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Bankruptcy and the coronavirus

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Introduction

Less than two months into the coronavirus crisis, and despite the massive infusion of federal funds, a rise in business bankruptcies has already begun. Even if the current efforts by Congress, the Federal Reserve, and Treasury to counteract the economic shutdown are effective, an enormous wave of bankruptcies may come. How effective will the bankruptcy system be as a second line of defense for consumers and businesses that are unable to avoid default?

The good news is that the bankruptcy system ordinarily works well, even in times of crisis. The framework that eventually led to the current Chapter 11—bankruptcy's reorganization provisions—was forged in the periodic economic "panics" of the late nineteenth century and used to restructure the numerous railroads that defaulted.[1] Although this report focuses primarily on business bankruptcies, note that the nation's bankruptcy judges also handled roughly 1.5 million consumer bankruptcies a year as recently as the early 2000s.[2]

Based on this track record, it is tempting to simply assume bankruptcy will be available as needed, with no special planning necessary. This would be a mistake. The bankruptcy system has three major limitations of great importance in the current environment: it has proven much more effective at reorganizing large corporations than small and medium-sized businesses; it functions very differently when the bankruptcy courts are congested; and Chapter 11 depends on the debtor having financing during the bankruptcy case. It is essential that the Federal Reserve and Treasury anticipate these limitations and consider creative solutions to the problems that are likely to arise.

After briefly describing the reasons to expect a wave of bankruptcies and the key limitations of Chapter 11, this report considers proposals to impose a bankruptcy-like standstill and offers several strategies for adapting the bankruptcy process for the current crisis, concluding with a brief comment on the capacity of the bankruptcy system.[3]

The coming wave of bankruptcies

The relationship between economic crises and bankruptcy filings is not always as direct as people assume. Bankruptcy filings nearly always rise following a crisis, but they may not rise dramatically. After the Dot Com bubble of the early 2000s, business filings rose only slightly (to 40,099 in 2001, from 37,884 in 1999.[4] The increase was substantially steeper during the Great Recession (60,837 in 2009, from 28,322 in 2007).

The current crisis could bring a much greater surge in business bankruptcy filings than either of the two most recent recessions. Prior to the current crisis, businesses took on an extraordinary amount of debt—$15.5 trillion, according to one estimate, a 52% increase since its high point during the 2008 crisis.[5] This debt, coupled with the nearly complete shutdown of the economy and the fact that the revenues of many businesses will be slow to recover, even after economic activity resumes, suggests there will be a surge of business bankruptcies. Businesses also may be less hesitant to file for bankruptcy than they otherwise would have, given that some debt is now guaranteed by the government and the distress has been triggered by a crisis outside their control. At the very least, regulators need to assume that a bankruptcy wave is coming.

The limitations of Chapter 11

Although U.S. bankruptcy laws are widely admired, Chapter 11 has three major limitations that cause concern in the current environment. If Congress, the Federal Reserve, and the Treasury want to avoid a catastrophic failure of the bankruptcy system, they need to anticipate each one.

While Chapter 11 is designed to give distressed but viable businesses a second chance, it has a very poor track record with small and medium-sized companies. (Chapter 11 appears to be better at achieving other objectives, such as nudging non-viable businesses to shut down promptly.)[6] The costs of bankruptcy for small and medium-sized businesses are substantial—often 30% of the value of the business—and two-thirds are liquidated rather than reorganizing.[7]

Last year, Congress enacted legislation designed to increase the ability for small businesses to successfully reorganize. One difficulty for small businesses is the absolute priority rule, which states that unless a class of creditors that objects to a reorganization plan is paid in full, no lower priority creditors or shareholders can be receive anything. Because the owner/shareholder of a small business is usually essential to its continued operation, the absolute priority rule can make it impossible for a small business to reorganize. The Small Business Reorganization Act relaxes this rule—allowing a court to confirm a reorganization plan if the owner promises to continue running the business and includes several other provisions that will ease the path to reorganization. It initially was available only to businesses with not more than $2,725,625 million of debt, but the threshold was increased to $7.5 million under the CARES Act.

These adjustments should improve the prospects of reorganization, and many of the small and medium-sized businesses that file for Chapter 11 may be more viable than the companies that file under ordinary circumstances—since their distress is due to the economic shutdown. But regulators should not expect the grim realities of Chapter 11 for small and medium-sized businesses to disappear. The small business changes are modeled to some extent on Chapter 13, the rehabilitation provisions for consumers, which has a similarly poor track record. And businesses with more than $7.5 million in debt cannot use them.

The success rate for reorganization of large businesses in Chapter 11 is much higher. A substantial majority reorganize, depending on how reorganization is defined.[8] This no doubt is why many scholars have advocated that Congress, the Fed and Treasury withhold rescue funding from the largest corporate debtors, and force them to file for Chapter 11.[9] They can be successfully restructured, the reasoning goes, at limited cost to the public fisc.

Even under ordinary circumstances, businesses and their stakeholders do not emerge from Chapter 11 unscathed. Empirical evidence suggests that Chapter 11 brings significant wage loss for employees.[10] But some of these effects may not be caused by Chapter 11—they may be inevitable when a company is distressed, and it is possible that the emphasis in the current relief efforts on protecting employees' jobs will counteract this.[11]

The second major problem is the likelihood of congestion in the bankruptcy courts, which could sharply reduce their effectiveness. Bankruptcy courts are overseen by federal bankruptcy judges, distributed through each of the federal courts throughout the country. All types of bankruptcy cases—large corporations, small and medium-sized corporations, consumer bankruptcies—go to the same courts. An important study by Benjamin Iverson of Brigham Young University found that bankruptcy courts function very differently when congested with cases. Small and medium-sized businesses are even more likely to be liquidated if the court is congested than in a court with a manageable caseload. Although implications are not quite as dire for large corporations, it takes longer for these companies to reorganize and costs are substantially higher if the court is congested.[12] It is possible the current crisis will not fit this pattern—Iverson has noted, for instance, that his study looked at a period when filings were falling rather than rising[13]—but the Fed and Treasury would be well-advised to assume that the effectiveness of Chapter 11 could be severely undermined by clogged courts.

The third problem is financing. Nearly every large corporate debtor that files for bankruptcy needs new financing—referred to as "debtor-in-possession" or "DIP" financing. Very often financing is provided by the company's principal prebankruptcy lenders.[14] Although DIP financers are ordinarily extremely well protected and defaults have been rare, the coronavirus crisis has created unprecedented uncertainty. In the Sanchez Energy bankruptcy, the debtor has announced that it will be unable to pay its DIP lender in full, and that lender is likely to take major losses.[15] At least in the short-run, many lenders may be unwilling or unable to provide DIP financing, and debtors may have difficulty attracting alternative sources of financing. The difficulty of finding a new lender is magnified by the fact that assets the debtor might offer as collateral for a new loan may already be encumbered by the liens of its pre-bankruptcy lenders.

In short, a large wave of bankruptcy filings could overwhelm the bankruptcy system. If nothing is done, even the largest debtors could face congested courts and an inability to obtain the financing they need for the bankruptcy process.

Flattening the bankruptcy curve

The most obvious implication of Chapter 11's limitations is that the system will work more effectively if the Federal Reserve and Treasury flatten the curve of coming bankruptcies. The CARES Act and the other programs the Fed has created are essential in this regard. If the grants and financing enable most American consumers and businesses to avoid bankruptcy, the bankruptcy system will serve as a more effective backstop in the current crisis.

The goal should be to offset the effects of the economic shutdown with across-the-board liquidity support, not to bail out companies that had problems before the crisis and need a more thoroughgoing restructuring.[16] Although it may be impossible to disentangle the two in many cases, companies that clearly need more than temporary liquidity—Boeing appears to be an example, as are fracking and retail—should be expected to file for bankruptcy, and their creditors and shareholders to bear some of the consequences of the financial distress. But Congress and regulators should get funds as quickly as possible to both large and smaller companies, as they have been seeking to do. As with responses to the coronavirus itself, the quicker and more decisive the intervention, the more likely the liquidity will flatten the bankruptcy curve and reduce the risk of a catastrophic failure of the bankruptcy system.

A much-discussed, bankruptcy-inspired reform—a standstill on collection by creditors—could magnify the protection for revenue-starved businesses, although it would need to be handled carefully. Indeed, it may no longer be advisable given other recent efforts to achieve the same benefit.

The bankruptcy standstill is automatic. When a debtor files for bankruptcy, an "automatic stay" goes into effect, which prohibits creditors from trying to collect what they are owed and enables the debtor to stop paying its pre-bankruptcy obligations.[17] Congress has occasionally provided for a stay for debtors who have not formally filed for bankruptcy, as with Puerto Rico in connection with the legislation that created an oversight board for Puerto Rico and in the Servicemembers Civil Relief Act of 2003. If a similar stay were imposed now, consumers and businesses could postpone paying potentially crippling rent or mortgage payments.

A patchwork fabric of ad hoc standstill arrangements has already emerged. Fannie Mae, Freddie Mac, and other government or government-sponsored mortgage agencies have announced temporary deferrals of mortgage obligations, as have private lenders in some cases[18] Many states have suspended eviction proceedings or taken other steps to provide relief[19]. The bankruptcy-style stay I have described would thus be a more universal version of the strategy that is already in place. The National Bankruptcy Conference, an influential group of bankruptcy judges, lawyers and professors, has advocated a temporary non-bankruptcy stay, as have other commentators (including myself).[20]

It is important to recognize the "rob Peter to pay Paul" risk of a non-bankruptcy stay. If the stay enables a small business to stop paying its landlord, the landlord's own distress may be magnified. The stay could reduce the government support needed by the small business but increase the landlord's need for help.[21] In my view, it no longer makes sense to adopt a universal stay, given the plethora of ad hoc initiatives. If a stay were enacted, it should be strictly limited in duration—perhaps to three months, as the National Bankruptcy Conference has advocated. But at this point in the crisis, the benefits of a stay are smaller than they would have been at the outset of the crisis, and the costs more significant.

The best non-bankruptcy strategy for limiting the strain on the bankruptcy system is minimizing the need for consumers and businesses to file for bankruptcy through the liquidity support lawmakers and regulators are attempting to provide through the CARES Act, new Federal Reserve programs, and other interventions.

The pre-packaged bankruptcy option

For businesses that do file for bankruptcy, it will be essential to simplify the bankruptcy process as much as possible. One strategy for doing this is to make creative use of a technique already used by many Chapter 11 debtors, the "prepackaged bankruptcy."

In a prepackaged bankruptcy, the debtor negotiates a restructuring of its debt prior to bankruptcy, then files a proposed reorganization plan along with or very shortly after its bankruptcy petition.[22] Chapter 11 explicitly authorizes debtors to solicit votes prior to bankruptcy, which significantly decreases the time required for the reorganization process.[23] The prepack approach isn't realistic for all corporate debtors; it works best with companies that seek to restructure a single class of debt—usually bonds—and to continue to pay their other obligations. Companies that do pursue the prepack option can restructure and emerge from bankruptcy in as little as thirty days.

Given the massive number of companies currently facing distress, regulators should consider setting up a program to support the simultaneous filing of multiple, "cookie cutter" prepackaged bankruptcies. The Nobel Prize winning economist Joseph Stiglitz and a co-author proposed a somewhat similar strategy in the late 1990s. The Stiglitz approach, which he called "Super Chapter 11," called for an automatic restructuring of the debt of large numbers of companies, presumably through an administrative process.[24] The Super Chapter 11 proposal appears to have been designed as a substitute process for countries without an efficient bankruptcy system. In the U.S., the ordinary prepackaged bankruptcy process could be used to achieve similar results in a more tailored fashion (taking account, for instance, of legal or capital structure factors that make the approach more or less plausible for particular firms); it would not be necessary to set up a new framework, with a new cadre of officials.[25]

Although debtors who pursue traditional prepacks usually do not seek DIP financing, financing is likely to be essential for the businesses that file for bankruptcy in the current environment. By making a prepack a condition of providing financing for appropriate debtors, regulators could take advantage of the prepack option. The principal obstacle to this strategy is restrictions on lending under the CARES Act. The Federal Reserve's emergency lending powers under section 13(3) prohibit the Fed from lending to companies in bankruptcy. The $500 billion in CARES Act funding that is intended to fund large corporations, among other recipients, is explicitly linked to programs established by the Fed under section 13(3). (Although the $350 billion in small business loans and grants does not have this restriction, bankruptcy is generally a disqualifier for loans in the program this funding is linked to, and most recipients cannot receive more than $10 million in any event.)[26]

Absent an amendment to the CARES Act, this suggests any loan to facilitate a prepackaged bankruptcy may need to be made prior to a bankruptcy filing. This restriction should not significantly interfere with the pre-pack strategy. Indeed, it may make it easier for regulators to oversee the process if debtors come to them first, then file for bankruptcy.

The prepack strategy is most plausible for companies that can obtain significant relief by restructuring a single class of debt. In the past, prepacks have been used to restructure unsecured bond debt. In the current crisis, prepacks might also work for junior secured debt (which many midsized companies issue rather than bonds) in some cases.

Recapitalizing through a sale

Whereas prepacks simplify the Chapter 11 voting process, a second strategy sidesteps the process altogether. If the debtor wishes to sell some or all of the company's assets, all that is needed is notice, a hearing, and bankruptcy judge approval. This strategy—the "363 sale," so called because of the section of the Bankruptcy Code that authorizes it—is routinely used to sell entire companies. Under the process that has emerged, the debtor often selects a "stalking horse" bidder and a one to two-month auction is held, during which any competing bids are solicited. The debtor then picks and asks the court to approve a winning bid.

Even now, the traditional sale process is likely to work for many debtors. Although the crisis has severely depleted many potential buyers' access to liquidity, those with funds will see the current moment as an attractive buying opportunity.

For other companies, however, the market will not function effectively. If potential buyers are themselves liquidity constrained, a traditional sale may not be an attractive option. For some of these companies, it may be possible to recapitalize the company through an internal sale—a "sale to self," in a sense. The debtor could transfer its assets and secured debt to a newly created entity, while leaving the stock and junior debt behind. The equity of the new entity would be distributed to the junior debt and the stock likely wiped out. The FDIC and Federal Reserve plan to employ a similar approach under the Dodd-Frank Act of 2010 if a systemically important financial institution falls into financial distress.[27]

The government could condition financing on the company's agreement to propose either a traditional sale or a sale to self. If regulators use this approach, they should announce in advance how they expect the transactions to proceed—as the FDIC and Fed have done with large financing institutions—and they should standardize the process as much as possible, to avoid being accused of picking winners and losers. In 2009, the government used a more elaborate "sale to self" strategy to restructure Chrysler and General Motors. Although these transactions are now widely viewed as successful, they were highly controversial at the time, because, among other things, they appeared to favor some constituencies over others. A simpler, more standardized transaction like the simple recapitalization described above would avoid these complaints.

Making DIP financing work

A final opportunity for creative use of the bankruptcy process comes with DIP financing, which is often essential for a successful reorganization. The private DIP financing market is severely stressed, due both to the new riskiness of DIP loans and lenders' concerns about their own liquidity. Unless the government steps in, debtors' inability to secure DIP financing could prevent many from reorganizing.

The most obvious solution is for the government to provide DIP financing directly, as has been assumed throughout this report. This solution has the benefit of both meeting companies' financing needs and giving the government leverage to steer the bankruptcy process if necessary. The principal obstacle comes not from bankruptcy law—the government can serve as financer in bankruptcy, as GM and Chrysler attest—but from the CARES Act itself. By tying funding to the Federal Reserve's section 13(3) powers, which preclude bankruptcy loans, the CARES Act discourages the government from providing traditional DIP financing. This stricture can be finessed by lending to firms before they file for bankruptcy (or to the new entity in a bankruptcy sale) rather than during bankruptcy. Alternatively, Congress could simplify the process by removing the prohibition against bankruptcy loans.

The direct lending strategy has an important shortcoming: it could crowd out private lenders who might otherwise be willing to provide DIP financing. Here is where a more creative use of governmental funding might come into play. Rather than thinking of governmental funding and private DIP loans as an either/or choice, the government could coordinate at least some of its funding with private lenders, rather than as a substitute for them. The government could agree to take the first 20 or 25 percent of the risk for qualifying loans, either by assuming a portion of the loan or through a guarantee. This is of course very similar to the approach being used under the CARES Act for loans outside of bankruptcy. A public-private partnership for DIP financing purposes would provide the funding that companies need in Chapter 11 and at the same time could help unfreeze the private DIP financing market.

The public-private strategy also could address another potential complication with DIP financing. Many debtors do not have any unencumbered assets—that is, assets that have not been pledged as collateral to existing lenders. Under current law, a new lender cannot be given a senior interest that trumps the earlier lender unless the earlier lender is essentially assured it will be paid in full.[28] If the government worked with the existing lender, and agreed to take the first loss, this complication would be averted.

The direct funding strategy might be best for Chapter 11 cases structured either as a prepack or as a sale. For more traditional Chapter 11 cases, the public-private partnership approach should be the norm, to encourage continued private DIP financing. Although either approach can be pursued under existing law, in my view, government involvement would require less gymnastics if Congress removed the restrictions on government funding in bankruptcy.

Buttressing the bankruptcy system

Even with a concerted campaign to restore liquidity and creative use of existing bankruptcy tools, the coming months are likely to see significant stress on the bankruptcy system. Congested courts pose a severe risk to bankruptcy's effectiveness as a backstop during the crisis and its aftermath. A final question is how the system itself can adjust, or be adjusted, to better handle the spike in bankruptcy filings.

In the past, congested courts have sometimes borrowed a judge or judges from less crowded districts. In the late 1990s, when its bankruptcy court had a flood of large Chapter 11 cases, Delaware borrowed judges from other districts for several years. Since the coming wave of bankruptcy filings is likely to hit some districts harder than others, this approach could be used to alleviate some of the burden.

Shifting judges around will not be enough. More judges are likely to be needed. If lawmakers are hesitant to create new judicial positions for a crisis that is not expected to last indefinitely, they could create temporary bankruptcy judgeships. Congress has done this in the past; indeed, there are eighteen (out of 350) bankruptcy judges serving temporary, five-year terms even now. Quickly authorizing more temporary judges, and increasing funding for the bankruptcy courts, would help prepare the bankruptcy system for the role it is likely to be playing. Private organizations such as the American Bankruptcy Institute could assist by providing nationwide training for non-bankruptcy lawyers who are likely to be working on bankruptcy cases in the coming months.

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Although the U.S. bankruptcy system ordinarily is quite effective, it faces major handicaps in the current crisis environment. For bankruptcy to serve as an effect backstop to their other efforts to stabilize the economy, the Federal Reserve, and Treasury need to minimize the number of new bankruptcies, as they already are attempting to do. They also need to prepare to intervene in the Chapter 11 restructuring process in creative ways.

ENDNOTES

1. I recounted the history in David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America*, Princeton: Princeton University Press, 2015.
2. The bankruptcy filing numbers can be found on the American Bankruptcy Institute website, at http://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf.
3. Some of these ideas have been developed in discussions with other bankruptcy scholars. For good early analyses of the current crisis, see Edward R. Morrison & Andrea C. Saavedra, "Bankruptcy's Role in the COVID-19 Crisis" (April 7, 2020); Aurelio Gurrea-Martinez, "Insolvency Law in Times of COVID-19" (April 3, 2020). See also Kenneth Ayotte & David Skeel, "Bankruptcy Law Needs a Boost for Coronavirus," *Wall Street Journal*, March 30, 2020.
4. The statistics in this paragraph can be found at http://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf.
5. The debt of large corporations topped out at $6.6 trillion in 2008 (44% of GDP), and has subsequently climbed to $10 trillion (48% of GDP). Small and medium-sized companies have an additional $5.5 trillion of debt (a total of 74% of GDP for all corporate debt). Mayra Rodriguez Valladares, "U.S. Corporate Debt Continues to Rise As Do Problem Leveraged Loans," *Forbes.Com*, July 25, 2019. See also John J. Rapisardi & Jacob T. Beiswenger, "The 2020 Economic Crisis: A Historical Perspective on Global Economic Distress and the Unique Impact the COVID-19 Crisis Will Have on U.S. Restructurings," O'Melveny & Myers LLP (2020).
6. Edward R. Morrison, "Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small Business Bankruptcies," *Journal of Law & Economics* 50 (2007): 381.
7. Arturo Bris, Ivo Welch, & Ning Zhu, "The Costs of Bankruptcy," *Journal of Finance* 61 (2006): 1253; Elizabeth Warren & Jay Lawrence Westbrook, "The Success of Chapter 11: A Challenge to the Critics," *Michigan Law Review* 107 (2009): 603; Douglas G. Baird & Edward R. Morrison, "Serial Entrepreneurs and Small Business Bankruptcy," *Columbia Law Review* 105 (2005): 2310.
8. See, for example, Douglas G. Baird, "Chapter 11's Expanding Universe," *Temple Law Review* 87 (2015): 975, 978 (describing trends).
9. See "Economics, Law and Finance Professors from Major Universities Write to Congress: 'Bail Out People Before Large Corporations'" (March 24, 2020)(open letter signed by several hundred scholars), available at https://promarket.org/economics-and-finance-professors-from-major-universities-write-to-congress-bail-out-people-before-large-corporations/.
10. John R. Graham, Hyunseob Kim, Si Li & Jiaping Qui, "Employee Costs of Corporate Bankruptcy" (June 2019).
11. Morrison & Saavedra make similar points in their recent paper. Morrison & Saavedra, ibid. at 7.
12. Benjamin Iverson, "Get in Line: Chapter 11 Restructuring in Crowded Bankruptcy Courts," *Management Science* 64 (2018): 5370.
13. Remarks of Benjamin Iverson, European Corporate Governance Institute Conference on ""The COVID-19 Crisis and Its Aftermath Corporate Governance Implications and Policy Challenges" (April 16, 2020).
14. Eckbo et al find that two-thirds of debtors who obtain debtor-in-possession financing rely on their pre-bankruptcy lender, and that larger firms are more likely to have debtor-in-possession financing. B. Espen Eckbo, Kai Li, & Wei Wang, "Rent extraction by super-priority lenders" (Sept. 22, 2019), pp. 7-8.
15. See Andrew Scurria & Aisha Al-Muslim, "Bankruptcy Loans Turn Dangerous," *Wall Street Journal*, April 8, 2020.
16. For an argument that ad hoc bailouts should nearly always be avoided, see Kenneth Ayotte & David A. Skeel, Jr., "Bankruptcy or Bailouts," *Journal of Corporation Law*, 35 (2010): 469.
17. 11 U.S.C. section 362(a).
18. Mortgage moratoria are tracked at https://www.forbes.com/sites/advisor/2020/04/20/mortgage-payments-interrupted-by-covid-19-the-federal-and-state-response/#6b5035254a08.
19. For information on eviction relief, see https://docs.google.com/spreadsheets/u/1/d/e/2PACX-1vTH8dUIbfnt3X52TrY3dEHQCAm60e5nqo0Rn1rNCf15dPGeXxM9QN9UdxUfEjxwvfTKzbCbZxJMdR7X/pubhtml#
20. Letter from National Bankruptcy Conference to Speaker Pelosi, Rep. McCarthy and Sens. McConnell and Schumer (March 22, 2020).
21. For a voluntary initiative that would bring both the debtor and the party owed performance would agree to the standstill, see Jonathan C. Lipson & Norman M. Powell, "Don't Just Do Something—Stand There! A Modest Proposal for a Model Standstill/Tolling Agreement," *Business Law Today* (April 14, 2020).

22. For a brief overview of prepackaged bankruptcies, see Robert K. Rasmussen & Randall S. Thomas, “Whither the Race? A Comment on the Effects of the Delawarization of Corporate Reorganizations,” *Vanderbilt Law Review* 54 (2001): 283, 288-89 (2001).
23. 11 U.S.C. section 1126(b) validates acceptances received before the debtor filed for bankruptcy.
24. Marcus Miller & Joseph Stiglitz, “Bankruptcy protection against macroeconomic shocks: the case for a ‘Super Chapter 11’” (December 1999). See also Marcus Miller & Joseph Stiglitz, “Leverage and Asset Bubbles: Averting Armageddon with Chapter 11?” (March 2010).
25. I also do not think it is necessary to amend the bankruptcy laws to set up the program described in the text, although it could be done through formal amendments. The National Bankruptcy Conference has advocated bankruptcy amendments that would have a similar objective. Letter from National Bankruptcy Conference to Speaker Pelosi, Rep. McCarthy and Sens. McConnell and Schumer (April 15, 2020).
26. For discussion of the potential to use these funds for DIP financing, see Thomas Salerno et al, “This DIP Loan Brought to You by Someone Who CARES! (Or ‘I’m From the Government And I’m Here To Help You,” *American Bankruptcy Institute* (2020). As of this writing, all of the initial $350 billion has been committed, and lawmakers have agreed to an additional $300 billion of funding.
27. See John Bovenzi, Randall Guynn, and Thomas Jackson, Too Big to Fail: The Path to a Solution 26-27 (Bipartisan Policy Center, May 14, 2013).
28. The earlier lender must be given “adequate protection.” 11 U.S.C. section 364(d).

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