

INTRODUCTION

Gregory Germain†

“May You Live in Interesting Times”
Supposedly an ancient Chinese curse.¹

This introduction to Volume 71 of the *Syracuse Law Review* is being written in what are surely “interesting times” in the United States and around the world. I write this introduction in my tenth month of isolation in an effort to avoid the Covid-19 pandemic, which has infected 13,142,997 million Americans, has killed 265,166 thousand Americans, has killed at least 1,460,000 million people worldwide, and is currently spreading in the United States and around the world at the fastest rate yet seen.² During this pandemic, we in the United States have experienced the most bitter and antagonistic national election of our lives, following months of street protests and riots around race and political division.³ Our schools have been operating with an “on-again, off-again” uncertainty since the pandemic began.⁴ While there are hopeful signs for new

† Professor of Law, Syracuse University College of Law.

1. *The Meaning and Origin of the Expression: May You Live in Interesting Times*, THE PHRASE FINDER, <https://www.phrases.org.uk/meanings/may-you-live-in-interesting-times.html> (last visited Feb. 27, 2021) (“May you live in interesting times” is western expression that is claimed to be a translation of a traditional Chinese curse. While considered to be a blessing, the expression is normally used ironically; life is better in “uninteresting times” of peace and tranquility, in other words times without trouble, than in “interesting” times.).

2. *United States COVID-19 Cases and Deaths by State*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited on Nov. 29, 2020); *WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int/> (last visited Nov. 29, 2020); Nigel Chiwaya & Corky Siemaszko, *Covid Spreading Faster than Ever in U.S.*, NBC NEWS (Oct. 27, 2020), <https://www.msn.com/en-us/news/us/covid-spreading-faster-than-ever-in-u-s-nbc-numbers-show/ar-BB1arJ8Z>.

3. Kashmira Gander, *‘A Deeply Divided Nation’: 68 Percent of Americans Say the Election Is Causing Significant Stress in Their Lives*, NEWSWEEK (Oct. 7, 2020), <https://www.msn.com/en-us/news/us/a-deeply-divided-nation-68-percent-of-americans-say-the-election-is-causing-significant-stress-in-their-lives/ar-BB19MDip>.

4. Valerie Strauss, *Schools Start Closing- or Delay Reopening- as Covid-19 Cases Jump Across the Country*, WASH. POST (Nov. 14, 2020, 6:00 AM), <https://www.washingtonpost.com/education/2020/11/14/schools-start-closing-or-delay-reopening-covid-19-cases-jump-across-country/>.

treatments and vaccines on the horizon, no one really knows when these benefits will be widely available.⁵

So what does Covid-19 have to do with the *Syracuse Law Review's* symposium on bankruptcy law? More than any of us foresaw when we started this project more than a year ago, in far less “interesting times.” The Covid-19 virus has not only infected our bodies, it (and our efforts to avoid catching it) has devastated our economy. The United States began the year with a 4% unemployment rate, which has nearly doubled to more than 7%.⁶ The Department of Labor estimates that 3.8 million new people are permanently unemployed, and 4.6 million are temporarily unemployed (and that is a significant recovery from the more than 18 million people who were suddenly out of work at the beginning of the lockdown).⁷ The virus has ravaged whole industries, including airlines, hotels, shopping centers, restaurants, and almost every other service industry in the country.⁸ Our governments have responded to the crisis by massively expanding the money supply, sending \$1,200 stimulus payments to adults earning less than \$75,000 per year⁹ (and with a political battle underway to send more),¹⁰ and by imposing a momentum

5. German Lopez, *When Can Everyone in the US Get a Covid-19 Vaccine? We Still Don't Know*, VOX (Jan. 29, 2021, 2:10 PM), <https://www.vox.com/future-perfect/22254650/covid-vaccine-coronavirus-rollout-when-can-i-get-vaccinated>.

6. *Unemployment Rate 2.0 Percent for College Grads, 3.8 Percent for High School Grads in January 2020*, U.S. BUREAU OF LAB. STAT.: TED: THE ECONOMICS DAILY (Feb. 20, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-2-percent-for-college-grads-3-8-percent-for-high-school-grads-in-january-2020.htm> (stating that the national unemployment was about 3.6 percent in January of 2020); *Three States Had Unemployment Rates Above 10 percent in November 2020*, U.S. BUREAU OF LAB. STAT.: TED: THE ECON. DAILY (Dec. 29, 2020), <https://www.bls.gov/opub/ted/2020/three-states-had-unemployment-rates-above-10-percent-in-november-2020.htm> (stating that the national unemployment rate was about 6.7% in November of 2020).

7. Greg Lacurci, *Unemployment was Supposed to Be Temporary. Now It's Permanent for Almost 4 Million*, MSN NEWS (Oct. 13, 2021), <https://www.msn.com/en-us/news/us/unemployment-was-supposed-to-be-temporary-now-its-permanent-for-almost-4-million/ar-BB19YQTw>.

8. *Employees on Nonfarm Payrolls by Industry Sector and Selected Industry Detail*, U.S. BUREAU OF LAB. STAT.: ECONOMIC NEWS RELEASE, <https://www.bls.gov/news.release/empsit.t17.htm> (last visited Feb. 27, 2021) (demonstrating the impact of COVID-19 on unemployment per industry).

9. *Economic Impact Payment Information Center – Topic C: Calculating by Economic Impact Payment*, IRS, <https://www.irs.gov/newsroom/economic-impact-payment-information-center-topic-c-calculating-my-economic-impact-payment> (last visited Feb. 27, 2021).

10. Benjamin Kail, *'Epic battle' Ahead Over Second Stimulus Check, Coronavirus Funding for States, Municipalities and Unemployment, Sen. Markey Says*, MASSLIVE (Jul. 15, 2020), <https://www.masslive.com/coronavirus/2020/07/epic-battle-ahead-over-second-stimulus-check-coronavirus-funding-for-states-municipalities-and-unemployment-sen-markey-says.html>.

on tenant evictions and homeowner foreclosures,¹¹ deferring an inevitable consumer housing crisis for an estimated forty million defaulting tenants¹² and mortgage borrowers (who currently exhibit the highest rate of mortgage delinquencies in twenty years).¹³

Our economy is under tremendous pressure, and the bankruptcy system is the economy's primary pressure relief valve. In times of boom and bust, it is the job of bankruptcy professionals to prevent economic dislocations from permanently breaking our economic machine. Our bankruptcy system is there to give overleveraged businesses the time they need to reorganize and restructure their financial affairs, to liquidate non-viable businesses so that productive assets can be put back to work while giving creditors some return on their claims, to allow homeowners time to cure their mortgage defaults and save their homes, and to give overleveraged consumers an opportunity for a fresh start in economic life by discharging the debts that they are unable to repay. Although much damage has been done to the economy by the Covid-19 virus (more I fear than most people and our financial markets realize), we have in our favor the most developed bankruptcy system in the world, which stands ready to address the economic dislocations caused by this pandemic. While none of us could foresee how timely this volume of the *Syracuse Law Review* would be when we undertook this project more than a year ago, our timing now seems prescient.

This issue honors Samuel Gerdano, who graduated from our Syracuse University College of Law in 1983 with an interest in public policy law, not bankruptcy.¹⁴ His ride to bankruptcy law was, like many bankruptcy lawyers I have spoken with, a story of unlikely and unexpected opportunity and circumstance. Early in his career, Gerdano found himself working for a United States Senator, Charles Grassley of Iowa, in the middle of a small farm crisis. Gerdano rose to the occasion by deftly shepherding through the halls of Congress a new chapter to the

11. Anna Bahney, *Homeowners and Renters Catch a Break: Evictions and Foreclosures are on Pause for Another Two Months*, CNN BUS. (June 17, 2020, 3:23 PM), <https://www.cnn.com/2020/06/17/success/fha-eviction-and-foreclosure-moratorium-extended/index.html>.

12. Emily Benfer et al., *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/#comments>.

13. *Mortgage Delinquencies Jumped to Highest Rate in 20 Years*, GLOB. PROP. INC., <https://globalpropertyinc.com/2020/10/13/mortgage-delinquencies-jumped-to-highest-rate-in-20-years/> (last visited March 3, 2021).

14. *Samuel J. Gerdano*, AM. BANKR. INST., <http://commission.abi.org/samuel-j-gerdano-ex-officio> (last visited March 1, 2021).

Bankruptcy Code, Chapter 12, which provides special reorganization benefits for small family farmers and fishermen. After this first foray in bankruptcy law, Gerdano became the go-to bankruptcy expert on Capitol Hill, and thus found himself involved in every new piece of bankruptcy legislation that came along.

Gerdano left Capitol Hill in 1991 to become the first director of a small nonprofit organization of bankruptcy professionals known as the American Bankruptcy Institute (ABI), which at the time had 3,000 members and a one million dollar budget.¹⁵ Over the next three decades, Gerdano would lead the ABI in a period of unprecedented growth in membership, and in educational and scholarly initiatives. The ABI is now, unquestionably, the leading organization of bankruptcy professionals in the country, with more than 10,000 members, and a revenue budget of nearly nine million dollars.¹⁶ The ABI sponsors large quarterly educational conferences, sponsors the leading bankruptcy moot court competition for law students, runs a large continuing legal education program for bankruptcy attorneys, and publishes the scholarly *ABI Law Review*, along with the monthly *ABI Journal*, which is one of the leading bankruptcy practice journals in the country.¹⁷ Following its educational outreach mission, the ABI is now an eminent force in promoting good bankruptcy policy in the halls of Congress and in the courts.¹⁸ In his oral history, Gerdano tells the story of his unlikely road to bankruptcy law, and of the ABI's development under his leadership.

Also included is a tribute to Gerdano from his former employer, Senator Charles Grassley, for his legislative work in bankruptcy law, both in Congress and at the ABI.

The idea for this symposium came from our first author, Professor David G. Epstein. Professor Epstein first approached us with the suggestion to celebrate Gerdano's career with a bankruptcy law symposium edition of the *Syracuse Law Review*, supported by articles written by Gerdano's academic colleagues. Professor Epstein's contribution, written with his former student Tevin Bowens (who is clerking for a federal bankruptcy judge in Illinois) raises new questions about the current hot trend in corporate Chapter 11 cases known as "Section 363 sales," a topic also discussed by some of our other authors.

15. See Samuel J. Gerdano, *An Oral History: Reflections on My 35 Years in Bankruptcy Policy*, 71 SYRACUSE L. R. 423, 430 (2021).

16. *American Bankruptcy Institute*, STERLING MARTIN ASSOC., <https://smartinsearch.com/american-bankruptcy-institute/> (last visited March 1, 2021).

17. *Management Tools: Journal Ranking Search*, WASH. & LEE L.J. RANKINGS, <https://managementtools4.wlu.edu/LawJournals/> (last visited March 3, 2021).

18. *About Us*, AM. BANKR. INST., <https://abi.org/about-us> (last visited March 3, 2021).

Prior to our last economic crisis known as the “subprime meltdown” (which occurred between 2007 and 2010), § 363 of the Bankruptcy Code did not play a major role in restructuring businesses in Chapter 11 cases. Section 363 was designed to regulate the interim use, sell or lease property of the estate prior to liquidation in Chapter 7 or confirmation of a reorganization plan in Chapter 11. It was not designed as a mechanism for restructuring entire businesses, or indeed entire industries.

That all changed following the United States Government’s “bail-out” of two of our oldest and largest industrial corporations: General Motors and Chrysler.¹⁹ At the height of the Subprime Meltdown, with both corporations on the brink of financial collapse, the government believed that the entire U.S. economy might not survive the collapse of the automobile industry.²⁰ The government stepped in to “bail-out” the auto industry, by providing emergency loans and investments to keep the suffering automobile industry alive.²¹ Both companies burned through the government cash at an alarming clip, and under intense government pressure developed a plan to file bankruptcies and promptly sell all of their assets to newly-formed entities in return primarily for the stock of the new companies.²² The sales included the assumption of select liabilities of the old companies and significant distributions to other constituencies, such as labor union members.²³ The sales had the effect of reorganizing the companies’ businesses, but without utilizing the usual Chapter 11 plan processes, which would have required disclosure and voting by creditors and equity security holders, and compliance with the many confirmation requirements in § 1129 of the Bankruptcy Code.²⁴ Instead of following the Chapter 11 plan rules, the companies accomplished the bulk of their reorganizations through quick sales of their entire businesses to newly-formed entities, leaving for later “liquidating plans of reorganization” to distribute the stock proceeds to the old creditors who had not been favored in the buyout.²⁵ With the government’s strong backing (and the obvious risk of a national calamity if the sales were not swiftly approved), the courts acquiesced in the plans.²⁶ These cases, and the many cases that have arisen after that follow

19. Todd Zywicki, *The Auto Bailout and the Rule of Law*, 46 NAT’L AFFS. 66, 66 (2011), <https://www.nationalaffairs.com/publications/detail/the-auto-bailout-and-the-rule-of-law>.

20. *See id.* at 67–68.

21. *See id.* at 68.

22. *See id.*

23. *See id.* at 68–69, 75.

24. *See Zywicki supra note 19*, at 74.

25. *See id.* at 74–75.

26. *See id.* at 75.

the original design, have been criticized as “sub rosa” plans because they have the effect of transcending the protections and processes dictated by the Chapter 11 plan process.²⁷

Epstein and Bowen take a different tack in criticizing the use of Section 363 sales to reorganize under Chapter 11. They focus on the unusual benefits that bankruptcy courts have been giving to the buyers of such businesses, including protection from state-law successor liability claims for product defects, liability for unpaid pre-sale employee benefits under the Coal Act, liability for travel vouchers and discrimination claims, and even lease and license terminations, and prohibiting the use of experience ratings for workers compensation and unemployment taxes. These special benefits, some of which would not be available even in a proper Chapter 11 plan, and none of which would be available outside of bankruptcy, encourage the use of bankruptcy and § 363 to “wash” asset sales, while avoiding the normal Chapter 11 processes of disclosure, solicitation, voting, and confirmation under the strictures of § 1129 of the Bankruptcy Code. Epstein and Bowen question the propriety of granting these special protections to buyers, who are not the intended beneficiaries of the bankruptcy process, and decry the harm that these special protections do to claimants who are entitled to the protections of the bankruptcy process.

In a similar vein, Robert J. Keach and Lindsay Zahradka Milne have argued that the Federal Bankruptcy Rules have unconstitutionally given bankruptcy courts the power to prevent judicial review of their decisions approving the use, sale or lease of estate property under § 363 of the Bankruptcy Code (or the approval of financing orders under § 364 of the Bankruptcy Code).²⁸ These provisions of the Bankruptcy Code provide that an appeal from such an order moot if the appellant does not obtain a stay pending appeal. There is no constitutional problem with the stay requirement, as long as the litigant has the opportunity to seek a stay from an Article III court. In order to protect the right to Article III review, Bankruptcy Rule 6004(h) gives potential appellants an automatic fourteen-day stay to obtain a longer stay pending appeal. However, the rule also provides that the automatic fourteen-day stay applies “unless the court orders otherwise,” which seemingly would allow the bankruptcy courts to eliminate the stay and make their own decisions unreviewable.²⁹ Keach and Zahradka argue that the power of the bankruptcy courts to shorten or eliminate the period for obtaining a stay undermines the

27. *See id.*

28. 11 U.S.C. § 363 (2021); 11 U.S.C. § 364 (2021).

29. Fed. R. Bankr. P. 6004(h).

essential constitutional requirement that federal judicial power be vested in Article III judges who have life tenure and undiminishable salaries, and that non-Article III bankruptcy judges can only exercise judicial power if their decisions are subject to review by Article III judges. By giving bankruptcy judges the power to issue unreviewable orders, the Federal Bankruptcy Rules have deprived litigants of their constitutional right to Article III review. Bankruptcy courts cannot insulate their orders from Article III review without violating the Constitution's jurisdictional limitations.

Bankruptcy judge (and former law professor) Michelle Harner and her judicial extern Robert Hockenbury have written an article tracing Judge Harner's work as the reporter for the ABI Commission on Chapter 11 Reform, which included as commissioners the most prominent bankruptcy experts in the country. The Commission's unanimous 400-page report recommending changes to the Bankruptcy Code was issued in 2014 to great acclaim. The Commission's recommendation for simplified reorganization procedures for small businesses was recently made into law in the Small Business Reorganization Act of 2019 (SBRA). But, as Harner and Hockenbury point out, much of the legislative and judicial work needed to perfect the Chapter 11 system remains to be done.

Professor Edward Janger from Brooklyn Law School has turned his annual ABI Alexander Paskay lecture criticizing the transfer of risk in corporate Leveraged Buyouts ("LBO") from the private equity buyers (who stand to benefit from the success of the buyout) to the old creditors and workers who bear the brunt of the losses when the company ends up in bankruptcy. Janger criticizes Delaware corporate cases rejecting the notion that the fiduciary duties of corporate managers should shift from benefiting the LBO shareholder to benefitting creditors and workers when the company is nearing or in deepening insolvency, and his cited legislation proposed by Senator Elizabeth Warren and others designed to protect creditors and workers from the additional leverage risks created in LBOs.

Professor David Skeel, Jr., from the University of Pennsylvania, discusses the theoretical basis for bankruptcy developed by Thomas Jackson, known as the "Creditors Bargain Theory," and how it impacts the enforceability of (or the scrutiny that courts give to) *ex ante* creditor agreements (entered into at the time of lending) and *ex post* creditor agreements (entered into after bankruptcy). Skeel argues that courts have been overly harsh in enforcing and interpreting *ex ante* agreements, even though they serve important purposes, and have been overly generous in enforcing *ex post* agreements that may unfairly undermine the reorganization process.

Finally, Professor Charles Tabb, an emeritus Professor of Law at the University of Illinois College of Law, has argued that the Bankruptcy Code's original dream for an efficient Chapter 11 process has turned into an expensive nightmare, primarily because of forum shopping allowed by the venue rules, the power given to secured creditors to monopolize the market for debtor-in-possession financing and thereby dictate the terms of the reorganization process, and by the courts subverting the statutory purposes of the Chapter 11 plan process by approving transactions, such as Section 363 sales and critical vendor orders, that do not follow the strictures of the absolute priority rule. Tabb gives us a list of statutory and judicial changes that are needed to make the original dream of the Bankruptcy Code drafters a reality.

There is nothing like an economic crisis to bring government attention to the problems that exist in our imperfect but world-leading bankruptcy system. We can hope that the contributions in this symposium will help to bring about a more perfect bankruptcy system to deal with the economic crisis that so many of us see on the horizon.