to serve on it.[20]

The National Conference of Referees in Bankruptcy likewise became the National Conference of Bankruptcy Judges in 1973.[21] During this decade, bankruptcy judges were actively involved in commenting on legislation and pressing issues of the day.[22] Indeed, the NCBJ proposed its own bankruptcy reform legislation,[23] and had a seat at the negotiating table, so to speak.[24] Senator Elizabeth Warren, in her prior law professor role, called the NCBJ one of the most influential players in bankruptcy debates in the 1970s.[25] And, of course, the bankruptcy reform efforts in 1978 changed the structure of

[20]*Id.* at 224; Mund, *supra* note 18, at 170 (quoting Hon. Conrad Cyr discussing similar point).

[21]Mund, *supra* note 18, at 171 (citing and discussing Federal Bankruptcy Rule 901(7), which provided that "'Bankruptcy judge' means the referee of the court of bankruptcy in which a case is pending, or the district judge of that court when issuing an injunction. . . and when acting in lieu of a referee. . ."); Douglas R. Rendleman, *Bankruptcy Revision: Process and Procedure*, 53 N. C. L. REV. 1197, 1214 (1975).

[22]*E.g., Referees Blame Garnishment For High Bankruptcy Rates*, WASH. POST, Aug. 12, 1967, at D6.

[23]Bankruptcy Act, H.R. 16643, 93rd Cong. (1974); Bankruptcy Act, H.R. 32, 94th Cong., (1st Sess. 1975); Marjorie Girth, *Prospects for Structural Reform of the Bankruptcy System*, 63 CAL. L. REV. 1546, 1551 (1975) ("After reviewing the Commission's proposed statute, the National Conference of Bankruptcy Judges decided to draft its own revisions to the present Bankruptcy Act."); *Collier on Bankruptcy* P 20.02 (15th ed. 2015)("H.R. 32, introduced in the 1st Session of the 94th Congress in January, 1975, was basically the bill proposed by the National Conference of the Bankruptcy Judges."); *Collier on Bankruptcy* App. Pt. 4(e)(i) (16th ed. 2015) (stating that in the 94th Congress Senator Burdick introduced an alternative drafted by representatives of the National Conference of Bankruptcy Judges that differed in several major aspects from the Commission's Bill).

[24]Mund, *supra* note 18, at 20-22 ("The NCBJ was no longer just a witness or interested party; it was a player who had a seat at the negotiating table. It was part of the process - an insider to that process - with direct access to the staff and leaders of the various congressional committees that were assigned jurisdiction over bankruptcy legislation. Just as in a courtroom where the attorneys sit inside the bar the Judges' Bill admitted the NCBJ and its leadership to the inner sanctum of congressional decisionmaking."). At present, the NCBJ and bankruptcy judges play a smaller role in advocating on legislation or commenting on substantive matters. In 1973, the initial Code of Conduct for Judges was put into place and applied to full-time bankruptcy referees. *Report of the Proceedings Of The Judicial Conference Of The United States*, H.R. DOC. NO. 93-103, at 10 (1st SESS. 1973). In 1974, the judiciary recognized referees as judges for purposes of the Code of Conduct. Mund, *supra* note 18, at 171 (citing and discussing 1974 proceedings). The available scholarship suggests that judicial lobbying among other types of judges continues notwithstanding the Code of Conduct. J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 405-447 (2016). And Congress continued to invite the National Conference of Bankruptcy Judges to testify on various matters post-1978, including in 1981, 1982, 1983, 1985, 1991, 1997, 1998, 1999, and 2007. But in today's climate, it is difficult to imagine a comprehensive bankruptcy system bill written, and advocated for, by judges.

[25]Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L. REV. 189, 191 (1999) ("A 'judges' bill' was widely debated in Congress and, although it failed to carry the day, it strongly influenced the shape of the final bill").

bankruptcy courts applicable to all cases.[26]

The 1970s also was a major decade for municipal bankruptcy. Worried that existing law was unworkable for big cities like New York,[27] Congress aimed to reform municipal bankruptcy ahead of consideration of a complete overhaul of the bankruptcy system.

A. Standalone Municipal Bankruptcy Reform in 1976

The 1973 Commission on the Study of Bankruptcy Laws had proposed that bankruptcy judges handle municipal cases,[28] a position with which the NCBJ surely concurred, as reflected in the later Judges' Bill.[29] The Ford Administration took a different position when it proposed a separate Code chapter for "major" municipal bankruptcies.[30] For big city cases, the Administration's bill proposed that district judges would continue to preside. When Senator Hruska inquired about this choice, Assistant Attorney General Antonin Scalia testified:

> Obviously, Senator, as this discussion has shown, there is an enormous amount of discretion on the part of the judge in this proceeding - more, I think, than in most proceedings - and the matter he is dealing with is incomparably more important than the matters which would be dealt with in most proceedings in bankruptcy. For those reasons, we think it is

[26]Susan Block-Lieb, *What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to Stern v. Marshall*, 86 Am. Bankr. L. J. 55 (2012).

[27]King, *supra* note 13, at 1158; Patchan & Collins, *supra* note 11, at 289, 291; *The Bankruptcy Reform Act: Hearings on S. 235 and S. 236, S. 582, and on S. 2597 before the Subcomm. On Improvements in Judicial Machinery of the Comm. of the Judiciary*, 94th Cong. Part III, 1975, at 198 (Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel) ("recent events with respect to the City of New York strongly suggest, however, that it is essential to have laws in place which can handle such an occurrence. Chapter IX of the Bankruptcy Act, now available to all municipalities, is in a number of respects inadequate for very large cities."); id. at 199 ("it is obvious that we are all considering the present legislation under some time constraints, since the necessity for its use by one of our major cities may arise within a short period of time"). Scalia's arguments for a standalone major municipality chapter were premised in part on the belief that such a choice would better justify federal intervention under both the Bankruptcy Clause and the Commerce Clause. *Id.*

[28]*Report of the Commission on the Bankruptcy Laws of the United States*, Part II.c. VIII (1973); King, *supra* note 13, at 1164 n. 31 (characterizing this recommendation of a switch to bankruptcy judges as "interesting"). As has been noted by other scholars, the Commission report focused on functional rather than constitutional issues. Block-Lieb, *supra* note 26, at 66 (recognizing that report dedicated only a few paragraphs to constitutional analysis).

[29]H.R. 32, 94th Cong., 1st Sess. (1975) (including 17 provisions to rewrite municipal bankruptcy law: 9-101 through 9-310); Patchan & Collins, *supra* note 11, at 292 (Judges' Bill proposed revisions to all chapters of the Bankruptcy Act, including chapter IX). In the Judges' Bill, the term court meant bankruptcy court or a judge of a bankruptcy court and the term judge meant judge of the United States Bankruptcy Court. H.R. 32, § 1-102(13), (29).

[30]S. 2597 would have created a standalone municipal bankruptcy chapter for the roughly half dozen cities of more than 1,000,000 in population at that time.

> important that we do whatever can be done to insure that the best possible person handle the case. Without meaning to in any way criticize bankruptcy judges, United States district judges are, ex officio, by reason of their stature, by reason of their lifetime tenure, presumably better qualified to take on a job of this magnitude.[31]

In a supplemental statement, Scalia elaborated:

> Bankruptcies involving a major municipality are proceedings of national interest and impact. In our opinion they deserve the quality of judicial ability to be found in our United States District Courts. They require, moreover, the insulation from popular and political pressures which the judge of a constitutional court, with lifetime tenure, possesses. It would be unwise, however, to require district judges for all municipal bankruptcies, since most can be adequately handled by bankruptcy judges and district courts are already overburdened.[32]

Congress rejected this proposed bifurcation of judicial responsibility in 1976, when it overhauled municipal bankruptcy to replace sections 81 through 84 of the Bankruptcy Act of 1898.[33] For the very short term, district judges would remain in charge of all municipal bankruptcy cases. Compared to the 1937 law, these cases would have a longer and more uncertain timeline because they no longer would be prepackaged.[34] The drafters doubted that district judges would be uniformly capable of handling the responsibilities associated with a major city bankruptcy.[35] Departing from the

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[31]Scalia testimony, *supra* note 27, at 223 (noting certain instances in which a district judge can refer a matter to bankruptcy judges "but what cannot be done is simply to delegate the entire case to a bankruptcy judge").

[32]*Id.* at 227 (in response to the question "What added thoughts do you have on those features of the Administration's bill which would not be appropriate for a revised Chapter IX of the Bankruptcy Act, applicable to all municipalities rather than merely major cities?"). Considering the circuit-court-supervised merit selection and reappointment process for bankruptcy judges, and the 14-year term of office, it is at least an open question whether the lifetime appointment of an Article III judge provides meaningfully greater insulation from the "popular and political pressures" Scalia warned of.

[33]Act of Apr. 8, 1976, Pub. L. No. 94-260, 90 Stat. 315 (1976). If the law were found to be unconstitutional, chapter IX of the Bankruptcy Act would be revived. *Id.* Sec. 3.

[34]King, *supra* note 13, at 1158, 1161.

[35]Gillette and Skeel have observed that municipal bankruptcy reform discussions in the 1970s included proposals for substantial expansion of the role of the judge. Gillette & Skeel, *supra* note 16, at Part II.C; *The Bankruptcy Reform Act: Hearings on S. 235 and S. 236, S. 582, and on S. 2597 before the Subcommittee On Improvements in Judicial Machinery of the Committee of the Judiciary*, 94th Cong. (3rd Sess. 1975) (statement of Joseph Patchan). It appears that those significant proposals for judicial oversight were meant to increase judicial oversight overall rather than to weigh in on the relative merits of district and bankruptcy judges.

random selection norm, the 1976 law instructed the chief judge of the applicable circuit court to designate a district judge to conduct a case when it was filed.[36] The 1976 law expressly contemplated a limited role for bankruptcy judges:

> 87(a) REFERENCE.—The court may refer any special issue of fact to a referee in bankruptcy for consideration, the taking of testimony, and a report upon such special issue of fact, if the court finds that the condition of its docket is such that it cannot take such testimony without unduly delaying the dispatch of other business pending in the court, and if it appears that such special issue is necessary to the determination of the case. *A reference to a referee in bankruptcy shall be the exception and not the rule.* The court shall not make a general reference of the case, but may only request findings of specific facts.[37]

B. Comprehensive bankruptcy reform in 1978

The restricted role for bankruptcy judges in municipal bankruptcy was short-lived. Readers of this journal hardly need a reminder of the creation of a new United States Bankruptcy Court for each district, with judges appointed by the President, and confirmed by the Senate, for fourteen-year terms.[38] As part of those bigger systemic reforms, chapter 9 cases of all sizes were handed over to bankruptcy judges. The job of presiding over such cases, and the statutory tools for managing them, would be expanding: the 1978 version of municipal bankruptcy explicitly incorporated many provisions of chapter 11 and other parts of Title 11.[39] Municipal bankruptcy retained non-

[36]1976 Law § 82(d), codified at 11 U.S.C. § 402 (1976) (having been notified of the filing by the chief district judge, the chief circuit judge "shall designate the judge of the district court to conduct the proceedings under this chapter"). The 1937 law, incorporated into the Bankruptcy Act, had contained no special judicial selection rule for municipal cases.

[37]1976 Law § 87(a), codified at 11 U.S.C. § 407 (1976) (emphasis added). Lawrence P. King, *Municipal Bankruptcy*, 50 AM. BANKR. L.J. 389, 391 (1976) (indicating district judges still primarily responsible for overseeing municipal bankruptcies in 1976 law); King, *supra* note 13, at n.31 ("The House Report states that the definition in section 1(10) of the Act, which makes the United States district court the court of bankruptcy, was copied into section 81(2); this was meant to render it clear that the Chapter IX case 'is to be conducted in the district court, before a district judge, rather than before a referee in bankruptcy'") (citation omitted).

[38]N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53, 102 S. Ct. 2858, 2862, 73 L. Ed. 2d 598 (1982) ("The judges of these courts are appointed to office for 14-year terms by the President, with the advice and consent of the Senate."); *see also* Brubaker, *supra* note 14, at 130-131; Troy A. McKenzie, *Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L. J. 23, 34 (2012).

[39]The 1976 law had no equivalent to section 901 with a list of express incorporations. The 1978 Act incorporated the following sections into chapter 9 via section 901: 301, 344, 347(b), 349, 350(b), 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(1), 509, 510, 524(a) (1), 524(a)(2),

random judge selection that originated with concerns about district judge competence.[40]

Digging through the legislative history at this time, there are no signs of concerns specific to a non-Article III bankruptcy court presiding over government cases. As in the other major phases of municipal bankruptcy history, the main constitutional anxiety continued to be whether *any* federal judge had authority over a unit of a sovereign state in this context.[41]

C. Putting the Pieces Back Together in 1984

The 1980s would have been a good time for lawmakers to consider whether municipal cases provoked a particular need for oversight by an Article III court. In 1982, the U.S. Supreme Court found the 1978 bankruptcy court system to be unconstitutional, requiring Congress to reconfigure the bankruptcy court's role in all types of cases.[42] The resulting amendments, which did not pass until 1984, made bankruptcy courts units of the district courts, from which cases would be referred, with the bankruptcy judges appointed by the U.S. Courts of Appeals.[43]

The 1984 law went beyond responding to the constitutional deficiencies identified in *Northern Pipeline*. At least one amendment specifically affected chapter 9.[44] Yet, even with these issues on the table nearly simultaneously, I

544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129 (a)(2), 1129(a)(3), 1129(a) (8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2) (B), 1142(b), 1143, 1144, and 1145. Section 557 was added in 1984. Section 1129(a)(6) was added in 1988. Sections 555-562 and 1123(d) were added in 2005. In 2010, sections 333 and 351 were added, and the 507(a) subsection reference was updated to reflect the 2005 reforms.

[40]*Legislative Statements*, 11 U.S.C. § 921(b) (2016) (stating that "Section 905 of the Senate amendment is incorporated as section 921(b) of the House amendment with the difference that the chief judge of the circuit embracing the district in which the case is commenced designates a bankruptcy judge to conduct the case in lieu of a district judge as under present law."). Section 921(b) has not been revised since 1978, although the National Bankruptcy Review Commission, in 1997, proposed its repeal, concluding that the provision was no longer necessarily in light of the strong merit-selected bankruptcy bench.

[41]Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REG. 55 (2016) (quoting Committee reports expressing concerns about the Supreme Court's federalism and Tenth Amendment jurisprudence).

[42]*N. Pipeline Constr. Co.*, 458 U.S. at 50 (1982). Wellness Int'l v. Sharif, 13 S. Ct. 1932, 1939 (2015) (referring to *Marathon* as well as *Stern v. Marshall*, Congress violated Article III by "authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication."). More specifically, Brubaker describes the broadest agreement among the various Justices' positions to be that the new bankruptcy court could not constitutionally be vested with jurisdiction to decide this state law contract claim. Brubaker, *supra* note 14, at 131-132.

[43]Bankruptcy Amendments and Federal Judgeship Act of 1984, 11 U.S.C § 101(52).

[44]Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct 1938, 1942 (2016) ("The Bankruptcy Code has long included Puerto Rico as a 'State,' but in 1984 Congress amended the definition of 'State' to exclude Puerto Rico 'for the purpose of defining who may be a debtor under chapter 9.' Bankruptcy Amendments and Federal Judgeship Act, § 421(j)(6), 98 Stat. 368, now codified at 11 U.S.C. § 101(52)").

have found no published debate over whether district judges should preside directly over municipal cases to avoid a constitutional problem.[45]

III. TODAY

A. The Bankruptcy Judge as a Key Institutional Actor in Chapter 9

Today's municipal bankruptcy system is more like other kinds of bankruptcy than ever before,[46] and, given the wider range of affected constituencies relative to the original municipal bankruptcy statute, provokes debates over policy similar to corporate bankruptcy.[47] In addition, the bankruptcy judiciary has been encouraged to become more "managerial."[48] We now see bankruptcy judges shaping both the procedure and substance of municipal restructurings in ways that would have been inconceivable in the early days of municipal bankruptcy law and the NCBJ.[49] As is recounted elsewhere, a bankruptcy judge might be extensively involved using case management and inquisitorial techniques, deploying adjuncts (such as mediators or examiners) to expand the scope and resources of the judicial team.[50] Even judges with a more reserved judicial philosophy are required by the demands of these cases to do considerably more than simply rule on eligibility, plan confirmation, and

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[45]Searches in Google, Hein, Lexis, and Proquest using a mix of terms such as "Article III", "municipal*", "bankruptcy judge*", "municipal bankruptcy" "constitution*" during the period of 1980-1985 produced no indication that *Northern Pipeline* induced any additional consideration of a different judicial oversight system for municipal cases than for corporate cases. Law review articles are plentiful on the post-*Northern Pipeline* amendments but likewise have not discussed the impact of the constitutional authority of bankruptcy judges on municipal bankruptcy. Of course, the legislative history of the municipal-related 1984 amendments is itself mysterious; there is no paper trail of why Puerto Rico was expressly excluded from the definition of state for purposes of chapter 9 eligibility. Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938 (2016) (observing lack of explanation for the way Puerto Rico was addressed in the reintroduced definition of state in the Bankruptcy Code).

[46]This assertion holds notwithstanding the fact that Congress has modestly cut back on the chapter-11-like features in chapter 9. For example, in 1988, Congress limited the extent to which section 552 applies in municipal bankruptcy cases, now codified in 11 U.S.C. § 928.

[47]*Commercial and Public Sector Issues in Bankruptcy: Hearing on Commercial and Public Sector Issues in Bankruptcy, House of Rep. Committee on the Judiciary House of Representatives, Subcomm. Econ. & Comm. L.*, 102nd Cong. 70 (2nd Sess. Aug 5, 1992) (statement of Jerry D. Klepner, Director of Legislation, Am. Fed. State, County & Munic. Employees, AFL-CIO), (recognizing, after the Bridgeport Connecticut bankruptcy filing, that "members' wages, their benefits, and their pensions could be totally lost in the event of a bankruptcy, leaving them not only unemployed, but without any health insurance and denied their very retirement security," and endorsing H.R. 3949, which would impose a wage priority in municipal bankruptcy and set forth a required standard for collective bargaining).

[48]Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 Ill. L. Rev. 101, 104-111 (2015); *see also* 11 U.S.C. § 105(d) (expressly empowering judges to conduct status conferences and providing broad authority "to ensure that the case is handled expeditiously and economically. . .").

[49]Jacoby *supra* note 41; David Dubrow, *Chapter 9 Revisited: Preparing for the Next Down Turn*, 12 Pratt's J. of Bankruptcy Law 116, 120-121 (2016).

[50]Jacoby, *supra* note 41, at 99-100 (summarizing case study of court's role in Detroit chapter 9).

other discrete disputes.[51]

In the meantime, district judges' direct exposure to bankruptcy has been limited. They have presided over any kind of bankruptcy case only in rare instances —typically because the bankruptcy case had a significant mass tort component,[52] or because a district court withdrew the reference for a different reason.[53] Having bankruptcy judges preside in the first instance over all types of bankruptcy has gained broad acceptance. The U.S. Supreme Court recently noted "it is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt."[54]

Bankruptcy judges also have played critical roles in the wake of the most recent financial crisis, handling mega cases with systemic consequences as well as a high volume of personal and commercial cases cascading from the home mortgage market meltdown.[55] Their performance has generated recognition that bankruptcy courts are appropriate venues in which to restructure or liquidate even systematically significant institutions. In the push to replace Dodd-Frank's Orderly Liquidation Authority with a new chapter of the Bankruptcy Code, House Republicans have noted:

> the bankruptcy process is administered through the judicial system, by impartial bankruptcy judges charged by the Constitution to guarantee due process in public proceedings under well-settled rules and procedures. It is a process that is faithful to this country's belief in the Rule of Law.[56]

Legislation to implement a proposed chapter 14 would amend the Judicial Code to require the Chief Justice of the United States to designate at least

[51]Although the number of published decisions stemming from major municipal cases remains relatively small, published decisions are not an adequate barometer of influence and workload. Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 FORDHAM URB. L. J. 849 (2014); Jacoby, *supra* note 41.

[52]28 U.S.C. § 157(b)(5) ("The district court *shall* order that personal injury tort and wrongful death claims shall be tried in the district court") (emphasis added). District and bankruptcy judges issued joint opinions in several mass tort bankruptcies. In re Eagle Picher Indus., Inc., 203 B.R. 256 (S.D. Ohio 1996) (District Judge Spiegel and Bankruptcy Judge Perlman jointly presiding); In re Joint Eastern and Southern Districts Asbestos Litigation, 830 F. Supp. 686 (E. & S.D.N.Y. 1993).

[53]Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 792 (2010).

[54]*Wellness Int'l*, 135 S.Ct. at 1938-39 (2015). Although the context suggests that the Court was referring to the high volume of bankruptcy cases, small numbers of cases of large companies or cities can consume significant judicial resources.

[55]Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L. J. 862 (2014) (discussing judges' roles in cases like Chrysler); Melissa B. Jacoby, *Bankruptcy Reform and the Financial Crisis*, 13 N.C. BANKING INST. J. 115 (2009).

[56]House Financial Services Committee at p. 26 (June 23, 2016) http://financialservices.house.gov/uploadedfiles/financial_choice_act_comprehensive_outline.pdf

10 bankruptcy judges to be available to hear the case.[57] The panel approach might have been well suited to use for territorial bankruptcy as well.

As in other types of cases, parties in chapter 9 cases occasionally have challenged the authority of bankruptcy judges to hear and decide certain matters. Early in the Detroit bankruptcy, an official committee representing retirees sought to withdraw the reference from the presiding bankruptcy judge over the determination of whether Detroit met the Bankruptcy Code's eligibility requirements.[58] The retiree committee asked the presiding bankruptcy judge to halt consideration of eligibility until the district court made a decision on its motion. The bankruptcy court scheduled an expedited hearing, took the motion to stay the proceedings under advisement, and issued a substantial decision for publication one week later denying the request.[59] The district judge who received the motion did not act on it—not before the eligibility hearing, not before the court found Detroit eligible, and not before the bankruptcy court confirmed Detroit's restructuring plan about a year later.[60]

Firefighters in San Bernardino's bankruptcy also moved to withdraw the reference on a matter relating to collective bargaining agreements.[61] The district court granted the motion in part, but in practical terms left as much as possible of the work with the bankruptcy court. Given that bankruptcy law created the possibility of rejecting these agreements, the district court ruled it was a core proceeding a bankruptcy judge could hear and decide.[62] If the matter went to trial and a jury trial was necessary, that trial could be held in the district court. But the district court made clear that the bankruptcy judge would and should handle everything else related to the dispute.[63] The district court also shared its suspicion that something other than constitutional concerns might have been motivating the challenge:

> the Court suspects that the Firefighters are engaging in forum shopping. "Forum shopping is likely where a party

[57]H.R. 2947, Financial Institution Bankruptcy Act of 2016, section 4 (passed the House of Representatives April 12, 2016).

[58]Jacoby *supra* note 51, at 859 (describing dispute and citing the court documents).

[59]*Id.* at 860; In re City of Detroit, Mich., 498 B.R. 776 (Bankr. E.D. Mich. 2013).

[60]The pendency of the motion to withdraw the reference does not appear to have affected the administration and disposition of the Detroit bankruptcy. Nevertheless, it is conceivable that a pending motion contesting the bankruptcy court's authority to hear a case could cast a pall over the proceeding and affect the decision-making process for stakeholders in the case. That concern is not unique to government bankruptcy cases, but might have different implications in such cases.

[61]San Bernardino City Prof'l Firefighters v. City of San Bernardino, 15-cv-00815-ODW (C.D. Cal. Nov. 10, 2015).

[62]*Id.* citing 28 U.S.C. § 157.

[63]*Id.* ("The Court shall only conduct the trial on these claims; all pre-trial proceedings, including hearing and ruling on any dispositive motions, will be conducted by the bankruptcy court").

> moves to withdraw the reference after adverse findings have been made against it by the Bankruptcy Court." *In re GTS 900 F, LLC*, No. 2:09-BK-35127-VZ, 2010 WL 4878839, at *5 (C.D. Cal. Nov. 23, 2010). Here, the Firefighters have appealed at least four adverse orders from the bankruptcy court. Given this succession of appeals, it seems apparent that the Firefighters simply do not want to litigate before the Bankruptcy Judge assigned to this matter. The Court therefore declines to exercise its discretion to withdraw the reference of this matter.[64]

As a separate issue, some Article III judges have noted the limited constitutional authority of bankruptcy judges when asked to apply the equitable mootness doctrine to appeals of chapter 9 plan confirmation orders. In the Jefferson County case, a district judge in Alabama held that the doctrine of equitable mootness did not prevent appellate review of a chapter 9 confirmation order. One of the rationales given was the need for an Article III court to "decide important constitutional questions that place substantial future financial obligations on the citizens. . ." of the debtor.[65]

Other appellate decisions have disagreed with the district court's Jefferson County decision (which, as of this writing, is pending before the Eleventh Circuit).[66] These other courts have held that the equitable mootness doctrine applies to municipal cases.[67] But a recent Sixth Circuit decision, stemming from the Detroit bankruptcy, included a strong dissent by Judge Moore expressing concern that equitable mootness

> undermines the delicate constitutional balance on which bankruptcy adjudication is based. [. . .] This right to review in Article III courts remains key to the Supreme Court's decisions setting forth the limitations on a bankruptcy court's authority to decide cases. See, e.g., *Wellness*, 135 S. Ct. at 1944 ("allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process" (emphasis added)).[68]

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[64]*Id.*

[65]Bennett v. Jefferson County, Ala, 518 B.R. 613, 637-38 (N.D. Ala. 2014).

[66]The 11th Circuit heard oral argument on December 16, 2016. Bennett v. Jefferson County, Ala., 15-11690 (11th Cir. 2016).

[67]In re City of Stockton, Calif., 542 B.R. 261 (9th Cir. BAP 2015); In re City of Detroit, 838 F. 3d 792 (6th Cir. 2016), affirming In re City of Detroit, Mich, 14-cv-14872, 2015 WL 5697702 (E.D. Mich. Sept. 9, 2015).

[68]In re City of Detroit, 838 F.3d at 811-812 (Moore, J. dissenting).

By eliminating appellate oversight in Article III courts, she argues, equitable mootness "'effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue' because 'bankruptcy courts control nearly all of the variables' that are considered in assessing whether an appeal is equitably moot."[69] Yet, these observations stop well short of doubting the ability of bankruptcy judges to hear and decide municipal cases in the first instance. Instead, the issue is effective appellate review by an Article III tribunal:

> By declining to review the bankruptcy court's assessment of [the retirees'] claims, the district court and the Majority ensure that they will never be heard by an Article III judge. Although I do not doubt the expertise that a bankruptcy judge brings to a case of this magnitude and complexity, having one's case decided by an Article III judge is no mere formality. . . Article III supervision of bankruptcy judges is key to the constitutionality of the bankruptcy court system that adjudicated the retirees' claims.[70]

Furthermore, Judge Moore's dissent challenges the applicability of equitable mootness for all types of bankruptcy cases, stemming from broader objections to prudential decisions to exercise expressly conferred jurisdiction.[71] Detroit's chapter 9 case was a good vehicle to raise these concerns because the panel was not strictly bound by Sixth Circuit precedent generated in chapter 11 cases.

The equitable mootness cases therefore do not themselves raise a strong challenge to the ability of a bankruptcy judge to preside over a government bankruptcy. At the same time, the prevalence of equitable mootness reminds us just how little exposure to the debt restructuring process, even as appellate courts, most district judges have had in the modern era.[72]

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[69]*Id.* (quoting In re One2One Communications, LLC, 805 F.3d 428, 445 (3rd Cir. 2015) (Krause, J., concurring)). She also cites a concurrence of then-judge Alito in Nordhoff Investments, Inc. v. Zenith Electronic Corp., 258 F.3d 180, 192 (3rd Cir. 2001) (Alito, J., concurring in the judgment) ("[E]quitable mootness. . .can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges.").

[70]*Id.* at 806.

[71]*Id.* at 810 (citing and quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377 (2014)).

[72]The district judge who may hold the claim for the most municipal bankruptcy exposure at the time of this writing is Hon. Gerald Rosen of the United States District Court for the Eastern District of Michigan, who was appointed as the lead mediator by the presiding bankruptcy judge in the case. Jacoby, *supra* note 41. He has recently retired from the bench to start an alternative dispute resolution practice. Tresa Baldas, *Gerald Rosen, The Judge Who Helped Save Detroit, Retires*, Detroit Free Press, Jan. 21, 2017. Thus, Chief Justice Roberts cannot select him to preside over a PROMESA Title III restructuring.

IV. WHO SHOULD PRESIDE OVER A PUERTO RICO BANKRUPTCY?

We can now return to the role of judges in a new government bankruptcy law enacted in response to Puerto Rico debt's crisis. PROMESA creates a restructuring regime for territories and their municipalities.[73] Readers familiar with bankruptcy law will recognize Title III of PROMESA as based considerably on the Bankruptcy Code through both express cross-references and through adapted provisions.[74] Title III contains an automatic stay and the ability to bind non-consenting creditors, under roughly similar conditions as in chapter 9 for municipalities of states.[75] As noted, PROMESA's Title III also calls for use of the Federal Rules of Bankruptcy Procedure.[76]

Even as PROMESA adopts a significant portion of the bankruptcy infrastructure that has developed since 1978, it contains no formal role for bankruptcy judges who have been instrumental to the effectiveness of this infrastructure. In the event a Title III case is filed, PROMESA gives the Chief Justice of the United States the responsibility to select a district judge to preside.[77] PROMESA does not even adopt the language of the 1976 chapter 9 law setting forth circumstances under which the district judge may enlist help from bankruptcy judges in exceptional situations.[78] The Natural Resource Committee's section-by-section analysis offers no explanation for this departure from chapter 9 and does not indicate that this choice was

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[73]S. 2328, Public Law No: 114-187, June 30, 2016. Congress excluded the latter category from chapter 9 in 1984 with its new definition of state. Commonwealth of P.R. v. Franklin Calif. Tax-Free Trust, 136 S. Ct. 1938, 1942 (2016).

[74]Although the legislation is designed to stem from Congressional power over the territories, it would not be surprising if a court ruled that, at least in part, the power stems from the Bankruptcy Clause of the Constitution. Railway Labor Execs. Assoc. v. Gibbons, 455 U.S. 457 (1982) (evaluating law under Bankruptcy Clause rather than as labor protection law under Commerce Clause, and invalidating provisions of Rock Island Railroad Transition and Employee Assistance Act, which applied to only one railroad, as violation of uniformity mandate of Bankruptcy Clause).

[75]PROMESA § 314. Congress altered the language in several respects but it is not clear how much of a difference results. For example, in deciding whether the plan is feasible and in the best interest of creditors, the court is required "*to consider* whether available remedies under the non-bankruptcy laws and constitution of the territory would result in a greater recovery for the creditors than is provided by such plan." Id. § 314(b)(6) (emphasis added).

[76]PROMESA § 310 ("The Federal Rules of Bankruptcy Procedure shall apply to a case under this title and to all civil proceedings arising in or related to cases under this title").

[77]PROMESA § 308(a) ("For cases in which the debtor is a territory, the Chief Justice of the United States shall designate a district court judge to sit by designation to conduct the case"). Bankruptcy judges could be selected by chief circuit judges to preside over a municipal filing *within* a territory. *Id.* § 308(b), adopting the rule from 11 U.S.C. § 921(b) ("The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case.") PROMESA also delinks the judge from the venue of the case.

[78]*Supra* note 37.

constitutionally mandated.[79] To the extent decision-makers were swayed by the benefits of district court oversight the Ford Administration identified long ago, one hopes they weighed those rationales against the significant institutional costs of forfeiting the formidable body of substantive and procedural expertise a bankruptcy judge would have brought to the task.[80]

CONCLUSION

In the life of the National Conference of Bankruptcy Judges, presiding over government bankruptcies has come full circle. Decades of experience have delivered hard-won lessons about how to administer and attend to the financial distress of a municipality. The bankruptcy judiciary has been groomed to optimally handle restructuring cases of all kinds, of ever-growing size and complexity. In light of this history, PROMESA's choice of district judge is a jarring break from history. It requires that the first-ever territorial bankruptcy be handled a judge who, in all likelihood, has not presided over any kind of bankruptcy and has seen only limited glimpses of the system through the oblique lens of the appellate process. One can only hope that any benefits - constitutional or otherwise - of this departure from the arc of bankruptcy court history are worth the considerable costs.

[79]Section by Section Analysis of H.R. 5278, p. 12 http://naturalresources.house.gov/uploadedfiles/section_by_section_6.6.16.pdf (describing section 308 without any rationale).

[80]As McKenzie explains, expertise is ordinarily used to uphold the use of non-Article III tribunals, although was used otherwise in *Stern v. Marshall.* Troy A. McKenzie, *Getting to the Core of Stern v. Marshall: History, Expertise, and the Separation of Powers*, 86 AM. BANKR. L. J. 23, 30 (2012). It has long been considered odd to presume that Article III courts are more expert in handling state law claims as is the implication of *Northern Pipeline*, and its progeny, *Stern*. *Id.* at 26 ("It is odd to speak of the Article III courts as 'experts' in state law matters such as the disputed claim in *Stern*. Indeed, the Supreme Court has developed an entire body of law - the *Erie* Doctrine - that rejects the notion of federal court expertise on those claims. . . I doubt that Article III judges are more 'expert' than bankruptcy judges in the correct application of state fraudulent conveyance law, to name one category of disputes that already has generated *Stern*-based objections to the adjudicatory power of bankruptcy judges."). *Id.* at 43 ("For the proceduralist in me, the most intriguing part of the *Stern* opinion is the Court's assertion that Article III courts are 'experts' at resolving state common law claims like the one at stake in the case. That statement would come as a surprise to my civil procedure students. . . . The central point of *Erie* and its progeny is that the federal judiciary brings no special insights to the adjudication of rights and obligations governed by state common law."). *Id.* at 42 ("The agency in *Schor* could assess the common law claim in light of, and in connection with, the larger dispute out of which it grew. In so doing, the agency provided 'an inexpensive and expeditious alternative forum' for resolution of the entire controversy before it, which was essential to the effectiveness of the overall regulatory scheme entrusted to the agency.").

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Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform

by

*Melissa B. Jacoby**

Change is in the air in the bankruptcy system. An omnibus bankruptcy bill has substantially amended titles 11 and 28 of the United States Code,[1] and the professionals involved with bankruptcy are working hard to prepare for the quickly approaching effective date.[2] They are writing and revising books, developing new rules of procedure and forms, updating and expanding case software, starting or re-tooling credit counseling and financial education programs, and holding workshops and conferences around the country. All of this activity suggests that something big is happening.

But will bankruptcy really be so different a year from now, two years from now, five years from now? And how will these changes affect people who are candidates for personal bankruptcy? I argue in this Article that one must look beyond the statutory revisions to answer these questions.[3]

Legal and sociological research suggests that the bill's impact will be filtered through the influences of day-to-day actors in the bankruptcy sys-

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[1]*See* S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [hereinafter BAPCPA], Pub. L. No. 109-8, 119 Stat. 23 (2005). [Most future references will be to the codified provision, i.e. 11 U.S.C. § ___ (2005).] This bill as enrolled has fifteen titles and over two hundred sections, many of which make multiple changes to title 11, title 28, and other parts of the United States Code. *Id.*

[2]Most of the bill is effective on October 17, 2005, 180 days after President Bush signed the legislation. *See* S. 256, 109th Cong. § 1501 (2005). Certain portions have a different effective date. *See* S. 256 §§ 324, 325(d), 434(b), 601(c), 603(e), 1001(a)(2), 1003(c), 1223(e), 1234(b), 1301(b)(2), 1302(c)(2), 1303(b)(2), 1304(b)(2), 1305(b)(2), 1306(b)(2), 1404(b), 1406, 1501(b).

[3]*See, e.g.*, Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 Nw. U. L. Rev. 1498, 1549 (1996) [hereinafter *Law in Lawyers' Heads*].

tem.[4] As in the past, this filtering may mute or magnify certain statutory changes and may produce variation around the country.[5] Assessments of the impact of formal law changes are incomplete without taking this filtering into account.

Notwithstanding this filtering, it is reasonable to predict that the changes will make bankruptcy more complicated and expensive for bankruptcy filers to some extent.[6] Even so, the real life impact of the changes is unclear. Researchers know little about filers *after* bankruptcy or about how their recovery compares with that of insolvent individuals who avoid bankruptcy.[7] If studies were to find that many filers confront serious financial trouble again two or three years after bankruptcy, then they might call into question the effectiveness of bankruptcy. Similarly, if studies were to find that non-filers with similar profiles recover equally well through non-bankruptcy means, then statutory changes that make bankruptcy more difficult may not be as consequential as they seem. Ultimately, therefore, it is difficult to characterize the impact of these changes on financially distressed individuals without knowing more about the effectiveness of bankruptcy in an absolute and comparative sense.[8]

Part I offers an overview of the statutory changes. Part II explores how the day-to-day influences of the bankruptcy system might affect the statutory changes. Part III describes the limits of research on personal bankruptcy filers and explains how this affects predictions of the impact of reform.

I. STATUTORY BANKRUPTCY REFORM

After almost eight years of intermittent consideration, the omnibus bankruptcy bill officially has become part of the formal law.[9] As the biggest set of statutory amendments to bankruptcy law in a generation, the bill has added hundreds of provisions, exceptions, qualifications, and requirements to the Bankruptcy Code and other portions of the United States Code along with a

[4]*See infra* text associated with notes 45-80. For a list of "system players," see Bernard Trujillo, *Self-Organizing Legal Systems: Precedent and Variation in Bankruptcy*, 2004 UTAH L. REV. 483, 520-521 (2004).

[5]*See infra* text associated with notes 45-80.

[6]*See generally* Melissa B. Jacoby, *Generosity Versus Accessibility: Bankruptcy, Consumer Credit, and Health Care Finance in the US*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 297-298 (JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY, WILLIAM WHITFORD, EDS. 2003). *See also* Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 AM. BANKR. L. J. 81, 108 (2002) (noting how costs and complex bureaucracy affect use of bankruptcy in other countries).

[7]*See generally infra* text associated with notes 92, 94, and 105.

[8]*See infra* text associated with notes 82-113.

[9]Prior bills containing some iteration of the ultimate changes include S. 1301, 105th Cong. (1997); H.R. 2500, 105th Cong. (1997); H.R. 3150, 105th Cong. (1998); H.R. 833, 106th Cong. (1999); H.R. 333, 107th Cong. (2001); and H.R. 975, 108th Cong. (2003). For a history, see, e.g., Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1095-1106 (2004).

host of uncodified duties and pronouncements.[10] Many, although not all, of the provisions are relevant to personal bankruptcy.[11]

Most of the attention has been showered on a provision requiring that chapter 7 cases be screened solely on the basis of ability to repay debts.[12] At least in some locations, this new statutory means test - presumably designed to encourage more chapter 13 repayment plans or to deter filings altogether - may be less important than many other changes. First, although chapter 13 filings are about 30% of personal bankruptcy filings overall, much higher proportions of debtors in some districts already are choosing chapter 13 over chapter 7.[13] Second, although the means test imposes paperwork requirements on nearly all individual chapter 7 bankruptcy filers with primarily consumer debts, most filers have too little income for their cases to be the subject of motions to dismiss or convert on the basis of the means test.[14] Third, at least in some districts, trustees already have been screening chapter 7 cases for ability to pay and other factors. In recent years, the Executive Office for United States Trustees has required that trustees screen chapter 7 cases for ability to pay.[15] Even before the EOUST took this step, an empirical study

[10]*See* BAPCPA, *supra* note 1. The other significant pieces of bankruptcy legislation since 1978 were enacted in 1984 and 1994, *see* Pub. L. No. 98-353, 98 Stat. 333 (1984); Pub. L. No. 103-394, 108 Stat. 4107 (1994), although many other pieces of legislation have amended the Bankruptcy Code. For a list of such bills through 1994, see Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801, 864 n.161 (1994) [hereinafter *Local Legal Culture*].

[11]Many Bankruptcy Code provisions have grown in length considerably due to the omnibus bill. *See, e.g.*, 11 U.S.C. § 362 (2005) (automatic stay); *id.* § 521 (debtor's duties); *id.* § 523 (exceptions to discharge); *id.* § 524 (discharge and reaffirmation agreements); *id.* § 704 (trustee duties); *id.* § 707 (dismissal or conversion). In addition, the bill added many new provisions, some of which are pertinent to personal bankruptcy. *See, e.g.*, *id.* § 111 (credit counseling and financial management regulation); *id.* § 112 (disclosure of name of minor children); *id.* §§ 526-528 (debt relief agencies); *id.* § 1115 (property of estate in case of individual chapter 11 debtor); *id.* § 1308 (tax returns).

[12]*See* Jacoby, *supra* note 9, at 1127 n.176. *See also* sources cited in note 42.

[13]*See, e.g.*, Gordon Bermant & Ed Flynn, *Stability and Change in Chapter 13 Activity (1990-1999)*, AM. BANKR. INST. J., Nov. 2000, at 20; Gordon Bermant & Ed Flynn, *Measuring Projected Performance in Chapter 13: Comparisons Across the States*, AM. BANKR. INST. J., July/Aug. 2000, at 22.

[14]*See, e.g.*, Ed Flynn & Gordon Bermant, *Pre-planning Limits Means Test Impact, Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors*, AM. BANKR. INST. J., Feb. 2000, at 22 (reporting that under 16% of their nationally representative sample had incomes above state median). For the income-related safe harbor, see 11 U.S.C. § 707(b)(7) (2005). All individual chapter 7 filers with primarily consumer debts must complete some paperwork under section 707(b)(2)(C) unless they are disabled veterans who meet the requirements of section 707(b)(2)(D). *See id.* § 707(b)(2).

[15]*See, e.g.*, United States Department of Justice, Executive Office for United States Trustees, Handbook for United States Trustees, 6-11 - 6-13 (2002, includes technical amendments effective January 1, 2005), *available at* http://www.usdoj.gov/ust/library/chapter07/forms/Ch7hb0702-2005.pdf; United States Department of Justice, U.S. Trustee Program, Annual Report of Significant Accomplishments 7-8 (2001) (on file with author); Antonia G. Darling & Mark A. Redmiles, *The Civil Enforcement Initiative: A Review of the First Ten Months and a Look at the Next Stage*, AM. BANKR. INST. J., Sept. 2002, *available at* http://www.usdoj.gov/ust/press/articles/abi_092002.htm (reporting that "an increasing number of offices are now reviewing all Chapter 7 petitions for substantial abuse and other indicia of problems. This

found that all United States trustee office respondents reported some method of screening chapter 7 cases, with 30% screening exclusively on the basis of ability to pay and the rest considering a variety of factors.[16] The possibility that cases already were being screened is consistent with studies estimating that a statutory means test applied to today's filers would not produce a lot of presumptively abusive cases.[17] Fourth, debtors who otherwise might have presumptively abusive cases can alter the outcome of the means test by incurring more secured debt or making charitable contributions, leaving the United States trustee or creditors to seek dismissal of their cases on generic grounds similar to those that existed under prior formal law.[18]

Of course, the means test consumes only a tiny fraction of the long omnibus bill and of the revisions to the Code. Those who have refrained from studying the bill until final passage are likely to be surprised by the range and apparent magnitude of changes that they find. At least in theory, provisions that directly alter the cost of a bankruptcy filing could have a more significant impact in engineering debtors' choices. Although revisions to the Judicial Code permit courts to waive filing and related fees for the lowest-income chapter 7 filers,[19] other revisions significantly raise the basic filing fee for chapter 7 from $155 to $220 while they lower the basic chapter 13 fee from $155 to $150.[20] The revised Bankruptcy Code permits providers of mandatory credit counseling and financial education courses to charge bank-

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has resulted in more debtors converting their cases to Chapter 13 and more dismissals of Chapter 7 cases, either by the court or by debtors who voluntarily dismiss their cases when the U.S. Trustee scrutinizes their income and expenses."); Lawrence Friedman, Director, *Executive Office for United States Trustees, A New Approach to Accountability in the Bankruptcy System*, AM. BANKR. INST. J., June 2002, *available at* http://www.usdoj.gov/ust/press/articles/abi_062002.htm ("all of our offices are reviewing Chapter 7 petitions for evidence of fraud and abuse").

[16]*See* Wayne R. Wells, Janell M. Kurtz, & Robert J. Calhoun, *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 CLEV. ST. L. REV. 15, 43 (1991).

[17]*See* sources cited *infra* notes 84-85.

[18]*See* 11 U.S.C. § 707(b)(1) (2005) (prohibiting courts from taking into account charitable contributions when determining whether case is abusive under any portion of section 707(b)); *id.* § 707(b)(2)(iii) (permitting deduction for secured debt payments owed within sixty months following the date of the petition for purpose of presumed abuse determination); *id.* § 707(b)(3) (providing grounds that court shall consider under section 707(b)(1), including totality of circumstances).

[19]*See* 28 U.S.C. § 1930(f) (2005) (permitting court to waive chapter 7 filing fee, and additional fees, if the court finds that the individual has income less than 150% of the "official poverty line" and is unable to pay the fee in installments). *See generally* Ed Flynn & Gordon Bermant, *The Impact of the Coming Fee-waiver Provision*, AM. BANKR. INST. J., July/Aug. 2001 (using sample of no-asset chapter 7 cases filed between 1998 and 2000, finding that "29.7 percent of individual chapter 7 debtors have incomes that are less than 150 percent of the applicable poverty line").

[20]*See* 28 U.S.C. § 1930(a) (2005). *See also* Memorandum from Glen K. Palman, Chief, Bankruptcy Court Administration Division, Administrative Office of the United States Courts to Clerks, United States Bankruptcy Courts regarding Clarification of Effective Date of Statutory Fee Increases and Reallocation of Fees for Bankruptcy Cases to October 17, 2005 (May 13, 2005) (on file with author) (providing fee schedule to reflect changes in omnibus bankruptcy bill and supplemental appropriations bill). The debtor must pay other fees in addition to the filing fee. *See id.*; 28 U.S.C. § 1930(b)-(d) (2000).

ruptcy filers a "reasonable fee."[21] In addition, the revisions to the Bankruptcy Code may lead debtors' lawyers to raise their own fees considerably, assuming they continue to represent debtors at all.[22]

The revised Bankruptcy Code also offers less debt relief across the board, even to chapter 7 filers who do not have presumptively abusive cases under the means test and to chapter 13 filers who manage to complete repayment plans. The revisions to the Code make a broader range of debts presumptively or absolutely non-dischargeable, including for-profit student loans, credit card debts, credit card cash advances, and property settlements not in the nature of support.[23] Debtors who finish chapter 13 repayment plans no longer will have earned a substantially broader "superdischarge" than chapter 7 debtors.[24] Discharges are available less frequently for all personal filers.[25]

The formal rules for keeping property subject to security interests also have changed. According to the revised Bankruptcy Code, lien avoidance is

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[21]An individual's eligibility for bankruptcy is conditioned on receipt of a nonprofit credit counseling briefing within 180 days before filing. *See* 11 U.S.C. § 109(h) (2005). The requirement does not apply if the United States trustee or bankruptcy administrator determines that available services are inadequate, *id.* §§ 109(h)(2)) & 111, if a debtor satisfies the requirements for a temporary exemption, *id.* § 109(h)(3), or if a debtor satisfies the requirement for one of the "status" exceptions. *Id.* § 109(h)(4) (rendering eligibility requirement inapplicable if the debtor is on active military duty in a military combat zone or is unable to complete the requirements because she fits statutory definition of incapacity or disability). The service providing the briefing may charge a reasonable fee but must provide the briefing "without regard to ability to pay the fee." *Id.* § 111(c)(1)(B). Completion of a financial management course is a condition of a chapter 7 and chapter 13 discharge, subject to exceptions similar to those for credit counseling. *Id.* § 727(a)(11); *id.* § 1328(g); *id.* § 111. For a discussion of the implications of these provisions, see *infra* text associated with notes 70-80.

[22]*See, e.g.*, 11 U.S.C. § 101(12A) (2005) (defining debt relief agency to include lawyers); *id.* § 526-528 (regulating debt relief agencies and their communications with clients and imposing sanctions); *id.* § 707(b)(4)(B) (lawyer sanctions); *id.* § 707(b)(4)(C) (importing Rule 11 requirements); *id.* § 707(b)(4)(D) (providing that "signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."). *See generally* Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 441-442 (2002); Catherine E. Vance, *Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition of Sanctions Against Debtors' Counsel*, 106 COM. L. J. 241 (2001); M. Clarkson McDow, *The Bankruptcy Reform Act of 2001 and its Impact on Consumer Lawyers*, S.C. LAWYER, July/Aug. 2001, at 32; Hon. A. Thomas Small & Hon. Eugene R. Wedoff, *A Proposal for More Effective Bankruptcy Reform*, at 5 *available at* http://www.abiworld.org/pdfs/LegisProposal256.pdf (noting that requiring attorneys to investigate schedule accuracy, when debtors already have obligation to provide complete and accurate disclosure raises costs of legal representation and interferes with attorney-client relationship).

[23]*See, e.g.*, 11 U.S.C. § 523(a)(2)(C) (2005) (presumptive fraud of credit card debts and cash advances); *id.* § 523(a)(8)(B) (for-profit student loans); *id.* § 523(a)(14)(A) (debts incurred to pay state or local taxes); *id.* § 523(a)(14)(B) (fines or penalties imposed under Federal election law); *id.* § 523(a)(15) (property settlements nondischargeable without affirmative defense or balancing test); *id.* § 523(a)(18) (loans to pension plans). *See generally* Hon. William Houston Brown, *Taking Exception to a Debtor's Discharge: The 2005 Bankruptcy Act Makes it Easier*, 79 AM. BANKR. L. J. 419 (2005).

[24]*See* 11 U.S.C. § 1328(a) (2005) (limited discharge after chapter 13 plan completion).

[25]*See id.* § 727(a)(8) (extending time between receipt of discharges to eight years); *id.* § 1328(f) (new restrictions on granting discharge in chapter 13 based on receipt of discharge in prior case).

available for only a limited list of household items,[26] the price to redeem property has increased,[27] non-consensual "ride-through" for personal property is prohibited,[28] and new procedures for reaffirmation agreements are in place.[29] The revised Code also appears to increase the price of keeping property in chapter 13 in numerous respects.[30]

Other revisions increase protection of debtors' assets but only to the extent they hold their wealth in particular forms. For example, the revised Bankruptcy Code insulates qualified retirement and educational funds from the reach of creditors.[31] And, for the small handful of filers with major assets, the revised Code preserves the use of generous state law property exemptions in many instances.[32]

Finally, the revisions to the Bankruptcy Code alter the substance and procedure throughout the cases of individual bankruptcy filers. The matters affected by these changes include document production,[33] personal property

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[26] *See id.* § 522(f)(4) (exclusive list of what constitutes "household goods" for purposes of lien avoidance).

[27] *See id.* § 506(a)(2) (imposing standard of replacement value, without deductions for costs of sale or marketing, for personal property subject to security interest for debtor in chapters 7 or 13). *See also id.* § 722 (clarifying that debt must be paid in full at time of redemption).

[28] *See id.* § 521(a)(6) (setting forth exclusive list of options for property subject to security interests and consequences of failing to act on intention); *id.* § 365(h) (providing automatic stay-related implications for failure to file statement of intention or to act on statement of intention).

[29] *See id.* §§ 524(k) - (m).

[30] Most significantly, several revisions to the Bankruptcy Code further limit the ability of a chapter 13 plan to modify undersecured claims over the objection of the lender. Modification refers to the ability to limit the secured claim to the value of the collateral and to pay 100% of that claim, and to treat the remainder of the debt as unsecured and entitled to a pro rata share of the debtor's disposable income. *See generally* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 900, 920-924 (1997). The revised Code disallows modification of purchase money obligations secured by cars if the debt was incurred within 910 days prior to the bankruptcy filing, and disallows modification of obligations secured by "any other thing of value" if the debt was incurred within one year before the bankruptcy filing. *See* 11 U.S.C. § 1325(a) (2005). The revised Code also clarifies that debts secured by mobile homes and incidental property fall within the general prohibition of modifying debts secured by a debtor's principal residence. *See id.* § 101(13A) (defining "debtor's principal residence"); *id.* § 101(27B) (defining incidental property). For the general prohibition on modifying loans secured by the debtor's principal residence, see TABB, at 920-924. For secured loans still subject to modification in chapter 13, the revised Code dictates the use of the replacement value standard, without deductions for the costs of sale or marketing. *See* 11 U.S.C. § 506(a)(2) (2005). *Compare* Associates Commercial Corp. v. Rash, 520 U.S. 953, 965 n.6 (1997) (providing that replacement value was standard, but "creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning").

[31] *See, e.g.,* 11 U.S.C. § 522(b)(3)(C) (2005) (retirement savings exemption for debtors in opt-out states); *id.* § 522(d)(12) (new provision for debtors using federal exemptions), *id.* § 522(n) (limitation for IRAs); *id.* § 541(b)(5) (exclusion from property of estate for qualified education accounts). The bill furthers this insulation of retirement assets by protecting a debtor's ability to repay a loan to her pension plan. *See id.* § 362(b)(19) (exception to automatic stay for withholding of wages for pension loan repayment), § 523(a)(18) (exception to discharge for debt to pension plan).

[32] *See id.* § 522(o)-(q) (imposing limitations in the delineated circumstances).

[33] *See id.* § 521(a) - (j).

leases,[34] residential leases,[35] chapter 13 "adequate protection" payments,[36] disposable income calculations,[37] the entry of discharges in chapter 13,[38] the maintenance of the automatic stay in a second (or third) bankruptcy case,[39] and significant aspects of chapter 11.[40]

While the omnibus bill producing these changes was pending in Congress, supporters and others offered various assessments of the impact of these changes. Academics and bankruptcy professionals critical of the bill regularly predicted a major, and usually negative, impact on the personal bankruptcy system and the filers themselves.[41] Presumably believing that the chapter 7 means test was the key change, Congressional supporters sometimes stated that the bill would not alter bankruptcy other than for a small number of high-income filers.[42] Other supporters pronounced that the revisions would

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[34]*See id.* § 362(h); *id.* § 521(d).

[35]*See id.* § 362(b)(22)-(23); *id.* § 362(l) -(m).

[36]*See id.* § 1326(a)(C).

[37]*See id.* § 1325(b)(2)-(3).

[38]*See id.* § 1328(h) (requiring hearing on whether section 522(q) is implicated). The rules of construction of the Bankruptcy Code suggest that the hearing may not be required if notice is properly provided. *See* 11 U.S.C. § 102(1) (2000) (explaining meaning of notice and hearing).

[39]*See* 11 U.S.C. § 362(c) - (d) (2005) (limited automatic stay for repeat filings).

[40]*See, e.g., id.* § 1115 (new provision making all postpetition earnings property of the estate); *id.* § 1123(a)(8) (new condition of confirmation involving payment of all future earnings); *id.* § 1129(a)(15) (new condition of confirmation linked to satisfaction of chapter 13 requirements).

[41]*See, e.g.,* Jean Braucher, *Middle Class Knowledge*, 21 EMORY BANKR. DEV. J. 193, 197 (2004) (reviewing ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003)) (explaining that "legislation would burden all would-be filers, leaving more debtors to continue to be hounded by debt collectors into paying small amounts of what they owe."); Braucher, *Means Testing Consumer Bankruptcy, supra* note 22, at 430, 433 (legislation "would burden even the worst off, while leaving some inequities and potential abuse in place, and risk bringing the system to its knees with new, often pointless paperwork" and that her "examination of the provisions of the proposed legislation will focus on demonstrating that they are complex and confusing and would burden even those debtors most in need of a fresh start, without catching all abuse . . ."); Walter W. Miller, Jr., *The Proposed "Bankruptcy Abuse Prevention and Consumer Protection Act of 2002,"* 22 ANN. REV. BANKING & FIN. L. 301, 308 (2003) (explaining that bill would exclude "uninformed, and genuinely needy" from bankruptcy protection and describing bill as "harmful to consumers"); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?* 18 BANKR. DEV. J. 1, 5-6 (2001) ("Bankruptcy reform in its current form is draconian for those financially vulnerable 'fragile middle class' debtors who have been the most in need of bankruptcy relief"); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L. J. 361 (2003); Jean Braucher & Charles W. Mooney, Jr., *Means Measurement Rather Than Means Testing: Using the Tax System to Collect from Can-Pay Consumer Debtors after Bankruptcy*, AM. BANKR. INST. J., Feb. 2003, at 6 ("the predictable effect would be to drive up fees of lawyers and document-preparers. Some of the worst-off debtors would be unable to afford a bankruptcy discharge"). *See generally* Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301, 303-304 (2004) (noting academics' general opposition to the bill even though they accepted prevailing conceptions of abuse). *But see* Todd J. Zwyicki, *An Economic Analysis of Consumer Bankruptcy*, George Mason Working Paper (2005) (arguing that generous bankruptcy laws impose economic and noneconomic costs and that bankruptcy laws must strike proper balance).

[42]*See, e.g.,* 151 CONG. REC. S2054 (daily ed. Mar. 4, 2005) (statement of Sen. Sessions) ("But on the question of, What about the changes? How does it impact a person who would go and file in bankruptcy?

bring a big shift in bankruptcy, or at least a big cost savings for non-bankrupt American families.[43] The Executive Office For United States Trustees' website reports that enactment of the bill "opens a new era in the history of bankruptcy law and practice."[44]

Most, although not all, of these positions could find some support in the Code revisions. Yet, the extent to which these various predictions actually come to fruition depends on many factors, discussed in Part II.

II. STATUTORY BANKRUPTCY REFORM AND REAL PEOPLE: THE DAY-TO-DAY SYSTEM ACTORS

> Local legal culture is not just dust in the national legal machine. In fact, it may be a significant element of the legal landscape. Failure to account for it causes policy debates as well as legal reforms to fall wide of their marks.[45]
>
> Thus, it is never the case that the legal system of any country is uniform, unified, and able to cover the whole country

We know that 80 percent of the people who file for bankruptcy make below median income. That means under the provisions of this bill, no fundamental changes will occur."); 151 CONG. REC. H2066 (daily ed. Apr. 14, 2005) (statement of Rep. Jim Moran) ("It is estimated that only a small minority of those already filing for bankruptcy would be affected, perhaps as little as 7 percent. Contrary to some reports, families and individuals facing difficult economic circumstances, people who may have lost their job or family breadwinner or have been devastated by a severe medical condition, will be given a chance to clear their debts and receive a fresh start under this bankruptcy reform legislation."); Press Release, Representative Ed Royce, House Passes Bankruptcy Reform Bill (Mar. 19, 2005) *available at* http://www.royce.house.gov/News/DocumentSingle.aspx?DocumentID=2604 ("This reform protects the rights of those who truly need and deserve a fresh start as determined by legal standard. Those who fall below the median threshold, as well as those with extraordinary circumstances like medical expenses, will not be subject to any change from current law."); News Release, Opening Statements of Sen. Chuck Grassley at the Bankruptcy Reform Hearing, Feb. 10, 2005, *available at* http://grassley.senate.gov/index.cfm?FuseAction=pressReleases.Detail&PressRelease_id=4878&Month=2&Year=2005 ("The fact is S. 256 doesn't harm bankrupts with large medical debts.").

[43]*See, e.g.*, 151 CONG. REC. H2047-48 (daily ed. Apr. 14, 2005) (statement of Rep. Sensenbrenner) ("This legislation represents the most comprehensive reforms of the bankruptcy system in more than 25 years. . . This bill will help stop fraudulent, abusive, and opportunistic bankruptcy claims by closing various loopholes and incentives that have produced steadily cascading claims."); 151 CONG. REC. H1980 (daily ed. Apr. 14, 2005) (statement of Rep. Dreier) ("On average, passage of this legislation will save a family of four $400 a year, and $400 a year is a very important amount of money for an awful lot of people in this country, and that is the price that they are paying because of the abuse that we have seen of our bankruptcy law that has been going on for years and years and years.").

[44]Executive Office For United States Trustees, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, *available at* http://www.usdoj.gov/ust/bapcpa/index.htm (reporting on new law).

[45]Sullivan, Warren & Westbrook, *Local Legal Culture*, *supra* note 10, at 865. *See also* Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Consumer Bankruptcy in the United States: A Study of Alleged Abuse and of Local Legal Culture*, 20 J. CONSUMER POL'Y 223, 225 (1997) ("these data suggest that, while formal law is an important determinant of the U.S. bankruptcy system, local legal cultures have developed that create different bankruptcy systems among the districts").

> like a smooth coat of paint.[46]
>
> Complex written law can produce a determinate system, but cannot control what it will be.[47]

Informed by a variety of bankruptcy and non-bankruptcy studies, many academics share the belief that the bankruptcy system is not simply imposed on judges, trustees, lawyers, and other repeat players; instead, these parties make the system what it is today.[48] Bankruptcy may be especially susceptible to shaping by the day-to-day actors because the vast majority of cases yield no formal litigation, let alone appeals.[49] Whether one prefers a precise model of local legal culture or a more generalized recognition of the role of real people, this inevitable shaping and filtering complicate statute-centered assessments of the future of bankruptcy. Indeed, as is discussed later in this section, the latest revisions may invite system players to shape the system much more than Congress anticipated.

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[46]Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 67 (1996).

[47]LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1549.

[48]*See, e.g.*, Rafael Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 EMORY BANKR. DEV. J. 351, 352-53 (2004) ("Law and society scholars attribute some of the disparity between the formal laws and the laws in actions [sic.], as well as the substantial local variations in the implementation of the laws, to the influence of legal culture. . . . Researchers sometimes use legal culture to explain apparent disparities between formal laws and the actual implementation of the laws on the ground."); LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1508 ("The examples I present here are only a small sample from a large body of empirical studies showing deviation of the law in action from the law on the books. I refrain from presenting more only because the existence of substantial deviations is not in dispute."); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 1003 (2004) (explaining that "most bankruptcy lawyers and bankruptcy judges use, apply, argue, and shape bankruptcy law primarily as actors 'on the ground.' It is in the bankruptcy courts, and within negotiations in the courts' shadows, where bankruptcy law is made and shaped by a particular legal culture. Bankruptcy law in a given bankruptcy court also is a function of the attitudes of bankruptcy judges, who have substantial control over the fate of a case."); David A. Skeel, Jr., *Bankruptcy's Home Economics*, 12 AM. BANKR. INST. L. REV. 43, 56 (2004) (explaining that use of chapter 13 has been determined more by local legal culture than by other factors); Trujillo, *supra* note 4, at 509-515; Jay Lawrence Westbrook, *Local Legal Culture and the Fear of Abuse*, 6 AM. BANKR. INST. L. REV. 25, 26-27 (1998).

[49]For example, in the year ending September 30, 2003, parties filed fewer than 100,000 adversary proceedings in bankruptcy cases - and even this was a significant increase compared to prior years—notwithstanding a total bankruptcy caseload of over 1.5 million. *See* Judicial Business of the Federal Courts, The Third Branch, Mar. 2004, *available at* http://www.uscourts.gov/ttb/mar04ttb/substantial/ ("For the year ending September 30, filings of adversary proceedings jumped 31 percent in 2003 to 96,809, the highest number reported in 20 years."). In fiscal year 2004, parties filed fewer than 3,000 bankruptcy appeals with the United States district courts, again notwithstanding the overall filing statistics. *See* United States District Court, Civil Cases Filed By Nature of Suit, tbl. 2.2, *available at* http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf In the five circuits that have Bankruptcy Appellate Panels, parties filed around 1,000 appeals annually in 2003 and 2004. *See* Judicial Business of the United States Courts 2004, 122 tbl. B-10, *available at* http://www.uscourts.gov/judbus2004/contents.html. *See generally* Elizabeth Warren, *Vanishing Trials: The Bankruptcy Experience*, 1 J. EMPIRICAL LEGAL ST. 913 (2004).

Well before Congress started considering the omnibus bankruptcy bill, researchers were observing significant local variation in and deviations from formal bankruptcy law.[50] For example, a researcher reported that chapter 13 plans in one city in the early 1980s lasted for seven, eight or nine years even though the Bankruptcy Code said then (and now) that courts may not approve plans for longer than five.[51] Several researchers have found judges and trustees who impose on chapter 13 plans an unsecured debt repayment requirement - 10% in some places, 100% in others - that appears to be entirely extra-statutory.[52] Examples of existing deviations of this nature could fill this entire journal symposium.

Congress did not outlaw local culture when it passed the 2005 omnibus bankruptcy bill. Even with its hundreds of amendments, the bill changed neither the overarching structure of the system nor the fundamental roles of the day-to-day actors, although it adds a few actors to the mix, such as credit counselors and financial management course providers. Two implications flow from this. First, in the absence of very explicit resolution, existing variations and deviations of the nature noted above likely will persist.[53]

Second, the revisions themselves may look quite different once filtered through the influences of the day-to-day actors. In some instances, financial constraints may dictate a different result than that anticipated by the revisions. For example, the Bankruptcy Code revisions change the way that chapter 13 plans deal with car loans.[54] Under former law, a plan could be confirmed over a car lender's objection if the debtor promised to pay 100% of the value of the car with interest and to pay a pro rata share of any remainder

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[50]*See, e.g., supra* sources cited in note 48.

[51]*See* Marjorie L. Girth, *The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals*, 65 IND. L. J. 17, 44 (1989-1990). The statutory reference to the length of plans at the time of Girth's study was 11 U.S.C. § 1322(c) (1988). *See* Girth, at 44 n.175. The reference is now 11 U.S.C. § 1322(d), and also has been changed to enable five year plans without showing cause for above-median income debtors. *See* 11 U.S.C. § 1322(d) (2005).

[52]*See, e.g.*, Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices - A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 166 n.3, 174, 178 (1997) [hereinafter *Counseling Consumer Debtors*]; Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L. J. 501, 532-534 (1993) [hereinafter *Lawyers and Consumer Bankruptcy*] (study of lawyers and consumer bankruptcy in four cities, including incentives to promise high repayment in chapter 13); LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1506-1507; Sullivan, Warren & Westbrook, *Local Legal Culture*, *supra* note 10, at 817 ("How much the debtors repay is subject to wide variation. From the start, debtors vary greatly in how much they promise to pay, and courts vary in what levels of promised repayment they will approve. At times one hundred percent payment is promised, and at other times, unsecured creditors are promised no payment at all."); id. at 832, fig. 5, 833 (showing variation in chapter 13 repayment promises by district); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L. J. 397, 410-412 (1994); Report of the National Bankruptcy Review Commission 267-268 (1997) [hereinafter Commission Report].

[53]*See* LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1515-1516.

[54]*See* sources cited *supra* note 30.

out of disposable income.[55] The revised Code no longer supports this approach for purchase money car loans securing debts incurred within 910 days prior to the bankruptcy filing.[56] If a chapter 13 filer wishes to keep the car over the lender's objection, the filer must pay the debt in full, plus interest, regardless of the worth of the car.[57]

Perhaps those who sought these changes assumed debtors will pay whatever it takes to keep their cars. Maybe they will be right. But maybe chapter 13 filers will propose to surrender their cars in chapter 13,[58] or simply allow lenders to repossess and liquidate their collateral because they can neither get a plan confirmed nor complete it.[59] Lenders may not want to deal with all of these used cars. If that is the case, lenders and debtors may make deals resembling the old formal law of chapter 13: the debtor will retain the car and pay something less than the full value over time with interest. If this happens, chapter 13 will not be the same as before—the statutory change has reduced debtors' leverage—but it will not be as different as the revised statutory language suggests.

Similarly, the revised Bankruptcy Code requires that chapter 13 filers make adequate protection payments directly to secured creditors but provide detailed evidence of these payments to the trustee so they can deduct these amounts from later plan distributions.[60] When put into practice, this could present accounting difficulties and confusion that hampers payments to the very creditors the provision was designed to assist. At least in some districts, secured creditors may decide they are better off if adequate protection payments are funneled through the trustee's office. Demanding direct receipt, as the revised Code entitles them to do, may or may not be in creditors' best interest, and their best interest probably will dictate whether substantive and procedural changes in the Code produce big changes in real life.

In other circumstances, the revisions to Bankruptcy Code may not be sufficiently absolute to overcome deep-seated beliefs among the day-to-day players. For example, the statute restricts application of the automatic stay to repeat filers.[61] Under this provision, if a debtor files a second case within

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[55]*See* 11 U.S.C. § 1325(a)(5)(B) (2000); TABB, *supra* note 30, at 922. For the method of determining the appropriate interest rate in this situation, see Till v. SCS Credit Corp., 541 U.S. 465 (2004).

[56]*See* 11 U.S.C. § 1325(a) (2005) (providing exception to general approach to valuation of secured claims). The language was added to the very end of subsection (a), after clause (9).

[57]*See id.*

[58]Surrender of the property without the consent of a lender is a method of obtaining confirmation of a chapter 13 plan. *See id.* § 1325(a)(5)(C).

[59]*See* Melissa B. Jacoby, *Collecting Debts from the Ill and Injured; The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 258 n.129 (2001) (citing chapter 13 trustee survey available on Internet at that time).

[60]*See* 11 U.S.C. § 1326(a)(1)(C) (2005).

[61]*See id.* § 362(c)(3). This supplements an existing, and rather weak, statutory restriction on eligibility for subsequent chapter 13 filings in a narrow set of cases, *id.* § 109(g), although courts had devised other

one year of the time a prior case was pending, the automatic stay goes into effect for only thirty days.[62] A party in interest can ask the court to extend the automatic stay, but must prove that the filing is in good faith, which in some cases requires overcoming a contrary presumption with clear and convincing evidence.[63] The circumstances that produce this presumption include routine occurrences, such as missing a deadline or a payment in a prior case.[64] Although the provision's application is not limited to chapter 13, these details suggest that its intended effect probably is geared toward that chapter.[65]

At first blush, these revisions appear to deter repeat filings for at least a year; overcoming this presumption looks difficult and debtors with inflexible jobs may find it difficult to attend such hearings.[66] However, in some locations, the belief in second (and third) chances in chapter 13 is probably quite strong, especially if system actors think that chapter 13 promotes values like repayment and fulfilling commitments.[67] These beliefs presumably are what motivate courts and trustees to impose the extra-statutory unsecured debt repayment requirements mentioned earlier,[68] and to permit cases to go on for much longer than the statutory limit.[69] Unless a secured creditor is convinced that debtors have no chance of success and is willing to spend money to enforce the provision rigorously, local beliefs about the utility of chapter 13 probably will shape whether the new rules on repeat filings have a deterrent effect or whether they serve as a slight hindrance to business as usual.

In other instances, the drafters wrote revisions to the statute that are destined for variable application on rather significant matters. For example, as noted earlier, the revised Code requires a credit counseling briefing as a

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methods of dealing with abusive repeat filings. *See, e.g.*, Susan L. DeJarnatt, *Once is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L. J. 455, 467-468 (1999).

[62]*See* 11 U.S.C. § 362(c)(3)(A) (2005). A third case within the year produces no automatic stay at all, subject to the debtor successfully requesting that a stay be imposed. *See id.* § 362(c)(4). The bill contains a separate exception to the automatic stay to protect secured creditors from filings that repeatedly are designed only to prevent foreclosure with no intent to cure the default on the loan. *See id.* § 362(d)(4).

[63]*See id.* § 362(c)(3)(B), (C).

[64]*See id.*

[65]For data on chapter 13 repeat filings, see, e.g., sources cited *infra* note 110.

[66]With the belief that the changes would be potent deterrents, some commentators who believe repeat filings generally are legitimate have expressed concern about these provisions. *See, e.g.*, DeJarnatt, *supra* note 61, at 467-468. On the other hand, deterrence of repeat filings would seem like a positive development to those who believe that the system over-uses dismissal with the expectation of a subsequent, that troubled repayment plans should be modified rather than dismissed, or that some districts' high chapter 13 counts are inflated by the same families filing multiple times. *See, e.g.*, Commission Report, *supra* note 52, at 276-279.

[67]Courts routinely dismiss chapter 13 cases for a variety of reasons, including failure to comply with administrative requirements or the incurrence of new debt, with the anticipation that the debtor will file another petition in the near future. *See, e.g.*, Commission Report, *supra* note 52, at 276- 279.

[68]*See supra* text associated with note 52.

[69]*See supra* text associated with note 51.

condition of bankruptcy eligibility and completion of a financial management course as a condition of discharge, both of which may impose an unspecified "reasonable fee" on debtors.[70] Providers are not supposed to refuse services based on debtors' inability to pay this fee, but they face no impediment to charging and billing the debtors once they have provided the services.[71] These eligibility and discharge requirements do not apply at all if the United States trustee for that district determines services are insufficient.[72] The United States trustees are expected to regulate these providers amidst a huge array of other new responsibilities.[73] Credit counselors need to be nonprofit to be on the approved list for bankruptcy,[74] but providers of financial management courses do not.[75]

Whether or not sound policy justifications explain these details, they make the impact of these two new requirements quite uncertain and dependent on how the day-to-day actors put them into place. The willingness of private nonprofit credit counselors to provide these services at all may depend on how many of their clients file for bankruptcy and discharge the counseling fee.[76] If offering these services to potential bankruptcy filers becomes undesirable, counselors may abandon the enterprise or charge an impossibly high fee to deter usage. United States trustees may have little choice but to declare services insufficient in certain districts, which, according to the statute, makes the eligibility requirement ineffective.[77] On the other hand, debtor's lawyers may decide to become nonprofit credit counselors, offer inexpensive briefing services over the Internet or telephone, and ensure pay-

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[70]*See* sources cited *supra* note 21.

[71]*See* 11 U.S.C. § 111(c)(2)(B) (2005); *id.* § 111(d)(1)(E).

[72]*See id.* § 109(h)(2)(A) (making briefing requirement inapplicable to debtors who reside in a district for which a U.S. Trustee or bankruptcy administrator determines that approved providers "are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies"); *id.* § 727(a)(11) (providing similar exception for financial management course requirement); *id.* § 1328(g)(2) (providing similar exception).

[73]*See, e.g.*, Executive Office For United States Trustees, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, *available at* http://www.usdoj.gov/ust/bapcpa/index.htm (summarizing certain new duties of United States trustees); Martha Davis, *Beyond The Bankruptcy Bill; Transparency in the Bankruptcy System*, AM. BANKR. INST. J., Apr. 2001, *available at* http://www.usdoj.gov/ust/press/articles/articles.htm (listing other data collection obligations, many of which will be undertaken by United States trustees).

[74]All references in new section 111 to budget and counseling agencies include the term "nonprofit" *See* 11 U.S.C. § 111(a)-(g) (2005). *See also id.* § 109(h) (also referring to "nonprofit").

[75]Unlike the references to credit counseling, the financial management course references do not include the term "nonprofit." *See id.* § 111(d); *id.* § 727(a)(11); *id.* § 1328(g). Of course, nonprofit status by itself offers few assurances. *See, e.g.*, Christopher Conkey, *Family Finance: Deterrent to Bankruptcy: Counseling: Congress's Overhaul of Code Would Require Sessions Before and After a Filing*, WALL ST. J., Apr. 6, 2005, at D2 ("The mandate for counseling comes amid a wave of scandals within the rapidly growing, largely nonprofit debt-services industry.").

[76]*See generally* 11 U.S.C. § 524(a) (2000) (delineating scope of discharge).

[77]*See* 11 U.S.C. § 109(h)(2) (2005).

ment before the case is filed through collaborating with their former debtor counsel colleagues. In this instance, the provision will be nominally operative, but may not have the tempering effect on the bankruptcy decision that Congress intended.

The personal financial management course requirement has some different details that also are susceptible to variable implementation. Congress could have imposed better controls on the consequences had it first instituted its intended pilot program.[78] The drafters apparently chose otherwise and have implemented the nationwide requirement concurrent with the pilot program.[79] The statute sets the stage for financial management courses to be more lucrative than credit counseling because, as noted above, the providers of financial management courses do not need to have nonprofit status, and they also are less likely to face a discharge of their fees, which are incurred after the filing of the case.[80] This may produce a range of financial management courses in various locations, with a range of associated fees that debtors must pay to emerge from bankruptcy with a discharge.

Like a package dropped from the top of a tall building, a statutory package dropped from Congress onto the bankruptcy system is unlikely to land intact. Even as bankruptcy professionals and judges work to implement the statutory changes faithfully and literally, the nature of legal systems and the details of these particular statutory changes practically dictate variable and divergent application. Whether the omnibus bankruptcy bill results in a ripple or a revolution for the personal bankruptcy system will depend on how the Bankruptcy Code revisions are filtered through the influences of the day-to-day actors trying to make the system work.

III. STATUTORY BANKRUPTCY REFORM AND REAL PEOPLE: PERSONAL BANKRUPTCY CANDIDATES

Perceptions of bankruptcy filers and perceptions of the omnibus bill often are linked. Those who believe filers have modest means and legitimate circumstances tend to doubt the desirability of the statutory revisions.[81] The

[78]Section 105 of S. 256 implements a six-district, 18-month pilot program for financial management courses under the guidance of the Director of the Executive Office for United States trustees. *See* BAPCPA, *supra* note 1, § 105. *See generally* Jonathan Fox, Suzanne Bartholomae, & Jinjook Lee, *Building the Case for Financial Education*, 39 J. CONS. AFF. 195, 199 (2005) ("The common challenge facing organizations offering financial education is the need to show that their programs make a difference."); *id.* at 208 ("Currently, financial education programs often omit evaluation as a component of their program design.").

[79]*See* BAPCPA, *supra* note 1, § 106.

[80]*See generally* 11 U.S.C. § 524(a) (2000) (delineating scope of discharge).

[81]*See, e.g.*, Charles J. Tabb, *Of Contractarians and Bankruptcy Reform: A Skeptical View*, 12 AM. BANKR. INST. L. REV. 259, 262 (2004) (arguing that the case for means testing and other restrictions have not been made, partly due to modest profiles of existing filers). By contrast, those who believe that the legislation will have a positive effect tend to believe that the profiles do not explain the filing trends and

existing studies of bankruptcy filers do call into question the need for major restrictions in bankruptcy relief. Yet, it is possible to believe that filers have modest means and legitimate circumstances but to reserve judgment on whether the legislation will have a negative impact. The reason for reserving judgment is that the effectiveness of bankruptcy currently does not enjoy a wealth of empirical support.[82]

Whether intentionally or accidentally, proponents of means testing and related proposals have narrowed the empirical research agenda involving personal bankruptcy filers.[83] They repeatedly have emphasized that some chapter 7 filers could repay their debts if required to do so and have commissioned various studies to support this assertion.[84] Academic and government researchers have, in turn, invested time, energy, and available financial resources in evaluating the methodology of these "can they pay" studies and in producing and analyzing other datasets focused on the circumstances of bankruptcy filers.[85] The ongoing scramble to respond to repeated allegations of

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prefer to use other criteria in judging the utility of the reforms. *See, e.g.*, Zywicki, *supra* note 41 (arguing that commonly cited circumstances leading to bankruptcy cannot explain filing trends).

[82]Systematic empirical research on how the bankruptcy system works has made great strides but the studies still are too few and far between. *Compare* Jay Lawrence Westbrook, *Empirical Research in Consumer Bankruptcy*, 80 TEX. L. REV. 2123, 2124 (2003) [hereinafter *Empirical Research*] ("Bankruptcy is a field in which there has been a relatively substantial amount of empirical work, especially in the last twenty years.") *with* Lynn M. LoPucki, *The Politics of Research Access to Federal Court Data*, 80 TEX. L. REV. 2161 (2002) [hereinafter *Politics of Research Access*] (arguing that there have been too few studies of bankruptcy, that court system hinders magnitude and content of research, and that Sullivan, Warren, and Westbrook "have completely dominated the field during [the last twenty years], producing what I estimate to be more than ninety percent of the work"). *See generally* Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 LAW & CONTEMP. PROBS. 195 (1987) (noting limits of reliance on episodic studies).

[83]*See* Westbrook, *Empirical Research*, *supra* note 82, at 2136 ("The agenda for empirical research in consumer bankruptcy over the last twenty years has been largely set by the opponents of the allegedly pro-debtor structure created by the 1978 Bankruptcy Code."); *id.* at 2140 (making similar assertion).

[84]*See, e.g.*, Credit Research Center, Krannert Graduate School of Management, Purdue University, Consumer Bankruptcy Study (1982); Tom Neubig et al., Ernst & Young, LLP, Chapter 7 Bankruptcy Petitioners' Ability to Repay: Additional Evidence from Bankruptcy Petition Files (Feb. 1998); WEFA Group Planning Servs., The Financial Costs of Personal Bankruptcy (Feb. 1998); John M. Barron & Michael E. Staten, Credit Research Center, Georgetown Sch. of Bus., Personal Bankruptcy: A Report on Petitioners' Ability To Pay (1997).

[85]*See, e.g.*, Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 WIS. L. REV. 1091 (1983); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Rejoinder: Limiting Access to Bankruptcy Discharge*, 1984 WIS. L. REV. 1087 (1984), TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS; BANKRUPTCY AND CONSUMER CREDIT IN AMERICA (1989) [hereinafter AS WE FORGIVE OUR DEBTORS]. *See also* Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31 (1999) [hereinafter *Test Drive*] (concluding that 3.6% of the sample debtors would have presumptively abusive cases under earlier proposed means test legislation, but explaining why this estimate was quite optimistic); U.S. Gen. Accounting Office, Personal Bankruptcy: The Credit Research Center Report on Debtors' Ability to Pay, GAO/GGD-98-47 (Feb. 1998); U.S.

chapter 7 debtors' ability to pay has left little resources for other projects, especially given the difficulties involved in collecting data relating to the bankruptcy system.[86]

The "can they pay" focus of the research has resulted in significant developments in our understanding of bankruptcy filers' situations at the time of filing.[87] Sullivan, Warren, Westbrook and other collaborators have found personal bankruptcy filers with very low incomes, significant indebtedness, and seemingly legitimate problems that fueled their financial distress.[88] Other studies offer less information about the debtors' circumstances, but reveal similar information about their financial profiles.[89] The findings of these studies make some lawmakers' characterizations of bankruptcy filers seem incongruous.[90]

Gen. Accounting Office, Personal Bankruptcy: The Credit Research Center and Ernst & Young Reports on Debtors' Ability to Pay, GAO/T-GGD-98-79 (March 12, 1998); U.S. Gen. Accounting Office, Personal Bankruptcy Analysis of Four Reports on Chapter 7 Debtors' Ability to Pay, GAO/GGD-99-103 (June 1999); Congressional Budget Office, Personal Bankruptcy: A Literature Review 23-30 (Sept. 2000); Gordon Bermant & Ed Flynn, *Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors*, AM. BANKR. INST. J., Jan. 1999, at 8.

[86]*See infra* sources cited in note 111.

[87]Indeed, Sullivan, Warren and Westbrook may never have gotten together had they not felt the need to respond to and critique the methodology of a "can they pay" study. *See* Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981-1991*, 68 AM. BANKR. L. J. 121, 122 n.5 (1994) [hereinafter *Consumer Debtors Ten Years Later*].

[88]*See, e.g., id.*, at 129 -130, 134-139 (reporting on 1981 and 1991 income, assets, and debt-income ratios); Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L. J. 115, 124-125 (2003) (reporting on 2001 data). The research also explores the types of problems debtors reported when they filed. *See generally* AS WE FORGIVE OUR DEBTORS, *supra* note 85; TERESA A. SULLIVAN, ELIZABETH WARREN, & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS; AMERICANS IN DEBT (2000); ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE CLASS MOTHERS AND FATHERS ARE GOING BROKE 81 (2003) (reporting that 87% of 2001 sample reported medical problems, job problems, or family breakup, or some combination of the three).

[89]For example, having studied the petitions and schedules of a nationally representative sample of personal bankruptcy filers in the late 1990s and early 2000s, Bermant and Flynn have found debtors of very modest incomes, significant indebtedness, and limited ability to repay. *See, e.g.*, Ed Flynn & Gordon Bermant, *How Fresh is the Fresh Start?*, AM. BANKR. INST. J., Jan. 2001, at 20; Ed Flynn & Gordon Bermant, *Pre-planning Limits Means Test Impact, Income, Debts, and Repayment Capacities of Recently Discharged Chapter 7 Debtors*, AM. BANKR. INST. J., Feb. 2000, at 22; Ed Flynn & Gordon Bermant, *Demographics of Chapter 7 Debtors*, AM. BANKR. INST. J., Sept. 1999, at 24. Culhane & White's sample of debtors also was a modest and burdened group. *See, e.g.*, Marianne B. Culhane & Michaela M. White, *Debt After Discharge, An Empirical Study of Reaffirmation*, 73 AM. BANKR. L. J. 709, 762 (1999) [hereinafter *Debt After Discharge*]; Culhane & White, *Test Drive*, supra note 85.

[90]*See, e.g.*, News Release, Opening Statement of Sen. Chuck Grassley at the Bankruptcy Reform Hearing, Feb. 10, 2005, *available at* http://grassley.senate.gov/index.cfm?FuseAction=pressReleases.Detail&PressRelease_id=4878&Month=2&Year=2005 ("When I started working on this issue, it was considered a scandal that bankruptcies might reach 1.4 million. Guess what? In 2004, there were 1.6 million. Congress has wasted time and we still have a bankruptcy crisis on our hands. . . . Most people think it should be more difficult for people to file for bankruptcy. Americans have had enough; they are

The observation that personal bankruptcy filers are legitimate users of the system is responsive to some important policy questions but not others. First, it does not directly speak to the question of whether bankruptcy maximizes social welfare generally.[91] Second, and more the focus of this discussion, it does not directly speak to the question of whether bankruptcy helps the people who actually file in the long term.[92]

Evaluating whether bankruptcy helps filers in the long term has a comparative component. If bankruptcy filers are a subset of financially distressed households in the working and middle classes, as some researchers believe, then many individuals with similar profiles to bankruptcy filers are dealing with their problems through other methods.[93] Although economic analyses have considered the effect of legal changes on the aggregate filing rate, it remains unclear why some financially distressed people file and others do not, and what happens to the latter group.[94] Some researchers have argued that other laws, whether in a current or modified form, could perform a similar function to bankruptcy and might be effective for individuals with certain kinds of problems.[95] If this were true, the revisions to the Bankruptcy Code would be less consequential. Even researchers who seem to believe that filers are honest and in need of help have expressed the concern that some debtors' lawyers may be too quick to put their clients into bankruptcy rather than

tired of paying for high rollers who game the current system and its loopholes to get out of paying their fair share.... Our current system allows wealthy people to continue to abuse the system at the expense of everyone else. People with good incomes can run up massive debts and then use bankruptcy to get out of honoring them.").

[91] *See, e.g.*, Kartik Athreya & Nicole B. Simpson, *Personal Bankruptcy or Public Insurance?* 3 (Fed. Reserve Bank of Richmond Working Paper No. 03-14, 2003) (considering the impact of permissive bankruptcy laws on moral hazard). For a review of this literature, see Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. (forthcoming 2005).

[92] *See, e.g.*, Mark L. Power, Tahira K. Hira and Roger P. Murphy, *Personal Bankruptcy, A Risk Management Technique: Policy Implications*, 2 RISK MANAGEMENT & INS. REV. 81, 81-82 (1998-99).

[93] *See, e.g.*, WARREN & TYAGI, *supra* note 88 (discussing financial vulnerability of middle class generally); Lawrence M. Ausubel & Amanda Dawsey, *Informal Bankruptcy* (Working Paper Feb. 2002) (studying bankrupt families omits half or more of households in financial collapse). *See also* Scott Fay, Erik Hurst, & Michelle J. White, *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706, 712 tbl. 2 (2002) (from economic analysis of data from Panel Survey of Income Dynamics, reporting that "[o]verall, a much larger proportion of households has an incentive to file for bankruptcy than actually files each year.").

[94] *See, e.g.*, Tashira K. Hira & Kyle L. Kostelecky, *Pilot Study of Consumer Debtors Provides New Insights - What Influences Debtors' Attitudes?*, AM BANKR. INST. J., Apr. 1995, at 1 ("A review of bankruptcy literature shows that no studies have been carried out on the decision making process debtors undertake when determining whether to file for bankruptcy."); Susan Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L. J. 675, 751, n.248 (1991) (noting lack of data on consumers who do not file for bankruptcy, making it difficult to assess how debtor-creditor system is working overall).

[95] *See, e.g.*, Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 140-143 (2004) (discussing changes in state collection law as superior substitute for bankruptcy); Jason J. Kilborn, *Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 OHIO ST. L. J. 855, 888-889 (2003) (arguing that lawyers may be doing debtors a disservice by sending them into bankruptcy system if another approach would suffice).

attempting to negotiate with creditors and exploring alternatives.[96]

Because filers' financial problems do not exist in a vacuum, it is especially important for both researchers and lawyers to compare bankruptcy with alternatives.[97] Consider, for example, filers who have medical-related financial distress.[98] In a recent study, chronic medical conditions were reported by more than half of the debtors who indicated that a medical issue was a "significant reason" for their bankruptcies.[99] In addition to the possibility of continued high personal liability for direct medical costs,[100] the chronic conditions they face may produce repeated income interruption and diminish the inability to save sufficiently for retirement and future emergencies.[101] The tools of bankruptcy can offer short term financial help but have obvious limits here.[102] On its face, bankruptcy seems inferior to other possible social insurance approaches for debtors with health problems that have long-term financial implications.

Comparative analyses should not overlook the wide array of bankruptcy's costs. Although the basic economic measurements of financial benefit and cost sometimes are stated to be the value of debt discharged and assets forfeited,[103] one also should consider issues such as a large outlay for an attorney's fee and related access fees, an increase in the cost of credit, the possibility that parties such as medical providers and insurers will discriminate against them, and the sense of failure associated with a bankruptcy filing.[104]

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[96] *See, e.g.*, Braucher, *Counseling Consumer Debtors*, *supra* note 52, at 172-173, 179 (noting that bankruptcy may not be right approach for debtors even if they have debts they cannot pay, and that lawyers should attempt more negotiation with creditors before filing bankruptcy cases for clients); Kovac, *supra* note 94, at 678. *See generally* David S. Kennedy, R. Spencer Clift III, & Shauna Fuller Veach, *Professionalism in the Legal Profession; The Bankruptcy Attorney as a True Professional*, 33 U. MEM. L. REV. 1, 17-21 (2002).

[97] *See, e.g.*, Feibelman, *supra* note 91.

[98] *See generally* Melissa B. Jacoby, Teresa A. Sullivan, & Elizabeth Warren, *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 408-409 (2001)

[99] *See* David U. Himmelstein, Elizabeth Warren, Steffie Woolhandler, & Deborah Thorne, *Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF. WEB EXCLUSIVE W5-63 (2005).

[100] *See, e.g.*, *id.* at W5-70 (reporting average out of pocket cost of nearly $12,000 among those who participated in the medical-specific component of the first telephone survey in Phase III of the Consumer Bankruptcy Project, with much higher averages among certain subsets of patients).

[101] *See, e.g.*, Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior; An Expanded Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. (forthcoming 2006). *See also* Jacoby, Sullivan & Warren, *supra* note 98, at 408-409 (reporting high correlation between job problem and medical problem). *See generally* SULLIVAN, WARREN, AND WESTBROOK, THE FRAGILE MIDDLE CLASS, *supra* note 88, at 160 (discussing income effects of illness and injury).

[102] *See* Jacoby & Warren, *supra* note 101.

[103] *See* Fay, Hurst & White, *supra* note 93, at 707.

[104] *See generally* Feibelman, *supra* note 91; Tahira K. Hira, *Causes and Effects of Consumer Bankruptcies: a Cross-Cultural Comparison*, 16 J. CONSUMER STUD. & HOME ECON. 229, 229 (1992) [hereinafter *Cross-Cultural Comparison*] ("Bankruptcy has both personal and societal costs. Personal costs may include

The effectiveness of bankruptcy has an absolute component as well. Indeed, it is difficult to embark on comparative questions without having a sense of how individuals fare after bankruptcy.[105] A forthcoming study by Professors Katherine Porter and Deborah Thorne evaluates in-depth post-bankruptcy interviews from the 2001 Consumer Bankruptcy Project, and has the potential to make a substantial contribution to the literature on these questions.[106] In the meantime, existing studies using more limited court data or debtor interviews present mixed results. Some have reported that debtors tend to have improved financial conditions right after bankruptcy, although the method of measurement of financial condition varies.[107] By contrast, fo-

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stress and depression, employment harassment, difficulty in morally accepting bankruptcy, loss of assets, social disapproval, court costs and legal fees."); Kovac, *supra* note 94, at 679, 681, 756; Ausubel and Dawsey, *supra* note 93.

[105]*See, e.g.*, Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net; Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1070 (2004); Hira, *Cross-Cultural Comparison*, *supra* note 104, at 230 ("few studies have focused on exploring the impact of bankruptcy on debtors' social and economic situations"); Power, Hira, & Murphy, *supra* note 95, at 82-83 ("A review of bankruptcy literature shows that none of the studies have reported the long-term personal and financial consequences of filing bankruptcy"); Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy*," 21 U.C.L.A. L. REV. 403 (1973) (noting limited information on rehabilitative consequences of personal bankruptcy); Westbrook, *Empirical Research*, *supra* note 82, at 2147 ("We know very little about consumer bankrupts after they leave the bankruptcy court, except that they rarely file again. We also know that nowadays they are offered credit again quite quickly, often on an unsecured basis. Indeed, some bankruptcy attorneys have reported receiving applications from credit-card companies asking that they be passed along to their bankrupt clients. But the rest is silence."); Marianne B. Culhane & Michaela White, Debtors After Discharge: Fresh Start or Still Deep in Debt?, 2-4 (June 29, 2001) (unpublished manuscript on file with author) (noting that most bankruptcy research has been focused on the front end and stating that "[k]nowledge of the immediate and long-term post-discharge financial picture of debtors is essential in order to design efficient and humane bankruptcy systems addressing the worldwide problem of consumer overindebtedness"). *See also* Larry H. Filer II & Jonathan Fisher, *The Consumption Effects Associated With Personal Bankruptcy*, 71 S. ECON. J. 837 (2005) ("Surprisingly little work has been done on the direct benefits to filing for bankruptcy. This is in contrast with the growing literature on the costs of bankruptcy.").

[106]For a description of the Consumer Bankruptcy Project, see Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1008-9 (2002).

[107]Bermant and Flynn found most debtors in their sample of no-asset chapter 7 cases closed in 2000 had a small positive net worth after discharge. Ed Flynn & Gordon Bermant, *How Fresh is the Fresh Start?*, *supra* note 89. In a small study, Hira found that most debtors reported an improved financial situation immediately after bankruptcy. *See* Hira, *Cross-Cultural Comparison*, *supra* note 104, at 238 (67% reporting they were better off financially, n.108). Hira and Kostelecky conducted a small pilot study involving post-bankruptcy contact, but did not report the debtors' postbankruptcy experiences in detail. *See* Tahira K. Hira & Kyle L. Kostelecky, *Methods of Data Collection from Debtors in Bankruptcy After Discharge: A Pilot Study*, J. FAMILY ECON. & RESOURCE MGMT. BIENNIAL 101 (1995). VISA U.S.A. has interviewed debtors after bankruptcy about their life after bankruptcy, but has limited its publicly available results. *See, e.g.*, Visa U.S.A., Executive Summary, Bankruptcy Qualitative Research, April 1997, available at http://www.abiworld.org/Content/NavigationMenu/News_Room/Research_Center/Bankruptcy_Reports_Research_and_Testimony1/General1/Bankruptcy_Qualitative_Research.htm; Rafael Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. ON POVERTY L. & POL'Y 205, 235 n. 173 (2003) (citing VISA U.S.A. INC., 2000 Life After Bankruptcy Study (2000)).

cusing on debtors who had reaffirmed debts, Culhane and White uncovered a grim picture of this subset of chapter 7 filers:

> The debtor-by-debtor results were as dismal as the district aggregates. Fully 52% of the reaffirming debtors had either zero income or a monthly deficit after reaffirmation payments, and for 16% of the reaffirming debtors, the monthly deficit exceeded $500. . . . Fewer than half of the reaffirming debtors had any income remaining after expenses and reaffirmation payments, and only a third had more than $100 per month left. . . . . More than one in five (22%) signed reaffirmations totaling more than 40% of annual income.[108]

The level of indebtedness also may remain high for the many debtors who drop out of chapter 13 repayment plans prior to completing them.[109] Some data suggest that a notable number of people in bankruptcy file more than one time—probably without having received a discharge the first time—which may signal, among other things, a lack of effectiveness or responsiveness of bankruptcy to their problems.[110]

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[108]Culhane & White, *Debt After Discharge*, *supra* note 89, at 762. *See also* Kovac, supra note 94 (surveying debtors after bankruptcy); Power, Hira & Murphy, *supra* note 105, at 96-99 (conducting longitudinal case study of one individual debtor, who was unsatisfied with how bankruptcy affected him); Marc Rudow, *A Statistical Analysis of Debtor Status in Chapter 7 Petitions in the Western District of North Carolina*, DISCLOSURE STATEMENT (North Carolina Bar Association), Oct. 2004, at 3, 5 (finding on basis of analysis of chapter 7 filers in Western North Carolina that "only 17 percent of debtors are able to live within their means after filing. The vast majority of debtors are spending or need to spend more than they earn . . . it still looks like many debtors have fallen short of putting their financial affairs in order and will continue to incur debt in excess of their ability to pay.").

[109]*See, e.g.*, Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANKR. INST. L. REV. 557, 564, 571 (2001) (reporting plan completion rates, five years after cases were filed , ranging from 18.2% and 54.1%). For cites to other published studies of chapter 13 plan completion rates, see Melissa B. Jacoby, *Collecting Debts from the Ill and Injured; The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 243-44 (2001). For the circumstances under which debtors can receive a discharge without completing the plan, see, e.g., 11 U.S.C. § 1328(b) (2005) (hardship discharge); 11 U.S.C. § 1307(a) (2000) (providing right to convert to chapter 7).

[110]*See, e.g.*, Commission Report, *supra* note 52, at 276 (compiling statistics); Hira, *Cross-cultural Comparison, supra* note 104, at 230 (11% repeat filers in small sample); Jean M. Lown & Barbara R. Rowe, *A Profile of Consumer Bankruptcy Petitioners*, 5 J. L. & FAM. STUD. 113, 125-126 (2003) (studying sample of 1997 cases in Utah, and finding "more than 20% of the Chapter 13 cases reported a previous bankruptcy filing (only those within the previous six years were recorded), and almost 90% failed to complete their plans"); Kathleen March and Jennifer Hildebrand, *Is Bankruptcy a Solution or a Way of Life: When Are Multiple Bankruptcies Permitted, When Are Multiple Bankruptcies Prohibited?*, 25 CAL. BANKR. J. 104, 110 (1999) (asserting that "[i]n the Central District of California a significant percentage of Chapter 13 debtors file more than one Chapter 13 cases [sic.]"). Repeat filings were on the radar screen even before the Bankruptcy Reform Act of 1978. *See* DAVID T. STANLEY AND MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 59 (1971) (finding 22% repeat filing rate among chapter XIII filers, and noting that this likely understated repeat filings because it excluded previous filings in other states). However, because of some data limitations, we currently do not have as much information on chapter 13 repeat

Although the results will come too late to inform current predictions, passage of the omnibus bill may promote study of the effectiveness of bankruptcy in the long run. First, revisions to Title 28 of the United States Code require that courts and trustees change their data collection and reporting practices in ways that may facilitate a wider range of research projects for lower cost.[111] These changes will not lead seamlessly to a better understanding of bankruptcy. Some issues are inherently hard (and expensive) to evaluate even with better access to case file information.[112] Also, the data collection provisions are far from perfect, and have the potential to produce misleading impressions of how the system is working.[113] Nonetheless, due to these changes, the court system now has a statutory obligation to collect financial information about bankruptcy cases.

In addition, passage of the omnibus bill may diminish the heavy research emphasis on chapter 7 access and ability to pay, at least in the short term. Presumably, the proponents of bankruptcy reform will move onto other challenges. If debates are not framed in terms of ability to pay, researchers may find themselves freer to explore a wider range of empirical projects.

As noted, this slight spark of promise for later generations of research does not help with the current dilemma, namely the assessment of the revised Code's effects on candidates for personal bankruptcy. The existing research on personal bankruptcy filers may call into question the need for restrictions

filings as we should. *See, e.g.*, LoPucki, *Politics of Research Access*, *supra* note 82, at 2169; Commission Report, *supra* note 52, at 106 (attributing lack of good information on repeat filings to lack of national database).

[111]The bill adds provisions to title 28 that impose new obligations on both the court system and on the Attorney General that will promote the collection and analysis of important information about the bankruptcy system. *See* 28 U.S.C. §§ 159, 589b (2005). In the past, the court system's method for storing records has not facilitated analysis. Commission Report, *supra* note 52, at 921-939. This has increased the expense and difficulty of studying even the most basic questions about how the system works. LoPucki, *Politics of Research Access*, *supra* note 82, at 2171 ("By offering selective access to data, the courts have controlled legal scholars' research agendas, encouraging research that focused on the social and economic implications of litigation and discouraging research that focused on the actions of judges and the impact of those actions on both litigants and the public."). Other kinds of studies, such as the effects of aggregate bankruptcy filings on credit supply, are not affected by these limitations. For a description and review of some studies exploring this issue, see Congressional Budget Office, *supra* note 85, at 31-37. The alternative available datasets, such as the chapter 13 trustees' recordkeeping systems, were designed for accounting and not research purposes and thus would require considerable tweaking to facilitate in-depth longitudinal analysis. Braucher, *Empirical Study of Debtor Education*, *supra* note 109, at 590-591.

[112]*See* sources cited *supra* note 84. Culhane and White have explained that "[q]ualitative studies estimating life enrichment and financial rehabilitation are difficult because former bankrupts are often difficult to locate and reluctant to answer questions about their past and present lives." Marianne B. Culhane & Michaela White, Fresh Start or Still Deep in Debt, supra note 105, at 2-4. *See also* Westbrook, *Empirical Research*, *supra* note 82, at 2147 (noting difficulties of studying filers after bankruptcy).

[113]*See, e.g.*, 28 U.S.C. § 159 (c)(3)(C) (2005) (requiring that the aggregate amount of debt discharged be calculated by subtracting categories of "predominantly nondischargeable" debt from "all scheduled debt and obligations"). If interpreted literally, this calculation has the potential to produce an erroneous calculation of discharged debts in bankruptcy.

in bankruptcy law, but does not predict the outcome of implementing those restrictions.

CONCLUSION

The revisions to the Bankruptcy Code preserve the structure of the former system but embellish and alter the details to a great extent. The provisions are complex, difficult to decipher, and a challenge to implement. This challenge in the short term, however, does not signify the impact of the statutory revisions in the long term.

This Article has explored the role of the day-to-day system players in shaping the actual impact of statutory revisions. I recently noted in this journal the practical impossibility of Congress's intent to exclude bankruptcy experts from system reform.[114] This Article reaffirms that position not at all as a sign of rebellion against the revisions to the statute, but as a description of law-making that researchers have observed time and time again. The drafting and the details of the omnibus bill may amplify the importance of these other factors. Once the statutory changes are filtered through other influences, the impact of the revisions is likely to vary in substance and magnitude, both geographically and as compared with a literal reading of the revised Code. With the correct inquiries and tools, researchers probably could predict the variations and deviations with reasonable certainty.[115] The key is to recognize that factors other than the statute matter greatly in determining whether the omnibus bankruptcy bill brings about major or minor changes.

However the bankruptcy system processes Congress's statutory changes, real live human beings will continue to face serious financial trouble, often precipitated by events out of their control. Depending on how the details play out, bankruptcy will be less beneficial to filers by at least a little, and maybe a lot. This Article has highlighted the difficulties of assessing the impact of this change. Reserving judgment about the impact of the bill should not be perceived as inconsistent with concerns about the well-being of these individuals and families. The implications of statutory bankruptcy reform simply remain murky without better information about the effectiveness of bankruptcy.

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[114] *See* Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L. J. 221 (2004).

[115] *See, e.g.*, LoPucki, *Law in Lawyers' Heads*, *supra* note 3, at 1503, 1555.

The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking

by

*Melissa B. Jacoby**

To those who support traditional bankruptcy policies, or even who simply appreciate good statutory drafting, the Bankruptcy Code looks better than expected on its twenty-fifth birthday. Some post-1978 amendments have marred its elegance,[1] but the Code thus far has escaped unscathed from the four-hundred-and-ninety-one page omnibus bankruptcy bill pending in Congress.[2]

Had the omnibus bill become law, Congress would have left bankruptcy experts with a larger Code to celebrate, but with little enthusiasm for the celebration. Unlike the years preceding enactment of the Bankruptcy Code, members of Congress now hesitate—and may well refuse—to fix even typographical errors at the request of bankruptcy experts.[3] These days, many

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[1]Many post-1978 amendments were fairly narrow special interest exceptions that were not particularly well integrated into the structure of the Bankruptcy Code. *See, e.g.*, Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217, 1238 (1996) (identifying examples principally from the early 1980s and thereafter); Nancy Blodgett, *Bad Law? Brickbats for Bankruptcy Code*, 70 A.B.A. J. 28 (1984) (quoting Prof. Lawrence P. King criticizing 1984 amendments as special interest legislation not driven by public policy); Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 VAND. L. REV. 887, 900 n.46 (2000) ("In contrast, the many amendments to the Code since 1978 can often be fairly characterized as patchwork, ill thought-through, or special interest legislation insensitive to the overall structure of the Code and bankruptcy policy."); David G. Epstein & Steve H. Nickles, *The National Bankruptcy Review Commission's Section 365 Recommendations and the "Larger Conceptual Issues,"* 102 DICK. L. REV. 679, 698 (1998) ("To date, Congress seems to have avoided any reconsideration of the larger conceptual issues of section 365 by enacting special interest legislation.").

[2]The latest version is the Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S. 1920 108th Cong. (2004), which is 491 pages in the Government Printing Office edition. Earlier versions have been of varying lengths, but all would add substantially to the size and complexity of the Bankruptcy Code. For a detailed history recounting legislative events from the mid-1990s through the present, see Melissa B. Jacoby, *Negotiating Bankruptcy Legislation through the News Media*, 42 HOUS. L. REV. (forthcoming 2004). *See also* Robert J. Landry III, *The Policy and Forces behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509 (2003).

[3]*See infra* text accompanying notes 18-30.

members of Congress consider bankruptcy professionals part of the problem, not the solution.[4] In addition, if its indifference to Chapter 12's repeated expiration is any indication, Congress is not actively concerned about the functioning of the system and deals negotiated in its shadow.[5] Bankruptcy experts are not of one mind about most issues, but they collectively have reason to harbor serious concerns about the future of Code-based bankruptcy lawmaking.

Even if Congress had a different attitude,[6] Bankruptcy Code amendment would be an imperfect and incomplete mechanism for system improvement. Overzealous pursuit of legislative solutions to past problems limits flexibility and will not necessarily address the problems of the future.[7] Furthermore, aspects of the federal legislative process may not be well suited to some of the oft-cited substantive goals of bankruptcy, such as equal treatment of similarly-situated creditors.[8] Also, the Code cannot be equipped to solve many of the problems that it confronts, such as overwhelming medical debt.[9] Finally, Congress does not have unfettered power to enact bankruptcy legislation

[4]Senator Grassley, one of the leading sponsors, set the tone. *See, e.g.*, 144 CONG. REC. S10695 (1998) (Statement of Sen. Grassley) ("Many lawyers who specialize in bankruptcy view bankruptcy as an opportunity to make big money for themselves. This profit motive causes bankruptcy lawyers to promote bankruptcy as the only option, even when a financially troubled client might obviously have the ability to repay some debt. This profit motive creates a real conflict of interest where bankruptcy lawyers push people into bankruptcy who do not belong there and they do it because they get paid up front."); 144 CONG. REC. S10649 (1998) (statement of Sen. Grassley) ("bankruptcy lawyers push people into bankruptcy who don't belong there simply because they want to make a quick buck. . . . I think there is a widespread recognition that bankruptcy lawyers are preying on unsophisticated consumers. . . . It is not surprising that bankruptcy lawyers are leading the charge against this bankruptcy reform legislation . . . I think it is outrageous, Mr. President, that bankruptcy lawyers are helping deadbeats to cheat to force spouses out of alimony and to cheat children out of child support . . . . The integrity of the bankruptcy system depends in part on the honesty and the competence of bankruptcy lawyers.").

[5]*See infra* text accompanying notes 31-54.

[6]Congress of course is not a single being capable of having an attitude, but I am not the first to anthropomorphize this legislative body. *See* William W. Buzbee, *The One Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 180 (2000).

[7]*See generally* Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173 (2000). Provisions like § 524(g) (the Johns-Manville amendments) would fit this description. *See* 11 U.S.C. § 524(g).

[8]*See* Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 870-871 (1997) (concluding that statutory bankruptcy laws are "unstable solutions" to financial common pool problems). *Cf.* Edward J. Janger, *The Locus of Lawmaking: Uniform State Law, Federal Law, and Bankruptcy Reform*, 74 AM. BANKR. L.J. 97, 113 (2000) (observing that the federal lawmaking process is "not pretty," but it may be better than alternatives). *See also* Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 845-851 (2002) (noting difficulty of actually achieving intended result through legislation); Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331 (2003) (evaluating the "cognitive frailties" of various types of lawmakers).

[9]*See* Melissa B. Jacoby, *The Debtor-Patient: In Search of Non-Debt Alternatives*, 69 BROOK. L. REV. 453 (2004).

because the Constitution limits Congressional authorization.[10]

These principles and Congress's posture toward bankruptcy should remind experts to embrace a more complex picture of system development. After all, not only does the bankruptcy system have many attributes that the Code simply cannot explain, but the system has evolved substantially over the last twenty-five years even as the Code has remained relatively constant.[11] In other words, myriad factors contribute to the bankruptcy system.[12] The Code is but one.

As a consequence, Congress has the power to exclude bankruptcy experts from Code deliberations but not from system reform.[13] Bankruptcy professionals help change the system even as they engage in case-specific negotiations and transactions.[14] Bankruptcy experts also participate in system change through the appellate process (whether or not they represent parties in interest in those cases),[15] state legislatures,[16] and even the media, otherwise known as the fourth branch of government.[17] This Article briefly explores the limits of Bankruptcy Code-based lawmaking and these other avenues of reform.

I. CONGRESS, EXPERTS, AND BANKRUPTCY

> I'd like to say, just from a personal perspective, I no longer feel that it's even worth the effort to try and ask Congress to make a reform that should, by and large, be largely non-controversial. There are a number of those reforms I think all of us would agree on, but you don't see anything going to Congress or through Congress in that manner. . . . frankly, I don't care to work with Congress anymore.[18]

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[10]*See* U.S. CONST. art. I, § 8; Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063, 1068 (2002).

[11]*See infra* text accompanying notes 64-83.

[12]*See* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 521 (1997).

[13]I use the term "reform" far more broadly in this Article, than, for example, Black's Law Dictionary, which not only offers a definition of "law reform," but refers to bankruptcy in it: "The process of, or a movement dedicated to, streamlining, modernizing, or otherwise improving a body of law generally or the code governing a particular branch of the law; specif., the investigation and discussion of the law on a topic (e.g., bankruptcy), usu. by a commission or expert committee, with the goal of formulating proposals for change to improve the operation of the law." BLACK'S LAW DICTIONARY 904 (8th ed. 2004). In my conception, system reform can and does happen incrementally.

[14]*See infra* text accompanying notes 75-85.

[15]*See infra* text accompanying notes 92-105.

[16]*See infra* text accompanying notes 106-13.

[17]*See* DOUGLASS CATER, THE FOURTH BRANCH OF GOVERNMENT (1959). *See generally infra* text accompanying notes 114-18.

[18]Roundtable Discussion, *Bankruptcy Reform: Then and Now*, 12 AM. BANKR. INST. L. REV. 299, 327 (2004) (statement of Gerald Smith).

Most members of Congress do not listen to bankruptcy experts today.[19] Not only may some be more receptive to the views of larger monetary contributors,[20] but some managers of bankruptcy legislation are affirmatively distrustful of people who make their living principally through the bankruptcy system.[21] According to Senator Grassley, a principal sponsor of the omnibus bill, bankruptcy professionals are among a "tiny handful of fringe radicals" trying to derail a good bipartisan bill for their own gain.[22] This is a stark change from a time when bankruptcy professionals were intensively involved in the shaping of legislation, particularly at the inception of the 1978 Bankruptcy Code.[23]

The shift in receptiveness to bankruptcy experts has revealed itself in

[19]Even the Los Angeles Times editorial page knows this. *See, e.g.*, *Bankruptcy Non-Reform*, L.A. TIMES, June 8, 1998, at B4 ("Bankruptcy judges, legal scholars and consumer groups are raising objections, yet Congress seems intent on ramming through frightfully flawed and sweeping changes in the complex law of bankruptcy. Virtually none of the recommendations from the 1997 congressional National Bankruptcy Review Commission are included.").

[20]*See, e.g.*, Robert J. Landry III, *The Policy and Forces behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509, 521-523 (2003); Stephen Nunez & Howard Rosenthal, *Bankruptcy Reform in Congress: Committees, Ideology, and Floor Voting in the Legislative Process*, 20 J.L. ECON. & ORG. 527 (2004). *See generally* Thomas Stratman, *Can Special Interests Buy Congressional Votes? Evidence From Financial Services Legislation*, 45 J.L. & ECON. 345 (2002) ("The results in this paper support the hypothesis that interest groups "buy" legislators' votes with PAC contributions. The findings show that contributions are most effective in swinging the vote of more junior legislators.").

[21]*See, e.g.*, 145 CONG. REC. S11561 (1999) (statement of Sen. Kyl) (endorsing letter attributing lawyer criticisms of bill as money driven); 144. CONG. REC. S 10649 (1998) (statement of Sen. Grassley) ("Bankruptcy lawyers are the fuel which makes the engines of the bankruptcy mills run. It is not surprising that bankruptcy lawyers are leading the charge against this bankruptcy reform legislation."); Rep. Bill McCollum, *Bankruptcy Reform: A Return to Responsibility*, THE HILL, May 20, 1998, at 38 (describing a "campaign of false information being disseminated by bankruptcy attorneys, bankruptcy 'experts,' and other people maligning the legislation to further their agendas. However, after subjecting the multitude of half-truths and false statements disseminated by the critics . . . to the light of day, they just don't stand up."). Bankruptcy lawyers would find work even if the bankruptcy system disappeared completely, of course. Individuals and firms would still have to work out disputes and financial problems. However, the perception is that bankruptcy lawyers have a vested interest in the status quo. *See* Tom Hamburger, *Auto Firms See Profit in Bankruptcy-Reform Bill Provision*, WALL ST. J., March 13, 2001, at A28 (industry lobbyist saying bankruptcy establishment likes bankruptcy system how it has been running it); Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard To Get Tougher Laws*, WALL ST. J., June 17, 1998, at A1 (citing lobbyist saying bankruptcy establishment simply prefers status quo).

[22]The full quote from Senator Grassley's floor statement is: "The tiny handful of fringe radicals who oppose bankruptcy reform have waged a disinformation campaign worthy of a soviet commissar." Press Release, Floor Statement of Sen. Chuck Grassley of Iowa, Chairman, Subcommittee on Administrative Oversight and the Courts, Bankruptcy Reform (June 20, 2000) (on file with author).

[23]*See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001); Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform and the Politics of Adversarial Legalism*, 13 J. L. & POL. 893 (1997); Bruce G. Carruthers & Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act 1986*, 74 AM. BANKR. L.J. 35, 36 (2000) (arguing that bankruptcy professionals played an "exceptional role" in the Bankruptcy Reform Act of 1978); Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 94-108 (1997); Elizabeth Warren, *The Changing Politics of Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189 (1999).

multiple ways. Congress embraced only small portions of the National Bankruptcy Review Commission's report,[24] which relied heavily on the input of bankruptcy experts. Then, preempting the Commission's report, Congress introduced and nearly passed detailed and complex omnibus legislation that would restrict the discretion of courts and lawyers.[25] Congress generally did not respond to the reams of paper documenting problems—typographical, grammatical, procedural, technical, substantive, policy, and theoretical—with this bill.[26] Congress did not take heed even of organizations that generally represented creditor interests, such as the Commercial Law League,[27] of claims that the legislation would have the opposite effect of that it supposedly intended,[28] or of claims of separate unintended consequences.[29]

Based on these types of experiences, it is difficult to imagine that Congress will be particularly receptive to bankruptcy experts' affirmative requests for legislation in the near future. Consider a possible so-called critical

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[24]For examples of Commission proposals that found their way into the omnibus bill, see Melissa B. Jacoby, *Generosity versus Accessibility: Bankruptcy, Consumer Credit, and Health Care Finance in the US*, *in* CONSUMER BANKRUPTCY IN GLOBAL PERSPECTIVE 283 n.77 (Johanna Niemi-Kiesiläinen, Iain Ramsay, William C. Whitford, eds., 2003).

[25]*See generally* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001). During this period, Congress also separately enacted provisions to insulate religious contributions made by personal bankruptcy filers, with scant opposition from creditor representatives. *See generally* John J. Dyer & Gregory Todd Jones, *Judicial Treatment of Charitable Donations in Bankruptcy Before and After the Religious Liberty and Charitable Contribution Protection Act of 1998*, 2 DEPAUL BUS. & COM. L.J. 265 (2004); Steven Walt, *Collective Inaction and Investment: The Political Economy of Delay in Bankruptcy Reform*, 49 EMORY L.J. 1211 (2000).

[26]*See* William T. Bodoh & Lawrence P. Dempsey, *Bankruptcy Reform: An Orderly Development of Public Policy?*, 49 CLEV. ST. L. REV. 191 (2001); Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 560 (2001); Ann Morales Olazábal, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L. J. 317 (2003); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?* 18 BANKR. DEV. J. 1 (2001); Catherine E. Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L. J. 361 (2003).

[27]Copies of testimony and position papers *available at* http://www.cllabankruptcy.org/bankruptcy/special_legislative_edition.htm#5.

[28]*See, e.g.*, Melissa B. Jacoby, *The Real Bankruptcy Bill*, NAT'L L.J., Nov. 17, 2003, at 42; Hank Hildebrand, *Survey Shows Big Impact of Anti-Lienstripping Provision in S. 625* (May 27, 1999) (on file with author) (finding that bill would produce reduction in unsecured creditor returns and would render some existing plans unconfirmable). For a critique of this approach to commenting on legislation, see Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 852 (2002) (noting that "backfire rhetoric tends to create an atmosphere that is not conducive to serious and objective consideration of important issues," although using different types of examples, such as backfire arguments used to defeat consumer protection legislation).

[29]*See, e.g.*, Pamela Kohlman Webster, *The Malpractice of Health Care Bankruptcy Reform*, 32 LOYOLA L.A. L. REV. 1045, 1046 (1999) (explaining that health care provisions in omnibus bill are poorly drafted and would result in "serious unintended consequences"). Of course, the 1978 Code itself had unintended consequences, see Lissa Lamkin Broome, *Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments*, 1987 DUKE L. J. 78, 99 n.101 (1987), as do other laws. *See, e.g.*, Michael J. Borden, *PSLRA, SLUSA, and Variable Annuities: Overlooked Side Effects of a Potent Legislative Medicine*, 55 MERCER L. REV. 681 (2004).

vendor or employee amendment as an example. Even in the unlikely event that everyone agreed on whether the Code should permit, prohibit, or condition the ability of a debtor-in-possession to pay the pre-petition claims of employees or vendors early in a business bankruptcy case,[30] dare anyone broach Congress with a proposed amendment? Would lawmakers allow bankruptcy experts to help draft it well? What kind of efforts would be required to give Congress sufficient incentive to act on it? Would Congress insist on carving certain groups out of a general amendment, or tack on multiple unrelated and undesirable provisions? As the quote beginning this section suggests, many bankruptcy experts are both weary and wary, and, consequently, likely to stay away from Washington, D.C.

Legislators genuinely might be committed to a legal system even if they chose not to heed the advice of system "insiders." Unfortunately, Congress has demonstrated some indifference to the system too. Many strong proponents of the omnibus bill seem to be unaware of its contents; for example, they assert that the bill does not affect bankruptcy filers other than those with incomes exceeding the national median,[31] and yet this limitation applies to only a tiny fraction of a several-hundred page bill.[32]

Congress' handling of Chapter 12 offers an even more demonstrative and less controversial example. Congress originally enacted Chapter 12 for family farmers on a trial basis, and that initial trial period expired over a decade ago.[33] Congress has temporarily reauthorized Chapter 12 ten times.[34] Ac-

[30]For a recent court of appeals statement on the issue, see *In re* Kmart Corp., 359 F.3d 866 (7th Cir. 2004) (upholding district court decision overturning bankruptcy court authorization of $300 million in critical vendor payments). *Cf. In re* Just for Feet, Inc., 242 B.R. 821 (D. Del. 1999).

[31]*See, e.g.*, Press Release, New Democrats Coalition Message of the Week, New Democrats Support Bankruptcy Reform (February 26, 2001), *available at* http://www.ndol.org/print.cfm?contentid=3099 ("Keep in mind that those earning less than the national median income (about $51,000 for a family of four) are not affected by this legislation. This bill appropriately targets those who can afford to repay some or all of their debt."). *See also* Tom Hamburger, *House Legislators Pass Measure to Curb Abuse of Bankruptcy-Protection Laws*, WALL ST. J., March 2, 2001, at B2 (Joe Rubin, former Rep. Gekas staffer, now with U.S. Chamber of Commerce told "wavering" House members "bill is targeted solely at wealthy debtors who have abused the bankruptcy system and can afford to repay their debts."); Stephen Labaton, *Promised Veto Appears to Doom Congressional Agreement on Overhauling Bankruptcy Law*, N.Y. TIMES, October 13, 2000, at A30 (Rep. Gekas saying "[w]e guarantee a fresh start to any American who needs it"); Katherine Ackley & Jacob M. Schlesinger, *House Panel Approves Bankruptcy-Reform Bill*, WALL ST. J., April 29, 1999, at B16 (Rep. Gekas saying bill simply requires filers capable of repaying portion of debts do so).

[32]*See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S. 1920, 108th Cong. §§ 102, 318 (2004) (engrossed amendment as agreed to by the House) (providing that median income is relevant to whether party can move for dismissal or conversion based on abuse, whether new abuse calculation applies to disposable income test in Chapter 13, and to duration of Chapter 13 plans).

[33]*See* Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

[34]*See* Family Farm Bankruptcies, Extensions, Pub. L. No. 103-65, 107 Stat. 311 (Aug. 6, 1993); Omnibus Consolidated and Emergency Supplemental Appropriations Act 1999, Pub. L. No. 105-277, 112 Stat.

cording to members' statements, Chapter 12 permanence is not only uncontroversial, but desirable.[35] In fact, one reasonably can infer that members of Congress are more comfortable with Chapter 12 than with any other chapter of the Bankruptcy Code. Yet, Congress so far has not permanently authorized Chapter 12; rather, it has let Chapter 12 completely lapse four times, often for many months.[36]

Members of Congress who say they support making Chapter 12 permanent have been open about their interest in tying Chapter 12's fate with the omnibus bankruptcy bill, which itself addresses Chapter 12.[37] Representa-

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2681-610 (Oct. 21, 1998); Bankruptcy: Extension of Reenactment of Chapter 12, Family Farmer Indebtedness, Pub. L. No. 106-5, 113 Stat. 9 (March 30, 1999) (effective April 1, 1999); Bankruptcy-Extension of Family Farmer Debt Adjustment, Pub. L. No. 106-70, 113 Stat. 1031 (Oct. 9, 1999) (effective Oct. 1, 1999); Bankruptcy-Chapter 12 Reenactment, Pub. L. No. 107-8, 115 Stat. 10 (May 11, 2001) (effective July 1, 2000); Bankruptcy Chapter 12-Reenactment, Pub. L. No. 107-17, 115 Stat. 151 (June 26, 2001) (effective June 1, 2001); Bankruptcy-Chapter 12 Reenactment, Pub. L. No. 107-170, 116 Stat. 133 (May 7, 2002) (effective Oct. 1, 2001); Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 532 (May 13, 2002) (effective June 1, 2002); Bankruptcy-Chapter 12 Reenactment, Pub. L. No. 107-377, 116 Stat. 3115 (Dec. 19, 2002) (effective Jan. 1, 2003); Family Farmer Bankruptcy Relief Act of 2003, Pub. L. No. 108-73, 117 Stat. 891 (Aug. 15, 2003) (effective July 1, 2003).

[35]*See, e.g.*, Senator Patrick Leahy, Statement on Family Farmer Bankruptcy Protection, H.R. 2465 (July 31, 2003) *available at* http://leahy.senate.gov/press/200307/073103d.html ("Everyone agrees that Chapter 12 has worked.");149 CONG. REC. H5674 (2003) (statement of Rep. Baldwin) ("there is great consensus that chapter 12 bankruptcy protections work well."); 148 CONG. REC. H6849 (2002) (statement of Rep. Tim Holden) ("Chapter 12 is by no means a controversial issue."); 148 CONG. REC. H6848, 6849-50 (2002) (statement of Rep. Sensenbrenner) (commending Rep. Gekas for leadership and unwavering efforts to make Chapter 12 permanent, and saying farmers and Chapter 12 have been priority from day one of legislation); 146 CONG. REC. H5101 (2000) (statement of Rep. Smith) ("No one disagrees that chapter XII (sic.) should be made permanent. No one."). *But see* United States Department of Agriculture, Economic Research Service, *The Economics of Food, Farming, Natural Resources, and Rural America, available at* http://www.ers.usda.gov/Briefing/Bankruptcies/questions/ (last modified Aug. 9, 2004) ("However, if one believes that marginal operations should not be given special consideration to keep them in business, then Chapter 12 has not worked well.").

[36]*See generally* Susan A. Schneider, The National Agricultural Law Center, *An Agricultural Law Research Note, Chapter 12 Bankruptcy: On Again, Off Again* (March 2003, updated February 2004) *available at* http://www.nationalaglawcenter.org/assets/articles/schneider_ch12.pdf. The last effective extension (extending Chapter 12 to January 1, 2004) also stated as follows:

> (b) All cases commenced or pending under chapter 12 of title 11, United States Code, as reenacted under subsection (a), and all matters and proceedings in or relating to such cases, shall be conducted and determined under such chapter as if such chapter were continued in effect after January 1, 2004. The substantive rights of parties in connection with such cases, matters, and proceedings shall continue to be governed under the law applicable to such cases, matters, and proceedings as if such chapter were continued in effect after January 1, 2004.

Family Farmer Relief Act of 2003, Pub. L. No. 108-73, 117 Stat. 891.

[37]*See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, 108th Cong. § 1001 (2003); Press Release, Senator Chuck Grassley, Grassley: Chapter 12 Bankruptcy For Farmers Extended for Now; President Signs Legislation to Help Farmers Reorganize Debt (May 8, 2002), *available at* http://grassley.senate.gov/releases/2002/p02r5-8a.htm (referring to an extension as a "stopgap measure until we enact the bankruptcy reform bill"); 148 CONG. REC. H6850 (2002) (statement of Rep. Sensenbrenner) (blaming lack of Chapter 12 permanence on President Clinton's veto of omnibus bill);

tive Sensenbrenner even burdened the most recent Chapter 12 *extension* bill with the entire omnibus bill.[38]

To the extent they thought about it at all, some members of Congress may have believed their inaction to be irrelevant to the system. After all, Chapter 12 comprises only a small subset of bankruptcies unevenly spread throughout the country.[39] But what about lawmakers like Senator Grassley, a friend of family farmers and an early proponent in moving for permanent authorization?[40] Maybe he assumed that farmers would continue to file Chapter 12 petitions even without a currently authorized Chapter 12,[41] or would find appropriate relief in other chapters.[42]

One is reminded of the period following the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*[43] After the Supreme Court declared the bankruptcy court structure unconstitutional, it

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Letter from The Financial Services Roundtable to All Members of the U.S. Senate (Oct. 17, 2000) (praising conference report for omnibus bill for making Chapter 12 permanent, and urging senators to support) (on file with author); 149 CONG. REC. H5673 (2003) (statement of Rep. Baldwin) ("[W]e are told that permanent extension cannot be passed separately from the big bill because taking out a popular item might slow that bill's momentum. We were told we had to strip the permanent extension of chapter 12 from last year's farm bill because it would slow down the bankruptcy bill.").

[38]*See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S. 1920, 108th Cong. (2004) (engrossed amendment as agreed to by the House). *See also House Rejects NFU-Approved Chapter 12 Bankruptcy Legislation*, 51 NAT'L FARMERS UNION NEWS 6 (Feb. 2004).

[39]*See* Administrative Office of the United States Courts, Table F-2, U.S. Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, During the 12-Month Period Ending September 30, 2003 (1987-2003), *available at* http://www.uscourts.gov/bnkrpcty stats/FY1987-2003.pdf; Ed Flynn & Gordon Bermant, *Who's Number One?*, AM. BANKR. INST. J., March 1, 2004, at 23 (reporting Nebraska as a leader in annual Chapter 12 filings four times and Texas ten times between 1989 and 2002).

[40]Senator Grassley introduced The Family Farmer Protection Act of 1997, S. 1024, 105th Cong. (1997), as well as the farm bill that initially included chapter 12 permanence. Press Release, Grassley Works to Extend and Expand Chapter 12 Protection for Farmers (January 20, 1999) (inclusion in SAFETY 2000 bill). *See generally* Jonathan K. Van Patten, *Chapter 12 in the Courts*, 38 S.D. L. REV. 52, 53 (1993) (discussing Senator Grassley's central role in initial enactment of Chapter 12).

[41]As it turns out, family farmers filed only a handful of Chapter 12 petitions during periods of expiration. For example, fewer than twenty Chapter 12 petitions were filed in January through March 31, 2002, and in January through March 31, 2004, when Chapter 12 had expired and not been reauthorized. *See* Administrative Office of the United States Courts, Business and Non-Business Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code, *available at* http://www.uscourts.gov/Press_Releases/302 f2_3.xls; http://www.uscourts.gov/Press_Releases/f23mos.xls.

[42]*See* 148 CONG. REC. H6848, 6849 (2002) (statement of Rep. Sensenbrenner) (noting that in absence of Chapter 12, family farmers can use other chapters, although these do not work as well); Bruce L. Dixon et al., *Factors Affecting State-Level Chapter 12 Filing Rates: A Panel Data Model*, 20 EMORY BANKR. DEV. J. 401, 405 (2004) (speculating that many consumers use Chapter 13 who fit some expansive definitions of family farmer); Bruce L. Dixon et al., *The Chapter 12 Experience in the U.S.: Regional Comparisons and Analysis of Filing, Discharge, and Failure Rates*, 55 AGRIC. FIN. REV. 47 (1995) (discussing use of Chapter 7 for farm bankruptcies).

[43]Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 459 U.S. 1094 (1982).

stayed its order to give Congress time to act.[44] Yet, it was unclear how the bankruptcy judges had the authority to continue to hear and decide the hundreds of thousands of pending cases in the meantime.[45] Congress did not act in a particularly timely fashion,[46] allowing plenty of time for the legislation to become mired in various special interest issues.[47] The Judicial Conference of the United States tried to ameliorate the situation with its proposed Emergency Rule,[48] although that Rule itself seemed unconstitutional.[49] Yet, for

[44]*Id.* The opinion was released in June of 1982, but the order was stayed until October 1982, and later extended until December.

[45]*See* Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 493 (1997) (using Emergency Rule as example of "a system imperative overriding the unambiguous command of the formal law").

[46]Congress did not fix the problem until the Bankruptcy Amendment and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 353 (1984), which became effective in July of that year.

[47]The media framed the debates over this early 1980s bankruptcy legislation as being entangled in special interest lobbying. *See Bankrupt on Bankruptcy*, N.Y. TIMES, March 28, 1984, at 26 (transformation of clean bill into Christmas tree, "disgraceful" bills laden with special interests); *Bankruptcy Bill is Stalled*, N.Y. TIMES, March 30, 1984, at D13 ("lobbying free-for-all . . . deadlock . . . not the result of some lofty dispute of great moment. It is a result of spending both political clout and political dollars by the consumer finance industry, which wants to be protected from the consumer bankruptcies that its easy credit practices often create."); *Bankruptcy Courts are Going Bust*, N.Y. TIMES, September 28, 1982, at 22 (measure to fix court system "could be threatened by amendments that would make it a Christmas tree for creditors."); Bill Keller, *Senate Votes Bankruptcy Bill*, N.Y. TIMES, June 20, 1984, at D19 (discussing provisions desired by lobbying interests); *System in Bankruptcy*, WALL ST. J., April 5, 1984 ("Next, various special interests climbed aboard the legislative train. . . . You can't shed many tears for the special-interest aid in this collapsed legislation."); Stuart Taylor, Jr., *Bankruptcy Court Setup Extended Until April 30*, N.Y. TIMES, March 31, 1984, § 1, at 32 (stopgap measure for courts while working out special interest issues); Stuart Taylor, Jr., *The Free-For-All on the Bankruptcy Express*, N.Y. TIMES, March 2, 1984, at 16 (lobbying free-for-all, three ring circus, with sideshows involving shopping centers, drunk drivers, grain elevators); Jane Bryant Quinn, *Credit Industry Media Hype Pushes Bankruptcy Law Revision*, WASH. POST, December 7, 1981, at 51 ("Consumer-credit industry wants to rewrite the federal law on personal bankruptcies, and is using tactics that would make a sailor blush . . . . Newswriters and broadcasters are being peppered with press releases, asserting that America has become a nation of debt dodgers."). *See also* William H. Jones, *Creditors Miss Target in War on Bankruptcy Law*, WASH. POST, October 12, 1981, at 1; *Panel Bill Alters Personal Bankruptcy Law; Proposals Aid Creditors: Bid to Bar Some Debtors From Chapter 7 is Ended*, WALL ST. J., April 20, 1983, at 60; Lawrence P. King, *The Plague of the Special Interest Groups*, N.Y. TIMES, March 4, 1984, at § 3, at 2 (opinion piece saying "indeed we may all be the fools, victims of extraordinary lobbying efforts by special interest groups that have held up legislation that would establish a new court because of their selfish demands for unrelated bankruptcy amendments"); Richard B. Levin, *Where Some Fine Tuning Could Help*, N.Y. TIMES, March 4, 1984, § 3, at 2 (opinion piece explaining consumer finance industry's "horror stories of doctors and others with promising futures who escape debt" have not been shown to be frequent). *See also* Eric Gelman, Christopher Ma and Ann L. McDaniel, *Bankruptcy on the Brink*, NEWSWEEK, March 26, 1984, at 64 ("As Congress moved to correct that [jurisdictional] defect, eager lobbyists" representing lenders, farmers, and even federal judges "cut in to prosecute their own claims, blocking action and turning the orderly dance of legislation into a game of musical chairs," with the loudest objections coming from the consumer credit industry.).

[48]*See, e.g.*, S. Elizabeth Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Court's Uncertain Authority*, 65 AM. BANKR. L.J. 143, 158 (1991).

[49]*See* Vern Countryman, *Emergency Rule Compounds Emergency*, 57 AM. BANKR. L.J. 1 (1983); Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 494 (1997).

the most part, the system soldiered on, even in the absence of constitutionally valid statutory authority for bankruptcy judges to adjudicate.

Realistically, few members of Congress would have had post-*Marathon* events in mind with respect to Chapter 12 reauthorization. Perhaps they assumed that family farmers would not notice the absence of Chapter 12 from the statute. As it turns out, however, others in and familiar with the small farm industry find the failure to act notable and consequential.[50] In addition to substantially deterring the filing of Chapter 12 cases,[51] the complete absence of Chapter 12 for months at a time may have affected negotiations between lenders and family farmers.[52] After all, although the bankruptcy system develops somewhat independently of the statute, the system can be only so resilient with respect to the disappearance of an entire chapter of the Code.[53]

Unlike the jurisdictional crisis of the early 1980s, the Chapter 12 fix was straightforward and not particularly controversial or time consuming. Congress declined to act. Likewise, Congress has kept the authorization of additional bankruptcy judgeships attached to the omnibus bankruptcy bill notwithstanding the substantial growth in per-judgeship caseload.[54] These examples do not bode well for less favored portions of the Code and for relying on Code amendments to accomplish reform.

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[50]United States Department of Agriculture, Economic Research Service, *The Economics of Food, Farming, Natural Resources, and Rural America* (September 23, 2003) *available at* http://www.ers.usda.gov/Briefing/Bankruptcies/questions/; *House Rejects NFU-Approved Chapter 12 Bankruptcy Legislation*, 51 NAT'L FARMERS UNION NEWS 6 (Feb. 2004) ("NFU President Dave Frederickson said the delay in approving an extension of Chapter 12 places agricultural producers and their families who are faced with bankruptcy in a serious position."); Senator Patrick Leahy, Statement on Family Farmer Bankruptcy Protection, H.R. 2465 (July 31, 2003) *available at* http://leahy.senate.gov/press/200307/073103d.html ("Too many family farmers have been left in legal limbo in bankruptcy courts across the country because Chapter 12 of the Bankruptcy Code is still a temporary measure. Our family farmers do not deserve these lapses in bankruptcy law that could mean the difference between foreclosure and farming."). For a study of the impact of financial failure in family farming generally, see KATHRYN M. DUDLEY, DEBT AND DISPOSSESSION: FARM LOSS IN AMERICA'S HEARTLAND (2000).

[51]*See infra* note 41; 146 CONG. REC. H5101 (2000) (explaining why Chapter 11 does not work as well for farmers as Chapter 12).

[52]*See, e.g.*, REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 1015 (1997) (describing farmer negotiations in shadow of Chapter 12). *Compare* Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

[53]On the other hand, a very recent analysis of determinants of Chapter 12 filings does not mention instability of Chapter 12 as a potential determinant. *See* Bruce L. Dixon et al., *Factors Affecting State-Level Chapter 12 Filing Rates: A Panel Data Model*, 20 EMORY BANKR. DEV. J. 401, 405 (2004).

[54]*See, e.g.*, J. Rich Leonard, *Having Thought About Private Matters: The Federal Courts' Initial Response*, 77 AM. BANKR. L.J. 9, 18 n.31 (2003) (noting how judgeship authorizations have become ensnared in omnibus bill, and comparing to Chapter 12 impasse); Michelle Arnopol Cecil, *Abandonments in Bankruptcy: Unifying Competing Tax and Bankruptcy Policies*, 88 MINN. L. REV. 723, 724 n.9 (2004) (citing Jim Wannamaker, *Record Bankruptcy Filings*, NABTALK, Fall 2002, at 35).

II. LIMITED BANKRUPTCY CODE CONTROL OF THE CURRENT SYSTEM

Congressional indifference is disappointing, but how much does it matter? To be sure, the Code is the legal backbone for a bankruptcy system that involves hundreds of billions of dollars of assets and is otherwise relevant to the national economy.[55] The Bankruptcy Code also subtly but fundamentally structures the way we think about the law of financial problems of individuals and firms. Consider bankruptcy's role in corporate governance,[56] small business policy,[57] health care finance,[58] consumer protection,[59] consumer credit policy,[60] and debtor-creditor relations. Bankruptcy is closely linked with these issues, but, on account of the Bankruptcy Code, is legally distinct. For example, it is by human action and not inherent logic that consumer bankruptcy is legally separate from other programs for financially distressed families, which, in some instances, may be substitutes for bankruptcy (and vice versa).[61] On the federal level alone, we have a bankruptcy system, a host of cash or in-kind assistance programs,[62] and an entirely distinct military program with some bankruptcy-like features.[63] The choice to produce a

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[55]*See* Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 507 (1999), citing LEGAL DEPARTMENT, INTERNATIONAL MONETARY FUND, ORDERLY & EFFECTIVE INSOLVENCY PROCEDURES: KEY ISSUES (Washington 1999); Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795 (2004) (citing THE BANKRUPTCY YEARBOOK AND ALMANAC 2003, 38 (Christopher M. McHugh et al., eds., 13th ed. 2003)).

[56]*See* Karen Gross, *A Response to J.J. White's Death and Resurrection of Secured Credit: Finding Some Trees But Missing the Forest*, 12 AM. BANKR. INST. L. REV. 203, 216-17 (2004); David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519 (2004).

[57]*See* Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499 (1999); Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J.L. & ECON. 543 (2003).

[58]*See* Melissa B. Jacoby, Teresa A. Sullivan & Elizabeth Warren, *Rethinking the Debates Over Health Care Financing: Evidence From the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375 (2001); Melissa B. Jacoby, *The Debtor-Patient; In Search of Non-Debt Alternatives*, 69 BROOK. L. REV. 453 (2004).

[59]*See* William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397 (1994).

[60]*See, e.g.*, Bob Herbert, *Living on Borrowed Money*, N.Y. TIMES, Nov. 10, 2003, at 21.

[61]*See, e.g.*, JONATHAN D. FISHER, THE EFFECT OF TRANSFER PROGRAMS ON PERSONAL BANKRUPTCY (U.S. Department of Labor, Working Paper No. 346, Oct. 2001) (finding 37.7% of bankruptcy filers in Panel Study of Income Dynamics sample received income from one of several income transfer programs), *available at* http://www.bls.gov/ore/pdf/ec010140.pdf.

[62]*See, e.g.*, A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify The Means?*, 75 AM. BANKR. L.J. 243 (2001) (arguing that bankruptcy should be viewed as part of the public assistance system).

The federal law and policy governing financial assistance to needy individuals actually spans dozens of programs. *See, e.g.*, General Accounting Office, *Means Tested Programs: Determining Financial Eligibility is Cumbersome and Can Be Simplified*, GAO-02-58 (November 2001) (noting existence of about 80 different means tested federal programs and observing different standards, definitions, and forms used by various programs), *available at* http://www.gao.gov/new.items/d0258.pdf.

[63]The Soldiers' and Sailors' Civil Relief Act, now the Servicemembers Civil Relief Act, suspends

cohesive Bankruptcy Code separate from other laws has so powerfully shaped the architecture of financial distress that we often forget there ever were choices to be made.

Nonetheless, much of the bankruptcy system itself develops irrespective of the Bankruptcy Code. For example, one could never predict, solely from the Code, that Chapter 13 cases would comprise fewer than four percent of consumer filings in the Northern District of Iowa but hit seventy-two percent in the Southern District of Georgia.[64] These very important, and sometimes puzzling, attributes of the consumer bankruptcy system have developed almost entirely through non-statutory means.[65]

In addition, Chapters 7 and 13 are far more similar than the Code and its legislative history would lead a reader to assume.[66] Both Chapter 7 debtors and Chapter 13 debtors tend to keep their property; most consumer debtors

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certain debt obligations for a member of the military when pressed into service. *See* Conroy v. Aniskoff, 507 U.S. 511 (1993). Codified at 50 U.S.C. § 501 *et seq.*, a long-awaited update was signed into law in December 2003. *See generally* Gregory M. Huckabee, *Congress Does it Again—The Ghost of Major John Wigmore Returns!*, 51 FED. LAWYER 21 (May 2004) (outlining eleven major changes); John T. Meixell, *Servicemembers Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, Department of the Army Pamphlet 27-50-367, ARMY LAWYER 38 (Dec. 2003); John F. Zink, *Legal Protection for the Citizen Soldier*, 19 ME. BAR J. 98 (2004). This Act has not prevented military families from seeking regular bankruptcy relief, however. *See* Letter from Derek B. Stewart, General Accounting Office to the Honorable Richard J. Durbin, Military Personnel; Bankruptcy Filings Among Active Duty Service Members, GAO-04-465R (February 27, 2004), *available at* http://www.gao.gov/new.items/d04465r.pdf. Perhaps the recent updates to the Servicemembers Act will make it a better replacement for bankruptcy.

[64]Many researchers have documented and discussed the non-uniformity of Chapter 13 filing ratios. *See, e.g.*, Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13, Adjustment of Debts of an Individual with Regular Income* (Admin. Off. of the U.S. Courts Working Paper No. 1, Jan. 1994); Rafi Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 EMORY BANKR. DEV. J. 351 (2004); Ed Flynn et al., *Bankruptcy by the Numbers: A Tale of Two Chapters*, AM. BANKR. INST. J., Oct. 21, 2002, at 20 (2002); Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J. L. & PUB. POL'Y 801 (1994). This is one of many persistent complaints about non-uniformity in the bankruptcy system. *See, e.g.*, Bryan T. Camp, *Bound by the BAP: The Stare Decisis Effect of BAP Decisions*, 34 SAN DIEGO L. REV. 1643, 1680-82 (1997); John K. Eason, *Developing the Asset Protection Dynamic: A Legacy of Federal Concern*, 31 HOFSTRA L. REV. 24, 62 (2002); Barbara J. Van Gorder, *Section 523(a)(15) of the Bankruptcy Code: A Paving Stone on the Road to the Region of Hades Reserved for Litigation Nightmares*, 77 B.U. L. REV. 1121, 1125 (1997); Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 860, 875 (1999); Rose J. Murphy, *Bankruptcy Exemptions: The Need for Uniformity in the United States and Canada*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 127, 128, 138-42 (2001).

[65]*See generally* Rafi Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 EMORY BANKR. DEV. J. 351 (2004).

[66]The chapters are not identical, of course. A cynic might observe that a principal difference between Chapters 7 and 13 is whether the debtor directly makes ongoing mortgage payments or is required to funnel them through the bankruptcy system. In addition, debtors are substantially less likely to receive a discharge in Chapter 13. *See* Melissa B. Jacoby, *Collecting Debts from the Ill and Injured; The Rhetorical Significance, But Practical Irrelevance, of Culpability and Ability to Pay*, 51 AM. U. L. REV. 229, 263 (2001).

do not forfeit non-exempt property even in Chapter 7.[67] They also are retaining homes and cars encumbered by security interests through ride-through (if permitted in the jurisdiction),[68] reaffirmation,[69] or redemption.[70] From the perspective of creditor returns, Chapters 7 and 13 also are producing similar winners and losers notwithstanding distinctions in the Code, with general unsecured creditors being the losers in both. Holders of general unsecured claims are known to get little through distribution of property in Chapter 7.[71] The publicly available data suggest that most of the money in Chapter 13 goes to everyone other than unsecured claims (namely, secured claims, priority claims, lawyers, trustees, and the cost of administering repayment plans).[72] According to United States Trustee Chapter 13 disbursement data on closed cases, many Chapter 13 cases in which unsecured debt is owed pay out only small portions on unsecured claims, and many others pay out nothing at all.[73] The Code plays some role in these patterns,[74] but the

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[67]*See, e.g.*, Ed Flynn et al., *supra* note 64 (most distributions in Chapter 7 coming from few large cases which mostly involved commercial debtors).

[68]*Compare, e.g.*, *In re* Price, 370 F.3d 362 (3d Cir. 2004) (finding that debtor may retain collateral and continue contract payments, and noting existing 4-4 circuit split on issue) *and In re* Burr, 160 F.3d 843 (1st Cir. 1998) (no authorization for ridethrough).

[69]*See* 11 U.S.C. § 524; Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 713 (1999).

[70]*See* 11 U.S.C. § 722.

[71]Unsecured debt can get paid after Chapter 7 through voluntary repayment or through new agreements to remain liable on the debt. *See* 11 U.S.C. § 524; Marianne B. Culhane & Michaela M. White, *Debt After Discharge, An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 713 (1999) (finding about twenty-five percent of case files with one or more reaffirmation agreements, and reporting that about sixty percent of these agreements were related to unsecured or nominally secured debts); Consumer Bankruptcy Project III (on file with author) (finding about twenty percent of case files included one or more reaffirmation agreement); Transcript, Presentation of National Consumer Bankruptcy Coalition to the National Bankruptcy Review Commission 166 (December 17, 1996) (representative of Sears testifying that reaffirmed debt portfolio performed 37.6% better than its overall portfolio) (on file with author).

[72]*See* Executive Office for United States Trustees, Chapter 13 Trustee Audited Annual Reports FY2003 (2004), *available at* http://www.usdoj.gov/ust/library/chapter13/ch13lib.htm. Looking at the universe of cases closed in FY2003, as the U.S. Trustee report does, general unsecured claims received only about twenty percent of total distributions. *See also* Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 460 (1999) (in Mississippi study, finding secured debt payments accounted for about ninety percent of all Chapter 13 payments, excluding attorneys' fees). *See generally* Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J.L. & ECON. 543, 545 (2003) (positing that there is little difference between chapters from creditors' viewpoint).

[73]*See* Executive Office for United States Trustees, Chapter 13 Trustee Audited Annual Reports FY2003 (2004), *available at* http://www.usdoj.gov/ust/library/chapter13/ch13lib.htm. This report identifies ranges of percentages of unsecured claims paid in cases closed in FY2003. Among these cases with unsecured debt and with payment information identified, almost forty percent paid nothing on their unsecured claims. More than a third paid thirty-nine percent or less. Even among the subset of cases closed due to plan completion (as opposed to dismissal or conversion), about 6.3% paid nothing on their unsecured claims and a bit over fifty percent paid thirty-nine percent or less. Using different data and after accounting for costs, one industry expert estimates that credit card lenders receive on average thirteen cents on the dollar from Chapter 13 repayment plans, and even less if they sell the debt to purchasers and

patterns do not appear to conform to any intentional design.

The Bankruptcy Code also does not explain or control changes over time in Chapter 11. Once upon a time, commentators noted that Chapter 11 took too long and cost too much, for little reward.[75] Debtors' managers seemed to exercise undue control over the Chapter 11 process.[76] In part due to these concerns, corporate and bankruptcy scholars believed the current system to be less efficient than alternative regimes they proposed.[77]

Today, heightened incorporation of commercial and corporate practices, and shrewd negotiation, give non-debtor parties considerable leverage and make asset sales an even greater component of the bankruptcy process.[78] The

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brokers, *Bankruptcy Debt Recovery - Part 2*, THE NILSON REPORT No. 782, at 6 (Feb. 2003), although informal discussions with industry lawyers suggest that this estimate is too high.

[74]For example, the Code authorization to deaccelerate and cure a mortgage in default surely helps account for the significant amount of secured debt funneled through Chapter 13. *See* 11 U.S.C. §§ 1322, 1325.

[75]*See, e.g.*, Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J. FIN. 1067, 1077 (1984); Lynn M. LoPucki, *The Trouble With Chapter 11*, 1993 WIS. L. REV. 729 (1993); Lawrence A. Weiss, *Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims*, 27 J. FIN. ECON. 285, 285-89 (1990) (estimating direct costs for publicly held firms at three percent of assets). *See also* Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J., 499, 500 (1999) (given size of most businesses when they file, Chapter 11 may be too expensive for them). For a summary and recent analysis of these arguments and sources, see Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 AM. BANKR. L. J. 509 (2000).

[76]*See* Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 AM. BANKR. L.J. 247, 272-73 (1983); Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11 (1991).

[77]*See, e.g.*, Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775 (1988); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527 (1983); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807 (1998). *See generally* Mark Jickling, *Chapter 11 Bankruptcy: The Economic Issues*, Congressional Research Service Report for Congress, 96-426E (April 30, 1996) (on file with author); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503 (2001); David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WISC. L. REV. 465 (1993); Omer Teme, *Revisiting the Creditors' Bargain: The Entitlement to the Going-Concern Surplus in Corporate Bankruptcy Reorganizations*, 19 BANKR. DEV. J. 287, 288-95 (2003) (reviewing literature).

[78]*See generally* Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 75 (2004) ("The ability of creditors to control their debtor and negotiate with each other outside of chapter 11 is now vastly greater than it was during the equity receivership - or even in chapter 11 just 20 years ago. Often chapter 11 is needed only to put in place a plan that the key players negotiated before the petition was filed."); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2014-15 (2002) (discussing role of distressed debt trading, and value of speed to speculators, in changing dynamics of Chapter 11 cases); David A. Skeel, Jr., *Creditors' Ball: The 'New' New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917 (2003); Symposium, *Mega-Bankruptcies: Representing Creditors and Debtors in Large Bankruptcies*, 1 DEPAUL BUS. & COM. L.J. 603 (2003) (discussing esti-

literature also reflects a far diminished concern about weak cases languishing in Chapter 11 over long periods of time.[79] Indeed, to the extent that repeat filings are any indication,[80] cases may be moving too fast.[81] Even if reports of sweeping change in Chapter 11 are overstated,[82] it is clear that Chapter 11 is capable of transformation without Bankruptcy Code amendment.[83] The

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mates that as many as half of Chapter 11 cases are really just asset sales); Elizabeth Warren & Jay Lawrence Westbrook, *Secured Party in Possession*, 22 AM. BANKR. INST. J. 12 (2003); James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139, 164 (2004) ("Well-heeled and well represented, secured creditors have made the most of these [secured creditor protective] provisions in the 25 years since the Code's adoption"). *But see* Lynn M. LoPucki, *The Nature of the Bankrupt Firm: A Response to Baird and Rasmussen's The End of Bankruptcy*, 56 STAN. L. REV. 645 (2003) (challenging empirical case for assertion of widespread change to Chapter 11 practice).

[79]*See generally* Douglas G. Baird & Edward R. Morrison, *Bankruptcy Decision Making*, 17 J.L. ECON. & ORG. 356 (2001) (finding, based on study of cases in Northern District of Illinois, that courts do good job of dealing with dead-on-arrival cases quickly); Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 263 (2004); Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69, 76 (2004) (using LoPucki Bankruptcy Research Database to find high proportion of prenegotiated plans that are confirmed within several months after filing); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 982-83 (1999) (noting several trends coinciding including reduction in case processing time and increases in prepackaged bankruptcies); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1374-76 (2000); Elizabeth Tashjian et al., *Prepacks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. FIN. ECON. 135, 142 (1996); James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139, 151, n.42 (2004) (showing decline in mean Chapter 11 duration using LoPucki Bankruptcy Database).

[80]*See, e.g.*, A. Mechele Dickerson, *A Behavioral Approach to Analyzing Corporate Failures*, 38 WAKE FOREST L. REV. 1, 35 n.128 (2003) (anecdotal and systematic evidence of repeat Chapter 11s); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Companies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND. L. REV. 231 (2001) (finding higher repeat filing rates in Delaware and New York); Lynn M. LoPucki & Joseph W. Doherty, *Why are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1964 (2002) (possible attribution of refiling frequency to higher proportion of prepackaged cases); Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2014-15 (2002) (attributing Chapter 11 recidivism in Delaware in part to distressed debt buyers who value speed over continuity of the enterprise).

[81]Some cases may be moving too fast even if no repeat filing follows. For example, Cannondale was on a fast track to a sale to a stalking horse bidder that left other creditors and potential investors with very little opportunity to evaluate the case. *See* Motion for Two-Week Continuance of Bidding Procedures Motion, *In re* Cannondale Corp., No. 03-50017 (Bankr. D. Conn. 2003); Objection by Unsecured Creditors' Committee, *In re* Cannondale Corp., No. 03-50017 (Bankr. D. Conn. 2003); Order Approving Sale of Substantially All Assets, *In re* Cannondale Corp., No. 03-50017 (Bankr. D. Conn. 2003). *See also* Oversight Hearing on the Administration of Large Business Bankruptcy Reorganizations, Subcomm. on Commercial and Administrative Law, Comm. on the Judiciary, United States House of Representatives, 108th Cong. (July 21, 2004) (statement of Professor Lynn M. LoPucki) (discussing quickly moving pre-negotiated sale cases).

[82]*See, e.g.*, Barry E. Adler, *Bankruptcy Primitives*, 12 AM. BANKR. INST. L. REV. 219 (2004); Lynn M. LoPucki, *The Nature of the Bankrupt Firm: A Response to Baird and Rasmussen's The End of Bankruptcy*, 56 STAN. L. REV. 645 (2003); Jay Lawrence Westbrook, *Bankruptcy Control of the Recovery Process*, 12 AM. BANKR. INST. L. REV. 245 n.4 (2004).

[83]*See, e.g.*, Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 498 (1997); James J. White, *Death and Resurrection of Secured Credit*, 12 AM. BANKR. INST. L. REV. 139 (2004).

Bankruptcy Code is important, but not all-important.

III. RETHINKING THE MEANING OF BANKRUPTCY REFORM

In the prior section, I observed that changing the Code has not been the exclusive means of shaping and changing the bankruptcy system. Current Congressional attitudes place a heightened burden on these non-Code means of system evolution. In this section, I discuss discrete ways in which bankruptcy professionals remain involved in setting the direction of the bankruptcy system even as Code-based reform stagnates and excludes bankruptcy experts.

A. PROFESSIONAL-TO-PROFESSIONAL

As suggested in the Chapter 11 discussion in the prior section, negotiation among bankruptcy professionals on a case-by-case basis has been, and will continue to be, a major force. Bankruptcy professionals and their clients engage in a considerable amount of bankruptcy decision-making every day, including deals that technically violate the Bankruptcy Code.[84] Although the United States Trustee or Bankruptcy Administrator may have the capacity to limit this private lawmaking,[85] their intervention is not consistent. One can expect the system to continue to develop well-engrained patterns and practices through these means. This is not revolutionary reform; it is evolutionary reform.

Bankruptcy experts also can collaborate on broader system projects. For example, a recent dialogue by Chapter 13 professionals on non-uniformity resulted in a model Chapter 13 plan.[86] Although the Advisory Committee on Bankruptcy Rules declined to pursue the professionals' request to make their model plan an official form,[87] the model plan has the potential to change

[84]Pre-packs confirmed within thirty days, notwithstanding the requirement of a meeting of creditors under 11 U.S.C. § 341, would fall within this category.

[85]For example, holders of claims in Chapter 11 cases may be routinely signing voting agreements, notwithstanding the fact that some interpret these agreements as violating § 1125. *See In re* Stations Holding Co., 2002 Bankr. LEXIS 1617, 02-10882 (Bankr. D. Del. September 30, 2002) (explaining that votes were designated and disqualified for those who had executed postpetition voting agreements); Transcript of Hearing at 59-65, *In re* NII Holdings, Inc., et al., No. 02-11505 (Bankr. D. Del. October 25, 2002) (designating and disqualifying votes by noteholders who formally executed voting agreements postpetition); Douglas E. Deutsch, *Ensuring Proper Bankruptcy Solicitation: Evaluating Bankruptcy Law, the First Amendment, The Code of Ethics, and Securities Law in Bankruptcy Solicitation Cases*, 11 AM. BANKR. INST. L. REV. 213, 259-61 (2003). *But see* Melissa B. Jacoby, *Prepacks and the Deal-Litigation Tension*, AM. BANKR. INST. J., March 2004, at 20; Robert J. Keach, *A Hole in the Glove: Why "Negotiation" Should Trump "Solicitation,"* AM. BANKR. INST. J., June 2003, at 22.

[86]*See, e.g.*, Henry E. Hildebrand, III and Keith M. Lundin, *The San Juan 50: A Proposed Model Form for the Chapter 13 Plan*, 7 NORTON BANKR. L. ADVISER 1 (July 2002); Henry E. Hildebrand, III, *Toward a More Perfect Plan*, AM. BANKR. INST. J., Feb. 2003, at 10.

[87]*See* Advisory Committee on Bankruptcy Rules, Minutes, Meeting of April 3-4, 2003, Longboat Key Florida, at 11, *available at* http://www.uscourts.gov/rules/Minutes/BKmin0403.pdf. The Committee's

the system without any Bankruptcy Code amendments if its proponents can encourage its use through local rules or informal adoption.[88] In the past, by contrast, complaints of non-uniformity often generated proposed statutory amendments.[89] In addition to being infeasible, Code amendments actually may be inferior vehicles to this type of grassroots model plan effort.[90]

Of course, in some instances, a single statutory amendment might have been more efficient than alternative means. For example, with respect to the privacy concerns arising from the use of electronic files, an amendment to 11 U.S.C. § 107 may have been a more straightforward solution than a patchwork of changes to the Federal Rules of Bankruptcy Procedure and the Official Forms.[91] Nonetheless, professional-driven reform that is implemented through rules and forms can be potent and successful.

B. Courts of Appeal

Appellate judges are likely to be more receptive than members of Congress or Congressional staffers to careful and well-grounded arguments by bankruptcy experts. Even under a so-called plain meaning analysis, some judges believe that context is critical to accurate statutory interpretation and construction.[92] Bankruptcy experts have strong abilities to contribute to this approach to system change.[93]

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meeting minutes reflect that various committee members thought the project time consuming (to get agreement on a form), unrealistic (because everyone would like her own form better than the forms of others), and unnecessary (because Chapter 13 was working fine as is).

[88]*See, e.g.*, Kenneth N. Klee, *The Future of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 277, 280-81 (1996) (discussing various forms of local rules and practices).

[89]For example, a majority of the National Bankruptcy Review Commission proposed amendments to increase the uniformity of the Chapter 13 repayment process. REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 262 (1997). Specifically, the Commission proposed a statutory income-based template and timetable for debt repayment.

[90]Admittedly, even if the model Chapter 13 form is widely implemented, it will leave many non-uniformity problems unaddressed, including the very ones the Bankruptcy Commission tried to tackle.

[91]*See generally* J. Rich Leonard, *Having Thought About Private Matters: The Federal Courts' Initial Response*, 77 AM. BANKR. L.J. 9 (2003).

[92]*See In re* Price, 370 F.3d 362 (3d Cir. 2004) (reviewing and evaluating interpretation-related case law).

[93]For studies of the impact of more generalist statutory interpretation scholarship, see, e.g., Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9, 11 (2000) (observing that "almost half of the statutory interpretation articles published between 1988 and 1995 have been cited in at least one judicial opinion," and that "at least seven statutory interpretation articles published during the past decade have been rather extensively cited by the courts") and Deborah Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996) (discussing role of academic writers in statutory interpretation). *See also* Karen Gross, *A Response to J.J. White's Death and Resurrection of Secured Credit: Finding Some Trees But Missing the Forest*, 12 AM. BANKR. INST. L. REV. 203, 213 (2004) ("perhaps academics have their greatest success when they proffer an approach to interpreting a particular statutory provision within the Code and argue for resolution among some well-known competing approaches").

The now-well-known *Cybergenics II* case offers a good example. A panel of the Court of Appeals for the Third Circuit decided that a creditors' committee is not authorized to bring an avoidance action on behalf of the estate.[94] The panel's reasoning was based in part on a U.S. Supreme Court decision interpreting an identical phrase in a different statutory section.[95]

In public writings, many members of the bankruptcy community reacted to the original panel decision with panic, anger, scorn, and general outcry.[96] This is not the place to recount the details, but the commentators essentially argued, among other things, that a literal statutory interpretation and construction actually supported the committee's authorization to pursue the action.[97] Commentators also suggested that the Court of Appeals needs a

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[94]Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 304 F.3d 316 (3d Cir. 2002), *vacated, reh'g en banc granted*, 310 F.3d 785 (3d Cir. 2002), *rev'd*, Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003).

[95]Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 120 S. Ct. 1942 (2000). *But see* David Gray Carlson, *Surcharge and Standing: Bankruptcy Code § 506(c) after Hartford Underwriters*, 76 AM. BANKR. L.J. 43, 56-61 (2002) (arguing that careful reading of *Hartford Underwriters* reveals that opinion does not always limit standing of parties other than trustees).

[96]*See, e.g.*, Michael A. Bloom & Joel S. Solomon, *Cybergenics II: Ignoring both Precedent and Pragmatism*, 11 J. BANKR. L. & PRAC. 417 (2002); *Creditor/Committee Derivative Litigation; Of Textualism and Equitable Powers*, 22 BANKR. L. LETTER 1. (Nov. 2002) ("*Cybergenics II* represents a new low in the modern mindless obsession with mechanical application of statutory text (to the exclusion of *every* other legitimate principle of American law) . . . a full understanding of the structural relationship the Bankruptcy Code establishes between 'the powers of the trustee' and 'the avenues for relief available under the Code for the benefit of creditors and the estate' (which the *Cybergenics II* court obviously did not possess) exposes the *Cybergenics II* court's textual analysis, and in particular, its reliance on *Hartford Underwriters*, to be exceedingly simplistic and woefully incomplete."); *Cybergenics Decision Leaves Many Stunned, Scrambling to Find Solution*, BANKR. CT. DECISIONS, November 19, 2002, at 1 (quoting lawyers opposing decision, including Martin Bienenstock saying "I think it's the wrong decision technically, the wrong decision policy-wise, the wrong decision based on the wording of the Code, and the wrong decision based on the jurisprudence." . . . "Bienenstock said the court's decision not only lacked sense, it didn't give direction to anyone about how they may proceed."); Shannon P. Duffy, *3rd Circuit Grants En Banc Review in Cybergenics Case*, LEGAL INTELLIGENCER, Nov. 21, 2002 (noting that bankruptcy lawyers "everywhere are breathing a sigh of relief" after en banc decision); *Past Decisions Make Cybergenics Look Strange, Lawyer Says*, BANKR. CT. DECISIONS, Nov. 19, 2002, at 4. *See also* Marianne B. Culhane, *Poking Holes in Golden Parachutes: Management Pensions at Risk in Bankruptcy*, AM. BANKR. INST. J., Dec./Jan. 2004, at 6 (referring readers to "lively comments" on *Cybergenics* on the American Bankruptcy Institute website); Robert J. Keach & Michael A. Fagone, *When the Committee is Not and When the Committee is No More*, 22 AM. BANKR. INST. J. 34 (Dec./Jan. 2004) (noting "momentary panic" after panel decision, "order appears restored" by en banc decision). *See generally* Nancy Haller, Comment, *Cybergenics II: Precedent and Policy versus Plain Meaning*, 56 ME. L. REV. 365 (2004).

[97]*See, e.g.*, Martin J. Bienenstock, *Recent Developments Affecting Chapter 11 Cases*, 850 PLI/COMM 7 (Apr. 2003) (arguing that *Cybergenics* panel decision should be overruled and generally not followed elsewhere because, among other reasons, decision violates several rules of statutory construction); Susheel Kirpalani, *The Importance of Being Plain: A Textual Response to Cybergenics II*, 21 AM. BANKR. INST. J. 1 (Nov. 2002); Alan R. Lepene & Sean A. Gordon, *The Case for Derivative Standing in Chapter 11: "It's The Plain Meaning, Stupid,"* 11 AM. BANKR. INST. L. REV. 313, 316 (2004) ("This article will demonstrate that by properly following Hartford Underwriters' road map to plain meaning construction of the Bankruptcy Code, the case for derivative standing in the context of chapter 11 cases is both compelling and clear.").

richer appreciation of bankruptcy practice when it interprets or construes the statute and decides these types of disputes.[98] With some similar arguments, bankruptcy lawyers and professors filed amicus briefs,[99] either on their own behalf,[100] or on the behalf of creditors' committees in other cases.[101]

The end of this story is known to most who will read this Article: The Court of Appeals for the Third Circuit vacated the panel decision, reheard the case en banc, and reversed the panel decision.[102] The published majority opinion—the citations, the serious engagement with the arguments of the amici—is a testament to the impact and persuasive authority of bankruptcy experts beyond those representing the parties in interest.[103] With respect to the question of pre-Code practice, the en banc *Cybergenics* majority placed "great weight" on the 1978 version of Collier on Bankruptcy and consumes two full columns of the opinion with string citations to this source closely associated with bankruptcy experts.[104] In other words, the bankruptcy ex-

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[98]*See, e.g.*, George W. Kuney, *Let's Make it Official: Adding an Explicit Pre-Plan Sale Process as an Alternative Exit from Bankruptcy*, 40 HOUS. L. REV. 1265, 1292 n.98 (describing *Cybergenics* as being decided based on bankruptcy practice rather than explicit statutory authorization). *Cf.* Leonard P. Goldberger, *Cybergenics II: Sounds Great, But Will It Work?*, AM. BANKR. INST. J., Dec./Jan. 2003, at 30 (noting, after original panel decision, that "Appellate courts have the luxury of making ground-breaking legal pronouncements without worrying (too much) about how they are actually implemented. This is especially so in bankruptcy practice, where legal principles must be road-tested in a highly practical, result-oriented court system."). *See generally* Douglas G. Baird, *The New Face of Chapter 11*, 12 AM. BANKR. INST. L. REV. 69 (2004) ("The courts of appeal and the Supreme Court generate a regular flow of authoritative interpretations of the Bankruptcy Code, often focusing on its language, separate from its history or the practices that have taken deep root in large and small cases over the last 25 years.").

[99]Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 555 (3d Cir. 2003) ("We have since accepted extensive supplemental briefing, including a number of amicus briefs, and heard oral argument by the parties and *amicus curiae*").

[100]*See, e.g.*, En Banc Brief of Amicus Curiae G. Eric Brunstad Jr. in Support of Appellant, Cybergenics Corp. the Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 2002 WL 32137102 (3d Cir. December 16, 2002) (No. 01-3805); Brief of Amici Curiae Law Professors In Support of The Appeal of The Official Comm. of Unsecured Creditors of Cybergenics Corp., 2002 WL 32137095 (3d Cir. Dec. 13, 2002) (No. 01-3805). By contrast, Professor Keith Sharfman wrote a brief supporting the appellees, but using very different arguments. *See* Brief of Amicus Curiae Keith Sharfman in Support of the Appellees, Official Comm. of Unsecured Creditors of Cybergenics Corp., 2003 WL 21745357 (3d Cir. Feb. 6, 2003) (No. 01-3805).

[101]Brief of Amicus Curiae, Official Comm. of Unsecured Creditors of Hayes Lemmerz International, Inc. and Affiliated Chapter 11 Debtors, in Support of Appellant and Seeking Reversal of the District Court, Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 2002 WL 32137101 (3d Cir. Dec. 16, 2002) (No. 01-3805); Brief of Amicus Curiae the Official Comm. of Unsecured Creditors of Safety-Kleen Corp., et al. in Support of Appellant and Reversal, Cybergenics Corp., Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 2002 WL 32137094 (3d Cir. Dec. 13, 2002) (No. 01-3805).

[102]Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548 (3d Cir. 2003) (en banc).

[103]*Id.* at 562-63, 565, 572-73 (quoting and discussing perspectives, usually favorably, of amici Brunstad or law professors supporting appellant). By contrast, the dissenting opinion does not cite the briefwriters or rely as heavily on bankruptcy-specific sources. *Id.* at 580-87 (Fuentes, J., dissenting).

[104]*Id.* at 571 (citing multiple sections and paragraphs of COLLIER ON BANKRUPTCY (14th Ed. 1978),

perts of today and of twenty-five years ago were integral to determining that the creditors' committee had the right to bring avoidance actions notwithstanding certain Code language. Even if some disagree with the rationale of the en banc majority opinion,[105] this opinion is a testament to the role of bankruptcy experts in shaping the system.

C. STATE LEGISLATURES

Bankruptcy relies heavily on non-bankruptcy state law.[106] Thus, even if one is excluded from working with Congress, she may affect bankruptcy outcomes, and transactions for which bankruptcy law is a backdrop, by seeking state law changes or clarifications, particularly through statutory means.

For example, Revised Article 9 affects bankruptcy outcomes regarding the treatment, priority, and protection of secured creditors.[107] In addition, while parties have so far failed in their competing attempts to define asset securitization in the federal law,[108] some state legislatures have defined asset securitization in ways intended to apply in bankruptcy.[109] Furthermore,

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noting that "*Collier's* view is persuasive on such matters, for the Supreme Court has itself cited to it as evidence" that a particular practice was "widely accepted" under the Bankruptcy Act and emphasizing the importance of "*Collier's* sense of the law").

[105]For example, one amicus argued in favor of appellees. *See* Brief of Amicus Curiae Keith Sharfman in Support of the Appellees, Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 2003 WL 21745357 (3d Cir. Feb. 6, 2003) (No. 01-3805). The court of appeals engaged in the arguments made in Professor Sharfman's brief, but, in the end, mostly disagreed. *See* Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 564, 565,571, 574, 575, 576 (3d Cir. 2003).

[106]*See generally In re* Earley, 305 B.R. 837 (Bankr. N.D. Ill. 2004) (using Illinois state law to determine proper characterization of garnishing creditor in Chapter 13); Thomas E. Plank, *Bankruptcy and Federalism*, 71 FORDHAM L. REV. 1063 (2002); Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15 (2000).

[107]*See, e.g.*, Richard L. Barnes, *UCC Article Nine Revised: Priorities, Preferences, and Liens Effective Only in Bankruptcy*, 82 NEB. L. REV. 607 (2004); Karen Gross, *A Response to J.J. White's Death and Resurrection of Secured Credit: Finding Some Trees But Missing the Forest*, 12 AM. BANKR. INST. L. REV. 203, 216 (2004) (noting role of changes in Article 9 in enhancing secured creditor power in bankruptcy); Steven L. Harris & Charles W. Mooney Jr., *Revised Article 9 Meets the Bankruptcy Code: Policy and Impact*, 9 Am. BANKR. INST. L. REV. 85 (2001); Edward J. Janger, *The Reliance Interest in Insolvency Law: A Reply to Harris and Mooney*, 25 CARDOZO L. REV. 1895 (2004); Margit Livingston, *Survey of Cases Decided under Revised Article 9: There's Not Much New Under the Sun*, 2 DEPAUL BUS. & COM. L.J. 47, 48 (2003) ("many of the revisions seemed geared toward allowing secured creditors an easier time in bankruptcy"); G. Ray Warner, *The Anti-Bankruptcy Act: Revising Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3 (2001).

[108]*Compare* Employee Abuse Prevention Act of 2002, H.R. 5221, 107th Cong. § 102 ("Durbin-Delahunt") (authorizing court recharacterization of transactions) *with* Bankruptcy Reform Act of 2001, S. 420, 107th Cong. § 912 (2001); H.R. 333, 107th Cong. § 912 (2001) (insulating transactions from recharacterization). *See generally* Edward J. Janger, *Muddy Rules for Securitizations*, 7 FORDHAM J. CORP. & FIN. L. 301 (2002).

[109]*See, e.g.*, STEPHEN L. SCHWARCZ, BRUCE A. MARKELL & LISSA L. BROOME, SECURITIZATION, STRUCTURED FINANCE, AND CAPITAL MARKETS 76 (2004) (discussing state law efforts to preempt Bankruptcy Code). *See, e.g.*, DEL. CODE ANN. tit. 6, § 2703A (2004); Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 CARDOZO L. REV. 1805 (2004); Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759 (2004). *See also* OHIO REV. CODE ANN. § 1109.75 (2004);

state statutes characterizing consumer rent-to-own arrangements essentially require full payment by Chapter 13 filers who wish to retain the property.[110]

To be sure, lobbying state legislatures is not easy. The examples mentioned above involved highly coordinated and probably well-funded efforts.[111] Preemption concerns are omnipresent.[112] Nonetheless, state law is a potent additive to bankruptcy and inherently is part of bankruptcy reform. Even if federal legislation remains the ideal, a state statute can be an important first step; members of Congress may perceive a state law as a model for federal legislation.[113]

D. The News Media

For those who are unconvinced that the system can grow and develop regardless of Congressional action or inaction, this section discusses a way to be involved indirectly with the federal legislative process: experts may be able to affect perceptions of a legal system and policy developments through interactions with the news media. The media help set the policy agenda and frame debates in ways that mobilize public opinion and lead to particular types of solutions.[114] To the extent news reporters "co-produce" policy,[115]

S.D. Codified Laws § 54-1-10(3) (2003); Tex. Bus. & Com. Code Ann. § 9.109(e) (2004) ("For all purposes, in the absence of fraud or intentional misrepresentation, the parties' characterization of a transaction as a sale of such assets shall be conclusive that the transaction is a sale and is not a secured transaction and that title, legal and equitable, has passed to the party characterized as the purchaser of those assets regardless of whether the secured party has any recourse against the debtor, whether the debtor is entitled to any surplus, or any other term of the parties' agreement."); Va. Code Ann. § 6.1-473 (2004). *See generally* Jeffrey M. Carbino & William H. Schorling, *Delaware's Asset-Backed Securities Facilitation Act: Will the Act Prevent the Recharacterization of a Sale of Receivables in a Seller's Bankruptcy?*, 6 Del. L. Rev. 367 (2003).

[110] *See, e.g.*, Mich. Comp. Laws § 445.952 (2004); Ohio Rev. Code. Ann. § 1351.01 (2004); Va. Code Ann. § 59.1-207.18 (2004). *See generally* Barkley Clark et al., *"Rent-to-Own" Agreements in Bankruptcy: Sales or Leases?*, 2 Am. Bankr. Inst. L. Rev. 115, 118 (1994) (reporting that thirty-six states have adopted legislation regulating rental-purchase agreements, and that most courts honor state court definitions of these agreements). *But see* The National Bankruptcy Conference's Code Review Project 164 (1997) (noting that most bankruptcy courts have treated transactions as installment sales, and advocating Bankruptcy Code amendment to trump state law characterizations).

[111] On the other hand, some types of state legislative efforts can be quite effective without a nationally coordinated effort. For example, the bar association of a single state may develop proposed changes to state exemption statutes.

[112] *See, e.g.*, Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 Cardozo L. Rev. 1805 (2004). For preemption problems in the closely related area of banking, see, e.g., Robert C. Eager & C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. Banking Inst. 21 (2004).

[113] *See, e.g.*, Center For Responsible Lending Policy Brief No. 6, *Miller, Watt, and Others Sponsor Anti-Predatory Lending Legislation Based on Landmark North Carolina Solution* (Mar. 2004) (explaining that "H.R. 3974 draws on North Carolina's landmark 1999 law").

[114] *See generally* Kathleen Hall Jamieson & Paul Waldman, The Press Effect: Politicians, Journalists, and the Stories that Shape the Political World 122 (2003); Everett M. Rogers et al., *A Paradigmatic History of Agenda-Setting Research*, *in* Do the Media Govern? (Shanto Iyengar &

experts may wish to attempt co-producing news reporting.

Just as they did not set Congress's agenda, bankruptcy experts did not substantially participate in the framing of media reporting on bankruptcy in the mid-to-late 1990s.[116] Some bankruptcy experts (particularly Elizabeth

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Richard Reeves, eds., 1997); MICHAEL SCHUDSON, THE SOCIOLOGY OF NEWS 35 (2003); Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989).

[115]*See, e.g.*, TIMOTHY E. COOK, GOVERNING WITH THE NEWS 3, 10-13 (1998) (political actors and journalists "interact in constant but implicit series of negotiations over who controls agenda"); STEPHEN HESS, LIVE FROM CAPITOL HILL: STUDIES OF CONGRESS AND THE MEDIA (1991); M. ETHAN KATSH, LAW IN A DIGITAL WORLD 9 (1995) (law and media "intimately linked institutions"); SIDNEY KRAUS & DENNIS DAVIS, THE EFFECTS OF MASS COMMUNICATION ON POLITICAL BEHAVIOR (1976) (centrality of media to policymaking, particularly since rise of television imagery); MICHAEL SCHUDSON, THE SOCIOLOGY OF NEWS 21 (2003) (politicians as parajournalists); Achilles Skordas, *Hegemonic Custom?*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & George Nolte, eds. 2003) (media as source of public conscience, playing role in policymaking); Frank R. Baumgartner et al., *Media Attention and Congressional Agendas*, *in* DO THE MEDIA GOVERN? POLITICIANS, VOTERS, AND REPORTERS IN AMERICA 350 (Shanto Iyengar & Richard Reeves, eds., 1997) ("[s]ometimes one leads and sometimes the other, and often both are following actions of some third party"); Robert H. Giles, *The Media and Government Regulation in the Great Tradition of Muckraking*, 11 KAN. J.L. PUB. POL'Y 567, 570 (2002) ("news plays a formative role in the development of policy, of legislation, of regulations, of reform and in the overlay of politics that is so characteristic of our contemporary democracy"); Jan Ellen Rein, *Misinformation and Self-Deception in Recent Long-Term Care Policy Trends*, 12 J.L. & POL. 195, 234 (1996) ("profound effect on policy decisions at every level of government"); Lucy A. Williams, *Race, Rat Bites, and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1174 (1995) (media imaging affecting poverty and welfare legislation).

[116]Individual bankruptcy experts did not get cited with particular regularity or consistency in the national press. Focusing only on law professors in the New York Times, Washington Post, and Wall Street Journal between September 1, 1997 and August 30, 2001, for example, fewer than ten academics other than Elizabeth Warren were cited at all, and even then, they were cited only one to three times. The late Professor Lawrence King was cited shortly before his death, in clear opposition to the bill, in the New York Times. Peter T. Kilborn, *Mired in Debt and Seeking a Path Out*, N.Y. TIMES, April 1, 2001, § 1, at 1 (most filers have job problems of no fault of their own or something else that "throws their lives out of kilter"); Philip Shenon, *How Bill in Senate Would Add Hurdles to Erasing of Debt*, N.Y. TIMES, March 14, 2001, at A1 ("I fear this will end up creating an underground economy. . . . In my 40 years of dealing with Congress on bankruptcy legislation, this is the worst I've ever seen. . . . It's the kind of bill that makes you want to point your fingers at individual congressmen and say, 'Shame on you.'"). Professor Todd Zywicki was cited favoring the legislation. Riva D. Atlas, *Bankruptcy Bill Tightens Rules For Businesses*, N.Y. TIMES, March 16, 2001, at C1 (defending absolute limit on time for assumption of non-residential lease); Peter T. Kilborn, *Mired in Debt and Seeking a Path Out*, N.Y. TIMES, April 1, 2001, at § 1, at 1 (most filers are legitimate but "there are large numbers who are not legitimate users. The bill eliminates the forms of abuse that are out there."); Philip Shenon, *How Bill in Senate Would Add Hurdles to Erasing of Debt*, N.Y. TIMES, March 14, 2001, at A1 ("no good reason why a schoolteacher earning $30,000 a year should have to pay more for a mortgage or more for a new couch because some guy making $100,000 a year finds it inconvenient to pay his debts"). Professors David Skeel and Jay Lawrence Westbrook were cited in connection with their books, although one of Skeel's citations is borderline critical of the bill. David Frum, *What Happens When the Money Runs Out*, WALL ST. J., August 24, 2000, at A20 (reviewing the THE FRAGILE MIDDLE CLASS co-authored by Westbrook); Robert Samuelson, *Bad Timing on the Bankruptcy Bill*, WASH. POST, March 14, 2001, at A25 (citing Skeel for history of Chapters 7 and 13); David Wessel, *The Muddled Course of Bankruptcy Law*, WALL ST. J., February 22, 2001, at A1 (legislation discourages filings by raising cost). Then Professor, now Judge Bruce Markell was cited twice: once about creditor practices and once about proponents' motivation for the bill. Caroline E. Mayer, *Night of the Living Debt; Discharged Bills Come Back—Often Illegally—to Haunt Bankruptcy Filers*,

Warren) eventually helped the media frame bankruptcy as a story of industry power and influence, as a story of loopholes for the rich, and as a women's and children's issue.[117] As reporters and editorial pages spoke more critically about bankruptcy through the lens of these universal themes,[118] the bill sputtered and stalled on several occasions. The omnibus bill did not become much better, but it also did not become law. I cannot prove causation, but close study of the reporting and legislative activities suggests interaction consistent with the media-related literature. An affirmative and earlier media strategy-before an omnibus bill was even introduced—could have made an even greater impact on Congressional receptiveness and enthusiasm.

WASH. POST, September 13, 1998, at H1 ("pretty clear what's going on. It's harassment, if you want one word for it."); Katherine Q. Seelye, *House to Vote Today on Legislation for Bankruptcy Overhaul,* N.Y. TIMES, June 10, 1998, at A18 ("They make money on being able to target those people who incur debt and can barely pay it off."). Professor Karen Gross spoke about creditor practices. Caroline E. Mayer, *Night of the Living Debt; Discharged Bills Come Back—Often Illegally—to Haunt Bankruptcy Filers,* WASH. POST, September 13, 1998, at H1. Professor Gene Marsh was cited about the rising filings in his state. Karen Lundegaard, *Debt-Laden Alabamians Find Bankruptcy a Refuge,* WALL ST. J., December 17, 1998, at S1. Kenneth Klee was cited reacting to a letter sent by an advocate of the legislation. Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard To Get Tougher Laws,* WALL ST. J., June 17, 1998, at A1. Professor Lynn LoPucki commented on Chapter 11's effects on parties without standing. Jess Bravin, *Judges' Actions Have Wide Reach With Bankruptcy,* WALL ST. J., August 24, 2001, at B1.

[117]Melissa B. Jacoby, *Negotiating Bankruptcy Legislation through the News Media,* 42 HOUS. L. REV. (forthcoming 2004).

[118]For example, the New York Times and Washington Post ultimately had harsh words for the omnibus bankruptcy bill. *A Business Dictated Bankruptcy Law,* N.Y. TIMES, March 16, 2001, at A18; *A Gift for the Credit Card Industry,* N.Y. TIMES, May 5, 2000, at A22; *A Retreat in the Senate,* WASH. POST, Jan. 27, 2000, at A26; *An Unfair Bankruptcy Bill,* N.Y. TIMES, December 13, 2000, at A34; *Bad Bankruptcy Legislation,* N.Y. TIMES, October 10, 1998, at A14; *Bad Ideas on Bankruptcy,* WASH. POST, Feb. 18, 2000, at A22; *Bankrupt Bipartisanship,* WASH. POST, December 15, 2000, at A40; *Loopholes for Millionaires,* WASH. POST, July 16, 2001, at A14; *Protecting Rich Bankrupts,* N.Y. TIMES, August 13, 1999, at A20; *Reform Choice for Mr. Bush,* WASH. POST, February 19, 2001, at A32; *The Rich Win,* WASH. POST, June 9, 2000, at A32. The Los Angeles Times editorial page's views on bankruptcy evolved. *Compare Bankruptcy: Best Reform is a Stiff Dose of Discipline,* L.A. TIMES, Oct. 27, 1997, at B4 ("The nine-member congressional commission was supposed to come up with recommendations to revise federal bankruptcy law and close loopholes that critics say favor debtors. However, many debtors would come out ahead if Congress were to adopt certain recommendations among the 170 that the panel has offered. As it is, bankruptcy filings continue to go up, and the majority of those filing simply walk away from their debts.") *with Bankruptcy Non-Reform,* L.A. TIMES, June 8, 1998, at B4 ("The credit card industry has hijacked efforts to reform bankruptcy laws. The House and Senate bills headed for floor votes are clothed cleverly in the rhetoric of reform, and change is certainly needed. But in reality they would significantly weaken protections for truly needy debtors and leave unchanged gaping loopholes in the law that savvy—and typically wealthy—filers use to put up the shield of bankruptcy to thwart creditors and lawsuits.") *and Unjust Bankruptcy Reform,* L.A. TIMES, April 26, 2000, at B8 (Congress "ended up with a creditors' bill of rights that is unsympathetic and unjust to most debtors.").

CONCLUSION

Some judges tell us that "the Code *is* the law."[119] Bankruptcy experts tend to internalize that message and then conceptualize system improvements in terms of Bankruptcy Code amendment. Many statutory changes were suggested to or discussed with the National Bankruptcy Review Commission via more than 2300 written submissions and 600 in-person contributions,[120] and much of the 1028 page majority report discussed proposed statutory amendments.[121] Law professors and others regularly write articles proposing Code amendments as the answer.[122] The National Bankruptcy Conference developed two lengthy reports recommending Code revisions.[123] It is not surprising that one would shudder at the thought of being excluded from Congressional deliberations.

Much is at stake in a discussion about the direction of the bankruptcy system. The bankruptcy system affects many millions of individuals, families, firms, and communities.[124] The system intersects with a staggering range of substantive issues: the bankruptcy system encounters families being sued for

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[119]Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 585 (3d Cir. 2003) (Fuentes, J., dissenting) (emphasis added).

[120]*See* REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 64-74 (1997).

[121]*See* REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION (1997).

[122]*See generally* Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of the Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 209 (2000) ("And those of us who comment on the bankruptcy system are not free from blame either. We dribble out an endless series of articles saying this particular case or that is wrong and call for an instant legislative fix."). The American Bankruptcy Law Journal itself dedicated many volumes to criticisms and proposals. *See, e.g., Symposium, Letters to the Commission*, 69 AM. BANKR. L.J.431 (1995); *Symposium, Reforming Consumer Bankruptcy Law; Four Proposals*, 71 AM. BANKR. L.J. 431 (1997).

[123]THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, REFORMING THE BANKRUPTCY CODE (May 1, 1994); THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT, REFORMING THE BANKRUPTCY CODE (Rev'd May 1, 1997).

[124]*See, e.g.*, REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION 722 (1997) ("The present bankruptcy system comes into contact with more individuals and entities and handles more money than the rest of the federal court system combined."); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) ("No corner of our society seems immune from the ubiquitous reach of bankruptcy. It touches mass tort victims, mega corporations, mom-and-pop businesses, (supposedly) wealthy California counties, fraudulent schemers, polluters, unfortunate individuals—the list is endless."); Elizabeth Warren, *The New Economics of the American Family*, 12 AM. BANKR. INST. L. REV. 1, 40 (2004). Even the 2004 Democratic National Platform acknowledges bankruptcy's national relevance. 2004 Democratic National Platform Committee Report, 22 (2004) (noting that one of seven middle class families may be bankrupt by the end of the decade). This mention of bankruptcy does not include any mention of Democrats'—particularly New Democrat or "Blue Dogs"—support for the omnibus bill. *See* Press Release, New Democrat Coalition, New Democrats Provide Key Support for Bankruptcy Reform (March 1, 2001), *available at* http://www.ndol.org/print.cfm?contentid=3111; Press Release, New Democrat Coalition, New Democrat Leaders Criticize Republicans for Ignominious Defeat of Critical Economic Legislation (Nov. 14, 2002), *available at* http://www.ndol.org/print.cfm?contentid=25108 (criticizing "group of right-wing, conservative Republicans" for preventing bankruptcy bill from passing due to abortion issue).

medical debts,[125] an Archdiocese defending against sexual abuse allegations,[126] major manufacturers of products that allegedly have caused widespread harm,[127] and small businesses fighting with the IRS,[128] all while the debtors have responsibilities to a wider range of claim or interest holders. Bankruptcy offers a collective approach to working through these and other problems.[129]

This system is too vast and too significant to be left in the hands of any one group, including bankruptcy experts. But believing that bankruptcy experts can be shut out of reform not only is counterproductive, but impossible. Bankruptcy experts know the system is not perfect, and do not speak with one voice regarding its ideal direction. But even if they did, they know that no version of the Code would capture it.[130] The Bankruptcy Code's birthday should be celebrated with the recognition that the Code's role in this vast and complex system is important but not all-encompassing. Twenty-five years from now, even if the Bankruptcy Code is largely the same, the bankruptcy system will have been remade again.

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[125] *See generally Hearing on a Review of Hospital Billing and Collection Practices Before the House Comm. on Energy and Commerce Subcommittee on Oversight and Investigations*, 108th Cong. (2004) (statement of Melissa B. Jacoby).

[126] *See, e.g.*, Laurie Goodstein, *Oregon Archdiocese Files for Bankruptcy Protection*, N.Y. TIMES, July 7, 2004, at A12.

[127] *See, e.g.*, S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095 (2000); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045 (2000).

[128] *See, e.g.*, Elizabeth Warren & Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 559 (1999) (reporting that one in five business bankruptcy filers in their sample identified problem with taxing authority, and nearly one in five also identified problem with specific creditor as reason for filing).

[129] *See, e.g.*, Stanley D. Longhofer & Stephen R. Peters, *Protection for Whom? Creditor Conflict and Bankruptcy*, 6 AM. L. & ECON. REV. 249 (2004).

[130] *See, e.g.*, Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 567-68 (3d Cir. 2003) ("We believe that the missing link is supplied by bankruptcy courts' equitable power to craft flexible remedies in situations where the Code's causes of action fail to achieve their intended purpose. . . . It is in precisely this situation that bankruptcy courts' equitable powers are most valuable, for the courts are able to craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain.").

First Day Motion Guidelines (Eff. June 1, 2019)

1. Where a Debtor-in-Possession or a Trustee requires relief upon or shortly after the filing of a petition for relief under Chapter 11, it may file motions seeking such relief on an expedited basis (the "First Day Motions"). First Day Motions may include, but are not limited to, requests to: maintain existing banking accounts and cash management systems; maintain and set adequate assurance for utility companies; honor customer deposits and obligations; pay pre-petition debts to service and product providers (i.e., critical vendors); pay prepetition payroll; and use cash collateral. The Debtor-in-Possession or Trustee must support all First Day Motions with admissible evidence and must otherwise comply with B.L.R. 9013-1. An omnibus declaration in support of the First Day Motions is acceptable, so long as the declarant is competent to attest to all relevant facts. See B.L.R. 9013-1(d)(2).

2. If the Debtor-in-Possession or Trustee would like the court to convene a hearing on its First Day Motions on the date that its files its petition for relief, counsel for the Debtor-in-Possession or Trustee must, once the petition has been filed, contact the chambers of the assigned judge to schedule a hearing on the First Day Motions. If the First Day Motions will not be heard until after the petition date, counsel for the Debtor-in-Possession or Trustee must, as soon as practicable after the filing of the petition, contact the chambers of the assigned judge to advise

of the coming First Day Motions, and to obtain a hearing date and time. Counsel shall also inquire whether the assigned judge wants chambers copies of the First Day Motions. Counsel for the Debtor-in-Possession or Trustee also must notify the assigned judge's law clerk(s) and the United States Trustee of the First Day Motions by email or by telephone.

3. Should the assigned judge want chambers copies of the First Day Motions, counsel for the Debtor-in-Possession or Trustee must deliver a complete set of chambers copies to the assigned judge's chambers on the day the First Day Motions are filed. Chambers copies shall be delivered in 3-ring binders not to exceed 2". Each pleading and each exhibit in each binder must be included in an index inserted as the first page in each binder and must be clearly marked with tabs.

4. The court encourages counsel for the Debtor-in-Possession or Trustee to make the court aware in advance of any new case that will require significant court involvement at its outset including, but not limited to, adjudication of First Day Motions.

5. First Day Motions requesting authority to use cash collateral and/or approval of post-petition financing shall comply with Rules 4001 (b), (c) and (d) of the Federal Rules of Bankruptcy Procedure. Counsel also must comply with the court's *Guidelines for Cash Collateral and Financing Stipulations*.

6. Any relief granted at the initial hearing on any First Day Motions is preliminary and subject to further order at subsequent hearing(s).

7. If an interested party wishes to appear by telephone at the hearing(s) on the First Day Motions, that party must comply with the court's Policy and Procedure for Appearances by Telephone, which is available on the court's website.

8. Attorneys who are not admitted to practice in the Northern District of California must comply with Civil L.R. 11-3 (incorporated by B.L.R. 1001-2(a)). *Pro hac vice* admission should be sought as soon as practicable, but is not required prior to the initial hearing on First Day Motions.

9. Any order submitted after hearing on a First Day Motion must be accompanied by a service list that complies with B.L.R. 9022-1(a).

10. Any party affected by a First Day Order or any party in interest may file a motion to modify any First Day Order under these Guidelines, except an order entered pursuant to 11 U.S.C. §§ 363 and 364 applicable to the use of cash collateral and/or court approval of post-petition financing. The motion must be filed not less than twenty-one days after entry of the First Day Order on the ECF docket. In any contested hearing on such a motion, the Debtor has the burden of proof on the propriety of the relevant First Day Order.

Guidelines for Early Disposition of Assets in Chapter 11 Cases, Pre-Packaged Plans, The Sale of Substantially All Assets Under § 363

Guidelines for Early Disposition of Assets in Chapter 11 Cases, Pre-Packaged Plans, The Sale of Substantially All Assets Under §

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

GUIDELINES FOR EARLY DISPOSITION OF ASSETS IN CHAPTER 11 CASES

PRE-PACKAGED PLANS

THE SALE OF SUBSTANTIALLY ALL ASSETS UNDER § 363

The following guidelines are promulgated as a result of the increasing use of pre-packaged plans or §363 sales to dispose of substantially all assets of a Chapter 11 debtor shortly after the filing of the petition. The court will consider all requests to modify the guidelines to fit the circumstances of a particular case.

PRE-PACKAGED PLANS

1. Declaration of Counsel for Debtor-In-Possession -- In connection with any request for the special setting of a hearing to approve a disclosure statement or a combined hearing to approve a disclosure statement and confirm a plan, in addition to any other required papers, counsel for the debtor-in-possession should submit a declaration covering the following points:

    a. Retention of counsel. The date counsel was retained by the debtor, the approximate number of hours of professional time expended pre-petition, compensation paid to counsel pre-petition including source of payment and the approximate amount of accrued but unpaid compensation.

    b. Communications with creditors. A description of any written communications of the debtor with creditors during the pre-petition reorganization process. Copies of letters should be attached. If letters contain confidential information, they need not be attached but the court may require in-camera inspection.

    c. Communications with shareholders or partners. A description of any written communications with shareholders or partners of a partnership during the pre-petition reorganization process. Copies of letters should be attached. If letters contain confidential information, they need not be attached but the court may require in-camera inspection.

    d. Creditors' Committee. If a Creditors' Committee existed pre-petition, indicate the date and manner in which the committee was formed.

e. Counsel for Committee. If the pre-petition Creditors' Committee retained counsel, indicate the date counsel was engaged and the selection process.

f. Position of United States Trustee. It is expected that the United States Trustee will be consulted prior to, or simultaneously with, the filing. Set forth the position of the United States Trustee regarding the request for a special setting, if known.

2. Declaration of Counsel for Creditors' Committee -- Where counsel has represented a pre-petition Creditors' Committee and anticipates representing the Official Creditors' Committee when appointed, counsel should submit a declaration covering the following points:

   a. Retention of counsel. The date counsel was retained by the Committee, the approximate number of hours of professional time expended pre-petition, compensation paid to counsel pre-petition including source of payment and the approximate amount of accrued but unpaid compensation.

   b. Investigation of Committee and Counsel. A description of the scope and results of any investigation into the debtor's affairs conducted by the Committee and/or its counsel.

   c. Communication with creditors. A description of any written communications of the Committee or its counsel with creditors during the pre-petition reorganization process. Copies should be attached. If letters contain confidential information, they need not be attached but the court may require in-camera inspection.

   d. Involvement in formulation of plan and disclosure statement. A description of the Committee's and counsel's involvement in the formulation of the plan and disclosure statement.

THE SALE OF SUBSTANTIALLY ALL ASSETS UNDER § 363 WITHIN 60 DAYS OF THE FILING OF THE PETITION

3. Declaration of Counsel for Debtor-In-Possession -- In connection with any hearing to approve the sale of substantially all assets within 60 days of the filing of the petition, the request for the special setting of a hearing or the sale motion itself when regularly noticed, should be supported by a separate declaration by counsel for the debtor-in-possession covering the following points:

   a. Retention of counsel. Same as ¶ 1.a. above.
   b. Communications with creditors. Same as ¶ 1.b. above.
   c. Communications with shareholders or partners. Same as ¶ 1.c. above.
   d. Creditors' Committee. Same as ¶ 1.d. above.
   e. Counsel for Committee. Same as ¶ 1.e. above.

   f. Sale Contingencies. Statement of all contingencies to the sale agreement together with a copy of the agreement.

   g. Creditor Contact List. If no committee has been formed, a list of contact persons together with fax and phone numbers for each of the largest 20 unsecured creditors.

   h. Administrative Debts. Assuming the sale is approved, an estimate of administrative debts to be incurred prior to closing and the source of payment for such debts.

i. Proceeds of sale. An estimate of the gross proceeds anticipated from the sale together with an estimate of the net proceeds coming to the estate with an explanation of the items making up the difference.

j. Debt Structure of debtor. A brief description of the debtor's debt structure including the amount of the debtor's secured debt, priority claims and general unsecured claims.

k. Disposition of Proceeds. A statement setting forth, to the best of declarant's knowledge, the likely distribution of proceeds to secured claimants, administrative claimants, priority claimants and general unsecured creditors.

4. Declaration of Responsible Individual for Debtor-In-Possession -- Counsel's declaration referred to in ¶ 3 above should be accompanied by a declaration from the responsible individual covering the following matters:

   a. Alternatives to Sale. A description of the efforts, if any, to pursue other alternatives such as financing, capital infusion, etc., including the period of time involved and the results achieved.

   b. Marketing of Assets. A description of the manner in which the assets were marketed for sale including the period of time involved and the results achieved.

   c. Decision to Sell. The date on which the debtor accepted the offer to purchase the assets.

   d. Asset Valuation. Disclosure of the debtor's prior valuations, within the last year, of the assets to be sold, if any. (i.e., book value, appraisals, financial statements, etc.)

   e. Relationship of Buyer. A statement identifying the buyer and setting forth, to the best of declarant's knowledge, all of the buyer's (including its officers, directors and shareholders) connections with the debtor, creditors, any other party in interest, their respective attorneys, accountants, the United States Trustee or any person employed in the office of the United States Trustee.

   f. Post Sale Relationship with Debtor. A statement setting forth, to the best of declarant's knowledge, any relationship or connection the debtor (including its officers, directors, shareholders, and employees) will have with the buyer after the consummation of the sale, assuming it is approved.

   g. Relationship with Secured Creditors. If the sale involves the payment of all or a portion of secured debt(s), a statement of all connections between debtor's officers, directors, employees or other insiders and each secured creditor involved (for example, release of insider's guaranty).

   h. Insider Compensation. Disclosure of current compensation received by officers, directors, key employees or other insiders pending approval of the sale.

5. Declaration of Counsel for Creditors' Committee -- Where counsel has represented a pre-petition Creditors' Committee and anticipates representing the Official Creditors' Committee when appointed, counsel should submit a declaration covering the following points:

   a. Retention of counsel. Same as ¶ 2.a. above.

b. Investigation of Committee and Counsel. Same as ¶ 2.b. above.

c. Communication with creditors. Same as ¶ 2.c. above.

d. Involvement in sale. A description of the Committee's and counsel's involvement in the negotiation of the sale.

6. Hearing and Notice Regarding Sale -- Unless the court orders otherwise, all sales governed by these guidelines, including auctions or the presentation of competing bids, will occur at the hearing before the court.

   The notice sent to creditors and other parties in interest regarding the sale should contain the information required by ¶¶ 3. h - k and 4. a - g above, in addition to any other matters normally set forth in a notice of sale.

7. Proposed Order Approving Sale -- A proposed order approving the sale should be provided to chambers 24 hours prior to the hearing.

8. Good Faith Finding -- There must be an evidentiary basis for a finding of good faith under § 363(m). Evidence can be presented in the form of a declaration from the prospective purchaser.

9. Competing Bids -- Unless the court orders otherwise, competing bids can be presented at the time of the hearing.

10. Financial Ability to Close -- Unless the court orders otherwise, any competing bidder must be prepared to demonstrate to the satisfaction of the court its ability to consummate the transaction if it is the successful bidder.

11. Overbids -- Unless the court orders otherwise, each overbid must be at least 5% more than the amount of the original offer. The amount of the original offer is determined without regard to any commission or payment to a broker or agent.

12. Damages Payable to Prospective Purchaser -- Whether denominated liquidated damages, breakup fee, topping fee or other designation, no damages of any kind are payable to a prospective purchaser or its agents absent approval of the court.

    If a provision for damages is contained in the original purchase agreement, and the parties intend to seek court approval for the provision separately, the provision should provide that it can be approved separately from the agreement itself.

    A request for the approval of a damage provision shall be supported by, in addition to any other required papers, a declaration from counsel for the debtor-in-possession setting forth the precise conditions under which damages would be payable and the factual basis on which the seller determined the provision was reasonable. Counsel for the proposed buyer may, but is not required to, submit a similar declaration.

PROCEDURES FOR COMPLEX CASES
IN THE SOUTHERN DISTRICT OF TEXAS

(Effective August 1, 2021)

Pursuant to BANKR. LOC. R. 1075-1, these procedures apply to the administration of complex chapter 11 and 15 cases (a "Complex Case"). A Complex Case is a case or group of affiliated cases in which (i) the total liabilities of the debtors[1] and their non-filing affiliates exceed $10 million; (ii) there are more than 50 parties-in-interest; or (iii) any claims against or interests in the debtors are publicly traded. A Complex Case includes a case that meets the foregoing criteria and is initiated by the filing of an involuntary petition under 11 U.S.C. § 303.

If the debtors and their non-filing affiliates have less than $200 million in liabilities, the debtors may elect the Complex Case designation. For cases where the debtors and their non-filing affiliates have $200 million or more in liabilities, the Complex Case designation is mandatory.

The Texas Procedures for Complex Chapter 11 cases do not apply in a Complex Chapter 11 Case. The Bankruptcy Local Rules shall apply unless they conflict with these procedures.

A. FIRST-DAY HEARINGS AND COMPLEX CASE DESIGNATION

1. Albert Alonzo, case manager for Chief Judge David R. Jones, is designated as the initial point of contact for all pre-filing matters for anticipated Complex Cases. Mr. Alonzo may be contacted at (713) 250-5467 (office), (832) 993-7656 (mobile), or by electronic mail at Albert_Alonzo@txs.uscourts.gov. Counsel for proposed debtors in a Complex Case should contact Mr. Alonzo as early as possible prior to filing a Complex Case to obtain a setting for first-day hearings. Mr. Alonzo will provide first-day hearing settings for both judges assigned to the Complex Case Panel of Judges. Once a judge has been assigned, the applicable setting can then be used. If Mr. Alonzo is not available, the point of contact is LinhThu Do, case manager for Judge Marvin Isgur, who may be contacted at (713) 250-5421 (office), (832) 544-6597 (mobile), or by electronic mail at Linhthu_Do@txs.uscourts.gov.

2. A Notice of Designation of a Complex Case must be filed by the debtors with the petition in a voluntary Complex Case. If the petition is filed under 11 U.S.C. § 303, the notice of designation must be filed by a petitioning creditor or the debtors within 14 days of service of the petition. Petitions must be filed electronically. **When opening a Complex Case, the Office should be selected as "Complex Docket" regardless of the division in which the case is filed. DO NOT SELECT A CITY NAME.** Detailed filing instructions may be found at https://www.txs.uscourts.gov/sites/txs/files/nextgen%20instructions-v2.pdf.

3. Unless otherwise ordered, first-day hearings will be conducted as Virtual Hearings (no in-person attendance permitted (see **Section I**)); provided, if first-day hearings are combined with the plan confirmation hearing in a prepackaged case or a request for equitable relief in an adversary proceeding, in-person attendance will be permitted but not required.

[1] The term "debtors" is used herein for convenience and includes a single debtor as well as a group of affiliated debtors whose cases are jointly administered.

B. FINAL ORDERS AT FIRST-DAY HEARINGS

4. Final orders, rather than interim orders subject to final orders at subsequent hearings, may be sought for the following types of relief:

a. Motions to pay employee wages and benefits that do not include relief of the nature specified in 11 U.S.C. § 503(c) or that do not otherwise contain a request for payments outside the ordinary course of the debtors' business. If relief is also sought for payments outside of the ordinary course of business or that implicates § 503(c), a separate motion seeking that additional relief should be filed.

b. Motions to pay pre-petition and post-petition taxes that are (i) secured by property of the estate; (ii) held in trust by the debtors pursuant to state or federal law; or (iii) entitled to priority pursuant to 11 U.S.C. § 507(a)(8).

c. Motions to pay (i) oil and gas royalties; (ii) mineral liens, or mechanic and material liens that meet the criteria of 11 U.S.C. § 546(b); (iii) joint interest billing disbursements to joint interest parties; claims arising under 11 U.S.C. § 503(b)(9); or (iv) claims arising under the Perishable Agricultural Commodities Act of 1930, the Packers and Stockyards Act of 1921, or any state statutes of similar effect.

d. Applications to retain a claims, balloting and/or noticing agent ("Claims Agent");

e. Motions to limit or modify the notice requirements of FED. R. BANKR. P. 2002;

f. Motions to approve adequate assurance procedures under 11 U.S.C. § 366 that (i) do not prejudice the right of a utility to propose alternative procedures; and (ii) provide for a hearing not later than 30 days after the petition date upon any timely filed objection to the adequate assurance procedures.

g. Motions that are procedural in nature and do not affect the substantive rights of creditors and other parties-in-interest.

C. CASH COLLATERAL AND FINANCING ORDERS

5. On motion by the debtors, a hearing (the "Initial Financing Hearing") will routinely be conducted as a first-day hearing to consider either cash collateral use and/or interim debtor-in-possession financing (the "Initial Financing").

6. At the Initial Financing Hearing, the debtors must introduce a cash flow projection showing sources and uses of cash necessary for ongoing operations on a weekly basis for not less than the first 3 weeks of the case (a "First Budget").

a. The First Budget must be filed with the Court and be served no later than noon on the first business day after the filing, or on the date of the filing if the Initial Financing Hearing is to occur before the second business day after the Petition Date.

b. The debtors must provide a copy of the First Budget in native file format upon request.

7. At the Initial Financing Hearing, the Court will consider the Initial Financing pursuant to 11 U.S.C. §§ 363, 364 and FED. R. BANKR. P. 4001, subject to the following:

a. The Court will set a hearing to consider permanent financing through use of cash collateral and/or debtor-in-possession financing in accordance with 11 U.S.C. §§ 363, 364 and FED. R. BANKR. P. 4001 (a "Permanent Financing Hearing").

b. If further interim financing relief is appropriate prior to a Permanent Financing Hearing, notice of a Permanent Financing Hearing is adequate notice of a request for further interim relief.

c. At the Permanent Financing Hearing, the debtors must introduce a cash flow projection for sources and uses of cash for the period of cash collateral use or debtor-in-possession financing that is proposed (a "Permanent Financing Budget").

d. The Permanent Financing Budget must be filed on the Exchange Date provided in BANKR. LOC. R. 9013-2. The debtors must provide a copy of the Permanent Financing Budget in native file format upon request.

8. If a motion to approve financing under 11 U.S.C. §§ 363 or 364 seeks to include any of the following terms, the motion must list all such provisions in a separate section or chart and provide specific reasons why each such provision should be approved:

a. Sale or plan confirmation milestones;

b. Cross-collateralization;

c. Roll ups (including (i) provisions deeming pre-petition debt to be post-petition debt; and (ii) provisions requiring the proceeds of post-petition loans to be used to repay pre-petition debt);

d. Liens on avoidance actions or proceeds of avoidance actions;

e. Default provisions and remedies that are self-executing or preclude court oversight, including: (i) provisions terminating the automatic stay without further order, (ii) provisions waiving rights to challenge lenders' ability to exercise post-default remedies; and (iii) provisions limiting required proof or altering the burden of proof at post-default hearings;

f. Releases of claims;

g. Limitations on the use of cash collateral or DIP proceeds (other than general "carve-outs") to pay approved fees and expenses of advisors to official committees or future trustees;

h. Non-consensual priming liens;

i. Any other provision that limits the ability of estate fiduciaries to fulfill their duties under the Bankruptcy Code and applicable law.

The inclusion of these types of provisions in an interim or emergency order will require an extraordinary showing.

9. Cash collateral and financing orders that contain a release of claims against lenders and other third parties by the debtors should provide that an official committee of unsecured creditors (the "Committee") has at least 60 days from the date of the Committee's formation to investigate claims against the lenders and to challenge the extent and validity of any liens or the appropriateness of such release, with such 60-day period subject to extension by agreement of the Committee and the lenders and other third parties, as the case may be, or by order of the Court.

D. DISFAVORED PROVISIONS

10. These provisions are disfavored in any motion or order:

a. The inclusion of a provision in any cash collateral, DIP loan or other financing order that (i) provides for the termination of the automatic stay without notice and hearing; (ii) alters the evidentiary burden with respect to the termination of the automatic stay; or (iii) limits the range of remedies that the Court may order upon a default.

b. The inclusion of a provision in any cash collateral, DIP loan or other financing order that terminates or limits the debtors' exclusive rights under § 1121.

c. Except as contained in a confirmed plan, the assumption of a plan support agreement as an executory contract or otherwise; provided, the Court does not disfavor the debtors' actual performance under a plan support agreement, including without limitation, the debtors' post-petition agreement to include performance deadlines in various financing orders and the debtors' reimbursement of the reasonable and necessary professional fees of parties to the plan support agreement.

E. MASTER SERVICE LIST

11. The debtors must maintain a consolidated master service list identifying the parties that must be served whenever a motion or other pleading requires notice. Unless otherwise required by the Bankruptcy Code or Rules, notices of motions, applications and other matters will be limited

to the parties on the master service list. The master service list must initially include (a) the Office of the United States Trustee for the Southern District of Texas; (b) the debtors; (c) the attorneys for the debtors; (d) the debtors' secured lenders; (e) the debtors' thirty (30) largest unsecured creditors; (f) those persons who have formally appeared in the chapter 11 case and requested service pursuant to FED. R. BANKR. P. 2002; (g) all applicable government agencies to the extent required by the Bankruptcy Rules and the Local Rules; and (h) any known counsel for (d) – (g). Any party in interest that files a Notice of Appearance will be added to the master service list.

a. Parties on the master service list who appear through counsel or submit a request for service by CM/ECF will be served with pleadings and orders through the CM/ECF notification system. No other form of notice will be required.

b. All other parties on the master service list must be served, at the server's option, by e-mail or regular mail. Each certificate/affidavit of service must include the actual e-mail or regular mail address for each party that is served under this paragraph 6(b) unless otherwise ordered.

c. The initial master service list must be filed within three (3) days after entry of an order granting complex case treatment. A revised list must be filed seven (7) days after the initial master service list is filed. The debtors must update and file a copy of the updated master service list (i) at least every seven (7) days during the first thirty (30) days of the case; (ii) at least every fifteen (15) days during the next sixty (60) days of the case; and (iii) at least every thirty (30) days thereafter. Updated lists need not be filed if there are no changes.

F. CLAIMS AGENTS AND CREDITOR LISTS

12. Motions seeking to employ a Claims Agent should use the official form of order located on the Court's website.

13. If a Claims Agent has been employed, the creditor matrix required by FED. R. BANKR. P. 1007 should be filed in pdf format using the "Complex Case Creditor Matrix" CM/ECF event code rather than uploading a .txt file using the "Upload List of Creditors File" CM/ECF event code.

14. The lead debtor in a jointly administered Complex Case must:

a. file a single, consolidated list of unsecured creditors on Official Form 204 consisting of the 30 largest unsecured creditors of all jointly administered debtors; and

b. if a Claims Agent has been appointed, use a Court-approved modified version of the Official Form 309F1 (Notice of Chapter 11 Case) to reflect the procedures approved for the services provided by the Claims Agent.

G. COMPLEX HEARINGS AND HEARING DATES

15. Unless otherwise directed by the Court, hearing dates must be obtained by contacting the Court's case manager.

16. All motions that do not require emergency consideration must state, immediately below the case caption and in lieu of the language required by any Local Bankruptcy Rule, the following:

> **If you object to the relief requested, you must respond in writing. Unless otherwise directed by the Court, you must file your response electronically at https://ecf.txsb.uscourts.gov/ within twenty-one days from the date this motion was filed. If you do not have electronic filing privileges, you must file a written objection that is actually received by the clerk within twenty-one days from the date this motion was filed. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.**
>
> **[IF A HEARING DATE HAS BEEN OBTAINED, INCLUDE THE FOLLOWING PARAGRAPHS:]**
>
> **A hearing will be conducted on this matter on ____, 202___ at _: am/pm in Courtroom __, ___ floor, ____(courthouse address)_____. [INCLUDE ONE AS APPLICABLE: You may participate in the hearing either in person or by an audio and video connection [OR] Participation at the hearing will only be permitted by an audio and video connection] [OR] You are required to appear in person at the hearing pursuant to the Court's order.**
>
> **Audio communication will be by use of the Court's dial-in facility. You may access the facility at 832-917-1510. Once connected, you will be asked to enter the conference room number. Judge ____'s conference room number is _____. Video communication will be by use of the GoToMeeting platform. Connect via the free GoToMeeting application or click the link on Judge _____'s home page. The meeting code is "Judge_____". Click the settings icon in the upper right corner and enter your name under the personal information setting.**
>
> **Hearing appearances must be made electronically in advance of both electronic and in-person hearings. To make your appearance, click the "Electronic Appearance" link on Judge ______'s home page. Select the case name, complete the required fields and click "Submit" to complete your appearance.**

17. All motions seeking relief on less than 21-days' notice must be filed as "emergency" motions. An emergency motion must contain the word "emergency" in the title of the motion and must be filed using the CM/ECF code for an emergency motion.

18. Emergency motions may be filed without a designated hearing date. Alternatively, an emergency motion may be calendared for hearing on a date obtained from the Court's case manager. For motions that seek emergency consideration, the Court will determine at the

scheduled hearing as an initial matter whether to allow emergency consideration. Motions that require emergency consideration must state, just below the case caption and in lieu of the language required by any Local Bankruptcy Rule, the following:

> **Emergency relief has been requested. Relief is requested not later than [_____ a.m/p.m. on __________, 202___].**
>
> **If you object to the relief requested or you believe that emergency consideration is not warranted, you must appear at the hearing if one is set, or file a written response prior to the date that relief is requested in the preceding paragraph. Otherwise, the Court may treat the pleading as unopposed and grant the relief requested.**
>
> **[IF A HEARING DATE HAS BEEN OBTAINED, INCLUDE THE FOLLOWING PARAGRAPHS:]**
>
> **A hearing will be conducted on this matter on ____, 202___ at _: am/pm in Courtroom __, ___ floor, ____(courthouse address)_____.**
>
> **[INCLUDE ONE AS APPLICABLE AS DIRECTED BY THE CASE MANAGER: You may participate in the hearing either in person or by an audio and video connection [OR] Participation at the hearing will only be permitted by an audio and video connection] [OR] You are required to appear in person at the hearing pursuant to the Court's order.**
>
> **Audio communication will be by use of the Court's dial-in facility. You may access the facility at 832-917-1510. Once connected, you will be asked to enter the conference room number. Judge____'s conference room number is _____. Video communication will be by use of the GoToMeeting platform. Connect via the free GoToMeeting application or click the link on Judge _____'s home page. The meeting code is "Judge_____". Click the settings icon in the upper right corner and enter your name under the personal information setting.**
>
> **Hearing appearances must be made electronically in advance of both electronic and in-person hearings. To make your appearance, click the "Electronic Appearance" link on Judge ______'s home page. Select the case name, complete the required fields and click "Submit" to complete your appearance.**

19. Appearances in a main case matter must be made by completing an Electronic Appearance Form. The Electronic Appearance Form is accessible from the Judge's home page:

https://www.txs.uscourts.gov/content/united-states-bankruptcy-judge-marvin-isgur
https://www.txs.uscourts.gov/content/chief-united-states-bankruptcy-judge-david-r-jones

Electronic Appearance Forms should be completed prior to the beginning of each in-person or electronic hearing for which the appearance is being made. Electronic Appearances are not available in adversary proceedings unless otherwise ordered.

20. Continuances or adjournments of scheduled hearings must be coordinated with the Court's case manager by email with a copy to all anticipated hearing participants, including all parties that have filed any pleadings regarding the matters for which the hearing is being adjourned. Scheduled hearings will be continued or rescheduled only upon the case manager's filing of a notice on the case docket. The movant must promptly file and serve a notice of any continuance or new setting in accordance with these procedures.

H. PROCEDURES FOR REMOTE PARTICIPATION

21. Beginning September 7, 2021 and (i) unless a hearing is a virtual hearing as set forth below in **Section I;** or (ii) otherwise ordered by the Court, parties may appear for a hearing in person or by remote participation. No motion is required for remote participation. Audio participation will be through the Court's dial-in facility as follows:

> The dial-in number for Judge Isgur is **832-917-1510**; conference room number 954554.
>
> The dial-in number for Judge Jones is **832-917-1510**; conference room number 205691.
>
> You will be asked to enter the conference room number. Once the conference room number is entered, you will be connected to the courtroom.
>
> Once you are connected, you will be able to hear persons speaking in the courtroom and other persons on the call addressing the Court.
>
> At each hearing, the Court will either (i) unmute all participants' lines; or (ii) selectively unmute participants' lines once they indicate that they wish to address the Court by pressing 5*.

22. Video participation is available via GoToMeeting. To use GoToMeeting, the Court recommends that you download the free GoToMeeting application prior to the hearing. A mobile version of the application is also available for IOS and Android devices. If a browser connection is used, Chrome is generally recommended as the preferred browser. The meeting code is either "JudgeIsgur" or "JudgeJones." You may also connect directly by clicking the link on either Judge Isgur's or Judge Jones' home page on the Southern District of Texas website. Once connected, click the icon in the upper right corner of your personal video box and enter your name.

23. Absent extraordinary circumstances, witnesses (whether appearing voluntarily or by subpoena) must appear by both audio and video.

24. Absent extraordinary circumstances, attorneys who intend to make arguments or examine witnesses must appear by both audio and video.

25. The Court may allow parties-in-interest to utilize GoToMeeting to present documents or other presentations.

26. Parties may stipulate that they will only participate remotely at a hearing. The stipulating parties will be bound by any such stipulation that is filed on the record prior to the commencement of the hearing.

I. ADDITIONAL PROCEDURES FOR VIRTUAL HEARINGS

27. The Court may authorize virtual hearings. For clarity, a "virtual hearing" differs from "remote participation" in that a virtual hearing will be conducted with ***none*** of the parties or witnesses being physically in the courtroom. Virtual hearing settings may be obtained by filing a motion in the form contained on the Court's website. Personal attendance at virtual hearings is not authorized.

28. The balance of the Procedures for Remote Participation apply.

J. AUDIO RECORDINGS

29. Audio recordings of hearings will normally be made available on CM/ECF using CourtSpeak. The audio file will be reflected on the docket as an .mp3 file embedded within a .pdf document. The .pdf document will contain basic instructions for accessing the audio file.

K. AUTOMATIC BRIDGE ORDER FOR EXTENSIONS OF TIME

30. Unless otherwise provided in the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, or Court order, if a motion is filed that complies with these procedures to extend the time to take any action before the expiration of the period prescribed by the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, or a confirmed plan, the time for taking the action is automatically extended until the Court rules on the motion. An automatic extension under this rule does not require the issuance or entry of an order extending the time.

L. SETTLEMENT

31. If a matter is properly noticed for hearing and the parties reach a settlement of the dispute prior to the hearing on the matter, the parties should promptly notify the Court's case manager that the matter is settled. The parties may announce the settlement at the scheduled hearing. If the Court determines that the notice of the dispute and the hearing is adequate notice of the effects of the settlement, (i.e., that the terms of the settlement are not materially different from what parties-in-interest could have expected if the dispute were fully litigated) the Court may approve the settlement at the hearing without further notice.

M. PROOFS OF CLAIM AND OMNIBUS CLAIM OBJECTION PROCEDURES

32. Unless a different date is ordered by the Court, the bar date for the filing of proofs of claim and proofs of interest is (i) 180 days after the petition date for governmental units; and (ii) for all other entities, 90 days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a). The debtors must promptly provide notice of the bar date to all creditors.

33. Omnibus claim objections must conform with FED. R. BANKR. P. 3007(d) and (e) and BANKR. LOC. R. 3007-1 absent further order.

34. Parties may file a motion to approve procedures for handling omnibus claim objections. Such procedures may not shift the burden of proof, discovery rights or burdens, or pleading requirements.

35. Parties may obtain claim objections hearing dates consistent with the above **Section G**. Adjournments or continuances of claim objections hearings must either (i) be agreed and reflected in a claims objection hearing agenda that is filed at least 24 hours prior to the scheduled hearing; or (ii) ordered by the Court on motion of any party.

N. SALE ORDERS AND BID PROCEDURES

36. Any party-in-interest opposing a sale motion on the basis that the proposed sale constitutes a *sub rosa* plan must identify with specificity what rights or protections under 11 U.S.C. §§ 1121-1129 are being violated. The proponents of a sale motion must respond specifically to any objection asserting that a proposed sale pursuant to 11 U.S.C. § 363 will constitute a *sub rosa* plan.

37. Bid procedures motions should provide for consultation with any official committees and secured lenders with liens on the property being sold. Notwithstanding the foregoing, secured lenders or committee members who are potential bidders may not participate in the adoption or implementation of bidding procedures and may not receive information that is not generally available to all potential bidders.

O. PLAN CONFIRMATION

38. If the debtors file a disclosure statement and plan before the Initial Financing Hearing, then at the Initial Financing Hearing, the Court will set the date for the disclosure statement hearing and related objection deadlines and will consider setting a date for the confirmation hearing and related voting and objection deadlines.

39. If the debtors file a plan and disclosure statement before the Permanent Financing Hearing, then at the Permanent Financing Hearing, the Court will set the date for the disclosure statement hearing and related objection deadlines and will consider setting a date for the confirmation hearing and related voting and objection deadlines.

40. If a proposed plan seeks consensual pre- or post-petition releases with respect to claims that creditors may hold against non-debtor parties, then a ballot must be sent to creditors entitled to vote on the proposed plan and notices must be sent to non-voting creditors and parties-in-interest. The ballot and the notice must inform the creditors of such releases and provide a box to check to indicate assent or opposition to such consensual releases together with a method for returning the ballot or notice.

P. JOINT HEARINGS ON APPROVAL OF DISCLOSURE STATEMENTS AND CONFIRMATION OF PLANS/CONDITIONAL APPROVAL OF DISCLOSURE STATEMENTS

41. A plan proponent may combine the disclosure statement and plan into a single document. Contemporaneously with the filing of a disclosure statement and proposed plan, a plan proponent may file a motion requesting (1) conditional approval of the disclosure statement; (2) approval of solicitation procedures; (3) the scheduling of a hearing on shortened notice to consider conditional approval of the proposed disclosure statement; and (4) the scheduling of a joint hearing to consider final approval of the adequacy of the disclosure statement and confirmation of the proposed plan.

42. All motions requesting a joint disclosure statement and confirmation hearing must:

a. identify the proposed balloting agent; and

b. identify any voting procedures in addition to those required in these procedures; and

c. identify the proposed hearing date for final approval of the disclosure statement and confirmation of the proposed plan (the "Combined Hearing").

43. The motion must include a proposed order that, in addition to setting the Combined Hearing date: (A) finally approves the balloting and voting procedures to be utilized; (B) finally approves the form of notice to be provided to creditors and interest holders; (C) finally approves the form of ballot which will be provided to creditors and interest holders entitled to vote on the proposed plan; (D) establishes a record date pursuant to FED. R. BANKR. P. 3017(d) and 3018(a); and (E) establishes a voting deadline.

Q. SUBMISSION OF PROPOSED ORDERS, CERTIFICATE OF NO OBJECTION AND CERTIFICATE OF COUNSEL

44. After a response deadline has passed, and with no response filed, counsel for the movant may file a Certificate of No Objection ("CNO"), stating that no objection/response was filed. By filing the CNO, counsel for the movant represents to the Court that the movant is unaware of any objection to the motion or application and that counsel has reviewed the Court's docket and no objection/response appears thereon. Upon receipt of the CNO, the Court may enter the order without further notice or hearing. Once the order is entered, the hearing scheduled on the motion is canceled.

45. Objections to a motion, application, objection to claim or other pleading filed with the Court may be resolved by filing an agreed form of order filed with a Certificate of Counsel ("CoC") consistent with this paragraph. The CoC must be signed by counsel with a certification that all known objections have been resolved by the agreed form of order. A CoC should not be filed if it resolves less than all filed objections. If there is an applicable objection deadline, the CoC may not be filed until after that deadline. Upon receipt of the CoC, the Court may enter the order attached to the CoC without further notice or hearing.

46. **Every motion, CNO and CoC should include a proposed form of order**. Proposed orders should be filed as a separate attachment and have no cover page. Proposed orders should also attach copies of any referenced exhibits. Any CNO or CoC that includes a proposed form of order that varies from the original proposed order must include (a) a redline of the revised form of order against the order filed with the subject motion and (b) a clean copy of the form of order without a cover page.

R. PROFESSIONAL RETENTION

47. Applications to retain professionals pursuant to FED. R. BANKR. P. 2014 are governed by BANKR. LOC. R. 2014-1. Proposed orders may be effective as of the original retention date if the application is filed within 30 days after the later of (i) the date the order for relief is entered and (ii) the commencement of work by the professional. BANKR. LOC. R. 9003-1 does not apply to applications to retain professionals in a Complex Case. No hearing should be self-calendared for an application to retain a professional.

S. MEDIATION

48. Matters Subject to Mediation. The Court may order mediation of any dispute arising in an adversary proceeding, contested matter or otherwise. Parties may agree to mediate any dispute without Court approval. No matter may be mediated by a sitting judge without first obtaining an order from the Court.

49. Effects of Mediation on Pending Matters. Unless otherwise ordered by the Court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules.

50. Cost of Mediation. Unless otherwise ordered by the Court, or agreed by the parties, (1) in an adversary proceeding that includes a claim to avoid and recover any alleged avoidable transfer of less than $25,000.00 per defendant pursuant to 11 U.S.C. §§ 544, 547, 548 or 550, the plaintiff in the adversary proceeding will pay the fees and costs of the mediator and (2) in all other matters, the fees and costs of the mediator will be shared equally by the parties.

51. Time and Place of Mediation. The mediator will schedule a time and place for the mediation and any pre-mediation conferences.

52. Submission Materials. Each party must submit directly to the mediator such materials (the "Submission") in form and content as the mediator directs. Prior to the mediation, the mediator may talk with the participants to determine what materials would be helpful. The Submission must not be filed with the Court.

53. Protection of Information Disclosed at Mediation. The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties in the course of the mediation. No person may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the mediation effort, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator, (C)

proposals made or views expressed by the mediator; (D) statements or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. Without limiting the foregoing, the parties are bound by (i) FED. R. EVID. 408, and (ii) any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation.

54. Discovery from Mediator. The mediator may not be compelled to disclose to the Court or to any person any of the records, reports, summaries, notes, communications or other documents received or made by the mediator while serving in such capacity. The mediator may not testify or be compelled to testify regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator will not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph prevents the mediator from reporting (i) the status, but not the substance, of the mediation effort to the Court; or (ii) whether a party failed to participate in good faith in the mediation.

55. Protection of Proprietary Information. The parties, the mediator and all mediation participants shall protect proprietary information.

56. Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

57. Service of Process. No party may be served with a summons, subpoena, notice or other pleading during the mediation or at the location where the mediation is occurring.

T. AGENDAS

58. Hearing agendas should be filed using the CM/ECF "agenda" code at least 24 hours prior to the scheduled hearing. Hearing agendas must include instructions for remote or virtual participation, as appropriate.

U. EXHIBITS

59. In addition to the requirements of Bankruptcy Local Rule 9013-2, exhibits must be filed on CM/ECF in advance of the hearing. Each exhibit must be filed as a separate attachment to an Exhibit List. The Court will review the exhibits from CM/ECF. Exhibits must be offered into evidence by reference to the CM/ECF docket number of the filed exhibit.

V. REQUESTS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES

60. Applications for interim compensation and reimbursement of expenses filed by professionals will consist of (i) the Complex Case Fee Application Coversheet; and (ii) a copy of the invoices for the interim application period (if hourly) or a calculation of the fee due for the interim application period (if non-hourly); (iii) an itemized list of expenses for which reimbursement is requested (if not contained in the copies of the invoices); and (iv) a proposed order in the form located on the Court's website. Applications for final compensation must include

(i) Complex Case Fee Application Coversheet; (ii) a complete analysis of entitlement to compensation under the applicable provisions of the Bankruptcy Code and relevant case law; and (iii) a proposed order in the form located on the Court's website. The Court may reconsider interim awards when the final application is considered. Parties-in-interest may object to a final fee application on any basis allowed by law and will not be estopped by failing to object to an interim application. The Complex Case Fee Application Coversheets should not be altered.

Guidelines for Cash Collateral & Financing Motions & Stipulations (Effective 1/1/2006)

Guidelines for Cash Collateral & Financing Motions & Stipulations (Effective 1/1/2006)

A. Introduction

The following Guidelines for Cash Collateral And Financing Motions And Stipulations ("Guidelines") are promulgated pursuant to **B.L.R. 9029-1** [1] and apply to uncontested motions or stipulations for the use of cash collateral (see **Bankruptcy Code § 363(c)(2) and (3)**(link is external) [2] and **Fed. R. Bankr. P. 4001(b) and (d)**(link is external) [3]) and to uncontested motions or stipulations for obtaining credit (see **Bankruptcy Code § 364(c)**(link is external) [4] and **Fed. R. Bankr. P. 4001(c) and (d)**(link is external) [3]).

B. Introductory Statement

Any motion or stipulation presented to the court for approval must include a completed Cash Collateral - Post Petition Financing Introductory Statement ("Introductory Statement"), which shall not exceed three pages and shall be signed and certified by the Certifying Professional as provided herein.

The Introductory Statement for cash collateral motions and stipulations must summarize all material provisions of the motion or stipulation, including:

- - the purposes for the use of the cash collateral;

  - the terms, including duration, of the use of the cash collateral; and

  - any liens, cash payments, or other adequate protection (including any protections afforded by **Bankruptcy Code § 364**(link is external) [4]) that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

    - the name of each entity with an interest in the cash collateral;

Motions or stipulations for authority to obtain credit under **Bankruptcy Code §364**(link is external) [4], shall be accompanied by:

- - a proposed form of order; and

  - the Introductory Statement, which must summarize all material provisions of the proposed credit agreement, including the amount of "new" money to be advanced, interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions.

- a copy of the credit agreement;

C. Required Disclosures

If the motion, stipulation, proposed credit agreement or proposed order (either for use of cash collateral or for financing) includes any of the following provisions, the motion or stipulation shall describe the nature and extent of each provision, explain the reasons for each provision, and identify the specific location of the provisions in the proposed form of order, agreement, stipulation or other document:

1. The granting of priority or a lien on property of the estate pursuant to **Bankruptcy Code §§ 364(c) or (d)**(link is external) [4];

2. The providing of adequate protection or priority with respect to a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under **Bankruptcy Code § 364**(link is external) [4] to make cash payments on account of the claim;

3. A determination with respect to the validity, perfection, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing such claim;

4. A waiver or modification of the provisions of the Bankruptcy Code or applicable rules relating to the automatic stay;

5. A waiver or modification of any entity's authority to file a plan, to seek an extension of time in which the debtor has the exclusive right to file a plan, or the right to request the use of cash collateral under **Bankruptcy Code § 363(c)**(link is external) [2], or to request authority to obtain credit under **Bankruptcy Code § 364**(link is external) [4];

6. A waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;

7. A release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;

8. Indemnification of any entity;

9. A release, waiver, or limitation of any right under **Bankruptcy Code § 506(c)**(link is external) [5]; or

10. The granting of a lien on any claim or cause of action arising under Bankruptcy Code §§ **544**(link is external) [6], **545**(link is external) [7], **547**(link is external) [8], **548**(link is external) [9], **549**(link is external) [10], **553(b)**(link is external) [11], **723(a)**(link is external) [12], or **724(a)**(link is external) [13].

11. Provisions for "carve-outs" for professionals' fees and expenses.

D. Application of Rule 9024

The court may grant appropriate relief under **Fed. R. Bankr. P. 9024**(link is external) [14] if it determines that the Introductory Statement did not adequately disclose a material element of the motion, stipulation or agreement.

E. The court will not ordinarily approve the following:

1. Cross-collateralization clauses, i.e., clauses that secure prepetition debt by postpetition assets in which the secured party would not otherwise have a security interest by virtue of its prepetition security agreement or applicable law. See **Bankruptcy Code § 552**(link is external) [15]. Also, "roll-ups," i.e., such as provisions deeming pre-petition debt to be post-petition debt or using post-petition loans from a pre-petition secured creditor to pay part or all of that secured creditor's pre-petition debt, other than as provided in **Bankruptcy Code § 552(b)**(link is external) [15], which deals with security interests in proceeds and profits. (See **¶¶ C. 1** [16], **2** [17])

2. Provisions or findings of fact that bind the estate or all parties in interest with respect to the validity, perfection or amount of the pre-petition secured party's lien or debt. (See **¶ C. 3** [18])

3. Provisions or findings of fact that bind the estate or all parties in interest with respect to the relative priorities of the secured party's lien and liens held by persons who are not party to the stipulation (This would include, for example, an order approving a stipulation providing that the secured party's lien is a "first priority" lien.). (**See ¶ C. 3** [18])

4. Waivers of, or grants of lien on, rights under **Bankruptcy Code §506(c)**(link is external) [5],unless the waiver or grant is effective only during the period in which the debtor is authorized to use cash collateral or borrow funds. (Otherwise a future trustee might be faced with a duty to care for and preserve collateral in the trustee's possession and no financial means for discharging that duty.)(See **¶¶ C. 9** [19], **10** [20])

5. Provisions that operate, as a practical matter, to divest the debtor in possession or trustee of any discretion in the formulation of a plan or administration of the estate or limit access to the court to seek any relief under other applicable provisions of law. (See **¶ C. 5** [21])

6. Releases of, or limitations on, liability for the creditor's alleged prepetition torts or breaches of contract. (See **¶ C. 7** [22])

7. Waivers of, or liens on any of the estate's rights arising under Bankruptcy Code §§ **544**(link is external) [6], **545**(link is external) [7], **547**(link is external) [8], **548**(link is external) [9], **549**(link is external) [10], **553**(link is external) [11], **723(a)**(link is external) [12], or **724(a)**(link is external) [13], or the proceeds of any such rights. (See **¶ C. 10** [20])

8. Automatic relief from the automatic stay upon default, conversion to Chapter 7, or appointment of a trustee. (**See ¶ C. 4** [23])

9. Waivers and modifications of the procedural requirements for foreclosure mandated under applicable non-bankruptcy law. (**See ¶ C. 6** [24])

10. Waivers or limitations, effective on default or expiration, of the debtor in

possession's or trustee's's right to move for a court order pursuant to **Bankruptcy Code § 363(c)(2)(B)**(link is external) [2]authorizing the use of cash collateral in the absence of the secured party's consent. (**See ¶ C. 5** [21])

11. Findings of fact on matters extraneous to the approval process. (For example, in connection with an application to borrow on a secured basis, a finding that the debtor cannot obtain unsecured credit would be acceptable if supported by competent evidence, whereas a "finding" that the lender acted in good faith in declaring the prepetition loan in default would not be acceptable.)

12. Provisions providing unreasonable treatment with respect to fees or professionals retained by a creditors' committee compared to any carve-outs provided for professionals retained by the debtor in possession or trustee. (**See ¶ C. 11** [25])

13. Provisions that provide an inadequate carve-out for a subsequently appointed trustee in the case, whether before or after conversion. (**See ¶ C. 11** [25])

F. The court will ordinarily approve the following:

1. Withdrawal of consent to use cash collateral or termination of further financing, upon occurrence of a default or conversion to Chapter 7.

2. Securing any postpetition diminution in the value of the secured party's collateral with a lien on postpetition collateral of the same type as the secured party had prepetition, if such lien is subordinated to the compensation and expense reimbursement (excluding professional fees) allowed to any trustee thereafter appointed in the case.

3. Securing new advances or value diminution with a lien on other assets of the estate, but only if the lien is subordinated to all the expenses of administration (including professional fees) of a superseding Chapter 7 case.

4. Reservations of rights under **Bankruptcy Code § 507(b)**(link is external) [26], unless the stipulation calls for modification of the Code's priorities in the event of a conversion to Chapter 7. (**See Bankruptcy Code § 726(b)**(link is external) [27])

5. Reasonable reporting requirements.

6. Reasonable budgets and use restrictions.

7. Expiration date for the stipulation.

G. Certification.

Each unopposed motion or stipulation for the use of cash collateral or post petition financing must include a certification signed by counsel for the debtor in possession or trustee ("Certifying Professional") regarding compliance with these Guidelines. The certification must appear as part of the Introductory Statement and be signed by the Certifying Professional. The certification is as follows:

- **Fed. R. Bankr. P. 9024**(link is external)

  Certification – The undersigned Certifying Professional has read the accompanying motion or stipulation and the Cash Collateral - Post

Petition Financing Introductory Statement; to the best of my knowledge, information and belief, formed after reasonable inquiry, the terms of the relief sought in the motion or stipulation are in conformity with the Court's Guidelines For Cash Collateral And Financing Motions and Stipulations except as set forth above. I understand and have advised the debtor in possession or trustee that the court may grant appropriate relief under [14] if the court determines that a material element of the motion or stipulation was not adequately disclosed in the Introductory Statement.

(Certifying Professional's Name)