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COVID-19 Debt and Bankruptcy Infrastructure

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ABSTRACT. The COVID pandemic put unprecedented pressure on all economies around the world. Many foretold that this economic dislocation would lead to an unprecedented number of corporate bankruptcies. This did not happen. The American government and other governments responded with extraordinary measures. Congress pumped trillions of dollars into the economy, both in the form of grants and loans, and the Federal Reserve ensured that interest rates were kept at historically low levels. While these measures allowed companies to ride out the worst of the pandemic, they did have consequences. Namely, many large companies were left with unprecedentedly large amount of debt on their balance sheets.

Perhaps a robust economy will allow the companies to grow their way out from under their debt burden. But perhaps not. To prepare for the possible increase of large companies filing for bankruptcy, Congress should act now to build up a bankruptcy infrastructure sufficient to handle an influx in cases. In particular, Congress should require that every circuit create a "business bankruptcy panel" designed to administer the Chapter 11 filing of large companies. As is well-known, three bankruptcy districts currently serve as dominant venues for large cases – the District of Delaware, the Southern District of New York and the Southern District of Texas. It is by no means clear that these three courts could deal with a significant increase in caseloads. In past cases of large waves of corporate bankruptcies, the system was stretched to its limits. By creating expertise across the country, the system would be prepared for any future rise in cases. Such creation would not require the inflow of additional resources into the bankruptcy system. Rather, it would be more in the nature of coordinating extant resources. A secondary effect of such a change is that it has the potential to ameliorate some of the concerns that have been raised over the years by the dominance of a small number of venues when it comes to large corporate cases. For example, it would involve more courts in considering contentious issues of bankruptcy law, thus alleviating the worry that there is insufficient judicial consideration of these issues.

The COVID-19 pandemic put unprecedented stress on almost all aspects of American society. The economy was shut down extensively and later reopened. Unemployment surged but has since begun to recover. Schools switched to online learning and have now reopened with extensive indoor mask use and routine testing. One impact that has yet to materialize is an increase in the number of large corporations seeking to resolve their financial distress under Chapter 11 of the Bankruptcy Code.

Predictions that the pandemic would produce a rush of bankruptcy filings by large companies[1] proved premature. There was, indeed, an uptick in bankruptcy filings among large corporations in the second quarter of 2020.[2] These were businesses that were already in distress, and the immediate shock of the pandemic forced them to turn to Chapter 11. However, this initial surge did not become a wave. For the rest of that year and the first half of 2021, there was a decrease in such cases.[3] The unprecedented amount of liquidity that Congress and the Federal Reserve Board added to the economy provided large companies with cheap access to funds to ride out the pandemic. New money allowed them to avoid defaulting on old debt.

But this further accumulation of debt has only delayed the wave of corporate bankruptcies a couple of years into the future—companies must pay back borrowed money or they will experience financial distress. The coming wave of bankruptcy filings has the potential to put unprecedented stress on the extant bankruptcy system. The infrastructure necessary to deal with this wave should be bolstered now, before the wave begins to crest. This Essay argues that Congress can both enhance the bankruptcy system on a long-term basis and resolve

1. *See* Mary Williams Walsh, *A Tidal Wave of Bankruptcies Is Coming*, N.Y. TIMES, (June 18, 2020), https://www.nytimes.com/2020/06/18/business/corporate-bankruptcy-coronavirus.html [https://perma.cc/GBV3-7A6U]. There is no single agreed-upon consensus over what constitutes a "large" bankruptcy. Lynn M. LoPucki's database includes all companies that report over $100 million dollars in assets at filing (or about $331 million when adjusting for inflation). Lynn M. LoPucki, *UCLA—LoPucki Bankruptcy Research Database*, UCLA SCH. L., https://lopucki.law.ucla.edu [https://perma.cc/9CJS-QGDS]. Bloomberg tracks large filings as those that report more than $50 million in assets.

2. *See Trends in Large Corporate Bankruptcy and Financial Distress: Midyear 2021 Update* at 1, CORNERSTONE RESEARCH, https://www.cornerstone.com/Publications/Reports/Trends-in-Large-Corporate-Bankruptcy-and-Financial-Distress-Midyear-2021-Update [https://perma.cc/U9GX-8728] (reporting that of the 60 "mega bankruptcies" (defined as companies with over $1 billion in reported assets) filed in 2020, 31 were filed in the second quarter).

3. *See* Jeremy Hill & Katherine Doherty, *U.S. Bankruptcy Tracker: Filings Cut in Half Since Covid Wave*, BLOOMBERG (May 4, 2021, 9:00 AM), https://news.bloomberglaw.com/bankruptcy-law/u-s-bankruptcy-tracker-filings-cut-in-half-since-covid-wave [https://perma.cc/Q3ZL-A4NU]. This lack of corporate bankruptcies is not unique to the United States. *See* Ashutosh Pandey, *German Bankruptcies Fall to Lowest Level Since the 1990s*, DEUTSCHE WELLE (Mar. 31, 2021), https://www.dw.com/en/german-bankruptcies-fall-to-lowest-level-since-1990s/a-57062045 [https://perma.cc/B6NV-N4XY]; *Japan Corporate Bankruptcies Hit 30-Year Low in 2020*, JAPAN TIMES (Apr. 8, 2021), https://www.japantimes.co.jp/news/2021/04/08/business/corporate-business/covid-19-bankruptcy-japanese-economy [https://perma.cc/JL2V-ZFB8]. For the large bankruptcies covered by the LoPucki database, there were fifty-six filed in all of 2020, which was well below the peak years of 2001 (ninety-seven) and 2009 (ninety-one). In the first half of 2021, there have been only five large cases.

a perpetual debate over bankruptcy venues for large companies[4] through a single, low-cost act. Legislation requiring the establishment of a business-bankruptcy panel with a minimum of two judges dedicated to such cases in each of the U.S. Courts of Appeals would increase our judicial system's capacity to handle large cases. It would also improve the operation of the American bankruptcy system by mitigating the perceived venue-shopping problems that have been the subject of vigorous debates over the past twenty years and by providing more rigorous review of contested interpretations of the Bankruptcy Code.

Part I of the Essay describes the effect that the pandemic and the accompanying government responses have had on the balance sheets of large corporations. The upshot of this change is the potential for a large increase in the number of Chapter 11 cases over the next few years. Part II describes the existing state of bankruptcy infrastructure, which includes extensive reliance on three venues. Part III explains how Congress can prepare the judicial system for such an increase by mandating the creation of special Chapter 11 panels within each court of appeals.

I. THE COVID-19 DEBT BOOM

The number of large companies entering Chapter 11 in the first half of 2021 was quite low. By one metric, only five large publicly held companies filed for bankruptcy during that period.[5] This quiescent period will not last. The govern-

4. The debate over the appropriate venue to handle the Chapter 11 cases of large corporate companies has raged for over twenty years. *See* Marcus Cole, *"Delaware Is Not a State": Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 VAND. L. REV. 1845 (2002); Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967 (1999); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1 (1998). Recent important work in this area includes Anthony J. Casey & Joshua C. Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, 37 EMORY BANKR. DEV. J. 101 (2021); Laura Napoli Coordes, *The Geography of Bankruptcy*, 68 VAND. L. REV. 381 (2015); Jared A. Ellias, *What Drives Bankruptcy Forum Shopping: Evidence from Market Data*, 47 J. LEGAL STUD. 119 (2018); and Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159 (2013). As a general matter, scholars from a law-and-economics perspective tend to endorse venue shopping (though at times with some constraints such as early venue selection), while other scholars tend to be highly skeptical of the practice. For an extensive summary of this debate, see Terrence L. Michael, Nancy V. Alquist, Daniel P. Collins, Dennis R. Dow, Joan N. Feeney, Frank J. Santoro & Mary F. Walrath, *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741 (2019).

5. *See* LoPucki, *supra* note 1.

ment's efforts to stabilize the economy during the pandemic have led to an unprecedented level of corporate debt—debt that will likely have to be adjusted through restructurings and reorganizations.

Corporate debt in the United States is now at least ten-and-a-half trillion dollars.[6] The ratio of corporate debt to GDP is at an all-time high.[7] To be sure, the majority of this debt is highly rated, and the companies that issued it have little risk of becoming financially distressed in the near term.[8] But the increase in debt during the pandemic has not only come from companies with secure credit ratings. Roughly $435 billion of new high-yield debt was issued in 2020—a record amount exceeding the prior record (set in 2012) by $90 billion.[9] Fifty-eight percent of U.S. financial and nonfinancial corporations are rated as noninvestment grade, the highest percentage on record.[10] Indeed, of the $5.3 trillion in investment-grade rated debt that is currently outstanding, $3 trillion of it sits on the rung just above junk status.[11] While the level of outstanding high-yield debt issued by American companies has increased, the amount of distressed debt—debt that is at substantial risk of being in default—has plummeted. In

6. Joy Wiltermuth, *U.S. Corporate Debt Soars to Record $10.5 Trillion*, MARKETWATCH (Aug. 31, 2020), https://www.marketwatch.com/story/u-s-corporate-debt-soars-to-record-10-5-trillion-11598921886 [https://perma.cc/L6Z9-UHJA].

7. *See* Peter Brennan, *Corporate America Not Likely to Unwind COVID-19 Debt Buildup Despite Credit Hits*, S&P GLOB.: MKT. INTEL. (Feb. 22, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/corporate-america-not-likely-to-unwind-covid-19-debt-buildup-despite-credit-hits-62756710 [https://perma.cc/C69G-LBU6] ("The total debt held by U.S. nonfinancial corporations surged in 2020 to a record high of 83.5% of GDP, or $17.544 trillion, in the third quarter from 75.7% at the end of 2019, according to the Institute of International Finance.").

8. *See U.S. Corporate Bond Statistics*, SIFMA (Sept. 23, 2021), https://www.sifma.org/resources/research/us-corporate-bonds-statistics [https://perma.cc/62MF-QSH8].

9. Jakema Lewis, *High-Yield Monthly: Record-Setting December 2020 Caps Frenzied Year of Issuance*, S&P GLOB.: MKT. INTEL. (Jan. 11, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/high-yield-monthly-record-setting-december-2020-caps-frenzied-year-of-issuance-62059140 [https://perma.cc/3P9U-UQWE]. The trend of a large issuance of high-yield debt has continued throughout the first half of 2021. *See* Finbarr Flynn & Irene García Pérez, *A Record $535 Billion of Junk Bonds Must Dodge Pockets of Risk*, BLOOMBERG (July 1, 2021, 10:24 AM), https://news.bloomberglaw.com/bankruptcy-law/a-record-535-billion-of-junk-bonds-must-dodge-pockets-of-risk [https://perma.cc/4NYA-7HHC] (reporting that $238 billion in high-yield debt was issued in 2021, an all-time high for the first six months of a year).

10. Brennan, *supra* note 7.

11. *Id.*

March of 2020, there was roughly $1 trillion in distressed debt.[12] A little more than a year later, that figure has declined to roughly $90 billion.[13]

This confluence of both a record debt load and a lack of financial distress is precarious. The market seems to be pricing debt for perfection, anticipating a robust recovery. Indeed, some commentators refer to the debt markets today as "frothy," reflecting their sense that prices for debt are too high and do not accurately reflect the risk of nonpayment.[14] It would take little bad or unexpected news to upset the extant state of affairs. Such a change would cause a substantial increase in the number of companies that encounter financial distress. We are in the calm before the storm.

We reached this unusual state of affairs as a result of the government's response to the COVID-19 pandemic. Unlike in prior recessions, the recession that

12. *See* Katherine Doherty, *Distressed Debt Balloons to Almost $1 Trillion, Nears 2008 Peak*, BLOOMBERG (Mar. 25, 2020), https://www.bloomberg.com/news/articles/2020-03-25/distressed-debt-balloons-to-almost-1-trillion-nears-2008-peak [https://perma.cc/7VTE-WT5X].

13. Jeremy Hill & Katherine Doherty, *BlackRock Sees Distress Still Lurking Despite Drop in Bankruptcies*, BLOOMBERG (Apr. 20, 2021, 9:00 AM), https://www.bloomberg.com/news/articles/2021-04-20/u-s-bankruptcy-tracker-blackrock-sees-distress-still-lurking [https://perma.cc/4KBQ-DTH7]; *see* Jeremy Hill, *Troubled Debt Pile Hits 14-Year Low, S&P Says*, BLOOMBERG (Apr. 28, 2021, 8:01 AM), https://www.bloomberglaw.com/bloomberglawnews/bankruptcy-law/XCDJ2ENO000000 [https://perma.cc/ZC5X-2DTD]; Antonio Vanuzzo & Laura Benitez, *Irrational World of Distressed Debt Leaves $15 Billion Idle (2)*, BLOOMBERG (Apr. 30, 2021, 8:00 AM), https://news.bloomberglaw.com/bankruptcy-law/irrational-world-of-distressed-debt-leaves-15-billion-idle [https://perma.cc/2J79-6DDH].

14. *See, e.g.*, Laura Benitez & Tasos Vossos, *Hedge Funds Make Biggest Short Bet on Junk Bonds Since 2008*, FIN. POST (May 7, 2021), https://financialpost.com/pmn/business-pmn/hedge-funds-boost-shorts-on-european-bonds-to-cushion-rate-risks [https://perma.cc/KF6J-JVS6] (identifying the short-position rush on junk bonds as "another sign that investors are lining up to bet against frothy debt markets").

accompanied the onset of the pandemic[15] witnessed an unprecedented availability of liquidity, which most large companies could easily access.[16] Perhaps learning from its weaker response to the Great Recession,[17] Congress reacted with dispatch and dollars. All were Keynesians, as the federal government authorized more than five trillion dollars in spending, dwarfing its response to the Great Recession.[18]

As Congress adjusted the country's fiscal policy, the Federal Reserve (Fed) pulled the levers on monetary policy. Interest rates were brought down to historic lows since the 2008 financial crisis.[19] In addition to lowering the federal-funds rate to twenty-five basis points,[20] the Fed projected that it would keep the

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15. The Business Cycle Dating Committee of the National Bureau of Economic Research declared in June 2020 that the country had entered a recession in March of that year. *Determination of the February 2020 Peak in US Economic Activity*, NAT'L BUREAU ECON. RSCH. (June 8, 2020), https://www.nber.org/news/business-cycle-dating-committee-announcement-june-8-2020 [https://perma.cc/76TP-7GF3].

16. At the onset of the Great Recession, there was less appetite for confronting the weakening economy head on. The Troubled Asset Relief Program (TARP) enacted during the Bush Administration was targeted at rescuing the banking sector, though the Obama Administration repurposed some of the funds to bail out the auto industry. The Recovery Act passed shortly after President Obama took office was just shy of $800 billion. David Rogers, *Senate Passes $787 Billion Stimulus Bill*, POLITICO (Feb. 13, 2009, 2:38 PM), https://www.politico.com/story/2009/02/senate-passes-787-billion-stimulus-bill-018837 [https://perma.cc/9CSV-6RTV]. On the relationship between lack of liquidity and recessions, see Ben S. Bernanke, *Bankruptcy, Liquidity and Recession*, 71 AM. ECON. REV. 155, 157 (1981); and Philip E. Strahan, *Liquidity Risk and Credit in the Financial Crisis*, FED. RSRV. BANK S.F. ECON. LETTER (May 14, 2012), https://www.frbsf.org/economic-research/publications/economic-letter/2012/may/liquidity-risk-credit-financial-crisis [https://perma.cc/S85L-FWGQ].

17. For arguments that the size of the stimulus at the outset of the Great Recession should have been larger, see Josh Bivens, *Why Is Recovery Taking So Long—and Who's to Blame?*, ECON. POL'Y INST. (Aug. 11, 2016), https://www.epi.org/publication/why-is-recovery-taking-so-long-and-who-is-to-blame [https://perma.cc/5U33-2PBN]; and Paul Krugman, *Botching the Great Recession*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/opinion/botching-the-great-recession.html [https://perma.cc/4YAW-UVDU].

18. Over two trillion dollars of COVID-19 relief directly targeted American businesses. Of course, even the other $3 trillion dollars benefited businesses as well. A large share of the federal funds went directly to individuals. While some of this money was saved, a lot of it became consumer spending, thus providing additional revenue for businesses. Andrew Van Dam, *What Happens to the Economy When $5.2 Trillion in Stimulus Wears Off?*, WASH. POST (July 12, 2021, 6:00 AM), https://www.washingtonpost.com/business/2021/07/12/coronavirus-spending-economy [https://perma.cc/XL53-CJUP].

19. *See* Heather Long, *Federal Reserve Slashes Interest Rates to Zero as Part of Wide-Ranging Emergency Intervention*, WASH. POST (Mar. 15, 2020), https://www.washingtonpost.com/business/2020/03/15/federal-reserve-slashes-interest-rates-zero-part-wide-ranging-emergency-intervention [https://perma.cc/8TTZ-9Z6D].

20. *See Open Market Operations*, BD. GOVERNORS FED. RSRV. SYS. (July 28, 2021), https://www.federalreserve.gov/monetarypolicy/openmarket.htm [https://perma.cc/2LHZ-A25C].

rate near zero at least through 2023.[21] The influx of cash into the economy and low interest rates left fixed-income investors looking for ways to get any return on their assets. Many of them were more than willing to fund companies whose fortunes had been negatively impacted by the COVID-19 outbreak.[22] For example, American Airlines, which saw a precipitous drop in revenue during the pandemic,[23] was able to borrow ten billion dollars in private funds at attractive rates.[24]

The government should be applauded for the actions it took in the face of an unprecedented national emergency. But its work is far from over. The increase in debt may well create an unprecedented demand for future restructurings. As Congress considers various aspects of infrastructure for our modern economy, it should consider the infrastructure of the bankruptcy system as well.

Those with an aversion to government action may argue that the economy will roar back, fueled by pent-up demand and government stimulus. According to this line of reasoning, heavily indebted businesses will see a dramatic jump in their revenues and will be able to pay down their debt in short order.[25] This natural deleveraging, they might conclude, will ensure that there is not a crush of

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21. *See* Jeanna Smialek, *Fed Projects Patience Even as Economic Outlook Brightens*, N.Y. TIMES (Mar. 17, 2021), https://www.nytimes.com/2021/03/17/business/economy/fed-projects-patience-even-as-economic-outlook-brightens.html [https://perma.cc/DD88-BVLJ]. The Federal Reserve has since backed off of this assurance a bit, now signaling that a rate hike may come in 2023. *See* James Politi & Colby Smith, *Fed Signals First Rate Rise Will Come in 2023*, FIN. TIMES (June 16, 2021), https://www.ft.com/content/0bf83e29-5ee2-415e-9e03-0edb38218bf3 [https://perma.cc/4XJV-ECWW].

22. *See* Kate Duguid, *Yield-Hungry Investors Drive Flock of Borrowers to U.S. Capital Markets*, REUTERS (Nov. 18, 2020), https://www.reuters.com/article/usa-credit/yield-hungry-investors-drive-flock-of-borrowers-to-u-s-capital-markets-idUSL1N2I42D8 [https://perma.cc/NHD5-JYEA].

23. *See* Robert Silk, *American Airlines Reports 90% Revenue Decline in Q2*, TRAVEL WKLY. (July 23, 2020), https://www.travelweekly.com/Travel-News/Airline-News/American-Airlines-90-percent-revenue-decline-in-Q2 [https://perma.cc/RY5D-6CXD].

24. *See American Airlines Upsizes, Prices $10 Billion Bond and Loan Offering*, REUTERS (Mar. 10, 2021, 6:28 PM), https://www.reuters.com/article/us-american-airline-debt/american-airlines-upsizes-prices-10-billion-bond-and-loan-offering-idUSKBN2B22V3 [https://perma.cc/4MPP-7VWR].

25. *See, e.g.*, Press Release, UCLA Anderson Sch. of Mgmt, UCLA Anderson Forecast Anticipates Near-Record Growth as Economic Recovery Continues (Mar. 10, 2021), https://newsroom.ucla.edu/releases/anderson-forecast-anticipates-robust-growth-march-2021 [https://perma.cc/3LHH-VV7Q] (projecting record growth for the U.S. economy as it recovers from the pandemic).

large companies seeking to fix their balance sheets in Chapter 11.[26] Their perspective implicitly embraces a view that the pandemic only caused a temporary paused a vibrant economy. Two years from now, after the pause is lifted, the economy will look like it did two years ago. Congress, having primed the pump, can then turn its attention to other matters.

However, there are reasons to doubt this Panglossian story. Even two years ago, the economy was likely nearing the end of the record expansion that began during the Obama Administration.[27] Had the pandemic not occurred, the economy might have headed for a recession anyway. With recessions, corporate filings increase.[28] Moreover, the pandemic's potential long-term effects on American companies increase the likelihood of a dramatic spike in filings. For example, brick-and-mortar retail was already under pressure before COVID-19 hit, and the shutdown orders were the death knell for many companies. Indeed, brick-and-mortar retail bankruptcies were a large component of the companies that did file for Chapter 11 during the pandemic.[29] This downward trend will continue, as Americans have become accustomed to buying even more of their goods online.[30]

Retail is not the only sector that could face post-pandemic headwinds. COVID-19 has altered many practices, and these alterations will remain, at least in part. Workers with newfound flexibility to work at home will put downward

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26. *See* Peter Brennan & Tayyeba Irum, *US Corporate Debt Levels Fall as Revenues Recover from Pandemic Slump*, S&P GLOB.: MKT. INTEL. (July 9, 2021), https://www.spglobal.com/market-intelligence/en/news-insights/latest-news-headlines/us-corporate-debt-levels-fall-as-revenues-recover-from-pandemic-slump-65370020 [https://perma.cc/AZ9V-N7HD] ("The rate of defaults among U.S. companies had been expected to surge when the crisis struck, but the low cost of borrowing and improving corporate revenues have, for now at least, removed that concern.").

27. *See For How Long Can Today's Global Economic Expansion Last?*, ECONOMIST (July 13, 2019), https://www.economist.com/briefing/2019/07/13/for-how-long-can-todays-global-economic-expansion-last [https://perma.cc/A225-PBGZ].

28. *See* Robert Jacobvitz, *The Correlation Between Chapter 11 Filings and Economic Recessions in the United States*, NAT'L CONF. BANKR. JUDGES (Feb. 28, 2019), https://ncbjmeeting.org/2019blog/2019/02/28/the-correlation-between-chapter-11-filings-and-economic-recessions-in-the-united-states [https://perma.cc/V4DH-JYXE].

29. Notable retail bankruptcies in 2020 included Neiman Marcus, J. Crew, J.C. Penny, Lord & Taylor, and Tailored Brands. Only the energy sector saw more large bankruptcies in 2020. *See Trends in Corporate Bankruptcy and Financial Distress*, CORNERSTONE RSCH. 4, https://www.cornerstone.com/Publications/Reports/Trends-in-Large-Corporate-Bankruptcy-and-Financial-Distress-2005-Q3-2020 [https://perma.cc/MK9W-HMJX].

30. *See* Pamela N. Danziger, *Stage Is Set for Another Record-Breaking Year of Retail Bankruptcies: Who's Next?*, FORBES (Jan. 24, 2021), https://www.forbes.com/sites/pamdanziger/2021/01/24/stage-is-set-for-another-record-breaking-year-of-retail-bankruptcies-whos-next [https://perma.cc/2QNL-8SXW].

pressure on the value of corporate real estate in major cities.[31] Business fliers will purchase fewer airline tickets as they replace some travel with Zoom meetings. Activity will surge as the country reopens, but the extent of these changes and their impact on different sectors of the economy remain unknown. It is foolhardy to hope that the economy of 2023will look like the economy of 2019.

Even a return to a robust economy probably will not resolve the pile of debt that was created during the pandemic. Much of the borrowing that has occurred has been made possible by extraordinary actions by the Fed. Most notably, the rollback of recent interest-rate increases, along with a commitment to keep interest rates at near-zero levels for the next few years, has resulted in yield-hungry investors, such as money-market funds and pension funds, participating heavily in the private debt markets.[32] But the Fed cannot maintain such extraordinarily low interest rates forever. Whether interest rates rise soon due to the onset of inflation or later because the Fed holds the line for a couple of more years, there is little doubt that the era of historically low interest rates will come to an end. When the inevitable rise in interest rates happens, this will put pressure on heavily indebted companies.[33]

Large companies have basically two alternatives when they are about to default on their debt obligations: restructuring outside of bankruptcy or reorganizing under Chapter 11. Restructuring is a workaround outside of bankruptcy where the company's financial creditors reach an agreement on a new capital structure. Old debt holders exchange their instruments for new ones that require less cash from the company. One of the attractions of a debt exchange outside of bankruptcy is that it is substantially less costly than a reorganization under Chapter 11.[34] Prior to the pandemic, restructuring efforts were more successful than they had been in the past.[35] This raises the question of whether debt exchanges would provide a sufficient mechanism to address any problems that arise due to the COVID-fueled run of corporate debt.

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31. *See* Jeff Elkins, *Commercial Real Estate Slump in Most Sectors to Continue*, NORMAN TRANSCRIPT (Apr. 25, 2021), https://www.normantranscript.com/news/commercial-real-estate-slump-in-most-sectors-expected-to-continue/article_74ff8c76-a474-11eb-8ecc-0bf9fa4b3270.html [https://perma.cc/Y268-DKUR].

32. *See* Arleen Jacobius, *Asset Owners Turn to Private Credit in Quest for Returns*, PENSIONS & INVS. (Feb. 8, 2021), https://www.pionline.com/pi-1000-largest-retirement-plans/asset-owners-turn-private-credit-quest-returns [https://perma.cc/WK3G-KCT6].

33. How immediately an interest-rate increase affects any given company depends on the amount of floating-rate debt it has issued.

34. *See* William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1630-34 (2018).

35. *See id.* at 1637-39 (reporting an 87.5% success rate for exchange offers between 2010 and 2016).

For years, the main impediment for restructurings has been the holdout problem. A small investor has an incentive not to tender into a value-increasing exchange because there is little chance that its decision will affect the success of the exchange. If the exchange is successful and the holdout retains its original investment, the value of its investment increases at the expense of those who tendered into the exchange. When there is a sufficient number of investors who engage in this calculation, a collective-action problem emerges. The group of holdouts becomes large enough that the exchange is not successful.[36]

The increase in institutional ownership of corporate debt has lessened the holdout problem. The debt of large corporations is no longer held directly by small retailer investors, but rather by institutions such as insurance companies, pension funds, mutual funds, and hedge funds.[37] There are fewer holders of debt and these holders can more easily communicate with each other. Disagreements and opportunism can still doom attempts at out-of-court restructurings, even when all parties are sophisticated investors.[38] But the trend is toward more rather than fewer such restructurings.

The debt-issuing binge of the past year should continue this trend. The vast amount of debt that has been issued has been purchased by institutional investors. To be sure, not all institutional investors will hold onto their investments should they decline in value. Many hedge funds specialize in distressed debt.[39] They provide a ready outlet for those wishing to sell their positions and are well-equipped to participate in discussions surrounding exchange offers. In this environment, some of today's highly leveraged companies will be able to address future financial distress through out-of-court restructurings.[40]

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36. This difficulty to engineer out-of-court restructurings was a feature, not a bug, of the system put in place by the New Dealers. *See* Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L.J. 232, 234 (1987) ("Douglas and his colleagues at the SEC were not only aware that requiring near unanimity would help induce bankruptcy, they welcomed the prospect.").

37. *See Compensation of Corporate Bond Ownership in the United States in 2007 and 2018, by Owner,* STATISTA (Jan. 20, 2021), https://www.statista.com/statistics/1083823/ownership-us-corporate-bonds/ [https://perma.cc/9C2T-UU6P] (reporting that in 2018, nine percent of corporate debt was held by households).

38. *See* Marblegate Asset Mgmt. v. Educ. Mgmt. Corp., 846 F.3d 1, 1-4 (2d Cir. 2017) (illustrating a situation where an exchange offer did not go through because of a single holdout bondholder).

39. *See* Ashish Chauhan, *Record Number of Distressed Debt Funds in Market Amid Downturn*, PREQIN (June 17, 2020), https://www.preqin.com/insights/research/blogs/record-number-of-distressed-debt-funds-in-market-amid-downturn [https://perma.cc/SSH2-2CJK].

40. To the extent that Congress wants to encourage out-of-court restrictions, it can revisit the oft-repeated suggestion to amend section 316(b) of the Trust Indenture Act. *See, e.g.*, Roe, *supra* note 36 (advocating for the repeal of section 316(b)).

But not all firms can even attempt to restructure their debt outside of bankruptcy. Some firms have claims held by diverse creditors, which renders a consensual restructuring infeasible. Other companies can only regain their footing by taking advantage of the provisions of the Bankruptcy Code that grant the debtor powers that it does not have outside of bankruptcy. This factor could loom large for companies that need to change their operations as well as their balance sheets in a post-pandemic economy. For example, the Bankruptcy Code can bind dissenting investors,[41] allow for the rejection of above-market leases,[42] provide for the rejection of collective-bargaining agreements,[43] and allow a company to sell all or part of its business and assure that its buyer receives clean title.[44] Moreover, should interest rates rise, there may not be sufficient liquidity in the capital markets to finance all feasible exchange offers. Even for firms that attempt to restructure their debts, some restructuring efforts fail. Before the pandemic, roughly twenty percent of the large companies that ran into financial distress turned to out-of-court exchanges rather than Chapter 11 proceedings[45] While there may be some changes around the edges, Chapter 11 will be called on to address the debt stock that has built up during the time of COVID-19. Developments over the past two decades that have come to define modern Chapter 11—including creditor control, restructuring support agreements, and sales of the business as a going concern—will loom large.[46]

II. BANKRUPTCY INFRASTRUCTURE ACROSS VENUES

The quantity and mix of forthcoming restructurings and reorganizations will depend on overall economic conditions. Within the next three or so years, corporate bankruptcies may accelerate because large companies will have to address the increase in debt caused by the pandemic. Should such a situation come to pass, there is a legitimate concern as to whether the existing restructuring infrastructure has the capacity to handle an onslaught of cases.

41. *See* 11 U.S.C. §§ 1126(c), 1129(b) (2018).

42. *Id.* § 365.

43. *Id.* § 1113.

44. *Id.* § 363. The use of § 363 to sell firms has become routine, though not without controversy.

45. *See* Bratton & Levitin, *supra* note 34, at 1634-35.

46. For descriptions of various aspects of modern practice, see Douglas G. Baird & Robert K. Rasmussen, *Chapter 11 at Twilight*, 56 STAN. L. REV. 673 (2003); Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L.J. 593 (2017); and David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366 (2020).

The restructuring community is relatively small,[47] and the same players repeatedly reappear across the large cases. For example, last year Kirkland & Ellis represented the debtor in over forty percent of the large corporate cases that were filed.[48] The community of lawyers and investment advisors could be stretched thin by a massive wave of corporate bankruptcies. Both restructurings and reorganizations are complex undertakings, and the same group of attorneys and financial advisors tends to oversee both. The way in which a debt obligation would be treated in a Chapter 11 case forms the backdrop for an exchange offer. Few would enter into an exchange if they concluded that they would receive a larger return through a Chapter 11 proceeding. Moreover, financial innovation has created many investments not contemplated by the drafters of the Bankruptcy Code.[49] Understanding these investments is often a time-intensive endeavor that requires significant expertise. The human capital necessary could well be in short supply should a large number of corporations seek to restructure or reorganize at the same time. While there are undoubtedly a large number of newly minted J.D. and MBA graduates who would welcome the chance to enter a restructuring practice, it takes time and training to ensure that they have the knowledge necessary to succeed. This is true for any complex practice, but it is especially true in the restructuring arena where many of the norms and practices are as much a matter of convention and shared understandings as they are of statutory text.[50]

Congress will have little to say about this aspect of the bankruptcy infrastructure, which is more of a concern for the business models of law firms and investment advisors. Of great concern to Congress, however, is the capacity of the judicial system to handle a sudden increase in the number of corporate-bankruptcy

47. One example of this is that, during the Great Recession, the two most notable bankruptcy cases may well have been those of Lehman Brothers and General Motors. These two companies were both represented by Harvey Miller, who at the time was in his midseventies. *See* Jonathan D. Glater, *The Man Who Is Unwinding Lehman Brothers*, N.Y. TIMES (Dec. 3, 2008), https://www.nytimes.com/2008/12/14/business/14miller.html [https://perma.cc/S2JF-WESR]; David Shepardson, *GM's Lead Bankruptcy Attorney Dies at 82*, DETROIT NEWS (Apr. 27, 2015), https://www.detroitnews.com/story/business/autos/general-motors/2015/04/27/gms-lead-bankruptcy-attorney-dies/26458615 [https://perma.cc/N2GY-FPZB].

48. *See* Roy Strom, *Kirkland Adds First Restructuring Lateral Since 2009 Amid Boom*, BLOOMBERG (Apr. 1, 2021), https://news.bloomberglaw.com/business-and-practice/kirkland-adds-first-restructuring-lateral-since-2009-amid-boom [https://perma.cc/CZ8C-BBPE].

49. *See* Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 648, 653-87 (2010).

50. *See* DOUGLAS G. BAIRD, THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS (forthcoming 2021).

cases.[51] Large corporate cases require the attention of both bankruptcy judges and clerks' offices.

To be sure, the amount of judicial resources that Chapter 11 cases require varies. The 1979 Bankruptcy Code introduced the notion of a prepackaged bankruptcy, in which negotiations among major parties occur outside of the bankruptcy itself—much like a restructuring.[52] However, unlike an exchange offer, a prepackaged bankruptcy consummates a deal reached outside of bankruptcy through a bankruptcy proceeding.[53] Although it took a few years for the restructuring community to embrace prepackaged bankruptcy proceedings, they are now commonplace.[54]

Proceedings in prepackaged bankruptcies can occur with breathtaking speed. Consider, for example, the retail chain Belk. The pandemic was not kind to Belk.[55] Belk, however, did not have its investments widely held by public investors at either the debt or equity level. Belk eventually filed for bankruptcy. Its Chapter 11 case lasted all of twenty-three hours.[56] The investors were able to hammer out a deal among themselves before a bankruptcy petition was filed, and the subsequent Chapter 11 filing was just the consummation of that deal. A prepackaged bankruptcy such as Belk is a fairly quick and routine affair, with few if any objections. It takes little judicial time, but it does take judicial resources, given that it has to be processed by the clerk's office.

The recent rise of restructuring support agreements further blurs the line between an out-of-court restructuring and a reorganization under Chapter 11. Here, the debtor begins the process with the intention of ultimately filing for bankruptcy. Prior to filing, however, it engages in negotiations with various creditor groups. The debtor may start by making peace with its senior lender,

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51. This Essay focuses exclusively on the effects that the pandemic will have on corporate restructurings. For an attempt to ascertain the capacity that the bankruptcy system would need should there be a wave of individual filings, see Benjamin Iverson, Jared A. Ellias & Mark Roe, *Estimating the Need for Additional Bankruptcy Judges in Light of the COVID-19 Pandemic*, 11 HARV. BUS. L. REV. 1 (2020).

52. *See* Elizabeth Tashjian, Ronald C. Lease & John J. McConnell, *Prepacks: An Empirical Analysis of Prepackaged Bankruptcies*, 40 J. FIN. ECON. 135, 135-139 (1996).

53. *See id.*

54. In the last five years, prepackaged bankruptcies have ranged from sixteen percent to thirty-three percent of large cases. *See* LoPucki, *supra* note 1.

55. *See Pandemic Prompts Layoffs at Belk Department Store Chain*, ASSOCIATED PRESS (July 2, 2020), https://wlos.com/news/local/pandemic-prompts-layoffs-at-belk-department-store-chain [https://perma.cc/QD45-V862].

56. *See* Teadra Pugh, *ANALYSIS: Billion-Dollar Bankruptcy and the Race to Confirmation*, BLOOMBERG (Apr. 1, 2021, 5:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-billion-dollar-bankruptcy-and-the-race-to-confirmation [https://perma.cc/JX3A-BR7E].

who often has a security interest in virtually all of the assets of the enterprise. It then negotiates with other creditor groups. Eventually the parties sign a contract—the restructuring support agreement—in which they agree to support the plan to which they have agreed. Under a prepackaged case, a case with a restructuring support agreement can take judicial time. There is much uncertainty in modern bankruptcy practice on what constitutes the permissible limits of a restructuring support agreement.[57] Judges are routinely called upon to sort out these dilemmas.

Contentious bankruptcy cases can demand significant judicial resources. Cases can entail thousands of docket entries and require extensive judicial supervision.[58] Should economic conditions deteriorate and many companies encounter financial distress, the majority of cases would not arrive in court with substantial agreement among the creditors as to the needed changes, either on the finance side or on the operations side, because the restructuring community does not have the capacity to simultaneously conduct the necessary negotiations in a large number of cases. When looking at prior waves of large corporate bankruptcies—following the dot-com bust and the Great Recession—the percentage of cases that filed without the framework of a deal in hand ranged between sixty and eighty-two percent.[59]

To the extent that there will be a need for additional judicial resources to sort out pandemic-related debt issues, the answer is not simply to add new judges at random to bankruptcy courts. Modern corporate-restructuring practice, at least as far as bankruptcy courts are concerned, is a concentrated area. There are ninety bankruptcy courts in the United States, each attached to one of the ninety-

57. *See, e.g.*, Skeel, *supra* note 46, at 395 ("The current approach has a "know-it-when-I-see-it" quality[.]) & 395-406 (proposing four "rules of thumb" to handle restructuring support agreements); Edward J. Janger & Adam J. Levitin, *The Proceduralist Inversion–A Response to Skeel*, 130 YALE L.J.F. 335, 344-49 (taking issue with Skeel's proposed rules of thumb) (2020).

58. For example, by the end of June 2021, the ongoing Purdue Pharma bankruptcy case had over 3,000 filings. *See In re* Purdue Pharma L.P., No. 7:19-bk-23649 (Bankr. S.D.N.Y. Sept. 15, 2019). Filings are available to the public online on Prime Clerk. *See Purdue Pharma L.P. Case No. 19-23649*, PRIME CLERK, https://restructuring.primeclerk.com/purduepharma/Home-DocketInfo [https://perma.cc/KYD5-H4CG].

59. *See* LoPucki, *supra* note 1.

four district courts.[60] Just three of those bankruptcy courts handle the overwhelming majority of the large, complex cases.[61] Those courts are the Southern District of New York, the District of Delaware, and the Southern District of Texas. Last year, these three venues received over eighty percent of the large Chapter 11 cases. For the four cases that have filed in the first half of 2021, all went to these venues of choice.

The preference of large companies to file for Chapter 11 in only a handful of venues is a practice that is roughly as old as the Bankruptcy Code itself. To date, the growth in attractive bankruptcy venues has been organic, without any input from Congress. The Southern District of New York was the first venue to draw a significant percentage of large cases. It established dominance shortly after the passage of the Bankruptcy Act of 1978.[62] The attractiveness of the Southern District has long been due to its convenience.[63] In 1978, law firms were by and large located in single cities. Indeed, the rise of the national law firm with offices in multiple cities did not occur until late in the 1980s. When the Bankruptcy Code was passed, many of the leading restructuring lawyers were in New York City. Moreover, the national banks and investment advisors, which also play a role in corporate reorganizations, were also located in New York City. It is thus not surprising that, when the first large cases arose, the Southern District of New York was the natural venue. The cases went well, at least from the perspective of the debtors' lawyers and financial advisors. Success begot success and, within ten years of the arrival of the Bankruptcy Code, the Southern District of New York had become the venue of choice.[64]

Starting in the 1990s, Delaware became an attractive venue as well.[65] Delaware's rise was born out of desperation. The management team of Continental

60. The federal districts of Guam, the Northern Mariana Islands, and the Virgin Islands do not have dedicated bankruptcy courts. In these districts, bankruptcy cases are heard by a district-court judge or a visiting bankruptcy judge. The Eastern and Western Districts of Arkansas share a single bankruptcy court. *See U.S. Bankruptcy Courts—Judicial Business 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/us-bankruptcy-courts-judicial-business-2020 [https://perma.cc/33D9-RTP6].

61. In 2020, forty-eight of the fifty-seven bankruptcy cases for large companies in Lynn LoPucki's database were filed in one of three districts. *See* LoPucki, *supra* note 1.

62. *See* Rasmussen & Thomas, *supra* note 4, at 1365-66.

63. *See* Eisenberg & LoPucki, *supra* note 4, at 29-30 (describing the reasons behind the choice of the Southern District of New York as a venue after the passage of the Bankruptcy Code).

64. Eisenberg and LoPucki were the first to document the trend of filing in the Southern District of New York. *See id.*

65. For a description of Delaware's rise as a venue of choice, see Eisenberg & LoPucki, *supra* note 4, at 983-85; Rasmussen & Thomas, *supra* note 4, at 1360, 1372-73; and Skeel, *supra* note 4, at 18.

Airlines concluded that it had to file for Chapter 11. Their lawyers explored possible venues, eschewing the Southern District of New York in large part because of how the bankruptcy of Eastern Airlines unfolded. Other possible venues were ruled out as well. They decided to take a chance on Delaware, which had a single bankruptcy judge at the time. The lawyers were pleased with their experience in Delaware, and soon more and more cases were filed there. Indeed, the Delaware bankruptcy bench has expanded from one to eight judges to handle its increased caseload.[66]

The story of the Southern District of Texas is of more recent vintage and has a notably different motivation.[67] Many attorneys outside of the Southern District of New York and the District of Delaware had aspirations of having companies file elsewhere. For example, judges and lawyers in the Southern District of Texas sought to attract large cases throughout the 1990s, though their efforts were largely unsuccessful.[68] The Southern District of Texas's recent ascension is a result of the efforts of two of the five bankruptcy judges on that court: Judge Jones and Judge Isgur. Judge Jones was appointed in 2011, after having spent nearly two decades in complex corporate-bankruptcy litigation.[69] Judge Isgur was appointed in 2004, after having worked as a bankruptcy attorney for fourteen years.[70] In 2016, they issued a standing order that they would be the only two judges to handle complex Chapter 11 cases. Their timing was propitious. The following year saw a wave of financial distress hit the oil patch. From 2000 to 2015, the Southern District of Texas handled a total of seventeen large cases.[71] These represented less than three percent of such cases filed during that time period. Since the start of 2016, they have seen fifty-five such cases, which represent over thirty percent of the nationwide filings.[72]

66. Investiture Notice, U.S. Bankr. Ct. of the Dist. of Del., New Judge Appointed to Delaware Bankruptcy Court (Apr. 26, 2021), https://www.deb.uscourts.gov/sites/default/files/news/Investiture%20Notice%20-%20Judge%20Goldblatt.pdf [https://perma.cc/FV8L-N694].

67. Interestingly, the Houston restructuring community attempted unsuccessfully to become an attractive venue in competition with the Southern District of New York and the District of Delaware in 2000. *See* Rasmussen & Thomas, *supra* note 4, at 1369.

68. *See id.*

69. *See* Mark Curriden, *Meet the Judge Who Saved the Texas Bankruptcy Practice*, HOUS. CHRON. (Sept. 1, 2020), https://www.houstonchronicle.com/business/article/meet-the-judge-who-saved-the-Texas-bankruptcy-15528320.php [https://perma.cc/T3QV-ESGH].

70. *See Biography for Martin Isgur*, ASS'N INSOLVENCY & RESTRUCTURING ISSUES, https://aira.org/pdf/2018/DALLAS18/Isgur%20bio%202018.pdf [https://perma.cc/F239-5DP9].

71. *See* LoPucki, *supra* note 1.

72. *See id.*

In addition to having two experienced bankruptcy practitioners at its helm, the Southern District of Texas worked with the local bar association to create procedures to ensure the smooth handling of bankruptcy cases. They formed a standing committee that created procedures for complex cases and is tasked with proposing amendments to its existing procedures as is necessary.[73] Especially at the outset, before the Southern District of Texas established its reputation for handling cases efficiently, the written procedures and support of the local bar assured companies that their cases would be handled similarly to how they were handled in the Southern District of New York and Delaware. These efforts have been extremely successful. Last year, the Southern District of Texas had double the number of filings as the Southern District of New York, though both venues still lagged behind Delaware.[74]

The concentration of large corporate cases in a small number of venues has generated controversy.[75] Lynn M. LoPucki, the first to document the trend of large cases being filed in a few venues, argued more than fifteen years ago that courts were "corrupt" because they tilted the playing field in order to attract cases.[76] Judges, not surprisingly, have rejected this characterization.[77]

Defenders of extant practice offer more benign explanations for venue selection: predictability, favorable case law, judicial expertise (including in the clerk's office), speed, and reduced costs.[78]

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73. *See Procedures for Complex Cases in the Southern District of Texas*, S. DIST. TEX. 1 (Aug, 7, 2021), https://www.txs.uscourts.gov/sites/txs/files/Complex%20Procedures%20for%20Chapter%2011%20Cases%20in%20the%20Southern%20District%20of%20Texas%208-7-2020.pdf [https://perma.cc/6FH2-92P4].

74. *See* LoPucki, *supra* note 1.

75. Proposals to restrict venue have been introduced in Congress repeatedly since the 1990s. For the most recent proposal, see *Bipartisan Bankruptcy Venue Reform Bill Introduced in the House*, AM. BANKR. INST. (June 29, 2021), https://www.abi.org/newsroom/bankruptcy-headlines/bipartisan-bankruptcy-venue-reform-bill-introduced-in-the-house [https://perma.cc/CS72-EEH7].

76. LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005). LoPucki's most thorough evidence of corruption was that companies that emerged from Chapter 11 after having filed in the Southern District of New York or Delaware were more likely to need a subsequent reorganization within five years. *Id*. at 97-122.

77. *See, e.g.*, Robert D. Martin, *Comments*, 54 BUFF. L. REV. 503, 504 (2006) (describing LoPucki's "[a]ssigning venal motives to the judges" and calling them "corrupt" as being "without any evidence" and a "vicious attack on people whose service is undertaken with dedication and sacrifice").

78. *See* Cole, *supra* note 4, at 1857-69; Ellias, *supra* note 4, at 126-44; *see also* Michael et al., *supra* note 4, at 61-108 (discussing the "laudable goals" served by venue-selection practices).

The Caesars bankruptcy case serves as a helpful example of the factors driving venue decisions.[79] This case was unusual, both because it featured a large, corporate debtor with two pending bankruptcy petitions, and because the debtor and one group of creditors disagreed as to where the case should be heard. The debtor, represented by Kirkland & Ellis, filed a bankruptcy petition in Chicago. While Kirkland's historic home is the Windy City, it was not local favoritism that led Kirkland to steer the case there. Indeed, Kirkland has a substantial bankruptcy practice in New York City and has represented debtors repeatedly in Delaware and the Southern District of New York.[80] A search for favorable case law drove its decision to file in Chicago. In particular, those in control of the debtor wanted to ensure that they received a third-party release of any claims against them. Kirkland decided that the law on third-party releases was more favorable in the Seventh Circuit than in other possible venues.[81]

Worried about Chicago judges' lack of experience with bankruptcy cases, the second-lien holders filed an involuntary Chapter 11 petition for Caesars in Delaware three days before Caesars's Chicago filing.[82] They were seeking a judge with experience handling a major, complex case. Indeed, they were pleased when the case was assigned to a well-respected Delaware judge.[83]

Unfortunately for the second-lien holders, the Chicago judge they feared the most was ultimately selected for their case.[84] That judge, however, made rulings that ultimately benefited the second-lien holders in their efforts to maximize their recovery. In particular, he approved the appointment of an examiner to investigate the prebankruptcy transfers within Caesars's corporate structure.[85] The

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79. *See* MAX FRUMES & SUJEET INDAP, THE CAESARS PALACE COUP: HOW A BILLIONAIRE BRAWL OVER THE FAMOUS CASINO EXPOSED THE POWER AND GREED OF WALL STREET 153-71 (2021).

80. Kirkland currently lists 118 lawyers in its New York City restructuring group. *See Professionals*, KIRKLAND & ELLIS (2021), https://www.kirkland.com/lawyers?practice=85268642-addb-45ee-8e92-ab9608393a9e&office=0710ac52-df10-4833-ab67-ef97b261187f [https://perma.cc/FDS7-S9TQ]. According to the LoPucki database, over half of the 121 cases where Kirkland represented the debtor were filed in either the Southern District of New York or the District of Delaware.

81. *See id.* at 155 (Caesars's lawyers wanted to file in the Seventh Circuit "where the case law was generous on third-party releases").

82. *See id.* at 166. The timing of the involuntary petition was not an accident. One creditor group had received collateral to support its claim in October 2014. This granting of security interest was arguably a preference under § 547 of the Code. *See* 11. U.S.C. § 547 (2018). However, § 547 examines transfers to outside creditors that took place within ninety days of bankruptcy. The voluntary petition, which the creditors knew was coming, would have left the transaction outside of the preference window. FRUMES & INDAP, *supra* note 79, at 154.

83. *See* FRUMES & INDAP, *supra* note 79, at 165.

84. *See id.* at 165-66.

85. *See id.* at 180-81.

examiner's report both gave ammunition to the second-lien holders and spurred negotiations that led to the ultimate reorganization plan.[86]

The incoming wave of large corporate bankruptcies provides Congress with an opportunity to enhance bankruptcy infrastructure to the benefit of both opponents and defenders of the extant system. The opponents of current practice seek to restrict venue choices.[87] In a clear attack on the Delaware bankruptcy court, opponents have sought, without success, to eliminate the place of incorporation as a permissible venue.[88] The defenders of current practice have fought proposals to restrict venue options, arguing that it would create too much uncertainty by forcing companies into courts that are ill-equipped to handle them.[89] Whether because of the merits of their arguments or pure political power,[90] defenders of the current practice have been able to beat back all attempts to limit venue.

III. BANKRUPTCY INFRASTRUCTURE FOR THE FUTURE

The thirty-year war over venue reform has been fought on the wrong terrain. Opponents of extant practice have (unsuccessfully) sought to limit venue choice, and defenders have stoutly defended the existing venue statute. Rather than limit available venues to those with the most experience presiding over bankruptcy cases, Congress should increase the attractiveness of alternative venues.

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86. See *id.* at 227-47.

87. *See* Bankruptcy Venue Reform Act of 2018, S. 2282, 115th Cong. § 3 (2018).

88. The most recent effort was launched in late June of 2021. See *supra* note 75.

89. For an attempt to quantify the cost of judicial inexperience in Chapter 11 cases, see Benjamin Iverson, Joshua Madsen, Wei Wang & Qiping Xu, *Financial Costs of Judicial Inexperience: Evidence from Corporate Bankruptcies* (Aug. 1, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084318 [https://perma.cc/3N5U-3PT9].

90. Delaware's senior senator up until 2009 routinely opposed attempts to eliminate place of incorporation as a permissible venue for a Chapter 11 filing. *See, e.g.*, Paul Blumenthal, *Elizabeth Warren's Plan for 'Big Structural Change' Threatens Joe Biden*, HUFFPOST (Sept. 11, 2019, 11:00 AM ET), https://www.huffpost.com/entry/joe-biden-elizabeth-warren-debate-delaware_n_5d76b4d7e4b07521023140e6 [https://perma.cc/W9J8-WRAC]. The state's newest senator has taken up the cause, identifying Delaware's bankruptcy court as "one of the key pillars of our local economy." *See* Chris Coons, *Sen. Chris Coons: Bankruptcy Legislation Could Devastate Delaware*, DEL. ONLINE (Jan. 25, 2018, 10:52 AM ET), https://www.delawareonline.com/story/opinion/contributors/2018/01/25/sen-chris-coons-bankruptcy-legislation-could-devastate-delaware/1065030001 [https://perma.cc/K3FT-TCV4].

First, Congress should create specialized panels of judges in each judicial circuit to handle large corporate cases.[91] Recall, the Southern District of Texas became an attractive venue because it guaranteed that one of two judges—both with extensive experience in major restructurings—would handle all bankruptcy cases. That reform substantially decreased the risk that a case would be heard by a judge who lacked specialized experience.

Second, Congress should amend the venue statute so that as long as a case has a statutory basis for being brought in any venue within a particular circuit, it can be filed with the circuit's specialized panel. For example, if one of the appropriate venues for a case is the Southern District of Indiana, the debtor could file with that circuit's panel, even if that panel is located in the Northern District of Illinois.

Congress could leave it to the respective judicial conferences of each circuit to decide where to locate the panels, and how many and which judges should sit on each. The Second, Third, and Fifth Circuits will presumably choose the Southern District of New York, the District of Delaware, and the Southern District of Texas, respectively. The remaining circuits might locate panels in their largest cities—Boston in the First Circuit, Charlotte in the Fourth, Nashville in the Sixth, Chicago in the Seventh, Minneapolis in the Eighth, Los Angeles in the Ninth, Denver in the Tenth, and Atlanta in the Eleventh. Large cities often have strong restructuring bars, convenient transportation, and at least two judges who have the experience necessary to manage a major bankruptcy case.

One of the benefits of this proposal is that it would increase bankruptcy infrastructure without requiring Congress to invest additional resources into the bankruptcy system. Creating new judgeships at any level is always a political challenge, as the party out of power is loath to give judicial appointments to the party in power. Especially in the Senate, the party out of power can prevent the creation of new judgeships by filibustering legislation that would create new vacancies to be filled.[92] Creating panels across the circuits for complex cases would not require the appointment of new judges. Rather, a small number of existing

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91. As to which companies should be allowed to file before a specialized panel, there is some arbitrariness in setting the line. To give one possible example of where to draw the line, in the Southern District of Texas, only companies with more than $10 million in liabilities can file before the complex panel. Companies with more than $200 million in liabilities must file before the panel. S. DIST. TEX., *supra* note 73.

92. On the political roadblocks to creating new judgeships despite the widespread agreement that such positions are needed, see Mark Joseph Stern, *Congress Might Actually Expand the Courts: But Will Republicans Let Joe Biden Fill the New Seats?*, SLATE (Feb. 24, 2021, 5:43 PM), https://slate.com/news-and-politics/2021/02/congress-expand-courts.html [https://perma.cc/2PMS-87CR].

judges would be designated as serving on the complex-bankruptcy panel. During periods of few large corporate-bankruptcy filings, these judges could continue to hear a docket of other bankruptcy cases.

Another aspect of the venue dispute provides additional support for this proposal. Since the initial round of debates over bankruptcy venue in the United States, other countries have intentionally created bankruptcy processes designed to be attractive to large, multinational corporations.[93] The United States no longer has a monopoly on the filing of large Chapter 11 cases with American ties. England and Singapore, for example, are expressly competing for cases that could otherwise be tried in the United States.[94] In light of these developments, committing to augmenting the bankruptcy system's infrastructure by creating additional venues designed to handle large cases is prudent. Little would be lost if America were to increase its capacity to handle large bankruptcy cases and the number of filings were to remain constant over time. After all, if the number of Chapter 11 filings remains low, the system can continue to function as it is. On the other hand, failure to expand capacity, coupled with a surge in cases, would harm the American judicial system. To the extent that America's bankruptcy infrastructure gets overwhelmed by cases, courts in other countries will welcome outstanding cases with open arms.

One could question why bankruptcy courts have not taken such action on their own. As the experience in Houston demonstrates, each bankruptcy court has the power to create a specialized panel, but only Houston has done so. It is easy to speculate as to why other districts have not taken similar steps.[95] One reason could be that some judges do not want such cases. Bankruptcy courts are already overburdened. Attracting new cases to a district could well increase the workload of those not on the panel. Another reason could relate to judicial egos. In order to establish a specialized panel, a bankruptcy court would have to select the judges who would serve on it. The restructuring community might not have

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93. *See* Casey & Macey, *supra* note 4, at 490.

94. For a description of these efforts, see *id.* at 486-91.

95. Delaware and the Southern District of New York maintain their attractiveness by having judges appointed who have the confidence of the restructuring community. To take a recent example, Judge Goldblatt is the newest member of the Delaware Bankruptcy Court. *See Delaware Bankruptcy Bench Is at Full Strength with the Addition of Judge Craig Goldblatt*, AM. BANKR. INST. (June 11, 2021), https://www.abi.org/newsroom/bankruptcy-headlines/delaware-bankruptcy-bench-is-at-full-strength-with-the-addition-of [https://perma.cc/3972-KRJG]. A long-time partner at WilmerHale, Judge Goldblatt is a former Supreme Court litigator and a conferee of the National Bankruptcy Conference. *See Craig Goldblatt Elected as a National Bankruptcy Conference Conferee*, WILMERHALE (Nov. 28, 2016), https://www.wilmerhale.com/en/insights/news/2016-11-28-craig-goldblatt-elected-as-national-bankruptcy-conference-conferee [https://perma.cc/5S9Z-UPCS].

confidence in all of the judges who were interested in the newly available positions. Unsurprisingly, few judges would want to tell their colleagues that they were not fit to serve on such a panel.

The proposal here overcomes both concerns. First, by not requiring that the judges on the panel come from a single district, no single district has to bear the burden of staffing the panel by itself. Second, having the judicial council for each circuit select the number and identity of the judges could ameliorate the problems of bruised egos. The judicial council of each circuit consists of appellate and district-court judges from the circuit and is generally charged with overseeing the administration of the courts in that circuit.[96] The members of the council are somewhat removed from any pressures by judges seeking to be on the panel as they are not the day-to-day colleagues of the bankruptcy judges who might feel slighted if they are passed over. Moreover, the judicial council could consult in confidence with representatives of the bar to identify attractive candidates. Indeed, the current method of selecting bankruptcy judges in some circuits involves such confidential inquiries.[97]

Increasing the number of specialized large-business-bankruptcy panels should find support among proponents of the current system. If proponents are correct that predictability, case law, judicial expertise, speed, and costs drive venue selection, they should welcome additional choices that offer more of these benefits. When there is a wave of bankruptcy cases, the current venue champions may have more cases than they can handle. If this happened, they would either have to spread themselves thin or transfer cases to another, probably less experienced, venue. Nudging each circuit to create a bankruptcy panel would provide the predictability touted by the proponents of venue selection. For example, the Central District of California alone has twenty-three bankruptcy judges,[98] which creates great uncertainty as to how particular cases will be handled. A panel of a small number of judges in the Ninth Circuit selected to handle complex Chapter 11 cases would be attractive to large companies, who would have a clearer idea of how their cases might play out before they filed their bankruptcy petitions.[99]

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96. *See Governance & the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference [https://perma.cc/7HU7-VC45].

97. *See* Malia Reddick & Natalie Knowlton, *A Credit to the Courts: The Selection, Appointment, and Reappointment Process for Bankruptcy Judges*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 16 (2013), https://iaals.du.edu/sites/default/files/documents/publications/a_credit_to_the_courts.pdf [https://perma.cc/C3ZU-7HVW].

98. *See Judge Directory*, U.S. BANKR. CT. CENT. DIST. CAL., https://www.cacb.uscourts.gov/judges/judge-directory [https://perma.cc/R4Y6-VUQ3].

99. Attorneys have repeatedly referenced the need for certainty in terms of case law in selecting a venue. *See, e.g.*, Eisenberg & LoPucki, *supra* note 4, at 29-30; Rasmussen & Thomas, *supra* note 4, at 1373.

Building up extra capacity now would ensure that the virtues of the existing system could be maintained during a crisis.

Opponents of the current system should also support this proposal. Those who decry extant practice note that a consequence of having only a few venues that attract almost all of the large cases means that only those venues have the opportunity to weigh in on important interpretations of the Bankruptcy Code.[100] The Supreme Court tends to take bankruptcy cases, like other types of cases, only when there is a circuit split.[101] With only two or three circuits weighing in on a disputed interpretation of the Bankruptcy Code, there is a greater likelihood that the appellate courts will be in agreement on a particular issue, even if there are strong arguments to be made on the other side. This creates the risk that agreement among a small number of courts will ossify an erroneous interpretation of the Bankruptcy Code.[102] To the extent that more venues become attractive for large companies, there would be additional opportunity to litigate controversial issues in bankruptcy law.[103] The concern of inadequate judicial vetting raised by skeptics of the current system would thus be ameliorated.

Along similar lines, many important bankruptcy issues do not receive appellate review because of the doctrine of equitable mootness.[104] This is not the place to describe the doctrine in detail. The upshot, however, is that it prevents issues from receiving appellate review. The general impetus behind the doctrine is that, by the time a bankruptcy case gets to a circuit court, so much time has passed that it would be unjust and exceedingly difficult to upset a confirmed plan of

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100. *See NCBJ Special Committee on Venue Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, NAT'L CONF. BANKR. JUDGES 34-37 (Nov. 27, 2018), https://cdn.ymaws.com/www.ncbj.org/resource/resmgr/docs_public/Venue_White_Paper_-_Final.pdf [https://perma.cc/H8XK-CXBC]; *Bankruptcy: The Next Twenty Years*, NAT'L BANKR. REV. COMM'N 782 (1997) ("But when a few judges, by virtue of sitting in desirable venues, are the only judges to review certain issues, the system breaks down."); Parikh, *supra* note 4, at 198 ("Without discourse across bankruptcy courts, [the] inaccuracies [of these courts] remain unchallenged and are actually strengthened by repeated application to a long string of cases.").

101. For an early empirical analysis of this trend, see Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993).

102. *See* NAT'L CONF. BANKR. JUDGES, *supra* note 100; NAT'L BANKR. REV. COMM'N, *supra* note 100; Parikh, *supra* note 44, at 198.

103. This is not to say that the Supreme Court has a coherent view of bankruptcy policy. Many argue that it does not. *See, e.g.*, RONALD J. MANN, BANKRUPTCY AND THE U.S. SUPREME COURT 225-29 (2017); Rasmussen, *supra* note 101, at 571.

104. For a description and trenchant criticism of the bankruptcy doctrine of equitable mootness, see Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377 (2019).

reorganization.[105] One could imagine an expedited system of appellate review from the bankruptcy panel to the appellate court that could increase the availability of meaningful appellate review.

Moreover, opponents of the current system lack a sufficient response to the proponents' predictability argument. Drastically curtailing venue would necessarily mean that some large cases would be heard by judges with little background in complex reorganization cases. The creation of designated panels in each circuit would allow those who ultimately wish to narrow venue selection to point to the advantages now touted by proponents. The argument to limit venue choices would become stronger with the assurance that particular Chapter 11 cases would not serve as learning opportunities for inexperienced judges .

One possible concern with my proposal is that the creation of additional venues with expertise on corporate restructuring will increase incentives for debtors to shop for venues. Given the fluidity of the bankruptcy-venue provision, a determined debtor can create a basis for filing in any jurisdiction that it wishes. Indeed, in recent years, roughly eighty percent of the cases have been filed in venues other than where the debtor has its principal place of business.[106] Those who decry current practice as a race to the bottom among three courts may well balk at turning the race into a sprint among panels in each of the circuits.

There are two responses to this concern. The first is that, with panels in each circuit, there could be more oversight of bankruptcy courts by higher courts. Part of the argument of the opponents of current practice is that bankruptcy judges misapply the law to attract cases. To the extent that this is true, additional review by higher courts could put an end to deviant practices more quickly. But there is an even stronger solution to this problem. To the extent that one is concerned about this risk, the best answer is to allow companies to commit to a potential bankruptcy venue well in advance of financial distress.[107] Professor Randall S. Thomas and I argued two decades ago that when companies make venue selections before they have to enter the market for new debt, they have an incentive to select a venue that maximizes the value of the company.[108] At a minimum, an

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105. *See In re* Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981) (noting that there had been "such a comprehensive change of circumstances" since the bankruptcy court's decision that it would be "inequitable" for the court to hear the appeal).

106. *See* Parikh, *supra* note 4, at 179.

107. Randall Thomas and I have elaborated on this proposal elsewhere. *See* Rasmussen & Thomas, *supra* note 4, at 1399. Casey and Macey have recently offered an improved version of our proposal by proposing a new mechanism by which a company that has selected a venue in its corporate charter can amend the charter and select a new venue. *See* Casey & Macey, *supra* note 4, at 500-03.

108. *See* Rasmussen & Thomas, *supra* note 4, at 499.

enforceable commitment would at least allow all those who deal with a company to know where any future insolvency proceeding may take place.

Recent Delaware case law would allow corporations to put venue-selection provisions in their corporate charter. The Delaware Supreme Court last year blessed a charter provision that requires any securities-fraud action to be filed in federal court.[109] In *Salzberg v. Sciabacucchi*, the court held that section 102(b)(1) of Delaware's General Corporation Law (DGCL) authorized such a charter provision.[110] Section 102(b)(1) authorizes "any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders."[111]

The court in *Salzberg* reasoned that charter provisions limiting where a securities-fraud action could be filed were authorized under either of these clauses.[112] The court noted "the DGCL allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise."[113] The Bankruptcy Code grants to the debtor the right to choose in which venue to file. Specifying how this power will be used in advance addresses both "the management of the business" of the corporation and "limit[s] the power of the corporation" to file in a specific venue.[114] At least as a matter of state law, a corporation could thus commit to a bankruptcy venue in its charter.

Nothing in the Bankruptcy Code would override such a charter provision. To be sure, a charter provision which prohibits a company from seeking relief under Chapter 11 could violate the policy behind federal bankruptcy law. The proposed charter provision here, however, is much more limited. The company could still file for bankruptcy. The proposed provision only informs the various investors in the corporation as to where, among the permissible venues, such a proceeding would take place. To the extent that the company had more than the current three experienced venues from which it could choose, this would increase private ordering in a way that would redound to the benefit of all the company's stakeholders.

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109. *See* Salzberg v. Sciabacucchi, 227 A.3d 102 (Del. 2020).

110. *Id.* at 109, 113-14.

111. DEL. CODE ANN. tit. 8, § 102 (2020).

112. *Salzberg*, 227 A.3d at 113-14.

113. *Id.* at 116.

114. *Id.* at 113 (citing DEL. CODE ANN. tit. 8, § 102 (2020)).

CONCLUSION

The pandemic is receding, but its effects will linger. Corporations have leveraged up their balance sheets and become more susceptible to financial distress. Congress should reinforce bankruptcy infrastructure to accommodate future waves of bankruptcy filings. Requiring each circuit to create a business-bankruptcy panel designed to handle large cases would accomplish this goal and increase the overall health of the bankruptcy system.

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