A New Bankruptcy Subchapter for Institutions of Higher Education: A Path but not a Destiny

by

*Robert W. Miller**

ABSTRACT

Almost any financially distressed entity can attempt to restructure under chapter 11 of the Bankruptcy Code[1] while continuing to operate. Institutions of higher education ("IHEs") present one of the few exceptions. The moment a bankruptcy is filed, IHEs forfeit federal financial aid funding, their primary source of liquidity. Continued operations are impossible and going-concern value dissipates. Recent articles explain why the purported policy supporting the current treatment of IHEs is stale and misplaced, while the question of how they should be treated remains unexplored. This article fills the void and suggests administering IHE restructurings through the enactment of an IHE-specific subchapter to chapter 11 of the Bankruptcy Code.

Restructuring IHEs requires navigation of cross-cutting priorities including: (i) protecting the public interest in federal financial aid funds, (ii) minimizing' reputational stigma to ensure continued viability, (iii) facilitating an efficient restructuring, and (iv) treating students' interests fairly. To accomplish this challenging task, the proposed subchapter draws from both scholarly and historical sources including Professor Laura Coordes's recent articles examining the challenges of restructuring of heavily regulated healthcare business entities and lessons from Congress's evolving treatment of railroad reorganizations. More specifically, the proposed subchapter: (i)

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*Assistant Professor, University of South Dakota, Knudson School of Law. All the views expressed and mistakes made are the author's own. Many thanks to Professors Laura Coordes, Matthew Bruckner, and Christopher Bradley, as well as Daniel Waxman, for their thoughtful comments.

[1] 11 U.S.C. §§ 101-1532 *et. seq.*

grants the Department of Education veto power over a bankruptcy filing, (ii) implements an accelerated case timeline, (iii) incorporates a form restructuring support agreement, (iv) elevates students' claims and safeguards their records, and (v) facilitates the resolution of conflicts between the Bankruptcy Code and substantive non-bankruptcy law.

Confronted by an inability to operate in chapter 11, financially distressed IHEs resort to bankruptcy liquidations, receiverships, and workouts as restructuring alternatives. To evidence the necessity of a subchapter, this article provides the first comprehensive evaluation of these options and animates each discussion with an IHE example. These case studies confirm that the alternatives are poor substitutes and provide further support for the provisions of the proposed subchapter.

Admittedly, changing the Bankruptcy Code is a heavy lift, however, it is consistent with Congress's disparate treatment of IHEs. The current bankruptcy restructuring preclusion is a product of the 1990s, when ever-growing demand made the isolated incidents of financial distress appear to arise solely from fraud or wrongdoing. Change is now warranted in the face of increasing financial pressures resulting from demographic shifts and preference switches. After showing that the existing alternatives for IHEs fall short, this article marshals the evidence for enacting an IHE subchapter and outlines its composition.

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INTRODUCTION

Having weathered what is hopefully the worst of the COVID-19 pandemic, many IHEs still stand at the edge of a financial precipice. IHEs have long relied upon increased debt financing[2] and ever higher tuition and fees to balance the books in the face of declining undergraduate enrollment.[3] They justify higher costs and bond issuances by offering luxurious amenities, upgraded housing options, state of the art academic buildings, low student to faculty ratios, and broad administrative support.[4] Given their

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[2] Elenie Schirmer, *It's Not Just Students Drowning in Debt. Colleges Are Too!*, THE NATION (Nov. 20, 2020), https://www.thenation.com/article/society/student-debt-university-credit/.

[3] Christina Capatides, *Colleges across the U.S. brace for impact as the coronavirus batters their already tenuous financial ground*, CBS NEWS (Apr. 10, 2020, 2:45 PM), https://www.cbsnews.com/news/us-colleges-coronavirus-impact-finances/; *see also* Robert Kelchen, *How Much Do Private Colleges Rely on Auxiliary Revenue Sources?*, KELCHEN ON EDUC. BLOG (June 1, 2020), https://robertkelchen.com/2020/06/01/how-much-do-private-colleges-rely-on-auxiliary-revenue-sources/. "[D]espite vaccinations and a return to classrooms, undergraduate enrollment nationwide for the fall semester declined again [in 2021], and is down 6.5% compared with 2019." Jinjoo Lee, *Chegg Deserves a Pass*, THE WALL STREET JOURNAL (Nov. 2, 2021), https://www.wsj.com/articles/chegg-deserves-a-pass-11635876942?st=4m7rgdn1iab6pn0&reflink =article_email_share. Indeed, enrollment has shrunk every year since 2014. National Student Clearinghouse Research Center Yearly Reports. https://nscresearchcenter.org/publications/.

[4] *Poloncarz raises bankruptcy alarm about SUNY-Erie*, THE BUFFALO NEWS, *available at* https://buffalonews.com/opinion/editorial/the-editorial-board-poloncarz-raises-bankruptcy-alarm-about-suny-erie/article_01cfd226-b99d-11ec-9522-670b981797e3.html; Paul Campos, *Why have law schools increased payroll spending so drastically?*, LAWYERS, GUNS & MONEY BLOG (Feb. 16, 2016, 9:09 AM), https://www.lawyersgunsmoneyblog.com/2016/02/why-have-law-schools-increased-

already shaky finances, commentators predicted a COVID-19-fueled cull of IHEs.[5] To their surprise, the IHE closure rate has remained within historical ranges. Even among small liberal arts colleges, a sector identified as particularly distressed, only a few have closed. Most notably Concordia College and Mills College whose campuses were purchased by Iona College and Northeastern University, respectively, and Becker College, whose most popular programs will be covered by neighboring Clark University's establishment of a new department.[6] Credit federal intervention, through the CARES Act and subsequent legislation,[7] for throwing a lifeline to struggling IHEs. Yet, congressional relief is only temporary; decreasing future enrollment and rising tuition discount rates still haunt IHEs' future.

What happens when income decreases while the most significant expenses and liabilities remain the unchanged? Normally, an entity faced with this conundrum would attempt to negotiate a resolution with its creditors in the shadow of a possible bankruptcy filing.[8] Among the bankruptcy-specific tools the entity could threaten to employ are amortization of secured claims, damage caps for onerous executory contracts and unexpired leases, and the discharge of unsecured debts. This is not the reality for IHEs; they cannot threaten to reorganize through bankruptcy.[9] Upon a bankruptcy filing, IHEs' primary sources of income disappear and a reorganization is impossible. The illusory threat of bankruptcy has a knock-

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payroll-spending-so-drastically. Some resistance to cutting faculty is certainly related to the importance of student faculty ratios in accreditation and school rankings. *Id.*

[5] *Compare* Melissa Korn, Douglas Belkin, and Juliet Chung, *Coronavirus Pushes Colleges to the Breaking Point, Forcing 'Hard Choices' About Education*, WALL STREET JOURNAL (Apr. 30, 2020, 10:15 AM), https://www.wsj.com/articles/coronavirus-pushes-colleges-to-the-breaking-point-forcing-hard-choices-about-education-11588256157; *with* Natalie Schwartz, *Are more college closures ahead?*, HIGHER ED DRIVE (Apr. 1, 2021), https://www.highereddive.com/news/are-more-college-closures-ahead/597746/.

[6] Douglas Belkin, *Broke Colleges Resort to Mergers for Survival*, THE WALL STREET JOURNAL (July 19, 2022, 1:04 A.M.) https://www.wsj.com/articles/broke-colleges-resort-to-mergers-for-survival-11658239445; Schwartz, *supra* note 5.

[7] The Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, March 27, 2020, 134 Stat 281, 310-311 established the Higher Education Emergency Relief Fund with $14 billion in funding for IHEs. The Higher Education Emergency Relief Fund II was authorized by the Coronavirus Response and Relief Supplemental Appropriations Act, 2021, Public Law 116-260, Dec. 27, 2020, and provided a second tranche of $21.2 billion. Finally, the Higher Education Emergency Relief Fund III authorized by the American Rescue Plan, Public Law 117-2, March 11, 2021, providing a third tranche of $39.6 billion for a total $76.2 billion.

[8] Thomas H. Jackson, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 161 (1989). Even after a bankruptcy case is filed, the option for a deal still exists. Indeed, the debtor could agree to dismiss the bankruptcy case based on how the case would have proceeded. *See* Samuel L. Bufford, *What Is Right About Bankruptcy Law and Wrong About Its Critics*, 72 WASH. U. L.Q. 829, 833 (1994).

[9] Although as will be discussed in Part V, they can threaten to reorganize through a receivership.

on effect that undermines IHEs' leverage when negotiating with their creditors generally.

The vast majority of IHEs' income is derived from tuition and fees in the form of federal student aid authorized under the title IV of the Higher Education Act of 1965 (the "HEA"), codified as 20 U.S.C. § 1070(a) ("title IV"). The names of the programs and financial products that dispense title IV funds—Pell Grants, Perkins Loans, Stafford Loans, and Grad Plus Loans—are more recognizable. Upon filing bankruptcy, as the law currently exists, the IHE cannot receive any title IV funds. Left without its primary source of income, an IHE cannot reorganize through a bankruptcy proceeding.

Out-of-court workouts with secured lenders offer one alternative. Changing the terms of the debt instruments governing the relationship between the IHE and its lenders will not impact title IV funding. Indeed, it is not coincidental that one of the first "liability management transactions," where a debtor takes advantage of the terms of their existing debt to craft new refinancing solutions outside of bankruptcy, was an IHE.[10] Although these strategies have become more common, even when they are available, an IHE may perceive that the reputational harm will exceed the financial benefits. In any event, the out-of-court restructuring is likely to be far more limited without the coercive tools available in a formal proceeding.

IHEs are not completely bereft of in-court restructuring options (liquidation, going-concern sale, or a reorganization) and this article provides the first comprehensive evaluation of these alternatives to a restructuring under chapter 11.[11] An IHE can still file a chapter 11 bankruptcy and sell its assets free and clear of liens through what is colloquially known as a "363 Sale"[12] while conducting a wind-down of unsold assets, even if it cannot operate.[13] Another option is to conduct a sale or restructuring through a

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[10] *See* Part VIII for discussion of Education Management Corporation's liability management transaction under the Trust Indenture Act.

[11] The author is not wading into the debate over whether a 363 Sale constitutes a liquidation, restructuring, or reorganization and their normative or positive merits. *See, e.g.*, A. Joseph Warburton, *Understanding the Bankruptcies of Chrysler and General Motors: A Primer,* 60 SYRACUSE. L. REV. 531 (2010) (canvassing the literature and using the GM and Chrysler cases as a lens for the evaluation). As the author has stated previously, this artificial bifurcation is usually unrealistic as the dividing line is "too fluid." Robert W. Miller, *A Comprehensive Framework for Conflict Preemption in Federal Insolvency Proceedings*, 123 W. VA. L. REV. 423, 477-78 (2020).

[12] A phrase derived from the operative provision of the Bankruptcy Code, 11 U.S.C. § 363.

[13] 363 Sales are common in chapter 11 cases even though they are not explicitly endorsed by the Bankruptcy Code and can be seen as an evasion or perversion of the chapter 11 confirmation process. *See* Harvey R. Miller & Shai Y. Waisman*, Is Chapter 11 Bankrupt?*, 47 B.C.L. REV. 129, 172 (2005) (discussing prevalence and benefits of 363 Sales). Although the IHE cannot operate in chapter 11, its assets can be sold to another IHE. Mercy College's purchase of the College of New Rochelle through a 363 Sale and the continued operations will be examined in Part III.B.

federal or state court receivership. Unlike a bankruptcy filing, a receivership does not necessarily trigger the elimination of title IV funding and some receivers have continued to receive title IV funding.[14] Uncertainty tempers the lure of this possibility because the Department of Education ("DOE"), the agency responsible for oversight of title IV funds, has been unwilling to confirm whether or how a receivership alters an IHE's eligibility to receive title IV funds.[15] Moreover, a receiver cannot muster certain coercive bankruptcy-specific powers to more comprehensively restructure the debtor. To recap IHEs' current options for in-court restructurings, an IHE's assets can be sold but it cannot operate following a bankruptcy filing while a receiver can sell an IHE's assets and potentially operate. Neither option can restructure both an IHE's balance sheet and cash flow statement. Put another way, IHEs cannot wield the discharge and cramdown powers of the Bankruptcy Code and continue as a reorganized as a going-concern (a "Chapter 11 Restructuring").[16] This article argues that this missing option is both essential for IHEs facing financial distress and consistent with public policies and theoretical frameworks undergirding bankruptcy generally.

This thesis may appear outmoded and unnecessary as 363 Sales are commonplace.[17] Even more damning, the provision that precludes a Chapter 11 Restructuring was enacted prior to the rise of 363 Sales in the early 2000s.[18] If traditional restructurings were previously more popular and Congress still enacted the limitation on title IV funds and eliminated a Chapter 11 Restructuring as an option for IHEs, why should we consider a change today?

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[14] "⟦A⟧n institution's eligibility to receive Title IV funding terminates immediately upon a bankruptcy filing⟦,⟧" while a federal receiver may still be eligible for title IV funding. Maria G. Carr, *Is receivership a better option for struggling higher education institutions?*, McDONALD HOPKINS (May 6, 2019), https://mcdonaldhopkins.com/Insights/May-2019/Is-receivership-a-better-option-for-struggling-hig.

[15] *See infra* note 197 and text accompanying.

[16] The term also includes sales consummated through chapter 11 plans. *See* 11 U.S.C. § 1123(a)(4) (a chapter 11 plan shall provide for adequate means of its implementation, such as the "sale of all or any part of the property of the estate, either subject to or free of any lien") and 11 U.S.C. § 1123(b)(5). Although far less common than 363 Sales due to their increased cost and duration, a sale through a plan is possible. Indeed, some well-known debtors have recently used plan sales successfully. *See, e.g.*, Findings of Fact, Conclusions of Law, and Order Confirming the Debtors' Second Amended Chapter 11 Plan, as Modified, *In re* RTI Holding Company, LLC (Bankr. D. Del. No. 20-12456 (JTD)) ECF No. 1144; *In re* Ditech Holding Corp., 606 B.R. 544 (Bankr. S.D.N.Y. 2019).

[17] At the time of the enactment of the Bankruptcy Code in 1978, traditional balance sheet restructurings were much more common for large debtors. *See* Miller & Waisman, *Is Chapter 11 Bankrupt?*, *supra* note 13, at 156 (explaining that rehabilitation and reorganization were the goals of the Bankruptcy Code and those purposes were vindicated during the early years following enactment prior to the rise in popularity of 363 Sales).

[18] *See id.*

My retort is twofold. First, altering the currently legal regime is necessary for not only a reorganization but also a going-concern 363 Sale of an IHE (why I use the broad term Chapter 11 Restructuring). When an IHE is sold in a bankruptcy case, the HEA imposes a two-year waiting period for obtaining access to title IV funds.[19] Given that title IV funds are the lifeblood of an IHE, the waiting period may as well be a hundred years as operations cannot be sustained without these funds. Second, IHEs located outside of urban centers will particularly benefit from a Chapter 11 Restructuring option.[20] The "college town," a phrase rooted in nostalgia, is the reality for hundreds of communities.[21] A Chapter 11 Restructuring could be the best option because a 363 Sale may not be economically feasible if no alternative use for the IHE's campus exists.[22]

Another obvious critique is that students will be reluctant to attend an IHE that has recently filed for bankruptcy. Unlike a single-use product, the service provided by an IHE often extends over four years, plus students also value the IHE's future standing and alumni network. As a result, a bankruptcy's tarnishing of an IHE's reputation could endanger its survival.

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[19] Betty Owen Schools, Inc. v. Department of Education (*In re* Betty Owen Schools, Inc.), 195 B.R. 23, 32 (Bankr. S.D.N.Y. 1996) (discussing 20 U.S.C. § 1099c(i)(1) (1992)); Will Hueske, *School's Out Forever: Lon Morris College, Section 525(a), and Revocation of Title IV Eligibility for Institutions of Higher Education in Bankruptcy*, WEIL RESTRUCTURING (Apr. 9, 2013), https://business-finance-restructuring.weil.com/government/schools-out-forever-lon-morris-college-section-525a-and-revocation-of-title-iv-eligibility-for-institutions-of-higher-education-in-bankruptcy/.

[20] Although many IHEs close each year, most are small operators with the noteworthy exceptions of for-profit IHEs located in or near urban centers.

[21] Consider Lincoln College, a small predominately black institution, which recently closed. It was located in the small town of Lincoln, Illinois (population 13,300) where it "played a prominent role in its local community, fielding sports teams and operating student-run radio and TV outlets." Bill Chappell, *Lincoln College closes after 157 years, blaming COVID-19 and cyberattack disruptions*, NPR, https://www.npr.org/2022/05/10/1097855295/lincoln-college-closes-157-years-covid-cyberattack.

[22] Moreover, an alternative use will likely devastate the local community because the positive externalities associated with the IHE will be eliminated. *See* Matthew A. Bruckner, *Terminating Tenure: Rejecting Tenure Contracts in Bankruptcy*, 92 AM. BANKR. L.J. 255, 261 (2018) (discussing Saint Paul Normal and Industrial School's closure and impact on Lawrenceville, Virginia); *see* Mark Maurer, *Barnes & Noble Education CFO Eyes More Cuts as Campuses Remain Closed*, WALL STREET JOURNAL (Dec. 28, 2020, 9:30 AM), https://www.wsj.com/articles/barnes-noble-education-cfo-eyes-more-cuts-as-campuses-remain-closed-11609165800?mod=business_minor_pos13. (discussing impact of COVID-19 on Barnes and Noble Education, a college bookstore operator, and its (potentially) temporary furloughs, which in the parallel context of a sale to a non-IHE would be permanent job losses). This may appear to be stronger argument for a bailout of IHEs generally, rather than allowing the restructuring of IHEs. Anthony Casey & Eric Posner, *A Framework for Bailout Legislation*, 91 NOTRE DAME L.J. 479 (2015) (providing a general theory for bailouts and suggesting they should be predicated on macroeconomic impact of failure; the moral hazard effect of the bailout; the discriminatory effect of the bailout; and procedural fairness). As explained in Part IV, a bailout is an inappropriate response for IHEs for non-COVID-19 distress.

Ironically, IHEs' broad-based financial struggles may address this problem.[23] Greater recognition of broad financial distress will shift public perceptions and the "stigma"[24] associated with an IHE filing for bankruptcy will decrease.[25] That being said, IHEs should attempt to mitigate potential reputational risk by swiftly reemerging from a Chapter 11 Restructuring.[26]

The third critique challenges how taxpayers will be protected. The DOE's poor oversight of unscrupulous and fraudulent IHEs motivated the title IV funding exclusion.[27] Indeed, the title IV funding exclusion functions as a blunt underwriting standard.[28] Nonetheless, protecting the taxpayers is particularly salient today as the possibility of greater student loan

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[23] Greater media and commentator coverage has already illuminated this issue. *See* Sarah Butrymowicz and Pete D'amato *Analysis: hundreds of colleges and universities show financial warning signs*, THE HECHINGER REPORT (Aug. 4, 2020), https://hechingerreport.org/analysis-hundreds-of-colleges-and-universities-show-financial-warning-signs/; Sean Illing, *Is it time to rethink the value of college?* VOX (June 1, 2021, 8:30 A.M.), https://www.vox.com/policy-and-politics/21279216/higher-education-college-america-student-debt

[24] A significant body of academic literature has evaluated bankruptcy stigma. *See, e.g.*, Michael D. Sousa, *Debt Stigma and Social Class*, 41 SEATTLE U.L. REV. 965 (2018); Yvana L.B.H. Mols, *Bankruptcy Stigma and Vulnerability: Questioning Autonomy and Structuring Resilience*, 29 EMORY BANKR. DEV. J. 289, 289 (2012); Teresa A. Sullivan et. al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213 (2006); Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 863 (2003); A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 243 (2001).

[25] Although most of the empirical work has evaluated only individual debtor cases, the prevailing view among practitioners, judges, scholars, and the media is that the major bankruptcy cases of "household names" in the 1980s and 1990s *i.e.*, Johns Mansville, Continental Airlines, Owens Corning, Texaco and others decreased the stigma of bankruptcy for corporate debtors. Albert Togut & Lauren L. Peacock, *The Growth of Modern Practice Evolution of Bankruptcy Practice Before the Code to Today*, 35 AM. BANKR. INST. J. 24, 71 (Oct. 2016); Kate Ballen, *Strategy for the 1990s: Bankruptcy*, FORTUNE, Feb. 11, 1991, at 13 ("Filing for protection from creditors under the bankruptcy code used to be akin to contracting a social disease. Not anymore.").

[26] This trick worked for both GM and Chrysler. *See* Stephanie Ben-Ishai and Stephen J. Lubben, *Sales or Plans: A Comparative Account of the "New" Corporate Reorganization*, 56 MCGILL L.J. 591, 593 (2011) (explaining how the GM and Chrysler cases involved rapid sales of the debtors' assets and subsequent proceedings concerning the distribution of the proceeds and noting the use of this strategy in many modern cases); Togut & Peacock, *Growth of Modern Practice, supra* note 25, at 71 (concluding that GM and Chrysler have not suffered from bankruptcy stigma).

[27] *See generally* CONG. RESEARCH SERV., R43159, INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS 1 (2019) (describing the independent investigation into "the issues of quality assurance and consumer protection . . . .").

[28] "With federal student loans, you're pretty much guaranteed to get a loan if you are attending an eligible school." Miranda Marquit, *Student Loan Underwriting Process*, LENDEDU (Jan. 1, 2019), https://lendedu.com/blog/student-loan-underwriting-processes. The last phrase, "eligible school," is relevant to this article because an IHE that files for bankruptcy is no longer an eligible school, or in the words of the statute, "an institution of higher education . . . ." 20 U.S.C. § 1002(a)(4) (2010).

dischargeability in bankruptcy[29] and blanket amnesty[30] loom large. Any option for a Chapter 11 Restructuring must reflect the public's interest in title IV funds. Yet the demographic challenges facing IHEs are not the product of fraud or wrongdoing; especially today, the exclusion is extremely overinclusive. When admissions and IHE revenues were steadily increasing, coupling financial strength with the ability to operate was more defensible. No more. IHEs, like other would-be-debtors, should have an opportunity undertake a Chapter 11 Restructuring, albeit with sufficient protection of the public's interest in title IV funds.

Turning to the prescription of this article, a new subchapter of the Bankruptcy Code is the appropriate solution. The treatment of two other heavily regulated industries, railroads and healthcare businesses,[31] buttress this conclusion. The 1898 Bankruptcy Act's treatment of railroad debtors attempted to protect the public interest, but it instead creating regulatory delay, which often endangered reorganizations. The subsequent enactment of the original subchapter of the Bankruptcy Code, subchapter IV (which covers railroads), mitigated this problem by entrusting the bankruptcy court to safeguard the public interest and set deadlines for regulatory action. As Professor Coordes explained, the scattershot approach followed by the Bankruptcy Code provisions covering healthcare businesses left too many holes and should not be replicated for IHEs.[32]

An IHE subchapter's composition must answer the critiques of IHE reorganizations. Time is a key variable in avoiding stigma, but swiftness must be weighed against the value of a comprehensive restructuring. It would be tempting for an IHE to use a prepackaged bankruptcy plan where the case could be completed in as little as 24 hours.[33] One of the drawbacks

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[29] Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation, Dept. of Justice, (Nov. 17, 2022); Matthew A. Bruckner, et al., *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183, 233-47 (2020) (surveying the literature); *compare* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F. 2d 395 (2d Cir. 1987) *with* Rosenberg v. N.Y. State Higher Educ. Servs. Corp. (*In re* Rosenberg), 610 B.R. 454 (Bankr. S.D.N.Y. 2020).

[30] Megan Leonhardt, *Smaller, targeted amounts of student loan forgiveness are more likely to benefit struggling Americans, report claims*, FORTUNE (April 21, 2022) https://fortune.com/2022/04/21/smaller-targeted-amounts-student-loan-forgiveness-more-likely-benefit-struggling-americans-report-claims-biden/. Indeed, the closed-school discharge is already available if a school closes and certain conditions are met. https://studentaid.gov/manage-loans/forgiveness-cancellation/closed-school. Well-known closed-school discharges include Corinthian Colleges, ITT Technological Services, Inc., Charlotte School of Law.

[31] Although the Bankruptcy Code uses the term "health care debtor," this article will use the more common single word variant of "healthcare".

[32] *See* Laura N. Coordes, *Reorganizing Healthcare Bankruptcy*, 61 B.C. L. REV. 419, 465 (2020) (suggesting the enactment of subchapters to both Chapter 7 and Chapter 11 to administer healthcare debtors as an alternative to further one-off changes).

[33] For example, the Sungard Availability Services Capital Inc. ("Sungard") chapter 11 plan was confirmed in nineteen hours. Hugh McDonald & Alissa Piccione, *The Upside of The Fastest Chapter*

of a prepackaged plan is that it cannot reject onerous contracts and leases, like real property leases and employment contracts for tenured faculty[34] as part of the plan.[35] Nevertheless, many of the benefits of a prepackaged plan can still be captured by setting aggressive but attainable deadlines for confirmation and requiring significant pre-filing planning.[36] Indeed, because of the seasonality application process, an IHE should seek to protect matriculation yield by reorganizing in the late Spring/early Summer, prior to the start of the Fall semester.

The pre-filing planning suggested by this article serves double duty because it also enables the DOE's oversight of a debtor. As a precondition for the continued use of title IV funding, the IHE must enter into a contract, known as a restructuring support agreement ("RSA"), which would be subject to the veto of the DOE. Absent a non-vetoed RSA, the debtor cannot use the title IV funding following a chapter 11 filing. Thus, the DOE will serve a gatekeeping function by only allowing debtors who satisfy the DOE's standards to access title IV funds and attempt a Chapter 11 Restructuring. The RSA must also be executed by the IHE's significant secured creditors, likely the parties whose agreement is most important to effectuate a swift confirmation. Once in bankruptcy, asset sales and plan confirmation will also be subject to the DOE's veto. The use of a veto rather than consent reflects a balance between facilitating rapid case progression and protecting the public interest in title IV funds. Other significant proposed provisions include elevated priority for certain claims of students

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11 Confirmation Ever, LAW360 (June 26, 2019, 1:07 P.M.), https://www.law360.com/articles/1173110/the-upside-of-the-fastest-chapter-11-confirmation-ever.

[34] Faculty contracts usually include financial exigency clauses that, when satisfied, can allow for the termination of tenured faculty. However, rejecting these contracts in a bankruptcy case is much easier for the IHE, as there is no inquiry or onerous due process applicable to rejection of executory contracts (the business judgment rule applies). *See infra* n.308. Moreover, these claims are also capped at one year of salary. *See* 11 U.S.C. § 502(b)(7). Indeed, in the case of Sungard, *see supra* note 33, the failure to make operational changes in its pre-packaged chapter 11, including the rejection of burdensome leases, led the company to file for bankruptcy again in 2022. Maria Chutchian, *Tech company Sungard files second bankruptcy in three years*, REUTERS (April 11, 2022, 2:01 P.M.) https://www.reuters.com/legal/transactional/tech-company-sungard-files-second-bankruptcy-three-years-2022-04-11/.

[35] As one group of commentators explained, "[t]he identity and claim amounts of other creditors (such as trade and litigation creditors) are more difficult to establish reliably without the benefit of a bar date, making prepetition solicitation of such claims, and compliance with FED. R. BANKR. P. 3018 (b), impractical in most cases. As a result, in a prepack chapter 11 plan, the claims of nonfinancial creditors are frequently classified separately from those of financial creditors, and left either unimpaired (i.e., reinstated or paid in full) or totally impaired (i.e., receives no distribution), avoiding the need to solicit votes from such creditors." Stephen D. Zide, et. al., *Prepackaged Bankruptcy: Is It Right for Your Company?*, 34 AM. BANKR. INST. J., at 30, 30–31 (October 2015).

[36] Lynn M. LoPucki and Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 994 (2015) (explaining that pre-negotiated cases do not have as high a rate of "success" (*i.e.*, survival of the debtor) as pre-packaged cases but are far more successful than cases than are not pre-planned.).

against the IHE, preservation of student records, and a saving clause to alleviate conflicts presented by collisions between bankruptcy law and applicable federal and state education law.

This article will proceed by first exploring the origins of the title IV funding exclusion, the Bankruptcy Code's IHE-specific provisions, and the weakened rationale for this treatment. It will then discuss the current options for IHEs under the Bankruptcy Code utilizing the cases of ITT Tech and The College of New Rochelle as examples. It will also explain how each of the three preeminent academic conceptions of bankruptcy support allowing IHEs to effectuate Chapter 11 Restructurings. Then, the other alternatives—state court and federal court receiverships—are considered, in comparison to a Chapter 11 Restructuring. Here the cases of the Dream Center, Education Centers of America, and Vatterot provide color. The last alternative, an out-of-court workout, is reviewed through the lens of Education Corporation of America. Next, the justifications for a separate subchapter for IHEs are assessed by drawing lessons from the treatment of railroads and healthcare businesses. Lastly, key provisions of the proposed subchapter are described.

I. THE IMPORTANCE OF TITLE IV TO IHES

The vital role IHEs play in the American economy is well known.[37] Less recognized is the significance of title IV programs and their associated funding to their continued financial viability. This section surveys the relationship between IHEs and title IV, including the requirements IHEs must satisfy to retain access to title IV funding as well as the treatment of title IV funds if a restructuring is unsuccessful and an IHE closes.

IHEs' collective importance does not make them monolithic. They are a mix of public and private institutions, for-profit and not-for-profit. Endowments and costs of attendance vary widely while each IHE's unique geographic location and campus also impact its current status and future trajectory. Yet, they do share some relevant commonalities. Each is overseen by an accreditation agency, which are themselves overseen by the DOE.[38]

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[37] IHEs directly employ over 2.5% of the population and directly generate 2.8% of GDP. *Higher Education Contributes to a Strong Economy*, Ass'n of Governing Bds. (June, 6, 2019), https://agb.org/guardians-campaign/higher-education-contributes-to-a-strong-economy/ (noting IHEs' employment impact), *Expenditure on higher education as a share of GDP in selected countries worldwide in 2019, by source of funding*, STATISTICA (Nov. 17, 2022) https://www.statista.com/statistics/707557/higher-education-spending-share-gdp/#:~:text=The%20 United%20States%20invested%202.6,in%202017%2C%20please%20click%20here(evaluating impact of IHEs on GDP). IHE graduates' contribution to future prosperity are even greater as a pipeline of talent is necessary for companies to grow and fill vacancies. *The Economics of Higher Education*, DEP'T OF TREAS. WITH DEP'T OF EDUC., (Dec. 2012) https://files.eric.ed.gov/fulltext/ED544780.pdf.

[38] *See* 20 U.S.C. § 1002; *see also* U.S. DEP'T OF EDUC., INSTITUTIONAL ACCREDITING AGENCIES, ACCREDITATION IN THE UNITED STATES, https://www2.ed.gov/admins/finaid/accred/

The DOE's indirect accreditation review works in concert with its direct regulation of title IV programs and title IV funding spigot. [39]

It is hard to overemphasize the importance of title IV funding to IHEs. Title IV programs fund most students' attendance at IHEs and they account for substantial share of IHEs' income.[40] Some combination of either private student loans or income sharing agreements ("ISAs") could theoretically replace title IV funding. In reality, these substitutes would provide insufficient financial support for IHEs.

ISAs are a contract between the IHE and the student whereby the IHE finances the student's educational expenses in consideration for the student promising to pay a portion of his or her income after graduation for a fixed time.[41] Although ISAs can provide greater upside for IHEs when students become high-earners, the risks and underwriting involved make them generally less attractive for IHEs when compared to traditional title IV student loans.[42]

The qualification process for private student loans mirrors the usual loan underwriting process and evaluates the unique characteristics of the applicant. [43] Most students would be denied loans based on lack of income and work experience unless they have a co-signer.[44] Conversely, no individualized borrower underwriting is conducted as part of the origination process for title IV program loans. Students qualify for title IV program

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accreditation_pg6.html; Matthew A. Bruckner, *The Forgotten Stewards of Higher Education Quality*, 11 UC IRVINE L. REV. 1, 13 (2020).

[39] Title IV established many federal student financial aid (grant and loan) programs including the Federal Pell Grant Program, the Federal Supplemental Educational Opportunity Grant Program, the Federal Stafford Loan Program, the Federal PLUS Program, the Federal Consolidation Loan Program, the Federal Work-Study Program, the Teacher Education Assistance for College and Higher Education Grant Program, the William D. Ford Federal Direct Loan Program, and the Federal Perkins Loan Program (collectively "title IV programs"). CONG. RESEARCH SERV., R43159, INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS 1-5 (2019).

[40] Matthew A. Bruckner, *Bankrupting Higher Education*, 91 AM. BANKR. L.J. 697, 713 (2017) ("Virtually all colleges receive a substantial portion of their income from these programs . . . .").

[41] Andrew Kreighbaum, *Lifting the Curtain on Income-Share Agreements*, INSIDE HIGHER ED (Sept. 26, 2019), https://www.insidehighered.com/news/2019/09/26/two-emerging-players-isas-deliberate-and-different-approaches.

[42] Melanie A. Zaber and Kathryn A. Edwards, *Income Share Agreements: What's Risky, What's Promising, and What We Still Need to Know*, THE RAND BLOG (June 5, 2019), https://www.rand.org/blog/2019/06/income-share-agreements-isas-whats-risky-whats-promising.html.

[43] *See* Rebecca Safier, *5 Common Private Student Loan Requirements*, LENDINGTREE (Mar. 25, 2021), https://studentloanhero.com/featured/private-student-loans-common-requirements-getting/ (describing specific requirements to qualify for private student loans, including attendance at an eligible school, credit and income criteria, and cosigner requirements).

[44] Ed Flynn, *Game of Loans: Is Student Debt Forgiveness Coming?*, 38 AM. BANKR. INST. J. 12, at 72 (December 2019) (noting that 90% of private student loans have a co-signer).

loans solely based on the IHE being eligible for title IV programs.[45] An IHE's eligibility for title IV funds serves an underwriting function based on the IHE's accreditation, not the individual applicant's profile.[46] Title IV programs dramatically increase the supply of student loans, the main source of funding for IHEs.[47] Neither ISAs nor private loans can match the attributes of title IV programs. "Through participation in title IV programs, a higher education institution is virtually guaranteed that all tuition and fee charges are paid, up front and on time[,]"[48] which results in a lower cost of attendance for students and a predicable revenue stream for IHEs.

IHEs must satisfy three requirements to obtain and retain access to title IV funding: (i) state licensure, (ii) accreditation by a DOE-recognized accrediting agency, and (iii) DOE certification that the institution is administratively capable and financially responsible.[49] DOE's annual evaluations of an IHE's audited financial statements test the third and most financially-dependent requirement.[50] To demonstrate sufficient financial responsibility, an IHE must meet all of its financial obligations, including maintenance of an equity ratio, reserve ratio, and net income ratios,[51] plus it must hold sufficient cash reserves to make required returns of unearned title IV funds.[52] These indicators are aggregated into a composite financial responsibility score.[53] If an IHE fails the financial responsibility test, the DOE may require that the IHE post a letter of credit to assure its obligations under the HEA.[54] Because a letter of credit issuer will often require

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[45] *ABI Members Testify on Discharging Student Loan Debt in Bankruptcy*, 28 AM. BANKR. INST. J. 10, (November 2009) at 10, 67.

[46] So does income driven repayment, at least at the back-end. John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L.J. 5, 11 (2020).

[47] It is illustrative that before the establishment of title IV programs and their predecessors, "student loans were almost unheard of." Luke Herrine, *The Law and Political Economy of A Student Debt Jubilee*, 68 BUFF. L. REV. 281, 288 (2020).

[48] Scott F. Norberg, *Bankruptcy and Higher Education Institutions*, 23 AM. BANKR. INST. L. REV. 385, 386 n.9 (2015).

[49] 20 U.S.C. § 1001(a); *see also* Clare McCann & Amy Laitinen, *The Bermuda Triad*, NEW AMERICA (Nov. 19, 2019), https://www.newamerica.org/education-policy/reports/bermuda-triad/.

[50] 20 U.S.C. § 1099c-1 (2008).

[51] For a discussion of reserve ratios, equity ratios, and net income ratios, *see Fed. Student Aid*, *Financial Responsibility Composite Scores*, https://studentaid.gov/data-center/school/composite-scores

[52] 34 C.F.R. §§ 668.171-173 (2020) (detailing information an IHE must provide and the methodology by which the Secretary considers the IHE's submission).

[53] 34 C.F.R. § 668.172 (2020).

[54] 34 C.F.R. § 668.173(d) (2020).

collateral as security, this requirement can be impossible for an IHE to satisfy if it has no unencumbered assets.[55]

Although this article profiles the options for IHE restructurings and suggests a new alternative, these efforts can fail and it is important to understand the procedures for treatment of title IV funding when an IHE closes. If a student is unable to continue a program due to an IHE's permanent closure, the DOE repays the student's title IV loan (resulting in a non-bankruptcy discharge of the student's title IV loans),[56] while the DOE retains a claim against the IHE for any refund it paid to the student.[57] From the DOE's perspective, this is not an ideal scenario because it is stuck with a claim against a defunct IHE and the student's educational journey is interrupted (and potentially derailed). To mitigate the risk of this outcome, the closing IHE must submit a teach-out plan[58] to its accrediting agency specifying how its students can complete their degree programs, notwithstanding the IHE's closure.[59] Students who participate in the teach-out plan or otherwise transfer their credits to another IHE receive neither payment of their student loan by the DOE nor a discharge of their student loans.[60]

"Without federal financial aid, most students cannot afford to attend college. Thus, terminating a college's title IV eligibility instantly destroys an

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[55] The DOE's request for a letter of credit precipitated Corinthian Colleges' sudden closure. *See* Declaration of William J. Nolan in Support of Chapter 11 Petitions and First Day Motions, *In re* Corinthian Colleges, Inc. (Bankr. D. Del. No. 15-10952 (KJC)), ECF No. 10.

[56] Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215, 263 (2014). However, a "borrower is not eligible for discharge, however, if she completes or is in the process of completing her course of study either through a 'teach-out' at another school or by transferring credits from the closed school to another school." *Id.*; *see also* DISCHARGE CRITERIA, FEDERAL STUDENT AID, https://studentaid.gov/manage-loans/forgiveness-cancellation/closed-school.

[57] *See* 20 U.S.C. § 1087(c) (2019). This claim against the permanently closed IHE is usually far less valuable than the claim against the student, even one who is in default, because it is very difficult for a student to discharge a student loan claim in bankruptcy. 11 U.S.C. § 523(a)(8); *In re* Long, 322 F.3d 549 (8th Cir. 2003); Brunner v. N.Y. State Higher Edu. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).

[58] Regulations define a "teach-out plan" as "a written plan developed by an institution that provides for the equitable treatment of students if [the institution] ceases to operate before all students have completed their program of study." 34 C.F.R. § 602.3 (2019).

[59] Norberg, *supra* note 48, at 387.

[60] Rendleman & Weingart, *Collection of Student Loans, supra* note 56; *see also* Matthew Bruckner, *Who's Looking Out for the Students?*, CREDIT SLIPS (Jan. 20, 2015, 8:49 P.M.), https://www.creditslips.org/creditslips/2015/01/whos-looking-out-for-the-students.html?utm_source =feedburner&utm_medium=feed&utm_campaign=Feed%3A+creditslips%2Ffeed+%28Credit+Slips %29 ("Ordinarily, when an institution of higher education closes, its students can avail themselves of the "closed school discharge," which enables students to discharge 100% of certain federal student loans if they meet certain criteria. But the ED has apparently approved a deal struck between Corinthian Colleges and the Education Credit Management Corporation … , pursuant to which many students will not be able to avail themselves of the closed school discharge.").

institution's financial viability."[61] Any restructuring strategy for an IHE must account for this dependence upon title IV funds.

II. TREATMENT OF DEBTOR-IHES AND TITLE IV FUNDS BY THE BANKRUPTCY CODE AND THE HEA

This article is a response to IHEs' inability to consummate Chapter 11 Restructurings. That has not always been the case. Prior to amendments to the HEA and the Bankruptcy Code, IHEs successfully consummated Chapter 11 Restructurings, including most notably, Bloomfield College.[62] Changes to both the Bankruptcy Code and the HEA eliminated this option. This section canvasses the unique treatment of IHEs and title IV funds by the Bankruptcy Code and how they dovetail with the relevant provision of the HEA.

Section 541 of the Bankruptcy Code defines the property of a debtor's estate to generally encompass all assets, including intangible rights.[63] Following a 1990 amendment to § 541, a debtor's eligibility to participate in title IV programs, as well as a debtor's accreditation status and state licensure, are no longer property of the debtor's estate.[64] An IHE no longer has the property right to participate in title IV programs or use its accreditation and the DOE can deny access to title IV funds solely based on a bankruptcy filing.[65]

Section 362 of the Bankruptcy Code establishes an automatic stay precluding almost all actions against the debtor, the debtor's property, and the property of the debtor's bankruptcy estate.[66] The 1990 amendment to §

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[61] Bruckner, *Bankrupting Higher Education*, *supra* note 40, at 713-14.

[62] Alfonso A. Narvaez, *Closing is Averted in College's Plan*, THE NEW YORK TIMES, 87 (Sept. 23, 1976), https://www.nytimes.com/1976/09/23/archives/new-jersey-pages-closing-is-averted-in-colleges -plan-bloomfield.html.

[63] 11 U.S.C. § 541(a)(1) (2014); Burgess v. Sykes (*In re* Burgess), 438 F.3d 493, 496 (5th Cir. 2006) ("[T]he scope of § 541 is broad: that section brings into the estate all of the debtor's legal and equitable interests 'wherever located and by whomever held.'"(citation omitted)); *see e.g.*, *In re* Central Ark. Broadcasting Co., 170 B.R. 143, 145 (Bankr. E.D. Ark. 1994) (explaining that a broadcasting license constitutes property of a debtor's estate).

[64] Section 541(b)(3) of the Bankruptcy Code was added and it provides that, "[p]roperty of the estate does not include … any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 [20 U.S.C. §§ 1001 *et seq.*, 42 U.S.C. §§ 2751 *et seq.*], or any accreditation status or State licensure of the debtor as an educational institution … ." 11 U.S.C. § 541(b)(3).

[65] Bruckner, *Bankrupting Higher Education*, *supra* note 40, at 738 n.122 (explaining that 11 U.S.C. § 541(c)(1)(B) and/or 11 U.S.C. § 525 would otherwise preclude the DOE from denying title IV funds based solely on bankruptcy filing) (citing Betty Owen Schools, Inc. v. Dep't of Educ. (*In re* Betty Owen Schools, Inc.), 195 B.R. 23, 28 (Bankr. S.D.N.Y. 1996)).

[66] Jordahl v. Dyal (*In re* Jordahl), 555 B.R. 861, 864 (Bankr. S.D. Ga. 2016) ("Arguably the most powerful of protections under the Bankruptcy Code, the stay prohibits almost all judicial proceedings and other collection or enforcement attempts against the debtor, the debtor's property, or property of the bankruptcy estate." (citing 11 U.S.C. § 362(a) (2010))).

362 allows: (i) the DOE to terminate a debtor's eligibility to participate in title IV programs or (ii) any action by an accrediting agency or state regarding an IHE's accreditation status or licensure to proceed, notwithstanding the existence of the automatic stay.[67] Taken together, the amendments to Bankruptcy Code §§ 362 and 541 preclude an IHE-debtor's use and allow the termination of its access to title IV programs and accreditation. Courts have rejected attempts by IHE debtors to evade the intended effect of these amendments.[68]

In 1992, Congress amended the definition of "institution of higher education" in the HEA to exclude an "institution . . . that has filed for bankruptcy."[69] There are no exceptions. Once an IHE files for bankruptcy, it can no longer participate in title IV programs. This change works in concert with the Bankruptcy Code amendments.[70] The cumulative effect is to preclude the use of chapter 11 to reorganize an IHE.[71]

Title IV loans are subject to distinct treatment in bankruptcy cases as they are generally only dischargeable based on a showing of "undue hardship."[72] Although some recent opinions may signal a shift, undue

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[67] Section 362(b)(14)-(16) provides:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—
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> . . .
>
> (14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;
>
> (15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;
>
> (16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act . . . .

11 U.S.C. § 362(b)(14)-(16).

[68] Norberg, *supra* note 48, at 388-90 (discussing *Betty Owen Schools*, 195 B.R. 23); Statewide Oilfield Construction, Inc. v. Career Collection Ass'n (*In re* Statewide Oilfield Construction, Inc.), 134 B.R. 399 (Bankr. E.D. Cal. 1991)). I will return to discuss *Betty Owen* in greater depth when describing the process of amending the Bankruptcy Code to allow the reorganization of IHEs.

[69] 20 U.S.C. § 1002 (a)(4)(A) (2010). The financial responsibility score was also added as part of these amendments. *See* 34 C.F.R. § 668.172.

[70] Norberg, *supra* note 48, at 387-88.

[71] Although "[t]his is not a legal prohibition, but an economic one[,]" it has the same result. Bruckner, *Bankrupting Higher Education*, *supra* note 40, at 713.

[72] 11 U.S.C. § 523(a)(8). This has not always been the case as prior to 1976, student loans were dischargeable under the same default standards as other claims. *See* Rafael Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 180 (2009). For a general discussion of the history of student loans in bankruptcy, consider Preston Mueller, *The Non-Dischargeability of Private Student Loans: A Looming Financial Crisis?*, 32 EMORY BANKR. DEV. J. 229, 232-35 (2015).

hardship has historically been an extremely challenging standard to meet.[73] This heavy burden, together with the title IV funding exclusion for debtor-IHEs, mitigates the need for individualized underwriting. If students cannot discharge student loans and financially distressed IHEs cannot originate new loans, which would increase the risk of closed-school discharges (these would occur irrespective of a student's bankruptcy), title IV funds and their collection are protected.[74] Congress's prioritization of the safeguarding of title IV funds cannot be ignored and this policy perspective plays a central role in the subchapter proposed by this article.

III. THE EROSION OF THE POLICY BACKING FOR THE CHAPTER 11 RESTRUCTURING EXCLUSION

To effectively advocate for IHEs' ability to undertake Chapter 11 Restructurings, it is necessary to understand the reasoning for Congress's prohibition and whether this reasoning remains valid. This section explains why the policies are either false or outdated. Either way, they should not entirely preclude Chapter 11 Restructurings for IHEs.

What prompted the amendments to the HEA and the Bankruptcy Code? As Professor Bruckner has explained, the genesis was a congressional investigation into reports of "waste, fraud, and abuse in the federal financial aid programs, which culminated in a series of high-profile hearings held over eight days in October 1990."[75] Based on the report's findings, Congress enacted "a package of integrity provisions designed to eliminate fly-by-night institutions from the programs, lower loan default rates, and address certain other areas of abuse."[76] As to their intended purpose, the amendments appear to have failed; a follow-up investigation two decades later concluded that the DOE's oversight of the title IV programs remained weak.[77]

Fast-forward to the present day. Many IHEs (particularly small private colleges) were experiencing financial distress even before the COVID-19 pandemic.[78] In 2019, Moody's Investor Services succinctly summarized that an estimated 20 percent of small private colleges face "fundamental stress due to declining revenues, rising expenses and little pricing power

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[73] *See, e.g.*, Pardo & Lacey, *supra* note 72, at 180. Although some recent opinions may signal a shift.

[74] Although caselaw has recently recognized debtors' ability to discharge some private student loans, (*see, e.g.*, Homaidan v. Sallie Mae, Inc., 2021 WL 2964217 (2d Cir. July 15, 2021)), changes to the dischargeability of public student loans will likely require Congressional legislation.

[75] Bruckner, *Bankrupting Higher Education*, supra note 40, at 738.

[76] *Id.*

[77] *Id.* (citing STAFF OF COMM. ON HEALTH, EDUC. LABOR, AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 171 (Comm. Print 2012)).

[78] Bruckner, *Bankrupting Higher Education*, *supra* note 40, at 700-01.

when it comes to tuition."[79] The declining size of future cohorts will only worsen these problems.[80] Attempting to pivot and secure survival, distressed IHEs are turning to larger, better capitalized IHEs as white knight merger partners. Indeed, more IHEs have merged in the four years ending in 2022, than in the prior 18 years.[81] One high profile example is Mills College, which merged into Northeastern University when Northeastern assumed Mills's $21 million debt and agreed to infuse $30 million in new capital.[82] Mills's solution is not easily replicable – few IHEs sit on real estate valued at $1 billion – and rural or ex-urban IHEs are less likely to find merger partners.[83] A restructuring of some sort is the only hope for their continued operation.

Due to the COVID-19 pandemic, starting mid-second semester 2020, IHEs generally closed their campuses to students, including revenue generators such as housing and dining halls, and transitioned to online classes.[84] Despite these issues, the predicted avalanche of IHE closures has not occurred as grants provided by Congress stabilized IHEs.[85] Nevertheless, some IHEs still resorted to debt financing during the

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[79] Scott Cohn, *The other college debt crisis: Schools are going broke*, CNBC DISRUPTOR (Dec. 3, 2019, 9:09 AM), https://www.cnbc.com/2019/12/03/the-other-college-debt-crisis-schools-are-going-broke.html. This finding is consistent with findings from the same source in 2016. Bruckner, *Bankrupting Higher Education*, supra note 40, at 700-01. The currently strong labor market has also altered high school graduates' preferences leading to decreased enrollment. Harriet Torry, *More High-School Grads Forgo College in Hot Labor Market*, THE WALL STREET JOURNAL (May 29, 2023).

[80] Kevin Carey, *The Incredible Shrinking Future of College*, VOX (Nov. 22, 2022, 7:03 A.M.) https://www.vox.com/the-highlight/23428166/college-enrollment-population-education-crash. Luring more students, including those from other geographic areas, is not the solution if those students' tuition is heavily discounted. In the case of Albion College, it materially increased its student census but its revenue actually decreased because its tuition discounts were so generous. David Jesse, *Liberal arts colleges fighting to survive are discounting tuition and raising enrollment, but it's not working*, USA TODAY (Feb. 14, 2021, 12:15 P.M.) https://www.usatoday.com/in-depth/news/education/2021/02/13/michigan-liberal-arts-college-tuition-discount/6721119002/? build =native-web_i_p.

[81] Belkin, *Broke Colleges, supra* note 5.

[82] *Id.*

[83] *Id.*

[84] IHEs who are heavily dependent upon tuition and fees have been very resistant to providing refunds; at best, pro-rated fees and room and board were on the table. Emma Kerr, *Why Students Are Seeking Refunds During COVID-19*, U.S. NEWS, (Apr. 22, 2020, 9:00 A.M.), https://www.usnews.com/education/best-colleges/paying-for-college/articles/college-tuition-refunds-discounts-an-uphill-battle-amid-coronavirus. Unable to find a compromise, some students filed class actions against IHEs. These problems do not include the litany of summer programs that were cancelled. Alexander C. Kafka, *Cancelled and Altered Summer Programs Will Cost Colleges Hundreds of Millions*, THE CHRONICAL OF HIGHER EDUC. (Apr. 9, 2020), https://www.chronicle.com/article/CanceledAltered-Summer/248469?cid=wcontentgrid.

[85] Natalie Schwartz, *Are more college closures ahead?*, HIGHER ED DIVE (Apr. 1, 2021) https://www.highereddive.com/news/are-more-college-closures-ahead/597746/.

pandemic to provide greater near-term liquidity.[86] Layering further debt on already stretched IHE balance sheets may simply delay restructurings rather than avoid them as IHEs attempt to return to normalcy.[87]

The current challenges facing IHEs are far removed from the reasons proffered for the bankruptcy exclusion for access to title IV funds.[88] When Congress enacted the exclusion provisions, IHEs' outlook (predicated upon the large millennial generation soon to be entering the IHE admission pool) was generally optimistic. Fraud was considered the default reason for financial distress. Given this prior understanding, the historical policy that bankruptcy should benefit honest but unfortunate debtors supported excluding IHEs from Chapter 11 Restructurings.[89] Professor Bruckner has previously explained why this policy rationale was never appropriate because targeted fraud-prevention tools are available in chapter 11.[90] Regardless, now, the demographic tailwinds have reversed and many IHEs need to right-size expenses and shed liabilities. Chapter 11 Restructurings provide an opportunity for the "honest but unfortunate" IHEs to obtain a fresh start. Any proposed change to the status quo, however, must acknowledge the salience of title IV funds, both fiscally and politically. To illustrate the importance of allowing greater optionality, a discussion of the current bankruptcy options is required.

IV. CURRENT BANKRUPTCY OPTIONS FOR IHES

It may seem counterintuitive to explore the options for court-supervised restructurings or liquidation before the out-of-court options. However, these out-of-court options are always conducted in the shadow of the

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[86] Juliet Chung and Melissa Korn, *Bond Boom Comes to America's Colleges and Universities*, THE WALL STREET JOURNAL (Dec. 26, 2020, 5:23 A.M.), https://www.wsj.com/articles/bond-boom-comes-to-americas-colleges-and-universities-11608978781?st=flfq01zal85xl1e&reflink=article_email_share. However, some IHEs, such as the University of Wisconsin-Madison did not have this option because state law precludes them from issuing bonds. *Id.*

[87] Less unencumbered assets can also make a restructuring more challenging as the debtor will have less leverage with secured creditors. Indeed, the rise in blanket liens covering all a debtor's assets is directly associated with secured creditors' increased leverage both pre and postpetition. *In re* Lucre, Inc., 339 B.R. 648, 662 (Bankr. W.D. Mich. 2006); Christopher W. Frost, *Secured Credit and Effective Entity Priority*, 51 CONN. L. REV. 575, 582 (2019).

[88] Dennis Cariello, *Allow universities to restructure themselves through bankruptcy*, THE HILL (Jan. 22, 2015, 1:00 P.M.), https://thehill.com/blogs/congress-blog/education/230282-allow-universities-to-restructure-themselves-through-bankruptcy.

[89] *See, e.g.*, Grogan v. Garner, 498 U. S. 279, 286, 287 (1991) (explaining the "unfortunate but honest debtor" policy perspective).

[90] Matthew A. Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, 106 KY. L.J. 223, 256-58 (2018) (surveying options including appointment of a chapter 11 trustee or examiner).

alternatives.[91] The discussion of IHEs' bankruptcy options begins with an evaluation of chapter 7 and then moves to chapter 11.

A. Chapter 7

The least palatable option, from the IHE's perspective, is a chapter 7 bankruptcy.[92] If the IHE files a chapter 7, the IHE's corporate decisionmakers, usually the President and Board of Trustees in the context of a non-profit or the CEO and the Board of Directors of a for-profit, are displaced and play no part in the bankruptcy case. An appointed trustee takes over the IHE and winds down its operations, liquidates its assets, reconciles the claims against the IHE, and distributes the proceeds to the claimants.[93] ITT Educational Services, Inc.'s ("ITT") chapter 7 case is illustrative. ITT was once a massive for-profit IHE that boasted 138 locations in 39 states only a year prior to its bankruptcy filing.[94] Following a DOE investigation into ITT's recruiting policies and two violations of its accreditation standards, the DOE eliminated ITT's access to title IV funds.[95] Lacking any endowment or other reserves and without any potential merger partners, less than two weeks later, ITT and its affiliates filed chapter 7 cases.[96] The chapter 7 trustee wound-down ITT's operations and liquidated the most significant assets, its real estate holdings.[97] ITT's management played no part in the trustee's decisions; instead, they were the targets of significant lawsuits by the trustee.[98] Former students could apply for a

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[91] AFL-CIO v. Verso Paper Corp., No. 1:14-CV-00530-JAW, 2015 WL 71472, at *41 (D. Me. Jan. 6, 2015) (noting that out-of-court negotiations and litigation "sometimes take place in the shadow of a potential bankruptcy filing[.]"); Mark J. Roe, *The Voting Prohibition in Bond Workouts*, 97 YALE L.J. 232, 267 (1987).

[92] Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 VA. L. REV. 1199, 1239 (2005) ("The firm's managers, however, have an incentive to always choose reorganization [over liquidation in Chapter 7] because it is the procedure that maximizes private benefits.").

[93] Although a Chapter 7 trustee may operate a debtor's business for some time following order of the court, *see* 11 U.S.C. § 704(8) (2010), it hard to fathom a trustee being able to operate an IHE without access to title IV funds.

[94] ITT EDUC. SERVS., INC., ANNUAL REPORT (Form 10-K) (Dec. 31, 2015), https://www.sec.gov/Archives/edgar/data/922475/000119312516504396/d129120d10k.htm.

[95] *Id.* at 5.

[96] *Id.*

[97] In contradistinction to many IHEs, ITT's real estate holdings were centered in office parks near major highways, which allowed for them to be easily repurposed by non-IHE buyers.

[98] *See* Caruso v. Modany (*In re* ITT Educ. Servs., Inc.), 613 B.R. 254 (S.D. Ind. 2020). This is one of the reasons that management of debtors generally resist chapter 7 filings. In a chapter 11 case, management is naturally very resistant to bringing claims against themselves. As a result, unsecured creditors' committee may be granted derivative standing to bring the clams or a chapter 11 trustee may be appointed. Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 576-79 (3d Cir. 2003). One work-around that has gained popularity is the prepetition appointment of a special committee of independent directors to investigate alleged wrongdoing by management. These "bankruptcy directors" often continue their investigation postpetition and may settle actions on behalf of the estate. *See*, Official Comm. of Unsecured Creditors v. Sabine Oil & Gas Corp. (*In re* Sabine Oil

closed-school discharge or transfer, while only a limited teach-out was available.[99]

B. Chapter 11

Although the HEA and Bankruptcy Code foreclose a Chapter 11 Restructuring, an IHE can sell its assets during a chapter 11 case or liquidate through a chapter 11 plan.[100] One recent example is The College of New Rochelle ("CNR").

CNR was originally established in 1898 and operated as a small liberal arts college.[101] Its primary asset was a 15.5 acre campus in Westchester County, New York.[102] CNR also possessed an endowment of approximately $3.6 million (only $1 million was unrestricted[103]) when, in Summer 2016, it uncovered significant fraud by its former controller.[104] Given its limited endowment, CNR relied exclusively on tuition to finance its operations and service its debt.[105] The malfeasance resulted in $31 million in unanticipated debts (most of which were payroll liabilities). Unfortunately, CNR's tuition revenue was insufficient to cover the payments associated with the controller-caused liabilities in addition to its ordinary course expenses and debt service. CNR aggressively sought a merger partner, but it was unsuccessful.[106]

& Gas Corp.), 562 B.R. 211, 219 (S.D.N.Y. 2016); Jared A. Ellias et. al., *The Rise of Bankruptcy Directors*, 95 S. CAL. L. REV. 1083 (2022) (coining the term "bankruptcy directors" and criticizing their use).

[99] *Frequently Asked Questions About the Closure of ITT Technical Institutes*, Federal Student Aid, https://studentaid.gov/announcements-events/itt/faq.

[100] The greater control a debtor in possession enjoys in chapter 11 makes it a preferred choice compared to chapter 7 liquidation. *See* 11 U.S.C. § 704; Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (*In re* Alvarez), 224 F.3d 1273, 1278 (11th Cir. 2000).

[101] Affidavit of Mark D. Podgainy Pursuant to Local Bankruptcy Rule 1007-2 at 2, *In re* The College of New Rochelle (Bankr. E.D.N.Y. No. 19-23694 (RDD)), ECF No. 2.

[102] *Id.* at 2-3.

[103] Restricted endowment may be unavailable in bankruptcy as a failure to continue operations as an IHE may be fatal to the intent of the donor, which could cause the gift to be altered under *cy pres*. *See In re* Bishop College*,* 151 B.R. 394, 397-98 (Bankr. N.D. Tex. 1993) (rejecting the creditors' argument that "the general charitable purpose of the trust has not failed, because the settlors' general intent can be met by making the trust resources available to the estate for the payment of creditors"); *see generally* Evelyn Brody, *The Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future*, 29 SETON HALL LEGIS. J. 471, 474-81 (2005).

[104] *Podgainy Affidavit*, *supra* note 101, at 3-4.

[105] *Id.* at 6.

[106] An asset sale outside of bankruptcy could provide a shield against the target IHE's liabilities but a court may be willing to find a de facto merger. *See* Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41 (2d Cir. 2003). This risk can be mitigated in bankruptcy through a 363 Sale. *See* Trevor W. Swett III, *"Free and Clear" Bankruptcy Sale Orders and State Law Successor Liability Claims: The Overlooked Question of Preemption*, 25 AM. BANKR. INST. L. REV. 275, 275 (2017); Rachel P. Corcoran, *Why Successor Liability Claims Are Not "Interests in Property" Under Section 363(f)*, 18 AM. BANKR. INST. L. REV. 697, 747 (2010).

CNR proceeded to effectuate an orderly wind-down of its operations. This disposition, which was effectuated over five months following the retention of a chief restructuring advisor, included four primary components: (i) a teach-out agreement with Mercy College ("Mercy"), (ii) a short-term lease of CNR's campus to Mercy, which Mercy pre-paid before the bankruptcy filing, (iii) the sale of CNR's campus pursuant to a 363 Sale in bankruptcy, and (iv) the confirmation of a liquidating chapter 11 plan. The teach-out agreement allowed CNR's students to seamlessly transfer to Mercy with full recognition of the credits earned at CNR.[107] The lease of CNR's campus provided operating cash and a runway of funding in the bankruptcy case. As is customary in a pre-planned bankruptcy filing,[108] CNR's campus had been marketed prepetition.[109] This process culminated in a robust postpetition auction resulting in a sale of the campus to Mercy.[110] After the closing of the sale to Mercy, CNR confirmed a chapter 11 plan of liquidation that transferred all the remaining assets, including causes of action, to a liquidating trustee who was tasked with maximizing the value of these assets for CNR's creditors and distributing the proceeds.[111]

To one familiar with current chapter 11 practice, CNR's case progression is typical. Many cases contemplate and culminate in 363 Sales free and clear of liens and interests under § 363(f) of the Bankruptcy Code (i.e., the purchaser receives clean title to the assets).[112] So, why are Chapter 11 Restructuring options needed for IHEs? Persuasively answering this

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[107] *Podgainy Affidavit*, *supra* note 101, at 5-6.

[108] Some bankruptcy filings are unplanned or "free fall." These filings result in, on average, higher costs than a pre-planned case, *see* Foteini Teloni, *Chapter 11 Duration, Pre-Planned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era*, 23 AM. BANKR. INST. L. REV. 571, 577 (2015) and are less likely to have a successful result. Lynn M. LoPucki, Joseph W. Doherty, *Bankruptcy Survival, supra* note 36, at 994 (Based on the authors' data set, "[n]one of the debtors filing prepackaged cases failed during those cases. Fifteen percent of the debtors filing prenegotiated cases failed, and 40 percent of the debtors filing free fall cases failed.").

[109] *See* Response of the Official Committee of Unsecured Creditors with Respect to Debtor's Motion for Entry of Orders (I)(A) Approving Bidding Procedures for the Sale of the Debtor's Campus; (B) Approving the Form of Purchase Agreement; (C) Approving Bid Protections in Favor of Any Stalking Horse Purchaser; (D) Approving the Form and Manner of Service of the Auction Notice; and (E) Scheduling an Auction; and (II) Approving Sale of the Campus Free and Clear of Liens, Claims, Encumbrances and Other Interests; and (III) Granting Related Relief at 3 n.1, *In re* The College of New Rochelle (Bankr. E.D.N.Y. No. 19-23694 (RDD)), ECF No. 170.

[110] *See* Order (I) Approving Sale of The Campus Free and Clear of Liens, Claims, Encumbrances and Other Interests and (II) Granting Related Relief, *In re* The College of New Rochelle (Bankr. E.D.N.Y. No. 19-23694 (RDD)), ECF No. 176.

[111] *See* Third Amended Chapter 11 Plan of the College of New Rochelle, *In re* The College of New Rochelle (Bankr. E.D.N.Y. No. 19-23694 (RDD)), ECF No. 291.

[112] *See generally* Matthew A. Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing a Preliminary Injunction Standard for Objections to § 363 Sales*, 62 CATH. U.L. REV. 1, 1-2 (2013) (discussing asset sales that occur "outside the context of a plan of reorganization and … pursuant to § 363 of the Bankruptcy Code … .").

gating question is important; otherwise, there is no need to alter the current options for IHEs in bankruptcy.

V. RATIONALE FOR THE OPTION FOR IHES TO REORGANIZE IN BANKRUPTCY

Only highlighting the weakness of the policy backing the prohibition on Chapter 11 Restructurings and its impact on IHEs tells an incomplete narrative. To provide a more fulsome analysis, this section first explains how the academic conceptions of bankruptcy support allowing IHEs a Chapter 11 Restructuring option. In contrast, the alternative policy of a general bailout would only delay the required supply-side correction for higher education. It then pivots to the practical consideration that unlike CNR, most IHEs will often be poor candidates for 363 Sales, an alternative to Chapter 11 Restructurings.

A. Academic Support for Chapter 11 Restructurings

Turning first to theory, none of the three predominate academic conceptions of bankruptcy: the creditors' bargain approach, the contracting approach, or the loss spreading approach, support limiting IHEs to liquidations.[113] The first approach envisions bankruptcy as a debt collection procedure designed to solve the collective-action problem posed by the "race to the courthouse." Thus, the optimal bankruptcy regime mirrors the remedies creditors would bargain for if they could negotiate collectively before extending credit (the "creditors' bargain approach").[114] The second approach views bankruptcy as a debt-collection construct based on actual contractual ordering with the goal of reducing borrowing costs (the "contracting approach").[115] The third approach considers bankruptcy as a set of loss-spreading rules, which are animated by competing and conflicting policy considerations, overlaid on non-bankruptcy debt-collection structures (the "loss spreading approach").[116]

Eliminating IHEs' option to reorganize is inconsistent with the creditors' bargain because it forecloses value-maximizing reorganizations and alters the balance prescribed by the Bankruptcy Code between

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[113] There are alternative theories as well, including those described by Professor Bruckner. *See* Matthew Bruckner, *The Virtue of Bankruptcy*, 45 LOY. U. CHI. L.J. 233 (2013) (providing an account of corporate bankruptcy law based on virtue ethics).

[114] The seminal work is Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982); *see also* David Gray Carlson, *Bankruptcy Theory and the Creditors' Bargain*, 61 U. CIN. L. REV. 453, 454 (1992) (canvasing the theory and its history).

[115] *See, e.g.*, Charles J. Tabb, *Of Contractarians and Bankruptcy Reform: A Skeptical View*, 12 AM. BANKR. INST. L. REV. 259 (2004); Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807 (1998).

[116] Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 343-44 (1993); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 776-77 (1987).

liquidations and reorganizations. This is not to say that all IHEs should reorganize, but the option should be available. A subset of distressed IHEs, like some firms generally, should be liquidated rather than reorganized.[117] An insolvent firm whose revenues are insufficient to cover non-financing costs should not be reorganized. Its assets can be put to better use by others and should be sold.[118] Other insolvent firms generate revenues that exceed non-financing costs but are still too low to service the firm's current debt load. These firms should be deleveraged and continue as going concerns.[119] When an IHE fits in latter category, a reorganization should be an option.

Enter the collective-action problem. An individual creditor is not interested in this distinction, it would rather maximize returns by attaching assets sufficient to pay its debt in full as quickly as possible. Writ large, when all creditors act in their individual self-interest, the debtor is dismembered in the race to maximize the value of each individual creditor's debt, even when the firm had greater value as an operating entity for all creditors.[120] Chapter 11 (together with the automatic stay) gives a debtor the opportunity to prove that creditors will benefit from continuing operations (via a going-concern sale or reorganization) while creditors have the escape valve of moving for conversion to a liquidation under chapter 7 if the debtor cannot cover its non-debt expenses.[121] This balance does not exist for an IHE because it cannot effectuate a chapter 11 Restructuring.[122]

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[117] Sometimes a lack of reorganization option would be a blessing as it would save creditors from paying the "freight" (freight is the term often used for the attendant administrative costs of running a chapter 11 case) of an infeasible reorganization attempt. Bruce S. Nathan & Bruce D. Buechler, *Who Pays the Freight? Interplay Between Priority Claims and a Debtor's Secured Lender*, 30 AM. BANKR. INST. J., 26 (Nov. 2011).

[118] Schwartz, *Contract Theory, supra* note 115, at 1807. The costs for an attempted reorganization for such a firm are wasteful.

[119] *Id.*

[120] *See, e.g.*, THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW, 7-19 (1986).

[121] Acknowledging this, the Bankruptcy Code provides for conversion to chapter 7 if sufficient "cause" exists, including an inability to cover non debt service expenses. 11 U.S.C. § 1112(b). Indeed, among the enumerated definitions of cause is "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation". 11 U.S.C. § 1112(b)(4)(A); *In re* Lizeric Realty Corp., 188 B.R. 499, 503 (Bankr. S.D.N.Y. 1995) ("Section 1112(b)(1) of the Code is intended to preserve estate assets by preventing the debtor in possession from gambling on the enterprise at the creditors' expense when there is no hope of rehabilitation."), *as amended*, (Nov. 28, 1995); Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 VA. L. REV. 1199, 1206 (2005) ("Distressed debtors that cannot persuade the market to provide further funds are forced into chapter 7, where they are broken up and liquidated.").

[122] Ironically, creditors could threaten to file an involuntary petition against an IHE, which could eliminate access to title IV funding and cause a liquidation. Given the rarity of involuntary filings generally, it is unsurprising that no published case law exists evaluating an IHE involuntary filing. Norberg, *supra* note 48, at 387 n.18 (noting that there are no reported decisions about involuntary bankruptcy filings and the termination of title IV eligibility).

Viewed through the lens of the creditors' bargain approach, this prohibition eliminates value-maximizing reorganizations and going-concern sales.

Precluding IHEs from reorganizing under the Bankruptcy Code undermines the contracting approach and its focus on lowering the cost of capital. The sine qua non for advocates of this view is market participants' ability to contract for the firm to use the most optimal bankruptcy system.[123] The current Bankruptcy Code is mandatory[124] and prohibits firms from contracting around bankruptcy through the elimination of ipso facto clauses.[125] Thus, firms cannot bargain with their creditors and cabin their restructuring options to a receivership or an out-of-court workout; bankruptcy is always an option.[126] For an IHE, however, the opposite issues arises. A Chapter 11 Restructuring is unavailable, even if the IHE and its lenders would have agreed that it is the best option. In other words, the contracting approach supports a Chapter 11 Restructuring option.

Considering the loss spreading approach, what impact does a liquidation have on the larger community where the IHE is located? An IHE has a significant multiplier effect whereby every dollar invested has greater impact on the local economy because it is re-spent by the IHE's constituents.[127] IHEs are also often one of the most significant employers in

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[123] Schwartz, *Contract Theory*, *supra* note 118, at 1821. The contracting approach has recently been subject to pragmatic criticism. Bankruptcy, however, increases the multiplicity of creditors, some of which will be unforeseen. Thus, suggesting that omnipotence of contracting parties is foolhardy and unrealistic. *See* Kenneth Ayotte and Christina Scully, *J. Crew, Nine West, and the Complexities of Financial Distress*, THE YALE LAW JOURNAL FORUM 363, 367 (Nov. 10, 2021).

[124] States cannot enact bankruptcy laws as this power is restricted to Congress pursuant to the Bankruptcy Clause of the Constitution. U.S. CONST. art. I, § 8. This restriction principally precludes the potential for intra-state discharges.

[125] 11 U.S.C. §§ 363(l), 365(e)(1), 541(c)(1)(B). Scholars advocating the contracting approach have suggested that firms should be able to contract around bankruptcy when they are transparent and can affect parties' action *ex ante*. *See e.g.*, Douglas G. Baird & Anthony J. Casey, *No Exit? Withdrawal Rights and the Law of Corporate Reorganizations*, 113 COLUM. L. REV. 1, 5, 11-13 (2013) (advocating for firms to have the right to opt-out of bankruptcy).

[126] *In re* Gen. Growth Props., Inc., 409 B.R. 43, 54 (Bankr. S.D.N.Y. 2009) (holding that bankruptcy filing by bankruptcy-remote special purpose entities should not be dismissed); *see generally* Forrest Pearce, *Bankruptcy-Remote Special Purpose Entities and A Business's Right to Waive Its Ability to File for Bankruptcy*, 28 EMORY BANKR. DEV. J. 507, 507 (2012) (discussing the *General Growth Properties* case).

[127] Mike Coppock, *Multiplier effect: Local economies' boost from colleges and universities is studied*, TULSA WORLD (Feb. 12, 2019), https://www.tulsaworld.com/business/multiplier-effect-local-economies-boost-from-colleges-and-universities-is/article_85052b14-cbca-527c-86c4-4a92806e5701.html. Graduates of IHEs, many of which will remain as local residents post-graduation, also contribute more value to a community than high school graduates. Jonathan Rothwell, *What colleges do for local economies: A direct measure based on consumption*, BROOKINGS (Nov. 17, 2015), https://www.brookings.edu/research/what-colleges-do-for-local-economies-a-direct-measure-based-on-consumption/.

their communities.[128] Allowing an economic engine of the community the opportunity to reorganize is consistent with bankruptcy's status as a public good. [129] Especially in light of the prior discussion of the weak underpinnings of the bankruptcy exclusion for title IV funding, it is appropriate for the government to permit IHEs to fully benefit from the rights afforded them by the Bankruptcy Code, as well as the protections provided to creditors.

Although the public benefits produced by IHEs are obvious, a bailout is not the answer. A general bailout is tempting and would likely be appropriate if IHEs' financial distress was primarily the result of the COVID-19 pandemic (or other force majeure); this is not the case.[130] Some right-sizing of supply is necessary. Demographic headwinds,[131] the mounting cost of higher education,[132] and the uncertain returns on investment for many academic programs,[133] have collectively led to decreased enrollment. Some IHEs will not and should not survive. Chapter 11 facilitates the sifting of the wheat from the chaff. To confirm a chapter 11 plan of reorganization, an IHE (like all chapter 11 debtors seeking to reorganize) must show that its plan is feasible.[134] Requiring a showing of feasibility, together with the RSA process outlined by this article, would establish a Chapter 11 Restructuring option while still safeguarding the

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[128] The federal government has recognized the particular importance of rural IHEs. *See* Rick Setlzer, *Rural Colleges' Lender of Last Resort*, INSIDE HIGHER ED (Jan. 1, 2019), https://www.insidehighered.com/news/2019/01/02/under-radar-usda-lending-provides-big-boost-financially-pressed-colleges (highlighting the $1.3 billion of grants and low interest loans provided by the United States Department of Agriculture, including the USDA Rural Development Community Facilities Direct Loan program).

[129] *See* Schwartz, *Contract Theory, supra* note 115, at 1817-18 (suggesting that bankruptcy is not necessary to protect communities when thick markets exist, but inferentially suggesting that it may play a role when markets are thin).

[130] Anthony Casey & Eric Posner, *A Framework for Bailout Legislation*, 91 NOTRE DAME L.J. 479 (2015).

[131] Watson Scott Swail, *The Demographic Challenge of Higher Education*, THE SWAIL LETTER ON HIGHER EDUCATION (Feb. 13, 2020) https://theswailletter.com/2020/02/13/the-demographic-challenge-of-higher-education/; Indeed, enrollment has shrunk every year since 2014. National Student Clearinghouse Research Center Yearly reports. *available at* https://nscresearchcenter.org/publications/.

[132] Trends in College Pricing, THE COLLEGE BOARD, https://research.collegeboard.org/trends/college-pricing/highlights.

[133] Kristin Blagg and Erica Blom, *Evaluating the Return on Investment in Higher Education*, THE URBAN INSTITUTE (November 2018), www.urban.org%2Fsites%2Fdefault%2Ffiles%2Fpublication%2F99078%2Fevaluating_the_return_on_investment_in_higher_education.pdf (highlighting the complexity and challenges inherent in making a conclusion as to the anticipated return on investment in higher education.).

[134] 11 U.S.C. § 1129(a)(11) ("confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor…"). As with all the requirements for confirmation of a chapter 11 plan, the court has an affirmative obligation to scrutinize a plan to determine whether it is feasible. *See In re* Treasure Bay Corp., 212 B.R. 520, 547 (Bankr. S.D. Miss. 1997).

public interest. While a bailout would be overinclusive, the current status is too restrictive.

B. The Limitations of 363 Sales for IHEs

Although 363 Sales represent a common disposition for chapter 11 cases, IHEs will often prove poor candidates for 363 Sales. As an initial matter, without title IV funds, an IHE's ability to consummate a going-concern 363 Sale is limited. Although a 363 Sale does not strictly require postpetition operations, operations help fund the expenses associated with the bankruptcy case and allow for a more flexible sale process. In most chapter 11 cases, even those that contemplate a 363 Sale from the outset, the debtor operates postpetition until the 363 Sale is consummated. Assuming these operations are not conducted at a loss, at least on an EBITDAR basis,[135] the operations may cover the costs of the bankruptcy case and even pay down the DIP lender/secured creditor's debt.[136] In contrast, a debtor without postpetition operations must rely completely upon its DIP lender[137] for liquidity to fund its bankruptcy case. The costs of such a loan would be prohibitively high and administratively challenging as any private lender would need to originate private student loans. Otherwise, students would not be able to afford attendance. As discussed previously, private student loans require individualized underwriting that would exclude most student borrowers.[138] An IHE cannot operate as an IHE during chapter 11, which means its options for income generation are limited, at best. One of the only options would be for an IHE to lease its campus, but the lease would likely impair the value of the underlying real estate in a 363 Sale.[139]

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[135] EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) is defined as "[a] company's income without deductions for interest expenses, taxes, depreciation expenses, or amortization expenses, used as an indicator of a company's profitability and ability to service its debt." EBITDA, BLACK'S LAW DICTIONARY 585 (9th ed.2009). EBITDAR is a variant of EBITDA that also considers restructuring costs. *In re* Chemtura Corp., 439 B.R. 561, 569 n.6 (Bankr. S.D.N.Y. 2010).

[136] A "DIP Loan" is the colloquialism for a loan obtained by a debtor in possession under 11 U.S.C. § 364. *See In re* LATAM Airlines Grp. S.A., 620 B.R. 722, 767-68 (Bankr. S.D.N.Y. 2020) (providing an overview of the legal framework for evaluating a debtor's request for a DIP loan).

[137] This assumption presumes that all assets are encumbered.

[138] *See supra* note 44.

[139] 11 U.S.C. § 365(h). As explained by one court:

> Through § 365(h), Congress has afforded tenants of debtors who are lessors special protections in the event a debtor as lessor rejects a lease. Section 365 provides the trustee and debtors in possession with the right to reject executory contracts and unexpired leases. In the case of a Debtor/lessor's rejection of a lease, however, the power is limited and tenants are given two options: either treat the lease as terminated and make a claim for damages, or continue in possession and pay rent.

Even though the transactions consummated in the CNR bankruptcy resulted in the continued operation of its assets under the umbrella of another IHE, it is an exception that proves the rule (proposed by this article). A going-concern sale may have yielded more value than the lease transaction with Mercy and a subsequent asset sale. Even if no extra value would be created, requiring this circuitous transaction to evade the two-year waiting period for obtaining access to title IV funds is inefficient and introduces further uncertainty and complexity into what is already a "bet the campus" transaction.

Other similarly situated IHEs have not been as fortunate as CNR. For instance, Lon Morris College ("LMC") filed chapter 11 bankruptcy and tried to sell its operations as a going-concern pursuant to a 363 Sale.[140] After LMC's bankruptcy filing terminated its access to title IV funding, it could not convince any purchaser to overlook the two-year waiting period for renewed access.[141] LMC's assets were eventually sold to a non-IHE,[142] but an IHE-purchaser may have been willing to pay more. The title IV funding exclusion limits the pool of bidders and potentially jeopardizes the 363 Sales process.

In re Haskell L.P., 321 B.R. 1, 6–7 (Bankr. D. Mass. 2005). *Compare In re* Haskell, L.P., 321 B.R. 1, 8–9 (Bankr. D. Mass. 2005); *and In re* Churchill Props., 197 B.R. 283, 286 (Bankr. N.D. Ill. 1996), *with In re* Spanish Peaks Holdings II, LLC, 872 F.3d 892, 898 (9th Cir. 2017); Precision Industries, Inc. v. Qualitech Steel SBQ, LLC *(In re* Qualitech Steel Corp.), 327 F.3d 537 (7th Cir. 2003). One option is a short-term lease, like CNR had with Mercy College regarding its teach-out. But even such a short-term lease can hinder a 363 Sale process if it is not perfectly timed to expire as the sale may be subject to the lease. *See* Debtor's Reply to Limited Response of Mercy College and in Further Support of Debtor's Motion for Entry of Orders (I) (A) Approving Bidding Procedures for the Sale of the Debtor's Campus; (B) Approving the Form of Purchase Agreement; (C) Approving Bid Protections in Favor of Any Stalking Horse Purchaser; (D) Approving the Form and Manner of Service of The Auction Notice; and (E) Scheduling an Auction; and (II) Approving Sale of the Campus Free and Clear of Liens, Claims, Encumbrances and Other Interests, and (III) Granting Related Relief, *In re* The College of New Rochelle (Bankr. E.D.N.Y. No. 19-23694 (RDD)), ECF No. 86 (agreeing that 363 Sale was subject to Mercy College's lease. Fortunately for the debtor, Mercy, the lessee, was the successful bidder for CNR's campus, which effectively mooted the problem. The existence of the lease, however, may still have impacted the sale process by making the property less desirable to other bidders.

[140] LMC's financial distress arose from the vicious cycle of declining enrollment, which required the school to increase admission, which in turn required the building of a new dormitory, which was financed by onerous borrowing terms. Will Hueske, *School's Out Forever: Lon Morris College, Section 525(a), and Revocation of Title IV Eligibility for Institutions of Higher Education in Bankruptcy*, WEIL BANKRUPTCY BLOG (Apr. 9, 2013), https://business-finance-restructuring.weil.com/government/schools-out-forever-lon-morris-college-section-525a-and-revocation-of-title-iv-eligibility-for-institutions-of-higher-education-in-bankruptcy/. After LMC ran out of cash and its president resigned, LMC's chief restructuring officer initiated a bankruptcy filing in spite of the risks posed by the HEA amendments. *Id.*

[141] *Id.*

[142] *Id.*

For many IHEs, a campus is (to borrow a phrase from many bankruptcy opinions) the highest and best use for their crown jewel assets.[143] Not all IHEs own real estate that would be attractive to a non-IHE buyer.[144] Turning a campus into an office park or lofts may be feasible in an inner suburb of New York City, but not so in rural America.[145] Unless another IHE has the interest and wherewithal to expand,[146] there may be no other entity interested in purchasing the campus.[147] Mills College's experience is demonstrative.[148] Its real estate holdings in Oakland, California were valued

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[143] *See* Robert K. Rasmussen, *Lessons for Academic Leaders from Modern Restructuring Practice*, 92 AM. BANKR. L.J. 233, 250 (2018) (Lenders to the Thomas Jefferson School of Law did not foreclose on its new building because, "even in a prime location in a major American city, [[the law school building]] is not easily or cheaply repurposed to other commercial uses. After exploring all their options, the bondholders decided that the highest use of the building was as a law school. They agreed to restructure the debt.").

[144] For, at least allegedly, an even more extreme example, consider Minnesota School of Business, Inc. and Globe University, Inc. These for-profit IHEs had lost their HEA funding due to fraud involving their criminal justice program. However, at the outset of their chapter 11 cases, they proposed to pay all their current creditors in full (pursuant to exit financing and subordinated loans from insiders) and reorganize around their real estate holdings, while no longer operating as IHEs. Findings of Fact and Conclusions of Law at 3-4, *In re* Minnesota School of Business, Inc., (Bankr. D. Minn. No. 19-33629 (WJF) ECF No. 128. Following fiercely contested motions to convert, dismiss, or appoint a chapter 11 trustee, the debtors were unable to confirm a chapter 11 plan and a chapter 11 trustee was appointed. *Id.* at 207. The salient point is that valuable underlying real estate can provide optionality for IHEs to pursue a reorganization but it cannot allow them to reorganize as an operating IHE with access to HEA funding.

[145] For instance, Southern Vermont College closed in 2019 and attempted to sell its campus to a summer camp operator. The operator took possession but disputes arose regarding the occupancy and the purchaser did not close. The entity that owned the campus filed a chapter 7 petition and the chapter 7 trustee filed a lawsuit against the potential purchaser and sought to solicit further bids for the campus. Eventually, a local healthcare provider purchased the campus. Jim Therrien, *Southern Vermont College Sales Approved By Court*, BENNINGTON BANNER, Dec 25, 2020, https://www.benningtonbanner.com/local-news/southern-vermont-college-sales-approved-by-court/article_67f57e2c-4665-11eb-abe7-8f792c5aa46e.html.

[146] As Professor Schwartz explains generally: "When asset specificity is high, industry firms will be the more likely buyers of an insolvent firm's assets and will pay the most. Economic and financial distress may be correlated across firms in an industry, however. If a strong correlation exists, (barely) solvent industry firms may lack the liquidity to buy insolvent firms. Hence, in cases when asset specificity and the correlation of returns across firms are high, an auction is unlikely to maximize the insolvency return." Schwartz, *Normative Theory, supra* note 121, at 1244.

[147] The highest and best use for an IHE's campus, even in a highly desirable area, is as an IHE. *See* Matthew Bruckner, *Why Troubled Law Schools May Remain Open*, CREDIT SLIPS (Jan. 12, 2015, 11:53 A.M.) https://www.creditslips.org/creditslips/2015/01/why-troubled-law-schools-may-remain-open.html (explaining why Thomas Jefferson School of Law remains operational, its revenue stream as an American Bar Association accredited law school).

[148] The Transformational Partnerships Fund will give grants of up to $100,000 to schools exploring mergers, partnerships or collaborations with other institutions. It expects to serve as many as 20 pairs of institutions in its first three years. https://www.higheredpartnerships.org/higher-education-pursue-partnerships-collaboration/.

at $1 billion, while its merger partner Northeastern has reportedly turned down many rural opportunities to expand.[149]

Another factor that may limit potential merger or sale partners is the possible decoupling of a campus and students. Many IHEs need greater enrollment but not necessarily a satellite campus. As a result, an IHE may attempt to onboard the target-IHE's students through a teach-out or transfers rather than a whole-sale merger. Clark University employed this strategy by establishing a department named the "Becker School of Design & Technology at Clark University" after nearby Becker College's closure.[150] Although the enrollment increase associated with these options is less predictable, they also do not involve a material change to the balance sheet that would often be required by assuming the assets and liabilities of the target-IHE in a merger.

IHEs are a vital component of America's economy and they face widespread financial distress that is largely due to demand changes, overleveraging, and tuition discounts. Congress, however, has not repealed or even adjusted the prohibition on Chapter 11 Restructurings enacted in the early 1990s. Without the option of a Chapter 11 Restructuring, IHEs have been forced to consider alternative non-bankruptcy restructuring options.

VI. RECEIVERSHIPS

Instead of bankruptcy, IHEs can both "seek" and be forced to restructure through receiverships. Although few large debtors besides banks and insurance companies (neither are eligible to be debtors under the Bankruptcy Code[151]) are typically restructured through receiverships, IHEs have resorted to federal and state court receiverships rather than file dead-end bankruptcy cases.[152] However, uncertainty regarding continued use of title IV funding, risks concerning the initiation of receivership cases, as well as the lack of certain remedies and powers unique to bankruptcy, mean that receiverships are, at best, a poor substitute for a Chapter 11 Restructuring.

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[149] Belkin, *Broke Colleges, supra* note 5.

[150] Statement Regarding the Establishment of the Becker School of Design & Technology at Clark University, CLARK UNIVERSITY (Mar. 29, 2021), https://www.clarku.edu/offices/president/2021/03/29/statement-about-establishing-the-becker-school-of-design-technology-at-clark-university/.

[151] 11 U.S.C. § 109.

[152] *See* Educ. Corp. of Am. v. United States Dep't of Educ., No. 2:18-CV-01698-AKK, 2018 WL 5786077, at *1 (N.D. Ala. Nov. 5, 2018); Educ. Corp. of Am. v. United States Dep't of Educ., No. 2:18-CV-01698-AKK, 2018 WL 5786077, at *1 (N.D. Ala. Nov. 5, 2018). Commentators have similarly suggested that receiverships are an alternative to a chapter 11 filing. Gerard DiConza, *Receiverships and Their Interplay with the Bankruptcy Code*, 28 No. 1 J. BANKR. L. & PRAC. Art. 3 (Feb. 2019); C. Randel Lewis, *Managing A Safe Landing: Dealing with Distressed Universities & Colleges*, 23 AM. BANKR. INST. L. REV. 367, 373 (2015).

Given the lack of academic commentary and media coverage garnered by receiverships, this section will provide a brief primer on receiverships, both federal and state. Afterward, it analyzes the administration of federal and state IHE receiverships by drawing on the federal receiverships of Education Corporation of America and Dream Center Education Holdings as well as the state receivership of Vatterott Educational Centers, Inc.

Bankruptcy and receivership cases differ from the outset. Unlike bankruptcy cases, which are almost exclusively initiated by the debtor,[153] receiverships have been traditionally commenced by a creditor's petition (either a secured creditor or judgment creditor that has exhausted its options to obtain a lien[154]) to appoint a receiver to take control of the debtor's assets.[155] Thus, the receivership is an ancillary remedy related to an underlying action by the petitioning creditor.[156] Moreover, the existence of a creditor that can trigger a receivership is not itself sufficient to obtain appointment of a receiver.[157] In contradistinction to the ease of filing a

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[153] Douglas G. Baird, *The Initiation Problem in Bankruptcy*, 11 INT'L REV. L. & ECON. 223, 223-25, 224 n.4 (1991) (Involuntary bankruptcies are extremely rare in the U.S., accounting for only about one half of one percent of bankruptcy petitions).

[154] In *Pusey & Jones Co. v. Hanssen*, the Supreme Court first observed that federal courts are vested with equitable authority to appoint receivers (1) "upon application of a secured creditor who fears that his security [in the debtor's assets] will be wasted" and (2) "upon application of a judgment creditor who has exhausted his legal remedy." 261 U.S. 491, 497 (1923). Neither of these situations applied in *Pusey* where an unsecured creditor moved for the appointment of a receiver assets. The district court granted the relief sought pending the litigation of the creditor's claim on the promissory notes. In appointing the receiver, the district court reasoned that a Delaware statute authorized a receiver to be appointed "upon application of a simple contract creditor, whose claim had not been reduced to judgment and who had no lien upon the corporate property." *Id.* at 496. Thus, an unsecured creditor must have, in bankruptcy parlance, a liquidated claim for which it has no legal remedy for collection. *See* Piambino v. Bailey, 757 F.2d 1112, 1132 (11th Cir. 1985).

[155] *See* Luhrig Collieries Co. v. Interstate Coal & Dock Co 281 Fed. 265, 269 (S. D. N. Y. 1922); Whelpley v. Erie R.R. Co., 29 F. Cas. 918, 920 (S.D.N.Y 1868) ("I am not prepared to admit that an order for an injunction, or a receiver, can be made in an improper case, even with the consent of both parties, more especially where the rights of third persons may be concerned."). This perspective is consistent with the notion that receiverships are creditors' remedies ancillary to the relief awarded. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 255 (2018). *Contra* Wabash, St. Louis & Pac. Ry. Co. v. Cent. Trust Co., 22 F. 272, 272-75 (C.C.E.D. Mo. 1884). As Professor Lubben explained, "The Wabash receivership is often said to be the first case to allow the debtor to initiate its own receivership, thereby moving railroad reorganization closer to modern chapter 11 practice…At most, however, the Wabash procedure was but a cosmetic change, as prior receiverships were often initiated by bondholders who were also officers or directors, and at least some earlier proceedings had been instituted by the debtor directly." Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420, 1474 n.106 (2004).

[156] Nat'l P'ship Inv. Corp. v. Nat'l Hous. Dev. Corp., 153 F.3d 1289, 1291 (11th Cir. 1998) ("[T]he appointment of a receiver in equity is not a substantive right; rather, it is an ancillary remedy which does not affect the ultimate outcome of the action.").

[157] Manuel v. Gembala No. 7:10-CV-4-FL, 2010 WL 3860407, at *6 (E.D.N.C. Sept. 30, 2010).

voluntary chapter 11 bankruptcy petition,[158] "the appointment of a receiver is "an 'extraordinary remedy' that should be employed with the 'utmost caution' and granted only in cases of 'clear necessity' to protect plaintiff's interests in the property."[159]

In federal courts and some state courts, receivership law is almost exclusively the product of common law.[160] Because few statutory default rules apply, the provisions of the receivership order (an organic, and often lengthy, document that can be customized to fit a specific receivership) delineating the duties and authority of the receiver take on outsized importance.[161] Following appointment, the receiver administers the debtor's assets to maximize value and achieve an equitable distribution to creditors.[162] Administration can encompass continuing operations, a going-concern sale, liquidation, a consensual reorganization, or a combination of these alternatives.

The flexibility inherent in receiverships and the accompanying lack of statutory guidance can be beneficial or detrimental to restructuring the debtor. With fewer statutory requirements also comes less transparency and procedural pleadings.[163] As a result, receiverships can be both less stigmatizing and cheaper than bankruptcy proceedings.[164] Moreover, the inherent flexibility grants a receiver significant discretion to mold the case trajectory.[165] Recall, however, that receivership is a creditors' remedy, and

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[158] Provided, of course, that the debtor is not one of the types of entities or individuals precluded from filing a bankruptcy petition. *See* 11 U.S.C. § 109.

[159] *Gembala*, 2010 WL 3860407, at *6. When applying this standard, courts consider several factors, including the possibility of fraud, the danger of dissipation of assets, the availability of alternative remedies, and the potential efficacy of the appointment of a receiver. *E.g.*, Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc., 999 F.2d 314, 316–17 (8th Cir. 1993).

[160] *See* Miller, *Framework, supra* note 11, at 445-46 & n.169-72.

[161] The receivership order often contains provisions detailing the transfer of property to the receiver, the length of the receivership, the receiver's compensation, the receiver's control over receivership property, and any stay of litigation. *See* Fed. Trade Comm'n v. Noland, No. CV-20-00047-PHX-DWL, 2020 WL 249157, at *14 (D. Ariz. Jan. 13, 2020).

[162] "When a district court creates a receivership, its focus is 'to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary.'" Sec. & Exch. Comm'n v. Vescor Capital Corp., 599 F.3d 1189, 1194 (10th Cir. 2010) (quoting Liberte Capital Grp., LLC v. Capwill, 462 F.3d 543, 551 (6th Cir. 2006)); John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 187 (1996) ("[a] receivership in theory [is] a collection device pure and simple. The receiver's job [is] to assemble the assets of the debtor, sell them, and distribute the proceeds to creditors, with the debtor or its owners being entitled to a portion only after creditors were paid in full.").

[163] DiConza, *Receiverships, supra* note 152, at 3.

[164] Receiverships are also often less costly compared to chapter 11 because there are few procedural requirements. *Id.*

[165] Sec. & Exch. Comm'n v. Nadel, 2013 WL 12323969, at *3 (M.D. Fla. Aug. 29, 2013) (a receivership court "may look for guidance from bankruptcy law, [but it is] not restricted by the dictates of bankruptcy law."); *Liberte Capital*, 462 F.3d at 551 (a receivership court's powers extend "outside []

a receiver will be reluctant to undertake actions that will anger the petitioning creditors or hurt their interests.[166] Even if the receiver desired to impair a creditor, any change in a creditor's rights as part of a receivership restructuring must be consensual because a receiver cannot muster bankruptcy-specific powers such as discharge or cramdown.[167] Although this limitation does not foreclose a going-concern sale,[168] it makes a reorganization much more challenging as holdout creditors must be cajoled without the threat of being steamrolled.[169] Even if a reorganization is possible, a receivership will likely result in a less extensive restructuring than might be accomplished in a bankruptcy case where a debtor may be less beholden to creditors and can wield (or at least threaten to employ) bankruptcy-specific powers.[170]

Federal court equity receiverships functioned as the predecessors to modern Chapter 11 Restructurings. They arose from the need to restructure financially distressed interstate railroads.[171] Until amendments to the 1898 Bankruptcy Act enacted during the Great Depression, equity receiverships were the preferred route for corporate reorganization.[172] Although equity receiverships are subject to congressional authority, unlike bankruptcy practice,[173] they remained completely uncodified during the 19th Century.[174] Even today, federal equity receiverships are only

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statutory bankruptcy proceedings or other legislated domain"); Quilling v. Trade Partners, Inc., 2007 WL 107669, at *1 (W.D. Mich. Jan. 9, 2007) (a receivership court need not "apply the stringent requirements of the Bankruptcy Code"); Lewis, *Managing A Safe Landing, supra* note 152, at 375.

[166] This is simple self-interest. A receiver who fails to protect the petitioning creditor's interests will be unlikely to be appointed in a subsequent case.

[167] *See* Philip M. Payne, *Plans of Corporate Reorganization*, THE FOUNDATION PRESS, 2 (1934) ("A court of equity has neither authority nor power to carry out and enforce any plan of readjustment without the cooperation of the owners of the property, the holders of the stocks and bonds.").

[168] *See* Big Shoulders Capital LLC v. San Luis & Rio Grande R.R., Inc., No. 19 C 6029, 2019 WL 6117578, *5 (N.D. Ill. Nov. 18, 2019) (receiver attempted to sell railroad as a going-concern).

[169] Recall, some of the most significant benefits of a bankruptcy filing are a debtor's ability to alter third parties' *in rem* interests non-consensually. *See supra* text accompanying n.167.

[170] There is a significant body of literature concluding that pre-packaged (consensual) plans of reorganization also are associated with higher refiling rerates as there is a heightened risk of an "under-restructuring" whereby the debtor is not sufficiently reorganized due to the more consensual nature of the pre-planned case. Teloni, *Chapter 11 Duration, supra* note 108, at 577. Taking this logic to the next step, a receivership, which is even more consensual, will result in an even lesser degree of "restructuring."

[171] Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 21 (1995).

[172] *Id.* (explaining how a receivership provided the opportunity for a sale of the business as a going-concern, and a higher distribution to creditors, compared to a liquidation in bankruptcy).

[173] *See* Act of Mar. 2, 1867, ch. 176, 14 Stat. 5 17, repealed by Act of June 7, 1878, ch. 160, 20 Stat. 99 See Act of Aug. 1 9, 1841, ch. 9, 5 Stat. 440, repealed by Act of Mar. 3, 1843, ch. 82, 5 Stat. 614; Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

[174] The codification began in 1911. *See* Link v. Powell, 57 F.2d 591, 592 (W.D.S.C. 1932) ("The statute under which the receivers were appointed was enacted on March 3, 1911, 36 Stat. 1102, Judicial

administered pursuant to a patchwork structure, which includes the Federal Rules of Civil Procedure and the Judicial Code.[175] This "loose scheme" is not a comprehensive system for administration. Equity jurisprudence fills the gaps as "the district court has broad powers and wide discretion to determine the appropriate relief."[176]

Receiverships are often initiated in state court because diversity jurisdiction may be lacking or the debtor's assets may be wholly located intrastate.[177] Recently enacted state receivership statutes have made this option more tempting.[178] Not only do these statutes reflect modern financial developments, but they also may include bankruptcy-like rights such as the defendant-debtor's ability initiate the receivership[179] and the automatic stay of state court litigation outside the receivership court.[180]

When considering the suite of options available for restructuring IHEs, state court receiverships present similar disadvantages to their federal counterparts as well as some distinct shortcomings. State courts (like federal receiverships) cannot grant discharges,[181] or impair contractual

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Code, § 56, 28 U.S.C. § 117."). For a discussion of equity receiverships and their relationship to modern reorganization proceedings, consider Tabb, *History, supra* note 171, at 21-23.

[175] Janvey v. Alguire, No. 3:09-CV-0724-N, 2014 WL 12654910, at *14 (N.D. Tex. July 30, 2014), *aff'd,* 847 F.3d 231 (5th Cir. 2017) (listing rules and statutes).

[176] Sec. & Exch. Comm'n v. Lincoln Thrift Ass'n, 577 F.2d 600, 606 (9th Cir. 1978). These powers are much broader than those available to a bankruptcy judge under the Bankruptcy Code's equitable powers pursuant to 11 U.S.C. § 105(a). *See, e.g.*, Law v. Siegel, 571 U.S. 415, 421 (2014) ("We have long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code.").

[177] Federal subject matter jurisdiction is a prerequisite for any civil action, including a receivership, in federal court. Fahey v. Calverley, 208 F.2d 197, 200 (9th Cir.1953) (holding that where a district court is "without jurisdiction, the receivership must necessarily fall"); Peterson v. Islamic Republic of Iran, 563 F. Supp. 2d 268, 277 (D.D.C. 2008) ("Jurisdiction is a prerequisite to the appointment of a receiver and therefore any receivership ordered by a court that lacks subject matter jurisdiction is void."). State court receivers generally enjoy the same flexibility as receivers appointed by federal courts. Lewis, *Managing A Safe Landing, supra* note 152, at 375. Another state law alternative, at least for liquidation of an IHE is an assignment for the benefit of creditors (an "ABC").

[177] *See* Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, *supra* note 90, at 258-59 (discussing ABCs as an option for liquidating an IHE). For a general discussion of ABCs, consider, Andrew B. Dawson, *Better Than Bankruptcy?*, 69 RUTGERS U.L. REV. 137, 145-49 (2016).

[178] *E.g.*, Article 38A of the N.C. General Statutes; Minn. Stat. § 576; Mo. Rev. Stat. §§ 515.500 through 515.665.

[179] Mo. Stat. § 515.510(6) ("[t]he appointment of a receiver is not required to be relief ancillary or in addition to any other claim, and may be sought as an independent claim and remedy.").

[180] Mo. Stat. § 515.575. For a comprehensive review of the Missouri Commercial Receivership Act, consider, Keith H. Holland, John M. McKenzie, *Navigating New Landscapes in Debtor Creditor Law: Select Provisions of the Missouri Commercial Receivership Act Compared to Federal Bankruptcy Law*, 4 BUS. ENTREPRENEURSHIP & TAX L. REV. 83, 83 (2020).

[181] Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 266 (1929) (recognizing Congressional field preemption of state laws granting a discharge when a federal bankruptcy statute is in force); *see* Miller, *Framework, supra* note 11, at 441 (identifying Supreme Court bankruptcy field preemption precedent in the field of discharging debts).

obligations[182] because these powers can only be granted pursuant to the Bankruptcy Clause of the Constitution. Moreover, unlike federal receiverships, state court receiverships do not enjoy nationwide jurisdiction.[183] As a result, if the defendant-debtor owns property that is located outside the state where the receiver was appointed, [184] another receiver, known as an ancillary receiver, must be appointed in the other jurisdiction to administer the property.[185]

Despite these limitations, receiverships present a tantalizing option for IHEs to restructure their debts while retaining access to title IV funding. Unlike a bankruptcy filing, which immediately terminates the debtor's access to title IV funding, a receivership does not automatically have the same effect.[186] The HEA does not equate a receiver's appointment to a bankruptcy filing, but it also fails to confirm the impact of the appointment, if any, on title IV funding.[187] Meanwhile, federal regulations categorize a change in ownership that constitutes a "change in control" as grounds to terminate title IV funding.[188] Although "control" is defined in the relevant regulations, the definition is vague and there is no reference to whether a receiver "controls" the IHE.[189] The DOE has exacerbated this ambiguity by failing to provide further guidance regarding how IHEs that are subject to receiverships will be treated. Nonetheless, this risk has not dissuaded IHEs from attempting to use receiverships to effectuate a restructuring (either a reorganization or a going-concern sale); an uncertain restructuring may be preferable to a certain liquidation.

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[182] *Int'l Shoe*, 278 U.S. at 266.

[183] *Id.* The corollary is that "[w]here a receiver, administrator, or other custodian of an estate is appointed by the courts of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate, within the limits of the state." Reynolds v. Stockton, 140 U. S. 254, 272 (1891).

[184] This initial receiver is known as a domiciliary or primary receiver. Cooley v. Union Indem. Co., 11 N.W.2d 850, 850 (Mich. 1943).

[185] *Id.* (explaining appointment of ancillary receiver to administer property outside the jurisdiction of the court that appointed the domiciliary receiver). Under 28 U.S.C. § 754, a federal receiver's *in rem* jurisdiction is nationwide. Thus, an ancillary receiver is only necessary in a federal case when the forum does not have subject matter jurisdiction over an *in personam* lawsuit. Am. Freedom Train Found. v. Spurney, 747 F.2d 1069, 1074 (1st Cir. 1984).

[186] *See* 20 U.S.C. § 1002(a)(4)(A).

[187] *See id.*

[188] 34 CFR § 600.31(a)(1).

[189] 34 CFR § 600.31(b). "Control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." *Id.*

A. Federal Court IHE Receiverships

This section uses the federal receiverships of Education Corporation of America ("ECA") and Dream Center Education Holdings ("Dream Center") to illustrate the shortcomings of federal receiverships as alternatives to bankruptcy for restructuring IHEs. The problems start upon the commencement of proceedings. Unlike a voluntary bankruptcy, which is very challenging to dismiss (at least at the outset),[190] both ECA and Dream Center struggled to obtain entry of an order appointing a receiver. Second, and even more importantly, after clearing the initial hurdle of a receivership order, receiverships are not a panacea. Confirming access to title IV funds, the principal potential advantage of a receivership, proved elusive in both cases.

The byzantine legal proceedings of ECA, including two receiverships in different federal courts illustrate the randomness, risks, and uncertainty endemic to IHE receiverships. When ECA initiated its first receivership, it enrolled over 20,000 students for in-person instruction on its campuses, plus many thousands more online.[191] ECA's revenues were almost exclusively derived from current students' tuition and fees and the vast majority of this revenue was title IV funds.[192] Prior to its receivership, ECA faced not only declining enrollment but its accreditor, the Accrediting Agency for Independent Schools and Colleges, had lost its federal recognition.[193] As a result, ECA needed to obtain alternate accreditation. Due to these looming issues, ECA determined that it would discontinue

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[190] Although 11 U.S.C. § 1112(b), the provision of the Bankruptcy Code governing dismissals of chapter 11 cases, does not expressly suggest that the inquiry is different at the start of the case, each of the non-exhaustive factors can only be shown after the debtor has had an opportunity to act during the chapter 11 case and failed to do so. *E.g.*, 11 U.S.C. § 1112(b)(1) "continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation"; (2) "inability to effectuate a plan"; (3) "unreasonable delay by the debtor that is prejudicial to the creditors"; (4) "failure to propose a plan within any time fixed by the court"; (5) "denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or a modification of a plan"; (6) "revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title"; (7) "inability to effectuate substantial consummation of a confirmed plan"; (8) "material default by the debtor with respect to a confirmed plan"; (9) termination of a plan by reason of the occurrence of a condition specified in the plan"; or (10) "nonpayment of any fees or charges required under chapter 123 of title 28." Although courts have recognized "good faith" as a further requirement and this hurdle can trigger dismissal in the early days of a case, *see In re* SGL Carbon Corp., 200 F.3d 154 (3d Cir. 1999), the lack of express factors that apply early in a chapter 11 case still hampers attempts to obtain early dismissals.

[191] The other affiliates of ECA were Virginia College and New England College of Business and Finance, LLC.

[192] Complaint for Declaratory and Injunctive Relief and Appointment of Receiver, Educ. Corp. of Am. v. U.S. Dep't of Educ. (N.D. Ala. No. 2:18-CV-01698 (AKK)) ECF No. 1.

[193] *Id.*

enrollment at 26 of its campuses and conduct associated teach-outs.[194] The lease terminations associated with these campuses created significant claims against ECA.

To shed these liabilities, while still allowing its other campuses to continue operations, ECA negotiated a restructuring plan with its senior lenders whereby they would purchase the go-forward campuses, as well as ECA's intellectual property and website, free and clear of all liens and claims. Although sales free and clear are more common in bankruptcy, precedent exists for their use in federal receiverships.[195] However, ECA's lenders wanted both confirmation regarding the go-forward campuses' continued access to title IV funds and required the appointment of a receiver as a precondition for the funding of wind-down expenses.[196] Prudently, ECA contacted the DOE to request assurances regarding the consequences for initiating a receivership and effectuating its restructuring plan. The DOE refused to confirm whether it would attempt to forestall or limit a receiver's access to title IV funds.[197]

The quest for continued access to title IV funds led ECA to file a complaint in federal court seeking: (i) the appointment of a receiver to effectuate its restructuring plan and close the teach-out schools, (ii) the imposition of a blanket injunction against collection actions, and (iii) a declaratory judgment against the DOE determining that the go-forward schools would still have access to title IV funding following the appointment of the receiver.[198] By suing the DOE, ECA sought to trigger federal subject matter jurisdiction. In essence, ECA was attempting to combine the most beneficial elements of two types of proceedings – a receivership (with confirmed access to title IV funding) and a chapter 11 reorganization (initiation by the debtor, the blanket automatic stay, a sale free and clear of liens and claims, and federal subject matter jurisdiction irrespective of the diversity of the parties). The DOE opposed the relief and requested dismissal based on a lack of a justiciable dispute; it alleged that no live dispute existed between ECA and DOE.[199] Instead, the DOE argued ECA's complained-of injury was traceable to ECA's landlords. The DOE

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[194] *Id.*

[195] *Id.*

[196] DiConza, *Receiverships, supra* note 152, at 3.

[197] In sum, DOE "stated emphatically that ECA should proceed at its own risk." Educ. Corp. of Am. v. U.S. Dep't of Educ., No. 2:18-CV-01698-AKK, 2018 WL 5786077, at *4 (N.D. Ala. Nov. 5, 2018).

[198] *Id.* at *1.

[199] *Id.*

also asserted ECA lacked standing because the HEA did not create a private cause of action.[200]

ECA's novel complaint was dismissed on multiple grounds and the failure may dissuade another IHE from following it as a blueprint. First, the court found that no concrete dispute existed between the DOE and the Debtors.[201] The DOE's lack of confirmation regarding how it would react to the receivership and accompanying restructuring was simply too indefinite to support a case and controversy.[202] This was particularly true given that ECA was unable to adduce evidence that the DOE historically found IHE receiverships ineligible for title IV funding.[203] Simply put, ECA could only provide "speculation or conjecture in attempting to determine how the DOE would respond to ECA's restructuring plan."[204]

As an alternative ground for dismissal, the court held that the HEA does not provide a private right of action.[205] As a further belt to go with the two suspenders, the court found that ECA had not met its burden to appoint a receiver because it did not recognize any precedent for the appointment of a receiver at the request of the debtor to protect its assets.[206] Although the setback did not end the saga of ECA's restructuring, the court's opinion is a key precedent for any IHE considering the use of a federal receivership.

Returning to ECA's travails, rather than appeal the adverse decision, ECA pivoted to a new venue. It had already removed one of the lawsuits by its landlords regarding a teach-out campus in Macon, Georgia to the Middle District of Georgia. The day after the decision by the Northern

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[200] *Id.* The DOE further argued that the broad injunction requested by ECA was improper under the Anti-Injunction Act, 28 U.S.C. § 2283. That statute "prohibits federal courts from utilizing [[their]] authority to stay proceedings in state court unless the requirements of one of three narrow exceptions are met." *Id.*

[201] *Educ. Corp.*, 2018 WL 5786077, at *4.

[202] *Id.* (citing Susan B. Anthony List v. Driehaus, 573 U.S. 149, 134 S. Ct. 2334, 2341 (2014) ("Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' ") (quoting U.S CONST., ART. III, § 2)). To satisfy the case or controversy requirement, the alleged injury "must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Id.* (citation omitted).

[203] *Educ. Corp.*, 2018 WL 5786077, at *5.

[204] *Id.*

[205] *Id.* Although ECA's complaint sought a determination under the Declaratory Judgment Act (28 U.S.CA. § 2201), the Declaratory Judgment Act is only a procedural remedy and a cognizable cause of action must otherwise exist. Medtronic, Inc. v. Mirowski Family Ventures, LLC, 571 U.S. 191, 197 (2014) (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671(1950)). Because no private right of action existed under the HEA, the Declaratory Judgment Action could not enable one. *Educ. Corp.*, 2018 WL 5786077, at *5 (citing Williams v. Nat'l School of Health Tech., 836 F. Supp. 273, 281 (E.D. Pa. 1993)).

[206] *Educ. Corp.*, 2018 WL 5786077, at *6.

District of Alabama, ECA requested the appointment of receiver in the Middle District of Georgia lawsuit.[207] The court granted ECA's request for appointment of a receiver.[208] The accompanying receivership order granted the receiver broad authority to operate ECA's business, sell its assets, and wind down its affairs.[209] Following the entry of the receivership order, the court authorized the ECA receiver to obtain financing from the secured lenders.[210] In addition, the court granted broad injunctive relief staying all creditors from enforcing their rights and claims against ECA.[211] A number of ECA's creditors (principally landlords), likely buoyed by the prior result, unsuccessfully requested that the receivership order be set aside.[212]

This victory proved fleeting for ECA. Before an appeal of the receivership order could be adjudicated, the Accrediting Council for Independent Colleges and Schools (its new accreditor) suspended accreditation for almost all ECA schools.[213] Shortly thereafter, ECA announced it was closing all of its locations that had lost accreditation.[214] Without any hope for restructuring, the receivership became a liquidation of ECA's assets.[215] It is important to recognize that currently this same

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[207] Emergency Motion for the Appointment of a Receiver and Entry of a Temporary Restraining Order and Preliminary Injunction, VC Macon GA LLC v. Virginia College, LLC *et al.*, (M.D. Ga. No. 18-CV-00388 (TES)) ECF No. 10.

[208] Order Appointing Receiver and Preliminary Injunction, VC Macon GA LLC v. Virginia College, LLC *et al.*, (M.D. Ga. No. 18-CV-00388 (TES)) ECF No. 26. The District Court judge selected John Kennedy, a local lawyer and politician with no higher education management, and limited receivership experience, to serve as receiver. *Id.* The lack of defined selection process stands in stark juxtaposition to the trustee selection process in bankruptcy proceedings. *See* 11 U.S.C. §§ 702, 1104.

[209] *Order Appointing Receiver, supra* note 208.

[210] Order (A) Authorizing the Receiver to Obtain Ninth Amendment Term Loans and (B) Granting Security Interests and Liens, VC Macon GA LLC v. Virginia College, LLC *et al.*, (M.D. Ga. No. 18-CV-00388 (TES)) ECF No. 105.

[211] *Order Appointing Receiver, supra* note 208.

[212] These creditors appealed to the Eleventh Circuit and eventually settled with the receiver. Order Granting Receiver's Expedited Motion to Amend Sale Procedures and Extend Deadlines, VC Macon GA LLC v. Virginia College, LLC *et al.*, (M.D. Ga. No. 18-CV-00388 (TES)) ECF No. 166.

[213] Ben Unglesbee, *How state agencies prepared for the chaos of ECA's abrupt closure,* EDUCATION DIVE (Jan. 22, 2019), https://www.educationdive.com/news/how-state-agencies-prepared-for-the-chaos-of-ecas-abrupt-closure/546538/. Only NECB, which had a different accreditor, did not lose its accreditation. It was subsequently sold in a credit bid to ECA's lenders. *Monroe Capital: Seeks Involuntary Bankruptcy Of Portfolio Company*, BDC REPORTER (Jan. 7, 2020), https://bdcreporter.com/2020/01/monroe-capital-seeks-involuntary-bankruptcy-of-portfolio-company/.

[214] Unglesbee, *state agencies*, *supra* note 213.

[215] This was not the last twist in the story. Although the receiver enjoyed the support of ECA's lenders, ECA's primary lender allegedly sought to influence the receiver's investigation and litigation of the remaining causes of action in the receivership estate, principally claims against the D&O insurance policies. Following months of negotiations, in January 2020, ECA's primary lender and two other significant creditors filed an involuntary chapter 11 petition against ECA in the United States Bankruptcy Court for the District of Delaware. The petitioning creditors sought to appoint a chapter 11

result could have occurred in the parallel universe of an ECA bankruptcy case as an accreditation body is not precluded from discriminating against a bankruptcy debtor.[216] This article proposes an amendment to reverse the current policy.

The receivership of Dream Center, probably best known for its operating subsidiaries Argosy University ("Argosy"), Art Institutes ("AI"), Western State College of Law, and South University, illustrates other permutations for federal IHE receiverships. In March 2017, Dream Center, a non-profit entity affiliated with a Los Angeles-based Pentecostal mega-church, began purchasing for-profit IHEs, including assets owned by Education Management Corporation ("EDMC") (an entity to which we will return in a discussion of out-of-court restructurings). Dream Center ran into financial difficulties and initiated teach-outs at numerous campuses of Argosy, two campuses of South University, and a few AI campuses.[217] Following input from the DOE, Dream Center entered into a restructuring plan with its senior lenders and potential purchasers of some of its assets with the goal of stabilizing operations and retaining both accreditation and access to title IV funding.[218]

Four days after announcing the restructuring plan, Digital Media Solutions, LLC ("Digital"), a small marketing firm, initiated a "friendly receivership" against Dream Center in the Northern District of Ohio.[219] Digital held a breach of contract claim against DCEH Education Holdings, LLC, one of the defendants, in the alleged amount of approximately

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trustee to administer the estate of ECA. The receiver strongly resisted the petitioning creditors' attempts to oust him from control and, in the end, they determined that the legal skirmishes surrounding the involuntary petition threatened the value of ECA's remaining assets and sought to dismiss the involuntary petition. Receiver's Fifteenth Report, VC Macon GA LLC v. Virginia College, LLC *et al.*, (M.D. Ga. No. 18-CV-00388 (TES)) ECF No. 342.

[216] Betty Owen Schools, Inc. v. Department of Education (*In re* Betty Owen Schools, Inc.), 195 B.R. 23, 32-34 (Bankr. S.D.N.Y. 1996). Despite § 525(a) of the Bankruptcy Code precluding discrimination by a government entity because of an entity being a bankruptcy debtor, courts have found an exception for accreditation bodies based on subsequent amendments to the Bankruptcy Code that granted exceptions to the automatic stay and excluded accreditation status from being part of the bankruptcy estate. *Id.*; *see supra* Section II.

[217] Order re Termination of Receivership as of May 31, 2019, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.,* (N.D. Ohio No. 19-CV-00145 (DAP)) ECF No. 285.

[218] Inspection of the Department's Activities Surrounding the Sale of Postsecondary Schools to Dream Center Education Holdings, 81 Dep't of Ed. Office of Inspector Gen. (June 29, 2021), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2021/i05t0010.pdf; Emergency Motion for the Appointment of a Receiver and Entry of a Temporary Restraining Order and Preliminary Injunction, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 3.

[219] Except for inconsequential allegations in two of the Complaint's 39 paragraphs, Dream Center admitted every allegation of the Complaint in its two-page Answer. Moreover, Dream Center both answered the Complaint and consented to the motion seeking a receiver on the same day that the Complaint and motion were filed.

$250,000.[220] Without disclosing its collusion with Dream Center, Digital requested the court enter a broad receivership order to protect the students and trade creditors of Dream Center. The court entered the proposed receivership order, which imposed a nationwide injunction against collection actions and granted the receiver control over all of the defendants' assets.[221] Relying on similar arguments to those mounted by landlords in the ECA receivership case in the Middle District of Georgia, including the impropriety of appointing a receiver based on an unliquidated claim and the inappropriate remedy of nationwide injunction when the underlying claim had no recourse to all the defendants' assets, the landlords sought dismissal.[222] After the receiver also failed to timely pay the defendants' lease obligations, the landlords sought to charge these costs of the receivership to Digital due to its collusion in the appointment of the receiver.[223] In the end, the court chastised Digital for its collusion and lack of transparency but stopped short of holding Digital liable for the costs because Digital did not know that the receiver would default on the obligations to the landlords.[224]

As the landlords launched their assault on the receivership, the DOE's prior support evaporated. Argosy had requested DOE approval of its conversion to non-profit status. The DOE denied the request because funds that were released (both pre and post-receivership) by the DOE to Argosy

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[220] Verified Complaint, Dig. Media Solutions, LLC v. South University of Ohio, LLC et al., (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 1.

[221] Dig. Media Sols., LLC v. S. Univ. of Ohio, LLC, No. 1:19-CV-145, 2019 U.S. Dist. LEXIS 11510 (N.D. Ohio Jan. 18, 2019).

[222] Movant 3601 Sunflower LLC's Memorandum in Support of Motion to Vacate the Injunction and Receiver Order or, in the Alternative, to Modify the Scope of the Receiver Order and Injunction at 5, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 54-1. The landlords also asserted an academically interesting argument that the receivership order was an inappropriate substitute for a restructuring under chapter 11 of the Bankruptcy Code because the receivership order was too one-sided in favor of the Defendants and stripped the landlords of the rights they would enjoy in a bankruptcy case, particularly under 11 U.S.C. § 365. Movant 3601 Sunflower LLC's Memorandum in Support of Motion to Vacate the Injunction and Receiver Order or, in the Alternative, to Modify the Scope of the Receiver Order and Injunction at 14-15, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 54-1. Although this issue does not appear to have been evaluated by the court, field preemption in bankruptcy proceedings is very limited and, as a result, it would appear unlikely to apply. *See* Miller, *Framework, supra* note 11, at 440-41.

[223] 3601 Sunflower LLC's Motion to Charge All Accrued and Ongoing Post-Receivership Rent as a Cost to Plaintiff, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 189; Hemingway at Richmond LLC's Motion to Charge All Accrued and Ongoing Post-Receivership Rent as a Cost to Plaintiff, Digital Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 139.

[224] Report and Recommendation, Digital Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 260.

to pay student stipends had not been distributed.[225] As a result, Argosy failed to meet the standards for financial responsibility or administrative capability under the HEA and it immediately lost access to title IV funds.[226] Another side effect was that the Argosy receivership became equivalent to a bankruptcy filing and no restructuring was possible. All the Argosy campuses were closed shortly after the title IV funding evaporated.[227]

Now that we have surveyed the two most prominent federal receiverships of IHEs, what are the important takeaways? First, and most importantly, receiverships are not a cure-all. The DOE may be willing to allow an IHE to continue to access title IV funding but they are unwilling to *confirm* that an entity in receivership will be able to access title IV funds and it is unlikely that an IHE can force a validation.[228] Moreover, ECA's failed receivership in Alabama appears to have foreclosed the option of suing the DOE as a basis to both initiate a receivership and confirm access

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[225] *See* Letter from Michael J. Frola, Director, Multi-Regional and Foreign Schools Participation Division, U.S. Department of Education, to Mark Dottore, Dottore Companies, and Randall K. Barton, Chairman, Dream Center Education Holdings (Feb. 27, 2019), https://studentaid.ed.gov /sa/sites/default/files/argosy-cio-denial-redacted.pdf.

[226] *Id.*

[227] On a positive note, Argosy's accreditation agency did not immediately pull its accreditation and, as a result, the receiver was able to enter into many teach-out and transfer agreements. Receiver's Response to March 20, 2019, Letter from Jamienne Studley, President of WASC Senior College and University Commission, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 219. In the end, the receiver was able to sell one Art Institute campus (Las Vegas) and Western State College of Law free and clear of liens. Order Granting Emergency Motion of Mark E. Dottore, Receiver of Dream Center Argosy University of California, LLC for an Order Authorizing the Sale of Substantially All of the Assets of Wester State College of Law at Argosy University, Free and Clear of Liens, Encumbrances, Claims and Other Interests and for Transfer of the Interests of Unpaid Lienholders to the Proceeds of the Sale, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 413; Order Granting Emergency Motion of Mark E. Dottore, Receiver of the Art Institute of Las Vegas, LLC, for an Order Authorizing the Sale of Substantially all of the Assets of the Art Institute of Las Vegas, LLC, Free and Clear of Liens, Encumbrances, Claims and Other Interests (with Certain Exceptions) and for Transfer of the Interests of Unpaid Holders of Interests to the Proceeds of the Sale, Dig. Media Solutions, LLC v. South University of Ohio, LLC *et al.*, (N.D. Ohio No. 19-CV-00145 (DAP)), ECF No. 406. Unfortunately, the Las Vegas Art Institute still ended up closing in December 2019. Tiana Bohner, *Art Institute of Las Vegas closes amid accreditation issues*, KVVU-TV (Dec. 23, 2019), https://www.fox5vegas.com/news/local/art-institute-of-las-vegas-closes-amid-accreditation-issues/article_1523464a-2611-11ea-a068-e35092e7e8c7.html.

[228] To be sure, a IHE would have a colorable argument that the DOE violated the Administrative Procedures Act by acting arbitrarily and capriciously in eliminating funding when it had not in the ECA case. *See* Ramaprakash v. FAA, 346 F.3d 1121, 1124 (D.C. Cir. 2003) ("[R]eview under the APA is highly deferential, but agency action is arbitrary and capricious if it departs from agency precedent without explanation."). Nonetheless, relying upon a tribunal to determine that the DOE lacked explanation for diverging from its prior action to retain title IV funding would be very risky given the deferential standard for explanation. *See id.* ("Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'") (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)).

to title IV funds.[229] A friendly creditor may also be reluctant to facilitate a receivership when it could be saddled with the entire cost of the case.[230] Of particular relevance to this article's thesis, a restructuring plan, similar to the RSA proposed by the hypothetical subchapter, is insufficient without a mechanism to confirm the agreement of the DOE. An agreement at the outset, however, should not be binding on the DOE if circumstances change and its support should be revoked.

A possibility (receivership) is better than an impossibility (bankruptcy) when it comes to title IV funding access but the lack of certainty creates perverse incentives whereby an IHE's lenders (or even the IHE) will likely wait as long as possible in the hope that one will not be necessary.[231] Common sense, let alone a significant body of scholarly literature, suggests that waiting until a debtor is about to exhaust its liquidity before filing for bankruptcy leads to worse reorganization outcomes.[232] The same conclusion would undoubtedly apply to receiverships.

An IHE's limited ability to unilaterally initiate a federal receivership weakens its negotiating leverage with creditors. For comparison, the vast majority of chapter 11 bankruptcies are voluntarily initiated by the debtor.[233] This right is so important that a debtor's waiver of the right to voluntarily file for bankruptcy is unenforceable as violative of public policy.[234] In contrast, debtors have not historically enjoyed the freedom to

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[229] Educ. Corp. of Am. v. United States Dep't of Educ., No. 2:18-CV-01698-AKK, 2018 WL 5786077, at *4 (N.D. Ala. Nov. 5, 2018). To be sure, *ECA* is only a single case from a district court. However, the multiple, strong legal bases undergirding the opinion make a subsequent attempt very unlikely to succeed. *See supra* notes 201-206 and text accompanying.

[230] Receivership law is clear that "the appointing court has not only the authority but also wide discretion to determine who shall bear the costs of the receivership." Little Earth of the United Tribes, Inc. v. U.S. Dep't of Hous. & Urban Dev., 807 F.2d 1433, 1442 (8th Cir. 1986). Where, the "receivership property may not yield adequate funds, the court may justifiably require ⟦the⟧ requesting party to pay costs and expenses of receivership." *Id.* However, the general rule is that the administrative expenses of the receivership should be paid from receivership funds. *E.g.*, Atlantic Trust Co. v. Chapman, 208 U.S. 360, 375-76 (1908).

[231] "There is a clear rule in bankruptcy law that a waiver of bankruptcy eligibility is not enforceable." Pearce, *Bankruptcy-Remote Special Purpose Entities, supra* note 126, at 509 (citing, *inter alia*, Klingman v. Levinson, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) ("For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy.")).

[232] Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 IOWA L. REV. 1127, 1129-32 (2020) (summarizing literature analyzing delay in bankruptcy filings and reasons associated therewith).

[233] *See* David S. Kennedy et al., *The Involuntary Bankruptcy Process: A Study of the Relevant Statutory and Procedural Provisions and Related Matters*, 31 U. MEM. L. REV. 1, 3 (2000) (noting that, in 1998, "less than 1/1000 of one percent of all bankruptcy cases filed were commenced involuntarily").

[234] *E.g.*, *In re* Huang, 275 F.3d 1173, 1177 (9th Cir. 2002). One of the only exceptions to this rule, ironically, is that a receivership order can preclude the filing of bankruptcy case. United States v. Royal Bus. Funds Corp., 724 F.2d 12, 16 (2d Cir. 1983) (citing Sec. & Exch. Comm'n v. Lincoln Thrift Association, 577 F.2d 600, 609 (9th Cir.1978); Sec. & Exch. Comm'n v. Bartlett, 422 F.2d 475, 477–79

initiate receivership proceedings[235] and any attempts will surely be challenged by recalcitrant creditors.[236]

Although the federal receiverships offer increased flexibility compared to bankruptcy, certain bankruptcy rights, most notably a discharge and amortization, are not available in receiverships.[237] Without the option of discharging debts or amortizing secured claims, all claims must be paid in full or consensually restructured.[238] Other statutory rights available under the Bankruptcy Code, such as caps on damage claims for real property lease

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(8th Cir.1970)). Consistent with this policy contractual clauses that trigger default based a debtor's right to file for bankruptcy, known as *ipso facto* clauses, are also neutered by the Bankruptcy Code. 11 U.S.C. §§ 363(l), 365(e)(1), 541(c)(1)(B).

[235] Harkin v. Brundage, 276 U.S. 36, 54 (1928) ("In fact, there should be no 'friendly receiverships."). That is not to say that the debtor must or even should always contest the receivership as there will be situations where the receivership is in the best interests of the creditors (who are the beneficiaries of the fiduciary duties of directors and officers upon insolvency) or the debt could not be reasonably controverted. *In re* Reisenberg, 208 U.S. 90, 108 (1908). The Sixth Circuit recently categorized a debtor's consent to the appointment of a receiver as a waiver of the claim of a lack of equity jurisdiction. Digit. Media Sols., LLC v. S. Univ. of Ohio, LLC, No. 21-4014, 2023 U.S. App. LEXIS 2966, at *16 (6th Cir. Feb. 7, 2023). Moreover, contemporary analysis of *Harkin* highlighted how lower courts nonetheless allowed friendly or "consent" receiverships. Thomas Clifford Billig, *Corporate Reorganization: Equity vs. Bankruptcy*, 17 MINN. L. REV. 237, 251 (1933).

[236] These would be any creditors that will benefit from either a liquidation in bankruptcy or no receivership. In both ECA and Dream Center, the landlords supported dismissal of the receivership. This is likely because of the greater flexibility of a receivership combined with a stay akin to the automatic stay in bankruptcy. Indeed, in both of these cases (ECA's M.D. Ga. receivership proceeding), a stay was imposed against landlords exercising their state law remedies.

[237] On one hand, a "true bankruptcy law" can only be enacted pursuant to the Bankruptcy Clause of the Constitution. Stellwagen v. Clum, 245 U.S. 605, 615-18 (1918). On the other hand, insolvency laws, including federal receivership law, can coexist with applicable bankruptcy law and need not be enacted pursuant to the Bankruptcy Clause. *Id.* The Puerto Rico Oversight Management and Economic Stability Act, Pub. L. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. § 2101). *But see* Stephen J. Lubben, *Promesa and the Bankruptcy Clause: A Reminder About Uniformity*, 12 BROOK. J. CORP. FIN. & COM. L. 53, 57 (2017). This seemingly straightforward guidance is tempered by the Supreme Court's admission that the distinction between bankruptcy laws and insolvency laws is generally arbitrary, and the overlap is significant. Sturges v. Crowninshield, 17 U.S. 122, 194-96 (1819). Unsurprisingly, conforming the Supreme Court's precedent in this area is challenging. I have previously categorized (a) granting a discharge and (b) distributing property in exchange for a discharge as "true bankruptcy laws" while (y) providing for the sale and disposition of the debtor's property to creditors without a discharge (such as a receivership or an assignment of the benefit of creditors) or (z) avoiding fraudulent transfers by a debtor, as insolvency laws. Miller, *Framework, supra* note 11, at 440-41 (conforming Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518 (1933); Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929); and *Stellwagen*, 245 U.S. at 615–16).

[238] The sale of an IHE is also an option, even without satisfying or consensually resolving all debts. However, as explained earlier, reorganization may be the best way for maximizing the value of an IHE in comparison to a sale.

rejections[239] and the neutering of ipso facto clauses,[240] are also not available in receiverships.

Moving beyond the more limited relief available, a district court may not be a receptive venue for a receivership, especially in comparison to a bankruptcy court. A cogent body of scholarship suggests that Article III judges are disinclined to address bankruptcy matters.[241] The frequent need for emergency hearings is part and parcel of corporate bankruptcy and receivership practice. District courts are unlikely to appreciate the onerous demands created by large IHE receiverships on their dockets.[242] In sum, a federal judge in a receivership will often be uninterested and ill-suited.[243]

Lastly, each of the supposed benefits of federal receiverships compared to bankruptcy proceedings are mitigated in IHE cases. For instance, flexibility is a double-edged sword as the lack of certainty can provide opportunities for parties to contest issues where judicial discretion is paramount, yet judicial experience may be minimal.[244] The associated

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[239] High Five Ventures, Inc. v. Sportsmansliquidation.Com, LLC, No. 1:13-CV-2334, 2015 WL 1932221, at *3 (M.D. Pa. Apr. 28, 2015) (explaining that 11 U.S.C. § 502(b)(6) is not applicable in an equity receivership).

[240] *See* Golden City Restaurant, Inc. v. Pike, 246 F.2d 684 (D.C. Cir. 1957) (ruling that a license agreement was validly terminated when the licensee was determined to be insolvent and a receiver was appointed).

[241] Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 791-92 (2010); *see* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 116 (1982) (White, J., dissenting) ("[T]he congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts …."). Professor McKenzie cites a number of examples ranging from the fact that even though district courts have original bankruptcy jurisdiction and cases are referred to bankruptcy judges, the "reference" is hardly ever withdrawn without a request from a party. It can also be seen in the doctrine of equitable mootness, which allows a bankruptcy appeal to be dismissed based on prudential considerations based in equity. Robert Miller, *Equitable Mootness: Ignorance Is Bliss and Unconstitutional*, 107 KY. L.J. 269, 314 n.21 (2019).

[242] Grant Hermes, *A Uniform Federal Judiciary Enables Bankruptcy Courts to Bring Relief to Debtors and Creditors*, 34 WHITTIER L. REV. 261, 275 (2013). Indeed, "bankruptcy judges adjudicate almost five hundred percent more cases each year than district court judges." *Id.* (citing BAPCPA Table 3, U.S. Bankruptcy Courts, United States Courts 51 http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx (listing the total number of filings for the calendar year of 2010 as 1,306,409); Table C-5 U.S. District Courts, United States Courts 59; http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.as (listing the total number of civil cases for the twelve month period ending March 31, 2011 as 267,272)); *see generally* Table D U.S. District Courts, United States Courts 62 http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.as (listing the total number of criminal cases for the twelve month period ending March 31, 2011 as only 79,551).

[243] It would not seem a stretch to apply these same critiques to state court receiverships as well.

[244] *See* Ronald J. Gilson et. al., *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170, 209 (2013) (explaining benefits of using Delaware as a state of incorporation to access a body of experienced jurists).

ambiguity can lead to increased litigation.[245] Limited case law covering IHE receivership issues only heightens the uncertainty. Meanwhile, a lack of transparency and sparse procedural safeguards are particularly troublesome when combined with the potential for misuse of title IV funds or lack of warning regarding the possible closure of facilities.[246] Although mismanagement and sudden deterioration of operations occurs in bankruptcy cases, more parties, including the United States Trustee[247] and an official committee of unsecured creditors,[248] provide greater direct oversight and can help avert disaster.[249]

B. State Court IHE Receiverships

Using one of the modern state receivership statutes, in July 2017, Vatterott Educational Centers, Inc., the parent company of Vatterott College and L'Ecole Culinaire (collectively, "Vatterott"), filed a receivership in the Circuit Court for the County of St. Louis, Missouri.[250] The receiver was tasked with stabilizing the entities' operations and finding a strategic partner to purchase Vatterott's assets. As for the first goal, the receiver was initially successful because he was able to continue to access title IV funds and operate the campuses.[251] Although the receiver agreed to a sale of most

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[245] DiConza, *Receiverships, supra* note 152, at 3.

[246] Both issues arose in the Dream Center receivership. *See supra* ns. 225-227 and accompanying text.

[247] Or Bankruptcy Administrator in bankruptcy courts located in North Carolina or Alabama.

[248] *See* Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, *supra* note 90, at 256-57 (2018) ("Bankrupt enterprises are supervised by bankruptcy courts, the United States Trustee, official committees of creditors or equity-holders, and others. An explicitly stated goal of the U.S. court system is to provide oversight mechanisms that "deter and prevent fraud, waste, and abuse, and address mistakes should they occur." Utilizing a system specifically focused on the problem that Congress is concerned about seems more likely to be effective than eliminating the "intrusive oversight" provided by the bankruptcy system.") (citations omitted)).

[249] *In re* Roman Catholic Church of Archdiocese of Santa Fe, 615 B.R. 644, 655 (Bankr. D.N.M. 2020) ("In short, the chapter 11 bankruptcy system is a hundred-eyed Argus.").

[250] Vatterott College operated seven locations in Missouri: Berkeley, Joplin, Kansas City, Springfield, St. Charles, St. Louis (Extreme Institute), and Sunset Hills. L'Ecole Culinaire operated in two locations in Missouri: Kansas City and St. Louis.

[251] Angela Mueller, *Vatterott files for receivership, seeks buyer*, ST. LOUIS BUS. J. (Jul. 3, 2017) https://www.bizjournals.com/stlouis/news/2017/07/03/vatterott-files-for-receivership-seeks-buyer.html. Vatterott remained open and stable for 18 months, taught-out multiple campuses, and graduated thousands of students while operating inside a state receivership.

of Vatterott's campuses to ECA,[252] the sale did not close.[253] In May of 2018, Vatterott's accreditor placed it on probation due to system-wide financial concerns.[254] The accreditor subsequently withdrew accreditation in early December 2018.[255] The DOE reacted to the loss of accreditation by placing significant restrictions on Vatterott's access to title IV funds. Vatterott almost immediately closed all its campuses.[256]

State IHE receiverships can be differentiated from federal ones but they share drawbacks. The nationwide reach of federal courts explains why they are usually preferred for cases involving national creditor bodies, like many IHEs.[257] Using this authority, a receiver can obtain a nationwide injunction against litigation and force creditors to file proofs of claim and participate in the claims reconciliation process. One factor that could favor a state court receivership over a federal alternative is the ability to unilaterally initiate a receivership (like Vatterott did), which may be available under modern state receivership statutes but is not generally recognized for federal receiverships. Most importantly, modern state court receiverships suffer from similar infirmities as federal court receiverships: no right to grant a discharge, no cramdown or forced amortization of secured debt, and no cap on rejection damages.

Although receiverships (both federal and state) represent the only in-court option for restructuring an IHE while it continues to operate (and receive title IV funds), they are not sufficient. The more balanced leverage between debtors and creditors, the ability to discharge debts, the greater certainty wrought by a statutory scheme, judges who have experience and a passion for restructuring, and an unfettered ability to initiate proceedings, are all factors that favor a Chapter 11 Restructuring over a receivership,

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[252] The world of for-profit higher education was very incestuous. *Education Corporation of America to Acquire Selected Campuses from Vatterott Educational Centers*, PR NEWSWIRE (Jan. 4, 2018, 5:00 P.M.) https://www.prnewswire.com/news-releases/education-corporation-of-america-to-acquire-selected-campuses-from-vatterott-educational-centers-300577903.html; Angela Mueller, *Vatterott to sell most of its campuses*, ST. LOUIS BUS. J. (Jan. 5, 2018) https://www.bizjournals.com/stlouis/news/2018/01/05/vatterott-to-sell-most-of-itscampuses.html.

[253] Vatterott Education Centers, Inc. Letter to Students, (Dec. 17, 2018), https://dhewd.mo.gov/psc/documents/2018-12-17StudentClosureLetter.pdf.

[254] Accrediting Commission of Career Schools and Colleges, Letter to Vatterott Education Centers, Inc. (Dec. 5, 2018), https://www.accsc.org/UploadedDocuments/2018/Withdrawal-Denial-Letters/Vatterott-College-Berkeley-Redacted.pdf.

[255] *Id.*

[256] *Vatterott Letter to Students, supra* note 253.

[257] Even though the Vatterot receiver was able to stay federal court litigation based on comity, federal court receivership stays are significantly more developed and well-recognized. *E.g.*, S.E.C. v. Wencke, 622 F.2d 1363, 1369 (9th Cir. 1980); KeyBank Nat'l Ass'n v. Monolith Solar Assocs. LLC, No. 1:19-CV-1562, 2020 WL 4340518, at *1 (N.D.N.Y. July 28, 2020); Schwartzman v. Rogue Int'l Talent Grp., Inc., No. CIV.A. 12-5255, 2013 WL 460218, at *1 (E.D. Pa. Feb. 7, 2013).

whether in state or federal court. Having considered receiverships, one further option still must be considered, out-of-court restructurings.

VII. OUT-OF-COURT WORKOUTS

Even for entities whose access to chapter 11 is not restricted like IHEs, some restructurings are consummated out-of-court (known as workouts). A workout is a contractual modification of debt. It can take two forms: amendment of the terms of the existing debt or an exchange of the existing debt for new obligations.[258] Due to efficiency and lower costs, workouts have gained popularity as an alternative to in-court restructurings.[259] Because IHEs face high hurdles in attempting to restructure in-court, they have unsurprisingly resorted to workouts.[260] Nonetheless, workouts cannot offer the same benefits as in-court options.[261] This remains true even as liability management transactions that allow debtors to non-consensually restructure debt outside of court have proliferated. This section will provide an overview of private debt workouts and the Trust Indenture Act (the "TIA"), a framework for public debt workouts.[262] It will then animate the discussion through the lens of EDMC's restructuring under the TIA. It will also explain the drawbacks of workouts and TIA restructurings compared to Chapter 11 Restructurings.

From a debtor's perspective, the largest drawback of a workout compared to bankruptcy is the debtor's weaker leverage over holdout

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[258] William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1604 (2018). Modifications can be further subdivided into extensions, compositions, or a debt-for-equity swaps. Dick, *Restructurings*, *supra* note 258, at 1342. Extensions reflect changes to the terms of the debt, compositions include forgiveness of principal, while a swap includes creditors' agreement to accept equity in exchange for their debt claims. For instance, equitization transactions where lower priority debt holders agree to consensually accept equity shares in the entity rather than risk being completely wiped out in a foreclosure by the secured creditor are common. Similarly, a debt for debt exchange can also occur when a lender exchanges old bonds for new bonds with different payment terms, to avoid a default under the old bonds. The LTV Corp. v. Valley Fidelity Bank & Trust Co. (*In re* Chateaugay Corp.), 961 F.2d 378, 381 (2d Cir. 1992). Indeed, "[t]he debtor and its creditors share an interest in achieving a successful restructuring of the debtor's financial obligations in order to avoid the uncertainties and daunting transaction costs of bankruptcy." *Id.*

[259] Popularity first increased as a result of the lack of debtor in possession financing during and immediately after the Great Recession. A temporary deferral of taxation of cancellation of indebtedness income further facilitated workouts. Bratton & Levitin, *Bond Workouts*, *supra* note 258, at 1634. More recently, a cheaper process under Rule 144A allows creditors who control the chapter 11 process to use exchange offers as a cost-effective alternative to pre-packs. *Id.* at 1632-34.

[260] *Roosevelt University Announces Successful Debt Restructuring with Preston Hollow Capital*, BUSINESS WIRE (Oct. 25, 2018), https://www.businesswire.com/news/home/20181025005036/en/Roosevelt-University-Announces-Successful-Debt-Restructuring-with-Preston-Hollow-Capital; Patrick Reilly, *University of Montana debt restructuring leaves more money for campus,* MISSOULIAN (Aug. 15, 2019), https://missoulian.com/news/local/university-of-montana-debt-restructuring-leaves-more-money-for-campus/article_c10f0943-432c-5916-8cc9-9d1fc5cf881f.html

[261] Dick, *Restructurings*, *supra* note 258, at 1346.

[262] 15 U.S.C. §§ 77aaa-77bbbb.

creditors and secured lenders. A bankruptcy filing requires creditors to assert their claims against the debtor in a single forum where the debtor can use bankruptcy-specific benefits and powers to alter creditors' rights and facilitate a restructuring.[263] As noted previously, receivers enjoy weaker rights and powers of coercion.[264] In a workout, these rights have traditionally been even feebler:[265] creditor cooperation is generally a prerequisite and "each individual creditor has a veto, at least in regard to its own debt."[266]

The current trend of liability management transactions has flipped the script and illustrated that non-consensual out-of-court restructurings are possible.[267] Private debt workouts are directly governed by loan agreements and state contract law.[268] If a secured creditor's loan documents, the basis for the debt and their security interests, are compromised or vulnerable, even in a hypertechnical way, the debtor may leverage this weakness to obtain significant concessions in a workout.[269]

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[263] The automatic stay established by 11 U.S.C. § 362(a) forces creditors to assert their claims in one forum. Section 1129(b)(1) of the Bankruptcy Code authorizes "cramdowns" of secured debt to the value of the collateral.

[264] See *supra* Part IV.

[265] Setting aside the ability to threaten a bankruptcy (*i.e.*, negotiating in the shadow of bankruptcy).

[266] Bratton & Levitin, *The New Bond Workouts*, *supra* note 258, at 1604; Dick, *Restructurings*, *supra* note 258, at 1335 and 1344 (noting that even though some minor clauses are often subject to majoritarian override, certain provisions, known as "sacred rights," are generally subject to unanimous consent. These sacred rights include the amount of principal outstanding and the interest rate); *see* Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp., 72 Misc. 3d 1218(A), 150 N.Y.S.3d 894 at *2 (N.Y. Sup. Ct. 2021) (all provisions of loan syndicated loan agreement were subject to waiver by required lenders except certain "sacred rights", which included changes in maturity, interest, or principal amount of loan).

[267] *See generally,* Dick, *Restructurings*, *supra* note 258, at 1333 (coining the term "hostile restructurings" and explaining their increasing popularity).

[268] *Id.* at 1342 ([workouts] are subject to the terms of the existing loan agreements and to general state contract laws that govern the interpretation of those agreements and the parties' entry into new agreements."). The debtor will usually align with the lenders who hold just enough of the relevant tranche of secured debt to establish "consent" under the loan documents and effectuate a transaction that is beneficial for both these participating lenders and the debtor. A currently popular example is an "uptier" transaction where some senior secured lenders swap their loans for a new category of higher priority debt that puts them ahead of the other secured creditors whom they previously held claims of pari passu priority while the debtor receives a new injection of liquidity. *See* Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp., 72 Misc. 3d 1218(A), 150 N.Y.S.3d 894 (N.Y. Sup. Ct. 2021); *see also* Shana Elberg, Evan Hill, and Catrina Shea, *Uptier Exchange Transactions Remain in Vogue, Notwithstanding Litigation Risk* 26 No. 23 Westlaw Journal Bank and Lender Liability 02. At its most aggressive form, the debtors will also "repurchase[] the participating lenders' share of the prior (now junior) loan – effectively leaving behind the minority holders in a tranche of debt that is now junior to that held by the majority lenders." Bayside Cap. Inc. v. TPC Grp. Inc. (*In re* TPC Grp. Inc.), Nos. 22-10493 (CTG), 22-50372 (CTG), 2022 Bankr. LEXIS 1853, at *3 (Bankr. D. Del. July 6, 2022).

[269] *See generally,* Dick, *Restructurings*, *supra* note 258, at 1333. It is important to remember, "it comes down to the terms in the original loan documents, whether that involves loopholes found in

Although workouts are private processes, the TIA creates guardrails for public debt workouts by mandating the terms in the contracts, so-called "trust indentures."[270] Like a "hostile restructuring" of private debt, the TIA represents a potential option to overcome holdout bondholders.[271] Given the popularity of public debt issuances by IHEs, the TIA could function as a viable alternative to bankruptcy.[272] Unfortunately for IHEs, the TIA is designed to funnel non-consensual restructurings into bankruptcy and lacks many of the coercive tools available to bankruptcy debtors.[273]

The most relevant provision of the TIA is Section 316, which addresses amendments and waivers, the currency of any workout. Subsection 316(a) is a collective action clause that makes certain waivers and amendments

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various covenant sections or the ability of majority lenders to allow collateral releases and other forms of restructuring the debt via amendment." Renee Kuhl, *Collateral Priming: Steps Lenders Can Take Against Predatory Practices*, SRS Acquiom White Paper Series (Jan. 2021). As highlighted in the EDMC saga, the debtor may align itself with certain creditors to obtain sufficient consents to restructure the debt to the detriment of other creditors.

[270] Bonds involve two separate contracts: a note, which is a promise to repay, and an indenture, which facilitates collective enforcement via an entity called an "indenture trustee." The indenture trustee represents the interests of the dispersed bondholders. Bratton & Levitin, *The New Bond Workouts*, *supra* note 258, at 1615 n.51. Absent the indenture (and to a lesser extent, the trustee), individual investors "likely would race to protect their individual interests, potentially through majority action to force a sale that might harm minority stakeholders. That is, an indenture is a way of establishing equality and stability among investors. It acts to prevent the chaos that would follow should each investor be free to pursue its own interests with respect to the covered investment." CNH Diversified Opportunities Master Acct., L.P. v. Cleveland Unlimited, Inc., 160 N.E.3d 667, 680 (N.Y. 2020) (Fahey, J., dissenting).

[271] Dick, *Restructurings*, *supra* note 258, at 1343 n.44 (noting analogous nature of bond workouts and private debt workouts). As explained by Professor Dick, workouts have been traditionally characterized as exercises in "collaboration and consensus among the company, its senior lenders, and other stakeholders that must consent to the restructurings." *Id.* at 1343. However, a recent spate of "lender-on-lender" violence has challenged this notion. *See* Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp., 72 Misc. 3d 1218(A), 150 N.Y.S.3d 894 at *1 (N.Y. Sup. Ct. 2021) ("A syndicated loan is a loan extended by a group of lenders (*i.e.*, a syndicate) to a single borrower, typically under a single agreement with common terms. By pooling their resources, the lenders share the benefits and risks of the transaction. Generally speaking, the spirit of such arrangements among lenders is all for one, one for all. But not always.").

[272] The TIA only applies to publicly issued bonds as private placement bonds exempt under Section 4(a)(2) of the Securities Act of 1933. In reality, the TIA's provisions are followed in most private bonds. *See* Stephen J. Lubben, *Holdout Panic*, 96 AM. BANKR. L.J. 1, 28 n.27 (2022). *But see* Tennenbaum Living Tr. v. TGLT S.A., No. 20 CIV. 6938 (JPC), 2021 WL 3863117, at *5 (S.D.N.Y. Aug. 30, 2021) (not applying TIA to private placement bond that did not specifically incorporate the TIA). Syndicated or unitranche loans are presumed to "non-securities," which exempts them from federal securities laws, including the TIA. *See* Lubben, *Holdout Panic*, at 1.

[273] S. REP. NO. 75-1619, at 19S. REP. NO. 75-1619, at 19 (1939); S. REP. NO. 76-248, at 26S. REP. NO. 76-248, at 26 (1939); H.R. REP. NO. 76-1016, at 56 H.R. REP. NO. 76-1016, at 56 (1939). *But see* Tobias Wetlitzky, *Water Under the Bridge? A Look at the Proposal for A New Chapter 16 of the Bankruptcy Code from A Comparative Law Perspective,* 37 EMORY BANKR. DEV. J. 255, 276 (2021) (supporting the National Bankruptcy Conference's suggestion that a "chapter 16" be added to the Bankruptcy Code to address a "streamlined, judicial procedure for restructuring TIA-governed indentures").

subject to majoritarian rule.[274] Subsection 316(b) is a unanimous action clause that prevents majorities of bondholders from binding minorities to amendments of terms implicating bondholders' "right to receive payment."[275] It does not restrict private ordering; individual bondholders can agree to amendments, but they cannot force holdouts to "agree." Thus, holdouts can forestall a workout supported by most bondholders, if the workout triggers the protections of subsection 316(b). The question then becomes, what is the scope of "right to receive payment?"

The same group of for-profit schools profiled in the last section,[276] which were previously owned by EDMC, illustrates the uncertainty surrounding the answer to this question. Although EDMC was eventually successful in its workout, the need for litigation, including a loss at the trial court level, and further restructuring, illustrates the risks and drawbacks of a non-consensual restructuring under the TIA.[277]

EDMC recognized that it needed to deleverage its balance sheet.[278] Given that it received almost 80 percent of its revenue in title IV funds, a chapter 11 reorganization was not an option.[279] Instead, EDMC aligned itself with its secured lenders and entered into a RSA whereby its unsecured noteholders (who held claims against EDMC's operating subsidiaries, which were guaranteed by EDMC's corporate parent) were given two options: (i) if the noteholders unanimously supported the agreement, the unsecured notes would be exchanged for common stock in EDMC resulting in a haircut of approximately 67 percent or (ii) if the noteholders' support was not unanimous, an alternative transaction adverse to the non-consenting noteholders would be consummated whereby the secured creditors foreclosed on their collateral and transferred the assets to a new subsidiary (which would not be burdened by the debts associated with its predecessor), after which the new subsidiary would then issue new debt and equity to the consenting noteholders while the corporate guarantee

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[274] Bratton & Levitin, *Bond Workouts*, *supra* note 258, at 1616; *see also* Beal Sav. Bank v. Sommer, 865 N.E.2d 1210 (N.Y. 2007) (discussing why collective action clauses are used).

[275] The public policy supporting subsection (b) was a concern that voluntary reorganizations would be accomplished over the objections of minority bondholders. Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp., 111 F. Supp. 3d 542, 555 (S.D.N.Y. 2015) ("Marblegate II").

[276] Some of these schools have endured the trifecta of restructurings: (i) a chapter 11 case as part of Corinthian Colleges, where they were sold to EDMC during the bankruptcy case, (ii) the out-of-court restructuring that is chronicled in this section, and (iii) a receivership as part of Dream Center.

[277] This is particularly true concerning a restructuring under the Trust Indenture Act, as undertaken by EDMC.

[278] EDMC's funded debt included approximately $1.3 billion in secured debt and $217 million in unsecured notes that were issued by EDMC's subsidiaries.

[279] *See* Marblegate Asset Mgmt. v. Educ. Mgmt. Corp., 75 F. Supp. 3d 592, 595 (S.D.N.Y. 2014) ("Marblegate I") (noting that EDMC depended on this source of revenue because it accounted for 78.6% of its revenues).

of EDMC's parent was removed. The non-consenting noteholders would be left with their original unsecured claims against a corporate shell after the secured creditors' foreclosure.

One group of noteholders ("Marblegate")[280] refused to consent and sought to preliminarily enjoin the restructuring as violative of TIA Section 316(b), which governed the unsecured notes.[281] In response, EDMC asserted that the loss of parental guarantee did not alter the actual payment terms of the noteholders, even though the economic value of their claims was reduced to zero. The Southern District of New York ("SDNY")[282] classified the language of TIA as ambiguous and pivoted to an analysis of the legislative history and statutory purpose of the TIA.[283] The SDNY canvassed both judicial and scholarly commentary and concluded that: "⟦the TIA⟧ was intended to force bond restructurings into bankruptcy where unanimous consent could not be obtained."[284] Consistent with this conclusion, the SDNY found that the TIA precluded a "involuntary debt restructuring" when the practical result was an alteration of the noteholders' right to payment.[285]

EDMC appealed to the Second Circuit, which reversed and allowed the consummation of the liability management transaction.[286] Although the Second Circuit also categorized section 316(b)'s language as ambiguous, it focused on the practical implications of preventing transactions that were not strictly precluded by the indenture.[287] Reading the legislative history differently from the SDNY, the Second Circuit viewed the lack of any discussion of foreclosures as illustrative that Congress was aware of their

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[280] Marblegate Asset Management, LLC and Marblegate Special Opportunity Master Fund, L.P. were the only remaining holdouts when the case was on appeal to the Second Circuit. Magnolia Road Capital LP, and Magnolia Road Global Credit Master Fund L.P. had been plaintiffs at the trial court level. *Id.* at 594.

[281] *See* Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Fin. Corp., 846 F.3d 1, 5 (2d Cir. 2017) ("Marblegate III") (summarizing district court's analysis of section 316(b) when deciding whether to grant preliminary injunction).

[282] This court is the predominant venue for boldholder litigation. William W. Bratton & David A. Skeel, Jr., *Bankruptcy's New and Old Frontiers*, 166 U. PA. L. REV. 1571, 1584 (2018).

[283] *Id.*; *see also* Marblegate Asset Mgmt., LLC v. Educ. Mgmt. Corp., 111 F. Supp. 3d 542, 547 (S.D.N.Y. 2015) ("Marblegate II").

[284] *Marblegate I*, 75 F. Supp. 3d at 614.

[285] *Id.* Although outside the scope of this article, Marblegate I and II "made bond workouts harder to close and was greeted with much consternation in the practice world." Bratton & Skeel, *New and Old*, *supra* note 282, at 1584. Prior to the Second Circuit's reversal, two other cases followed the reasoning of Marblegate I and II. *See* BOKF, N.A. v. Caesars Entm't Corp. 144 F. Supp. 3d 459, 473 (S.D.N.Y. 2015); Meehancombs Glob. Credit Opportunities Funds, LP v. Caesars Entm't Corp., 80 F. Supp. 3d 507, 516 (S.D.N.Y. 2015) (upholding the broad interpretation of section 316(b) using Marblegate I and II reasoning).

[286] *Marblegate III*, 846 F.3d at 17.

[287] *Id.* at 7.

existence and consciously failed to regulate their use for bond restructurings.[288] The Second Circuit concluded that Congress intended to bar only unconsented amendment of payment terms, not alterations to underlying assets.[289]

Despite being an option for restructuring private or public debt, liability management transactions may not generally be a good fit for IHEs. The heightened litigation risk associated with liability management transactions may be acceptable to a for-profit IHE like EDMC.[290] In contrast, non-profit IHEs may be unwilling to engage in transactions that could tarnish their reputation and mire them in expensive time-consuming litigation.[291]

Moreover, workouts generally are not a substitute for a Chapter 11 Restructuring. EDMC's subsequent history provides a cautionary illustration of the shortcomings of the out-of-court approach. Even after its restructuring, EDMC's financial troubles continued and its assets were eventually sold to Dream Center, whose receivership was chronicled in the last section. Similarly, Serta, J Crew, and Revlon—three paradigmatic examples of liability management transactions—still ended up filing chapter 11 bankruptcies. Without the rights and powers granted to a chapter 11 debtor (or the ability to credibly threaten a Chapter 11 Restructuring), an IHE is likely to be under-restructured in a workout.

VIII. THE IMPORTANCE OF CASH FLOW RESTRUCTURING

A balance sheet restructuring such as a receivership or a workout may also fail to significantly alter the expense side of the cash flow statement. For that, at a minimum, an IHE will likely need to reject onerous executory contracts and unexpired leases. Put another way, an IHE emerging from a receivership or workout will be under-restructured compared to the same entity, if it had been able to undertake a Chapter 11 Restructuring. This

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[288] The Court reviewed the famous SEC Report and found no mention of an objective to require unanimous consent to all out-of-court restructurings. *Id.* at 9-10. The Court went on to consider the congressional committee process, which also supported this conclusion. *Id.* at 12.

[289] *Id.* at 13-14. Following the issuance of the Second Circuit's opinion, the legal landscape has settled. Bratton & Levitin, *The New Bond Workouts*, *supra* note 258, at 1673. Taken together with the increase in workout activity, [m]arkets have shown that they can muddle through with the status quo." *Id.*

[290] *See* Elberg, Hill, & Shea, *Uptier Exchange Transactions, supra* note 268; *c.f.* Vincent S.J. Buccolla, *Sponsor Control: A New Paradigm for Corporate Reorganization*, 90 U. CHI. L. REV. 1, 6 (2023) (noting heightened litigation risk posed by liability management transactions, but suggesting that private equity portfolio companies and their parent sponsors have incentives to still undertake them, including less concern about reputational risk).

[291] *C.f.* Buccolla, *Sponsor Control, supra* note 290, at 21-22 (suggesting that boards of directors of public companies have little appetite for hardball liability management transactions because they are at the tail-end of their careers and highly value their reputations). This same logic could apply to non-profit IHE administrators.

section will explain the IHE-specific benefits of cash flow restructuring under a Chapter 11 Restructuring.

The Bankruptcy Code generally allows a debtor to decide whether it wants to continue to perform under its existing contracts, assign them to other entities, or reject them.[292] To continue to perform, an assumption in bankruptcy parlance, the debtor must cure all defaults.[293] When assigning the contract, the debtor can reap the benefits of any consideration from the assignee, while a rejection constitutes an anticipatory repudiation that is deemed to have occurred prior to the debtor's bankruptcy filing.[294] The temporal distinction is significant. By categorizing the rejection as arising prepetition, the damages associated with the rejection are treated as a prepetition general unsecured claim under the Bankruptcy Code. Not only are these claims discharged following confirmation of the debtor's plan, but they are paid pro rata with all similarly situated claimants.[295] Usually, the distribution is in "tiny bankruptcy dollars"; i.e., heavily discounted because the amount of liabilities that share pro rata typically far exceeds the value of the assets. Moreover, both unexpired long-term leases and executory employment contracts are subject to further damage caps imposed by the Bankruptcy Code.[296] In sum, a bankruptcy filing gives the debtor the opportunity to jettison an executory contract or unexpired lease at a lower cost than in a receivership[297] or out-of-court restructuring, thereby helping

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[292] 11 U.S.C. § 365.

[293] 11 U.S.C. § 365(b).

[294] Section 365(g) of the Bankruptcy Code deems the lease rejection to have occurred as of the petition date. Central States, Southeast and Southwest Areas Pension Fund v. Basic American Industries, Inc., 252 F.3d 911, 916 (7th Cir. 2001).

[295] *See In re* Ames Dep't Stores, Inc., 306 B.R. 43, 65 n.76 (Bankr. S.D.N.Y. 2004).

[296] 11 U.S.C. § 502(b)(6), (7). Generally, a claim arising from a rejection of an executory contract grants the party a prepetition claim for damages based on the breach of the contract. Bank of Montreal v. Am. HomePatient, Inc. (*In re* Am. HomePatient, Inc.), 414 F.3d 614, 620 (6th Cir. 2005). The relevant theories for damages based on the breach of contract will depend upon state law and often include traditional breach of contract damage options, including expectation, reliance, and restitution. Restatement (Second) of Contracts §§ 347 (expectation), 349 (reliance), 371 (restitution) (Am L. Inst. 1981). The measure of damages is based on state law unless preempted by federal law, such as the caps imposed by 11 U.S.C. § 502(b)(6) and (7). *Am. HomePatient, Inc.,* 414 F.3d at 620.

[297] Rejection of executory contracts is available at common law in receivership cases. *See* Janvey v. Alguire, No. 3:09-CV-0724-N, 2014 WL 12654910, at *7 (N.D. Tex. July 30, 2014) (summarizing history of rejection power and explaining that rejection is predicated on the ability of the receiver to abandon onerous or unprofitable property). However, the receivership rejection power is not equivalent to the bankruptcy rejection power. Certain damages caps under the Bankruptcy Code may not be available, while a discharge of debts (including rejection damages) is not available in a receivership. *Compare* High Five Ventures, Inc. v. Sportsmansliquidation.Com, LLC, No. 1:13-CV-2334, 2015 WL 1932221, at *3 (M.D. Pa. Apr. 28, 2015) (finding 11 U.S.C. § 502(b)(6) inapplicable to receivership case) *with* S.E.C. v. Elmas Trading Corp., 85 B.R. 116, 120 (D. Nev. 1987) (applying 11 U.S.C. § 502(b)(6) to receivership case); James A. Chatz & Joy E. Levy, *Alternatives to Bankruptcy*, 17 J. BANKR. L. & PRAC. 1 Art. 5 (Feb. 2008) (noting that unlike a bankruptcy, a receivership cannot discharge debts).

to maximize its cash flow as a reorganized entity. This power is independent of the ability to discharge debts without creditors' consent, another power unique to bankruptcy.[298]

Both for-profit and not-for-profit IHEs would benefit from the rejection of executory contracts and unexpired leases, albeit likely in different ways. In the for-profit context, many IHEs lease campus space in multiple cities. Some locations may be profitable to assume[299] while others can be assigned or rejected. Moreover, the debtor's ability to threaten to reject a lease and cap the attendant rejection damages claim[300] incentivizes landlords to compromise with the debtor.[301] Outside of bankruptcy, this leverage does not exist.[302]

In the not-for-profit context, the ability to reject tenured faculty contracts would likely be imperative to obtaining a fresh start.[303] Tenure is generally defined as a rank that grants the holder continued employment absent extraordinary circumstances such as cause or financial emergency.[304]

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[298] Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 266 (1929).

[299] The lease must be assumed *cum onere*, including all burdens and benefits. *See, e.g., In re* Fleming Cos., Inc., 499 F.3d 300, 308 (3d Cir. 2007) ("'[T]he debtor may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.' The *cum onere* rule "prevents the [bankruptcy] estate from avoiding obligations that are an integral part of an assumed agreement.") (citations omitted).

[300] 11 U.S.C. § 502(b)(6).

[301] Assumption does not preclude a renegotiation of the lease terms. Although a lease can only be assumed over a counterparty's objection if there is a cure of all defaults, *see* 11 U.S.C. § 365(b)(1), a debtor may threaten to reject a lease in order to facilitate an assumption under better terms that a complete cure with consent of the landlord. *See* Michael J. Riela, *Lease Defaults and Restructuring: The Impact of Bankruptcy on Commercial Landlords and Tenants,* ABA https://www. americanbar.org /groups/business_law/publications/blt/2021/02/lease-defaults-restructuring/. That being said, the 2005 amendments to the Bankruptcy Code shifted some leverage from debtors to landlords by limiting the window for a debtor to make the rejection decision. *See* Richard Levin and 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, 624 (2005) (explaining that 11 U.S.C. § 365(d)(4)(A)(i) extended the time for a debtor to make its decision regarding rejection to 120 days from 60 days but it also drastically limited the availability of further extensions, which were easy to obtain previously).

[302] Soma Biswas and Kate King, *Bed Bath & Beyond's Tough Challenge: Shutting Stores Without Paying a Fortune*, WALL STREET JOURNAL (February 13, 2023) https://www.wsj.com/articles/bed-bath-beyonds-tough-challenge-shutting-stores-without-paying-a-fortune-a2b9d1e6.

[303] This is not the case for for-profit entities as they "rarely (if ever) provide faculty with tenure." Matthew A. Bruckner, *Terminating Tenure: Rejecting Tenure Contracts in Bankruptcy*, 92 AM. BANKR. L.J. 255, 266 (2018). Moreover, even those contracts that do include a financial exigency clause often require onerous procedural due process and even a bankruptcy filing may not be sufficient. *Id.* at 284. Such requirements would not be applicable in bankruptcy. Volkswagen of Am., Inc. v. Dan Hixson Chevrolet Co. (*In re* Dan Hixson Chevrolet Co.), 12 B.R. 917, 924 (Bankr. N.D. Tex. 1981) (applying conflict preemption to due process requirements in executory contract); *see* Miller, *Framework, supra* note 11, at 469-70.

[304] The American Association of University Professors describes tenure as "an indefinite appointment that can be terminated only for cause or under extraordinary circumstances such as

Because tenured faculty are more difficult to terminate, it is challenging for an IHE to right-size a department to match student demand.[305] Moreover, tenured faculty's higher pay compared to non-tenured or adjunct counterparts, makes their salaries a significant expense for non-profit IHEs. Although a "financial emergency" can be sufficient to allow the termination of faculty, there is usually an onerous administrative process and a material notice period (often one year), which delays the termination of tenured faculty.[306] Do the greater protections afforded to tenured faculty impact the treatment of their contracts if their IHE files for bankruptcy? Professor Bruckner has already considered this issue in a 2018 article.[307] He concludes that an IHE can reject faculty tenure contracts just like any other executory contract.[308]

Returning to one of the themes of this article, the possibility of an IHE filing for bankruptcy and employing the powers granted to a debtor in possession alters the negotiating leverage. The IHE could credibly threaten rejection.[309] Indeed, the landlords in ECA or Dream Center may have been

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financial exigency and program discontinuation." Tenure, AM. ASS'N. UNIV. PROFESSORS, https://www.aaup.org/issues/tenure. Although tenure is often characterized as a "job for life," it is more precise to consider the specific bundle of substantive and procedural rights, which usually provide some greater protection than "at will" termination. Bruckner, *Terminating Tenure*, *supra* note 303, at 265. That being said, "[t]he particular substantive and procedural rights conferred vary substantially based on the tenure-granting institution." *Id.*

[305] Often, a tenured faculty member can be terminated if the entire department or unit is being eliminated. *See, e.g.*, *Faculty Handbook*, Termination of Employment of Tenured Faculty, 2.18.2.1 General Grounds for Termination, https://www.uab.edu/policies/content/Pages/UAB-AA-HBK-0000656.html#Termination%20of%20Tenured%20Faculty%20Due%20to%20Bona%20Fide%20Financial%20Exigency%2c%20Bona%20Fide%20Financial%20Crisis%2c%20or%20Academic%20Program/Unit%20Closure.

[306] Faculty Handbook, Termination of Employment of Tenured Faculty, 2.18.2.1 General Grounds for Termination, https://www.uab.edu/policies/content/Pages/UAB-AA-HBK-0000656.html#Termination%20of%20Tenured%20Faculty%20Due%20to%20Bona%20Fide%20Financial%20Exigency%2c%20Bona%20Fide%20Financial%20Crisis%2c%20or%20Academic%20Program/Unit%20Closure. Some IHEs have altered this process. *See* Sara Dillon, *On Academic Tenure and Democracy: The Politics of Knowledge*, 52 UIC J. MARSHALL L. REV. 937, 968-69 (2019) (summarizing changes to the tenure model at Vermont Law School).

[307] Bruckner, *Terminating Tenure*, *supra* note 303.

[308] *Id.* The analysis is slightly complicated regarding public IHEs where faculty members may have stronger grounds to contest a rejection based on both procedural grounds and possibly constitutional protections. *Id.* at 279-91. Professor Bruckner still concludes that such contracts likely can be rejected. *Id.* As noted previously, public IHEs likely will need to seek to reorganize under chapter 9 and are outside the scope of this article. *See, e.g.*, Matthew A. Bruckner, *Special Purpose Municipal Entities and Bankruptcy: The Case for Public Colleges*, 36 EMORY BANKR. DEVELOPMENTS J. 341 (2020). For private IHEs (both for-profit and not-for-profit) the analysis is more straightforward and they can be rejected. Bruckner, *Terminating Tenure, supra* note 303, at 291.

[309] *See* Bruckner, *Terminating Tenure, supra* note 303, at 267-79 (examining tenure contracts in the context of 11 U.S.C. § 365(a)). Effectively this section also allows the debtor to renegotiate executory contracts and unexpired leases. A debtor's ability to renegotiate its executory contracts is not a power expressly granted by the Bankruptcy Code. Rather, it flows directly from the debtor's ability to reject.

more willing to work with the IHEs if they credibly threatened a bankruptcy filing where the landlords might have received minimal distribution. In any event, a receivership or workout cannot match the array of restructuring tools available in a Chapter 11 Restructuring. Having surveyed the current options for a IHE restructuring, the chart below provides a summary:

	Chapter 7	Chapter 11	State Court Receivership	Federal Receivership	Workout
Automatic Stay/ Injunction	Yes	Yes	Maybe	Yes	No
Retain Control	No	Yes[310]	Maybe	Maybe	Yes
Access to Title IV funds	No	No	Maybe	Maybe	Yes
Discharge	Yes	Yes	No	No	No

If the "No" in the access to title IV funds column for chapter 11 could be changed to a "Yes," it would clearly be the best option for an IHE when compared to the uncertainty of receiverships, the lack of control in chapter 7 (along with the loss of access to title IV funds), and the under-restructuring of a workout. This is true even if the "Maybes" in the access to title IV funding for receiverships were changed to "Yes." Thus, amending the HEA to confirm continued access in a receivership is an inferior solution compared to authorizing IHEs the option of undertaking a Chapter 11 Restructuring.

Just because this option would be best for IHE debtors does not mean it would be normatively superior. Only by imposing guardrails in response to concerns about IHEs' use of chapter 11 and title IV funds can an appropriate scheme be developed.

IX. A SUBCHAPTER AS A SOLUTION

Having explained why a Chapter 11 Restructuring should be an option for IHEs, the next question is how this option should be framed. The simplicity of allowing IHEs to file bankruptcy without enacting any further provisions is attractive. However, it ignores the omni-present conflicts

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See George G. Triantis, *The Effects of Insolvency and Bankruptcy on Contract Performance and Adjustment*, 43 U. TORONTO L.J. 679, 679 (1993) ("[T]he adjustment of contracts is negotiated against the background of rules governing breach.").)

[310] Unless a chapter 11 trustee is appointed. *See* 11 U.S.C. § 1108.

between the Bankruptcy Code and substantive non-bankruptcy law,[311] as well as the public interest considerations that motivated the preclusion of Chapter 11 Restructurings.

Given that allowing an IHE to undertake a Chapter 11 Restructuring under the general provisions of chapter 11 is suboptimal, two obvious alternative structures are available: a specific subchapter and piecemeal enactments.[312] This section will compare the differing treatment of railroads (separate subchapter) and healthcare businesses (piecemeal provisions). It then highlights the benefits and drawbacks of each approach, including the balance of power between private and public actors. Finally, this section will apply these lessons to IHEs and conclude that they should be treated under a separate subchapter.

A. Railroads: The Original Subchapter of the Bankruptcy Code

Like IHEs, railroads played a fundamental role in the growth of the American economy.[313] In 1877, Congress established the Interstate Commerce Commission (the "ICC"), to regulate railroads.[314] The ICC's status as the first federal agency confirms the public importance of railroads. In another parallel to IHEs, railroads' salience to Americans' everyday lives has not rendered them immune to financial distress.[315] However, Congress failed to establish a framework for restructuring railroads when they became financially distressed in the late nineteenth century.[316] Neither the ICC nor any other agency was tasked with overseeing the reorganization of railroads. No federal bankruptcy law was in effect at that time. Even when Congress enacted the first permanent bankruptcy statute, the 1898 Bankruptcy Act, railroads could not confirm plans of reorganization under the composition provisions of the 1898 Bankruptcy Act.[317] Federal equity receiverships

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[311] *C.f.* Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 442-48 (explaining parallel regulatory and public interest concerns in healthcare business chapter 11 cases and the need to enact responsive bankruptcy provision).

[312] *See* David N. Crapo, *Higher Education in the COVID Era*, 40 AM. BANKR. INST. J. 16, 56-67 (May 2021) (noting both piecemeal enactments and a separate subchapter as options for allowing IHEs to restructure under the Bankruptcy Code).

[313] Barton v. Barbour, 104 U.S. 126, 135 (1881) ("[T]he cessation of [a railroad's] business for a day would be a [public] injury. A railroad is authorized to be constructed more for the public good to be subserved, than for private gain …. It is, therefore, a matter of public right by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not suffer detriment by the non-user of the franchises.").

[314] United States. Interstate Commerce Act of 1887, Pub.L. 49–104, 24 Stat. 379, enacted February 4, 1887.

[315] Tabb, *History, supra* note 171, at 21.

[316] *Id.*

[317] Act of July 1, 1898, ch. 541, 30 Stat. 544, 547, repealed by An Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, 92 Stat. 2549, 2641 (1978) (codified at 11 U.S.C. §

filled this void as the interstate nature of most railroads required the nationwide reach of federal courts to effectuate relief.[318]

Unfortunately, railroad receiverships were both inefficient and ineffective. Just like the modern IHE receivers profiled earlier, railroad receivers' coercive powers were limited and receivers were dependent on secured creditors to effectuate a reorganization.[319] A sufficient number of creditors would need to acquiesce to a plan that amounted to a glorified foreclosure sale free of claims.[320] The assets were then conveyed by the creditors to a new corporation.[321] Because creditors held so much leverage, receivers often minimized the alteration of creditors' rights to obtain their support.[322] This should sound familiar: These drawbacks are still present in modern receiverships and workouts.

The ICC's role constituted one of the primary criticisms of railroad equity receiverships.[323] After 1920, the ICC's approval was required for a reorganized railroad to offer new securities pursuant to a reorganization.[324] Requiring the input of the ICC exacerbated the delays that generally plagued equity receiverships and stoked criticism of the ICC.[325] In response, the ICC often undermined the public interest by supporting unsound reorganization plan, merely to avoid further delays and criticism.[326]

Recognizing the shortcomings of equity receiverships as a vehicle for reorganizing railroads, in 1933 Congress amended the 1898 Bankruptcy Act to allow for the voluntary reorganization of railroads pursuant to a new Section 77.[327] Under this provision, the ICC continued to play an important

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1165 (1994)). A 1910 amendment confirmed a lack of access to railroads as it expressly forbade railroads from being debtor "Any person, except a… railroad… shall be entitled to the benefits of this Act as a voluntary bankrupt." Act of June 25, 1910, Pub. L. No. 61-294, 36 Stat. 838, 839 (1910).

[318] Tabb, *History*, *supra* note 171, at 22.

[319] Lubben, *Railroad Receiverships, supra* note 155, at 1468.

[320] Vincent L. Leibell, Jr., *The Chandler Act-Its Effect Upon the Law of Bankruptcy*, 3 FORDHAM L. REV. 380, 393 (1940). One commentator aptly described parts of the process as "only an empty ritual with no substance behind it." Julie A. Veach, *On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers*, 72 IND. L.J. 1211, 1216 (1997).

[321] Leibell, *Chandler Act*, *supra* note 320, at 393.

[322] Lubben, *Railroad Receiverships, supra* note 155, at 1468-69. The continued control over the railroad by insiders often exacerbated this issue as they are often willing to compromise with creditors in order to retain control. Tabb, *History*, *supra* note 171, at 22. This was particularly true when the same party held both equity and secured creditor positions in the capital structure. When this occurred, the equity holders could control the sale and provide advantageous terms for their own credit bidding of the secured debt. Jacob Trieber, *The Abuses of Receiverships*, 19 YALE L.J. 275, 277 (1910).

[323] Veach, *Public Interest*, *supra* note 320, at 1216.

[324] *Id.*

[325] *Id.*

[326] *Id.*

[327] Reorganization of Railroads Engaged in Interstate Commerce, Pub. L. No. 72-420, 47 Stat. 1474 (1933), repealed by An Act to Establish a Uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-

role in protecting the public interest as its approval was necessary for confirmation of a plan of reorganization.[328] The substance of Section 77 was substantially amended only two years later to greatly broaden the relief available to debtors, including the ability to sever a branch of a railroad and sell it.[329] The amendments did not diminish the ICC's role and its authorization was required to sever and sell a branch,[330] or to abandon one.[331]

Courts' application of the public interest considerations in Section 77 evolved. Initially, the interest of access and availability to the public was the predominant interest. The District of Colorado's statement is illustrative: "Section 77 expresses the public policy which led to its enactment and demands that the operation of railroads be continued for the benefit of the public, regardless of the interests of their creditors and stockholders."[332] As railroads' salience to the American economy shifted, the centrality of the public interest in railroads diminished. Most notably, in the *New Haven Inclusion Cases*, the Supreme Court recognized the conflict between maximizing the value of the debtor's assets for the benefit of creditors and the preservation of an ongoing railroad in the public interest.[333] Yet, the court overseeing the bankruptcy case and the trustee administering the railroad debtor would both be "charged with the dual responsibility."[334]

598, 92 Stat. 2549, 2641 (1978) (codified at 11 U.S.C. § 1165 (1994)). This provision was enacted on the last day of the Hoover Administration. Leibell, *Chandler Act, supra* note 320, at 384. Professor Lubben has recently asserted that the enactment of Section 77, and later Section 77(b), reflected a reorientation of reorganizations focusing on a fair, structured process that contrasted strongly with the prior free-wheeling equity receiverships. Stephen Lubben, *Fairness and Flexibility: Understanding Corporate Bankruptcy's Arc*, 23 U. PA. J. OF BUS. L. 132, 159-60 (2020).

[328] Bankruptcy Act of 1898, § 77(d). "Congress insisted that the law provide for the protection of the public interest in railroad reorganizations, and it did so by making the Interstate Commerce Commission (ICC) the arbiter of the public interest in this respect." Jonathan Brown, *When Social Enterprises Fail*, 62 VILL. L. REV. 27, 65 (2017). However, Section 77 did not require that the Court make a finding that the plan of reorganization was in the public interest. Louis B. Wehle, *Railroad Reorganization under Section 77 of the Bankruptcy Act: New Legislation Suggested,* 44 YALE L.J. 197, 200 (1934). The protections for creditors under Section 77 were different from the default confirmation requirements under the 1898 Act because a majority of creditors were not required to vote in favor of a plan of reorganization so long as the court found it was fair and equitable. Vernon X. Miller, *Bankruptcy: Proceedings Under Section 77B: Voluntary Petition Filed by a Dissolved Corporation*, 22 MARQUETTE L. REV. 148, 148 n.5 (1938).

[329] Veach, *Public Interest, supra* note 320, at 1218.

[330] *Id.*

[331] 1898 Bankruptcy Act § 77(o); Palmer v. Com. of Mass., 308 U.S. 79, 88 (1939).

[332] *In re* Denver & Rio Grande W. R.R., 38 F. Supp. 106, 115 (D. Colo. 1940); *see also In re* Chicago & N.W. Ry. Co., 126 F.2d 351 (7th Cir. 1942).

[333] New Haven Inclusion Cases, 399 U.S. 392, 420 (1970).

[334] *Id.*

In 1970, Congress tasked the National Bankruptcy Commission (the "NBC") with making recommendations for the overhaul of the 1898 Bankruptcy Act.[335] Among the many items in the NBC's crosshairs were Section 77 and the delay in administration of railroad cases. The NBC viewed the ICC's extensive role and the necessity of its approval of proposed reorganization plans and asset dispositions as a root cause of delay.[336] It concluded that "the defects in section 77 stem from divided responsibility and an elaborate procedure which assumes that the time available in which to effect a cure is infinite."[337]

As part of the Bankruptcy Code, Congress chose to enact a separate subchapter of chapter 11 especially for railroads, subchapter IV.[338] Subchapter IV illustrates Congress's recognition that the public interests presented by railroads and the heavily regulated environment they operated in "merited distinct treatment within the bankruptcy system."[339] Following the NBC's suggestions, Congress significantly curtailed the ICC's power over proceedings under the new subchapter. Consistent with this shift, the bankruptcy court, not the ICC, would be charged with protecting the public interest.[340]

The more limited role envisaged for the ICC and its successor, the Surface Transportation Board ("STB"),[341] was intended to mitigate Section 77's problems. Under subchapter IV, the STB possesses standing but it does not have an explicit role in evaluating a chapter 11 plan or asset disposition (sale, severance, or abandonment) much less the power enjoyed by the ICC

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[335] A few years later, in 1973, Congress responded to comprehensive distress among railroads by enacting the Regional Railroad Reorganization Act (the "RRRA"). 45 U.S.C. §§ 701-797. One affected railroad challenged the constitutionally of the RRRA on the basis that the RRRA violated the uniformity requirement of the Bankruptcy Clause. Regional Rail Reorganization Act Cases, 419 U.S. 102, 122 (1974). The Court found that the RRRA's treatment of railroads operated uniformly on all railroad debtors and their creditors. *Id.* at 160. Even before the RRRA, the Supreme Court confirmed Congress's authority to treat railroads differently under the Bankruptcy Clause. Continental Illinois Nat. Bank & Trust Co. v. Chicago, R.I. & P.R. Co., 294 U.S. 648, 671 (1935). This precedent supports the different treatment for different categories of debtors, including IHEs under the hypothetical subchapter proposed by this article.

[336] Howard v. Surface Transp. Bd., 389 F.3d 259, 269 (1st Cir. 2004) (analyzing S. Rep. No. 95–989, at 11–12 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5797–98 and H. Rep. No. 95–595, at 423 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6379)).

[337] 1 REPORT OF COMMISSION ON BANKRUPTCY LAWS OF UNITED STATES 29 (1973). The proposed solution was to make section 77 more like chapter X of the 1898 Act, with the ICC supporting the court, instead of operating in parallel with it. *Id.* at 30. Subchapter IV shares significant similarities with the NBC report's recommendations.

[338] 11 U.S.C. §§ 1161-74.

[339] Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 459.

[340] Veach, *Public Interest*, *supra* note 320, at 1222.

[341] The ICC was abolished in 1995 and its duties were transferred to the STB. ICC Termination Act of 1995, Pub.L. 104–88, 109 Stat. 803, enacted December 29, 1995.

under the 1898 Bankruptcy Act.[342] Instead, the trustee is required to file an application with the ICC and the ICC is required to file a report detailing its conclusions.[343] The report is relevant but not binding on the bankruptcy court.[344] The bankruptcy court can also accelerate the STB report process by setting a deadline for filing the report.[345]

Subchapter IV substitutes the bankruptcy court for ICC/STB as the protector of public interest.[346] Subchapter IV requires that the bankruptcy court itself must "take into account the 'public interest' in the preservation of the debtor's rail service, in addition to the interests of the debtor, creditors, and equity security holders."[347] As if this directive were not explicit enough, the bankruptcy court must also find that the chapter 11 plan is consistent with the public interest.[348]

Subchapter IV also alters the default application of certain provisions of the Bankruptcy Code. It elevates the priority of certain claims, including prepetition personal injury claimants, to administrative expense priority,[349] delineates a much more searching abandonment procedure[350] and varies the default treatment of secured creditors' rights when their collateral is rolling stock.[351]

Zooming out, the comparison between subchapter IV and Section 77 illustrates the balance chosen by Congress between minimizing the delay occasioned by the ICC's (now the STB's) role in the chapter 11 process and protecting the public interest in railroads. Increased engagement by STB was not worth the delay and increased cost, which could easily imperil the bankruptcy case and, ironically, prejudice the public interest. Instead,

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[342] Howard v. Surface Transp. Bd., 389 F.3d 259, 268 (1st Cir. 2004) ("Congress made it clear in enacting 11 U.S.C. § 1170 that it wanted the bankruptcy court, not the STB, to make the final determination of whether a debtor's rail lines could be abandoned and the STB to play an advisory role, subject to time constraints. This would speed up the decisional process."). The STB expressly possesses standing to be heard, but it cannot file an appeal. 11 U.S.C. § 1164. The Secretary of Transportation (the head of the STB) also plays a significant role in selecting the trustee for the debtor. The Secretary of Transportation recommends five persons and the United States Trustee selects one of them as the trustee. 11 U.S.C. § 1163.

[343] 11 U.S.C. § 1170(b).

[344] *Howard*, 389 F.3d at 268 (citing 11 U.S.C. §§ 1170(b), (c)). This influence is consistent with the STB's implementation of overall Congressional rail transportation policy. *Id.* (citing 49 U.S.C. § 10903).

[345] 11 U.S.C. § 1170(b).

[346] Brown, *Social Enterprises*, *supra* note 328, at 66 (noting four instances when the court, the trustee, or both, may be instructed to weigh the public interest in a subchapter IV case).

[347] 11 U.S.C. § 1165.

[348] 11 U.S.C. § 1173(a)(4). *See In re* Montreal Maine & Atl. Ry., Ltd., No. BR 13-10670, 2015 WL 7431192, at *12 (Bankr. D. Me. Oct. 9, 2015), *adopted*, No. 1:15-MC-329-JDL, 2015 WL 7302223 (D. Me. Nov. 18, 2015).

[349] 11 U.S.C. § 1171.

[350] 11 U.S.C. § 1170.

[351] 11 U.S.C. § 1168.

Congress placed the onus on the bankruptcy court to protect the public interest and balance it with the interests of other stakeholders while the STB retains standing as well as a limited consulting function. Although Congress altered the statutory scheme 30 years ago, its concerns are still germane to developing a proposed treatment of IHEs. We will return to these lessons in the last section's discussion of the proposed composition of an IHE subchapter.

B. Health Care Businesses: Piecemeal Approach

Given its more recent and differing treatment compared to railroads, Congress's handling of healthcare businesses is relevant to any proposal for the treatment of IHEs. Although healthcare businesses constitute a significant portion of the United States economy,[352] their revenues and costs are extremely volatile. They are not only dependent upon consumer demands but are also sensitive to regulatory changes and the disruptions in the insurance marketplace.[353] Many have been and continue to be in financial distress.[354] Like IHEs, healthcare businesses present thorny public and private interest issues that are not easily reconciled within the framework of a bankruptcy case.[355]

Rather than enact a new subchapter to the Bankruptcy Code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") added a series of provisions (collectively, the "BAPCPA Amendments") intended to improve the administration of "healthcare business" bankruptcy cases.[356] The most significant change was the establishment of the patient care ombudsman ("PCO") to monitor the debtor's patient care.[357] As with any professional retained by a bankruptcy estate, the most important questions are: (i) What is the PCO's role? and (ii) How is the PCO compensated? The PCO assesses the quality of patient care and files written reports with the bankruptcy court detailing the findings.[358] The appointment of a PCO is by default unless the bankruptcy

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[352] Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 426 (listing statistics).

[353] *Id.* at 427.

[354] *See* Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, *supra* note 90, at 238-48 (discussing the financial distress of hospitals and contrasting their treatment in bankruptcy to that of IHEs).

[355] *See* Laura N. Coordes, *Bespoke Bankruptcy*, 73 FLA. L. REV. 359 (2021).

[356] See 11 U.S.C. § 101(27A) (providing the definition of "health care business" under the Bankruptcy Code). For a consideration of these provisions, *see* Levin & Ranney-Marinelli, *The Creeping Repeal of Chapter 11, supra* note 301, at 639-41.

[357] 11 U.S.C. § 333(a)(1).

[358] Unfortunately, there are no standards or metrics for how PCOs should measure the quality of patient care or the format and scope of the reports to be filed. Thus, the effectiveness of the PCOs depends largely on the quality of the appointee. Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 449-50.

court finds that it is not necessary to protect patients.[359] The compensation of the PCO is paid by the debtor's estate and set pursuant to the usual standards for compensation of professionals.[360] Unlike the ICC under Section 77, the PCO does not have any formal powers or influence over a sale or a plan of reorganization.[361] Indeed, the mandate of the PCO was designed to be "extremely limited" and its narrow remit is to monitor the quality of patient care "to avoid a crisis."[362]

The BAPCPA Amendments also imposed duties on the debtor to protect patients' interests. When a healthcare facility is being closed, the debtor is required to "use all reasonable and best efforts" to transfer patients to a nearby facility that will provide substantially similar service and reasonable quality of care.[363] The debtor must also follow the detailed provisions for disposal of patient records.[364] In contrast to subchapter IV, the bankruptcy court is not tasked with making any specific findings (besides potentially the lack of need for a PCO) in a healthcare business case.

What has been the impact of the BAPCPA Amendments? It is mostly bad news. Successful healthcare business restructurings remain the exception, not the rule.[365] The lackluster quality of case outcomes is unsurprising as the BAPCPA Amendments neither comprehensively address the tension between regulators and the bankruptcy court regarding oversight of healthcare businesses nor provide tailored options to increase the likelihood of successful restructurings.[366] Turning to the principal change wrought by the BAPCPA Amendments, PCOs act as a spokesperson (not advocate) for the otherwise unrepresented patients.[367]

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[359] 11 U.S.C. § 333(a)(1).

[360] *See* 11 U.S.C. § 330(a).

[361] Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 449-50.

[362] *See* Samuel R. Maizel, *The First Year of the Patient Care Ombudsman in Review*, Part I, 27 AM. BANKR. INST. J. 2 (March 2007) (quoting the Statement of Keith J. Shapiro before the Hearing Regarding S. 1914 and explaining that Mr. Shapiro, along with Nancy Peterman, assisted the staffs of Sens. Chuck Grassley (R. Iowa) and Dick Durbin (D-Ill.) in drafting the healthcare business provisions of BAPCPA).

[363] 11 U.S.C. § 704(a)(12); 11 U.S.C. § 1106(a)(1). As a further signal of the importance of these duties, actual and necessary costs of both moving patients and disposing of records by the debtor or by a regulator are entitled to administrative expense priority. 11 U.S.C. § 351.

[364] 11 U.S.C. § 503(a)(8)(A) and (B).

[365] Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 433; Tammy Worth, *Hospital Bankruptcies a Result of Trends, Not a Single Event*, HEALTHCARE FIN. (Jan. 30, 2014), https://www.healthcarefinancenews.com/news/hospital-bankruptcies-result-trends-not-single-event).

[366] Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 452.

[367] Although a pool of experienced PCOs has developed and some standardization has occurred, *See* Andrew Troop and Joseph V. Zujkowski, *Issues Facing Patient Care Ombudsman*, 30 AM. BANKR. INST. J. 18 (March 2011), without further guidance it uncertain whether they are performing the role envisioned by the creation of PCOs. Moreover, a PCO's reports are not only digested by the parties and the bankruptcy court but they can also be the subject of local media reporting. *See* Mai Hoang, *Patient care ombudsman again voices concerns on staffing at Astria Regional*, YAKIMA HERALD (Nov.

This salutary function must be balanced against the added layer of administrative costs (not only does the PCO get paid by the debtor's estate but the PCO usually obtains counsel, who is also paid by the same source),[368] to an already expensive process. Criticism of PCOs for failing to improve the outcomes in healthcare business cases is misplaced, however, as their role is to protect against patient catastrophes, not facilitate successful restructurings. Nonetheless, the BAPCPA Amendments in toto appear to have failed to improve outcomes for healthcare business debtors.

C. Benefits of a Subchapter

In her recent article, Professor Coordes describes healthcare businesses as "bankruptcy misfits" because "[t]he [Bankruptcy] Code is insufficiently specific with respect to healthcare debtors, and the [Bankruptcy] Code lacks an organizing principle that adequately addresses the needs and interests of the competing players in a healthcare bankruptcy case."[369] The result: healthcare businesses are less likely to be successfully reorganized.[370] Her preferred solution: new subchapters in chapters 11 and 7 for healthcare businesses. Given the parallels to the solution advanced by this article and similarities between IHEs and healthcare businesses in both their importance to the economy and their heavily regulated nature at both the state and federal level, the critiques she relies upon are worthy of evaluation and application to any proposed treatment of IHEs.

Professor Coordes's first critique centers on Congress's failure to enact provisions targeting the issues specific to healthcare business bankruptcies including: (i) the eligibility to file for bankruptcy, (ii) the jurisdiction of bankruptcy courts over disputes involving regulators, and (iii) whether Medicare provider numbers constitute estate assets (that can be sold free and clear of liens and interests) or executory contracts (that require the cure

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19, 2019) https://www.yakimaherald.com/special_projects/astria/patient-care-ombudsman-again-voices-concerns-on-staffing-at-astria-regional/article_b51bef5e-c4c5-5aaa-997b-ec0b78c58efe.html. Mai Hoang, *Astria Health continues to reduce staff, providers and facilities in Yakima,* YAKIMA HERALD (Mar. 9, 2020) https://www.yakimaherald.com/special_projects/astria/astria-health-continues-to-reduce-staff-providers-and-facilities-in-yakima/article_9dbec8eb-ac0c-5f3f-a88b-1bcddedacef0.html; Chris Coyle, *Cedar Haven bankruptcy: Latest patient care report finds no major problems*, LEBTOWN (Dec. 30, 2019) https://lebtown.com/2019/12/30/cedar-haven-bankruptcy-latest-patient-care-report-finds-no-major-problems/. Healthcare businesses, especially hospitals, are often among the largest employers in smaller cities and towns. As a result, local media coverage may be much more significant than one might expect.

[368] Indeed, a PCO that is an organized entity cannot appear in court without counsel. *See* Samuel R. Maizel, *Patient Care Ombudsman: What About Counsel?*, 29 AM. BANKR. INST. J. 14, 14 (Feb. 2010). This increased cost has made some courts reluctant to appoint PCOs in smaller cases. *See, e.g.*, *In re* William L. Saber, M.D., P.C., 369 B.R. 631-638 (Bankr. D. Colo. 2007).

[369] Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 420.

[370] *Id.* at 433.

of all defaults in order for them to assigned).[371] She suggests that these are issues at the "heart of bankruptcy law" and should be resolved legislatively to bring uniformity and end the splits among courts.[372]

Professor Coordes's second critique focuses on the tension between regulators' intentions and the Bankruptcy Code's goals. Regulators' licensure authority grants them significant power over the fate of a debtor.[373] Not only is licensure necessary for a healthcare business debtor's continued operations but it also must be considered in any going-concern sale of the debtor.[374] The Bankruptcy Code's failure to address the balance of authority between the regulators and the bankruptcy court is particularly problematic as the issue is multifaceted. The regulator may push a healthcare business to remain open to benefit the community when the best financial decision is to close the doors and convert to a chapter 7.[375] Meanwhile, the regulator may use its authority over licensure transfers to influence sales of healthcare businesses.[376] These tensions between the interests of creditors and regulators are challenging, no doubt. However, providing a defined construct allows for a more consistent approach that will decrease uncertainty and parties' incentives to litigate.[377]

Professor Coordes presents a strong normative argument for adding subchapters rather than making piecemeal changes. Enacting a subchapter provides the opportunity to establish a comprehensive framework for treating a specific category of debtor entity. The new provisions will be easier to navigate if they are found in a single subchapter. Moreover, it signals the importance of restructuring the specific entity-type.[378]

Both of Professor Coordes's critiques support a subchapter for IHEs. Enacting IHE-specific provisions, some of which share similarities with the

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[371] *Id.* at 433-41.

[372] *Id.* at 441.

[373] *Id.* at 442.

[374] *See In re* HHH Choices Health Plan, LLC, 554 B.R. 697, 700 (Bankr. S.D.N.Y. 2016) ("Just to be clear, there are various regulatory requirements, licensing issues, or other approvals that may apply to the different bidders for different reasons. I am not suggesting, by any means, that the Bankruptcy Code supplants those.").

[375] Coordes, *Reorganizing Healthcare Bankruptcy*, *supra* note 32, at 443.

[376] *See In re* Gardens Regional Hospital and Medical Cntr., Inc. 567 B.R. 820 (Bankr. C.D. Cal. 2017).

[377] I have proposed an overarching framework to resolve these preemption problems in my other writings. *See* Miller, *Framework, supra* note 11.

[378] It is important to emphasize that even a specific subchapter will leave questions unanswered. That is the nature of bankruptcy law. It is largely a procedural overlay on substantive state and federal law. *E.g.*, Butner v. United States, 440 U.S. 48, 54 (1979). Unfortunately, Congress's recent track record in making enactments and amendments to the Bankruptcy Code is mixed, at best. *E.g.*, Katherine A. Jeter-Boldt, *Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA's Credit Counseling Requirement*, 71 MO. L. REV. 1101 (2006). Thus, further commentary exploring potential enactments is important to steer future developments.

healthcare business provisions identified by Professor Coordes, reflects the distinct issues triggered by IHEs. The importance of resolving, or at least mitigating, conflicts between the remits of regulators and bankruptcy courts should be a centerpiece of a subchapter. Subchapter IV is illustrative. Recognizing this natural tension, Section 77 of the 1898 Act and subchapter IV both provide separate swim lanes for bankruptcy courts and the ICC/STB when a railroad files for bankruptcy. Section 1166 generally requires a railroad debtor(and its trustee) to follow applicable provisions of the Interstate Commerce Act and the orders of any federal, State, or local regulatory body to the same extent as it would outside of bankruptcy.[379] Section 1166 is a corollary to 28 U.S.C. § 959(b), which requires a debtor to follow substantive non-bankruptcy law when operating or managing property, even if the substantive law is an obstacle to the debtor's reorganization.[380] The two provisions differ in a key respect. Section 1166 lists the specific types of transactions where non-bankruptcy law is preempted. In contrast, 28 U.S.C. § 959(b) does not determine the result when a substantive law directly conflicts with the Bankruptcy Code.[381]

Although the framework provided in my prior scholarship can be applied to guide courts in evaluating implied preemption issues, statutory clarification (like § 1166) would be particularly helpful in the context of intra-federal law conflicts.[382] The sparse case law in this area does little to clarify the uncertainty wrought by the collisions of these different legal regimes.[383] In sum, providing greater guidance covering the complex

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[379] 11 U.S.C. § 1166; *In re* Auto-Train Corp., 11 B.R. 418, 421 (Bankr. D.D.C. 1981). The most significant exception is the abandonment power, which is governed by 11 U.S.C. § 1170, not applicable non-bankruptcy law. Given the general prohibition on abandonment outside of 11 U.S.C. § 1170, it is perhaps unsurprising that some entities have sought to extend the application of that section to non-debtors. *See* Howard v. Surface Transportation Board, 389 F.3d 259, 270-71 (1st Cir. 2004) (denying attempt by non-debtor to use the abandonment power under 11 U.S.C. § 1170 to abandon non-debtor easement and rail line without following the adverse abandonment requirements prescribed by the Surface Transportation Board).

[380] 28 U.S.C. § 959(b); *see* Gillis v. State of California, 293 U.S. 62, 63 (1934) (applying predecessor to 28 U.S.C. § 959(b) and holding that a federal receiver of an operating debtor must satisfy applicable California state law requiring a surety bond assuring payment of taxes even if such requirement would preclude receiver's preferred method of administrating the debtor).

[381] Section 959(b) is a specific savings clause that eliminates the obstacle prong of conflict preemption but does not eliminate the impossibility prong that is implicated when a direct conflict occurs. Miller, *Framework, supra* note 123, at 454-55. An example of a direct conflict is the situation when § 363(f) allows a sale free and clear of state law interests including laws allowing collection of healthcare overpayments from buyers. WBQ P'ship v. Virginia Department of Medical Assistance Servs. (*In re* WBQ P'ship), 189 B.R. 97, 108 (Bankr. E.D. Va. 1995).

[382] *See* Miller, *Framework, supra* note 11, at 454-55.

[383] Unfortunately, as one scholar has noted, "there has been little scholarly treatment as to how conflicts between federal statutes should be resolved. In the courts, various canons are invoked. Statutes should be read in harmony where possible. Old laws yield to new. General statutes yield to specific ones.

relationship between regulators and bankruptcy courts as part of a subchapter makes sense for both healthcare businesses and IHEs.

Any proposed treatment of IHEs in bankruptcy should apply the lessons learned from Congress's enactment of subchapter IV and the BAPCPA Amendments. It is imperative to carefully consider the relationship between the bankruptcy court and non-bankruptcy regulators to minimize delays while still protecting the public interest. For example, Section 77's requirement that the ICC actively participate caused significant delays. Extending the pendency of a case has many bad side-effects, including increased administrative costs, heightened reputational risk, and exhaustion of liquidity.[384] Congress responded by reallocating authority over the bankruptcy case and safeguarding the public interest to the bankruptcy court, at the expense of the ICC.

The concerns regarding case pace that animated the changes in subchapter IV are even more salient today. Secured creditors often require the accomplishment of certain key objectives by certain dates (colloquially known as "milestones") to ensure the steady progress of the case. Typical milestones culminate in the approval of significant sales or confirmation of a chapter 11 plan.[385] A debtor's failure to satisfy the milestones can cause a default under the DIP financing facility, which may result in the secured creditor foreclosing on its collateral.[386] Leaving aside the requirements imposed by a secured lender, a rapid reorganization is also important for protecting an IHE's reputation and minimizing student attrition. An IHE's reputation is one of the most important inputs that sets the demand for the IHE's educational services.[387] Relying upon the DOE to quickly approve a sale or merger of an IHE or plan of reorganization could be unrealistic.[388] Yet, the DOE's status as the provider of most the debtor's operating funds

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Implied repeal is disfavored." Brendan S. Maher, *The Affordable Care Act, Remedy, and Litigation Reform*, 63 AM. U. L. REV. 649, 703-04 (2014) (internal citations omitted).

[384] Often, a debtor's cash is subject to a lender's perfected security interest as cash collateral and the lender will only provide consensual use of the cash pursuant to a budget for a definite period. *E.g.*, *In re* Glob. Safety Textiles Holdings LLC, No. 09-12234 KG, 2009 WL 7834657, at *6-7 (Bankr. D. Del. July 30, 2009). Although the conventional wisdom is that longer chapter 11 duration is correlated with increased cost, this view has been subject to criticism. *See, e.g.*, Stephen J. Lubben, *What We "Know" About Chapter 11 Cost Is Wrong*, 17 FORDHAM J. CORP. & FIN. L. 141, 143 184, (2012) (suggesting complexity is the key determinant for cost of a chapter 11 and finding that duration is not significantly correlated with increased cost).

[385] Frederick Tung, *Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis*, 37 YALE J. ON REG. 651, 672 (2020).

[386] Which would likely include the IHE's campus.

[387] This is why stigma is such an important consideration in IHE bankruptcies.

[388] It is reasonable to view the DOE's failure to confirm whether the IHEs will continue to receive title IV funding following a receivership filing as a presage of its unwillingness to actively participate in a Chapter 11 Restructuring. *See supra* note 197.

(via title IV) cannot be ignored. Balancing the significant interests of the DOE with the time crunches endemic to modern chapter 11 cases should be the goal of any proposed legislation allowing IHEs to access Chapter 11 Restructurings.

Identifying which interests and constituencies should benefit from a new subchapter is integral to determining its composition. In the IHE context, the "public interest" in the continued proper use of title IV funds is distinct from the students' interest in the IHE providing current and future educational services. The latter is more akin to the patients' interests monitored by the PCO in a healthcare business bankruptcy case. Ensuring that students' interests are protected when they may be geographically disparate (such as an online IHE) and they likely have minimal understanding of the bankruptcy system, is proper when no other party is tasked with protecting their interests.[389] Appointing an ombudsman, especially one without a specific remit, however, does not appear to be a cost-effective solution. This is particularly true if the IHE cases are intended to last 60-90 days. Because less educational services are generally delivered in the summer, a matching case trajectory will minimize disruption. If this quick seasonal timeline can be utilized, an ombudsman may be useless. Meanwhile, the DOE has historically protected this interest, as well as the public's interest in title IV funds.[390] It would be improper for an ombudsman to usurp the DOE's role.

X. AN IHE SUBCHAPTER

The recent enactment of the small business-focused subchapter V to chapter 11 shows Congress's willingness to use subchapters as tool to improve the Bankruptcy Code. Moreover, as part of the response to the COVID-19 pandemic, Congress broadened the eligibility requirements for subchapter V by increasing the debt limits.[391] It also provided significant financial support to IHEs via the $76 billion allocated in the Higher Education Emergency Relief Fund I, II, and III.[392] Between Congress's reaffirmation of the use of subchapters to the Bankruptcy Code, its decision

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[389] Student class actions/class claims are common in IHE bankruptcy and receivership cases but in order for such claims to be cognizable, wrongful acts must have already arisen. In contrast, no party is monitoring or prospectively protecting the students' interests.

[390] *See* Educ. Corp. of Am. v. United States Dep't of Educ., No. 2:18-CV-01698-AKK, 2018 WL 5786077, at *5 (N.D. Ala. Nov. 5, 2018).

[391] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, March 27, 2020, 134 Stat 281, 310-311. Pursuant to its latest extension, the elevated debt limits are scheduled to sunset on June 21, 2024. Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, 136 Stat. 1298, 1300 (June 21, 2022).

[392] CARES Act: Higher Education Emergency Relief Fund, U.S. DEP'T OF ED. https://www2.ed.gov/about/offices/list/ope/caresact.html.

to alter the Bankruptcy Code in response to the COVID-19 pandemic, its willingness to confront financial crises facing IHEs, and most importantly, its previous recognition of the unique nature of IHEs through their treatment by Bankruptcy Code, a specific subchapter of the Bankruptcy Code would appear to be a reasonable next step. Although critics may highlight that the near-term crisis for many IHEs has abated, the demographic challenges IHEs continue to face cannot be cured with a vaccine. Enacting a Chapter 11 Restructuring regime now, rather than amid crisis, will provide greater opportunity to troubleshoot potential issues prior to a future surge in financial distress. The remainder of this section will detail proposed provisions to facilitate Chapter 11 Restructurings for IHEs.

A. Non-Subchapter Amendments

The first and most obvious necessary change is not the enactment of a subchapter but changes to the either the Bankruptcy Code or the HEA to allow IHE debtors to use title IV funds and retain accreditation. Two options exist. The easier option is to amend the Bankruptcy Code and rely on the "last in time rule" for interpreting conflicting federal statutes.[393] More specifically, an amendment to Bankruptcy Code § 525(a), the statutory provision that precludes discrimination based on a bankruptcy filing could allow postpetition access to title IV funding. Indeed, when a bankruptcy court last evaluated the conflict between this section and the title IV funding exclusion, the subsequent enactment of the HEA and its greater specificity weighed heavily.[394] As a result, an amendment to § 525(a) could trump the HEA amendment due to its more recent enactment and equivalent focus. Although this solution may be easier politically when compared to an amendment to the HEA itself, the greater clarity of amending the HEA is preferable. Additionally, the exclusion of accreditation status as property of the IHE's bankruptcy estate and the associated exception to the automatic stay should also be eliminated when a IHE files under the new subchapter.[395]

B. The Subchapter's Composition

Having explained the importance of allowing IHEs to effectuate Chapter 11 Restructurings and settled on a subchapter as the best vehicle for reconciling the tensions among the competing stakeholders, the

[393] *E.g.*, Boudette v. Barnette, 923 F.2d 754, 757 (9th Cir. 1991) ("When two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will.").

[394] Betty Owen Schools, Inc. v. Department of Education (*In re* Betty Owen Schools, Inc.), 195 B.R. 23, 34 (Bankr. S.D.N.Y. 1996) (in order for accreditation status to be subject to assumption, it must be an executory contract that is property of the bankruptcy estate).

[395] *See* Statewide Oilfield Construction, Inc. v. Career Collection Ass 'n (*In re* Statewide Oilfield Construction, Inc.), 134 B.R. 399, 401 (Bankr. E.D. Cal. 1991).

composition of the subchapter should be outlined. At bottom, the proposed process is intended to balance the DOE's protection of the public interest with the need for rapid case progression, while incorporating lessons from subchapter IV and modern restructuring practice.

1. Prepetition RSA

As Professor Rasmussen has cogently suggested, IHEs should embrace modern restructuring strategies as part of their toolkit for combating financial distress.[396] One of the key tools for efficiently administering and processing bankruptcy cases is the use of RSAs.[397] An RSA is a contract between a debtor and its creditors in which the parties agree prepetition to support the debtor's proposed chapter 11 plan and/or transaction in return for the plan/transaction including certain provisions.[398] A required prepetition RSA is the lynchpin of the proposed subchapter.

Greater efficiency and decreased bankruptcy stigma represent some of the most significant benefits of an RSA.[399] An RSA brings order to what can be a very chaotic process.[400] In lieu of a free-fall into bankruptcy, an RSA establishes a framework and facilitates consent among the core constituencies.[401] It forces parties to row in the same direction despite the divergences among their interests[402] because the parties understand the rules imposed by the Bankruptcy Code and can bargain in the shadow of

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[396] Rasmussen, *Lessons for Academic Leaders, supra* note 143.

[397] There are other variants on the RSA depending upon the specific context or objective such as plan support agreement (a "PSA") or a sale and plan support agreement (a "SAPSA").

[398] Rasmussen, *Lessons for Academic Leaders*, *supra* note 143, at 247; *see* Edward J. Janger & Adam Levitin, *Badges of Opportunism: Principles for Policing Restructuring Support Agreements*, 13 BROOKLYN J. CORP. FIN. & COM. L. 169, 173 (2020).

[399] Douglas G. Baird, *Bankruptcy's Quiet Revolution*, 91 AM. BANKR. L.J. 593, 604 (2017).

[400] Janger & Levitin, *Opportunism*, *supra* note 398, at 177 and 185. RSAs have also been subject to significant criticism as coercive instruments. *E.g.*, Lubben, *Fairness and Flexibility, supra* note 327, at 173, 175; Edward J. Janger, Adam J. Levitin, *The Proceduralist Inversion-A Response to Skeel*, 130 YALE L.J. FORUM 335 (2020).

[401] Free fall chapter 11s are often unsuccessful. There too many things that can go wrong postpetition when a debtor is insolvent, subject to legal obligations imposed by the Bankruptcy Court, and under the microscope of the bankruptcy court and parties in interest for the filing and the goals to not be planned for in advance. Even when a case must be filed rapidly, providing the appearance of a path forward is vital. Consider the recent bankruptcy filing of cryptocurrency brokerage Voyager Digital Holdings, Inc. Although the bankruptcy case was filed within 3 weeks of legal counsel being retained, a proposed chapter 11 plan was filed along with the other usual first day motion. Joint Plan of Reorganization of Voyager Digital Holdings, Inc. and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code, *In re* Voyager Digital Holdings, Inc. (Bankr. S.D.N.Y. No. 22-10943 (MEW)), ECF No. 15. To be sure, the proposed plan was a placeholder but it provided a reset of expectation for customers who are largely unfamiliar with the bankruptcy system, not unlike the students of an IHE.

[402] As Professor Baird explained, "restructuring support agreements ensure that every can be confident that a pre-packaged plan that parties shape outside of bankruptcy is implemented inside of bankruptcy." Baird, *Revolution*, *supra* note 399, at 604.

the likely results.[403] Even though it is not comprehensive (unexpected twists are common when an entity experiences financial distress), an RSA provides, in the words of Professor Baird, a "base camp" for the parties.[404] Although the RSA can be assumed after the bankruptcy filing, it is also subject to a fiduciary-out whereby the debtor is not bound to its terms if a better transaction or plan option arises.[405]

Negotiating resolutions in advance of a bankruptcy filing usually makes administration of the bankruptcy case more efficient because the attendant motion practice and court supervision is eliminated and fewer parties are involved. Decisions among the core constituencies can also be made quicker. That being said, adequate disclosure and information still must be provided.[406] Unlike the formal solicitation process associated with plan confirmation, no disclosure statement is prepared for an RSA.[407] As a result, RSAs should be, and often are, subject to termination if the information on which they are based is incorrect or incomplete.[408] If the RSA contains sufficient information and is followed by the parties, the case itself will likely be more consensual and cheaper.[409]

An RSA can also help protect a debtor's reputation, a particularly important consideration for IHEs. In the context of corporate debtors, the media as well as practitioners have suggested that the common use of bankruptcy as a financial tool has lessened stigma associated with a bankruptcy filing and its adverse impact on debtors' reputations.[410] Hypothetically, if IHE bankruptcies became commonplace, the stigma will likely diminish. Admittedly, IHEs must confront different stigma-related challenges than single-use product sellers or service providers – the length of commitment associated with an IHE (often four or more years), the financial commitment (often tens of thousands of dollars), and the future benefits (alumni network and value of credential) all distinguish them. In a parallel context involving Southern Vermont College, the notice of a show-cause hearing regarding its financial viability issued during the 2019

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[403] Janger & Levitin, *Opportunism*, *supra* note 398, at 177.

[404] Baird, *Revolution*, *supra* note 399, at 604.

[405] Any order approving of assumption of an RSA should provide for a fiduciary out whereby Debtors are allowed to discard an RSA if performing under the RSA will breach the fiduciary duties of the Debtors. *See* Janger & Levitin, *Opportunism, supra* note 398, at 173.

[406] *Id.* at 177-79.

[407] *Id.* at 178.

[408] *Id.* at 179.

[409] Other concerns certainly exist, namely that the RSA can be used to coerce less powerful constituencies and they can constitute an "end" run around the plan process and circumvent or pre-bake a result notwithstanding the procedural protections of the plan process. *Id.* at 178-80.

[410] *See supra* note 25 and accompanying text.

recruiting season resulted in a dramatic decrease in enrollment.[411] It ultimately filed a chapter 7 petition and liquidated.

An RSA can mitigate the reputational risk of an IHE's bankruptcy filing and increase the chances of a successful Chapter 11 Restructuring. An RSA signals to vendors, employees, and, most importantly, students and prospective students, that the IHE has a settled strategy for its bankruptcy and the support of its major constituencies. This support can help establish momentum for the case where fewer parties seek to disrupt the Chapter 11 Restructuring, less pleadings are necessary, and confirmation arrives both quickly and consensually.[412] An ideal case-path will not always eventuate, even with an RSA. Yet, the presence of an RSA increases the likelihood.

Although IHEs are distinct, there are parallels with other industries that have successfully used chapter 11 as a financial restructuring tool. The bankruptcy filings of major auto manufacturers provide perhaps the closest comparison. Bankruptcy was supposed to signal their death-knell as people would be unwilling to trust in the resale value of the cars and continued viability of warranties.[413] Instead, the bankruptcies empowered new management teams to make long overdue changes that have since lead to profitability:[414] (i) liabilities were shed or restructured but pre-bankruptcy warranties were honored, (ii) customers continued to buy their cars, and (iii) resale values were stable.[415] The same thing may happen in the context

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[411] Jim Therrien, *Southern Vermont College Closing*, BENNINGTON BANNER, (Mar 4, 2019) https://www.benningtonbanner.com/uncategorized/southern-vermont-college-closing/article_e7ff169e-01ed-5be2-af98-c36acba65f20.html.

[412] David A. Skeel, Jr., *Distorted Choice in Corporate Bankruptcy*, 130 YALE L.J. 366, 384-85 (2020) (discussing how the rise in popularity of RSAs are both a cause and symptom of compressed timeline for modern bankruptcy cases).

[413] "When they initially sought government assistance, the automakers resisted filing for bankruptcy, citing concerns that consumers would be unwilling to buy cars and rely on warranties from a company in bankruptcy, and that the resulting collapse in revenues would doom the companies to liquidation. The bankruptcy strategies Chrysler and GM ultimately adopted thus placed a premium on minimizing the time spent in bankruptcy and assuring the public that the automakers would emerge from bankruptcy as viable companies." *Steering Through the Auto Crisis*, 100209 ABI-CLE 9, Views from the Bench (October 2, 2009); Joshua Rauh and Luigi Zingales, *A Bankruptcy to Save GM*, VOX EU (Nov. 18, 2008), https://voxeu.org/article/gm-solution-chapter-11-government-restructuring-finance.

[414] Matthew DeBord, *How GM went from a government bailout and bankruptcy to being one of the world's best-run car companies a decade later,* BUSINESS INSIDER (Oct. 20, 2018), https://www.businessinsider.com/gm-mary-barra-management-helped-save-automaker-2018-10.

[415] Some brands were eliminated (Oldsmobile, Saturn, and Hummer were three casualties). It is also hard to overstate the role played by the federal government in the GM and Chrysler bankruptcy cases. *E.g.*, Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of Chrysler and GM,* 2010 U. ILL. L. REV. 1375 (2010); A. Joseph Warburton, *Understanding the Bankruptcies of Chrysler and General Motors: A Primer*, 60 SYRACUSE L. REV. 531 (2010). The combination of the systemic importance of these automakers and their limited numbers facilitated the government's heavy involvement. Given the multitude and diffuse nature of the IHEs (irrespective of their collective systemic importance), it is unrealistic to expect the federal government to have a significant hands-on role in every case.

of IHEs, if bankruptcy becomes an option for a Chapter 11 Restructuring. As Southern Vermont College's experience shows, however, stigma must be carefully managed. A default rapid case timeline that can be accomplished during the summer offers a solution.

Just like other chapter 11 cases, not all IHEs will be successfully restructured.[416] These failures should not signal that allowing IHEs to use the Bankruptcy Code is a mistake.[417] Entities in financial distress frequently fail, even with a full suite of restructuring alternatives available. Instead, the success of any legislation that allows IHEs to reorganize should be measured not only by the successful Chapter 11 Restructurings, but also in the greater success IHEs will have negotiating with their creditors outside of bankruptcy.[418] If IHEs can credibly threaten a Chapter 11 Restructuring, they will possess greater leverage to negotiate concessions from creditors. The result will be more fulsome out-of-court restructurings, thereby resolving financial distress while avoiding bankruptcy filings.

Recognizing the value of an RSA begs two questions: (i) Who should be the parties to the RSA? and (ii) What provisions should be included in the RSA? The answer to the first inquiry must include the DOE. It is the source of the majority of the IHE's operating cash via title IV funds and the agency charged with protecting the public interest in those funds. That being said, federal agencies are not known as quick decision makers who can match the pace of modern restructurings. Although information travels much faster than it did when the 1898 Bankruptcy Act governed, bureaucratic delay still occurs. It is imperative to avoid the mistakes of Section 77 and provide the DOE an opportunity to veto, rather than requiring its explicit approval.[419] Allowing a veto represents a compromise between the DOE's protection of public interest and streamlining the

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[416] See Bruckner, *Bankrupting Higher Education*, *supra* note 40, at 736 note 256 (discussing chapter 11 reorganizations of IHEs before the current bar was enacted and noting that not all were successful).

[417] *See, e.g.*, Elizabeth Warren and Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to its Critics*, 107 MICH. L. REV. 603 (2009) (describing chapter 11 as a success because approximately 80% of cases that filed a plan within six months of the bankruptcy petition were successfully reorganized, despite this being a minority of all bankruptcy cases filed).

[418] Focusing solely on bankruptcy results discounts the impact of negotiating in shadow of bankruptcy (*i.e.*, with both sides considering their rights and leverage in a hypothetical bankruptcy filing), which is at least as important. Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 1020 (2000) ("corporate bankruptcy negotiations in the United States may be self-executing because they take place under the shadow of bankruptcy law").

[419] In the unlikely event that an involuntary bankruptcy is filed against an IHE, the subchapter should allow the IHE to opt-into the subchapter upon the consent of the DOE. Consent in this context is more reasonable because drafting and agreeing to an RSA prior to the entry of an order of relief, which may be entered after 22 days or earlier by agreement is unlikely. *See* FED. R. BANKR. P. 1011(b).

restructuring process.[420] Defining the DOE's role will also mitigate the uncertainty that plagued IHE receiverships. The debtor will be able to force the DOE to engage with its proposed Chapter 11 Restructuring.

Creating a standardized process will enable the DOE's oversight. Recently, Congress has recognized the benefit of standardized pleadings by prescribing a base chapter 11 plan for subchapter V cases.[421] Requiring an IHE to use a standard form RSA (the "Form IHE RSA") would not materially prejudice an IHE while it would make a truncated review window for the DOE more reasonable.[422] I believe that 28 days is appropriate as it mirrors the notice period for objecting to confirmation of a chapter 11 plan.[423] The running of the review period would be triggered by the delivery to the DOE of: (i) the Form IHE RSA, including a summary term sheet, (ii) relevant historical financials from the IHE, (iii) projections for the IHE under the restructuring/transactions proposed in the Form IHE RSA, and (iv) explanation of continued accreditation. Before the 28 days elapses, the DOE would have to exercise its veto, otherwise the IHE is entitled to file a chapter 11 case and continue to use title IV funding. If the DOE timely exercises its veto, the IHE would not be an eligible debtor under the proposed subchapter.[424]

The Form IHE RSA creates a path for the IHE to follow in bankruptcy without predetermining the result.[425] The IHE will still need to satisfy the requirements for confirmation under chapter 11[426] and any additional

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[420] The Fifth Circuit recently recognized the need to "balance[] the benefits of providing the bankruptcy court with FERC's insight with the necessity for swift and efficient bankruptcy proceedings. *See* Fed. Elec. Reg. Comm. v. Ultra Res., Inc. (*In re* Ultra Petroleum Corp.), 28 F.4th 629, 643 (5th Cir. 2022).

[421] Official Form 425A, Plan of Reorganization for Small Business Under Chapter 11, https://www.uscourts.gov/sites/default/files/b_425a_0.pdf.

[422] The DOE could create the Form IHE RSA with input by trade groups, judges, and practitioners pursuant to a public comment period. The Form IHE RSA would also presumably provide some opportunity for addendums and exhibits to the RSA.

[423] *See* FED. R. BANKR. P. 2002(b). In the context of an involuntary case, the debtor would have the option of electing to reorganize under the subchapter for IHEs.

[424] The eligibility restriction would require an amendment to § 109 of the Bankruptcy Code, which establishes "[w]ho may be a debtor" under the chapters of the Bankruptcy Code. The proposed RSA requirement parallels the requirement for individual debtors to complete prepetition credit counseling. *See* 11 U.S.C. § 109(h)(1).

[425] *See* Janger & Levitin, *Opportunism, supra* note 398, at 173.

[426] The absolute priority rule, which is codified as 11 U.S.C. § 1129(b)(2)(B), requires that junior creditors cannot receive a distribution unless higher priority creditors are paid in full. *See* Pamela Foohey, *Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities*, 86 ST. JOHN'S L. REV. 31, 52-55 (2012) (explaining the application of absolute priority rule to for-profit entities). Thus, equity holders are wiped out unless creditors are paid in full. However, courts have determined that non-profit entities do not have equity holders for the purposes of the absolute priority rule as an equity interest means an ownership or an interest in the organization's profit. *E.g.*, *In re* Gen. Teamsters, Warehousemen & Helpers Union, Loc. 890, 265 F.3d

standards added by the IHE subchapter. Other core constituencies, particularly secured lenders, may also be necessary parties to the Form IHE RSA. A secured lender's support is particularly important as a further infusion of liquidity pursuant to a debtor-in-possession credit facility will likely be necessary.[427]

The Form IHE RSA should incorporate elements of a traditional RSA as well as provisions specific to IHEs. The Form IHE RSA should explain the proposed treatment of the claims of different classes of creditors and the major transactions that the contract parties intend to undertake during the bankruptcy case. Moving to the IHE-specific provisions, the Form IHE RSA should explain how the reorganized IHE will satisfy the DOE's standards for continued use of title IV funds as well as how the IHE will retain its accreditation with its relevant accreditor. It should also describe how the interests of current students are affected, including the impact of any significant reductions in expenses or contemplated transactions on the delivery of education services and the experience of students.[428]

2. Reconciling Conflicts Between Other Regulatory Regimes and the Bankruptcy Code

Mirroring subchapter IV and its inclusion of Bankruptcy Code § 1166, an IHE subchapter should address the endemic conflict between the Bankruptcy Code and non-bankruptcy law. Recognizing the frequent tension between the goals of the Bankruptcy Code and state law, Congress enacted 28 U.S.C. § 959(b) as a specific savings clause that requires conformance with substantive non-bankruptcy law when a direct conflict does not exist.[429] As a result, in the absence of a direct conflict with the Bankruptcy Code, a debtor must follow substantive law when operating or managing its property.[430] Identifying a direct conflict compared to an inconvenience is a matter of degree in the eye of the beholder.[431] To ease

869, 873 (9th Cir. 2001); *In re* Wabash Valley Power Ass'n, Inc., 72 F.3d 1305, 1313-15 (7th Cir. 1995); *In re* 28th Legislative Dist. Cmty. Dev. Corp., No. 10-14804, 2011 WL 5509140, at *11 (Bankr. E.D. Tenn. Nov. 10, 2011).

[427] The Form IHE RSA should contemplate a debtor-in-possession financing facility.

[428] Any material changes are surely relevant for the determining the likelihood of a successful reorganization as decrease in expenses will often be accompanied by a decrease in services offered to students, which may cause an exodus of transfers. Although predicting the exact result of any reduction in services in the RSA is challenging, requiring the IHE to articulate why its proposed changes will not cause a tsunami of transfers is important to the feasibility of the case trajectory.

[429] Miller, *Framework, supra* note 11, at 477.

[430] 28 U.S.C. § 959(b); *see also* Gillis v. State of California, 293 U.S. 62, 63 (1934).

[431] *C.f.* Fed. Elec. Reg. Comm. v. Ultra Res., Inc. (*In re* Ultra Petroleum Corp.), 28 F.4th 629, 635 (5th Cir. 2022) (describing and evaluating the challenging "clash of two congressionally constructed titans, FERC and the bankruptcy courts ⟦when⟧ Congress has imbued each entity with a significant wellspring of authority").

this evaluation, Congress identified specific direct conflicts in § 1166.[432] A similar provision would help court navigate the complex conflicts between substantive law and the Bankruptcy Code in IHE bankruptcy cases.

3. Student Interest

Paralleling subchapter IV, an IHE subchapter should contain an express requirement for the bankruptcy court to consider the students' interests, including student records and deposits. The students' interests merit special protection as they may not be able to organize or have the means to obtain representation.[433] Appointing an ombudsman to monitor students' interests is one solution but it is unlikely to provide meaningful value for an IHE case under the subchapter proposed by this article. Not only will it add another layer of administrative expenses but the proposed truncated timeline, which should align with summer break, will limit the opportunities for the ombudsman to evaluate any changes in the quality of educational services. Instead, a provision analogous to § 1165, which requires bankruptcy courts to consider the public interest in the context of railroad reorganization cases, would be a better fit.[434] Moreover, the flexible nature of the public interest inquiry, as shown by its evolution in the Section 77/subchapter IV context, is particularly appropriate for IHEs undergoing sector-wide disruption.

The proposed subchapter to Bankruptcy Code should protect current and former students by expressly addressing the treatment and disposal of student records. The Bankruptcy Code gives a debtor the authority to abandon property that is either burdensome or worthless.[435] Notwithstanding the lack of express restrictions, this power is not unlimited. When the abandonment power collides with a debtor's substantive obligations under state law that implicate public health and safety, the debtor can only exercise its power if suitable public protections exist.[436] Similarly, Bankruptcy Code §1170 (the railroad reorganization-specific provision for abandonment) only allows a trustee to abandon a rail line if it is in the public interest and either essential to the plan or in the best interest of the estate. More recently, the BAPCPA Amendments protect

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[432] 11 U.S.C. § 1166; Howard v. Canadian Nat. Ry. Co., No. 03-63-P-S, 2003 WL 22316558, at *7 n.9 (D. Me. Oct. 8, 2003) (recognizing "interplay between title 11 and title 49").

[433] Although class actions are not a feasible vehicle to protect students' rights, they are often filed in IHE cases if the debtor's conduct (or its management's) has been tortious or the students' contracts with the IHE were breached.

[434] Furthermore, the Form RSA should also require the IHE to explain how students' interests will be safeguarded.

[435] 11 U.S.C. § 554.

[436] Midlantic Nat. Bank v. New Jersey Dep't of Envt'l. Prot., 474 U.S. 494, 506-07 (1986). Although traditionally applied to environmental obligations, neither the legislative history nor the language of the statute supports such a narrow reading. *See* Kentucky Emps. Ret. Sys. v. Seven Ctys. Servs., Inc., 823 F. App'x 300, 305 (6th Cir. 2020).

patient records and incentivize appropriate disposal by granting administrative expense priority for regulator expenditures.[437]

Although we may think that paper academic records disappeared long ago, digitization of paper records is expensive[438] and IHEs still retain paper records to fulfill state and federal laws.[439] These obligations continue despite a bankruptcy filing or even a closure as the records typically must be delivered to the state higher education regulator. An express curtailment of the abandonment power to resolve the conflict with non-bankruptcy record-keeping obligations would provide clarity. More fundamentally, students (and former students) need access to their academic records for future education and employment opportunities. As a result, funds expended by the debtor or any regulator to preserve student records should be entitled to administrative expense priority status.[440]

4. Administrative Expense Priority for Student Claims

An IHE cannot credibly undertake a Chapter 11 Restructuring without protecting students' financial investments in the IHE. One option, copied from subchapter IV, is to confer students' tuition or fee-related claims with administrative expense priority status, even if they arose prepetition.[441] Absent this provision, students with prepetition claims would, at best, have a priority claim capped at the $3,025 for any deposit held by the IHE.[442] Any claims for other education-related liabilities or those in excess of the statutory cap would be entitled to only general unsecured status.[443] Given the importance of instilling confidence in students, granting them a non-administrative expense claim for tuition or fees is simply not commensurate

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[437] 11 U.S.C. §§ 351, 503(b)(8)(A); FED. R. BANKR. P. 6011.

[438] *See* Trustee's Omnibus Reply to Objections to Trustee's Motion to Establish Certain Protocols and Procedures For Requesting Documents, *In re* ITT Technical Services, Inc., (Bankr. S.D. Ind. Case No. 16-07207 (JMC)) ECF No. 1373 (involving a Chapter 7 trustee that spent over $3 million to retrieve, move, and index documents in order to engage with third party vendor to provide digitization services, who would charge fees based fixed schedule).

[439] The Family Educational Rights and Privacy Act, requires the IHE to allow current and former students access to their academic records, including transcripts. *E.g.*, 20 U.S.C. § 1232g; Ind. Code Ann. § 21-18.5-6-10(c); Colo. Rev. Stat. Ann. § 12-59-119; Ala. Code § 16-46-3(f); Ga. Code Ann. § 20-3-250.17; Nev. Rev. Stat. Ann. § 394.550.

[440] Not only would this provision parallel the treatment of patient records, but it appears to be necessary to confirm administrative expense status. *See In re* Computer Learning Ctrs., Inc., 298 B.R. 569 (Bankr. E.D. Va. 2003) (denying California's administrative expense claim for record retention).

[441] *See* 11 U.S.C. § 1171 (establishing administrative expense priority for prepetition personal injury actions in Subchapter IV cases).

[442] 11 U.S.C. § 507(a)(7). Both the legislative history as well as the relevant precedent support granting students priority claims for tuition deposits. *In re* Longo, 144 B.R. 305, 312 (Bankr. D. Md. 1992) (citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 188 (1977) U.S. Code Cong. & Admin. News 1978, pp. 5787, 6148)).

[443] Considering the cost of tuition, the cap would in many cases only represent a small fraction of a deposit.

with the importance of students to the IHE's Chapter 11 Restructuring. Instead, removing the cap and granting administrative expense status, rather than priority or general unsecured status, would be appropriate.

5. Plan Confirmation and 363 Sale

Most IHE plans of reorganization proposed under the hypothetical subchapter will be pre-negotiated rather than prepackaged. A prepackaged plan is solicited to creditors prior to a bankruptcy filing.[444] The debtor will have already tabulated the creditors' votes and will be ready to obtain confirmation almost immediately after filing.[445] The advantages of a prepackaged case are well known. They are cheaper as there is little motion practice, no unsecured creditors committee is appointed, and certain filings, including schedules, as well as the meeting of creditors, are excused.[446] Prepackaged cases are generally consensual (i.e., creditors whose claims are impaired agree to the alteration of their rights against the debtor and its property). The usual result is that first lien secured creditors' claims will not be altered, lower priority secured creditors and/or unsecured noteholders will be cut or equitized,[447] and the current equity holders (in the context of a for-profit entity) will be diluted. Meanwhile, unsecured non-financial creditors will not be impaired.[448] This last attribute parallels an out-of-court workout and is likely to undermine an IHE Chapter 11 Restructuring.

As previously explained, a cash flow restructuring will likely be vital for an IHE to successfully reorganize.[449] Whether it is a for-profit chain with leased locations or a non-profit with tenured professors and administrators, an IHE considering a Chapter 11 Restructuring likely has bloated expenses associated with unsecured non-financial claims based on executory contracts and unexpired leases. A prepackaged chapter 11 forecloses the option of rejecting these albatrosses. In other words, the IHE would be "under-restructured."[450] A pre-negotiated case based on an RSA is more likely to be effective. Because the case will be pre-negotiated, a short deadline for filing a plan, perhaps 30 days, with the possibility of an

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[444] 11 U.S.C. § 1126(b); FED. R. BANKR. P. 3018(b).

[445] Indeed, some debtors have been able to obtain confirmation of chapter 11 plans in pre-packaged cases within 24 hours of filing. *See supra* note 33.

[446] Joshua Sussberg, *et. al.*, *The Clear Case for Prepacks: Understanding Prepackaged Bankruptcies and Dispelling Criticism*, J. BANKR. L. & PRAC. Art. 2 (Apr. 2022).

[447] An equitization involves an exchange of promissory notes for equity interests. *See* Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 80 (2002).

[448] The colloquial description of this is "ride through". *See In re* Archdiocese of Saint Paul & Minneapolis, 579 B.R. 188, 206 (Bankr. D. Minn. 2017).

[449] *See supra* Part VIII.

[450] *See supra* note 170 and accompanying text.

extension for cause, would be appropriate.[451] However, unlike a prepackaged case, impairment of general unsecured creditors and rejection of executory contracts and unexpired leases would be possible.

Not all RSAs are assumed and performed by the debtor. Realistically, RSAs are flexible and the final version of the plan is unlikely to mirror the exact terms initially proposed. The factual circumstances in place when the DOE did not veto the Form IHE RSA may have changed. The DOE is basically the holder of cash collateral used by the debtor-IHE to fund operations. Reflecting this import, the DOE should be granted a veto over the debtor's plan of reorganization or 363 Sale. Allowing a veto represents a compromise between DOE's interests and the importance of facilitating a rapid Chapter 11 Restructuring.

CONCLUSION

The current suite of options curtails IHEs' ability to restructure. None of the possibilities provide the combination of continued operation and the ability to effectuate a balance sheet and cash flow restructuring provided by chapter 11. The lack of credible threat of a Chapter 11 Restructuring also has the knock-on effect of diminishing IHEs' negotiating leverage in any workout with creditors.

Many IHEs face a bleak future with a demographic deficit in the prospective student pool, the scars of the COVID-19 pandemic, bloated debts and expenses, and few possible acquirors. Without the option of a Chapter 11 Restructuring, numerous IHEs will likely close. To be sure, a right-sizing is necessary but that fact should not doom the IHEs that could propose a feasible chapter 11 plan or 363 Sale. A one size fits all approach precluding a Chapter 11 Restructuring is an axe when a scalpel should be employed. The negative externalities of forestalling IHEs' access to Chapter 11 Restructurings are significant and untethered from the rationale that supported the original enactment of the limitation. Nonetheless, simply allowing IHEs to utilize the current chapter 11 process would ignore the distinct issues posed by IHEs.

A new chapter 11 subchapter tailored to address the DOE's oversight needs while also protecting students' interests and incorporating a Form IHE RSA reflects a compromise among the multifaceted interests implicated in a IHE Chapter 11 Restructuring. Lessons from the treatment of railroads and healthcare businesses suggest that: (i) a subchapter has advantages over piecemeal enactments, (ii) granting the bankruptcy court primacy over the

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[451] This deadline is shorter than that imposed by small and medium sized enterprises under the newest subchapter to chapter 11, subchapter V. *See* 11 U.S.C. 1189. The requirement of an RSA makes this more truncated timeline reasonable.

chapter 11 process will decrease delay, and (iii) statutory enactments can govern the conflicts between the Bankruptcy Code and applicable non-bankruptcy law, thereby reducing uncertainty between the dueling legal regimes. Applying these teachings to the subchapter proposed in this article, particularly a Form IHE RSA, provides the foundation for an equitable and efficient restructuring of IHEs in bankruptcy.