REHABILITATING BANKRUPTCY REFORM

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I. Introduction

From a creditor's perspective, the equitable powers of the bankruptcy judge can seem a vexatious force. Actions that further the central bankruptcy policy to maximize value for all parties to a bankruptcy case[1] come at the expense of aggressive creditors who would otherwise overdraw from the common pool.[2] Accordingly, constituents who deal in the shadow of bankruptcy tend to seek defenses to blunt the force of the Bankruptcy Code's[3] rehabilitative aims, at least as applied to their individual interests. This Article explores legislative trends that increasingly exempt certain vocal or powerful creditor groups from the reach of bankruptcy equity. These trends have assumed a dominant role, largely to the exclusion of competing policies, in the recent Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[4]

The last thirty years have seen the Bankruptcy Code expand to accommodate protections obtained by various creditor constituencies and other interest groups.[5] Buoyed by rising attention to neoclassical theories of economics, which extol the virtues of certainty and predictability in bankruptcy,[6] these reforms are increasingly accomplished by replacing flexible, judge-driven stan-

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[1] *See, e.g.*, Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 Chap. L. Rev. 173, 187 (2000) ("The [Supreme] Court has recognized two overarching policies that animate the Bankruptcy Code: (a) the rehabilitation of debtors, and (b) the maximization of value and fair and equitable treatment of similarly situated creditors.").

[2] The "common pool" theory of bankruptcy, expounded by Professor Thomas H. Jackson, relies on the notion that creditors, left to their own devices, would pursue self-interested actions that would deplete the common pool of funds available to the wider creditor body. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857, 862 (1982). According to this theory, federal bankruptcy law serves to resolve the common-pool problem by providing a centralized mechanism to maximize creditors' collective returns. Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 Ariz. L. Rev. 801, 803 (1997).

[3] The Bankruptcy Code appears in title 11 of the United States Code. *See* 11 U.S.C. §§ 101–1532 (2006).

[4] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified at 11 U.S.C. §§ 101–1532 (2006)).

[5] *See infra* Part II.C.4.

[6] *See* Diane Lourdes Dick, *Confronting the Certainty Imperative in Corporate Finance Jurisprudence*, 2011 Utah L. Rev. 1461, 1469–70 (2011) (explaining the rising influence of "Chicago School" economics on corporate finance and bankruptcy jurisprudence).

dards with bright-line rules.[7] This shift in legislative design serves to solidify participants' entitlements in bankruptcy by limiting the amount of post hoc judicial activity that might undermine the expectations of bargaining parties.[8] BAPCPA's emphasis on rules, however, has increased the opportunities for non-cooperative conduct in bankruptcy and encouraged key participants to favor the debtor's early liquidation. These amendments drain debtors'[9] liquidity and impose new procedural hurdles to reorganization. Working together, BAPCPA's reforms have distanced Chapter 11 from its normative foundations and undermined some of BAPCPA's own aims. Many of BAPCPA's amendments are poor substitutes for the careful balances struck in prior reform efforts. Following these reforms, reorganization under Chapter 11 has proved an unattainable goal for many debtors seeking bankruptcy protection.

The recent experiences of retailers in Chapter 11 bankruptcy provide a useful lens through which to view the limitations of BAPCPA's rules-based reforms. Following BAPCPA, Borders,[10] Linens & Things,[11] Sharper Image,[12] Circuit City,[13] Steve and Barry's,[14] Mervyn's,[15] Friedman's Jewelry,[16] Gottschalks,[17] and numerous other retailers have sought liquidation within mere months of filing for Chapter 11 bankruptcy protection.

Whether the bankruptcy laws should serve to rehabilitate such distressed businesses is the subject of a longstanding and hard-fought debate among bankruptcy scholars.[18] Nevertheless, it is generally agreed that bankruptcy law should, at the very least, maximize the value of the debtor's assets to achieve the greatest return for creditors.[19] BAPCPA undermines this goal by granting piecemeal benefits to the most vocal constituencies and subjecting reorganization cases to rigid, often unrealistic time frames.[20] These reforms appear to encourage liquidations, leaving little room for the market to determine whether an alternative course would have enhanced the value of the bankruptcy estate.[21]

In the process of bankruptcy reform, the values of cohesive interest groups[22] tend to carry greater weight than the diffuse and difficult-to-organize

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[7] *See infra* Part III.
[8] This trend is not unique to the bankruptcy arena. Indeed, a rising interest in passive enforcement of contractual rights and strict construction of statutory text has been well documented in other areas of law. *See* Dick, *supra* note 6, at 1470 (broadly examining these trends in the realm of corporate finance).
[9] In this Article, I use the term "debtor" to refer to any debtor-in-possession and to refer to any trustee appointed to administer a debtor's case pursuant to section 322 of the Bankruptcy Code.
[10] *In re* Borders Group, Inc., No. 11-10614 (MG) (Bankr. S.D.N.Y. 2011).
[11] *In re* Linens Holding Co., No. 08-10832 (CSS) (Bankr. D. Del. 2008).
[12] *In re* Sharper Image Corp., No. 08-10322 (KG) (Bankr. D. Del. 2008).
[13] *In re* Circuit City Stores, Inc., No. 08-35653 (KRH) (Bankr. E.D. Va. 2009).
[14] *In re* Stone Barn Manhattan, LLC, No. 08-12579 (ALG) (Bankr. S.D.N.Y. 2010).
[15] *In re* Mervyn's Holdings, LLC, No. 08-11586 (KG) (Bankr. D. Del. 2008).
[16] *In re* Friedman's Inc., No. 08-10161 (CSS) (Bankr. D. Del. 2008).
[17] *In re* Gottschalks Inc., No. 09-10157 (KJC) (Bankr. D. Del. 2009).
[18] *See infra* Part II.C.4.
[19] Stephen J. Lubben, *The "New and Improved" Chapter 11*, 93 KY. L.J. 839, 843 (2004).
[20] *See infra* Part IV.
[21] *See infra* Part IV.E.
[22] Creditor groups and bankruptcy professionals are among those groups with a significant degree of influence on the shape of bankruptcy laws. *See generally* DAVID A. SKEEL, JR.,

interests of debtors, their employees, and the abstract "public interest."[23] Particularly in robust economic times, broader social values served by bankruptcy tend to cede ground to the goals and desires of vocal interest groups.[24] BAPCPA was enacted in a time of economic prosperity, but now must be evaluated in light of challenging economic conditions. From this vantage point, the value of Chapter 11's former adaptability comes into sharper focus. The post-BAPCPA experiences of retail debtors clarify key principles that should guide Congress in future bankruptcy legislation.

In this Article, Part II uses principles of public choice theory to explore the history of bankruptcy reform. Part III discusses the origins and the limitations of BAPCPA's emphasis on rules-based reforms. Part IV discusses the impact of four of BAPCPA's amendments on retail debtors. Part V suggests how the structure of BAPCPA's reforms could be altered to mitigate BAPCPA's failings. Finally, Part V establishes that, even if one distrusts the oversight of the bankruptcy judge, standards-based reform is preferable to rules-based reform.

II. Public Choice Theory and Bankruptcy Reform

A. *Public Choice Theory*

Public choice theory draws on principles of economics to explore matters of political science.[25] Starting with the premise that individuals involved in the political sphere tend to act in furtherance of their rational self-interest, public choice scholars attempt to explain the effect of such motivations on the legislative process.[26] Under the umbrella of public choice, interest-group theorists contend that rational legislators may enact legislation to favor organized groups over broader social values.[27]

Interest-group theory begins with the understanding that voters affect legislation by electing their representatives and by communicating their desires to those representatives.[28] Standing alone, an individual voter is unlikely to have a

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Debt's Dominion: A History of Bankruptcy Law in America 21–70, 212–37 (2001) (cataloguing the impact of interest groups on the lawmaking process throughout the history of U.S. bankruptcy laws); *see also infra* Part II.C.

[23] *See, e.g.*, Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 Stan. L. Rev. 311, 341–46 (1993) (reviewing public choice theory in Chapter 11 reorganization); *see also infra* Part II.A–B.

[24] William C. Whitford, *What's Right About Chapter 11*, 72 Wash. U.L.Q. 1379, 1403–04 (1994).

[25] David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 Vand. L. Rev. 647, 651 (1997) (reviewing Maxwell L. Stearns, Public Choice and Public Law: Readings and Commentary (1997)).

[26] *Id.* at 652.

[27] *See generally* Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 34 (1971) (setting out a theory of groups and organizations); *see also* Block-Lieb, *supra* note 2, at 819; Skeel, *supra* note 25, at 652 (explaining that because interest groups are generally better informed than individual voters, and provide political funding, legislators tend to respond to their interests).

[28] Block-Lieb, *supra* note 2, at 820 ("If voters are displeased with the statutes enacted by their representatives, they can, in the next election, vote for other candidates . . . . Alternatively, voters can seek to influence legislation prospectively . . . by making their opinions on proposed statutes known to their representatives.").

meaningful impact on either an election or an existing legislator's stance on pending legislation.[29] Accordingly, individuals tend to join interest groups in order to exert greater influence on the legislative process.[30] Interest groups are generally more informed and more vocal than the average voter.[31] Legislators, it follows, are more likely to learn of their interests.[32] Additionally, because interest groups provide a significant source of funding to legislators, "legislators have a tremendous incentive to be responsive to interest group perspectives."[33]

The impact of interest groups on the legislative process may be particularly pronounced in cases where the legislation involves complex or technical issues, as is the case with bankruptcy reform.[34] In these circumstances, fewer legislators will have the time or inclination to become fully-informed of the content and the effect of legislation, and may rely more heavily on their committees and staff.[35] These parties may rely heavily on information provided by organized interests.[36] Interest groups' dominance over the supply of information may distort a legislator's understanding of an issue, causing the legislator to approve legislation favoring individual interests, in the belief that she is acting for the public good.[37] Complicated and technical statutes may, more cynically, allow legislators and interest groups to disguise hidden deals by couching the legislation's purpose in terms of the public interest.[38]

Among various interest groups, those that are smaller and focused on discrete issues have a comparatively greater impact on the legislative process. Smaller groups face fewer free-rider problems.[39] Additionally, their members are incentivized to participate by the promise of greater individual benefits from successful legislative initiatives.[40] Members of large interest groups face greater headwinds to organization, as the gains and losses associated with legis-

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29 *Id.*
30 *Id.* at 822.
31 *Id.* at 825; *see also* Skeel, *supra* note 25, at 652.
32 Block-Lieb, *supra* note 2, at 824.
33 Skeel, *supra* note 25, at 652.
34 Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 230–31 (1986); *see also* Block-Lieb, *supra* note 2, at 836.
35 Block-Lieb, *supra* note 2, at 825.
36 *Id.*
37 Macey, *supra* note 34, at 230–31. ("[The] control of information, particularly regarding complex issues, enables interest groups to 'distort congressmen's thinking on an issue—normally all an interest group needs to achieve its ends.' ") (quoting G. Easterbrook, *What's Wrong with Congress?*, ATLANTIC, Dec. 1984, at 70).
38 *Id.* at 232–33 (discussing such "hidden-implicit" deals between Congress and interest groups).
39 "Free-rider problems are said to exist because collectivization is costly to those who organize, although the benefits of organization, and the legislation that flows from it, accrue to everyone, whether or not they spent the time and effort to organize." Block-Lieb, *supra* note 2, at 822.
40 The members of small interest groups may risk more per-capita than members of a larger interest group. This increases the likelihood that a member or members of a small group "will find that his personal gain from having the collective good exceeds the total cost of providing some amount of that collective good." OLSON, *supra* note 27, at 34. Because these members "would be better off if the collective good were provided, even if they had to pay

lation are spread among a larger pool of beneficiaries.[41] Larger groups may additionally "face more effective opposition than small groups."[42]

While public choice theory provides valuable insights into the political process, its critics rightly note that its conclusions can be simplistic or incomplete.[43] Consideration of additional factors may augment public choice analysis, providing a fuller picture of the legislative process. Professor Mark Roe has placed a valuable gloss on public choice theory by examining the role of ideology in legislative change.[44] Roe concludes that "[t]he implicit public choice assumption that ideology doesn't count, or doesn't count much, is usually correct."[45] Nevertheless, "when the broad mass of average people have even a weak preference, and that preference is the same for most people," then ideology can impact the outcome of legislation.[46] Populist ideology, for example, has played a central role in past bankruptcy reforms.[47] More recently, a pervasive rhetoric in favor of "sanctity of contract" and "legal certainty" has impacted both the substance and the structure of bankruptcy amendments.[48]

B. *Interest Groups and Their Influence on Bankruptcy Laws*

Viewing bankruptcy reform through the lens of public choice theory reveals a number of interest groups with varying degrees of influence on the creation, amendment, and repeal of bankruptcy legislation. Consistent with interest-group theory, the more cohesive and organized groups have the greatest capacity to influence bankruptcy legislation. Their actual influence, however, varies according to factors including their incentive to shape bankruptcy reform, congressional receptiveness to their positions, and competing ideological considerations.[49]

1. *Secured Lenders*

Banks and secured lenders, for example, have a high degree of influence over commercial legislation,[50] but have historically played a limited role in

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the entire cost of providing it themselves," the existence of free riders is less likely to derail interest-group activity. *Id.*

41 Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 38 (1991).

42 *Id.* at 39.

43 Block-Lieb, *supra* note 2, at 837 (noting that public choice critics suggest that the theory "offers an incomplete, but not a wholly inaccurate, model of the political process.").

44 *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 31 (1991).

45 *Id.*

46 *Id.* (emphasis omitted).

47 *See* David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 WIS. L. REV. 465, 498 (1993).

48 Block-Lieb, *supra* note 2, at 863. *See also infra* Parts II.C.4 and III.A (discussing the influence of these principles on the development of recent bankruptcy laws).

49 For a more thorough discussion of the effect of various interest groups on bankruptcy reform see Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 54–58 (1997); Adler, *supra* note 23, at 341–46; Skeel, *supra* note 47, at 495–99.

50 Skeel, *supra* note 47, at 497 ("Banks are notoriously well organized and effective as lobbyists.").

bankruptcy reform.[51] "Because secured creditors have priority both inside bankruptcy and out, secured creditors are not so concerned about large issues such as the restrictiveness or generosity of bankruptcy law."[52] Instead, these creditors tend to adapt to bankruptcy legislation by adjusting the terms of their lending agreements with debtors.[53]

2. *Bankruptcy Professionals*

In contrast to secured lenders, bankruptcy professionals have exercised a great deal of influence over bankruptcy reforms.[54] While their experience and comprehensive understanding of the bankruptcy laws have historically assisted Congress in navigating the technicalities of bankruptcy legislation, this assistance carries the risk of self-interested behavior. Bankruptcy professionals rely on bankruptcy law for their livelihoods and have a significant interest in preserving or enhancing their individual status.[55] In recent years, these perceived detriments to the contributions of bankruptcy professionals have received increased congressional attention,[56] and Congress has reacted by nearly eliminating the bankruptcy bar from the legislative process.[57]

3. *Unsecured Creditors*

Unsecured creditors are a large and extremely diffuse group. Although these creditors have significant incentives to shape bankruptcy legislation,[58] organizational challenges prevent unsecured creditors from exercising much

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[51] David A. Skeel, Jr., *Bankruptcy Lawyers and the Shape of American Bankruptcy Law*, 67 FORDHAM L. REV. 497, 508 (1998). Secured creditors' interests in shaping bankruptcy legislation generally relate to minimizing administrative and other costs that may deplete their ultimate recovery. *Id.* at 508–09.

[52] *Id.* at 508. Of course, if bankruptcy amendments have a direct impact on banks' lending and collection activities, banks will lobby forcefully for favorable legislation. *See, e.g.*, SKEEL, *supra* note 22, at 98 (discussing bank lobbying against limitations on the right to setoff).

[53] *See* David A. Skeel, Jr., *The Past, Present and Future of Debtor-in-Possession Financing*, 25 CARDOZO L. REV. 1905, 1906–07 (2004) (discussing lenders' use of the financing arrangement as a governance device). Lenders' contractual influence over bankruptcy cases has increased steadily since the 1980s. Indeed, lenders now commonly influence the selection of managerial staff and dictate time frames for sales and liquidations. *Id.* at 1930.

[54] *See* Skeel, *supra* note 51, at 510.

[55] *See generally* SKEEL, *supra* note 22, at 73–100 (discussing the impact of the powerful and organized interests of the bankruptcy bar on the lawmaking process).

[56] *See* Melissa B. Jacoby, *The Bankruptcy Code at Twenty-Five and the Next Generation of Lawmaking*, 78 AM. BANKR. L.J. 221, 224 n.21–22 (2004) (collecting statements of distrust among congressional representatives, including a statement by Senator Grassley that bankruptcy professionals are a "tiny handful of fringe radicals who oppose bankruptcy reform [and] have waged a disinformation campaign worthy of a soviet commissar.").

[57] *See id.* at 221–22 ("[M]embers of Congress now hesitate—and may well refuse—to fix even typographical errors at the request of bankruptcy experts. These days, many members of Congress consider bankruptcy professionals part of the problem, not the solution."). *See also infra* text accompanying notes 149–150.

[58] Skeel, *supra* note 51, at 509 ("Indeed, in corporate bankruptcy there is a strong argument that unsecured creditors have the best perspective of any constituency. They, after all, are the ones who benefit most if a debtor's troubles are resolved efficiently, and suffer the most from inefficiency.").

collective influence on bankruptcy reform.[59] Under the label of "unsecured creditors," however, are a variety of industries and trade associations that have organized quite successfully to impact bankruptcy legislation. As discussed in greater detail below, a number of such associations have secured significant benefits from recent bankruptcy amendments.[60]

4. Debtors

Debtors in bankruptcy likewise stand to benefit from favorable legislation, but they have a very limited voice in the bankruptcy reform process. "Many potential debtors do not realize that they are likely to wind up in bankruptcy; and even if they did, both collective action problems and the disinclination to announce their financial distress to the world make their participation unlikely."[61] Before entering bankruptcy, most businesses hold outstanding debts, and may therefore identify more closely with the agendas pursued by secured and unsecured creditors.[62] Once in bankruptcy, debtors gain little new incentive to participate in the reform process, as any amendments likely would have only prospective effect.[63] Added to these challenges, debtors in bankruptcy typically face financial limitations on their lobbying activities, and their historically "stigmatized" nature may affect Congress's receptiveness to their interests.[64] Accordingly, debtors rarely advance their own agendas before Congress.[65] Instead, debtor-focused reforms typically follow economic panics, when ideological considerations assume increased importance, or arise as a package of reforms championed by bankruptcy professionals with complementary goals.[66]

C. History of Bankruptcy Reform in the United States

The development of U.S. bankruptcy laws reveals a longstanding give-and-take occurring primarily between organized creditor constituencies, bankruptcy professionals and populist or pro-debtor ideals.[67] In broad terms, challenging economic times tend to beget legislation that focuses on debtor

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59 *Id.* David Skeel argues that in addition to their significant collective action limitations, unsecured creditors are frequently silent in the legislative process because they can "price out" many of the adverse effects of debtor-friendly bankruptcy laws. *See id.* ("If bankruptcy is generous, creditors can charge higher interest rates, and they can reduce these rates where there is a stricter regime.").

60 *See, e.g.*, *infra* text accompanying notes 108–121 (listing a number of amendments favoring various interest groups).

61 Skeel, *supra* note 51, at 508.

62 *See, e.g.*, Block-Lieb, *supra* note 2, at 857.

63 SKEEL, *supra* note 22, at 81.

64 Block-Lieb, *supra* note 2, at 857 ("Except during periods of economic malaise, few are likely to lobby on behalf of debtors' interests. Debtors can be perceived as . . . immoral deadbeats or unlucky schmoes.").

65 *Id.* But, "if debtors' interests are put forward [individually] in Congress, they are more likely to be put forward by narrowly defined organizations of debtors." *Id.*

66 *See, e.g.*, *id.* at 860 ("When large segments of the American population suffer as a result of the nation's economic difficulties, public opinion may favor the provision of financial relief on humanitarian grounds."); *see also infra* Part II.C (noting where reforms benefitting debtors were promoted by the bankruptcy bar).

67 SKEEL, *supra* note 22, at 16.

rehabilitation, whereas healthier economies allow for greater influence from organized creditor groups.[68] The bankruptcy amendments enacted since the 1980s have featured a significant emphasis on organized creditor interests. While many of these amendments, standing alone, may rest on defensible normative foundations,[69] their collective effect on the bankruptcy process has drawn critique.[70] The impact of these reforms is exacerbated by the statutory design of many recent amendments, which secure interest groups' entitlements through the imposition of bright-line rules.[71]

1. Bankruptcy Reform in the Nineteenth Century

Congress first exercised its power to establish a federal bankruptcy law in 1800,[72] in response to the fallout from an economic crash in 1782.[73] The law was designed to last five years, but was repealed in three years due to complaints over the small dividends paid to creditors, the difficulty of traveling to federal courts, and perceived abuses of the law by speculators.[74] During the ninety-six years that followed, Congress enacted a series of bankruptcy laws on the heels of various economic panics, only to repeal them in healthier times.[75] Pressure for repeal generally arose from creditor groups, which objected to the low dividends paid, high fees and long delays, and the degree of control accorded to the courts.[76]

In 1898, following a twenty-year period without a federal bankruptcy law, Congress enacted the Bankruptcy Act of 1898 (the "1898 Act").[77] Commercial trade groups provided the initial pressure to pass the 1898 Act, but strong populist ideological forces tempered their interests, resulting in an Act with a signif-

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68 This statement omits a great deal of nuance from the history of bankruptcy reform, which is detailed in small part below and much more comprehensively in Professor Skeel's DEBT'S DOMINION, as well as Professor Tabb's *A History of the Bankruptcy Laws in the United States*. *See generally id.*; *see also* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995).

69 The normative basis of many such amendments has been challenged by commentators. *See* Block-Lieb, *supra* note 2, at 867 & n.364.

70 *See, e.g.*, *id.* at 806–07 n.20 (listing sources that discuss and evaluate the Bankruptcy Code amendments in the 1980s and 1990s); Richard Levin & Alesia Ranney-Marinelli, *The Creeping Repeal of Chapter 11: The Significant Business Provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 603, 603 (2005) (noting BAPCPA's responsiveness to interest-group agendas).

71 *See infra* Part III.

72 Article I of the United States Constitution gives Congress the authority "[t]o establish . . . uniform Laws on the subject of Bankruptcies . . . ." U.S. CONST. art I, § 8, cl. 4.

73 CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 18–19 (1972).

74 *Id.* at 19–20; *see also* Tabb, *supra* note 68, at 15.

75 Skeel, *supra* note 51, at 500 ("According to the traditional account, [early bankruptcy legislation] can be distilled to a single, recurring pattern: during severe economic downturns, Congress responded by enacting bankruptcy legislation; but when good times returned, Congress repealed its earlier handiwork.").

76 *See* Tabb, *supra* note 68, at 15–19 (describing the impetus for repeal of the Bankruptcy Acts of 1800, 1841, and 1867, respectively).

77 *Id.* at 23. Bankruptcy laws were extremely unpopular at the time, but panics in 1884 and 1894 "clearly exposed the need for some form of federal bankruptcy law." *Id.*; *see also* SKEEL, *supra* note 22, at 23 ("[S]tate laws suffered from serious jurisdictional limitations, and each new crisis brought calls for federal legislation.").

icant pro-debtor focus.[78] The 1898 Act remained in effect for eighty years, marking the "beginning of the era of permanent federal bankruptcy legislation" in the United States.[79] In the years following the passage of the 1898 Act and leading up to the Great Depression, creditor interests attempted to repeal the Act or, alternately, to whittle down its debtor-centric provisions.[80] While these groups succeeded in securing additional grounds for denying discharge and exempting more debts from discharge, they failed to effect a major shift in the normative priorities of the 1898 Act.[81]

2. *Early Twentieth Century and Depression-Era Reforms*

The Great Depression ushered in a flurry of reforms focused on debtor rehabilitation.[82] These laws broadened the availability of reorganization and curtailed many creditor collection activities.[83] Many of the reforms in this era reflect the strong influence of the bankruptcy bar, buttressed by ideological support for the expansive use of bankruptcy for business rehabilitation.[84] Amid these largely debtor-focused reforms, certain organized creditor groups managed to obtain legislation favorable to their interests as well. Railroad lessees, for example, received a carve-out from the force of the automatic stay, and banks successfully thwarted an attempt to treat setoffs as preferential transfers.[85]

In 1938, after several years of nearly constant bankruptcy legislation, Congress passed the Chandler Act.[86] The Chandler Act reworked several of the new reorganization laws into a unified structure: Chapter X for corporate reorganizations; Chapter XI for arrangements; Chapter XII for real property arrangements; and Chapter XIII for wage earners' plans.[87] The Chandler Act also altered the administration of bankruptcy laws and retooled both the substance and the procedure of liquidation bankruptcies.[88] The Chandler Act

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78 Tabb, *supra* note 68, at 24; SKEEL, *supra* note 22, at 37–39 (explaining how the interests of creditor organizations, as tempered by the countervailing influence of a pro-debtor ideological movement, produced the 1898 Act). Principally, the 1898 Act lifted many earlier restrictions on the debtor's right to discharge and allowed very few debts to be exempted from the discharge. Tabb, *supra* note 68, at 24. In addition to providing enhanced relief to debtors, the act provided a framework to "facilitat[e] the equitable and efficient administration and distribution of the debtor's property to creditors." *Id.* at 25.

79 *Id.* at 23.

80 WARREN, *supra* note 73, at 143.

81 *Id.* ("While the Act of 1898 has been frequently amended, and violently criticised [sic], it remains the law to-day [sic] . . . ."). Professor David Skeel attributes the staying power of the 1898 Act and subsequent bankruptcy legislation to the emergence of the bankruptcy bar. *See* Skeel, *supra* note 51, at 506 ("In social choice terms, the emergence of a bankruptcy bar created a structure-induced equilibrium that reinforced the influence of commercial organizations, and made it all but impossible to eliminate (or even sharply curtail) federal bankruptcy law.").

82 Tabb, *supra* note 68, at 28–29 (reviewing the many laws passed in this time period).

83 *Id.* at 28.

84 SKEEL, *supra* note 22, at 98.

85 *Id.*

86 Chandler Act, ch. 575, 52 Stat. 840 (repealed 1978).

87 Tabb, *supra* note 68, at 29–30.

88 For an expansive discussion of the Chandler Act's changes to the bankruptcy process, see *id.*

remained in effect for the next forty years, subject to occasional amendments to address discrete issues.[89]

3. The Bankruptcy Reform Act of 1978: A New System of Corporate Reorganization

In 1970, Congress responded to the rising numbers of bankruptcy filings and mounting dissatisfaction with the existing bankruptcy regime[90] by establishing the Commission on the Bankruptcy Laws of the United States.[91] Congress instructed the Commission to "consider[ ] . . . the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of bankruptcy administration, [and] the applicability of advanced management techniques to achieve economies in administration of the Act . . . ."[92] The Commission provided its report in 1973 and, after an additional five years of research and debate, Congress enacted The Bankruptcy Reform Act of 1978 (the "Reform Act").[93] While the Reform Act made substantial changes to the administrative structure of bankruptcy cases and the process of individual bankruptcy, this sub-Part focuses solely on its amendments to the corporate reorganization process.[94]

The Reform Act condensed the reorganization laws under the Chandler Act, combining aspects of Chapters X, XI, and XII into a single Chapter 11 process. It aimed to simplify Chapter 11, allowing a business to "[r]estructure [its] finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."[95] This emphasis on reorganization rested on the belief that in most cases, creditors will achieve a greater recovery where a business emerges from bankruptcy as a going concern.[96] Congress recognized that a rehabilitated business would maximize value for the business's creditors and shareholders, as well as for its customers, suppliers, employees, and nearby property owners.[97] The goal of

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89 *Id.* at 30. For example, in 1946, compensation for bankruptcy referees was shifted to a salary basis. In 1970, a new dischargeability scheme substantially reworked the mechanisms for obtaining a discharge. *Id.* at 31–32.

90 *See* Posner, *supra* note 49, at 61 ("The 1898 Act was itself complicated and vague, and it reflected needs produced by economic and social conditions, including a severe depression, that no longer existed in the second half of the twentieth century. Moreover, Congress had amended the 1898 Act many times, and courts had interpreted the 1898 Act and its amendments in an aggressive way, resulting in a law of bankruptcy that often bore little relation to the statutory text.").

91 Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468, 468–69.

92 *Id.*

93 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101–1330).

94 For an additional discussion of many other aspects of the Reform Act, see Tabb, *supra* note 68, at 36–37.

95 H.R. Rep. No. 95-595, at 220 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 [hereinafter 1977 House Report].

96 *See id.* Indeed, "[t]he premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap." *Id.*

97 *Id.* ("It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets."); *see also* Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129, 143 (2005) (discussing the rehabilitative focus of the 1978 Act); Eliza-

preventing the broader impact of a business failure on the local economy served as an additional justification for supporting business reorganizations.[98]

The Reform Act's reorganization provisions "represented a fairly even balance between the interests of the credit industry and debtors."[99] To encourage a debtor's managers to seek bankruptcy relief at a relatively early stage in a company's distress,[100] Congress crafted Chapter 11 to permit the debtor's management to remain in control of the company as "debtor in possession"[101] and expanded debtors' powers and protections under the bankruptcy laws.[102] The Reform Act balanced these rights with a variety of new or expanded benefits to creditors and equity holders.[103] The Reform Act's debtor-creditor balance relied heavily on the central authority of the bankruptcy judge, whom Congress endowed with significant discretion to allocate relief according to the equities of a dispute.[104]

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beth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775, 788 (1987) ("Congressional comments on the Bankruptcy Code are liberally sprinkled with discussions of policies to 'protect the investing public, protect jobs, and help save troubled businesses,' of concern about the community impact of bankruptcy, and of 'the public interest' beyond the interests of the disputing parties.").

98 Warren, *supra* note 97, at 787–88.

99 Tabb, *supra* note 68, at 36.

100 1977 House Report, *supra* note 95, at 231, 1978 U.S.C.C.A.N. at 6191 (recognizing "the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions . . . until it would be too late for them to be an effective remedy.").

101 *See* 11 U.S.C. §§ 1107(a), 1108 (2006). As debtor in possession, management may continue to run the business and make many day-to-day decisions without seeking court authority. *See id.* § 363(c)(1).

102 *See* Harvey R. Miller, *Chapter 11 in Transition—From Boom to Bust and Into the Future*, 81 Am. Bankr. L.J. 375, 386–87 (2007) (detailing debtor-focused provisions created as part of the Reform Act). Because the Reform Act is the first bankruptcy legislation passed in a time of relative economic stability, one might be surprised by the Reform Act's debtor-centric focus. Professor Skeel attributes this phenomenon to the interests of the various bankruptcy professionals involved in the Reform Act's enactment and also to muted pro-debtor interests responsive to the economic stagnation of the 1970s. Skeel, *supra* note 22, at 156–57.

103 1977 House Report, *supra* note 95, at 223–24, 1978 U.S.C.C.A.N. at 6182–84. These creditor-friendly amendments permitted creditors to, among other things, commence an involuntary case against a debtor, terminate the debtor's exclusivity power, propose a competing plan, or convert the case to a liquidation case under Chapter 7 of the Bankruptcy Code. The Bankruptcy Code further provides non-debtor entities with various due process protections, the right to request adequate protection (if secured creditors), and the absolute priority rule, a condition on the debtor's cramdown rights that "precludes the payment of junior claims as long as senior claims remain unsatisfied." *In re* Wabash Valley Power Ass'n, Inc., 72 F.3d 1305, 1313 (7th Cir. 1995); *see also* 11 U.S.C. § 303(b) (2006) (giving creditors the right to commence an involuntary case against a debtor); *id.* § 361 (giving creditors the right to adequate protection); *id.* § 363(e) (giving judge the authority to allow the use, sale or lease of property in the bankruptcy estate if necessary to provide adequate protection to creditors); *id.* § 707 (allowing creditors to request dismissal of a debtor's case or conversion to a liquidation case); *id.* § 1121(c) (allowing creditors to file a competing bankruptcy plan); Fed R. Bankr. P. 2002 (providing creditors with due process protections such as adequate notice).

104 *See, e.g.*, 11 U.S.C. § 1121(b), (d) (giving the bankruptcy judge discretion to terminate or extend exclusivity); *id.* § 363(b) (requiring judicial approval of any auction of the debtor's assets); *see also* Skeel, *supra* note 22, at 157 ("The compromises [offered by the Reform Act] generally satisfied creditors, yet offered additional protections to debtors and

4. *Reform and Rhetoric After 1978*

i. *Amendments following the Reform Act*

Since the passage of the Reform Act, Congress has continued to rework Bankruptcy Code provisions in response to, among other issues, Supreme Court and lower court decisions, the farm crisis in the 1980s, and rising bankruptcy filing rates.[105] Generalized complaints lodged by the credit industry and steady lobbying by individual interest groups have also encouraged reform,[106] to the extent that one prominent bankruptcy lawyer remarked, "[v]irtually every group with an effective lobbyist has come forward and worked its magic on Congress for a statutory provision that benefit[s] its special interests."[107] Amendments passed in the 1980s and 1990s provided new exemptions and protections to, among many others,[108] the consumer credit industry,[109] parties storing grain in grain storage facilities,[110] commercial real property lessors,[111] Mothers Against Drunk Driving,[112] parties to repurchase agreements,[113] timeshare purchasers,[114] labor unions,[115] secured parties holding interests in aircraft equipment, vessels, and rolling stock,[116] independent sales representatives,[117] certain transferees of interests in liquid and gaseous hydrocarbons,[118] financial institutions,[119] retirees,[120] and various real estate financiers.[121] The

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did so in a way that expanded the role of bankruptcy professionals, given that each compromise located the decisive decision-making authority squarely within the bankruptcy court.").

105 Tabb, *supra* note 68, at 37.

106 *Id.*

107 Miller, *supra* note 102, at 387–88.

108 The list that follows is substantially recreated from Block-Lieb, *supra* note 2, at 866–67. Professor Block-Lieb has written extensively on the legislative history of many of the amendments listed herein. *See, e.g.*, *id.*; Susan Block-Lieb, *Using Legislative History to Interpret Bankruptcy Statutes*, *in* BANKRUPTCY PRACTICE AND STRATEGY 2-1, 2-1–48 (Alan N. Resnick ed., 1987).

109 *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 301–324, 98 Stat. 333, 352–58 [hereinafter Act of 1984].

110 *Id.* at §§ 350–354, 98 Stat. 358–61.

111 *Id.* §§ 361–62, 98 Stat. at 361–63; Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 219, 108 Stat. 4106, 4128–29 [hereinafter Act of 1994].

112 Act of 1984, *supra* note 109, at § 371, 98 Stat. at 364.

113 *Id.* §§ 391–96, 98 Stat. at 364–66.

114 *Id.* §§ 401–04, 98 Stat. at 366–67; Act of 1994, *supra* note 111, at § 205, 108 Stat. at 4122–23.

115 Act of 1984, *supra* note 109, at § 541, 98 Stat. at 390–91.

116 Act of 1994, *supra* note 111, at § 201, 108 Stat. at 4119–21.

117 *Id.* § 207, 108 Stat. at 4123–24.

118 *Id.* § 208, 108 Stat. at 4124–25.

119 *See, e.g.*, 11 U.S.C. §§ 362(b)(6)–(7), 555, 556, 559, & 560 (2006) (each established during this period to allow financial institutions conducting derivative transactions to offset mutual claims notwithstanding the automatic stay, and to enforce ipso facto provisions).

120 Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, § 2, 102 Stat. 610 (1988) (amending various provisions of Chapter 11 to address payment of insurance benefits to retired employees).

121 *See, e.g.*, Act of 1994, *supra* note 111, at § 214, 108 Stat. at 4126 (extending protections over postpetition mortgages and security interests in rents); *id.* § 218, 108 Stat. at 4128 (limiting a single-asset-real-estate debtor's ability to defeat a secured creditor's request for relief from the automatic stay).

benefits extended to these groups range from an elevated priority status to waivers of the automatic stay and other procedural accommodations.[122]

These piecemeal amendments were enacted in a time of rising dissatisfaction with the debtor-friendly aspects of the Reform Act. Chapter 11, in particular, came under fire during the 1980s and early 1990s for its perceived "bias[ ] toward saving failing firms."[123] Critics argued that the debtor's management had too much power over the reorganization process[124] and that some judges allowed cases to drag on endlessly to the detriment of creditor interests.[125] The *Eastern Airlines* bankruptcy case served as a poster child for such criticism. Eastern's CEO stalled negotiations and postponed selling the company for years as its value steadily deteriorated. The company ultimately liquidated for a fraction of what the assets were worth at the commencement of the bankruptcy case.[126]

ii. Proceduralist Influence

Scholars grounded in the Law and Economics movement responded to this discord with calls to limit the purposes of Chapter 11 or to replace it with one of a variety of contracts-based alternatives.[127] These scholars, dubbed "proceduralists," argue that Chapter 11 should serve solely to eliminate common-pool problems[128] and maximize returns to creditors.[129] Proceduralists eschew any broader purpose for Chapter 11—preserving a business, saving

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122 *See* Block-Lieb, *supra* note 2, at 866–67. This state of affairs has led some to conclude that bankruptcy law "is so riddled with legal rules designed to benefit the narrow preferences of discrete interest groups rather than those of the public-at-large that it has compromised the potential rehabilitation of many financially distressed companies." *See* Peter A. Alces & David Frisch, On the UCC Revision Process: A Reply to Dean Scott, 37 WM. & MARY L. REV. 1217, 1238 (1996).

123 Daniel Altman, *Chapter 11? Or Time to Close the Books?*, N.Y. TIMES, Dec. 15, 2002, at B1 (quoting Professor Michelle J. White, economics professor at the University of California at San Diego).

124 Skeel, *supra* note 53, at 1916 (noting that the debtor's managers could use the benefits accorded under the Bankruptcy Code "to drag out the case, extract concessions from [debtors'] creditors, or both.").

125 *See* Stephen J. Lubben, *Accidental Convergence: Corporate Reorganization in Two Federal Systems*, 26 EMORY BANKR. DEV. J. 33, 35–37 (2009). Allegations of a pro-debtor bias on the part of the judiciary have been hotly disputed in bankruptcy literature. *See, e.g.*, Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 719 (1993) (concluding from empirical research that "[j]udicial restraint seems to be a norm in large reorganization cases.").

126 *See* Lubben, *supra* note 125, at 33.

127 *See, e.g.*, Barry E. Adler, *Finance's Theoretical Divide and the Proper Role of Insolvency Rules*, 67 S. CAL. L. REV. 1107, 1109–10 (1994) (proposing a "Chameleon Equity" model to replace bankruptcy legislation); Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1050 (1992) (proposing a conditional equity system to replace Chapter 11 bankruptcy); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 61–63 (1992) (reducing Chapter 11 to a default rule that contracting parties could contract around); *see also* Skeel, *supra* note 47, at 476–93 (evaluating these proposals); Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503, 510 (2001) (also evaluating these proposals).

128 *See* Jackson, *supra* note 2, at 864–65 n.34.

jobs, or committing other acts of judicial activism, all values that proceduralists attribute to a "traditionalist" bankruptcy paradigm.[130] According to Douglas Baird, a leading proceduralist scholar, "[f]irms must live or die in the market. All bankruptcy can do is ensure that fights among creditors and other investors . . . do not accelerate a firm's liquidation."[131]

Central to the proceduralist's vision of bankruptcy is a minimalist bankruptcy judge, tasked primarily with enforcing prepetition rights and entitlements.[132] Proceduralists generally disapprove of broader judicial interventions, except, in theory, where such actions might increase the value of the bankruptcy estate.[133] But because proceduralists doubt bankruptcy judges' capacity to distinguish between interventions that would enhance the value of the estate and those which would not, proceduralists generally seek to constrain the judge from taking any redistributive measures.[134]

While proceduralist theory has not inspired a major overhaul of the Chapter 11 process, such Law-and-Economics principles have impacted the design of recent bankruptcy reforms.[135] In addition, bankruptcy practice has adopted many features of proceduralist theory.[136] In many cases, "[t]he endless negotiations and mind-numbing bureaucratic process that seemed to characterize bankruptcy in the 1980s have been replaced by transactions that look more like the market for corporate control."[137] As a result of these shifts, earlier critiques of

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129 Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 579–80 (1998) (summarizing the proceduralist scholar's position as follows: "(1) the preservation of firms is not an independent good in itself; (2) ex ante effects are important; and (3) the judge, after controlling for the biases and weaknesses of the parties and resolving the legal disputes, must allow the parties to make their own decisions and thereby choose their own destinies"); *see also* Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559, 562–63 (2001) (summarizing proceduralist theories).

130 Baird, *supra* note 129, at 579 (summarizing the traditionalist scholar as believing that "(1) the preservation of firms (and therefore jobs) is an important and independent goal of bankruptcy; (2) contemplation of the rights and needs of the parties before the court matters more than the effects on incentives before the fact; and (3) bankruptcy judges should enjoy broad discretion to implement bankruptcy's substantive policies.").

131 *Id.* at 578.

132 Janger, *supra* note 129, at 572 (summarizing the proceduralist position and, in particular, the proceduralist's vision of the bankruptcy judge).

133 *Id.* at 575–76 (labeling this role of the bankruptcy judge as "the proceduralist 'should not' ").

134 *Id.* at 577 ("Baird argues that even if we assume that cases exist where the exercise of judicial discretion in order to facilitate an efficient (pareto superior) reorganization would be justified, bankruptcy judges are not capable of identifying them. If the judge cannot distinguish likely candidates for reorganization from unlikely ones, the appropriate response is to advocate the minimalist judge."). Janger labels this concept as "the Proceduralist 'Cannot.' " *Id.*

135 This impact is the subject discussed *infra* Part III.

136 *See* SKEEL, *supra* note 22, at 213; *see also supra* Part II.C.4.ii.

137 David A. Skeel, Jr., *Creditors' Ball: The "New" New Corporate Governance in Chapter 11*, 152 U. PA. L. REV. 917, 918 (2003); *see also* Lubben, *supra* note 19, at 840–41 ("Corporate reorganizations today are the legal vehicles by which creditors in control decide which course of action—sale, prearranged deal, or a conversion of debt to a controlling equity stake—will maximize their return.").

Chapter 11 have faded significantly.[138] As of the late 1990s and early 2000s, "[c]ritics of Chapter 11 no longer needed to argue forcefully . . . to replace Chapter 11 with a market[-]oriented approach because the existing bankruptcy structure was accommodating the market."[139] While this modern Chapter 11 structure ensures that cases move quickly and efficiently through bankruptcy, scholars have warned that it may provide greater opportunities for dominant creditors to promote their individual interests over the general goal of maximizing the value of the bankrupt firm.[140]

5. *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

On April 20, 2005, after nine years of congressional debate, President Bush signed into law the most comprehensive set of bankruptcy reforms since the 1978 Reform Act.[141] BAPCPA was designed to "improve the bankruptcy system by deterring abuse, setting enhanced standards for bankruptcy professionals, and streamlining case administration."[142] While its legislative history reflects a primary goal to revamp the consumer bankruptcy provisions, more than half of BAPCPA's revisions affect Chapter 11 business reorganizations.[143] Those amendments reflect proceduralist principles, particularly in their drive to replace the bankruptcy judge's decision-making powers with provisions that function without judicial oversight.[144] This shift from discretion to automation furthers BAPCPA's related goals of speeding up the Chapter 11 process, enhancing and solidifying creditor outcomes, and instilling greater market control over the Chapter 11 process.

Although BAPCPA was enacted after much of the prevailing criticism of Chapter 11 reorganization had tempered,[145] it reads like it was enacted in the

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[138] Lubben, *supra* note 125, at 37 ("While Chapter 11 was often criticized for its perceived 'debtor bias,' by the turn of this century it was generally agreed that the pendulum had swung in the direction of creditors . . . [and] the concerns of the 1980s, particularly involving the length of cases, seemed to have largely vanished.").

[139] Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 Buff. L. Rev. 401, 430–31 (2006).

[140] Lenders may, for example, be unduly protective of their collateral and eschew risk taking that might otherwise enhance the value of the bankruptcy estate. Or, as Professor Stephen Lubben has observed:

> Consider the controlling lender that utilizes its control to ensure that the debtor-firm obtains "exit financing"—that is, post-bankruptcy financing—only from the controlling lender. Here, the controlling lender obtains value, but the choice of post-bankruptcy lenders under these circumstances is unlikely to increase the debtor's value and may even decrease the firm's overall value.

Lubben, *supra* note 19, at 851.

[141] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified at 11 U.S.C. §§ 101–1532 (2006)).

[142] H.R. Rep. No. 109-31, at 47 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 118 [hereinafter 2005 *House Report*].

[143] *See* Levin & Ranney-Marinelli, *supra* note 70, at 603.

[144] This trend to limit the judicial role appears in many of BAPCPA's consumer-focused amendments as well. *See* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 Am. Bankr. L.J. 471, 472 (2007) (evaluating Congress's attempts to rein in judicial discretion through BAPCPA's "means test," which determines an individual's eligibility for Chapter 7 relief).

[145] *See supra* text accompanying notes 136–39.

thick of the anti-Chapter 11 ethos. BAPCPA reacts to abuses observed in a handful of high-profile bankruptcy cases and responds forcefully to perceptions that Chapter 11 cases suffer undue delays.[146] While the issue of delay may have carried greater weight when Congress began to consider bankruptcy reform in the mid-1990s, "apparently Congress did not bother to consider if anything had changed in the interim."[147] BAPCPA's out-of-touch priorities, in addition to its numerous conflicting or incomprehensible amendments,[148] are thought to arise from Congress's rejection of the bankruptcy community's input during the reform process.[149] "Congress generally did not respond to the reams of paper documenting problems—typographical, grammatical, procedural, technical, substantive, policy, and theoretical" with pre-BAPCPA bankruptcy reform bills.[150]

Although Congress largely rejected the input of bankruptcy professionals, BAPCPA proves responsive to other interest group agendas. BAPCPA grants new and expanded benefits to a variety of interest groups,[151] which drain debtors' cash and increase creditors' leverage.[152] While Congress's attention to organized interests does not, standing alone, indicate that BAPCPA's amendments conflict with broader bankruptcy policies, judges,[153] bankruptcy lawyers,[154] and legal academics[155] have called both the substance and the structure of these reforms into question.

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[146] *See, e.g.*, Chad P. Pugatch et al., *The Lost Art of Chapter 11 Reorganization*, 19 U. FLA. J.L. & PUB. POL'Y 39, 69 (2008) (noting that BAPCPA has been criticized as an overreaction by Congress to recent high-profile cases such as Enron, Worldcom, and Adelphia).

[147] Lubben, *supra* note 125, at 33 n.3.

[148] *See, e.g.*, 11 U.S.C. § 522(b) (2012) (arguably making federal exemptions available to debtors in states that have opted out of the exemptions); *id.* § 522(c)(1) (potentially invalidating all state exemption laws with respect to the collection of domestic support obligations); *see also infra* notes 216–23 (discussing additional inconsistencies). While some of these inconsistencies have been resolved through technical amendments, many issues remain. *See* Nancy C. Dreher & Michael J. Stepan, *Bankruptcy Technical Corrections Act of 2010*, 2 NORTON BANKR. L. ADVISER 2 (2011).

[149] *See, e.g.*, Hon. Jack B. Schmetterer et al., *Panel 3: BAPCPA: What Do We Know and When Did We Know It?*, 4 DEPAUL BUS. & COM. L.J. 597, 597 (2006) ("[W]e have a bill that was drafted by people who had no idea how the bankruptcy system worked and had no idea how to draft legislatively.").

[150] *See* Jacoby, *supra* note 56, at 225. As discussed in the following Part, Congress's mistrust of the bankruptcy community extends beyond the legislative floor and into its provisions that limit the discretionary powers of the bankruptcy judge.

[151] Levin & Ranney-Marinelli, *supra* note 70, at 603.

[152] *Id.* (noting that "the increased burden placed on reorganizing debtors in favor of particular groups of creditors will likely reduce overall recoveries for all creditors, including the favored groups").

[153] *See* Schmetterer et al., *supra* note 149, at 598 (statement of Judge Schmetterer that BAPCPA is "very badly and shabbily drafted."); Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J. 1, Sept. 24, 2005, at 68, 70 ("If the drafters intended to make . . . bankruptcy law less coherent and more difficult of application, they succeeded.").

[154] Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 803 (2010) ("In large measure, the organized bankruptcy bar viewed the legislation with disdain. Indeed, even though the principal advocates for the statute included the clients of a good slice of elite bankruptcy lawyers (creditor interests generally, and banks more specifically, provided the major impetus for the reforms), most of the bar expressed

III. Rules and Standards in Bankruptcy Reform

A. *BAPCPA's Shift from Standards to Rules*

BAPCPA's amendments limit judicial interference in the Chapter 11 process by replacing former standards-based provisions with rules. "Rules" and "standards" are categories of directives given to decision makers to cordon their exercise of choice.[156] Under a rules-based framework, decision makers focus on the facts and apply the law in a standardized manner, engaging in few values-based judgments.[157] Standards, in contrast, allow a decision maker to weigh and balance competing policies and interests.[158] The Reform Act created a flexible reorganization system that relied heavily on standards-based provisions, turning on terms such as "adequate," "reasonable," or "cause." Amendments following the Reform Act, particularly as part of BAPCPA, replace many such provisions with ones that function without judicial influence.[159]

Congress's emphasis on rules finds its basis in a rhetoric of legal certainty that has dominated both judicial decision-making and legislative design in the last forty years.[160] This trend, which Professor Diane Lourdes Dick terms the "certainty imperative," has its roots in the global economic instability of the 1970s and 1980s and the rising influence of neoclassical economic theory.[161] While it is characterized by an emphasis on restraint in judicial decision-making,[162] this focus on legal certainty has encouraged legislative reforms that "further disempower[ ] courts."[163] Congress's attention to this certainty imperative, or bankruptcy-specific proceduralist principles, is evident in BAPCPA's strong drive to limit the influence of the bankruptcy judge.[164]

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full-throated opposition."); *see also* Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 Am. Bankr. L.J. 191, 191 (2005) (finding BAPCPA's enactment to be mean-spirited and intellectually dishonest).

155 Brian Rothschild, *The Illogic of No Limits on Bankruptcy*, 23 Emory Bankr. Dev. J. 473, 475 n.1 (2007) (collecting BAPCPA criticism and describing the academic response as "consistently negative").

156 Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 57 (1992).

157 *Id.*

158 *Id.* at 59; *see also* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1688 (1976) (Standards "require[ ] the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.").

159 *See* discussion *infra* Part IV (in-depth discussion of several such provisions).

160 *See generally* Dick, *supra* note 6 (discussing these trends in the context of corporate finance jurisprudence).

161 *Id.* at 1468–70. Often termed "Chicago School" economists, these theorists "rejected the notion of governmental regulation in most financial affairs, arguing that markets are perfectly competitive, inherently stable, and entirely efficient so long as they are permitted to function without excessive governmental interference." *Id.* at 1470. Within bankruptcy theory, proceduralists readily identify with Chicago-School theorists.

162 *Id.* at 1466. An emphasis through strict statutory interpretation and passive enforcement of contract rights, for example, is thought to encourage stability in financial markets and promote economic efficiency.

163 *Id.* at 1488.

164 *See supra* text accompanying notes 127–34.

BAPCPA's emphasis on rules may also reflect Congress's increased responsiveness to interest-group agendas. Interest groups tend to favor rules-based reforms as a mechanism for preserving their individual rights and entitlements from post hoc review.[165] As Professor Carol Rose has observed in her study of "crystals" and "mud" in property law, "the more important a given kind of thing becomes for us, the more likely we are to have . . . hard-edged rules to manage it."[166] Rules permit parties to rely on a fixed set of outcomes, limiting the risk that equitable second-guessing will later upset their expectations.[167] Thus, interest groups may seek rules based on their rational self-interest in protecting their pre-bankruptcy entitlements from interference by a bankruptcy judge.

B. *The Limitations of Rules in Chapter 11*

The reorganization framework established by the 1978 Reform Act relies on the central authority of a bankruptcy judge to weigh competing interests and accord relief in a manner that maximizes value for all constituents.[168] In the course of a bankruptcy case, the judge must "face conflicts of complex dimensions and oversee an intense process of negotiation, administration, and litigation."[169] Congress recognized that it does not have the capacity to identify and craft rules to govern "all important aspects of the court's . . . deliberation."[170] The Reform Act, thus, employed standards to allow the judge to adapt the Bankruptcy Code's provisions to disputes arising in bankruptcy cases of all types and sizes.

BAPCPA does not disturb this structure,[171] but rather blocks various avenues of judicial discretion. In so doing, BAPCPA's amendments have replaced careful debtor-creditor balances with bright-line approximations. Decisions once based on the equities of a particular conflict now turn either on the passage of time or on the desires of an interested party. Creditors and debtors alike receive benefits regardless of need, and relief may be withheld from debtors even though it might maximize value for all parties. While rules generally carry

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[165] *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 603–04 (1988).

[166] *Id.* at 577.

[167] *See* Robert E. Scott, *The Politics of Article 9*, 80 Va. L. Rev. 1783, 1819 (1994).

[168] Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 Am. Bankr. L.J. 1, 81 (2006) ("Bankruptcy is about how to divide efficiently and fairly a fund that is too small to satisfy all claimants. Satisfying multiple claimants from a limited fund always involves balancing the interests of the claimants, as well as the debtor in Chapter 11 and Chapter 13 cases. Such balancing cannot always be done robotically according to the Code's formulas."). *Cf*. Christopher W. Frost, Bankruptcy Redistributive Policies and the Limits of the Judicial Process, 74 N.C. L. Rev. 75, 124–35 (1995) (questioning judges' capability to address polycentric disputes in bankruptcy).

[169] Donald R. Korobkin, *Value and Rationality in Bankruptcy Decisionmaking*, 33 Wm. & Mary L. Rev. 333, 336 (1992). Although bankruptcy cases have become more streamlined, it is no less true that bankruptcy cases involve a variety of parties in interest, and the bankruptcy judge serves as the ultimate bulwark against encroachment of their rights. *Id.*

[170] *Id.* at 358.

[171] A review of BAPCPA's amendments reflects that the Chapter 11 process established in the Reform Act remains fundamentally intact. Notably, earlier calls to replace Chapter 11 with a market-based alternative were not implemented.

such risks of over- and under-inclusiveness, their side effects are magnified in BAPCPA due to its poor drafting.

When taken together, these amendments have culminated in what Professor Carol Rose would term an "overload" of "crystalline" rules.[172] Overload occurs when rule makers make too great an effort for clarity and contractual certainty.[173] This overuse of rules can create a system that is more opaque and difficult to navigate than a standards-based alternative would be. In this way, "[s]imple boundaries and simple remedies . . . may yield radically unexpected results, and may destroy the confidence we need for trade, rather than fostering it."[174] BAPCPA's overload is exhibited in reforms that drain debtors' liquidity and increase the overall costs of reorganization, while encouraging key participants in a bankruptcy case to favor individual recovery over the collective best interest.[175] Taken together, BAPCPA's amendments upset the normative foundations of many Bankruptcy Code provisions and may even undermine BAPCPA's aims.

IV. Retail Reorganizations After BAPCPA

This Part details the limitations of BAPCPA's rules-based reforms by examining four provisions amended by BAPCPA and their combined effect on large retail reorganization cases. Each of these provisions has seen a former judge-driven standard replaced by a "crystalline" rule.[176] Standing alone, these changes appear to make modest adjustments to the Chapter 11 process. Working together, however, these amendments place significant financial and procedural hurdles in the path of a successful reorganization. These provisions impact all businesses under Chapter 11 bankruptcy protection, but their effects are magnified for large retail debtors, who tend to do business with many of BAPCPA's favored groups. For this reason, the retail story provides a particularly stark example of the risks of overload in BAPCPA's rules-based reforms. As Part V explores in more detail, the retail story further illustrates the relative ease of curbing BAPCPA's impact through slight procedural modifications in favor of standards.

The provisions highlighted in this Part are not unique in their legislative design. Indeed, many other amendments evidence BAPCPA's drive to limit the discretion of the bankruptcy judge.[177] Additionally, while this writing examines

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172 Rose, *supra* note 165, at 604.

173 *Id.* Professor Rose notes, by way of example, that parties may seek certainty in contracts by attempting to resolve ex ante all possible contingencies. The resulting contract, however, may cover so much ground that it soon becomes more opaque than a contract that left such issues open for future resolution. *Id.* at 597.

174 *Id.* at 601.

175 *See infra* Part IV.

176 Rose, *supra* note 165, at 577 (referring to hard-edged rules in property laws as "crystals").

177 *See, e.g.*, 11 U.S.C. § 503(c) (2006) (limits the judge's discretion in implementing Key Employee Retention Programs); *id.* § 101(51D) (the Bankruptcy Code's small business provisions are now mandatory for those companies meeting the definition of "small business debtor"); *id.* § 1325 (limits the bankruptcy judge's discretion in reviewing the reasonableness of a Chapter 13 plan). A particularly notable example of this phenomenon in consumer bankruptcy is BAPCPA's means test, a rule-based provision used to determine eligibility for

retail debtors, virtually all debtors facing bankruptcy after BAPCPA are to some extent impacted by BAPCPA's rigidity. For example, commentators have noted BAPCPA's negative effects on small businesses,[178] restaurants,[179] and consumer debtors, among others.[180] The following discussion on retail debtors may thus provide insight to mitigate BAPCPA's impact in other areas of bankruptcy law.

A. 11 U.S.C. § 366: Utility Providers Now Receive Adequate Assurance in Cash or Cash Equivalents

In an effort to preserve the debtor's operations at the commencement of a Chapter 11 case, section 366 of the Bankruptcy Code enjoins utility companies from terminating service to a debtor based upon either a bankruptcy filing or prepetition amounts owing to the utility.[181] This injunction is only temporary; the utility may alter, refuse, or discontinue service if the debtor fails to provide the utility "adequate assurance of [future] payment" shortly after filing.[182] In enacting this provision, Congress sought to balance the competing interests of utility and debtor. Congress protected the debtor from utility coercion by limiting the utility's ability to terminate or threaten termination of services. It then accounted for the utility's risk of non-payment by providing the utility special assurances of future payment.[183]

Chapter 7 relief. *Id.* § 707(b)(2)(A)(i). Several scholars have critiqued this provision. *See, e.g.*, Pardo, *supra* note 144, at 473; Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 668 (2005).

[178] *See, e.g.*, Hon. James B. Haines, Jr. & Philip J. Hendel, *No Easy Answers: Small Business Bankruptcies After BAPCPA*, 47 B.C. L. REV. 71, 72 (2005) (arguing that "the value of BAPCPA's reforms is outweighed by the procedural burdens the statute imposes on small business debtors").

[179] *See, e.g.*, *Circuit City Unplugged: Why Did Chapter 11 Fail To Save 34,000 Jobs?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Judiciary Comm.*, 111th Cong. 57–58 (2009) [hereinafter *Circuit City Hearing*] (statement of Isaac M. Pachulski on behalf of National Bankruptcy Conference) (stating that BAPCPA's impact on retailers can also be seen in other businesses, such as restaurants, that operate in multiple locations and sell products to the public).

[180] Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 122–30 (1999) (critiquing proposed rules-based means test legislation).

[181] 11 U.S.C. § 366(a) (2006):

> Except as [otherwise] provided . . . a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

[182] *Id.* at § 366(b). Under section 366(b), which was not amended by BAPCPA, the debtor is allowed twenty days from the date of the *order for relief* to furnish adequate assurance of payment. After BAPCPA, Chapter 11 debtors must make adequate assurance payments within a thirty-day period beginning on the *petition date*. *Id.* at § 366(c)(1)(B)(2) (emphasis added). This difference may lead to inconsistencies in involuntary bankruptcy cases, where an order for relief may be entered well after the petition date.

[183] *See* Russell R. Johnson III, *Adequate Assurance of Payment for Utilities Under 11 USC § 366(b): The Need for a Legislative Solution*, 4 J. BANKR. L. & PRAC. 79, 79 (1994) ("Section 366 of the Bankruptcy Code was enacted in 1978 to strike a balance between the debtor's need for postpetition utility service and the utility's need for assurance that the debtor will pay for that service."); Veryl Victoria Miles, *Adequate Assurance of Payment*

Before BAPCPA, the Bankruptcy Code required the debtor to provide to the utility "a deposit or similar security," but left determination of the form and amount of such "adequate assurance" in the hands of the bankruptcy judge.[184] Depending on the debtor's circumstances and its relationship with the utility provider, courts would award cash deposits, letters of credit, pre-payment of postpetition bills, administrative expense priority, or a combination of several assurances.[185] An award of administrative priority was common in cases where the utility faced little risk of non-payment, such as when the debtor had a strong history of timely payments and solid postpetition cash flow.[186] Utility companies, naturally preferring to be assured in cash, impressed upon Congress the need for reform of section 366.

As amended, section 366 includes a new definition of "adequate assurance of payment."[187] Now, adequate assurance may include *only* cash deposits, letters of credit, certificates of deposit, surety bonds, prepayments or "another form of security that is mutually agreed on between the utility and the debtor or the trustee."[188] BAPCPA expressly rejects the former practice of awarding administrative priority as a form of adequate assurance.[189] In addition, this provision allows the utility to recover or offset prepetition security deposits without providing notice or obtaining a court order, a practice that was barred by the automatic stay before BAPCPA.[190]

This provision further provides that adequate assurance must be "satisfactory to the utility."[191] This language removes the determination of the appropriate measure of relief from the bankruptcy judge and places it in the hands of an interested creditor. By requiring the utility's "satisfaction," this provision values the adequacy of assurance based on the desires of the utility provider, rather than the risk that the debtor will be unable to pay its bills. The bankruptcy

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Under Section 366 of the Bankruptcy Code: A Term For Interpretive Flexibility or Judicial Confusion?, 20 AKRON L. REV. 715, 726 (1987) (noting that section 366 was enacted to "eliminate coercion by utilities against bankrupt debtors").

184 11 U.S.C. § 366(b) (amended 2005).

185 *See* Johnson, *supra* note 183, at 85–86 (collecting cases).

186 *See, e.g.*, Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646, 651 (2d Cir. 1997) (finding utilities adequately assured without prepayment or other security); *In re* Adelphia Bus. Solutions, Inc., 280 B.R. 63, 66 (Bankr. S.D.N.Y. 2002) (same); *In re* Federated Dep't Stores, Inc., Nos. 1-90-00130 through 1-90-00196, 1990 Bankr. LEXIS 132, at *1–2 (Bankr. S.D. Ohio Feb. 1, 1990) (same); *In re* George C. Frye Co., 7 B.R. 856, 858–59 (Bankr. D. Me. 1980) (same); *see also* Johnson, *supra* note 183, 85 n.55 (citing Order Extending Until Confirmation the Twenty-Day Period Under Section 366(b) of the Bankruptcy Code During Which Utility Companies May Not Alter, Refuse, or Discontinue Service to the Debtors, *In re* RH Macy & Co., No. 92-40477 (Bankr. S.D.N.Y. Feb. 28, 1992) (finding utilities adequately assured without prepayment or other security); Supplemental Order as to Certain Utilities Extending Until Confirmation of a Plan the Time Period Under Section 366(b) of the Bankruptcy Code and Enjoining Such Utilities from Altering, Refusing, or Discontinuing Such Services to the Debtors, *In re* Best Prods. Co., Inc., No. 91–10048 (Bankr. S.D.N.Y. Jan. 30, 1991) (same).

187 *See* 11 U.S.C. § 366(c)(1)(A).

188 *Id.*

189 *Id.* § 366(c)(1)(B) ("For purposes of this subsection an administrative expense priority shall not constitute an assurance of payment.").

190 *See id.* § 366(c)(4).

191 *Id.* § 366(c)(2).

judge retains a limited power to modify adequate assurance awards,[192] but when making modifications, is expressly prohibited from considering information directly relevant to the risk of debtor non-payment, such as the debtor's prepetition payment history.[193]

The increased adequate assurance obligations under BAPCPA are magnified for large retail debtors, who can have hundreds of locations, each with multiple utilities that may demand such a deposit. Linens & Things, a 600-store national chain, estimated its aggregate adequate assurance demands to be $2,138,662.52.[194] This charge represents a significant new limitation on a company's use of cash during the first weeks of its bankruptcy case, when a debtor's position is particularly vulnerable.

Additionally, a strict interpretation of the "satisfactory to the utility" requirement calls into question the common Chapter 11 practice in which debtors obtain "first-day" relief to address their utility demands en masse. Typically, a Chapter 11 debtor will request court approval of unified procedures to govern its adequate assurance obligations and ask the court to deem all utility providers to have received adequate assurance therefrom.[195] The Bankruptcy Court for the Western District of Michigan's holding in *In re Lucre* essentially defeated this possibility for large debtors in bankruptcy.[196] In *Lucre*, the court held that a bankruptcy judge has no authority over adequate assurance awards until the utility has first expressed its "satisfaction" with offered assurances.[197] Under this reading, if the utility refuses to accept (or even acknowledge) an offer of adequate assurance, then the court has no power to enjoin the utility from terminating services once section 366's injunction has elapsed.[198]

Lucre's interpretation of section 366 has gained little traction outside of the Western District of Michigan because of the significant time and financial resources that would be expended if large debtors were required to negotiate

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192 *Id.* § 366(c)(3).

193 *See id.* § 366(c)(3)(B) (In determining whether assurance is adequate, a judge may not consider the absence of any deposit or security before the debtor filed for bankruptcy relief; timely prepetition payments; or the availability of administrative expense priority.).

194 *See* Motion of the Debtors and Debtors in Possession for Entry of an Order Determining Adequate Assurance of Payment for Future Utility Services, *In re* Linens Holding Co., No. 08BK10832 (Bankr. D. Del. May 2, 2008) (estimating the debtors' two-week utility costs at $2,138,662.52). This provision would similarly impact other Chapter 11 debtors with multiple locations or particularly large utility obligations.

195 In Circuit City's case, for example, the debtors proposed setting $5,000,000 in a segregated account for payment of adequate assurance demands. *In re* Circuit City Stores Inc., No. 08-35653, 2009 WL 484553, at *2 n.10 (Bankr. E.D. Va. Jan. 14, 2009). The debtors also requested approval of dispute-resolution procedures if a utility later objected to the debtors' proposed payment. *See* Motion of Debtors for Order Under Bankruptcy Code Sections 105(a), 363, and 366, and Bankruptcy Rule 6003 (I) Approving Debtors' Adequate Assurance of Payment, (II) Establishing Procedures for Resolving Requests by Utility Companies for Additional Assurance of Payment, (III) Scheduling a Hearing with Respect to Contested Adequate Assurance of Payment Requests, and (IV) Authorizing Debtors to Pay Claims of a Third Party Vendor at 2, *In re* Circuit City Stores, Inc., No. 08-35653 (Bankr. E.D. Va. Nov. 10, 2008), ECF No. 8.

196 *In re* Lucre, Inc., 333 B.R. 151, 154 (Bankr. W.D. Mich. 2005).

197 *Id.*

198 *See id.*

individually with each of their many utilities.[199] Nevertheless, *Lucre* makes frequent appearances in motions filed by utility providers and may encourage utilities to litigate the issue.[200]

B. 11 U.S.C. § 503(b)(9): A New Class of Administrative Claimants

Before BAPCPA, if a vendor sold goods to a debtor on unsecured credit, the vendor's prepetition right to payment was treated as a general unsecured claim. Unsecured claims may be modified pursuant to a plan of reorganization and frequently receive "pennies on the dollar" in distributions from the debtor's estate.[201] In light of these low-level recoveries, a retailer's trade creditors have historically supported reorganization efforts and the prospect of continuing a business relationship with the debtor.[202]

BAPCPA responded to the interests of trade creditors by enacting section 503(b)(9). Section 503(b)(9) grants administrative priority to claims for the value of goods delivered to the debtor, in the ordinary course of business, during the twenty-day period preceding the debtor's bankruptcy case ("twenty-day claims").[203] In contrast to unsecured claims, claims with administrative priority must be paid *in full* as a condition to confirmation of a debtor's plan of reorganization and a prerequisite to emergence from Chapter 11.[204]

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199 *See, e.g.*, *In re* Crystal Cathedral Ministries, 454 B.R. 124, 129–30 (C.D. Cal. 2011) (holding that section 366 does not require a debtor to first accede to the utility provider's proposal before granting modifications under section 366(c)(3)); *In re* Great Atl. & Pac. Tea Co., No. 11-CV-1338 (CS), 2011 WL 5546954, at *4 (S.D.N.Y Nov. 14, 2011) (same); *In re* Circuit City Stores, Inc., No. 08-35653, 2009 WL 484553, at *3 (Bankr. E.D. Va. Jan. 14, 2009) (holding that Lucre's interpretation of section 366 is "simply unworkable" and "could lead to absurd results").

200 *See, e.g.*, Objection of NV Energy to Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 363(b) and 366 for Entry of an Order Establishing Adequate Assurance Procedures with Respect to Their Utility Companies and Granting Other Related Relief at 6, *In re* Borders Grp., Inc., No. 11-10614 (MG), 2011 WL 1671399 (Bankr. S.D.N.Y. Mar. 7, 2011); Objection to Interim Order and Debtors' Motion for an Order Pursuant to Section 366 of the Bankruptcy Code at 3, *In re* Buffets Rest. Holdings, Inc., No. 12-10237 (MFW), 2012 WL 1188780 (Bankr. D. Del. Jan. 19, 2012); Objection to Interim Order and to Debtors' Motion for Entry of Interim and Final Orders Determining Adequate Assurance of Payment for Future Utility Services at 4, *In re* Movie Gallery, Inc., No. 10-30696-DOT, 2010 WL 8226806 (Bankr. E.D. Va. Feb. 17, 2010).

201 *See* John A. Pearce II & Ilya A. Lipin, *Supplier Tactics for Dealing with Financially Distressed Corporate Customers*, 8 HASTINGS BUS. L.J. 405, 424 n.143 (2012).

202 Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807, 1837–38 (1998) (acknowledging that trade creditors tend to support reorganization and proposing a contracts-based solution for reconciling their interests with those of other unsecured creditors).

203 11 U.S.C. § 503(b)(9) (2006). Congress also expanded these creditors' reclamation rights over goods delivered to the debtor in the days preceding bankruptcy. Former section 546 allowed reclamation for goods delivered ten days prior to bankruptcy. BAPCPA enhanced that provision to forty-five days. *See id.* § 546(c); *see also* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 467 (6th ed. 2009) (crediting trade creditors' lobbyists with the expanded protections in both section 503(b)(9) and section 546(c)'s expanded reclamation rights).

204 11 U.S.C. § 1129(a)(9)(A) (Supp. 2010) (requiring that all administrative expenses be paid in full on the effective date of a plan); *see also* Levin & Ranney-Marinelli, *supra* note

The promotion to the elite status of administrative claimants is a major boon to trade creditors, whose recovery would otherwise be uncertain in a typical bankruptcy case. If a supplier has a significant twenty-day claim, however, the prospect of receiving an immediate recovery through a quick liquidation may overshadow the creditor's interest in supporting the reorganization.[205] In this way, BAPCPA has eroded the support of a longtime ally of the debtor in its reorganization efforts.

This new administrative priority signals a departure from the normative foundation of administrative expense claims. Historically, awarding administrative priority to creditors fell within the discretion of the bankruptcy judge.[206] Bankruptcy judges apply this priority only to "the actual, necessary costs and expenses of preserving the estate."[207] A claimant must generally demonstrate that its claim arises from a transaction with the bankruptcy estate, and that the claimant provided a direct and substantial benefit to the estate.[208] Section 503(b)(9)'s blanket administrative expense priority for twenty-day claims diverges from these limitations on several grounds. The provision applies to vendors' prepetition claims, which necessarily are claims against the company, rather than against the bankruptcy estate.[209] Moreover, entitlement to administrative priority depends solely on the time of delivery of goods, omitting any inquiry as to whether the creditor has provided, or will provide, any benefit to the debtor's bankruptcy estate.[210]

70, at 604 (noting that this new category of administrative claimants are payable in "hundred cent dollars," contrary to general unsecured claims).

205 *Circuit City Hearing*, *supra* note 179, at 38 (statement of Richard M. Pachulski) (noting that section 503(b)(9) claims "set a floor at liquidation value that is difficult to surpass with a going concern sale or reorganization"). The growth in international, letter-of-credit transactions furthers this conversion of the broad class of trade creditors into a new class of secured creditors, who primarily are interested in maximizing the recovery on their secured claims, and wary of any prospects that might deplete the assets available to satisfy them. *See id.* at 38–39.

206 *See, e.g.*, *In re* Glickman, Berkowitz, Levinson & Weiner, P.C., 196 B.R. 291, 294 (Bankr. E.D. Pa. 1996) (holding that determination of whether to allow administrative expenses is left to the Bankruptcy Court's discretion).

207 11 U.S.C. § 503(b)(1)(A); *see also* Nat'l Union Fire Ins. Co. v. VP Bldgs., Inc., 606 F.3d 835, 838 (6th Cir. 2010) (administrative expenses must (1) arise from a transaction with the bankruptcy estate and (2) directly and substantially benefit the estate); *In re* Williams, 246 B.R. 591, 594 (B.A.P. 8th Cir. 1999) (same); *In re* Keene Corp., 208 B.R. 112, 115 (Bankr. S.D.N.Y. 1997) (same).

208 *See, e.g.*, *In re* Eagle-Picher Indus., Inc., 447 F.3d 461, 464 (6th Cir. 2006); *In re* DAK Indus., Inc., 66 F.3d 1091, 1094 (9th Cir. 1995); *In re* Jartran, 732 F.2d 584, 587 (7th Cir. 1984). A narrow construction of administrative claims protects the estate against the unnecessary depletion of vital funds.

209 Prior to BAPCPA, a small number of prepetition claims could be subject to administrative priority. *In re* Plastech Engineered Prods., Inc., 394 B.R. 147, 151 (Bankr. E.D. Mich. 2008) (collecting examples). Debt qualifying for section 503(b)(9) status, however, is "far more pervasive than the relatively rare types of pre-petition debts that were previously elevated to expenses of administration." *Id.*

210 *See* Michael G. Wilson & Henry P. "Toby" Long III, *Section 503(b)(9)'s Impact: A Proposal to Make Chapter 11 Viable Again for Retail Debtors*, AM. BANKR. INST. J., Feb. 2011, at 20 (arguing that in enacting section 503(b)(9), "Congress effectively ignored one of the principal tenets underlying the Code: namely, that claims accorded administrative-expense priority should be narrowly limited to those that provide a benefit to the bankruptcy

BAPCPA does not extend a similar priority status to bondholders, creditors who provide services to the debtor, or even vendors who deliver goods within the twenty-day period but outside the ordinary course of business. The legislative history of section 503(b)(9) provides no rationale for distinguishing twenty-day claimants from these other unsecured creditors.[211] At least one judge has argued that this distinction without apparent difference violates "[o]ne of the bedrock policies of the Bankruptcy Code . . . to provide uniform and equal treatment to creditors that are similarly situated."[212]

After this amendment, debtors must now find or borrow cash to pay twenty-day claims as a prerequisite to exiting bankruptcy. For large retailers, manufacturers, and other debtors receiving frequent deliveries of goods, these claims can represent a large and potentially insurmountable cash hurdle to confirmation of a plan of reorganization.[213] The twenty-day claims filed in Circuit City's case, for example, were nearly $350 million.[214] According to Circuit City's attorneys, the company's extensive 503(b)(9) liability sounded the "final death knell" for its attempt at reorganization.[215] Even if a debtor finds financing to meet these inflated claims, the debtor will exit bankruptcy more indebted and in a weaker financial position to weather future downturns.[216]

Section 503(b)(9) is often cited in bankruptcy critiques for its opaque drafting and ensuing ambiguities. Section 503(b)(9) is unclear, for example, on when 503(b)(9) claims are to be paid,[217] at which point or by which method they are to be valued, how the term "goods" is to be defined,[218] or at which

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estate to ensure that a debtor has a realistic opportunity to successfully reorganize and stay in business.").

[211] *Id.* (noting that the legislative history on section 503(b)(9) is "virtually nonexistent"); Brendan M. Gage, *Should Congress Repeal Bankruptcy Code Section 503(b)(9)?*, 19 AM. BANKR. INST. L. REV. 215, 218 (2011) (arguing Congress is responsible for the extensive litigation on this provision because it failed to provide legislative history on what 503(b)(9) was meant to accomplish).

[212] *Plastech Engineered Prods*., 394 B.R. at 151.

[213] *See Circuit City Hearing*, *supra* note 179, at 35; *see also* Gage, *supra* note 211, at 217 & 217–18 n.10 (collecting cases).

[214] *Circuit City Hearing*, *supra* note 179, at 35. The debtor's managers estimated that at least $215 million of these claims ultimately would be allowed. *Id.* at 36.

[215] *Id*. at 34. Section 503(b)(9)'s effect on retail debtors may be exacerbated by amendments to section 546(c) of the Bankruptcy Code, which expanded the reach-back period for vendors' reclamation claims from ten days to forty-five days. *See* 11 U.S.C. § 546(c) (2006). Creditors meeting the requirements of 546(c) may demand the debtor return any goods delivered within the forty-five days prior to bankruptcy or pay for them in cash. *Id.* But, because many debtors have asset-based financing, giving a lender a lien on goods that otherwise would be subject to reclamation, this impact may ultimately be limited.

[216] For example, Goody's Family Clothing, which as of 2009 was one of only three retailers to have emerged from bankruptcy after BAPCPA's enactment, commenced a new Chapter 11 case in order to liquidate its assets roughly three months after exiting its first Chapter 11 case. *See In re* Goody's Family Clothing, Inc., 443 B.R. 5, 10 (Bankr. D. Del. 2010).

[217] *See* Gage, *supra* note 211, at 242–45 (summarizing case law on the timing of payment of 503(b)(9) claims).

[218] The Bankruptcy Code does not define "goods" and section 503(b)(9) does not refer to another source, such as the Uniform Commercial Code, for this definition.

point those goods are "received."[219] More significantly, section 503(b)(9) does not subject claims to the "prior rights of a holder of a security interest in such goods,"[220] which suggests that both a secured creditor and the seller might recover the value of goods delivered within the twenty-day period preceding bankruptcy, doubling the cost to the debtor.[221] Additionally, a seller whose claim qualifies under section 503(b)(9) apparently may enjoy double recovery by asserting a reclamation claim for the goods subject to priority.[222] As courts continue to work through these thorny interpretive issues, debtors and creditors may face additional litigation demands.[223] The outcome of these cases, to the extent they differ between jurisdictions, is likely to increase forum shopping.[224]

C. 11 U.S.C. § 1121(d)–(e): New Caps on Extensions for the Debtor's Exclusivity Period for Filing and Soliciting Acceptances of a Plan

When Chapter 11 was enacted, its drafters determined that both creditors and debtors would be entitled to file a plan of reorganization.[225] The debtor, however, would have an initial period of exclusivity for crafting and negotiating a plan.[226] This element of control over the plan process was part of a package of provisions designed to encourage debtors to seek Chapter 11 relief at an early stage in the debtor's distress, when Bankruptcy Code protections might be of greatest use.[227] After the exclusivity period expires, any party in interest, including the debtor's creditors, may file a plan.[228]

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219 *See generally* Ryan T. Routh, *"Twenty-Day Claims:" The Anticipated and Unanticipated Consequences of Code § 503(b)(9)*, AM. BANKR. INST. J. 24, Nov. 25, 2006, at 24, 24 (discussing these and additional ambiguities in section 503(b)(9)).

220 11 U.S.C. § 546(c).

221 *See* David G. Epstein, *BAPCPA and Commercial Credit: Who (Sic) Do You Trust?*, 10 N.C. BANKING INST. 57, 68 (2006).

222 *See* 11 U.S.C. §§ 503(b)(9), 546. Nothing in the text of these provisions limits the vendor to either reclamation or administrative priority.

223 If the debtor requires DIP financing, such financing arrangement must contemplate the expanded time and liquidity demands that these provisions create.

224 Gage, *supra* note 211, at 219.

225 *See In re* Timbers of Inwood Forest Assocs., Ltd., 808 F.2d 363, 372 (5th Cir. 1987), *aff'd sub nom.* United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988).

226 11 U.S.C. § 1121(b) (2006) ("Except as otherwise provided in this section, only the debtor may file a plan until after 120 days after the date of the order for relief under this chapter.").

227 *See* 1977 House Report, *supra* note 95, at 231, 1978 U.S.C.C.A.N. at 6191 ("Proposed Chapter 11 recognizes the need for the debtor to remain in control to some degree, or else debtors will avoid the reorganization provisions in the bill until it would be too late for them to be an effective remedy."); The Reform Act also "recognize[d] the legitimate interests of creditors, whose money is in the enterprise as much as the debtor's, to have a say in the future of the company." *Id.* at 231–32, 1978 U.S.C.C.A.N. at 6191. *See also In re* Sw. Oil Co. of Jourdanton, Inc., 84 B.R. 448, 450 (Bankr. W.D. Tex. 1987) ("The 120-day exclusivity period . . . represents a compromise between the dual goals of giving the debtor time to reorganize and protecting the creditors' legitimate interests."); *In re* Pine Run Trust, Inc., 67 B.R. 432, 434 (Bankr. E.D. Pa. 1986) (Section 1121 "seeks to balance the relative negotiating positions of the debtor and creditors.").

228 11 U.S.C. § 1121(c).

Before BAPCPA, the bankruptcy court had broad discretion to balance the debtor's need for control with the often-conflicting interests of creditors. While debtors were afforded 120 days following the petition date to exclusively file a plan of reorganization, and a total of 180 days to solicit acceptances of the plan,[229] each of these periods could be increased or reduced by court order upon the showing of "good cause."[230] If a debtor needed additional time to negotiate a consensual plan with its creditors, the court had the flexibility to grant extensions. If, in contrast, the debtor was unduly delaying the plan process, the court could truncate the exclusivity period and allow creditors to formulate a competing plan.[231] In deciding whether to grant the debtor an extension of its exclusivity period, courts considered a variety of factors to gauge both whether a company had going-concern value to protect and whether an extension would facilitate or impede the reorganization process.[232]

In response to arguments that bankruptcy judges granted too many extensions of exclusivity,[233] revised section 1121 sharply limits this practice. The debtor retains its initial 120-day exclusivity period, but extensions are capped at eighteen months from the petition date.[234] Exclusivity ends within twenty months of the petition date.[235] The exclusivity period is even shorter for "small business" debtors, a designation that BAPCPA imposes on all debtors engaged in commercial or business activities with aggregate debts not exceeding $2,343,300.[236] Small business debtors have 180 days to exclusively file a plan of reorganization and must file the plan and disclosure statement within 300 days.[237] Section 1129 provides that the court shall confirm the plan in a small business case within forty-five days after the plan is filed.[238]

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229 *Id.* § 1121(c)(2)–(3).
230 *Id.* § 1121(d)(1).
231 1977 House Report, *supra* note 95, at 232, 1978 U.S.C.C.A.N. at 6191 (noting that this structure "allows the flexibility for individual cases" that was unavailable before the Reform Act).
232 Richard M. Cieri et al., *Applying an Ax when a Scalpel Will Do: The Role of Exclusivity in Chapter 11 Reform*, 2 J. Bankr. L. & Prac. 397, 412 (1993) (stating that courts consider the following factors when determining whether cause exists for an extension: (1) the elapsed time since the filing of the petition, (2) the case's size and complexity, (3) the debtor's progress in resolving its estate's issues, (4) the debtor's motive in extension request, (5) the possible harm that an extension of time will cause creditors, and (6) if the extension is granted, the debtor's prospects for filing a viable plan. *In re* Adelphia Commc'ns Corp., 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) (outlining factors that might constitute cause). Courts have also extended the exclusivity period to allow the debtor to resolve pending litigation. *See* Cieri, *supra*, at 416.
233 Janger, *supra* note 129, at 620. According to a 1993 study, in 34 of 43 public company bankruptcy cases, the judge allowed the exclusivity period to extend the entire duration of the case. LoPucki & Whitford, *supra* note 125, at 717–18 n.177; Professor Janger notes that these extensions could indicate creditor consent, rather than pro-debtor bias on the part of the bankruptcy judge. Janger, *supra* note 129, at 620.
234 11 U.S.C. § 1121(d)(2)(A).
235 *Id.* § 1121(d)(2)(B).
236 *See id.* § 101(51D).
237 *Id.* §§ 1121(e)(1)–(2).
238 *Id.* § 1129(e). These periods are subject to extension upon a showing of "cause," but obtaining an extension requires a burdensome hearing in which the debtor must demonstrate "by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time." *Id.* § 1121(e)(3)(A).

Because modern Chapter 11 cases generally proceed very quickly,[239] many cases are largely complete before this eighteen-month window has closed.[240] If a debtor is exceptionally large, faces unique legal issues, or requires additional time to negotiate with its creditors, however, the time frames set forth in section 1121 may prove insufficient. In contrast to their larger counterparts, most small business debtors struggle to reorganize under BAPCPA's reduced time frames.[241]

More broadly, extensions to exclusivity now turn on the passage of time, rather than a determination whether the relief requested would assist or impede a debtor's reorganization efforts. In this manner, BAPCPA has replaced a functional, rehabilitation-encouraging provision with a rough proxy for entitlement to relief. This proxy may serve adequately in some cases, but risks deleterious effects to debtors on the margins. This provision may additionally decrease creditors' incentives to negotiate a consensual plan, particularly if their interests are better served by waiting out the expiration of the exclusivity period.[242]

D. 11 U.S.C. § 365(d)(4): Debtors Must Now Assume or Reject Executory Contracts or Unexpired Leases within 210 Days

Section 365 of the Bankruptcy Code affords debtors the opportunity to either assume or reject executory contracts or unexpired leases.[243] Grounded in the "fresh start" principle of reorganization, this provision allows a debtor "to use valuable property of the estate and to 'renounce title to and abandon burdensome property.' "[244] As part of the debtor's power to assume contracts, the debtor may assign them to third parties, avoiding anti-assignment clauses and other limiting provisions in the contracts.[245] Companies operating in multiple locations have historically used section 365 to reject above-market leases, close underperforming locations, and sell below-market leases to willing buyers. In

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[239] *See supra* text accompanying notes 137–39.

[240] This is particular true for retail industry debtors, where cases post-BAPCPA rarely last longer than a handful of months. *See infra* Part IV.D.

[241] *Cf.* Haines & Hendel, *supra* note 178, at 79–80 (describing the reduced time frames that small business debtors face and the hurdles they must clear to receive an extension).

[242] Janger, *supra* note 129, at 621; *see also infra* Part V.D (discussing this effect in more detail).

[243] 11 U.S.C. § 365(a). Although executory contract is not defined in the Bankruptcy Code, it generally refers to contracts where "performance remains due to some extent on both sides." 1977 House Report, *supra* note 95, at 347, 1978 U.S.C.C.A.N. at 6303.

[244] Orion Pictures Corp. v. Showtime Networks, Inc. (*In re* Orion Pictures Corp.), 4 F.3d 1095, 1098 (2d Cir.1993) (quoting 2 COLLIER ON BANKRUPTCY 365.01[1] (15th ed. 1993)). If the debtor wishes to assume a contract, it must cure any non-monetary defaults and provide the lessor adequate assurance of future performance. 11 U.S.C. § 365(b)(1). An assumed contract is treated as an obligation of the estate. *See In re* Crystal Apparel, Inc., 220 B.R. 816, 834 (Bankr. S.D.N.Y. 1998). The debtor may instead reject a contract, which is treated as a prepetition breach, giving the non-debtor party an unsecured claim for damages. *See* 11 U.S.C. § 365(g). That claim, like all general unsecured claims, may be modified pursuant to a plan of reorganization. *See* 11 U.S.C. § 502(g)(1).

[245] *See* 11 U.S.C. § 365(f).

this way, section 365(d)(4) allows debtors to both cut operating costs and bring value to the estate.[246]

Before BAPCPA, a debtor faced a sixty-day window to assume or reject non-residential real property leases, such as store, plant, or office leases.[247] That window could be extended by the bankruptcy court for "cause."[248] Courts routinely granted debtors' requests for extensions and, over time, debtors and lenders relied on the ability to obtain as many extensions as needed to make reasoned lease decisions.[249] Commercial landlords, frustrated with the long delays, lobbied forcefully for an amendment that would "remove the bankruptcy judge's discretion to grant extensions of the time."[250]

Section 365(d)(4) now provides the debtor an initial 120 days after the petition date to assume or reject non-residential real property leases.[251] This time frame is subject to only one ninety-day extension, resulting in a maximum 210-day window to make lease determinations.[252] If the debtor needs additional time to evaluate its leases, the debtor must obtain each landlord's written consent for a further extension. If the debtor fails to elect assumption or rejection and cannot obtain the landlord's written consent to a further extension, then the lease is deemed rejected.[253] This new time limit has proved challenging for large retailers, who can have thousands of retail leases to evaluate.[254] Retailers

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[246] *See, e.g.*, Anheuser-Busch, Inc. v. Miller, 99 B.R. 137, 141 (Bankr. D. Mass. 1989) (allowing rejection of an executory contract and assignment of sublease despite the creditor's objection); In re Ames Dep't Stores, Inc., 287 B.R. 112, 126–27 (Bankr. S.D.N.Y. 2002) (allowing an immediate sale and future assignment of a lease because it was likely to maximize overall value for creditors).

[247] 11 U.S.C. § 365(d)(4) (2000).

[248] *Id.*

[249] *See, e.g.*, *In re* Kmart Corp., 290 B.R. 614, 619 (Bankr. N.D. Ill. 2003) ("Permitting the debtor to makes [sic] its decision as late as the plan confirmation date enables the debtor to carefully evaluate the possible benefits and burdens of an executory contract.").

[250] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Report of the Committee on the Judiciary, H.R. Rep. No. 109-31, at 86. The commercial landlord lobby has been a powerful force in forming bankruptcy legislation. An earlier lobbying campaign by commercial landlords resulted in the 1984 "Shopping Center" amendments to the Bankruptcy Code. These amendments required debtors to remain current on their non-residential real property lease obligations in bankruptcy, and instituted the initial sixty-day limit on making lease decisions. These benefits to landlords, as well as 365(d)(4)'s new time frames, are not available to lessors of property other than non-residential real property. *See generally* Sally S. Neely, *BAPCPA Provisions Directly Affecting Executory Contracts and Unexpired Leases in Chapter 11 Cases (With Hypothetical)*, *in* SM014 ALI-ABA, Chapter 11 Business Reorganizations 295, 298 (2007) (discussing the "political clout" of the commercial real estate lobby and its effects on executory contract practices in bankruptcy).

[251] 11 U.S.C. § 365(d)(4) (2006).

[252] *Id.*

[253] *Id.*

[254] Lubben, *supra* note 125, at 38. A retailer's business is seasonal, with a large percentage of its sales occurring in the last months of the calendar year. Historically, retailers have frequently taken over a year to evaluate in-bankruptcy data, including holiday sales data, for each store. *See, e.g.*, Brett Berlin et al., *Business Bankruptcy Panel: Hot Topics in Retail Bankruptcy*, 25 Emory Bankr. Dev. J. 343, 349 (2009) (panel commentator noting that "the retail business is seasonal" and that "[i]t usually takes a full twelve-month cycle for a retailer to know what is going on").

now have less than seven months to make lease decisions, unless they can obtain piecemeal extensions from the necessary landlords.[255]

Like the utility provision discussed above, section 365(d)(4) replaces a judicial determination of the proper timeline for lease decisions with a provision that turns on creditor consent. Revised section 365(d)(4) gives landlords a great deal of leverage, particularly over larger debtors who may be in greater need of additional time. Landlords may, for example, exact fees or other concessions as a condition to any extensions beyond the outside window of 210 days.[256] Requiring individual negotiations with each landlord also imposes a potentially significant communications burden on a debtor that already faces a truncated bankruptcy process.

This change has seriously impacted the ability of retailers to secure meaningful debtor-in-possession ("DIP") financing. Debtors entering Chapter 11 bankruptcy need liquidity to stabilize trade credit, pay their lawyers and financial advisors, meet general operating costs, and avoid a premature liquidation of the business.[257] As companies facing bankruptcy are frequently in a tight cash position, they may rely on DIP financing to meet these obligations.[258] The reduced time frames presented by section 365(d)(4), coupled with debtors' increased cash demands, make a retail bankruptcy case a much less attractive investment for DIP lenders than it was before BAPCPA.

To understand section 365(d)(4)'s impact, it is important to note that a DIP financer's willingness to lend to a retailer has historically relied on the debtor's ability to market the debtor's commercial leases.[259] Before BAPCPA, retail debtors frequently assigned their below-market leases to third parties, generating significant value for the bankruptcy estate.[260] Likewise, the sale of

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255 With a shortened time for making lease decisions, a greater number of mistakes are likely to occur. Mistaken assumptions or rejections of leases carry stiff consequences. If the debtor rejects a lease prematurely, it risks losing a profitable location, injuring both itself and the landlord. If a debtor assumes a lease prematurely and later decides that it must reject the lease, the landlord may have a large administrative claim against the debtor (roughly equivalent to the monetary obligations due for a period of two years under the lease), which must be paid in full before the debtor emerges from bankruptcy. 11 U.S.C. § 503(b)(7) (2006), as amended acknowledges that mistakes will likely be more prevalent, and places a two-year limit on the recoverable damages for an assumed-and-later-rejected lease. Notwithstanding this adjustment, this damage award has the potential to be a significant obligation for an already cash-deficient debtor. *See also* 11 U.S.C. § 365(d)(4) (2006).

256 For example, landlords may request that the debtor waive any preference claims against the landlord as a precondition to granting an extension.

257 *See* Skeel, *supra* note 137, at 925; *see also In re* Ames Dep't Stores, Inc., 115 B.R. 34, 36 (Bankr. S.D.N.Y. 1990) ("[M]ost successful reorganizations require the debtor-in-possession to obtain new financing simultaneously with or soon after the commencement of the Chapter 11 case.").

258 Skeel, *supra* note 137, at 925.

259 Lawrence C. Gottlieb, Michael Klein, & Ronald R. Sussman, *BAPCPA's Effects on Retail Chapter 11s are Profound*, J. CORP. RENEWAL (Feb. 19, 2009), http://www.turnaround.org/Publications/Articles.aspx?objectID=10643 ("Prior to BAPCPA, lenders were far more likely to finance a debtor's attempt at reorganization, partly because the Bankruptcy Code essentially provided them with an indefinite period of time to market and assign a debtor's below-market leases to third parties at a premium in the course of a subsequent liquidation.").

260 *Id.*

"designation rights" allowed the debtor to obtain immediate liquidity early in a bankruptcy case.[261] Designation rights are the rights to direct the debtors to assume and assign unexpired leases to qualifying third parties.[262] Designation-rights sales have been especially helpful to large retail bankruptcies because they allow the debtor to quickly monetize the value of the leases while shifting the administrative burden of assigning individual leases to a willing buyer.[263] Due to the reduction of the time periods for assigning leases under BAPCPA, the time to market commercial leases and designation rights packages is starkly reduced.[264]

Moreover, a DIP lender generally relies on the value of a retailer's inventory to secure its loan.[265] The debtor's inventory is most valuable to a lender if it remains on the store shelves, available to customers. If the debtor must liquidate, lenders will frequently demand that the liquidation proceed while existing stores remain open.[266] Thus, a lender's agreement to provide bankruptcy financing will likely require the debtor to make lease decisions nine to twelve weeks in advance of the lease decision deadline to allow for sufficient time to conduct a going-out-of-business sale on site.[267] In effect, this truncates the retailer's reorganization process to no more than a five-month window.[268]

E. Taking Stock of BAPCPA: Impact on the Retail Industry

In recent years, retail bankruptcy cases have largely followed a predictable pattern: when the retailer enters bankruptcy, the case is either filed as a liquidation from the outset, or its lenders allow a one-shot attempt to complete an internal reorganization or locate a going-concern buyer. If the debtor fails to do so within five months of filing, the retailer will be liquidated before the lease

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261 In re Ames Dep't Stores, Inc., 287 B.R. 112, 116 (Bankr. S.D.N.Y. 2002) (noting that the sale of designation rights is a method to "realize on the economic value in [the Debtors'] leases" that "would make a great deal of business sense for the Debtors' creditors generally.").

262 *Id.* at 114 n.2.

263 Russ Munsch et al., *Bankruptcy Issues in the Retail Sector*, Continuing Legal Education Presented at the Univ. of Texas School of Law, 27th Annual Jay L. Westbrook Bankruptcy Conference, at 11 (Nov. 13–14, 2008), http://www.munsch.com/files/bankruptcy_issues.pdf.

264 Gottlieb, *supra* note 259.

265 Lawrence Gottlieb & Seth Van Aalten, *The Benefits of BAPCPA? A Mirage for Retail Creditors*, 13 CREDIT & FIN. MGMT. REV. 53, 56 (2007).

266 Gottlieb, *supra* note 259.

267 *Id.* Retailers who file late in the calendar year may experience added pressure from lenders to fast-track a going out of business sale during the critical holiday season. *See id.*

268 Representatives of commercial landlords are quick to argue that extensions available upon landlord consent erase any difficulties associated with amended 365(d)(4). *See Circuit City Hearing*, *supra* note 179, at 43 (statement of Daniel B. Hurwitz, President and COO, Developers Diversified Realty Corporation, on behalf of International Council of Shopping Centers). Although a landlord may consent to an extension of the lease decision period, the financing packages following BAPCPA overwhelmingly indicate that lenders do not yet have sufficient confidence in the debtor's ability to obtain such piecemeal extensions. Robert J. Keach et al., *Legislative Symposium Roundtable: Chapter 11 at the Crossroads: Does Reorganization Need Reform?*, 18 AM. BANKR. INST. L. REV. 365, 371–72 (2010).

rejection window has closed.[269] This rushed and mechanical process affords little opportunity for market participants to determine the best use for the debtor's assets, or to negotiate an alternate course.

An increased prevalence of liquidations harms a number of parties, from employees to nearby retailers, as well as other businesses in the supply chain. Ironically, several of the purported beneficiaries of BAPCPA's amendments have found themselves in a worse position following the recent spate of retail liquidations.[270] Large real estate conglomerates, which lease much of the U.S. retail space, have sustained major losses from the liquidation of numerous national retail chains. Indeed, in the wake of widespread retail liquidations and plunging real estate values, the nation's second-largest shopping mall operator filed for bankruptcy relief.[271] Additionally, utility companies and twenty-day claimants lose continuing business relationships when their customers liquidate. Twenty-day claims will be subordinated to Chapter 7 administrative expenses if a bankruptcy case converts to a Chapter 7 liquidation.[272] Thus, in the wake of rampant retail liquidations, many retail creditors may find the benefits promised by BAPCPA to be illusory.[273]

BAPCPA was passed in 2005, shortly before the start of the recent financial crisis. As such, it is difficult to fully distinguish BAPCPA's effects from broader economic pressures on retail bankruptcy cases.[274] For example, many former DIP lenders exited the market in 2008, making DIP financing extremely difficult to obtain.[275] For those debtors that have managed to locate a willing DIP lender in recent years, the resulting financing arrangements have contained restrictive loan covenants and carried extraordinary fees.[276] Whether these financing packages respond to BAPCPA's pressures, prevailing economic conditions, or a combination of factors, their impact on retail bankruptcy cases is certainly pronounced.

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[269] *See* Gottlieb, *supra* note 259; *see also* Berlin et al., *supra* note 254, at 350 (discussing this phenomenon and noting that "[w]e cannot underestimate the impact of the change to the Code on DIP lending and what DIP lenders are willing to do.").

[270] Levin & Ranney-Marinelli, *supra* note 70, at 603.

[271] *See In re* General Growth Props., Inc., 409 B.R. 43, 47 (Bankr. S.D.N.Y. 2009); *see also* GGP, *About GGP*, http://www.ggp.com/about-ggp/overview (last visited Dec. 29, 2012).

[272] 11 U.S.C. § 726(b) (2006). For this reason, 503(b)(9) claimants typically contest such a conversion.

[273] For a more thorough discussion of this topic see Gottlieb & Van Aalten, *supra* note 265, at 53–60.

[274] Further research might compare the recent retail liquidations to the successful reorganizations of Macy's, Federated Department Stores, and similar retailers following the Savings and Loan Crisis to identify the extent of BAPCPA's impact on retail bankruptcies. Alternately, the passage of time and eventual economic recovery will reveal whether high levels of retail liquidations will endure.

[275] *See generally* Erika L. Morabito, *Debtor-in-Possession and Exit Financing in Today's Market*, *in* DEBTOR-IN-POSSESSION AND EXIT FINANCING: LEADING LAWYERS ON SECURING FUNDING AND ANALYZING RECENT TRENDS IN BANKRUPTCY FINANCING 43, 44–52 (Eddie Fournier ed., 2010) (discussing the impact of recent financial issues on DIP lending).

[276] Circuit City's DIP financers, for example, required $30 million in fees in exchange for roughly $50 million in new credit. *See Circuit City Hearing*, *supra* note 179, at 26 (statement of Richard M. Pachulski). Circuit City's bankruptcy case ultimately failed due to its inability to comply with the company's tight DIP restrictions, including a forced timeline for sale. *Id.*

Despite this ambiguity, it appears likely that a full economic recovery will not completely remediate the post-BAPCPA trend toward retail liquidations. Because BAPCPA effectively ties the terms of a retailer's bankruptcy financing to the debtor's lease rejection deadline,[277] most retailers facing bankruptcy can at best hope to run the gantlet that BAPCPA's provisions create by locating a going-concern buyer within five months of filing. Thawing credit markets may increase the incidence of such going-concern sales, particularly among smaller retailers like Harry & David and Crabtree & Evelyn, which exited bankruptcy under new ownership in 2010 and 2011.[278] Nevertheless, BAPCPA's "truncated reorganization process offers little hope for real reorganization in all but the simplest cases."[279] Particularly among larger retailers, the few post-BAPCPA "success" stories have been short-lived.[280]

V. Rehabilitating Bankruptcy Reform Through Statutory Design

The retail story is one of unintended consequences resulting from BAPCPA's emphasis on crystalline rules. BAPCPA's expansion of interest-group benefits and reduction of the judicial role have made reorganization more costly and time-pressured and have incentivized many creditors to favor the debtor's liquidation.[281] The rise of retail liquidations under BAPCPA suggests that the structure of BAPCPA's reforms has undermined their substance, upsetting both foundational bankruptcy policies and BAPCPA's normative goals.

This Part proposes several alternatives to BAPCPA's amendments, each designed to fulfill BAPCPA's goals while limiting its adverse effects. In recognition that bankruptcy reform efforts must balance a variety of competing inter-

277 Absent overwhelming landlord support at a very early stage in the bankruptcy case, debtors will continue to have roughly five months to attempt a reorganization.

278 *See* Greg Stiles, *Harry & David Set to Exit Bankruptcy Today*, Mail Trib. (Sept. 13, 2011, 2:00 AM), http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20110913/BIZ/109130302; Bruce Watson, *Comeback Brands: Ten Famous Brands Coming Back to Life*, AOL Daily Fin. (July 26, 2010 6:30 PM), http://www.dailyfinance.com/2010/07/26/comeback-brands-ten-famous-brands-that-are-coming-back-to-life/.

279 Lubben, *supra* note 125, at 35 (comparing BAPCPA's constraints on the Chapter 11 process with Swiss reorganization systems). As "the Swiss argue that their current, limited reorganization system too often leads to late filings and company liquidation," Lubben wonders "[w]hy [Congress would] want to move the U.S. system in this direction?" *Id.*

280 *See, e.g.*, *In re* Goody's Family Clothing, Inc., 401 B.R. 131, 132–33 & n.3 (Bankr. D. Del. 2009) (filing a second Chapter 11 petition roughly four months after emerging from bankruptcy and liquidating shortly thereafter); Order Pursuant to Bankruptcy Code Sections 105(a), 363(b), 364(e), 365(a), and 554(a) and Bankruptcy Rules 2002, 6003, 6004, 6006, and 9014 (I) Approving the Debtor's Entry into Agency Agreement, (II) Authorizing the Debtors to Sell Certain Merchandise through Store Closing Sales, (III) Authorizing the Debtors to Abandon Unsold Property, (IV) Waiving Compliance with Contractual Store Closing Sale Restrictions and Exempting the Debtors from Certain State Wage Pay Requirements and Laws Restricting Store Closing Sales, (V) Authorizing the Debtors' Assumption of October Agency Agreement and (VI) Granting Related Relief at 10, *In re* Filene's Basement, LLC, No. 11–13511 (KJC) (Bankr. D. Del. 2011) (liquidating under Chapter 11 after emerging from bankruptcy protection in 2009).

281 *See supra* Part IV; *see also* Richard D. Thomas, *Tipping the Scales in Chapter 11: How Distressed Debt Investors Decrease Debtor Leverage and the Efficacy of Business Reorganization*, 27 Emory Bankr. Dev. J. 213, 226 (2010).

ests, including those of organized creditor groups, this part declines to rule on the balances struck in BAPCPA's reforms.[282] This Part assumes the soundness of BAPCPA's goals and evaluates only the legislative design of its amendments. It argues that nearly all of BAPCPA's goals could have been accomplished, with fewer negative effects on retail reorganization cases, through the use of standards-based directives.[283] This Part concludes by exploring the broader implications of these principles on the process of bankruptcy reform.

A. *Addressing Concerns of Efficiency*

Rules-based statutes are commonly thought to be more efficient than their standards-based counterparts because they are applied in a reflexive or automated fashion. Professors Rose and Janger have clarified, however, that when one weighs the ex ante effects of rules and standards together with their effects ex post, "crystalline rules seem less the king of the efficiency mountain than we may normally assume."[284] A more sophisticated analysis of the functions of rules and standards suggests that the restoration of judicial discretion, as proposed in this Part, may ultimately increase efficiency in the reorganization process.[285]

If the outcome of a dispute is fixed, parties are likely to settle;[286] parties will litigate only in cases where their expectations of the outcome of trial diverge.[287] The indeterminacy of standards increases parties' uncertainty regarding potential outcomes and thus increases the likelihood that a matter in dispute will be submitted to a judge.[288] With such risk in play at the time of contracting, parties will take care to avoid actions that later might be deemed inappropriate. This focus on "how it will look later" may limit parties from overreaching in negotiations.[289] Standards thus provide the opportunity to curb non-cooperative behavior ex ante, at the time of contracting, and again if the transaction comes before a judge.[290]

Former section 1121's exclusivity period provides a prime example of this positive impact on the bankruptcy process. Both creditors and debtors can seek outcomes under section 1121 that promote individual gain over the best inter-

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282 The validity of BAPCPA's interest-group-favoring aims has been questioned in other writings and must be thoroughly reassessed in future reform efforts. *See, e.g.*, Ira L. Herman, *Statutory Schizophrenia and the New Chapter 11*, 25 AM. BANKR. INST. J., Dec./Jan. 2007, at 30 (discussing BAPCPA's formation and highlighting "potentially unwanted side effects"); Gottlieb et al., *supra* note 259 (questioning reforms and highlighting their impact on the retail industry); Lundin, *supra* note 153 (cataloguing BAPCPA's flaws).

283 Professor Donald Korobkin has advocated a similar role of bankruptcy reform as part of his "values-based" account of bankruptcy. *See* Korobkin, *supra* note 169, at 362 ("Congress thus reforms bankruptcy law not by locating a reductive method of deciding all bankruptcy questions, but by adjusting the constraints by which bankruptcy decisionmaking in a particular context is guided.").

284 Rose, *supra* note 165, at 600.

285 *See generally* Janger, *supra* note 129, at 581 (discussing how standards-based provisions can enhance efficiency in the Bankruptcy Code).

286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.* at 585.

290 *Id.*

ests of all parties to the reorganization. Creditors might attempt to terminate exclusivity and propose a competing plan, while debtors might seek extensions of exclusivity, despite having little likelihood of accomplishing a reorganization. A judge under the former, standards-based 1121 would resolve such disputes depending on the going-concern value to be preserved and the likelihood of a successful reorganization.[291] The high level of flexibility in setting the exclusivity period established a functional tension between debtor and creditor, which discouraged either side from acting in sole fulfillment of its individual interest;[292] the risk of long extensions of exclusivity discouraged a creditor from refusing to negotiate, while the threat of exclusivity termination alerted the debtor that it could not stonewall the process to force creditor settlement.[293] This flexible standard for granting extensions allowed the judge to "encourage cooperation among the creditors where cooperation will preserve asset value."[294] In contrast to the standards-based structure of former section 1121, BAPCPA's new caps on exclusivity discourage consensus. Creditors now face a fixed window of time that they simply may wait out if they would prefer not to work with the debtor toward a consensual plan of reorganization.[295]

Restoring judicial discretion over section 1121 would reduce these negative incentives and restore cooperation in the plan confirmation process. Other provisions discussed in this Article would enjoy similar benefits from standards-based reforms. For example, revising section 366, as detailed below, would limit litigation relating to individual utilities' "satisfaction" with the offered assurance of future payments. Revising section 503(b)(9) would reduce vendors' incentives to seek recovery of large twenty-day claims in an early liquidation. A standards-based section 365(d)(4) would reduce landlords' opportunities to strip value from the debtor and might remedy lenders' current tendencies to avoid or exorbitantly price bankruptcy financing packages. These efficiency gains strongly militate in favor of future standards-based reforms.

B. *Addressing Judicial Distrust*

Proceduralist theorists may balk at enhancing the role of the bankruptcy judge, whom proceduralists generally view to lack the capacity to allocate relief efficiently in a Chapter 11 case.[296] Professor Janger argues that even after taking into account proceduralists' concerns of the efficacy of the bankruptcy judge, standards remain a preferable design for many Bankruptcy Code provisions.[297] He notes that scholars who advocate for a limited role for the bankruptcy judge would, at a minimum, expect a judge to identify and prevent

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291 *Id.* at 594–95.
292 Cieri et al., *supra* note 232, at 406–407. "This tension between the debtor's, creditors', and other constituents' interests is consistent with the Code's goal of fostering meaningful negotiations between the debtor and its constituencies." *Id.* at 407.
293 *Id.* at 406.
294 Janger, *supra* note 129, at 595.
295 *Id.* at 621.
296 *See id.* at 576–78.
297 *Id.* at 594. Before BAPCPA's enactment, Professor Ted Janger presented a compelling case for the wide use of standards to curb inefficient, unilateral behavior exercised by creditors and debtors in bankruptcy.

"abusive" behavior, which he describes as inefficient, unilateral behavior exercised by creditors and debtors in bankruptcy.[298] Janger notes that standards' function to "deter abusive behavior with the threat of judicial decision-making"[299] applies with equal force whether the judge is competent or incompetent.[300]

In addition, standards generally increase the costs parties incur in pursuing non-cooperative behavior.[301] Disputes in bankruptcy are tied to the value of the debtor's estate, and any form of litigation will deplete the sum available for all creditor recovery.[302] Thus, standards discourage parties from pursuing litigation to the extent that it might hinder their ultimate recovery. Based on the opportunities that standards provide to discourage inefficient, unilateral behavior in bankruptcy, Professor Janger argues that "legislators should allocate open-ended rules without regard to whether they view the bankruptcy judge as competent or incompetent."[303] The legislature should simply place standards in areas where abuse is likely to occur and ensure that the cost of non-cooperative behavior serves as an effective check.[304] The following Parts examine how standards-based reforms may restore cooperative behavior and heal many of the complications arising from BAPCPA's reforms.

C. *Restoring the Utility-Debtor Balance to Section 366*

In drafting BAPCPA, Congress determined that administrative priority status should no longer serve as a form of adequate assurance for utilities under section 366.[305] To achieve that goal, Congress crafted a definition of adequate assurance that excluded administrative priority.[306] To this point, BAPCPA's amendment of section 366 represents an example of productive, standards-based bankruptcy reform. The amendment falls short, however, by shifting the role of decision maker from the bankruptcy judge to the utility provider. By allowing the utility to demand satisfaction with its adequate assurance award, the legislature has upended the former balance between debtor and utility and increased the potential for coercive conduct by the utility. Although developing case law has lessened the impact of this provision, amended section 366 introduces new financial burdens on the reorganization and may encourage litigation.[307]

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298 To support this point, Janger cites a leading proceduralist scholar who notes the principal obstacle to determining the best use of the debtor's assets is unilateral action by creditors. *Id.* at 592–93 & n.132 (citing Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 183 (1987)).
299 *Id.* at 586; *see also supra* Part IV.D (discussing this effect of standards).
300 Janger, *supra* note 129, at 603.
301 *Id.* at 608.
302 *Id.* at 607 ("[C]reditors will have an incentive, on the one hand, to appear willing to bring a reputational lawsuit (seeking, perhaps, to lift the automatic stay) to enhance their bargaining position in the bankruptcy, while on the other hand, they must recognize that the costs will come out of their recovery.").
303 *Id.* at 613.
304 *Id.*
305 *See supra* text accompanying notes 186–187.
306 *See* 11 U.S.C. § 366(c)(1)(A) (2006).
307 *See supra* text accompanying notes 194–199.

Section 366 would function more efficiently if the "satisfactory to the utility" language simply were removed. This slight procedural tweak would return the provision to a judge-guided standard, but would constrain the judicial role to adhere to BAPCPA's priorities. This change also would achieve BAPCPA's objectives—providing additional security to utility providers by limiting the use of administrative priority as a form of adequate assurance—without disrupting the original debtor-creditor balance intended by section 366.

D. Restoring Judicial Oversight in Sections 365(d)(4)'s and 1121's Extensions of Time

BAPCPA's goal of reducing delays in the reorganization process, as observed in the limits on extending section 365's lease assumption/rejection period and section 1121's exclusivity period, would likewise operate more efficiently if Congress had employed open-textured standards. Rather than imposing hard-and-fast deadlines, sections 365(d)(4) and 1121 could restore judicial discretion in granting extensions but require a greater showing of need from the debtor. For example, the former "cause" standard for granting extensions might be adjusted to require the debtor to show that relief is necessary to avoid "irreparable harm" to the bankruptcy case.[308]

An alternate approach would permit unlimited extensions upon a showing of "cause," but subject each extension to a definite time frame. In the case of lease decisions, for example, extensions capped at ninety days might provide the debtor a reasonable time to analyze its leases and request further extensions for only those leases that require additional work. The court would receive regular updates on the debtor's progress and have the opportunity to rule or comment on further necessary extensions. The court might additionally set benchmarks upon which further extensions would be conditioned. Bankruptcy courts have historically used benchmarks when granting extensions of exclusivity, with great success.[309] Requiring courts to outline their expectations for the debtor would streamline later hearings on these issues, reducing the administrative burden of multiple extensions on the bankruptcy courts. At the same time, the time frame for crafting a plan would remain tailored to the individual debtor's circumstances.

Any of these standards-based adjustments would sharply limit the availability of extensions, in accordance with BAPCPA's priorities, while ensuring that debtors whose value might be preserved with additional time would have access to it. More importantly, these amendments would limit much of the potential for self-interested conduct created by BAPCPA's hard-and-fast deadlines and might additionally reduce lenders' incentives in favor of liquidation. In this way, the use of standards would drive parties to seek outcomes that promote broader collective recoveries in Chapter 11.

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308 Professor Janger has proposed a more nuanced standard for extensions of exclusivity, which would require showing of creditor recalcitrance and a likelihood of a successful reorganization. Janger, *supra* note 129, at 621.

309 *See* Cieri et al., *supra* note 232, at 418 (describing interim deadlines set in Macy's case that required the debtor to demonstrate progress toward a plan of reorganization at several points during the exclusivity period).

E. Rejecting Section 503(b)(9)

Section 503(b)(9), which grants administrative priority for the value of goods received within the twenty days preceding bankruptcy, is not so easily rehabilitated. Its normative function is difficult to discern from BAPCPA's legislative history and it diverges significantly from several bedrock principles of bankruptcy law.[310]

If providers of goods indeed require the protection afforded by section 503(b)(9), bankruptcy reform should focus on apportioning that relief only to vendors who provide real and necessary benefits to the bankruptcy estate. This would enable the bankruptcy judge to make case-by-case determinations based on the circumstances of each vendor's transactions with the debtor. Such a reform should grant relief to providers of services as well, absent some justification for isolating sellers of goods for preferential treatment.[311] The legislature might properly determine, however, that in light of the benefits that providers of goods enjoy absent 503(b)(9),[312] the shaky legislative foundation for this amendment and its apparent conflicts with deep-set Bankruptcy Code policies, the best course of action is simply to repeal section 503(b)(9).

F. Guarding Standards in Future Bankruptcy Reforms

Recent Bankruptcy Code amendments have made reorganization a more burdensome process, although many of BAPCPA's normative goals could have been achieved with less detrimental impact through standards-focused amendments. When Congress next undertakes to amend the bankruptcy laws,[313] the experiences of retail debtors should encourage Congress to focus greater attention on the decision-making aspects of its amendments. Preserving the flexibility of the Bankruptcy Code and discouraging unilateral conduct are primary ideological considerations against which future amendments should be measured. When standards are viewed as essential to maximizing value and preventing abuse in the bankruptcy process, they may be palatable to those on both the proceduralist and traditionalist sides of the bankruptcy divide. The proposals advanced in Part IV provide a starting ground for achieving Congress's objectives through standards-based bankruptcy reform. The principles advanced in Part IV may expand and adapt to assist Congress in future legislative efforts.

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310 *See supra* text accompanying notes 205–11.

311 Although the practice of granting priority to "critical vendors" of the debtor is not without its flaws, its tailored approach might better serve as a guideline for developing a standard to further section 503(b)(9)'s apparent goals. For a history of critical vendor payments and discussion of their continued vitality after BAPCPA, *see* Shirley S. Cho, *The Intersection of Critical Vendor Orders and Bankruptcy Code § 503(b)(9)*, 29 CAL. BANKR. J. 7, 11–13 (2007).

312 *See, e.g.*, U.C.C. § 2-705 (2012) (prepetition right to stop delivery or reclaim goods); 11 U.S.C. § 546(c) (2006) (postpetition reclamation rights, as expanded by BAPCPA).

313 Members of Congress have considered legislative initiatives to curb BAPCPA's deleterious effects. *See, e.g.*, Business Reorganization and Job Preservation Act of 2009, H.R. 1942, 111th Cong. §§ 1–2 (2009) (seeking to repeal amendments to several provisions discussed in this writing, based on the negative effects they have had on retail and other reorganization cases).

When considering future revisions to the Bankruptcy Code, Congress need not ignore the agendas of commercial landlords, utility providers, and other interest groups. Congress should, however, more carefully weigh those interests against the broader values sought in bankruptcy.[314] Congress might also give weight to the contributions of the bankruptcy bar, at least insofar as bankruptcy professionals highlight errors and potential unintended consequences in proposed reforms. If Congress undertakes to revise the provisions examined in this Article, it may ultimately conclude that BAPCPA's reforms were too responsive to certain discrete creditor groups at the expense of more pressing legislative priorities. To the extent that Congress finds that BAPCPA's goals remain worthwhile, then a simple adjustment to the design of these provisions will mitigate many of BAPCPA's ill effects.

Congress will continue to receive pressure to amend the bankruptcy laws. Left to their own devices, rational, self-interested creditor groups will continue to take actions to benefit their individual recovery, whether or not those actions align with the public interest.[315] As Professor Rose's work clarifies, these groups may tend to pursue legislation to protect their rights with bright-line rules.[316] Some scholars advocate for reforms to reduce the impact of interest groups on the legislative process,[317] but this Article posits that Congress's increased attention to the design of its amendments will mitigate some of the negative impact of interest-group activity. The foregoing sections demonstrate that standards-based provisions can lessen many of the harsh effects of an inartful or imbalanced Bankruptcy Code. These beneficial qualities suggest that Congress should view standard-based bankruptcy form as an essential component of its legislative efforts.

The importance of standards-based reforms becomes increasingly relevant as global financing, distressed-debt investing, and other economic shifts further attenuate relationships in the commercial marketplace. Ongoing relationships encourage parties to behave cooperatively, or risk losing trading partners or harming their reputation.[318] In the absence of long-term, mutually beneficial connections in a bankruptcy case, standards provide a useful surrogate to encourage cooperative behavior. Standards "mimic [the] pattern of post hoc readjustments that people would make if they were in an ongoing relationship with each other."[319] In this way, standards preserve the cooperation and balance essential to bankruptcy in the face of shifting market dynamics.

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[314] As each of the creditor groups discussed herein has received special treatment under prior versions of the Bankruptcy Code, Congress may conclude that their interests were adequately represented before BAPCPA's amendments.

[315] *See* Jackson, *supra* note 2, at 862; Baird, *supra* note 129, at 581–82.

[316] Rose, *supra* note 165, at 593.

[317] Professor Block-Lieb, for example, suggests that Congress should establish a permanent bankruptcy review commission, like the Permanent Editorial Board for the Uniform Commercial Code, to lessen the impact of interest-group activity on the bankruptcy laws. Block-Lieb, *supra* note 2, at 871.

[318] Rose, *supra* note 165, at 602.

[319] *Id.* (emphasis omitted).

VI. Conclusion

Crystalline rules may seem attractive from the perspective of many creditor groups. Rules afford an element of stability in the Chapter 11 process, as parties may anticipate and rely on a limited range of outcomes without concern for post hoc equitable rebalancing. Recent retail bankruptcies highlight that these beneficial aspects of rules extend only to a point. Overuse of rules-based reforms has increased inefficiencies in the bankruptcy process and placed unnecessary barriers in the path of reorganization. The Bankruptcy Code requires flexibility and resilience in order to adapt to individual Chapter 11 cases and to weather future oscillations between creditor- and debtor-focused reforms. Congress's failure to understand the salutary effects of this flexibility can have far-reaching consequences on the Chapter 11 process.

Future bankruptcy reform efforts should benefit from the lessons of retailers in the wake of BAPCPA. The limitations of rules, and the concomitant benefits of standards, should serve as a guideline for crafting future bankruptcy legislation. If care is taken to preserve flexibility and balance in the Bankruptcy Code through a thoughtful allocation of standards-based provisions, the story of retailers after BAPCPA is one that need not be repeated.