**THE YALE LAW JOURNAL FORUM**

NOVEMBER 10, 2021

# Shocking Business Bankruptcy Law

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**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.

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**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

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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

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**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

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**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]

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**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

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**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

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**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

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**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.

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**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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