

SMALL BUSINESS DEBT IN THE AGE OF COVID-19

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INTRODUCTION

American bankruptcy law is as old as the United States Constitution.¹ Although bankruptcy law in the United States has been amended numerous times since the country's founding,² Congress enacted the current version of regulations, which can be found in the United States Bankruptcy Code (the "Bankruptcy Code"),³ in 1978.⁴ The Bankruptcy Code uniformly regulates bankruptcies across various types of groups⁵—individuals,⁶ municipalities,⁷ businesses,⁸ family farmers and fishermen,⁹ and international bankruptcies.¹⁰ The most common cases arise from chapter 7,¹¹ chapter 11,¹² and chapter 13¹³ of the Bankruptcy Code.¹⁴ In 2019, Congress amended the Bankruptcy Code through the Small Businesses Reorganization Act of 2019 ("SBRA"),¹⁵ thereby adding subchapter V to chapter 11.¹⁶ The SBRA went into effect in February 2020.¹⁷

¹ U.S. CONST. art. I, § 8, cl. 4.

² See, e.g., Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99; Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532 (2018)).

³ The Bankruptcy Code is codified at title 11 of the United States Code. See 11 U.S.C. §§ 101–1532.

⁴ See Bankruptcy Reform Act of 1978, 92 Stat. 2549.

⁵ Bankruptcy proceedings are also governed by the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the local rules of each individual bankruptcy court. ADMIN. OFFICE OF THE U.S. COURTS, BANKRUPTCY BASICS 5 (rev. 3d ed. 2011), <https://www.uscourts.gov/sites/default/files/bankbasics-post10172005.pdf> [hereinafter BANKRUPTCY BASICS]. Each federal judicial district houses a bankruptcy court, thereby resulting in ninety bankruptcy courts across the country. *Id.*

⁶ Individuals may file for bankruptcy under chapter 7, regulating liquidation of assets, or chapter 13, regulating adjustment of debts for individuals with regular income. See 11 U.S.C. §§ 701–784, 1301–1330.

⁷ Municipalities may file for bankruptcy under chapter 9, regulating adjustments of debts and reorganizations of cities, towns, villages, taxing districts, municipal utilities, and school districts. See *id.* §§ 901–946.

⁸ Businesses may file for bankruptcy under chapter 7, regulating liquidation of assets, or chapter 11, regulating reorganization. See *id.* §§ 701–784, 1101–1174.

⁹ Family farmers and fishermen may file for bankruptcy under chapter 12, regulating adjustments of debt for family farmers or fishermen with regular annual incomes. See *id.* §§ 1201–1232.

¹⁰ Bankruptcies that involve one or more international parties may be filed under chapter 15, regulating ancillary or other cross-border cases. See *id.* §§ 1501–1532.

¹¹ See *id.* §§ 701–784.

¹² See *id.* §§ 1101–1174.

¹³ See *id.* §§ 1301–1330.

¹⁴ See *Understanding Chapter 7, 11, and 13 Bankruptcy*, RESNIK HAYES MORADI LLP (Aug. 15, 2017), https://www.simonresnik.com/chapter-13/understanding-chapter-7-11-13-bankruptcy/2462/#.X1o-Yy2ZP_Q.

¹⁵ See Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified as amended at 11 U.S.C.A. §§ 1181–1195 (West 2020)).

¹⁶ See *id.*

¹⁷ See *SBRA Resources*, AM. BANKR. INST., <https://www.abi.org/sbra> (last visited Feb. 5, 2021) ("The Small Business Reorganization Act of 2019 (SBRA), in effect as of February 19, 2020, was enacted to provide Main Street business debtors with a more streamlined path for restructuring their debts.").

Unbeknownst to Congress, in March 2020, a global pandemic would rock the United States' economy and, indeed, global commerce.¹⁸ The novel SARS-CoV-2 coronavirus ("COVID-19") shook the world in early-2020.¹⁹ As a result, a series of state stay-at-home orders required all non-essential businesses to cease operations indefinitely.²⁰ In response to the shutdowns, Congress swiftly enacted legislation through the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")²¹ to financially support American individuals and businesses.²² The CARES Act serves many purposes.²³ Relevant to this paper are the CARES Act amendments to subchapter V²⁴ and the creation of the Paycheck Protection Program ("PPP").²⁵ Notably, the CARES Act amended subchapter V by increasing the eligible debt limitation a debtor may possess from \$2,725,625 to \$7,500,000.²⁶ Importantly, however, the amendment contains a sunset provision that reverts the debt limitation back to \$2,725,625 on March 27, 2021.²⁷ Additionally, Congress's creation of the PPP allows eligible businesses to receive 2.5 times their average monthly payroll, up to a maximum of \$10,000,000, with a one percent fixed interest rate, and payment

¹⁸ See Amy E. Vulpio, *New Subchapter V May be the Bankruptcy Lifeline Small Businesses Need to Survive COVID-19*, WHITE & WILLIAMS LLP: NEWS AND RESOURCES (Apr. 15, 2020), <https://www.whiteandwilliams.com/resources-alerts-New-Subchapter-V-May-be-the-Bankruptcy-Lifeline-Small-Businesses-Need-to-Survive-COVID-19.html> ("When the Small Business Reorganization Act (SBRA) was signed into law in August 2019 and slated to go effective in February 2020, no one could have foreseen that, by March 2020, the U.S. economy would grind to a halt as a result of a global pandemic.").

¹⁹ See generally CDC COVID Data Tracker, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/summary.html#background> (last visited Feb. 5, 2021) (summarizing the outbreak of COVID-19). Viral symptoms include, *inter alia*, fever, cough, and shortness of breath or difficulty breathing. See Symptoms, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. The virus also may result in death. See generally Worldwide Map of Coronavirus Spread, WASH. POST: CORONAVIRUS (Feb. 5, 2020, 2:10 PM), <https://www.washingtonpost.com/graphics/2020/world/mapping-spread-new-coronavirus/> [<https://perma.cc/8RAW-ZUT9>] (mapping cases of and deaths resulting from coronavirus).

²⁰ See, e.g., Exec. Order No. N-33-20, EXEC. DEP'T OF THE STATE OF CAL. (Mar. 29, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>; Director's Stay at Home Order, OHIO DEP'T OF HEALTH (Mar. 19, 2020), https://content.govdelivery.com/attachments/OHOOD/2020/03/22/file_attachment/s/1407840/Stay%20Home%20Order.pdf; Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay at Home, COMMONWEALTH OF PA. OFFICE OF THE GOV. (Apr. 1, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/04/20200401-GOV-Statewide-Stay-at-Home-Order.pdf>; see also Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (Apr. 20, 2020) (detailing which states and cities enacted stay-at-home orders). Essential businesses include, *inter alia*, healthcare, grocery stores, gas stations, and critical trades. See Director's Stay at Home Order, *supra*, at 5–7.

²¹ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended in scattered sections of the United States Code).

²² See *id.* (detailing the support available to individuals and businesses in order to keep workers paid and employed, enhance healthcare systems, and stabilize the economy during the global pandemic).

²³ See *id.*

²⁴ See *id.* § 1113, 134 Stat. at 310–12.

²⁵ See *id.* § 1102, 134 Stat. at 286–94.

²⁶ See *id.* § 1113(a)(1)(A), 134 Stat. at 310.

²⁷ See *id.* § 1113(a)(5), 134 Stat. at 311.

deferrals for six to twelve months.²⁸ Congress replenished these funds and amended certain provisions of the CARES Act in December 2020 through the Coronavirus Response and Relief Supplemental Appropriation Act of 2021 ("CRRSAA").²⁹ Nonetheless, much litigation surrounding the pandemic, as well as uncertainty with regard to the future, remains.

This Paper assesses the various implications of COVID-19 on the current bankruptcy landscape.³⁰ First, this Paper examines the background on bankruptcy reforms in the 21st century.³¹ This Paper also discusses the state of the United States' economy in the age of COVID-19, briefly describing relevant sections of the CARES Act and the CRRSAA in relation to bankruptcy law.³² Then, this Paper analyzes the effect COVID-19 will have on small business debtors,³³ including a discussion of business interruption insurance proceeds,³⁴ PPP loans,³⁵ and debtor-in-possession ("DIP") financing.³⁶ Lastly, this Paper suggests that, in progressing the purpose behind enacting the SBRA, courts should adopt applicable precedent from existing chapter 12 and chapter 13 cases and apply this precedent to new subchapter V cases.³⁷ Ultimately, this Paper serves to inform small business debtors of the implications COVID-19 will have on their businesses, as well as suggest ways to further streamline the chapter 11 bankruptcy process in the aftermath of COVID-19.³⁸

I. AMERICAN BANKRUPTCY LAW AND 21ST CENTURY AMENDMENTS

Bankruptcy is expressly contemplated in the United States Constitution.³⁹ Indeed, creating laws to regulate bankruptcy is a power the Framers enumerated to Congress,⁴⁰ and which departed from the English system of bankruptcy.⁴¹ While the

²⁸ See *id.* § 1102(a)(2), 134 Stat. at 286–94; see also Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) (determining a one percent fixed interest rate is appropriate because it provides low-cost funds to eligible borrowers and offers a relatively attractive interest rate to lenders).

²⁹ See Coronavirus Response and Relief Supplemental Appropriations Act of 2021, H.R. 133-728, 116th Cong. (2020) (enacted at Pub. L. No. 116-260).

³⁰ See *infra* Part III.

³¹ See *infra* Part I.

³² See *infra* Part II.

³³ See *infra* Part III.

³⁴ See *infra* Section III.A.

³⁵ See *infra* Section III.B.

³⁶ See *infra* Section III.C.

³⁷ See *infra* Part IV.

³⁸ See *infra* Parts II–IV.

³⁹ See U.S. CONST. art. I, § 8, cl. 4.

⁴⁰ See *id.* ("The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . .").

⁴¹ *Too Broke to Go Bankrupt? The Impact of The New US Trustee Fees on MidCap Bankruptcy Debtors*, AM. BAR ASS'N (Mar. 29, 2019), https://www.americanbar.org/groups/business_law/resources/materials/201

English laws strongly favored creditors, Congress chose to enact a system of laws to "[p]revent[] the inefficient dismemberment of companies and quell[] creditor's raw self-preservation instincts."⁴² As such, American bankruptcy law seeks to provide debtors with a "financial fresh start"⁴³ by giving "the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."⁴⁴

Congress enacted the first bankruptcy law in 1800;⁴⁵ however, it repealed the act three years later.⁴⁶ The federal government did not enact another bankruptcy law until 1841, after the Panic of 1837.⁴⁷ Like the Bankruptcy Act of 1800, the Bankruptcy Act of 1841 was only in force for a short time—Congress repealed the Act in 1843.⁴⁸ Another financial panic in the 1850s and 1860s, spurred by the American Civil War, caused Congress to enact the Bankruptcy Act of 1867.⁴⁹ Unlike its predecessors, the 1867 Act stayed in effect for over a decade until Congress repealed it in 1878.⁵⁰ Congress replaced the Bankruptcy Act of 1867 with the Bankruptcy Act of 1898, which remained in effect for over eighty years, until 1978.⁵¹ Congress replaced the Bankruptcy Act of 1867 with the Bankruptcy Code, which governs modern bankruptcy law.⁵²

Congress most recently amended bankruptcy law in 2020 under the CARES Act⁵³ and the CRRSAA.⁵⁴ Since the Bankruptcy Code's creation in 1978, however,

9/spring_materials/too_broke// [hereinafter *Too Broke to Go Bankrupt?*] ("From its early days, American bankruptcy law, an enumerated Congressional power . . . departed from the English system. . . .").

⁴² *Id.*; see also *Cont'l Ill. Nat'l. Bank & Tr. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 668 (1935) ("The English Law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor and proceeded upon the assumption that the debtor was necessarily to be dealt with as an offender.").

⁴³ See BANKRUPTCY BASICS, *supra* note 5, at 6.

⁴⁴ *Local Loan v. Hunt*, 292 U.S. 234, 244 (1934) (citations omitted).

⁴⁵ See Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248; see also Hon. Marcia S. Krieger, "The Bankruptcy Court is a Court of Equity": What Does That Mean?, 50 S.C. L. REV. 275, 287 (1999).

⁴⁶ See Act of Dec. 19, 1803, 2 Stat. 248 (repealing the Bankruptcy Act of 1800).

⁴⁷ See Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; see also Krieger, *supra* note 45, at 288; Samantha Gibson, *The Panic of 1837*, DIGITAL PUB. LIBR. OF AM. (2017), <https://dp.la/primary-source-sets/the-panic-of-1837> ("The Panic of 1837 was a major recession in the US economy that began in the spring of 1837 and lasted until the mid-1940s. During the 'panic,' . . . hundreds of banks collapsed, currency lost value as prices soared, and farmers, merchants, and business owners across the country suffered severe financial losses or ruin.").

⁴⁸ See Act of Mar. 3, 1843, 5 Stat. 614 (repealing the Bankruptcy Act of 1841).

⁴⁹ See Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99; see also Krieger, *supra* note 45, at 289.

⁵⁰ See Act of June 7, 1878, 20 Stat. 99 (repealing the Bankruptcy Act of 1867).

⁵¹ See Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549; see also Krieger, *supra* note 45, at 290.

⁵² See Bankruptcy Reform Act of 1978, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532 (2018)).

⁵³ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁵⁴ See Coronavirus Response and Relief Supplemental Appropriations Act of 2021, H.R. 133-728, 116th Cong. (2020) (enacted at Pub. L. No. 116-260).

it has been amended several times.⁵⁵ Most notably, Congress made major changes in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").⁵⁶

A. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Congress passed the BAPCPA in 2005, marking the most significant changes to the Bankruptcy Code since its creation in 1978.⁵⁷ The decision to amend the Bankruptcy Code was largely fueled by an increase in bankruptcies over the preceding two decades.⁵⁸ The purported purpose behind the BAPCPA was to "ensure that the [bankruptcy] system is fair for both debtors and creditors."⁵⁹ Practitioners and scholars, however, largely opposed the bill.⁶⁰ In fact, the effects of the BAPCPA made it more difficult for debtors to file for bankruptcy.⁶¹

⁵⁵ See, e.g., Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of title 11 of the United States Code); Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of title 11 of the United States Code); Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified as amended at 11 U.S.C.A. §§ 1181–1195 (West 2020)).

⁵⁶ See Bankruptcy Abuse Prevention and Consumer Protection Act, 119 Stat. 23.

⁵⁷ See *id.*; see also Stephen J. Spurr & Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy*, 87 AM. BANKR. L.J. 27, 28 (2013) ("BAPCPA is the most significant revision of the Bankruptcy Code since its enactment in 1978."); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005) ("[BAPCPA's] end product represents one of the most comprehensive overhauls of the Bankruptcy Code in more than twenty-five years.").

⁵⁸ See Tal Gross et al., *The Economic Consequences of Bankruptcy Reform*, MASS. INST. TECH., at 1 (Dec. 27, 2018), <https://economics.mit.edu/files/16255> ("[T]he rate of consumer bankruptcy filings in the United States climbed from 0.3 percent of households annually in the early 1980s to 1.5 percent in the early 2000s. This increase in bankruptcies was cited by lawmakers as reason to pass the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act." (citation omitted)); see also Spurr & Ball, *supra* note 57, at 28 ("The amendments were passed after a period in which bankruptcy filing rates increased steadily.").

⁵⁹ See H.R. REP. NO. 109-31, pt. 1, at 2–3, 10–18 (2005) ("The purpose of the [BAPCPA] is to . . . ensure that the system is fair for both debtors and creditors."); see also Allyson MacKenna, *Bankruptcy—Mimsy were the Borogroves: A "Ride-Through" the Looking Glass with the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act*, 33 W. NEW ENG. L. REV. 657, 657 (2011) ("BAPCPA's purpose was to end abuse of the bankruptcy system and, purportedly, to help consumers.").

⁶⁰ See Jennifer Emens-Butler, *Bankruptcy Reform Gather 'Round Children, Yes, the Sky IS Falling*, 31 VT. B.J. 26, 26 (2005) ("[N]o established group of attorneys, including the American Bar Association, judges, law professors, bankruptcy practitioners, women, or consumer advocates supported the bill."); see also Spurr & Ball, *supra* note 57, at 28 ("The 2005 amendments made by BAPCPA were promoted mostly by credit card companies, banks, and other creditor groups."). But see David Galler, *Bankruptcy Reform Act 10 Year Review*, GALLER LAW (May 8, 2018), <https://gallerlaw.com/bankruptcy-reform-act-10-year-review/> ("Although BAPCPA is a welcome reform, it is not perfect and kinks need to be ironed out.").

⁶¹ See Spurr & Ball, *supra* note 57, at 28 ("BAPCPA's congressional sponsors intended to emphasize the role of 'personal responsibility' and to make it more difficult for individual debtors to obtain bankruptcy relief. . . ."); see also Galler, *supra* note 60 ("The main purpose of the [BAPCPA] reform was to make filing bankruptcy more difficult for debtors.").

Cited flaws of the BAPCPA include increased filing costs, an inaccurate calculation of repayment capacity through the means test,⁶² and ineffective credit counseling.⁶³ Significantly, critics of the BAPCPA attacked the Act's limitation on who can file for bankruptcy due to the exorbitant costs of filing.⁶⁴ Nonetheless, the BAPCPA created certain favorable changes. For example, it limited how often debtors could file for bankruptcy within a certain time period and restrained the improper use of state exemption laws.⁶⁵ It also required debtors to disclose tax returns and income to trustees, and attributed the filing's accuracy to the attorneys as opposed to relying on the debtors.⁶⁶ Relevant to this Paper, however, is the BAPCPA's recognition of "small business debtors."

The BAPCPA followed Congress's first identification of small business debtors.⁶⁷ In 1994, Congress attempted to "streamline[] [the] chapter 11 process for businesses that had insufficient assets to fund a typical bankruptcy reorganization."⁶⁸ The 1994 amendments allowed small business debtors with \$2,000,000 or less in liquidated debts to waive creditors' committees and combine disclosure and plan confirmation hearings.⁶⁹ In 1997, the National Bankruptcy Review Commission ("NBR Commission") submitted a report detailing its opinion of bankruptcy law for the upcoming twenty years.⁷⁰ As part of its opinion, the NBR Commission claimed

⁶² See 11 U.S.C. § 707(b)(2) (2018) (explaining the formula the court employs for determining if case dismissal or conversion is appropriate); see also *Bankruptcy Basics Glossary*, U.S. COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/bankruptcy-basics-glossary#content-for-n> (last visited Feb. 5, 2021) (describing the means test as a way "to determine whether an individual debtor's chapter 7 filing is presumed to be an abuse of the Bankruptcy Code requiring dismissal or conversion of the case (generally to chapter 13)").

⁶³ See Galler, *supra* note 60; see also Spurr & Ball, *supra* note 57, at 31 ("Other provisions [of the BAPCPA] substantially increased the cost of filing bankruptcy under either chapter 7 or chapter 13.").

⁶⁴ See Emens-Butler, *supra* note 60, at 26 ("Those truly in need of bankruptcy relief, for example, people with children, will find it more difficult to retain counsel and seek relief."); see also Spurr & Ball, *supra* note 57, at 28 (noting the BAPCPA's sponsors intended "to make it more difficult for individual debtors to obtain bankruptcy relief, particularly the more common form known as chapter 7").

⁶⁵ See Galler, *supra* note 60.

⁶⁶ See *id.*

⁶⁷ See Jeffrey T. Kucera et al., *Small Business Debtor Reorganization: An Overview of Chapter 11's New Subchapter V*, K&L GATES LLP (Sept. 23, 2019), <http://www.klgates.com/small-business-debtor-reorganization-an-overview-of-chapter-11s-new-subchapter-v-09-23-2019/?nomobile=perm>; see also Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of title 11 of the United States Code).

⁶⁸ Kucera et al., *supra* note 67; see also Jessica K. Haskell & Nicholas Chmurski, *CARES Act Temporarily Increases Debt Limitation for Small Business Debtors*, O'NEIL CANNON HOLLMAN DEJONG & LAING S.C. (Apr. 3, 2020), <https://www.wilaw.com/cares-act-temporarily-increases-debt-limitation-for-small-business-debtors/> ("In amendments to the Bankruptcy Code in both 1994 and 2005, Congress distinguished small business and attempted to provide for a streamlined small business reorganization process.").

⁶⁹ See Bruce A. Markell, *Small Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, SL068 A.L.I.-A.B.A. 263, 265 (2005); see also Kucera et al., *supra* note 67; Bankruptcy Reform Act of 1994 § 217, 108 Stat. 4106.

⁷⁰ See Nat'l Bankr. Rev. Comm'n, *Bankruptcy: The Next Twenty Years* (1997).

the 1994 changes to the Bankruptcy Code were inadequate.⁷¹ Congress sought to amend these inadequacies through the BAPCPA, and "basically adopt[ed] the [NBR] Commission's recommendations wholesale."⁷² The most notable amendments to the Bankruptcy Code through the BAPCPA were:

[C]hanges to the nature of small business bankruptcy through amendments to the applicable definitions and through making the small business provisions mandatory; changes to the scope of reporting and other duties; faster timelines for plan confirmation; severe penalties for failure to comply with the new rules; and provisions designed to ensure that small business debtors do not become serial filers.⁷³

Unfortunately, both the 1994 amendments and the BAPCPA "largely proved unworkable," and Congress yet again resorted to amending the Bankruptcy Code in 2019.⁷⁴

B. The Small Business Reorganization Act of 2019

The SBRA,⁷⁵ which created subchapter V of chapter 11, arose out of qualms with the BAPCPA.⁷⁶ Before Congress passed the SBRA, small business debtors were required to choose between the extreme option of losing their business under chapter 7 liquidation or paying lofty fees to retain their business under chapter 11 reorganization.⁷⁷ Due to the high costs of chapter 11 bankruptcy, many small businesses chose to liquidate their assets under chapter 7.⁷⁸ Decisions to opt for chapter 7 liquidation were typically made at the advice of counsel—if a specific

⁷¹ See *id.* at 611–15; see also Markell, *supra* note 69, at 265 ("The Review Commission thought these changes weren't enough, and were improperly aimed. They thought that there should be stricter adherence to fast timetables, and clear consequences for avoidable delay.").

⁷² Markell, *supra* note 69, at 265.

⁷³ *Id.* at 266.

⁷⁴ See Haskell & Chmurski, *supra* note 68 ("Unfortunately, [the efforts to streamline chapter 11 for small businesses] have largely proved unworkable for most small businesses as the amendments were tightly confined within the strictures of Chapter 11.").

⁷⁵ Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (codified as amended at 11 U.S.C.A. §§ 1181–1195 (West 2020)).

⁷⁶ See Lauren Newman, *CARES Act expands eligibility under Small Business Reorganization Act of 2019*, THOMPSON COBURN LLP: CREDIT REPORT BLOG (Mar. 27, 2020), <https://www.thompsoncoburn.com/insights/blogs/credit-report/post/2020-03-27/cares-act-expands-eligibility-under-small-business-reorganization-act-of-2019> ("Subchapter V was enacted to address some of [BAPCPA's] issues.").

⁷⁷ See Lei Lei Wang Ekvall & Timothy Evanston, *The Small Business Reorganization Act: Big Changes for Small Businesses*, AM. BAR ASS'N: BUS. L. TODAY (Feb. 14, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/02/small-business-reorg/.

⁷⁸ See Newman, *supra* note 76 ("Prior to the enactment of subchapter V, created by the SBRA, many small businesses found traditional Chapter 11 proceedings difficult and expensive, and not a practical tool for reorganization. Often, small businesses would end up in liquidation.").

number of creditors disapproved the proposed reorganization plan, the bankruptcy judge would reject it.⁷⁹ The SBRA sought to address the impracticalities, burdens, and expenses imposed by pre-SBRA chapter 11 filings.⁸⁰ Thus, its aim was "to promote simplicity and efficiency for reorganization of small-business debtors"⁸¹ and to "strike a balance between chapter 7 and chapter 11 bankruptcies for small-business debtors."⁸²

In passing the SBRA, Congress implemented four main features of subchapter V:

(1) [Subchapter V] modifies confirmation requirements; (2) it provides for the participation of a trustee . . . while the debtor remains in possession of assets and operates the business as a debtor in possession; (3) [it] changes several administrative and procedural rules; and (4) [it] alters the rules for the debtor's discharge and the definition of property of the estate with regard to property an individual acquires postpetition and from postpetition earnings (which has implications for operation of the automatic stay of § 362(a)).⁸³

Many of these provisions decreased costs for debtors and, therefore, created opportunities for more businesses to opt for chapter 11 relief. For example, Congress removed creditors' committees from small business cases, unless the judge orders formation of a committee for cause.⁸⁴ Typically, creditors' committees hire

⁷⁹ See Zach Shelomith, *INSIGHT: Small Businesses Get Break From Chapter 11 Burdens*, BL (Mar. 5, 2020, 4:01 AM), <https://news.bloomberglaw.com/bankruptcy-law/insight-small-businesses-get-break-from-chapter-11-burdens> ("In particular, creditors have a distinct advantage because a certain number of creditors must vote to accept a reorganization plan in order for that plan to be approved by the court. For that reason, many attorneys are hesitant to recommend filing a Chapter 11 bankruptcy for a small business.").

⁸⁰ See *id.*; see also Haskell & Chmurski, *supra* note 68 ("For many small businesses, a Chapter 11 reorganization is not practical because the traditional proceedings are expensive and cumbersome. The SBRA . . . eliminates some of the procedural barriers and costs of a traditional Chapter 11 proceeding in an attempt to make reorganization more viable for small businesses."); Jeffrey Barber, *Small Business Reorganization Act of 2019 Goes into Effect February 2020*, NAT'L L. REV. (Oct. 3, 2019), <https://www.natlawreview.com/article/small-business-reorganization-act-2019-goes-effect-february-2020> ("The [SBRA] eliminates some of the more costly elements of traditional Chapter 11 relief, such as disclosure statements. . . ."); Shelomith, *supra* note 79 ("For small businesses, Chapter 11 bankruptcy is costly, time-consuming, has burdensome procedural and reporting requirements, and is risky for owners who wish to retain their ownership interests in the company."); Ekvall & Evanston, *supra* note 77 ("Legal commentators have long lamented that chapter 11's high costs and complexities make it too difficult for small businesses to successfully reorganize.").

⁸¹ Barber, *supra* note 80.

⁸² Ekvall & Evanston, *supra* note 77.

⁸³ Paul W. Bonapfel, *A Guide to the Small Business Reorganization Act of 2019*, 93 AM. BANKR. L.J. 571, 576 (2019).

⁸⁴ See Small Business Reorganization Act of 2019, Pub. L. No. 116-54, § 2, 133 Stat. 1079, 1079 (codified as amended at 11 U.S.C.A. § 1181(b) (West 2020)); see also Kucera et al., *supra* note 67 ("Going forward, creditors' committees will be the exception—not the rule—in small business debtor reorganizations.").

professionals, such as attorneys, to assist in the restructuring plan.⁸⁵ The debtor, as opposed to the creditors, pay the fees incurred from the committees.⁸⁶ Therefore, removal of creditors' committees will likely decrease costs for debtors.⁸⁷

The SBRA also removed the requirement that the debtor file a disclosure statement.⁸⁸ Furthermore, only debtors may file a reorganization plan.⁸⁹ Thus, the court can approve a contested reorganization plan so long as the plan "does not 'discriminate unfairly' and is 'fair and equitable' as to each class of impaired creditors that has not accepted the plan."⁹⁰ These streamlined provisions of the SBRA will likely further reduce costs for debtors.⁹¹

Additionally, in striking the balance between chapter 7 and chapter 11, Congress modeled certain procedures after chapter 12 and chapter 13 filings.⁹² For example, the now-required trustee⁹³ "serves in a role similar to a [c]hapter 12 or 13 trustee in disbursing plan payments."⁹⁴ Typically, the U.S. trustee receives quarterly payments

⁸⁵ See Ekvall & Evanston, *supra* note 77.

⁸⁶ See *id.*

⁸⁷ See *id.* (stating the SBRA "will now allow the small business debtor to avoid [the] additional expenditure" of committee fees).

⁸⁸ See Small Business Reorganization Act of 2019 § 2, 133 Stat. at 1079 (codified as amended at 11 U.S.C.A. § 1181(b)); see also Ekvall & Evanston, *supra* note 77. A subchapter V debtor will only be required to file a disclosure statement under limited circumstances. See Ekvall & Evanston, *supra* note 77, at n.vii ("A small-business debtor will not be required to file a disclosure statement unless ordered to do so by a bankruptcy court for cause.").

⁸⁹ Small Business Reorganization Act of 2019 § 2, 133 Stat. at 1081 (codified as amended at 11 U.S.C.A. § 1189(a)); see also Newman, *supra* note 76 ("There is no requirement to file a disclosure statement. The plan of reorganization will include a brief history of the business, a liquidation analysis and financial projections.").

⁹⁰ Haskell & Chmurski, *supra* note 68; see also Small Business Reorganization Act of 2019 § 2, 133 Stat. at 1082 (codified as amended at 11 U.S.C.A. § 1191(b)).

⁹¹ See Ekvall & Evanston, *supra* note 77 ("The SBRA's elimination of a disclosure statement and potential competing plans will prevent contested hearings that prolong the reorganization process and increase costs for debtors.").

⁹² See Barber, *supra* note 80 ("[I]n some ways [the SBRA] is modeled after expedited procedures used in Chapter 12 and 13 cases."); see also Haskell & Chmurski, *supra* note 68 ("Cases filed under Subchapter V have similarities to cases under Chapter 12 and 13."). But see Barber, *supra* note 80 ("In a significant departure from Chapter 13 practice, the Subchapter V plan may modify the rights of a secured lender with a lien on the principal residence if the 'new value' received from the loan was not used primarily to acquire the resident and was used primarily in connection with the small business."); see also Bonapfel, *supra* note 83, at 575 ("Subchapter V resembles chapter 12 in some [ways]. . . . But subchapter V differs from chapter 12 in significant ways. For example, whereas chapter 12 confirmation standards (§ 1225) are similar to those in chapter 13 (§ 1325), subchapter V confirmation requirements incorporate most of the existing confirmation requirements in § 1129(a). Unlike Chapter 12, subchapter V does not provide for a codebtor stay.").

⁹³ See Small Business Reorganization Act of 2019 § 2, 133 Stat. at 1079 (codified as amended at 11 U.S.C.A. § 1183(a)). The Justice Department hired approximately 250 new trustees to serve in chapter 11, subchapter V bankruptcies. See Alex Wolf, *Small Business Bankruptcy Law Rolls Out With New Trustees*, BL (Feb. 19, 2020, 3:31 PM), <https://news.bloomberglaw.com/bankruptcy-law/small-business-bankruptcy-law-rolls-out-with-new-trustees>.

⁹⁴ Barber, *supra* note 80; see also Ekvall & Evanston, *supra* note 77 ("The SBRA's sponsors explain that the trustee will 'perform duties similar to those performed by a . . . Chapter 13 trustee and help ensure the reorganization stays on track.'" (quoting Press Release, Sen. Chuck Grassley et al., Fact Sheet on *The Small Business Reorganization Act* (Apr. 9, 2019), <https://www.grassley.senate.gov/sites/default/files/documents/B>

from debtors based on the payments made to creditors in the case.⁹⁵ The SBRA, however, removed the required U.S. trustee payments, thereby making an exception for subchapter V cases.⁹⁶ Accordingly, debtors that elect for subchapter V relief now save the expense of paying the U.S. trustee.⁹⁷

Although Congress sought to reduce costs of chapter 11 relief, therefore allowing more small business debtors to opt-into subchapter V relief, it failed to adopt the obvious amendment—to raise the allowable debt limit.⁹⁸ Indeed, experts urged Congress to adopt a \$5,000,000 debt limit when Congress considered the BAPCPA in 2005.⁹⁹ Congress once again rejected this proposal in 2019 when it passed the SBRA.¹⁰⁰ Nonetheless, Congress's enactment of the SBRA has widespread effects—"[b]usinesses that would have previously had to liquidate now may have a new chance to survive. . . . Approximately half of all chapter 11 debtors will now be able to take advantage of [subchapter V]. . . ."¹⁰¹ When passing this legislation, however, Congress was unaware that a global pandemic would rock the world, shortly after the SBRA amendments became effective.¹⁰²

ankruptcy%2C%2004-09-

19%2C%20Small%20Business%20Reorganization%20Act%20Fact%20Sheet.pdf)).

⁹⁵ See 28 U.S.C. § 1930(a)(6)(A) (2018).

⁹⁶ See Small Business Reorganization Act of 2019 § 4(b)(3), 133 Stat. at 1087 (amending 28 U.S.C. § 1930(a)(6)(A)); see also Bonapfel, *supra* note 83, at 33; Newman, *supra* note 76.

⁹⁷ Note, however, the debtor must nonetheless pay fees for the assigned trustee. See Bonapfel, *supra* note 83, at 20–23 (explaining considerations for subchapter V trustee compensation).

⁹⁸ See Kucera et al., *supra* note 67 ("At first blush, Subchapter V appears to have significantly reformed small business debtor reorganization under chapter 11. . . . However, the debt limit to qualify as a small business debtor remains unchanged from the 1994 amendments, increasing only with the Consumer Price Index by virtue of the automatic three-year dollar adjustments required by section 104 of the Bankruptcy Code.").

⁹⁹ See *id.* ("Fifteen years ago, Congress rejected the recommendation to raise the debt limit to \$5 million, and the debt limit currently remains at \$2,725,625."). Since the publication of the previous source, Congress has increased the debt limit from \$2,725,625 to \$7,500,000 in response to the early-2020 COVID-19 crisis. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113(a)(1), 134 Stat. 281, 310 (2020) (codified as amended at 11 U.S.C.A. § 1182(1) (West 2020)). The debt allowance increase in the CARES Act includes a sunset provision that will revert the allowance back to \$2,725,625 on March 27, 2021, pending no further Congressional action. See *id.* § 1113(a)(5), 134 Stat. at 311; see also Haskell & Chmurski, *supra* note 68 ("The CARES Act represents a significant step toward expanding the scope of Subchapter V by increasing the debt limitation under the SBRA from \$2,725,625 to \$7,500,000. This increase, however, is only temporary and will sunset on March 27, 2021, unless further action is taken by Congress.").

¹⁰⁰ See Kucera et al., *supra* note 67 (stating the debt limit remained at \$2,725,625 after the enactment of the SBRA).

¹⁰¹ Shelomith, *supra* note 79.

¹⁰² See Vulpio, *supra* note 18.

II. CORONAVIRUS (COVID-19): A GLOBAL PANDEMIC

COVID-19 changed the world, and way it functioned, in early-2020.¹⁰³ Although the virus originated in Wuhan, China in 2019,¹⁰⁴ it quickly spread to over 100 other nations, including the United States.¹⁰⁵ The World Health Organization ("WHO") announced COVID-19 as a global pandemic on March 11, 2020.¹⁰⁶ Thereafter, the global economy screeched to a halt.¹⁰⁷

As of February 5, 2021, there were over 105,000,000 confirmed cases of COVID-19 and 2,289,000 reported deaths worldwide;¹⁰⁸ the United States fell victim to over 26,667,000 confirmed cases and 455,000 reported deaths.¹⁰⁹ In response to the spreading pandemic, county officials and state governors began instituting "stay-at-home" orders, requiring citizens to remain indoors except for certain exempted reasons.¹¹⁰ As a result of the stay-at-home orders, thousands of businesses shutdown at the beginning of 2020.¹¹¹

¹⁰³ See generally sources cited *supra* note 19.

¹⁰⁴ See SCRIPPS RSCH. INST., COVID-19 coronavirus epidemic has a natural origin, SCIENCEDAILY (Mar. 17, 2020), <https://www.sciencedaily.com/releases/2020/03/200317175442.htm> ("The novel SARS-CoV-2 coronavirus . . . emerged in the city of Wuhan, China, last year. . . . On December 31 of last year, Chinese authorities alerted the World Health Organization of an outbreak of a strain of coronavirus causing severe illness, which was subsequently named SARS-CoV-2.").

¹⁰⁵ See Dr. Tedros Adhanom Ghebreyesus, Director-General, WHO, Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020) (transcript available at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>) [hereinafter *Opening Remarks*] (noting there was more than 118,000 cases in 114 countries as of March 2020); see also *CDC COVID Data Tracker*, *supra* note 19.

¹⁰⁶ See *Opening Remarks*, *supra* note 105 ("Pandemic is not a word to use lightly or carelessly. . . . Describing the situation as a pandemic does not change WHO's assessment of the threat posed by this virus. It doesn't change what WHO is doing, and it doesn't change what countries should do. . . .").

¹⁰⁷ See Fergal O'Brien, *Global Economy Crashes on Mass Virus Business Shutdowns*, BLOOMBERG (Mar. 24, 2020, 11:12 AM), <https://www.bloomberg.com/news/articles/2020-03-24/europe-dragged-into-record-recession-in-battle-to-halt-virus> ("The global economy is taking a battering not seen in decades, the outcome of severe restrictions on businesses and households by governments desperately trying to contain a pandemic. . . ."); see also Yuwa Hedrick-Wong, *How To Stop The Global Economy From Plunging Into A Depression*, FORBES (Apr. 10, 2020, 8:40 AM), <https://www.forbes.com/sites/yuwahedrickwong/2020/04/10/how-to-stop-the-global-economy-from-plunging-into-a-depression/#13436af726fa> ("There is little doubt that the global economy is in a recession, which is defined by the [International Monetary Fund] as growing less than 2% a year. Looming on the horizon is the even darker threat: global depression, which is characterized by a decline in real [gross domestic product] exceeding 10% in more than one major economy and lasting for two or more years.").

¹⁰⁸ See *Worldwide Map of Coronavirus Spread*, *supra* note 19.

¹⁰⁹ U.S. Map of Coronavirus Spread, WASH. POST (Feb. 5, 2021, 2:10 PM), <https://www.washingtonpost.com/graphics/2020/national/coronavirus-us-cases-deaths/> [<https://perma.cc/NZ5U-YX9J>].

¹¹⁰ See generally *supra* note 20 and accompanying text. Exempted reasons included travel for health and safety, necessary supplies and services, outdoor activity, certain types of work, and to take care of others. See *Director's Stay at Home Order*, *supra* note 20, at 2.

¹¹¹ See Chris Arnold, *America Closed: Thousands of Stores, Resorts, Theaters Shut Down*, NAT'L PUB. RADIO (Mar. 16, 2020, 6:51 PM), <https://www.npr.org/2020/03/16/816398498/america-closed-thousands-of-stores-resorts-theaters-shut-down> ("In an unprecedented attempt to contain the coronavirus outbreak, thousands of stores and other businesses are closing their doors to customers.").

Notably, small businesses make up ninety-nine percent of all businesses in the United States.¹¹² Undoubtedly, then, COVID-19 has had a substantial impact on small businesses, most of which cannot survive an extended shutdown.¹¹³ Indeed, former head of the Small Business Administration ("SBA"), Karen Mills, has indicated that an extended shutdown will exterminate many small businesses.¹¹⁴ Mills stated that the average small business has a cash buffer of about twenty-seven days.¹¹⁵ Remove steady cash flow, however, while "still paying employees and other expenses like rent and your loan payment, then pretty soon you run out of money. . . ." ¹¹⁶ Fortunately, the SBRA, along with the recently-enacted CARES Act and CRRSAA, may be a saving grace of these concerns.¹¹⁷

A. The Coronavirus Aid Relief and Economic Security Act

Congress passed the CARES Act on March 27, 2020 in an attempt to save the American economy from another depression.¹¹⁸ The CARES Act is the largest stimulus package in United States history, measuring in at \$2,200,000,000,000, which is approximately three times larger than the stimulus package Congress passed during the Great Recession.¹¹⁹ Specific to small businesses, the CARES Act established the PPP,¹²⁰ made changes to the SBA's Economic Injury Disaster Loan

¹¹² 2018 *Small Business Profile*, U.S. SMALL BUS. ADMIN., at 1, <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf> [hereinafter 2018 *Small Business Profile*]. As of 2018, the U.S. was comprised of 30.2 million small businesses that employed 58.9 million people, which is approximately 47.5% of the U.S. workers population. *See id.*

¹¹³ *See* Arnold, *supra* note 111 ("Small businesses are particularly vulnerable—many don't have enough cash on hand to survive an extended shutdown. And if a lot of small businesses get hurt, that can be very damaging for the overall economy."); *see also* Vulpio, *supra* note 18 ("The financial consequences of COVID-19 have hit small businesses especially hard.").

¹¹⁴ *See* Arnold, *supra* note 111.

¹¹⁵ *See id.*

¹¹⁶ *Id.* (quoting the former head of the SBA, Karen Mills).

¹¹⁷ *See* Vulpio, *supra* note 18 ("The SBRA . . . may provide a much-needed lifeline to small businesses struggling to survive [the COVID-19] crisis."); *see also* Haskell & Chmurski, *supra* note 68 ("[The CARES Act] will allow more small businesses to reorganize under the newly created Subchapter V of Chapter 11 of the Bankruptcy Code.").

¹¹⁸ *See The CARES Act: A Reference Guide*, WHITE & WILLIAMS, LLP, 1 (Apr. 28, 2020), <https://www.whiteandwilliams.com/assets/htmldocuments/The%20CARES%20Act.pdf> ("On March 27, 2020, the House passed the third and largest of stimulus packages . . . the CARES Act, to help large and small businesses, individuals and families better cope financially with the rapid and relentless ravage that the COVID-19 pandemic has unleashed on the U.S. economy.").

¹¹⁹ *See id.* The term "Great Recession" is a representation of "the sharp decline in economic activity" from December 2007 to June 2009, which is "considered the most significant downturn since the Great Depression." Jim Chappelow, *The Great Recession*, INVESTOPEDIA (Apr. 21, 2020), <https://www.investopedia.com/terms/g/great-recession.asp>.

¹²⁰ *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281, 286–94 (2020) (codified as amended at 15 U.S.C.A. § 636(a) (West 2020)).

("EIDL") program,¹²¹ and nearly tripled the debt limitation under the SBRA from \$2,725,625 to \$7,500,000 for one year, until March 27, 2021.¹²²

The PPP modified SBA's 7(a) loan program and created new business loans under the SBA.¹²³ Congress created PPP loans, initially allocating \$350,000,000,000 to the SBA, in an attempt to incentivize small businesses to keep their workers on the payroll.¹²⁴ Eligible small businesses, typically those with less than 500 employees, may receive 2.5 times their average monthly payroll, up to a maximum of \$10,000,000, with a one percent fixed interest rate, and payment deferrals for six to twelve months.¹²⁵ As an incentive to seek a PPP loan, the "SBA will forgive loans if all employee retention criteria are met, and the funds are used for eligible expenses."¹²⁶ PPP loans thereby lessened one of the financial burdens small businesses were facing—how to pay their employees.¹²⁷ The PPP loan terms,

¹²¹ See *id.* §§ 1007(a)(6), 1110, 134 Stat. at 302, 306–08. Congress authorized the EIDL in the Coronavirus Preparedness and Response Supplemental Appropriations Act, which Congress enacted on March 6, 2020. Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116–123, 134 Stat. 146, 147.

¹²² See Coronavirus Aid, Relief, and Economic Security Act § 1113(a)(1), (5), 134 Stat. at 310 (codified as amended at 11 U.S.C.A. § 1182).

¹²³ See *The CARES Act: A Reference Guide*, *supra* note 118, at 2–5 (explaining, *inter alia*, the eligibility requirements, loan terms, and how proceeds may be used).

¹²⁴ See *Paycheck Protection Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited Feb. 5, 2021) [hereinafter *Paycheck Protection Program*]; see also *The CARES Act: A Reference Guide*, *supra* note 118, at 2; *2018 Small Business Profile*, *supra* note 112 (noting that, as of 2018, U.S. small businesses employed 58,900,000 workers, which counted for 47.5% of all U.S. workers). In April 2020, Congress passed a second measure that provided an additional \$320,000,000,000 for the PPP. Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116–139, § 101(a), 134 Stat. 620, 620 (2020); see also Victor Reklaitis, *Trump signs into law \$484 billion that replenishes coronavirus aid program for small businesses*, MARKETWATCH (Apr. 24, 2020, 12:32 PM), <https://www.marketwatch.com/story/house-set-to-pass-bill-that-replenishes-coronavirus-aid-program-for-small-businesses-2020-04-23>.

¹²⁵ Coronavirus Aid, Relief, and Economic Security Act § 1102(a)(2), 134 Stat. at 286–94; see also Business Loan Program Temporary Changes; Payment Protection Program, 85 Fed. Reg. 20811, 20813 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120) (determining a one percent fixed interest rate is appropriate because it provides low-cost funds to eligible borrowers and offers a relatively attractive interest rate to lenders).

¹²⁶ *Paycheck Protection Program*, *supra* note 124; see also *The CARES Act: A Reference Guide*, *supra* note 118, at 4 ("The SBA guarantee of [PPP] Loans is increased to 100% through December 31, 2020. After that date, guarantee percentages would return to 75% for loans exceeding \$150,000 and 85% for loans equal to or less than \$150,000."). Additionally, the company must maintain employee and compensation levels for eight weeks after the loan is dispersed and may only use the loan for eligible expenses, such as payroll, mortgage obligations, rent, and utilities. *Paycheck Protection Program (PPP) Information Sheet: Borrowers*, U.S. DEP'T OF TREASURY, <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf> (last visited Feb. 5, 2021).

¹²⁷ See Arnold, *supra* note 111 (quoting Karen Mills, former head of the SBA, who noted that small businesses are struggling with paying their employees).

however were confusing at best¹²⁸ and may cause small businesses headaches in the event the businesses choose to file for bankruptcy under subchapter V.¹²⁹

Moreover, according to the initial PPP Borrower Application Form,¹³⁰ a debtor that had already filed for bankruptcy could not apply for a PPP loan.¹³¹ The form also indicated a debtor is ineligible for a PPP loan if it, or any of its owners or subsidiaries, were currently delinquent or had defaulted on a federal loan within the past seven years.¹³² The SBA promulgated these restrictions in April 2020 regulations related to PPP eligibility, which stated as follows:

If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.¹³³

¹²⁸ See Paul Davidson, *Coronavirus PPP loans leave small firms confused, wary and rushing to secure cash to survive*, USA TODAY (Apr. 14, 2020, 7:37 AM), <https://www.usatoday.com/story/money/usaandmain/2020/04/13/coronavirus-small-businesses-scramble-secure-federal-ppp-loans/5133984002/> ("Many firms are still struggling to apply for the money as they face technical glitches and confusion about lending terms. Hundreds of thousands of others have gotten approval but still haven't received funding. Still others are hesitant to apply without knowing what their businesses will look like when the outbreak eases and they reopen. . . ."); see also Ryan J. Udell & Adam Chelminiak, *Are You Confused Yet? The SBA Issues Supplemental Guidance on Paycheck Protection Program Implementation*, WHITE & WILLIAMS LLP (Apr. 8, 2020), <https://www.whiteandwilliams.com/resources/alerts-SBA-Issues-Supplemental-Guidance-on-Paycheck-Protection-Program-Implementation.html> (explaining key components of the SBA's Supplemental Guidance regarding PPP).

¹²⁹ See *infra* Section III.B.; see also Vulpio, *supra* note 18 ("[S]mall businesses should carefully consider the timing of a Subchapter V filing: the Borrower Application Form promulgated by the U.S. Small Business Administration indicates that applicants presently subject to a bankruptcy proceeding are ineligible for the [PPP]. Subchapter V filings will likely surge once PPP funds run out, particularly among businesses who find themselves unable to meet the loan forgiveness criteria.").

¹³⁰ U.S. SMALL BUS. ADMIN., SBA FORM NO. 248, PAYCHECK PROTECTION PROGRAM BORROWER APPLICATION FORM (Apr. 2020), <https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf> [hereinafter APRIL 2020 PPP BORROWER APPLICATION].

¹³¹ *Id.* ("If questions (1) or (2) below are answered 'Yes,' the loan will not be approved . . . 1. Is the Applicant or any owner of the Applicant . . . presently involved in any bankruptcy?"); see also Vulpio, *supra* note 18.

¹³² APRIL 2020 PPP BORROWER APPLICATION, *supra* note 130 ("If questions (1) or (2) below are answered 'Yes,' the loan will not be approved . . . 2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?").

¹³³ Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120–21).

The CARES Act also updated the EIDL program by "offer[ing] an emergency grant to allow an eligible borrower to request an advance to the EIDL of up to \$10,000 within three (3) days of applying."¹³⁴ The business need not repay the advance payment, even if it is subsequently denied an EIDL.¹³⁵ Notably, however, a business that received a PPP loan could not use an EIDL, or co-mingle the EIDL with other loans, for the same purposes of the PPP loan.¹³⁶ Much like the concerns with PPP loans, the EIDL added yet another layer of debt that small businesses must consider if they subsequently file for chapter 11 bankruptcy.¹³⁷

B. The Coronavirus Response and Relief Supplemental Appropriations Act of 2021

Approximately nine months after passing the CARES Act, in December 2020, Congress adopted the CRRSAA,¹³⁸ which allocated an additional \$900,000,000,000 in pandemic aid to American citizens and businesses.¹³⁹ This second stimulus replenished funds for small businesses, providing an additional \$325,000,000,000 for ailing companies.¹⁴⁰ Relevant to this Paper, the CRRSAA allotted \$284,500,000,000 to the PPP¹⁴¹ and created the "PPP second draw," which allows certain eligible small businesses that already secured a PPP loan to obtain a second loan.¹⁴²

The CRRSAA also expanded expenses for which companies may use their PPP loans.¹⁴³ Specifically, in addition to rent, payroll, and utilities, businesses may use these funds to pay for operating expenses, property damage costs that arose from

¹³⁴ *The CARES Act: A Reference Guide*, *supra* note 118, at 5; *see also id.* (discussing additional changes the CARES Act made to the EIDL program); *see also Economic Injury Disaster Loan Emergency Advance*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/economic-injury-disaster-loan-emergency-advance> (last visited Feb. 5, 2021). In April 2020, Congress passed another amendment allocating an additional \$60,000,000,000 to the EIDL program. *See Reklaitis*, *supra* note 124.

¹³⁵ *The CARES Act: A Reference Guide*, *supra* note 118, at 5.

¹³⁶ *See id.*

¹³⁷ *See infra* Section III.B.

¹³⁸ *See* Coronavirus Response and Relief Supplemental Appropriations Act of 2021, H.R. 133-728, 116th Cong. (2020) (enacted at Pub. L. No. 116-260).

¹³⁹ *See id.* div. M–N.

¹⁴⁰ *See* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133-812, div. N., tit. III, §§ 301–348, 116th Cong. (2020) (enacted at Pub. L. No. 116-260). Because Congress enacted this Act under the CRRSAA, this paper will refer to it as the CRRSAA for simplicity.

¹⁴¹ *See id.* § 323(d).

¹⁴² *See id.* § 311. The maximum available relief for a second draw is \$2,000,000. *See id.* To be eligible, a business must employ no more than 300 workers, have used or will use the full amount of its first PPP loan, and show that it experienced at least a twenty-five percent decrease in gross receipts in the first, second, or third quarter of 2020, as compared to the same quarter in 2019. *See id.* For a detailed summary of section 311, *see Division-by-Division Summary of COVID-19 Relief Provisions*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/Portals/1/Documents/statefed/Summary-of-HR-133-Coronavirus-Relief-Provisions.pdf> (last visited Feb. 5, 2021).

¹⁴³ *See* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 304.

civil unrest over the summer of 2020,¹⁴⁴ supplier costs, and worker protection expenditures.¹⁴⁵ It also created a simplified application, but only for loans under \$150,000.¹⁴⁶ Thus, confusion regarding the application process may remain for businesses that seek funds over that amount.¹⁴⁷ Notably, however, Congress required the SBA to issue regulations related to the CRRSAA and its amendments to the CARES Act within ten days of the law's enactment,¹⁴⁸ which may relieve some of the uncertainty and confusion that percolated throughout the first round of funding.¹⁴⁹

Lastly, relevant to this Paper, the CRRSAA did not change the CARES Act's increase of subchapter V's debt limitation to \$7,500,000 applicable to small business debtors.¹⁵⁰ The CRRSAA, moreover, is silent with regard to the CARES Act's sunset provision, which reverts subchapter V's debt limitation back to \$2,725,625 on March 27, 2021.¹⁵¹ Therefore, although the CRRSAA replenished PPP funds, and the CARES Act increased the debt limitation under subchapter V to \$7,500,000 until March 2021, businesses nonetheless need to prepare for the worst—that is, bankruptcy—especially if they cannot obtain PPP funds due to their status as a debtor.¹⁵²

C. PPP Loan Eligibility for Bankrupt Businesses

Use of PPP funds for unauthorized purposes, even if inadvertent, negates the loan forgiveness provisions and could leave companies in more debt than they incurred before receiving the loan.¹⁵³ Significantly, courts are currently split on the

¹⁴⁴ See *Division-by-Division Summary of COVID-19 Relief Provisions*, *supra* note 142 (explaining section 304 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act applies to, *inter alia*, "[c]osts related to property damage due to public disturbances that occurred during 2020 that are not covered by insurance"). This unrest arose after George Floyd, an African-American man, died while in police custody. See Brad Polumbo, *George Floyd Riots Caused Record-Setting \$2 Billion in Damage, New Report Says. Here's Why the True Cost Is Even Higher*, FOUND. FOR ECON. EDUC. (Sept. 16, 2020), <https://fee.org/article/s/george-floyd-riots-caused-record-setting-2-billion-in-damage-new-report-says-here-s-why-the-true-cost-is-even-higher/#:~:text=New%20reporting%20from%20Axios%20reveals,%241%20billion%20to%20%242%20billion.&text=The%20US%20has%20experienced%20rioting,far%20exceed%20any%20historical%20precedent>.

¹⁴⁵ See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 304.

¹⁴⁶ See *id.* § 307.

¹⁴⁷ See, e.g., *supra* note 128 and accompanying text.

¹⁴⁸ See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 303.

¹⁴⁹ See *supra* note 128 and accompanying text.

¹⁵⁰ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113(a)(1), 134 Stat. 281, 310 (2020).

¹⁵¹ See *id.* § 1113(a)(5).

¹⁵² See *infra* Section III.

¹⁵³ See *PPP Loan Forgiveness*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program/ppp-loan-forgiveness> (last visited Feb. 5, 2021) (explaining borrowers "qualify for loan forgiveness if during the 8- to 24-week covered period following loan disbursement" the funds were used for payroll costs and other eligible expenses); see also *USF Fed. Credit Union v. Gateway Radiology Consultants, P.A.* (*In re Gateway Radiology Consultants, P.A.*), No.

issue of whether the government can deny PPP assistance to bankrupt debtors.¹⁵⁴ The CRRSAA nullified a majority of these concerns, as it departed from the SBA's April 2020 guidance denying PPP loans to bankrupt companies.¹⁵⁵ In particular, the CRRSAA allows DIPs or trustees to obtain PPP funds for the bankrupt business, subject to the court's approval and the SBA's determination that the debtor is otherwise eligible for the loan.¹⁵⁶ Nonetheless, the most recent PPP Borrower Application Form¹⁵⁷ inquires into both the business's and its owners' status in bankruptcy.¹⁵⁸ Like the initial application, it also questions whether the company or its owners have defaulted on a federal loan in the past seven years.¹⁵⁹ In both cases, it states the loan will not be approved.¹⁶⁰ Accordingly, it appears the SBA plans to deny PPP loans to bankrupt debtors, despite the CRRSAA expressly allowing businesses in bankruptcy to receive the loans.¹⁶¹

Thus far, only two circuit courts have addressed whether the SBA may deny such loans to chapter 11 debtors, both of which ruled in favor of the SBA.¹⁶² In *Hidalgo County Emergency Service Foundation v. Carranza* (*In re Hidalgo County*

20-13462, 2020 WL 7579338, at *2 (11th Cir. Dec. 22, 2020) ("The statutory list of allowable uses of loan funds is longer than the list of uses that qualify for loan forgiveness; all forgivable uses are allowable, but not all allowable uses are forgivable.").

¹⁵⁴ See, e.g., *Springfield Hosp., Inc. v. Carranza* (*In re Springfield Hosp., Inc.*), 2:20-ap-01003 (Bankr. D. Vt. Jun. 22, 2020), *appeal granted*, No. 20-2884, 20-2890 (2d Cir. Dec. 9, 2020) (granting a permanent injunction against the SBA and holding section 525(a) of the Bankruptcy Code, *see* 11 U.S.C. § 525(a) (2018), prohibits the SBA from discriminating against bankrupt companies); Final Judgment, *In re USA Gymnastics*, No. 1:20-ap-50055 (Bankr. S.D. Ind. Jun. 22, 2020), ECF No. 26 (granting a permanent injunction against the SBA, reasoning it exceeded its authority when it issued its policy denying PPP loans to existing debtors, and holding this disqualification was arbitrary and capricious); Order Denying Motion for Temporary Restraining Order, *In re Cosi, Inc.*, No. 1:20-ap-50591 (Bankr. D. Del. May 14, 2020), ECF No. 18 (denying a temporary restraining order against the SBA and finding nothing in the Bankruptcy Code disallows the SBA the ability to exclude bankrupt companies from the PPP).

¹⁵⁵ See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133-812, div. N., tit. III, § 320, 116th Cong. (2020) (enacted at Pub. L. No. 116-260); *see also* Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23,450, 23,451 (Apr. 28, 2020) (to be codified at 13 C.F.R. pts. 120–21).

¹⁵⁶ See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 320.

¹⁵⁷ U.S. SMALL BUS. ADMIN., SBA FORM NO. 2483, PAYCHECK PROTECTION PROGRAM BORROWER APPLICATION FORM (Jan. 2021), <https://www.sba.gov/sites/default/files/2021-01/PPP%20Borrower%20Application%20Form%20%28revised%201.8.2021%29.pdf> [hereinafter JANUARY 2021 PPP BORROWER APPLICATION].

¹⁵⁸ See *id.* ("1. Is the Applicant or any owner of the Applicant . . . presently involved in any bankruptcy?").

¹⁵⁹ See *id.* ("2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is (a) currently delinquent, or (b) has defaulted in the last 7 years and caused a loss to the government?").

¹⁶⁰ See *id.* ("If questions (1) [or] (2) . . . are answered 'Yes,' the loan will not be approved.").

¹⁶¹ Compare *id.*, with Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 320.

¹⁶² See *USF Fed. Credit Union v. Gateway Radiology Consultants, P.A.* (*In re Gateway Radiology Consultants, P.A.*), No. 20-13462, 2020 WL 7579338 (11th Cir. Dec. 22, 2020); *Hidalgo Cnty. Emergency Serv. Found. v. Carranza* (*In re Hidalgo Cnty. Emergency Serv. Found.*), 962 F.3d 838 (5th Cir. 2020). Notably, the court decided both cases before Congress enacted the CRRSAA and the SBA updated its Borrower Application Form.

Emergency Service Foundation),¹⁶³ Hidalgo, a chapter 11 debtor, filed suit against the SBA in bankruptcy court after the SBA denied its application for a PPP loan.¹⁶⁴ Hidalgo sought an injunction against the SBA, claiming the SBA exceeded its jurisdiction and authority by categorically excluding debtors from receiving PPP funds.¹⁶⁵ Moreover, Hidalgo alleged the SBA's policy violated section 525(a) of the Bankruptcy Code¹⁶⁶ and was arbitrary and capricious.¹⁶⁷

The United States Bankruptcy Court for the Southern District of Texas issued a preliminary injunction in favor of Hidalgo, requiring the SBA to process the company's PPP application without consideration of its ongoing bankruptcy.¹⁶⁸ The SBA appealed to the Fifth Circuit, arguing both federal statutory law¹⁶⁹ and Fifth Circuit precedent¹⁷⁰ prohibit injunctions against the Administrator of the SBA.¹⁷¹ Conversely, Hidalgo urged the court to create an exception to the statute and case law given the "extreme facts and highly compressed time frame presented in [the] case."¹⁷² In the alternative, Hidalgo invited the court to revisit the doctrine entirely, "in light of the Supreme Court's invalidation of another anti-injunction provision. . . ."¹⁷³

A Fifth Circuit panel rejected Hidalgo's arguments, ultimately reversing the bankruptcy court's decision.¹⁷⁴ Relying on "well-established Fifth Circuit law," the court concluded "the bankruptcy court exceeded its authority when it issued an injunction against the SBA Administrator. . . ."¹⁷⁵ The panel, however, noted "[t]he issue at hand is not the validity or the wisdom of the PPP regulations and related statutes, but the ability of a court to enjoin the [SBA] Administrator" under existing precedent.¹⁷⁶

Most recently, the Eleventh Circuit addressed a similar issue in *USF Federal Credit Union v. Gateway Radiology Consultants, P.A. (In re Gateway Radiology*

¹⁶³ 962 F.3d 838.

¹⁶⁴ See *id.* at 840.

¹⁶⁵ See Response Brief of Appellee Hidalgo Cnty. Emergency Serv. Found. at 27–32, *In re Hidalgo*, 962 F.3d 838 (No. 20-40368).

¹⁶⁶ 11 U.S.C. § 525(a) (2018) (prohibiting a governmental unit from discriminating against bankrupt companies).

¹⁶⁷ See Response Brief of Appellee Hidalgo Cnty. Emergency Serv. Found., *supra* note 165, at 32–46.

¹⁶⁸ See *In re Hidalgo*, 962 F.3d at 840.

¹⁶⁹ See 15 U.S.C. § 634(b)(1) ("[N]o . . . injunction . . . or other similar process . . . shall be issued against the Administrator [of the SBA] or his property.").

¹⁷⁰ See *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1290 n.6 (5th Cir. 1994) (prohibiting, absolutely, injunctive relief against the SBA); see also *Valley Constr. Co. v. Marsh*, 714 F.2d 26, 29 (5th Cir. 1983); *Expedient Servs., Inc. v. Weaver*, 614 F.2d 56, 58 (5th Cir. 1980).

¹⁷¹ See *In re Hidalgo*, 962 F.3d at 840.

¹⁷² See Response Brief of Appellee Hidalgo Cnty. Emergency Serv. Found., *supra* note 165, at 51.

¹⁷³ *Id.* (citing *South Carolina v. Regan*, 465 U.S. 367, 379–80 (1984) (holding the anti-injunction provisions in the tax code were not intended to bar action where Congress provided no alternative way to challenge the validity of the tax)).

¹⁷⁴ See *id.* at 840–41.

¹⁷⁵ *Id.* at 841.

¹⁷⁶ *Id.*

Consultants, P.A.).¹⁷⁷ At the time Gateway applied for a PPP loan, it was an active chapter 11 debtor but falsely stated on its PPP application it was not in bankruptcy.¹⁷⁸ Relying on the application, a federal credit union approved Gateway for the loan.¹⁷⁹ Pursuant to section 364 of the Bankruptcy Code,¹⁸⁰ however, a bankruptcy court was required to approve the loan.¹⁸¹ At the approval hearing, the SBA objected to issuing the loan, indicating Gateway was currently in bankruptcy.¹⁸² The court nonetheless granted Gateway's motion and entered an injunction against the SBA, concluding the SBA regulations regarding the CARES Act were unreasonable, arbitrary, and capricious.¹⁸³

The Eleventh Circuit reversed.¹⁸⁴ The court found, under the CARES Act, Congress gave the SBA broad discretion to determine PPP eligibility,¹⁸⁵ given that Congress created the program as an amendment to the SBA's 7(a) loan program.¹⁸⁶ Thus, because the SBA treated PPP applications similar to other section 7(a) applications,¹⁸⁷ it did not exceed its vested authority when it precluded bankrupt companies from obtaining PPP loans.¹⁸⁸ Similarly, the court overruled the bankruptcy court's finding that the SBA's decision was arbitrary and capricious given the SBA's long-held consideration of applicants' bankruptcy status.¹⁸⁹

Although both the Fifth Circuit and Eleventh Circuit ruled in favor of the SBA, a circuit split may arise depending on the Second Circuit's decision in *Springfield Hospital, Inc. v. Carranza (In re Springfield Hospital, Inc.)*.¹⁹⁰ Additionally, given the SBA's apparent departure from the CRRSAA's allowance that debtors may obtain PPP loans, more litigation regarding SBA's policies will likely arise.¹⁹¹ Moreover, when businesses are considering whether to apply for a PPP loan or file for

¹⁷⁷ No. 20-13462, 2020 WL 7579338 (11th Cir. Dec. 22, 2020).

¹⁷⁸ *See id.* at *1.

¹⁷⁹ *See id.*

¹⁸⁰ 11 U.S.C. § 364 (2018).

¹⁸¹ *See id.* (requiring a trustee to obtain court approval before obtaining certain additional debt).

¹⁸² *In re Gateway*, 2020 WL 7579338, at *1.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at *9–10.

¹⁸⁶ *See id.* at *3 ("[T]he PPP was not created as a standalone program; instead it was added into [section] 7(a), albeit with several of that subsection's general eligibility requirements relaxed." (citations omitted)); *see also supra* note 123 and accompanying text.

¹⁸⁷ The court noted the PPP Borrower Application included similar questions related to bankruptcy as the existing section 7(a) loan application. *See In re Gateway*, 2020 WL 7579338, at *3.

¹⁸⁸ *See id.* at *9–14.

¹⁸⁹ *See id.* at *16 (noting evaluation of an applicant's ability to repay the loan is a relevant consideration, and "[t]hat [the SBA] fashioned its consideration of bankruptcy status into a streamlined and bright-line rule that would speed up decisions about whether PPP loans should be made is not implausible, irrational, or the product of arbitrary and capricious decision making").

¹⁹⁰ *Springfield Hosp., Inc. v. Carranza (In re Springfield Hosp., Inc.)*, 2:20-ap-01003 (Bankr. D. Vt. Jun. 22, 2020), *appeal granted*, No. 20-2884, 20-2890 (2d Cir. Dec. 9, 2020).

¹⁹¹ *Compare* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133-812, div. N., tit. III, § 320, 116th Cong. (2020) (enacted at Pub. L. No. 116-260), *with* JANUARY 2021 PPP BORROWER APPLICATION, *supra* note 157.

bankruptcy, they should not rely on their business interruption insurance to refund any lost revenue during the shutdowns.¹⁹²

D. Business Interruption Insurance: Friend or Foe?

Business interruption ("BI") insurance could be the life preserver ailing companies need in the midst of the COVID-19 crisis—that is, if the insurance is available.¹⁹³ BI insurance attempts to put insureds in the place they would have occupied had the interruption not occurred.¹⁹⁴ In doing so, BI coverage "is intended to replace a policyholder's lost revenues" during the period of which the business is shutdown.¹⁹⁵ Indeed, the business's "inability to produce income while the plant is out of commission . . . can easily be the most significant financial loss."¹⁹⁶

BI losses are typically large, with some reaching billions of dollars in lost revenue.¹⁹⁷ According to the Federal Emergency Management Agency ("FEMA"),

¹⁹² See *NAIC Statement on Congressional Action Relating to COVID-19*, NAT'L ASS'N OF INS. COMM'RS (Mar. 25, 2020), https://content.naic.org/article/statement_naic_statement_congressional_action_relating_covid_19.htm [hereinafter *NAIC Statement*] ("Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance . . . is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period."); see also Mark D. Plevin et al., *INSIGHT: Companies May be Thwarted by These Business Interruption Defenses*, BLOOMBERG LAW (Apr. 13, 2020, 4:01 AM), https://www.bloomberglaw.com/document/X7BR6M6S000000?bna_news_filter=us-law-week&jsearch=BNA%2520000001715585dc1ca9ff5f9da3350001#jcite.

¹⁹³ See Plevin et al., *supra* note 192 ("Businesses that have shut down or reduced operations due to the coronavirus pandemic may look to their insurance to pay their losses, but insurance coverage may not be available under 'business interruption' coverage in commercial property policies."). Of course, those small businesses that self-insure cannot rely on BI insurance at all because they have not contracted for coverage.

¹⁹⁴ Christopher C. French, *The Aftermath of Catastrophes: Valuing Business Interruption Insurance Losses*, 30 GA. ST. U. L. REV. 461, 469 (2014) [hereinafter *The Aftermath of Catastrophes*] ("The purpose of business interruption insurance is to protect the insured against losses that occur when its operations are unexpectedly interrupted, and to place it in the position it would have occupied if the interruption had not occurred." (quoting *Cont'l Ins. Co. v. DNE Corp.*, 834 S.W.2d 930, 934 (Tenn. 1992))).

¹⁹⁵ CHRISTOPHER C. FRENCH & ROBERT H. JERRY, *INSURANCE LAW AND PRACTICE: CASES, MATERIALS, AND EXERCISES* 698 (2018). Losses may also include "expenses the business would not have accrued but for the interruption." Kevin Bandoian & Christina Orrico, *INSIGHT: Business Interruption Insurance Wording Is Key to a Covid-19 Claim*, BL (Apr. 10, 2020), https://www.bloomberglaw.com/product/blaw/document/X5S4UAL4000000?bna_news_filter=true&jsearch=h=BNA%25200000017141bad73ea17953beb0d20001#jcite. Insurers write BI insurance coverage under two forms—Gross Earnings and Business Income—which include "net profits plus continuing expenses such as payroll and taxes. . . ." *The Aftermath of Catastrophes*, *supra* note 194, at 469. For an explanation of the two policy forms, as well as sample policy language from under both forms, see *The Aftermath of Catastrophes*, *supra* note 194, at 469–71.

¹⁹⁶ FRENCH & JERRY, *supra* note 195, at 698.

¹⁹⁷ See *id.*; see also *The Aftermath of Catastrophes*, *supra* note 194, at 463 ("[BI] losses caused by natural and unnatural disasters are enormous. For example, the [BI] losses associated with the 9/11 terrorist attack have been estimated to exceed \$10 billion. Hurricane Katrina caused more than \$45 billion in damage. The governors of New York and New Jersey estimated that Hurricane Sandy caused more than \$60 billion in damages."); DANIEL T. TORPEY ET AL., *BUSINESS INTERRUPTION: COVERAGE, CLAIMS, AND RECOVERY* 4 (2d ed. 2011); Gregory D. Miller & Joseph D. Jean, *Effect of Post-Loss Economic Factors in Measuring*

approximately forty to sixty percent of small businesses fail after experiencing a disaster.¹⁹⁸ More specifically, approximately ninety percent of small businesses "fail within a year unless they can resume operations within 5 days."¹⁹⁹ BI insurance, however, may be a way for these businesses to continue operating post-disaster, but only if the claims are covered.²⁰⁰

With regard to COVID-19, the American Property Casualty Insurance Association estimates that small businesses with 100 or fewer employees will see losses of up to \$431,000,000,000 per month, collectively.²⁰¹ This number is forty-three to seventy-two times the monthly premiums for commercial property insurance policies,²⁰² and nine times the amount of damages that arose from the 9/11 terrorist attacks.²⁰³ Unfortunately, for businesses, these losses may not be covered.²⁰⁴ Notably, if communicable diseases are explicitly covered under the insurance policy,²⁰⁵ any dispute is clear-cut. Unless the insurer can assert a defense,²⁰⁶ the insurer must cover the loss based on the language of the policy.²⁰⁷ If the policy does not provide coverage, or the language is ambiguous regarding coverage, however,

Business Interruption Losses: An Insured's and Insurer's Perspectives, in NEW APPLEMAN ON INSURANCE: CURRENT CRITICAL ISSUES IN INSURANCE LAW 25, 25 (2010).

¹⁹⁸ *Are You Prepared for Anything?*, SMALL BUS. ADMIN., <https://ascent.sba.gov/disaster-and-economic-recovery/recovery-strategies/are-you-prepared-for-anything> (last visited Feb. 5, 2021).

¹⁹⁹ *Continuity Planning for the Health Care Delivery System: Building Resilience within Delaware*, DEL. J. OF PUB. HEALTH, http://djph.delamed.org/V5_I4/DP020.pdf (last visited Feb. 5, 2021) (quoting *Make Your Business Resilient*, FED. EMERGENCY MGMT. AGENCY (2019), https://www.fema.gov/media-library-data/1441212988001-1aa7fa978c5f999ed088dcaa815cb8cd/3a_BusinessInfographic-1.pdf).

²⁰⁰ See NAIC Statement, *supra* note 192 (explaining BI policies typically do not cover communicable diseases, such as COVID-19).

²⁰¹ Eileen Gilligan, *APCIA Releases New Business Interruption Analysis*, AM. PROP. & CAS. INS. ASS'N (Apr. 6, 2020), <http://www.pciaa.net/pciwebsite/cms/content/viewpage?sitePageId=60052>.

²⁰² *Id.*

²⁰³ Jef Feeley & Katherine Chiglinsky, *Litigation Builds Against Insurers Over Coronavirus Business Interruption*, INS. J. (Apr. 8, 2020), <https://www.insurancejournal.com/news/national/2020/04/08/563723.htm>.

²⁰⁴ See NAIC Statement, *supra* note 192 ("Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk."); see also Plevin et al., *supra* note 192 (discussing terms and defenses insurers may use to defend against BI claims for coronavirus). But see Bandoian & Orrico, *supra* note 195 (explaining the precise language of the specific insurance policy is essential in determining whether COVID-19 is covered under BI insurance policies).

²⁰⁵ See Bandoian & Orrico, *supra* note 195 ("Some businesses may have direct coverage for communicable diseases, while other businesses may be able to receive financial relief for the Covid-19 disruption through their business interruption insurance (also known as business income insurance). Many businesses have this coverage as an endorsement to their property insurance policies.").

²⁰⁶ Common defenses include concealment, misrepresentations, warranties, conditions, and limitations or exclusions on coverage. See JOHN F. DOBBYN & CHRISTOPHER C. FRENCH, INSURANCE LAW IN A NUTSHELL 311–50 (5th ed. 2016); see also FRENCH & JERRY, *supra* note 195, at 270–77 (explaining common exclusions and insurer defenses).

²⁰⁷ See *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 685–86 (5th Cir. 2011) (illustrating how an insurer can be liable for losses based on the specific language of the policy).

disputes may arise. Indeed, businesses have already suited up for coverage litigation.²⁰⁸

In these disputes, insureds will likely argue that, absent any specific exclusions for communicable diseases, based on the concept of *contra proferentem*, a broadly-worded BI policy should be construed in favor of the insured.²⁰⁹ Importantly, all fifty states and the District of Columbia have adopted the notion of *contra proferentem*.²¹⁰ Additionally, if the broadly-worded policy language creates "many lawsuits with inconsistent results," which could be the situation with COVID-19 coverage litigation, the courts typically rule the policy language is ambiguous.²¹¹ If the policy language is considered ambiguous, then most courts will rule in favor of coverage.²¹²

Insureds will also likely argue under applicable provisions for contingent business interruption²¹³ and interruption due to civil or military authority or loss of ingress/egress.²¹⁴ Furthermore, insureds may contend their businesses were "uninhabitable,"²¹⁵ thereby causing direct physical loss, which an insured is required

²⁰⁸ See, e.g., Complaint & Jury Trial Demand, *Laudenbach Periodontics & Dental Implants, Ltd. v. Liberty Mut. Ins.*, No. 2:20-cv-02029 (E.D. Pa. Apr. 27, 2020), ECF No. 1; Complaint, *Big Onion Tavern Grp. V. Soc'y Ins.*, No. 1:20-cv-02005 (N.D. Ill. Mar. 27, 2020), ECF No. 1; Petition for Declaratory Judgment, *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, No. 2020-02558 (La. Civ. Dist. Ct. Mar. 16, 2020), ECF No. 1; see also Evan Weinberger, *Reed Smith, Pillsbury Gear Up for Coronavirus Insurance Fights*, BL (Apr. 10, 2020), <https://news.bloomberglaw.com/banking-law/reed-smith-pillsbury-gear-up-for-coronavirus-insurance-fights> (anticipating a wave of insurance coverage litigation regarding COVID-19 and BI policies).

²⁰⁹ See, e.g., Plaintiffs' Suggestions in Opposition to Defendant Owners Ins. Co.'s Motions to Dismiss at 10, *Blue Springs Dental Care LLC v. Owners Ins. Co.*, No. 4:20-cv-00383-SRB, 2020 WL 5512165 (W.D. Mo. Aug. 21, 2020), ECF No. 9 (arguing the policies at issue are at least ambiguous and must be construed against the insurers); see Christopher C. French, *Understanding Insurance Policies as Non-Contracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535, 556 (2017) [hereinafter *Understanding Insurance Policies as Non-Contracts*] ("The doctrine of *contra proferentem* provides that any contract language that is unclear or ambiguous should be construed against the drafter. In the insurance context, because insurers draft the policies, any ambiguities should be construed against them." (footnote omitted)); see also RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. L. INST. 1981) (adopting the concept of *contra proferentem*).

²¹⁰ Ethan J. Leib & Steve Thel, *Contra Proferentem and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773, 774 n.4 (2015) ("[T]he *contra proferentem* rule[] is followed in all fifty states and the District of Columbia. . . ." (alterations in original) (quoting *Phillips v. Lincoln Nat'l Life Ins.*, 978 F.2d 302, 312 (7th Cir. 1992))).

²¹¹ *Understanding Insurance Policies as Non-Contracts*, *supra* note 209, at 557.

²¹² *Id.*

²¹³ See Bandoian & Orrico, *supra* note 195 ("Business interruption insurance can also include coverage for *contingent business interruption*, which covers insureds for losses sustained due to a customer or supplier's own loss or damage. . . .").

²¹⁴ See, e.g., Plaintiffs' Suggestions in Opposition to Defendant Owners Ins. Co.'s Motions to Dismiss at 13–14, *supra* note 209; see Bandoian & Orrico, *supra* note 195 ("Business interruption insurance can also include coverage for . . . *interruption due to civil or military authority or loss of ingress/egress*, which could occur if access to the insured's business is restricted or prevented. . . . [G]overnmental authorities in many states and cities have ordered all nonessential businesses closed and implemented operating restrictions for certain essential businesses."); Mervosh et al., *supra* note 20 (depicting which U.S. jurisdictions have instituted stay-at-home orders, thereby shutting down certain nonessential businesses).

²¹⁵ Bandoian & Orrico, *supra* note 195 ("[The] 'uninhabitable' condition would seemingly apply to businesses closed due to Covid-19. . . ."); see also CONG. RESEARCH SERV., BUSINESS INTERRUPTION

to prove to recover under a BI policy.²¹⁶ This uninhabitability argument stems from the ability of COVID-19 to remain on surfaces for days.²¹⁷ Many courts have already found that an uninhabitable business constitutes a direct physical loss.²¹⁸ Thus, this may be a winning argument for insureds.²¹⁹ Nonetheless, insurers will assert counter-arguments of their own.²²⁰

Insurers will likely argue that communicable diseases, such as COVID-19, are not covered because they are uninsurable risks that are too unforeseeable.²²¹ Arguably, communicable diseases are not insurable because they put the insurer at

INSURANCE AND COVID-19 1 (Mar. 31, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11295> ("If a property has become physically contaminated and uninhabitable due to coronavirus, there may be a basis to claim that a direct physical loss has occurred.").

²¹⁶ See, e.g., *Elegant Massage, LLC v. State Farm Mut. Auto Ins. Co.*, No. 20-cv-265, 2020 WL 7249624, at *10 (E.D. Va. Dec. 9, 2020) (finding it is plausible the meaning of "direct physical loss" includes property that is uninhabitable). BI insurance is a type of property insurance; see also FRENCH & JERRY, *supra* note 195, at 698 ("Another type of insurance commonly sold as part of a commercial property policy is 'Business Interruption Insurance.'"). Like any property insurance, then, the insured must prove "direct physical injury" to the property in order to recover. *Id.* at 621 ("In order to recover under a property policy, whether a homeowners policy or a commercial property policy, there must be a 'direct physical loss.'").

²¹⁷ See, e.g., Petition for Declaratory Judgment at 3, *supra* note 208; see also CONG. RESEARCH SERV., *supra* note 215, at 2 ("Several lawsuits challenging the physical damage requirement have been filed, arguing that the virus physically infects and stays on the surface of materials for days and contamination of the insured premises by the coronavirus is a direct physical loss needing remediation."); Bandoian & Orrico, *supra* note 195 ("A business setting is a potential hotbed for Covid-19 contamination; with regular and close interaction among employees, customers, and surfaces, the virus might inhabit surfaces such as desks, tables, door handles, and computers, among countless other items.").

²¹⁸ See, e.g., *Elegant Massage*, 2020 WL 7249624, at *10 ("[I]t is plausible that [the insured business] experienced a direct physical loss when the property was deemed uninhabitable . . . by the Executive Orders because of its high risk for spreading COVID-19. . . . [T]he facts of this case are similar [sic] those where courts found that asbestos, ammonia, odor from methamphetamine lab, or toxic gasses from drywall . . . constituted a direct physical loss."); *S.A.N.T., Inc. v. Berkshire Hathaway, Inc.*, No. 2:20-cv-862, 2021 WL 147139, at *6 (W.D. Pa. Jan. 15, 2021) ("Courts have found physical loss or damage to property that was too unsafe to inhabit.").

²¹⁹ See, e.g., *Elegant Massage*, 2020 WL 7249624, at *10; see also Bandoian & Orrico, *supra* note 195 ("Certainly, the highly contagious nature and means of transmittal for this virus have caused businesses to become temporarily 'uninhabitable' for some duration of time. . . . These circumstances may cause businesses to sustain losses and many businesses may not be able to continue operating at all if their employees are not physically present on site.").

²²⁰ See generally Plevin et al., *supra* note 192 (explaining the arguments insurers may assert to defend against BI claims).

²²¹ See Gilligan, *supra* note 201 ("Pandemic outbreaks are uninsured because they are uninsurable."); see also NAIC Statement, *supra* note 192 ("Business interruption policies were generally not designed or priced to provide coverage against communicable diseases, such as COVID-19 and therefore include exclusions for that risk. Insurance works well and remains affordable when a relatively small number of claims are spread across a broader group, and therefore it is not typically well suited for a global pandemic where virtually every policyholder suffers significant losses at the same time for an extended period."); Robert Shulman & Cristen Rose, *INSIGHT: Climate Change, Covid-19 Are Indeed Insurable Risks*, BL (Apr. 8, 2020, 4:01 AM), https://www.bloomberglaw.com/document/XBBJSM48000000?bna_news_filter=environment-and-energy&jcsearch=BNA%2520000001714b1adbffa3fddf1e42ca0001#jcite ("The insurance industry's approach to . . . coronavirus seeks to remove from coverage risks that it deems . . . too unforeseeable to insure. . . ."). Shulman and Rose argue that the insurers' arguments for uninsurability are fallacies. See *id.*

risk for insolvency.²²² Additionally, even if COVID-19 is insurable, insurers will likely argue that it did not cause "direct physical loss" to the premises.²²³ Indeed, courts reviewing analogous situations have found that coverage does not exist.²²⁴

Further, businesses filing suit under a policy's "civil authority" clause²²⁵ must, nonetheless, overcome the "direct physical loss" requirement.²²⁶ Thus, if the court finds the plaintiff did not prove "direct physical loss," the plaintiff will not prevail under the "civil authority" clause.²²⁷ Additionally, the argument for coverage under the "civil authority" clause will falter in some cases depending upon the language of

²²² See Gilligan, *supra* note 201 ("Any action to fundamentally alter business interruption provisions specifically, or property insurance generally, to retroactively mandate insurance coverage for viruses by voiding those exclusions, would immediately subject insurers to claim payment liability that threatens solvency and the ability to make good on the actual promises made in existing insurance policies."); see also NAIC Statement, *supra* note 192 ("While the U.S. insurance sector remains strong, if insurance companies are required to cover such claims, such an action would create substantial solvency risks for the sector, significantly undermine the ability of insurers to pay other types of claims, and potentially exacerbate the negative financial and economic impacts the country is currently experiencing.").

²²³ See, e.g., Malaube, LLC v. Greenwich Ins. Co., No. 20-22615, 2020 WL 50501581, at *8-9 (S.D. Fla. Aug. 26, 2020) (holding the mere economic losses suffered by the insured business, without more, was insufficient to establish a "direct physical loss" under the policy); Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London Known as Syndicate PEM 4000, No. 8:20-cv-1605-T-30AEP, 2020 WL 5791583, at *4-5 (M.D. Fla., Sept. 28, 2020) (holding the economic losses associated with COVID-19 did not constitute "direct physical loss of or damage to property"); West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos., No. 2:20-cv-05663-VAP-DFMx, 2020 WL 6440037, at *3-4 (C.D. Cal., Oct. 27, 2020) (finding plaintiff failed to allege COVID-19 *physically* altered the insured property in any way to constitute "a direct physical loss of or damages to property"); see also Plevin et al., *supra* note 192 ("Coronavirus causes harm to persons, but is not reported to cause physical damage to property.").

²²⁴ See, e.g., Universal Image Prods., Inc. v. Fed. Ins. Co., 475 F. App'x 569, 575 (6th Cir. 2012) (finding no "direct physical loss" occurs when a foul odor causes disruptions to business activities, but does not cause any tangible damage to physical property); Mama Jo's, Inc. v. Sparta Ins. Co., No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (holding nearby construction endeavor did not cause "direct physical loss" to restaurant that remained open and paid more in cleaning fees due to cleaning the premises of the construction debris); Phoenix Ins. Co. v. Infogroup, Inc., 147 F. Supp. 3d 815, 825 (S.D. Iowa 2015) (finding mere loss of use of business facilities does not constitute physical loss or damage); White Mountain Cmty. Hosp. Inc. v. Hartford Cas. Ins. Co., No. 3:13-cv-8194 JWS, 2015 WL 1755372, at *2 (D. Ariz. Apr. 17, 2015) (ruling a company is not entitled to loss of income due to general decrease in business from wildfires affecting the community at large); Traveler's Ins. Co. v. Eljer Mfg., Inc., 757 N.E.2d 481, 503-04 (Ill. 2001) (ruling a company that reduces its hours due to an anticipated physical loss cannot recover under its BI policy).

²²⁵ See *supra* note 214 and accompanying text.

²²⁶ Plevin et al., *supra* note 192 ("[C]ivil authority provisions typically require that losses be caused by action of civil authority that prohibits access to the described premises due to *direct physical loss of or damage to property*, other than at the described premises. Thus, courts have found no coverage unless insureds demonstrate a nexus between the civil authority order and *direct physical damage* to property other than the insured premises." (internal quotations omitted)).

²²⁷ See, e.g., Dickie Brennan & Co. v. Lexington Ins. Co., 636 F.3d 683, 687 (5th Cir. 2011) (holding the business was not entitled to BI coverage because it failed to show "that the issuance of the [civil authority] order was 'due to' physical damage to property. . . ."); Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834, 838 (8th Cir. 2006) (holding, where insured was unable to ship uncontaminated beef due to concerns of "mad cow disease," BI insurance was unavailable because the uncontaminated beef was not physically damaged); see also Plevin et al., *supra* note 192.

the underlying policy.²²⁸ For example, some Hartford Financial Services Group BI policies read:

This insurance is extended to apply to the actual loss of Business Income you sustain and the actual, necessary and reasonable Extra Expense you incur when access to your "Scheduled Properties" is specifically prohibited by order of a civil authority as the direct result of a *Covered Cause of Loss* to property in the immediate areas of your "Scheduled Premises."²²⁹

Therefore, to prevail under the "civil authority" clause, businesses must prove that the civil authority order shutting down the business was due to a covered loss;²³⁰ however, as discussed above, communicable diseases are typically not covered.²³¹ If the insurer can prove that the civil authority order was the result of COVID-19, and that COVID-19 is definitively an uncovered loss, then the insurer will prevail.²³²

Moreover, insurers may argue that the business's "uninhabitability" cannot be proven.²³³ Generally, any "contamination" rendering a business "uninhabitable" must be proven through testing of the premises.²³⁴ This testing would prove that the business was "unfit for occupancy and use."²³⁵ According to a study published by the *New England Journal of Medicine*, however, COVID-19 is thought to last for only seventy-two hours on plastic, forty-eight hours on stainless steel, twenty-four hours

²²⁸ See Complaint & Demand for Jury Trial ¶ 50, *SA Hosp. Grp., LLC v. Hartford Fin. Servs. Grp., Inc.*, No. 1:20-cv-03258 (S.D.N.Y. Apr. 24, 2020), ECF No. 1 [hereinafter *SA Hosp. Grp. Complaint*]; see also Bandoian & Orrico, *supra* note 195 (noting policy language is integral in determining whether a claim under COVID-19 will be covered).

²²⁹ *SA Hosp. Grp. Complaint*, *supra* note 228, ¶ 50 (emphasis added).

²³⁰ See *id.*

²³¹ See *NAIC Statement*, *supra* note 192 (explaining BI policies typically do not cover communicable diseases, such as COVID-19).

²³² Cf. *Cleland Simpson Co. v. Firemen's Ins. Co. of Newark, N.J.*, 140 A.2d 41, 44 (Pa. 1958) (denying coverage for business interruption by civil authority when the order and interruption was due to the risk of fire, rather than the direct result of a fire, which was a covered loss under the policy).

²³³ See Plevin et al., *supra* note 192 ("Business interruption claims related to coronavirus could also founder because insureds seeking coverage are unable to bear their burden of proving with evidence that their losses were directly and physically caused by coronavirus.").

²³⁴ See, e.g., *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (explaining the parties tested the allegedly contaminated water to determine whether the water was contaminated with bacteria); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (describing the tests performed to determine whether flammable vapors were present in the facility); see also Plevin et al., *supra* note 192 ("Where courts have previously found business loss coverage for 'contamination' of insured premises, such contamination (from substances such as E-coli or ammonia) was generally confirmed by testing and it was undisputed that the contamination rendered the premises unfit for occupancy and use.").

²³⁵ Plevin et al., *supra* note 192.

on cardboard, four hours on copper, and three hours in the air.²³⁶ Therefore, unless the company tested the premises prior to closing, this evidence is likely lost.²³⁷

Even if insurers are required to pay claims filed by companies under their BI policies, another time- and money-consuming endeavor is litigating how much the claim is worth.²³⁸ Due to the uncertain nature of the COVID-19 crisis, companies and insurers will likely argue over BI claims for years to come.²³⁹ Thus, the following Section explores COVID-19's impact on small businesses with regard to insurance payouts, PPP loans, DIP lending, and considerations for subchapter V bankruptcy.

III. COVID-19'S EFFECT ON SMALL BUSINESSES AND SUBCHAPTER V BANKRUPTCY

COVID-19 will have a lasting impact on every aspect of life, both personal and professional. Relevant to this Paper is COVID-19's effect on small businesses, with particular regard to BI insurance, PPP loans, DIP lending, and subchapter V moving forward.

A. When Determining Whether to File for Subchapter V Bankruptcy, Small Businesses Should Not Rely on Business Interruption Insurance to Account for Lost Income

Although decisions regarding BI coverage will inevitably vary across the country based on differing case law and policy language,²⁴⁰ businesses should not

²³⁶ See generally Neeltje van Doremalen et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, NEW ENG. J. MED. (2020), <https://www.nejm.org/doi/full/10.1056/NEJMc2004973> (studying how long SARS-CoV-2 lasts on various surfaces).

²³⁷ See *id.*; see also Plevin et al., *supra* note 192 ("[I]t is likely that few businesses conducted tests to document actual contamination by the coronavirus. And because coronavirus reportedly remains detectable on hard surfaces for only a limited time, even positive tests conducted in the future should not be sufficient to support a coverage claim for past losses because such tests would not prove earlier contamination.").

²³⁸ See FRENCH & JERRY, *supra* note 195, at 698 ("Sometimes business interruption insurance disputes involve the question of whether a claim is covered, but more frequently such disputes involve valuation of business interruption claims. This is because the calculation of loss is based upon answers to questions that are frequently speculative. For example, how long should it take the policyholder to rebuild and resume its operations after the initial interruption? How much money would the policyholder have made if not for the interruption? Would the policyholder's business have increased or decreased if not for the interruption?").

²³⁹ See *supra* note 208 and accompanying text. For more information and a thorough discussion of the availability of BI insurance related to the pandemic, see Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Coverage*, 27 CONN. INS. L. J. 1 (2020). Professor French has also discussed some business's unconventional decision to file BI litigation in federal court, as opposed to more favorable state courts. See Christopher C. French, *Forum Shopping COVID-19 Business Interruption Insurance Claims*, 2020 U. ILL. L. REV. ONLINE 187 (2020).

²⁴⁰ See, e.g., *Malaube, LLC v. Greenwich Ins. Co.*, No. 20-22615, 2020 WL 50501581, at *8–9 (S.D. Fla. Aug. 26, 2020) (dismissing the plaintiff's claim for failing to establish the insured property suffered direct physical loss or damage as a result of COVID-19); *Studio 417 v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB, 2020 WL 4692385, at *4–6 (W.D. Mo. Aug. 12, 2020) (denying Defendant's motion to dismiss because Plaintiff adequately alleged direct physical loss under its policy); see also Bandoian & Orrico, *supra* note 195

rely on BI coverage to shovel them out of debt. First, the timing of claims could affect the business's decision to file for bankruptcy. For example, most policies require the business to close for a specific amount of days before the business can file a claim.²⁴¹ Additionally, once the business files a claim, the insurer typically has thirty days to review the claim and decide whether to cover said claim.²⁴² Given the uncertainty regarding whether BI policies cover injuries arising from COVID-19, the business's insurer will likely deny the claim.²⁴³ Additionally, some courts, such as New York state courts, have suspended new filings of nonessential claims.²⁴⁴ Thus, assuming the business contests the denial, the coverage litigation could take years to resolve.²⁴⁵ Coverage litigation involving COVID-19 is no exception.²⁴⁶ Unfortunately, the failing business likely does not have years to wait to file a lawsuit or wait for a decision regarding its BI coverage. Indeed, without active cash flow, the business will need to institute a bankruptcy proceeding, thereby triggering the automatic stay,²⁴⁷ to thwart creditors seeking payment. Therefore, the business will likely need to file for bankruptcy before the BI litigation commences or resolves.

As such, businesses should be cognizant of the amount of debt they have accrued, regardless of any potential insurance proceeds. A small business debtor that has accrued \$8,000,000 in debt, for example, will be ineligible for subchapter V bankruptcy.²⁴⁸ Thus, \$1,000,000 in potential insurance proceeds would do nothing to help a small business that is currently breaching the \$7,500,000 debt

("Ultimately, insurance coverage and relief for the disruption caused by Covid-19 will vary widely by client and insurance policy."); Plevin et al., *supra* note 192 ("Specific facts could lead to different outcomes. For example, Colorado's stay-at-home order expressly presumes that coronavirus can cause property damage because of its 'propensity to attach to surfaces.'" (quoting Third Updated Public Health Order 20-24 Implementing Stay at Home Requirements, COLO. DEPT OF PUB. HEALTH & ENV'T (Apr. 1, 2020), https://www.newcastlecolorado.org/sites/default/files/fileattachments/community/page/2043/third_updated_public_health_order_-_authorized_business_ada.pdf)).

²⁴¹ Weinberger, *supra* note 208; *see also* Bandoian & Orrico, *supra* note 195 (discussing how business interruption insurance allows reimbursement after a fixed period of time).

²⁴² Weinberger, *supra* note 208.

²⁴³ *See* discussion *supra* Section II.D.

²⁴⁴ *See* Administrative Order of the Chief Administrative Judge of the Courts, Essential Proceedings Administrative Order A0/78/20, N.Y. UNIFIED CTS. (Mar. 22, 2020), <http://nycourts.gov/whatsnew/pdf/AO-78-2020.pdf> (ordering no new court filings shall be accepted unless it is an essential matter). Essential claims include, *inter alia*, certain criminal matters, certain family adjudications, and certain housing matters. *Id.* at ex. A. *See id.* for a full listing of proceedings deemed essential in New York.

²⁴⁵ *See* Weinberger, *supra* note 208 (explaining that BI coverage litigation regarding asbestos "dragged on for decades").

²⁴⁶ *See* Greg Mollett, *Business Interruption Insurance and COVID-19: An Overview*, GREENSFELDER, HEMKER & GALE, P.C. (Apr. 2, 2020), <https://www.greensfelder.com/newsroom-publications-business-interruption-insurance.html> ("There likely will be years of insurance coverage litigation relating to the making and denial of [COVID-19-related] claims."). *But see* Weinberger, *supra* note 208 (explaining that BI coverage litigation regarding COVID-19 may be different than asbestos because "[i]t is all happening at once" (citation omitted)).

²⁴⁷ *See* 11 U.S.C. § 362 (2018).

²⁴⁸ *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113(a)(1), 134 Stat. 281, 310 (2020) (codified as amended at 11 U.S.C.A. § 1182(1)(A) (West 2020)).

limitation. Regardless of the potential insurance proceeds, the debtor will nonetheless be ineligible for subchapter V relief unless the insurance proceeds are paid to the debtor before the debtor files for bankruptcy.²⁴⁹ Additionally, small businesses should be aware of the CARES Act's sunset provision that reverts the \$7,500,000 debt limitation back to \$2,725,000 on March 27, 2021.²⁵⁰ Pending further Congressional action extending or increasing the debt limitation, debtors that currently breach the usual \$2,725,625 debt limitation will have until March 27, 2021 to file for subchapter V bankruptcy.²⁵¹ Should these debtors bet their odds in obtaining BI insurance proceeds, they could miss the opportunity to file for bankruptcy under subchapter V if they lose in their suit against the insurance company. Further, they will accrue even more debt through the lengthy insurance coverage litigation process.²⁵²

Therefore, although the debtor ultimately decides whether to file for bankruptcy under subchapter V,²⁵³ businesses should not rely on any potential BI insurance proceeds in making that decision. Doing so could cost companies even more money and could consequently remove them from subchapter V eligibility. These considerations are especially important for small businesses that pursue PPP loans.

B. Beware the PPP Loans

Although PPP loans carry loan forgiveness provisions,²⁵⁴ their confusing terms²⁵⁵ could result in many businesses inadvertently failing to follow through on their end of the loan. Thus, it would behoove companies to make certain they can abide by the loan's terms before seeking a PPP loan. Failing to do so could prove fatal for the business's finances. Additionally, the SBA's current PPP Borrower Application Form and a potential split in the federal circuit courts may render some already-bankrupt companies eligible for PPP assistance while leaving others to fend for themselves.

1. Evaluating the timing and necessity of PPP loans

Under the PPP, companies may seek up to \$10,000,000 from the SBA.²⁵⁶ Currently, the SBA guarantees that it will fully forgive PPP loans, but only if 100

²⁴⁹ See *id.* (requiring the amount of debt not exceed \$7,500,000 "as of the date of the filing of the petition or . . . of the order for relief" (emphasis added)).

²⁵⁰ See *id.* § 1113(a)(5), 134 Stat. at 311.

²⁵¹ See *id.*

²⁵² See *supra* note 245 and accompanying text.

²⁵³ See 11 U.S.C.A. § 1189(a) ("Only the debtor may file a plan under this subchapter.").

²⁵⁴ See *supra* note 126 and accompanying text.

²⁵⁵ See *supra* note 128 and accompanying text.

²⁵⁶ See *The CARES Act: A Reference Guide*, *supra* note 118, at 3.

percent of the loan proceeds are used toward approved purposes.²⁵⁷ Because the PPP has placed such strict limitations for activities in which the loans can be used, borrowers should beware of co-mingling PPP loans with other funds.²⁵⁸ Any blip in the company's accounting could render the company liable for up to \$10,000,000.²⁵⁹

Indeed, some companies that initially sought PPP loans subsequently returned the loans based, in part, on government warnings.²⁶⁰ As recently as November 2020, the SBA's inspector general described concerns there are "strong indicators of widespread potential abuse and fraud" related to the PPP after estimates demonstrated there may be tens of thousands of ineligible companies that received the loans.²⁶¹ The SBA also released information detailing each entity that obtained

²⁵⁷ See *supra* note 126 and accompanying text. Presumably, the loans will be forgiven if companies use them for approved expenses under the CRRSAA amendments. See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133-812, div. N., tit. III, § 304, 116th Cong. (2020) (enacted at Pub. L. No. 116-260) (expanding approved expenses to include operating expenses, property damage costs that arose from civil unrest over the summer of 2020, supplier costs, and worker protection expenditures).

²⁵⁸ See Mark W. Schweighofer & Rebecca O'Neill, *Tips for Spending PPP Loan Proceeds and Maximizing Loan Forgiveness*, STEIN SPERLING BENNETT DE JONG DRISCOLL P.C. (Apr. 15, 2020), <https://steinsperling.com/tips-for-how-to-spend-ppp-loan-proceeds-and-maximizing-loan-forgiveness/> ("To facilitate [the process of receiving a PPP loan], a business owner's first step upon receiving PPP loan proceeds should be to open a separate bank account to hold proceeds, and to ensure that they are not comingled with any other business funds."). But see Chad Bumbaugh, *4 Accounting Considerations for Your PPP Funds*, STAMBAUGH NESS (Apr. 17, 2020), <https://www.stambaughness.com/blog/accounting-ppp-funds/> ("Our position is that Company's [sic] with sound accounting practices who aren't concerned about the visibility of activity outside of PPP usage can co-mingle funds."). Additionally, the terms of EIDL assistance are clear: A borrower that takes out a PPP loan cannot receive an EIDL for the same purpose as the PPP loan, and may not co-mingle funds from other loans for the same purpose as the PPP loan. See *The CARES Act: A Reference Guide*, *supra* note 118, at 5.

²⁵⁹ See Allyson B. Baker et al., *Turning to Forgiveness: Key Considerations After Receiving Payroll Protection Program Loan Funds*, VENABLE LLP (Apr. 17, 2020), <https://www.venable.com/insights/publications/2020/04/turning-to-forgiveness> (explaining how co-mingling of funds can lead to additional liability if loan funds are misused).

²⁶⁰ See Ben Popken, *Which companies are returning their PPP loans? Here's the list.*, NBC NEWS (July 7, 2020, 3:43 PM), <https://www.nbcnews.com/business/business-news/which-companies-are-returning-their-ppp-loan-here-s-list-n1194566> ("Facing public backlash, government warnings and private misgivings, more than a dozen companies and big businesses have so far announced that they have returned, or intend to return, small-business coronavirus relief loans issued by the [SBA]."). As noted, some public companies also returned PPP loans based on backlash that alleged the companies took money that should have gone to truly small businesses. See *id.* (discussing the negative publicity faced by large publicly traded entities who received PPP loans when smaller businesses were denied PPP loans); see also Kenny Herzog, *Which Public Companies Have Returned Their SBA PPP Loans?*, ENTREPRENEUR (May 26, 2020), <https://www.entrepreneur.com/article/349848> ("[P]lenty of . . . dining and hospitality chains, among other relatively solvent and resourceful businesses, have been called out for leveraging their sophisticated legal apparatus and relationships with large banks to outmuscle truly mom-and-pop outfits in the scramble for survival funds.").

²⁶¹ Ryan Tracy, *Evidence of PPP Fraud Mounts, Officials Say*, WALL ST. J. (Nov. 8, 2020, 9:04 AM), https://www.wsj.com/articles/ppp-was-a-fraudster-free-for-all-investigators-say-11604832072?mod=article_inline. Examples of this fraud include "corporations created after the pandemic began, businesses that exceeded workforce size limits . . . or those listed in a federal 'Do Not Pay' database because they already owe money to taxpayers." *Id.*

PPP funds and exactly how much assistance they received.²⁶² These findings and the December 2020 disclosure report lead experts to believe the Biden administration²⁶³ will prioritize preventing and prosecuting abuse of the system, especially as more loans are released as a result of the CRRSAA.²⁶⁴

Moreover, commentators anticipate a "surge" of subchapter V bankruptcy filings once Congress extinguishes all allocated PPP funds.²⁶⁵ This will likely be the case should businesses fail to meet the specific forgiveness terms of PPP loans.²⁶⁶ Thus, small businesses must determine whether seeking a PPP loan is in their best interests. Companies must be aware that failing to meet the PPP loan requirements could render them up to \$10,000,000 more in debt than they were previously.²⁶⁷ As such, they will no longer be eligible to file for bankruptcy under subchapter V if they exceed the \$7,500,000 debt limitation.²⁶⁸

Importantly, while the CRRSAA replenished PPP funds and expanded eligible expenditures, it nonetheless failed to increase the debt limitation under subchapter V or extend the timeframe for which the \$7,500,000 remains in effect.²⁶⁹ Although Congress may pass a third stimulus bill to supplement the CRRSAA in the coming

²⁶² EIDL, EIDL Advance, and PPP Data, SMALL BUS. ADMIN., <https://sba.app.box.com/s/5mydlnxutoq8wxecx2562baruz774si6> (last visited Feb. 5, 2021).

²⁶³ In the midst of the pandemic, former vice-president Joe Biden defeated President Donald Trump in the 2020 election. See Lindsay Wise et al., *Congress Certifies Joe Biden's Election Win Following Day of Turmoil*, WALL ST. J. (updated Jan. 7, 2021 6:42 AM), <https://www.wsj.com/articles/trump-allies-in-congress-challenge-bidens-election-win-11609929001>.

²⁶⁴ See Amanda Kramer et al., *Who Will Investigate PPP Fraud Under the Biden Administration?*, BL (Dec. 18, 2020, 4:01 AM), https://www.bloomberglaw.com/document/X5H47VPG000000?bna_news_filter=white-collar-and-criminal-law&jcsearch=BNA%2520000001763e31da1da1feff3155e20001#jcite ("Given the controversies surrounding the program, we expect the Biden administration to place a high priority on investigating and prosecuting PPP fraud. Such investigations are likely to go beyond the blatant fraud cases that have been brought so far and address more complex schemes carried out by corporations and small business owners.").

²⁶⁵ Vulpio, *supra* note 18 ("Subchapter V filings will likely surge once PPP funds run out, particularly among businesses who find themselves unable to meet the loan forgiveness criteria."). To date, law firms have "made nearly \$235 million over the first half of [2020] on the biggest bankruptcy cases[, which is] nearly double the amount of cash that firms hauled in for the same type of work in all of 2019." Meghan Tribe, *By the Numbers: The Big Law Stories That Mattered Most in 2020*, BL (Dec. 29, 2020, 5:32 AM), <https://news.bloomberglaw.com/us-law-week/by-the-numbers-the-big-law-stories-that-mattered-most-in-2020?context=search&index=2>.

²⁶⁶ See Vulpio, *supra* note 18.

²⁶⁷ See William S. Durr & Thomas J. Zamadics, Jr., *PPP Loan Forgiveness Denied—An Overview of the PPP Loan Review Decision and Appeal Process*, NAT'L L. REV. (Sept. 2, 2020), <https://www.natlawreview.com/article/ppp-loan-forgiveness-denied-overview-ppp-loan-review-decision-and-appeal-process> (noting a borrower who is denied PPP loan forgiveness in whole or in part must begin making payments on the balance of the loan amount).

²⁶⁸ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113(a)(1), 134 Stat. 281, 310 (2020) (codified as amended at 11 U.S.C.A. § 1182(1)(A) (West 2020)).

²⁶⁹ See Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133-812, div. N., tit. III, §§ 301–348, 116th Cong. (2020) (enacted at Pub. L. No. 116-260).

weeks,²⁷⁰ the specific provisions of that potential bill are unclear.²⁷¹ Moreover, Democrats' narrow margin in the Senate requires full support from all democratic senators.²⁷² The possibility of further stimulus, any changes to the subchapter V debt limitations, and the timing to file for bankruptcy under the heightened limitation are therefore slim in light of potential democratic opposition.²⁷³

Thus, like the considerations for BI insurance proceeds,²⁷⁴ small businesses must also consider the timing of their subchapter V filing.²⁷⁵ If the debtor waits to file for bankruptcy after March 27, 2021, subchapter V's debt limitation will decrease almost three-fold, dropping from \$7,500,000 to \$2,725,625.²⁷⁶ After March 27, 2021, should the debtor have breached the terms of the PPP loan, it is even more likely to be ineligible for subchapter V relief. Therefore, a small business that obtains a PPP loan should be cognizant of the timeframe in which it must abide by the terms of the loan. Companies must also evaluate their eligibility for PPP loans if they, or any of their owners, are currently in bankruptcy proceedings or have defaulted on a federal loan in the past seven years.

2. Eligibility for PPP assistance for bankrupt companies

In addition to determining whether additional loans are in an entity's best interest, small businesses must also be aware that, according to the PPP's Borrower

²⁷⁰ See Jeff Stein & Erica Werner, *\$2,000 stimulus checks could become a reality with Democratic control of the Senate*, WASH. POST (Jan. 6, 2021, 4:44 PM), <https://www.washingtonpost.com/us-policy/2021/01/06/georgia-election-2000-stimulus-checks/>; see also Lance Lambert & Anne Sraders, *Democrats plan to use Senate win to pass \$2,000 stimulus checks*, FORTUNE (Jan. 6, 2021, 8:00 PM), <https://fortune.com/2021/01/06/georgia-senate-runoff-ossoff-warnock-stimulus-checks-2000-dollars-covid-aid/>. This possibility arose from the results of the 2020 election, which flipped Senate control and the presidency to Democrats, "giving [Democrats] a monopoly on power in the nation's capital for the first time since President Barack Obama's first term." Stein & Werner, *supra*.

²⁷¹ See Stein & Werner, *supra* note 270 ("[I]t's not clear whether the House and Senate would vote on the [\$2,000 stimulus] checks as stand-alone legislation, or as part of a larger package. . . .").

²⁷² See Lambert & Sraders, *supra* note 270 ("Democrats will control the 50-50 split Senate with Vice President-elect Kamala Harris's tie-breaking vote. In order to pass legislation in the face of united Republican opposition, they would need every single Democratic vote. . . .").

²⁷³ See Jordan Williams, *Manchin on proposed round of \$2k checks: 'Absolutely not'*, THE HILL (Jan. 8, 2021, 12:52 PM), <https://thehill.com/homenews/senate/533355-manchin-on-proposed-round-of-2k-checks-absolutely-not> ("[Senator] Joe Manchin . . . voiced firm opposition to providing \$2,000 stimulus checks. . . ."). But see Rachel Sandler, *Will Democratic Sen. Joe Manchin Kill \$2,000 Checks? Not So Fast*, FORBES (Jan. 8, 2021, 3:19 PM), <https://www.forbes.com/sites/rachelsandler/2021/01/08/will-democratic-senator-joe-manchin-kill-2000-checks-not-so-fast/?sh=777a6fcb31ba> (explaining Senator Manchin's top priority is distributing COVID-19 vaccines, but "he could potentially support more [stimulus] checks if they were narrow in scope and targeted to people who really need[] them").

²⁷⁴ See *supra* Section III.A.

²⁷⁵ Vulpio, *supra* note 18 ("[S]mall businesses should carefully consider the timing of a Subchapter V filing. . . .").

²⁷⁶ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113(a)(5), 134 Stat. 281, 311 (2020) (enacted at Pub. L. No. 116-260).

Application Form,²⁷⁷ a debtor that has already filed for bankruptcy may not apply for a PPP loan.²⁷⁸ This form also indicates a debtor is ineligible for a PPP loan if it, or any of its owners or subsidiaries, are currently delinquent or have defaulted on a federal loan within the past seven years.²⁷⁹ Thus, as of January 2021, the SBA's PPP application form appears to reject Congress's amendments to the CARES Act and Bankruptcy Code under the CRRSAA that allowed small business debtors to obtain relief under the PPP.²⁸⁰

Notably, however, the CRRSAA does not *require* the SBA to allocate PPP loans to such entities.²⁸¹ Rather, it merely indicates small business debtors *may* obtain relief under the PPP *upon authorization by the SBA* and approval of a bankruptcy court.²⁸² In this regard, it appears Congress intended the SBA maintain broad discretion to determine PPP eligibility as a corollary of the existing section 7(a) loan program.²⁸³ Although litigation related to PPP eligibility for bankrupt debtors has focused on the first round of PPP loans before Congress passed the CRRSAA,²⁸⁴ challenges to the SBA's departure from the CRRSAA's allowance for PPP relief to small business debtors will likely similarly fail, given Congress's apparent deference to the SBA.²⁸⁵

²⁷⁷ JANUARY 2021 PPP BORROWER APPLICATION, *supra* note 157.

²⁷⁸ *See id.* ("If question[] (1) . . . below [is] answered "Yes," the loan will not be approved. . . . 1. Is the Applicant or any owner of the Applicant . . . presently involved in any bankruptcy?").

²⁷⁹ *See id.* ("If question[] . . . (2) below [is] answered "Yes," the loan will not be approved. . . . 2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?").

²⁸⁰ Compare Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, H.R. 133-812, div. N., tit. III, § 320, 116th Cong. (2020) (enacted at Pub. L. No. 116-260), with JANUARY 2021 PPP BORROWER APPLICATION, *supra* note 157. Notably, the CRRSAA is silent with regard to PPP eligibility related to previously bankrupt companies and debtors, only addressing companies currently in bankruptcy. *See* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 320.

²⁸¹ *See* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 320.

²⁸² *See id.* (explaining the amendments take effect when the Administrator of the SBA submits "a written determination that, subject to satisfying any other eligibility requirements, any debtor in possession or trustee that is authorized to operate the business of the debtor . . . would be eligible for a loan . . . under section 7(a)" and after authorization by a bankruptcy court); *see also* Division-by-Division Summary of COVID-19 Relief Provisions, *supra* note 142 ("[Section 320] [e]stablishes a special procedure in the bankruptcy process if the [SBA] Administrator determines certain small business debtors are eligible for [PPP] loans. . . . The provisions in this section would take effect *only* upon written determination by the [SBA] Administrator that certain small business debtors are eligible for [PPP] loans. . . ." (emphasis added)).

²⁸³ *See* Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act § 320; *see also supra* note 185 and accompanying text. *Accord* USF Fed. Credit Union v. Gateway Radiology Consultants, P.A. (*In re* Gateway Radiology Consultants, P.A.), No. 20-13462, 2020 WL 7579338, at *3 (11th Cir. Dec. 22, 2020) (noting the PPP Borrower Application includes similar questions related to bankruptcy as the existing section 7(a) application, and "the PPP was not created as a standalone program; instead it was added into [section] 7(a), albeit with several of that subsection's general eligibility requirements relaxed" (citations omitted)).

²⁸⁴ *See, e.g., In re* Gateway, 2020 WL 7579338; Hidalgo Cnty. Emergency Serv. Found. v. Carranza (*In re* Hidalgo Cnty. Emergency Serv. Found.), 962 F.3d 838 (5th Cir. 2020); Springfield Hosp., Inc. v. Carranza (*In re* Springfield Hosp., Inc.), 2:20-ap-01003 (Bankr. D. Vt. Jun. 22, 2020), *appeal granted*, No. 20-2884, 20-2890 (2d Cir. Dec. 9, 2020).

²⁸⁵ *See supra* note 282 and accompanying text.

The Eleventh Circuit, moreover, aptly noted the evaluation of an applicant's eligibility to repay the loan is a relevant consideration and "[t]hat [the SBA] fashioned its consideration of bankruptcy statutes into a streamlined and bright-line rule that would speed up decisions about whether PPP loans should be made is not implausible, irrational, or the product of arbitrary and capricious decisions making."²⁸⁶

Accordingly, small businesses should nonetheless be aware of this caveat. In an abundance of caution, bankrupt debtors, and debtors who have subsequently defaulted on federal loans, should not rely on PPP loans to assist them through the current economic downturn, as the SBA will likely deny relief. Furthermore, debtors must consider a potential dip in DIP lending when considering whether subchapter V relief is a viable option.

C. Will DIP Lending Dip?

DIP financing is crucial to the survival of a business in a chapter 11 bankruptcy that lacks liquidity.²⁸⁷ The impact of COVID-19, however, may tank DIPs' abilities to secure credit from lenders.²⁸⁸ Indeed, as more companies declare bankruptcy due to the pandemic's near-halt of the economy, the ability for every chapter 11 debtor to obtain DIP financing grows grimmer.²⁸⁹ This is due to the mathematical fact that DIP lenders will not be able to keep up with the growing bankruptcies that are expected to "surge" in the aftermath of the pandemic.²⁹⁰ DIP lenders simply may not

²⁸⁶ *In re Gateway*, 2020 WL 7579338, at *16.

²⁸⁷ See Robert L. Eisenbach III, *DIP Financing: How Chapter 11's Bankruptcy Loan Rules Can Be Used To Help A Business Access Liquidity*, COOLEY LLP: THE BUS. BLOG (Nov. 5, 2013), <https://bankruptcy.cooley.com/2013/11/articles/business-bankruptcy-issues/dip-financing-how-chapter-11s-bankruptcy-loan-rules-can-be-used-to-help-a-business-access-liquidity/> ("Companies in financial distress often find that their need for liquidity goes up just as the availability of traditional financing goes down.").

²⁸⁸ See Tiffany Hsu & Emily Flitter, *Businesses Face a New Coronavirus Threat: Shrinking Access to Credit*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/business/economy/coronavirus-business-credit-access.html> ("Companies of all sizes, from local businesses to blue-chip giants, have taken a big hit from the coronavirus pandemic which will gut companies' profits and affect not only their ability to keep operations afloat, but also their ability to borrow money."). But see Tom Califano et al., *COVID-19: The benefits of US chapter 11 relief in a time of economic crisis*, DLA PIPER (Mar. 19, 2020), <https://www.dlapiper.com/en/us/insights/publications/2020/03/benefits-of-chapter-11-to-companies-in-crisis/> ("While in the current climate [of a global pandemic], traditional financing may be extremely difficult to procure—particularly for a distressed entity—DIP financing provides a unique opportunity for lenders. In chapter 11, DIP lenders are typically afforded extraordinary protections and incentives for providing financing. . . .").

²⁸⁹ See Hsu & Flitter, *supra* note 288 (noting more companies declaring bankruptcy "could worsen the recession that's now widely expected and affect the financial markets—already stressed from stock-market plunges—where investors buy and sell debt issued by companies, making it even harder for companies to borrow").

²⁹⁰ See *id.* ("All of these businesses [that are losing money] are going to at some time have to re-up their loans, renew their loans, roll them over. With the decline in revenues the ability to borrow money is going to be very problematic." (internal quotation and citation omitted)); see also Vulpio, *supra* note 18 ("Subchapter

be willing to finance bankrupt businesses, especially small businesses with little to no assets to be used as collateral.

Compare the current COVID-19 economic crisis with the financial disaster brought about by the Great Recession.²⁹¹ From 2008 to 2010, over three million bankruptcies rocked the United States.²⁹² With them came "a drought of bankruptcy loans."²⁹³ A once multibillion-dollar lending market came to a screeching halt.²⁹⁴ Some companies took months to find a lender that was willing to provide DIP financing.²⁹⁵ Not only was DIP financing scarce, it was also expensive.²⁹⁶ Consequently, some debtors delayed filing for bankruptcy under chapter 11.²⁹⁷ Others that chose to file for chapter 11 relief were forced to convert to chapter 7 and liquidate their businesses because they could not maintain a steady cash flow during the restructuring process.²⁹⁸ In essence, due to the lack of available funding and

V filings will likely surge once PPP funds run out, particularly among businesses who find themselves unable to meet the loan forgiveness criteria.").

²⁹¹ The term "Great Recession" is a representation of "the sharp decline in economic activity" from December 2007 to June 2009, which is "considered the most significant downturn since the Great Depression." Chappelow, *supra* note 119.

²⁹² See Jay Heflin, *Pandemic likely to exceed Great Recession in number of bankruptcies*, WASH. EXAM'R (Apr. 13, 2020), <https://www.washingtonexaminer.com/news/pandemic-likely-to-exceed-great-recession-in-number-of-bankruptcies> ("[T]he financial crisis reached its peak in 2010 when nearly 1.6 million bankruptcies were filed. . . . In 2009, there were 1.4 million bankruptcies and 1.1 million in 2008. . . .").

²⁹³ See Emily Chasan & Caroline Humer, *Bankruptcy financing seen more costly as wave hits*, REUTERS (Jan. 12, 2009), <https://www.reuters.com/article/us-restructuring-loans/bankruptcy-financing-seen-more-costly-as-wave-hits-idUSTRE50B7KJ20090113> (stating the number of new DIP loans was about forty-six percent lower than the number issued in 2005); see also Jeffrey McCracken & Paul Glader, *'DIP' Loans Are Scarce, Complicating Bankruptcies*, WALL ST. J. (Oct. 17, 2008), <https://www.wsj.com/articles/SB122421475294443955> ("[T]he number of lenders willing to do DIP financing 'has shrunk in the recent month from 30-plus in the heydays of 2006-07 to maybe five or six now.'" (citation omitted)).

²⁹⁴ See McCracken & Glader, *supra* note 293 ("This multibillion-dollar corner of the lending market—debtor-in-possession and exit financing—has been rocked by . . . [a] recent, undisclosed decision to largely halt lending to companies in bankruptcy-court protection. . . .").

²⁹⁵ See Chasan & Humer, *supra* note 293 ("Companies . . . have said the credit crunch sent them scouring markets for months to locate debtor-in-possession, or DIP, financing that would allow them to keep operating during bankruptcy.").

²⁹⁶ See *id.* ("DIP financings are either not available in any significant size, or if they are available the pricing is scary. . . ."); see also McCracken & Glader, *supra* note 293 (explaining interest rates for bankruptcy financing doubled from 2007 to 2008).

²⁹⁷ See *Tight bankruptcy financing to hurt bondholders-report*, REUTERS (Nov. 10, 2008, 4:15 PM), <https://www.reuters.com/article/dip-bondholders-creditsights/tight-bankruptcy-financing-to-hurt-bondholders-report-idUSN1047135620081110>.

²⁹⁸ See, e.g., Order Pursuant to section 1112(a) of the Bankruptcy Code and Bankruptcy Rules 1017(f) and 1019 Converting Debtors' Chapter 11 Cases to Cases Under Chapter 7 of the Bankruptcy Code at 2, *In re BB Liquidating Inc. et al.*, No. 10-14997 (BRL) (Bankr. S.D.N.Y. July 16, 2013), ECF No. 2880 (granting the debtors' motion to convert the case from chapter 11 to chapter 7); see also *The Great Recession's Biggest Bankruptcies: Where Are They Now?*, FORBES (Aug. 10, 2011, 11:44 AM), <https://www.forbes.com/sites/steveschaefer/2011/08/10/the-great-recessions-biggest-bankruptcies-where-are-they-now/#3fb0a6a34b7e> ("For some companies, like Lehman Brothers, a Chapter 11 bankruptcy filing amounts to death."); McCracken & Glader, *supra* note 293 ("Without the lending lines, companies that would normally survive bankruptcy will have to quickly sell assets. Potential buyers may not be able to borrow either, meaning companies could be forced to liquidate immediately instead of working out their problems.").

surplus in bankruptcies, companies that were able to secure and afford DIP financing were few and far between.

Now, in 2021, the COVID-19 crisis is poised to deliver an onslaught of bankruptcies that exceed the number of bankruptcies filed in the midst of the Great Recession.²⁹⁹ Over the past several years, companies have borrowed historical levels of debt.³⁰⁰ Combining the record level of debt with the COVID-19 business shutdowns, the Federal Reserve has estimated that consumers and businesses will file between 200,000 and 1,000,000 bankruptcies over the next year.³⁰¹ Thus, similar to the lack of DIP lending during the Great Recession due to the tight lending market,³⁰² the United States is facing another dip in DIP lending. Lenders may simply refuse to finance businesses that lack assets to use for collateral or that are unable to operate their businesses during the state shutdowns.³⁰³ Although DIP lenders are typically persuaded to finance bankrupt companies by "extraordinary protections and incentives,"³⁰⁴ DIP financing is only possible upon consent of primed secured creditors or the court's approval that the primed secured creditors' interests will be "adequately protected."³⁰⁵ Courts may refuse to find that secured creditors' interests will be "adequately protected" given the overwhelming amount of debt

²⁹⁹ See Heflin, *supra* note 292 ("The coronavirus pandemic . . . will also create a surge in bankruptcies that is likely to eclipse that of the Great Recession.").

³⁰⁰ Califano et al., *supra* note 288 ("[A]s the US economy continued to grow in unprecedented fashion over the last several years, many companies industrywide increasingly took on significant and historically high levels of debt. The pandemic therefore may serve as an economic tipping point for what may have otherwise been an inevitable crisis for these particular companies." (footnote omitted)); see also George Melloan, *A Reckoning for Indebted Companies*, WALL ST. J. (Mar. 16, 2020, 6:40 PM), <https://www.wsj.com/articles/a-reckoning-for-indebted-companies-11584398416> ("The danger [of COVID-19 threatening the global economy] is heightened by the heavy load of debt American corporations have piled up as they have taken advantage of low-cost borrowing.").

³⁰¹ See Heflin, *supra* note 292 ("Economists from the Federal Reserve expect between 200,000 and 1 million bankruptcies will be filed over the next 12 months."); see also Anita Sharpe, *Record Bankruptcies Predicted in Next Year as Unemployment Soars*, BLOOMBERG (Apr. 10, 2020, 5:00 AM), <https://www.bloomberg.com/news/articles/2020-04-10/record-bankruptcies-predicted-in-next-year-as-unemployment-soars?sref=h5EZFUoq> ("New research from economists at three Federal Reserve banks shows coronavirus-related bankruptcies could rise by 200,000 to reach almost 1 million, unless government stimulus programs offset the increase.").

³⁰² See Chasan & Humer, *supra* note 293 ("[T]ight lending markets now mean many companies must rely on existing lenders or other parties with a stake in the bankruptcy's outcome to provide the DIP.").

³⁰³ See Leslie A. Pappas, *Surge of Bankruptcies Will Be Next Virus Curve to Flatten*, BL (Apr. 20, 2020, 5:45 AM), <https://news.bloomberglaw.com/bankruptcy-law/surge-of-bankruptcies-will-be-next-virus-curve-to-flatten> ("Companies that file [for bankruptcy] while the economy is on hold may have trouble selling assets or getting bankruptcy loans.").

³⁰⁴ Califano et al., *supra* note 288 (stating DIP lender protections and incentives include "attractive interest rates, super-priority liens and claims . . . and even the ability to 'prime' other senior secured lenders under certain circumstances"); see also Eisenbach III, *supra* note 287 ("The Bankruptcy Code offers a way to give the lender comfort that the loan will not be challenged.").

³⁰⁵ A DIP must prove "adequate protection" under three scenarios: when the automatic stay is in effect; when it uses, sells, or leases a secured creditor's collateral; and when it proposes to prime a secured creditor's lien with an additional lien. See 11 U.S.C. §§ 362(d), 363(e), 364(d) (2018). See 11 U.S.C. § 361 for ways a DIP can prove "adequate protection."

companies have accrued in the past several years and the potential outcry for DIP financing that will come with a surge of bankruptcies amid the pandemic. Without these certifications, the court will not approve the DIP financing, and the DIP lenders will likely refuse lending without any of the typical "extraordinary protections and incentives."³⁰⁶ Nonetheless, in an attempt to rebuild the global economy, courts may be willing to relax the "adequate protection" requirement for primed liens, therefore increasing the amount of DIP financing available to chapter 11 debtors.³⁰⁷ Courts may opt for this option, if possible, to avoid conversion from chapter 11 to chapter 7. Indeed, companies that filed for chapter 11 relief before or during the COVID-19 crisis are already converting to chapter 7.³⁰⁸ Too many conversions to chapter 7, thereby liquidating businesses' assets, could result in an even more catastrophic economic downturn.³⁰⁹

The results of COVID-19 on DIP lending and, indeed, the entirety of business objectives, remain to be determined until the pandemic subsides. In the meantime, courts should look to minimize costs for both litigants and the government. Accordingly, courts should consider applicable precedent from other chapters of the Bankruptcy Code when presented with novel issues under the newly enacted subchapter V of chapter 11.

IV. TO FURTHER THE INTERESTS OF THE SBRA, BANKRUPTCY COURTS SHOULD LOOK TO APPLICABLE CHAPTER 12 AND CHAPTER 13 PRECEDENT FOR GUIDANCE

Prior to Congress passing the SBRA, thereby creating subchapter V, small businesses that filed for chapter 11 relief were often "the least likely to reorganize successfully."³¹⁰ This was due to the costly reorganization process that small

³⁰⁶ See Califano et al., *supra* note 288; see also Eisenbach III, *supra* note 287 (explaining the debtor "will [either] need the existing lender to consent or will have to convince the Bankruptcy Court that the existing lender's lien position will be 'adequately protected'").

³⁰⁷ See 11 U.S.C. § 361 (describing the "adequate protection" requirements).

³⁰⁸ See, e.g., Order (I) Converting Their Chapter 11 Cases to Cases Under Chapter 7, (II) Establishing a Deadline for Filing Final Chapter 11 Fee Applications and Setting a Hearing Thereon, and (III) Granting Related Relief at 2, *In re Art Van Furniture, LLC*, No. 20-10553 (CSS) (Bankr. D. Del. Apr. 6, 2020), ECF No. 263 (granting motion to convert case from chapter 11 to chapter 7); see also Pappas, *supra* note 303 ("Companies that had already filed for bankruptcy when the pandemic hit are showing signs of the unique challenges ahead. Michigan-based retailer Art Van Furniture LLC filed for Chapter 11 protection in March. . . . Eleven days later . . . stay-at-home orders forced the company to close all stores, stop its going-out-of-business sales, and halt furniture deliveries. . . . Now, less than a month after filing for bankruptcy, Art Van is in Chapter 7 liquidation.").

³⁰⁹ See Ekvall & Evanston, *supra* note 77 (explaining when a debtor files a chapter 7 case, "[a] trustee is appointed to liquidate the assets of the bankruptcy estate and distribute the proceeds to the debtor's creditors"); see also Pappas, *supra* note 303 (highlighting how "more than 1,000 employees have lost their jobs and health care" after one company filed for chapter 7 liquidation).

³¹⁰ H.R. REP. NO. 116-171, at 3 (2019) (quoting H.R. REP. NO. 109-31, at 3 (2005)); see also Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 COM. L.J. 297, 325 (1992) (finding only approximately 6.5% of debtors that elected for chapter 11 relief survived as a rehabilitated entity).

businesses with little to no assets could not afford.³¹¹ As a result, many small businesses were forced into the chapter 7 liquidation process, without the ability to rehabilitate and continue operating the company.³¹² Both the National Bankruptcy Conference and the American Bankruptcy Institute submitted recommendations to Congress to amend the Bankruptcy Code, which created a backdrop upon which Congress developed subchapter V.³¹³

The purpose of enacting subchapter V in chapter 11 of the Bankruptcy Code was to "streamline the bankruptcy process by which small businesses debtors reorganize and rehabilitate their financial affairs."³¹⁴ In doing so, subchapter V contains the following three key features:

(1) [R]equiring the appointment of an individual to serve as the trustee in a chapter 11 case filed by a small business debtor, who would perform many of the same duties required of a chapter 12 trustee; (2) [R]equiring such private trustee to monitor the debtor's progress toward confirmation of a reorganization plan; and (3) [A]uthorizing the court to confirm a plan over the objection of the debtor's creditors, providing such plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.³¹⁵

Since Congress's implementation of subchapter V, commentators have noted similarities between the subchapter and other chapters of the Bankruptcy Code—namely, chapter 12 and chapter 13.³¹⁶ The question remains, then, how bankruptcy courts will apply existing chapter 12 and chapter 13 precedent to any disputes arising under subchapter V.³¹⁷ To further the purpose of subchapter V in streamlining the chapter 11 bankruptcy process, courts should apply applicable precedent from prior chapter 12 and chapter 13 cases when presented with novel issues under subchapter V.

³¹¹ See H.R. REP. NO. 116-171, at 3; see also *Too Broke to Go Bankrupt?*, *supra* note 41 (noting fees imposed on chapter 11 debtors contribute to the increasing difficulties small businesses face during reorganization).

³¹² See H.R. REP. NO. 116-171, at 2-3 ("If a chapter 11 case is unsuccessful, the case is usually converted to one under chapter 7. . . . Not surprisingly, while most chapter 11 business cases are filed by small business debtors, they are often 'the least likely to reorganize successfully.'" (quoting H.R. REP. NO. 109-31, at 3)); see also Ekvall & Evanston, *supra* note 77 (explaining while filing chapter 11—instead of chapter 7—would allow a small business to maintain control over operations, it may not be able to afford it).

³¹³ H.R. REP. NO. 116-171, at 4.

³¹⁴ *Id.* at 1.

³¹⁵ *Id.* at 4.

³¹⁶ See Barber, *supra* note 80 ("The trustee is not an operational trustee but rather serves in a role similar to a Chapter 12 or 13 trustee in disbursing plan payments."); see also Haskell & Chmurski, *supra* note 68 ("Cases filed under Subchapter V have similarities to cases under Chapters 12 and 13.").

³¹⁷ See Barber, *supra* note 80 ("It is also unclear how courts will apply prior Chapter 12 and Chapter 13 precedents to new Subchapter V cases.").

Understandably, some disputes will simply not be comparable to chapter 12 and chapter 13 cases, as subchapter V is fundamentally different because it only applies to qualified debtors.³¹⁸ By adopting existing case precedent from applicable chapter 12 and chapter 13 cases, however, both litigants and the courts will save the time and expense of drawn-out litigation and will be able to further the purpose of subchapter V—streamlining the bankruptcy process.

CONCLUSION

Congress's addition of subchapter V in chapter 11 of the Bankruptcy Code seemed to strike the balance between chapter 7 and chapter 11 for which commentators advocated since Congress's passage of the BAPCPA in 2005.³¹⁹ When subchapter V went into effect in February 2020, Congress did not anticipate that the United States' economy would screech to a sudden halt due to a global pandemic.³²⁰ The international COVID-19 crisis resulted in states across the country shutting down non-essential businesses for an undisclosed period of time.³²¹ Due to thousands of mandated business closures, and therefore, lack of cash flow, small businesses may not survive the shutdowns. As a result, commentators anticipate a "surge" of bankruptcies in the upcoming months.³²²

Importantly, small business owners forced into bankruptcy must be aware of several factors relevant to subchapter V bankruptcy.³²³ First, small business owners should recognize the current debt limitation under subchapter V. The CARES Act increased the debt limitation applicable to debtors under subchapter V from \$2,725,625 to \$7,500,000 until March 27, 2021.³²⁴ Nonetheless, business owners should not rely upon any potential BI insurance proceeds to help them maintain a debt below the limitation of subchapter V.³²⁵ Additionally, businesses should be cognizant of all terms under any PPP loan they solicit.³²⁶ Failure to abide by all terms of the PPP loans could result in revoked loan forgiveness, thereby adding up to \$10,000,000 of debt in addition to what the company already owed.³²⁷ Furthermore, by comparing the current economic crisis to that of the Great Recession, it can be

³¹⁸ See 11 U.S.C.A. § 1182(1)(A) (West 2020) (exhibiting the requirements a debtor must meet to file for bankruptcy under subchapter V in chapter 11 of the Bankruptcy Code).

³¹⁹ See Ekvall & Evanston, *supra* note 77; see also H.R. REP. NO. 116-171, at 4 ("Notwithstanding the 2005 Amendments, small business chapter 11 cases continue to encounter difficulty in successfully reorganizing.").

³²⁰ Vulpio, *supra* note 18.

³²¹ See Mervosh et al., *supra* note 20.

³²² See Vulpio, *supra* note 18 ("Subchapter V filings will likely surge once PPP funds run out, particularly among businesses who find themselves unable to meet the loan forgiveness criteria.").

³²³ See *supra* Part III.

³²⁴ See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113(a)(1), (5), 134 Stat. 281, 310–11 (2020).

³²⁵ See *supra* Section III.A.

³²⁶ See *supra* Section III.B.

³²⁷ See *supra* Section III.B.

surmised that DIP lenders may be few and far between.³²⁸ As such, debtors must be aware of the implication arising from the lack of DIP financing—namely, a potential for their chapter 11 reorganization cases being converted to chapter 7 liquidation.³²⁹ Accordingly, planning and timing of bankruptcy proceedings are crucial. To further the purpose of subchapter V, bankruptcy courts should adopt any applicable precedent from existing chapter 12 and chapter 13 cases to new subchapter V cases, thereby saving the time and expense of litigation.³³⁰ While the exact implications of the COVID-19 crisis remain unclear, business owners must be informed about all possible scenarios to protect their companies from liquidation and to maintain the global economy.

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³²⁸ See *supra* Section III.C.

³²⁹ See *supra* Section III.C.

³³⁰ See *supra* Part IV.