

OUT OF THE ABYSS?

RESTRUCTURING AND BANKRUPTCY AFTER THE COVID-19 PANDEMIC



Credit Research Foundation

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Overview

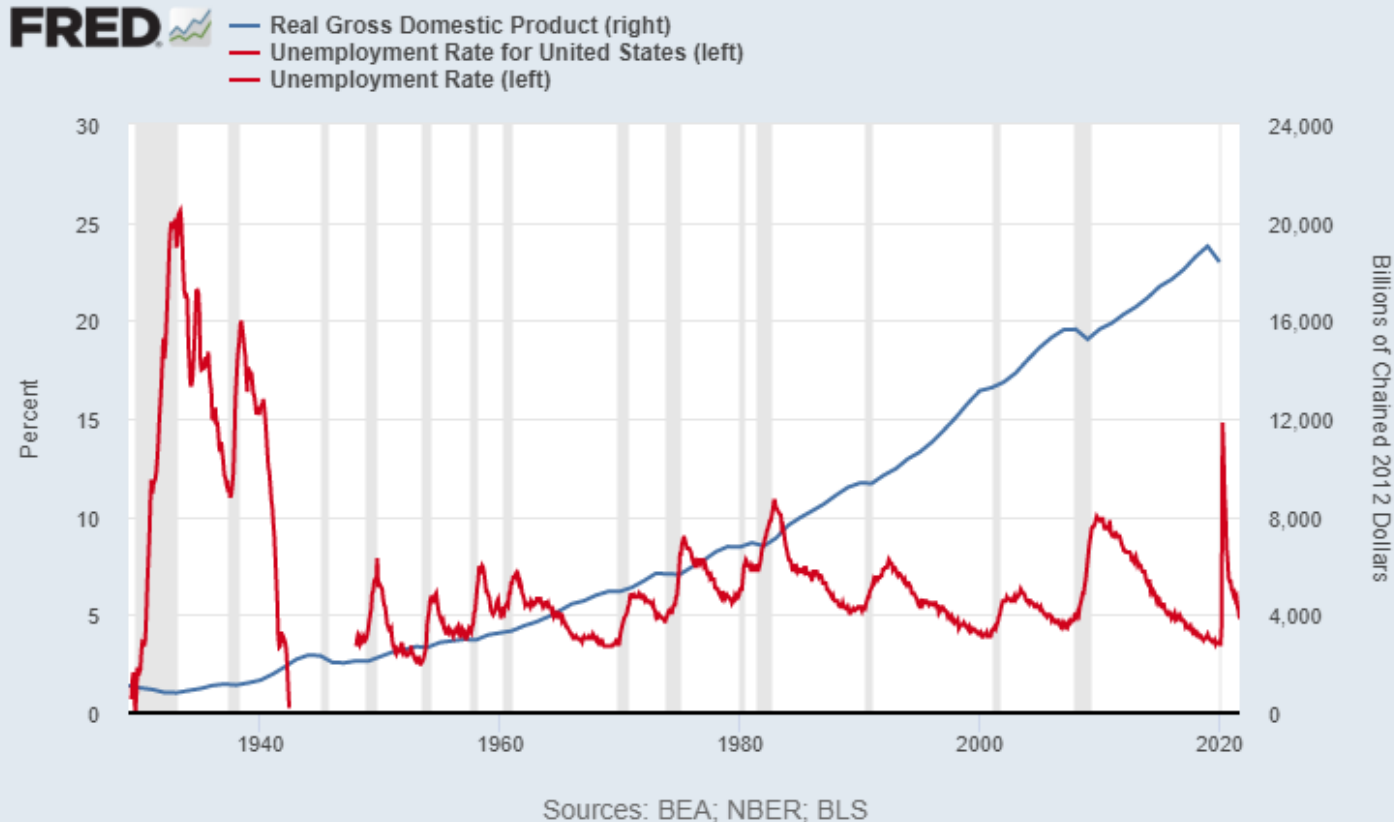
- *Where Have All The Bankruptcies Gone?*
 - A discussion of the macroeconomic factors that have helped distressed companies kick the bankruptcy can down the road
- *Post-Pandemic Restructuring Trends*
 - Bankruptcy Express: Speedier Chapter 11s
 - Third-Party Releases in Chapter 11 Plans
 - “Structured” Dismissals of Chapter 11 Cases
 - Changes in Bankruptcy Court Operations
 - Changes in Creditors’ Committee Formation
 - Subchapter V: Small Business Chapter 11 Cases
 - Preference Uptick and SBRA Changes
 - Non-Bankruptcy Alternatives to Chapter 7 or 11

Where Have All The Bankruptcies Gone?

A discussion about what's keeping so many distressed companies alive, and why things may be much worse when they finally do go off the cliff



A quick study on cause . . .

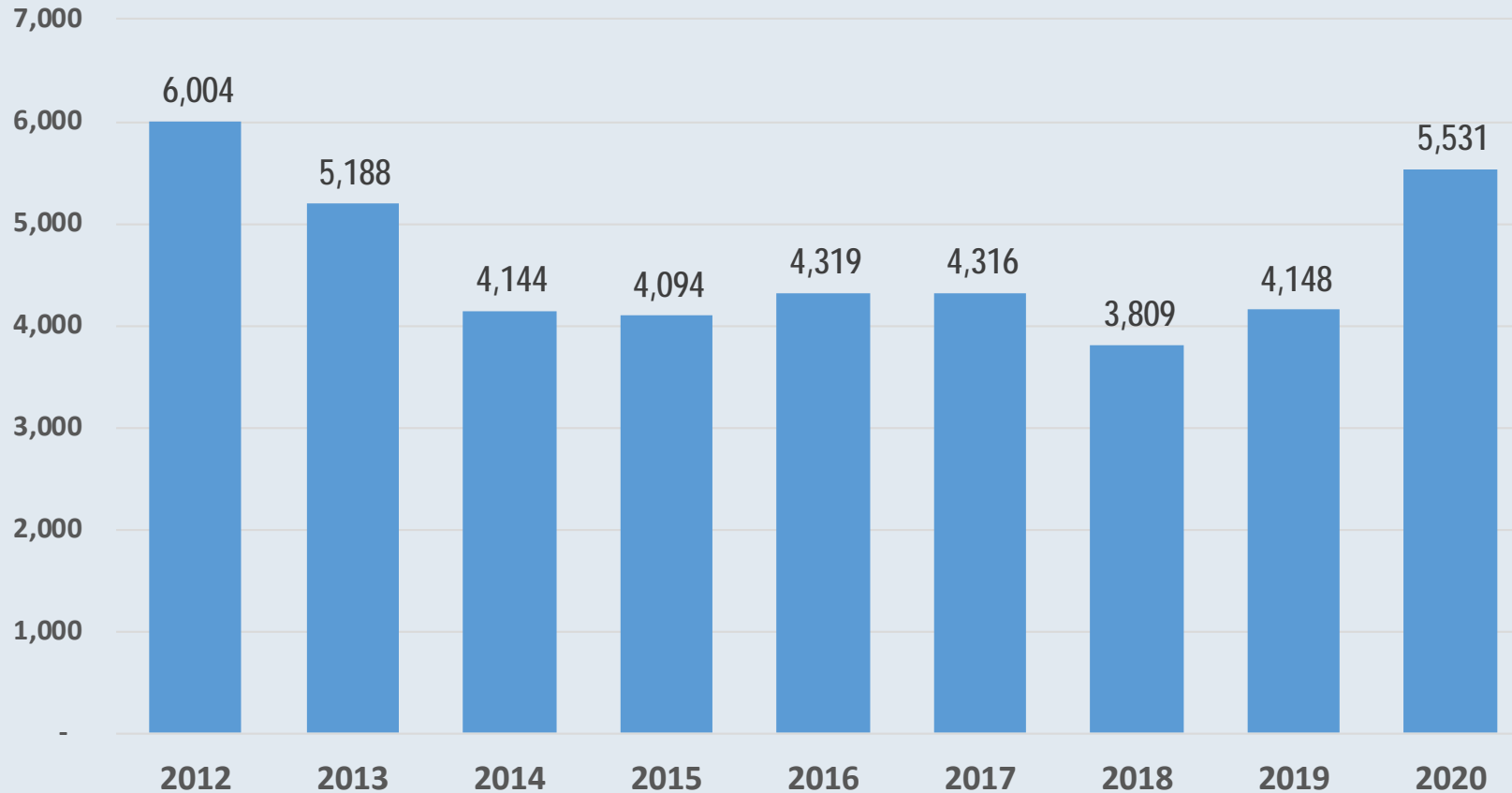


Measured by GDP, the impact of the broad economic shutdown triggered by the COVID-19 pandemic in 2020 was **much more abrupt** than the 1929 crash.

But measured by unemployment rate, the Great Depression was much **longer** and had a **devastating, prolonged impact** on household incomes and livelihoods.

... and effect

Business Chapter 11 Filings January-September



Business chapter 11 filings in 2020 surged to the highest level since 2009

Through the first nine months of the year, highest level since 2012

Retailers and energy companies drove the filing volume.

Case volume started tapering off in October 2020 and has continued to decline.

... but then the cases **just disappeared.**

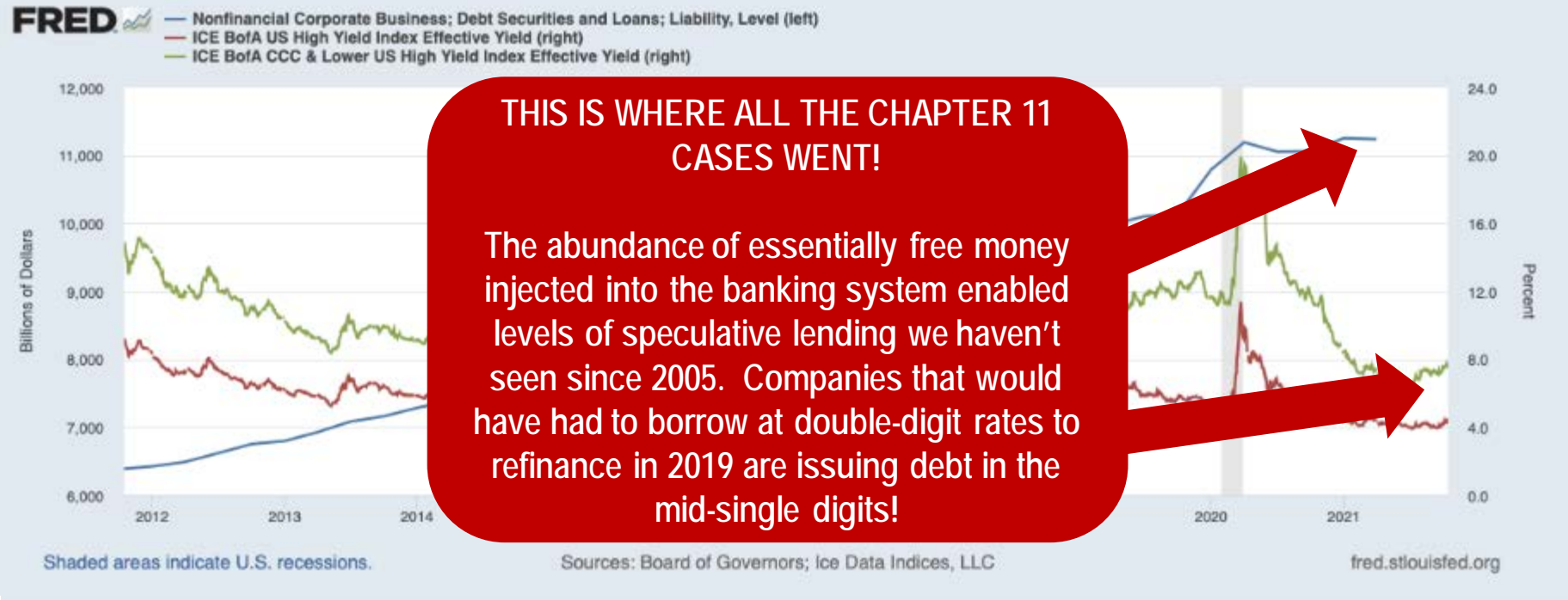
Business Chapter 11 Filings January-September



After declining significantly from October 2020 onward, business chapter 11 case volume has plummeted by nearly 50% in the first nine months of 2021

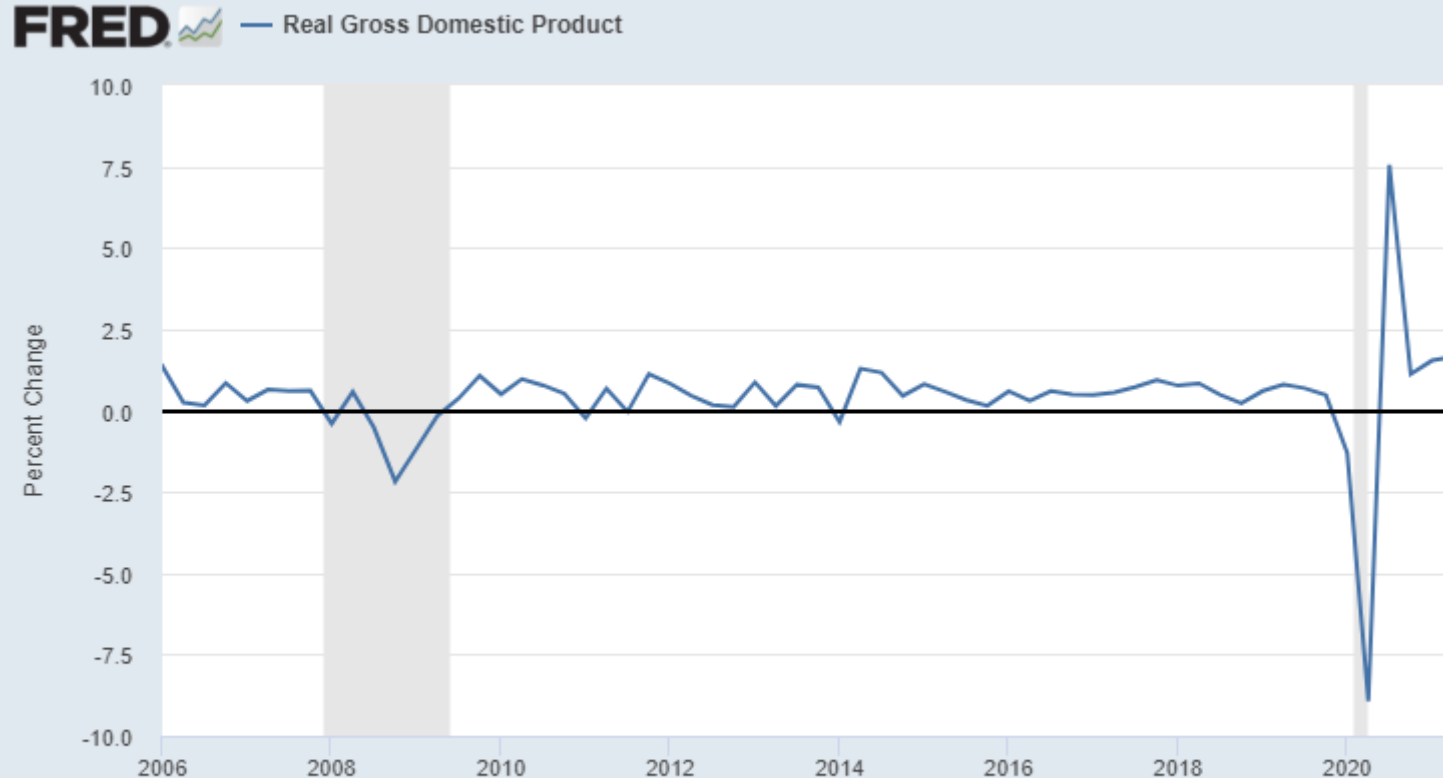
Some pockets of restructuring activity – small retailers, oil and gas, mass tort – but otherwise, activity has been reduced to a simmer vs. the furious pace of 2020

We found the missing chapter 11 debtors!



Corporate debt was **already at an all-time high** before the onset of the pandemic
Aggregate corporate debt **ballooned to \$11.2 trillion** in 2020 and has remained there
Meanwhile, **yields on high-yield debt** have plummeted – 4.27% is “high yield”!
Even **junk bonds** – rated CCC and lower – are trading at 7.55%
Free cash (more on this in a minute) = **record levels of speculative lending** to businesses that **otherwise would've gone off the cliff months ago!**
THIS IS NOT SUSTAINABLE! Sustaining this level of high-yield lending would entail pouring all of the sidelined cash into the system, with a massive inflationary impact.

2020 was worse than 2008 in some ways, better in others

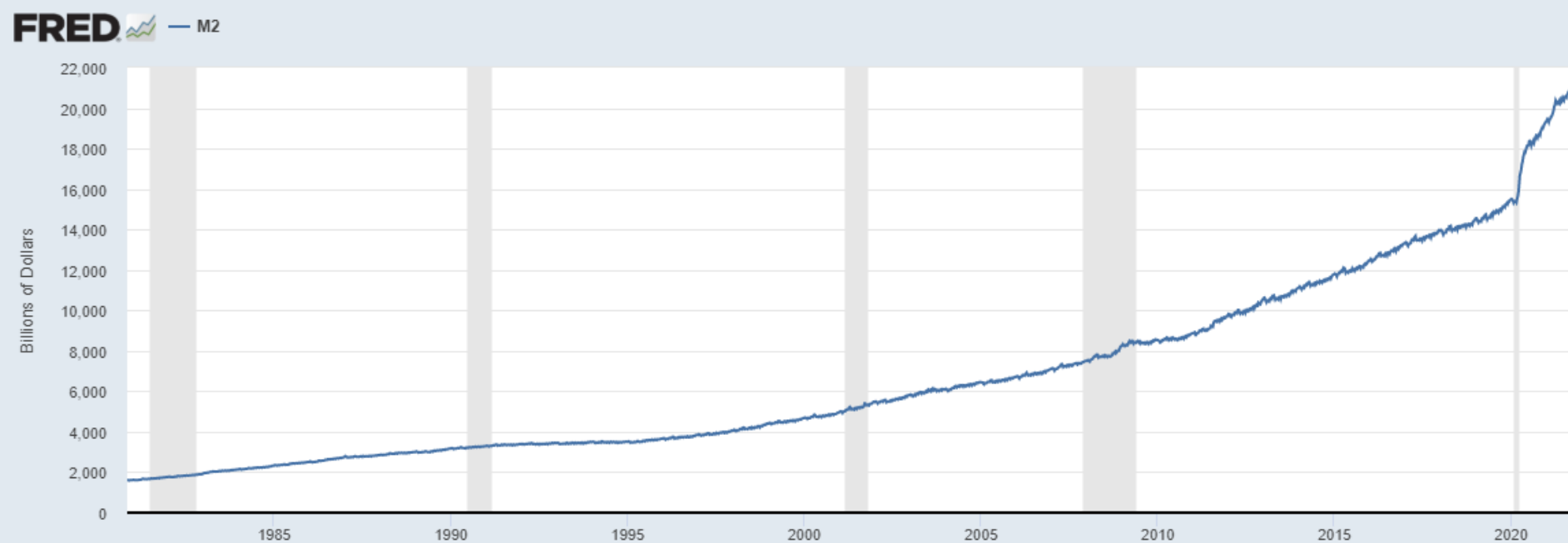


Source: U.S. Bureau of Economic Analysis

Quarter-over-quarter loss of GDP at the onset of the COVID-19 pandemic was **much more drastic** than at the onset of the 2008 Great Recession.

But economic recovery began much more quickly and was more pronounced.

But unprecedented shock led to unprecedented stimulus efforts...



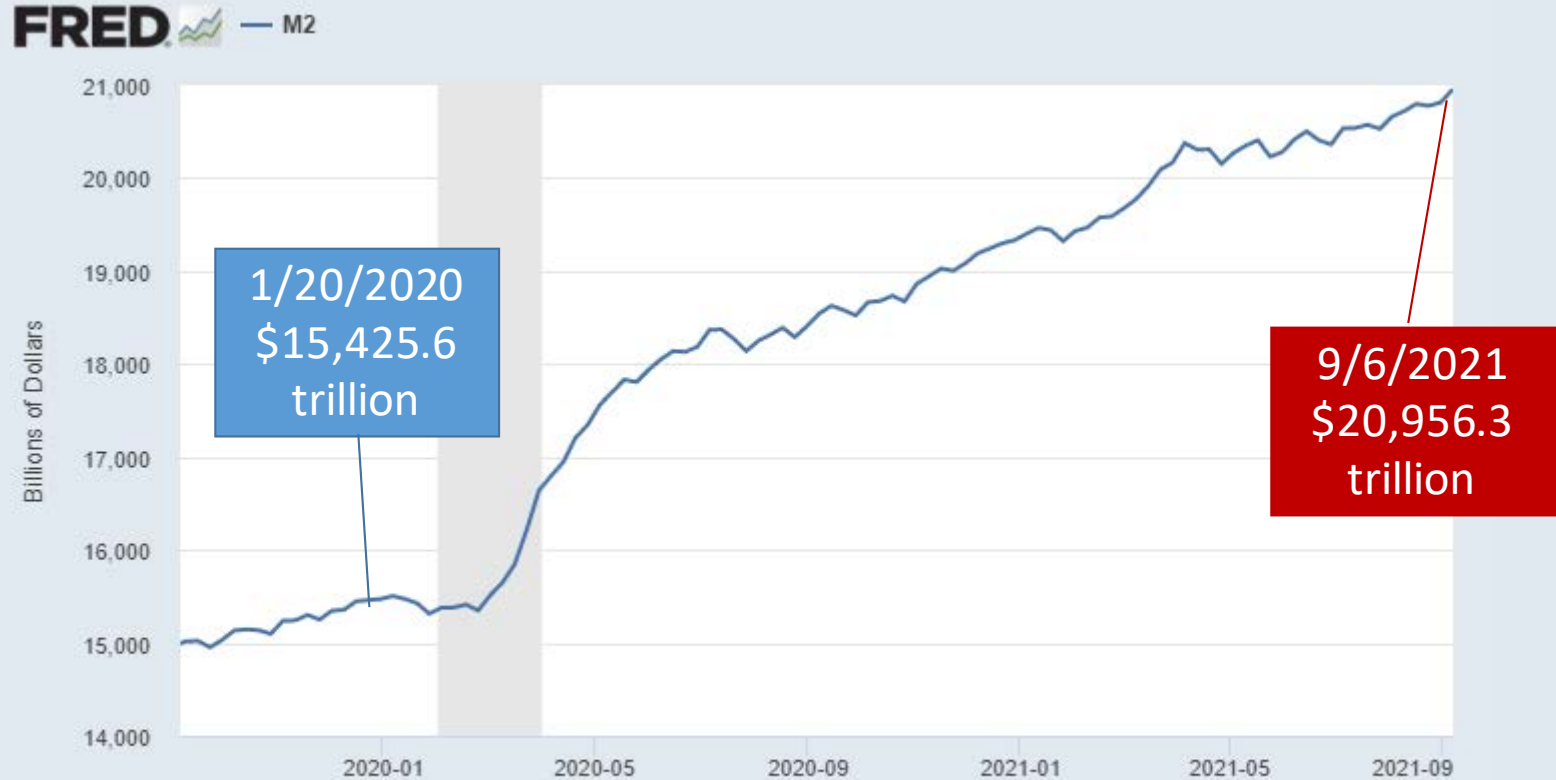
Shaded areas indicate U.S. recessions.

Source: Board of Governors of the Federal Reserve System (US)

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A significant element of the quick, sharp economic recovery in 2020 was the **creation of new money** to fund the broadest economic stimulus program in history.

...including an unprecedented level of **new money creation**



Source: Board of Governors of the Federal Reserve System (US)

...a LOT of new money - **\$5.5 trillion** in about a year and a half, to be exact.

Isn't that going to cause inflation?

Not according to the Fed! Inflation is just “transitory” ... or is it?

AP

Fed’s Powell says high inflation temporary, will ‘wane’

By CHRISTOPHER RUGABER June 22, 2021

<https://apnews.com/article/inflation-health-coronavirus-pandemic-business-6e7c813472a3eb706e0cdafe305c1477>

THE WALL STREET JOURNAL.

ECONOMY

Fed’s Powell Plays Down Inflation Threat

Sees shortages fading over time, bringing inflation closer to the Fed’s 2% long-run target

<https://www.wsj.com/articles/feds-powell-set-to-testify-before-lawmakers-on-pandemic-programs-11624370400>

Bloomberg

Fed Officials Have Six Reasons to Bet Inflation Spike Will Pass

By [Steve Matthews](#) + Follow

May 13, 2021, 5:00 AM EDT

Updated on May 13, 2021, 8:43 AM EDT

<https://www.bloomberg.com/news/articles/2021-05-13/fed-leaders-are-confident-inflation-is-transitory-here-s-why>

Macroeconomics 101: A quick lesson on the quantity theory

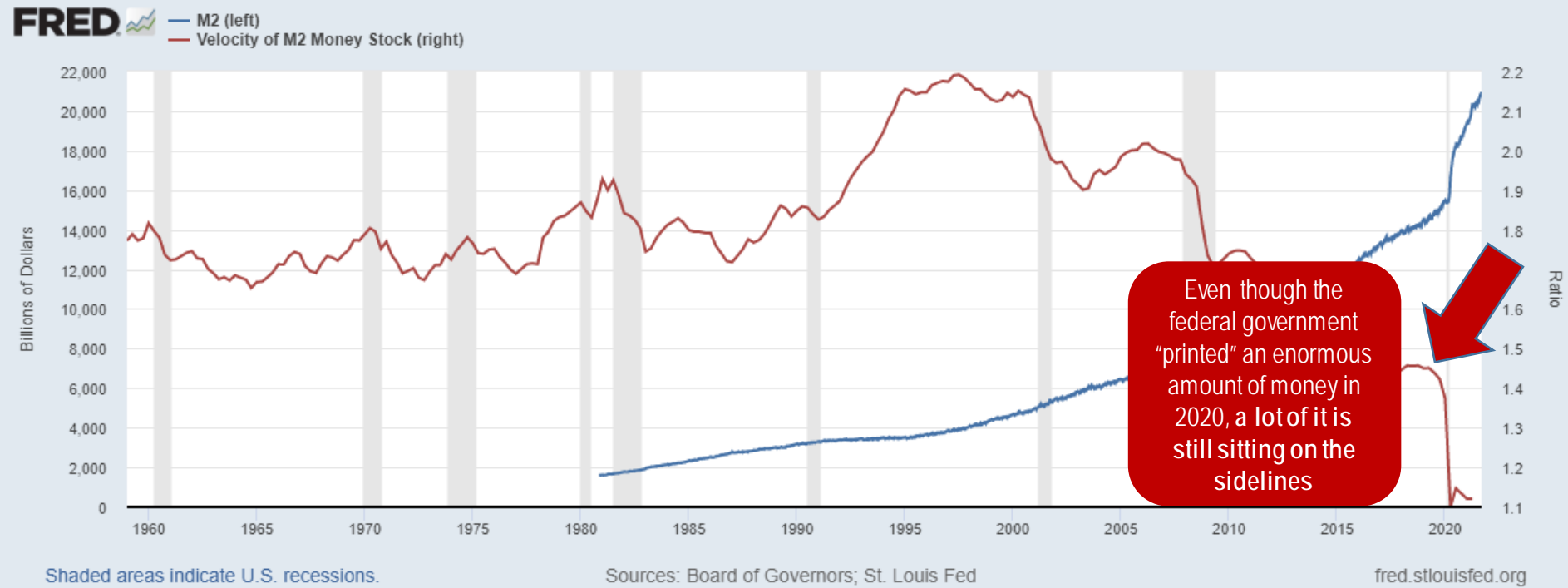
The diagram illustrates the quantity theory equation $M \times V = P \times T$. Above the letter M is a red arrow pointing upwards. Above the letter V is a green arrow pointing downwards. Above the letter P is a red arrow pointing upwards. Above the letter T is a green arrow pointing upwards. Below the equation, the variables are labeled: M is Money Supply, V is Velocity of Money, P is Average Price Level, and T is Volume of Transactions. A large black bracket is positioned below the P and T terms, with the text "Approximate Economic Output" centered underneath it.

$$M \times V = P \times T$$

Money Supply Velocity of Money Average Price Level Volume of Transactions

Approximate Economic Output

The only reason we haven't seen massive inflation: idle money



A lot of the fresh liquidity infused by the Fed and the Treasury in 2020-2021 is still **sitting on institutional balance sheets** and has not been lent or invested

A lot of the new cash that has ended up in individuals' hands (direct stimulus, subsidies to critical industries, enhanced unemployment benefits) is **being saved**, not spent . . .

Increased household savings are helping to slow inflation

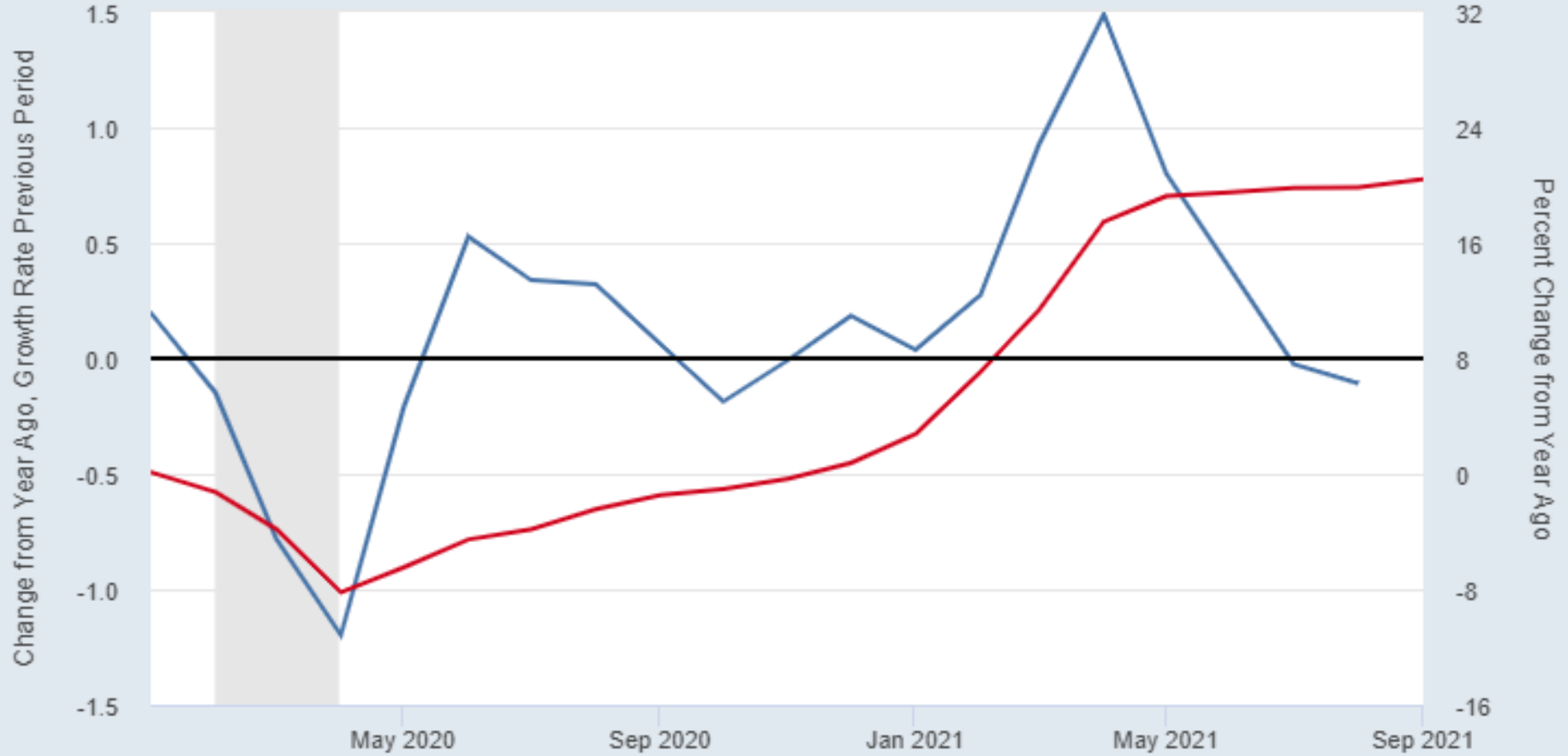


Much of the cash that ended up in individuals' hands is being **saved rather than spent**
The **personal saving rate** skyrocketed in early 2020 and has **remained consistently high** throughout the pandemic era – still at an eight-year high of 9.4% as of August
This is a very good thing

Is the worst yet to come?

FRED

— Consumer Price Index: Total All Items for the United States (left)
— Producer Price Index by Commodity: All Commodities (right)

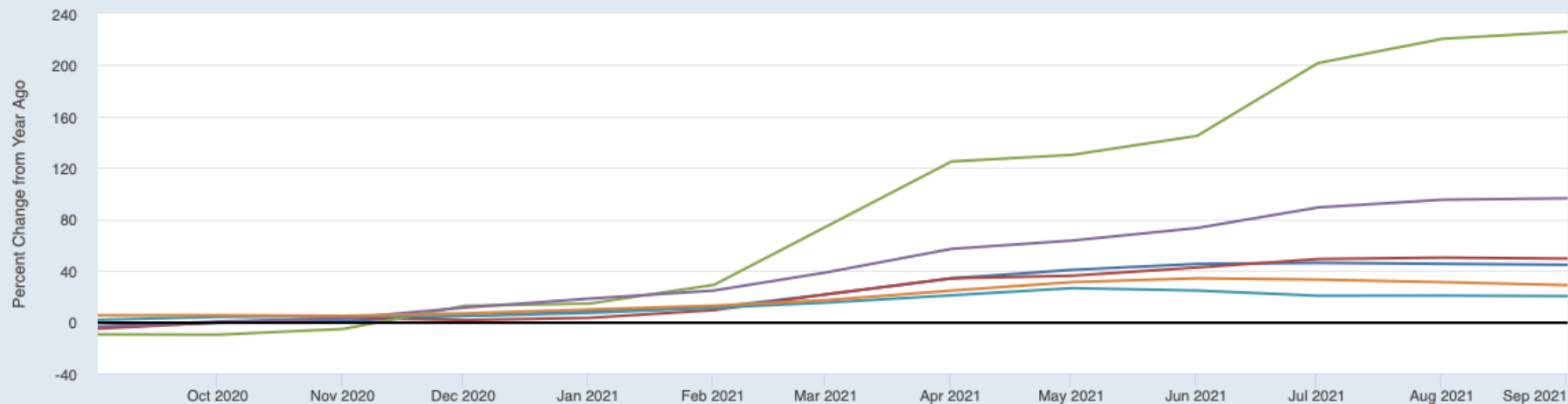


Sources: OECD; BLS

Is the worst yet to come?

FRED

— Producer Price Index by Industry: Plastics Material and Resins Manufacturing
— Producer Price Index by Commodity: Pulp, Paper, and Allied Products: Wood Pulp
— Producer Price Index by Commodity: Metals and Metal Products: Cold Rolled Steel Sheet and Strip
— Producer Price Index by Commodity: Metals and Metal Products: Iron and Steel
— Producer Price Index by Industry: General Freight Trucking, Long-Distance Truckload
— Producer Price Index by Commodity: Special Indexes: Construction Materials



Shaded areas indicate U.S. recessions.

Source: U.S. Bureau of Labor Statistics

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Some commentators have attributed the spike in PPI to **rising oil prices**.

While that is **part of the story**, it simply is **not the entire picture** – at all.

Prices of **just about every commodity** are rising, some **doubling or more** year over year.

Labor shortages at **every step of the supply chain** are leading to shortages of input materials, transportation delays, and manufacturing slowdowns, all with **ripple effects** throughout the remainder of the manufacturing and distribution processes.

There is **not a lone root cause** for price spikes. The issue is systemic and will take time to resolve – stimulus cash and extended unemployment have crowded out private employers, many workers fear returning, and many are battling over vaccine mandates.

So what's next? ...

Anticipated Uptick In Business Bankruptcy Filings



UNSUSTAINABLE LEVERAGE

FINANCIALLY STRESSED
AND DISTRESSED BUSINESSES

LABOR SHORTAGES
RISING LABOR COSTS

RENT INFLATION

SUPPLY CHAIN DISRUPTION

RISING COMMODITY COSTS

PRICE INFLATION

INFLATION EXPECTATION LOOP

EXPIRATION OF STIMULUS PROGRAMS

FED INTEREST RATE HIKES

LOSS OF LENDER COOPERATION

Bankruptcy and Restructuring After the COVID-19 Pandemic

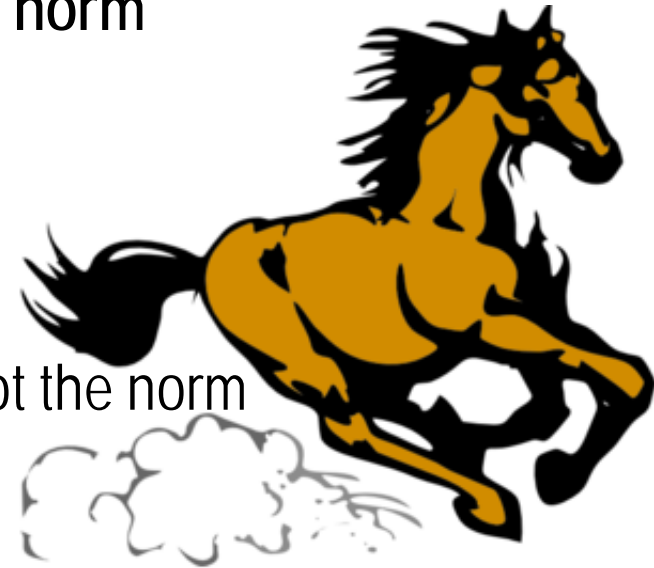
Trends (old and new), statutory developments, and other changes to the landscape of bankruptcy and restructuring as the world emerges from the pandemic environment



2022

Bankruptcy Express: Speedier Chapter 11s

- Chapter 11 Cases Have Been Transformed from the 1980's and early 1990's
 - Increased frequency of prepackaged and pre-arranged plans
 - **Asset Sales** in Chapter 11 cases have gone from being the exception in the 1980s – early 1990s to the norm
- Traditional Chapter 11 Restructurings
 - Fix business/operational problems first
 - Followed by Chapter 11 Plan Process
 - True restructuring is **now the exception**, not the norm



Reasons For Speedier Chapter 11s

- Private Equity Funds and Hedge Funds as Secured Lenders or Loan Participants
 - Holders of first, second, third-lien debt
 - Less patient than money center banks and asset-based lenders
 - Focus on limiting their own downside and positioning themselves to capture all of the post-emergence upside through quick chapter 11 sale or debt-for-equity restructuring process
 - Less need for longer traditional chapter 11 process
 - Increased emphasis on pre-bankruptcy planning and negotiation
 - “Loan to own” – Lending into stressed or distressed businesses with the intent of ending up owning the business through a credit bid or debt swap

“Prepackaged” Chapter 11 Cases

- Prepacks Not New but Increasing in Popularity
- Debtor Files Chapter 11
- Prior to Filing, Debtor Has Agreement In Place With All Significant Stakeholders, Usually Holders of Significant Amount of Secured and/or Bond Debt
- Creditors (not Trade) Solicited and Vote on Prepackaged Plan Pre-Petition
- Trade Creditors Usually Paid In Full Upon Approval of Chapter 11 Plan or Earlier Pursuant to Court Order in Exchange for Trade Credit
- Combined Hearing on Plan and Disclosure Statement Usually Between 30 – 60 Days After Chapter 11 Filing
 - Could be much quicker, such as Belk prepackaged plan
- Prepackaged Chapter 11 Plan Allows Proponents to Bind Dissenting Creditors
- *Belk* (2021): Drive-Through prepack – One Day In, Next Day Out

Advantages of Prepackaged Chapter 11 Cases

- Quicker Process Leads to Reduced Administrative Claims Associated with Bankruptcy.
 - Less (or no) monthly operating reports
 - No 341 meeting of creditors
 - No official committee of unsecured creditors (usually)
 - No claim filing process
- Largely Consensual Process also Reduces Professional Fees
- Greater Certainty as to the Results that May Be Achieved in the Case
- Virtually Eliminates Operational Disruptions for the Business
- Greater Chance that Management Will Retain Control over the Business and Not be Displaced.
- Less Negative Publicity Surrounding the Bankruptcy Case
- Preference Claims Usually Not Pursued

■ Disadvantages of “Prepackaged” Chapter 11 Cases

- Prepackaged Chapter 11’s Lend Themselves to Financial Not Operational Restructurings
- Insufficient Time for Debtor To Downsize Through
 - Shutdown of unprofitable business/sale of assets
 - Rejecting unprofitable contracts
 - Renegotiating collective bargaining agreements
- Consent of all Major Stakeholders Often Difficult or Impossible to Achieve
- This Strategy Does Not Work for a Company that Needs Strategic and Operational Changes other than Pure Debt Reduction – May Result in a Chapter 22, Chapter 33 or even Chapter 44.
- Most Debtors are Not in a Position to Pay Unsecured Creditors in Full or Let their Claims Ride Through Unimpaired.

“Pre-negotiated” Chapter 11 Cases

- Debtor Reached Restructuring Support Agreement With Certain (but not all) Stakeholders (e.g., largest secured creditor(s)) before Chapter 11 Filing
 - Roadmap for chapter 11 case
 - Milestones define case path and timeline
 - Broad releases of claims against PE/hedge fund sponsor/affiliates
 - Expedited Sale Process, DEBT-FOR-EQUITY Swap, or Combination
- No Pre-Petition Agreement With Other Creditor Classes
 - Risk of no or de minimis recovery on junior secured, unsecured and/or trade claims
 - Critical vendors may be treated better than other trade creditors
 - Risk of pursuit of preference claims
- Pre-negotiated Chapter 11 Cases Tend to Move Quickly but Take Longer than Prepacks
 - Typically completed in 100-150 days
 - Caesars took *nearly 2 years*

Quickie Section 363 Sales

- Debtor Uses Bankruptcy Code Section 363 to Sell (Subject to Bankruptcy Court Approval)
 - Entire Business
 - Business Lines
 - Groups of Assets
 - Going Out of Business Sales ("GOB's")
- Sales Under Section 363 ("363") Allow the Buyer to Obtain Court Approval To Purchase a Set of Specific Assets Free and Clear of Liens, Claims and Encumbrances Faster Than Through A Reorganization Plan
 - Bankruptcy sale process is public, benefitting debtor and creditors, and the sale is subject to higher and better offers at a competitive auction
 - "Higher and better" contemplates not only the purchase price, but also the form and terms of the asset purchase agreement, the form of consideration (i.e., cash vs. notes) and the ability of the purchaser to close.
 - Non-financial issues such as continued employment for workers may be considered in determining what constitutes a better offer.

Acquiring Distressed Assets Under §363 (continued)

Overview of the 363 Sale Process

- Search for a stalking horse bidder (typically a limited process)
- Stalking horse bidder signs an asset purchase agreement

- Debtor files for bankruptcy protection (at times, Debtor files before a stalking horse bidder is selected)
- Stalking horse bidder typically named, establishing valuation floor

- Judge approves stalking horse bidder and sets bid procedures
- Bid deadline determined
- Auction date scheduled
- Other perspective purchasers must submit “qualified bids”

- Auction takes place; winner with “highest and best bid” both named by the debtor and creditors’ committee
- Final results are subject to adequate assurances and Court approval

- Judge approves auction results at the final sale hearing
- Standard for approval, easy to satisfy “business judgment standard”
- Transaction closes

Quickie Section 363 Sales

- Credit Bid – Secured Lender
 - Is prequalified to participate in process
 - Might in some circumstances choose to serve as stalking horse bidder
 - Can credit bid up to the full face amount of its secured claim
 - Even though secured lender purchased the claim at a substantial discount
 - Can discourage competitive bidding if amount of secured claim exceeds value of assets
- Credit Bid Cheaper and Quicker Alternative to Swapping Debt for Equity Via Plan Process

Quickie Section 363 Sales Risks to Unsecured Creditors

- Unsecured Creditors' Committee Can Object to Terms of Proposed Bidding Procedures, Protections for Stalking Horse Bidder and Sale
 - Expedited sale process not designed to maximize recovery
 - No shop provisions
 - Break-up fee unreasonably high
 - Bid procedures chill competitive bidding
 - Goal: Slowing down the process to facilitate marketing efforts
- Creditors' Committee Can Object to Credit Bid
 - Risk of chilling sale process
 - Does it cover unencumbered assets? Lien challenges?

Chapter 11 Plans: Third-Party Releases

- Included in many (perhaps most) Chapter 11 plans
- Typically named “Release by Holders of Claims and Interests”
- Releases claims of creditors against **non-debtor third parties** such as directors, officers, shareholders, private equity sponsors, affiliates, subsidiaries, etc.
- Opt-In vs. Opt-Out vs. Nonconsensual Releases
 - Modern trend is toward “opt-out” releases
 - Failure to take affirmative steps to opt out is **deemed consent**
 - Nonconsensual releases – no opportunity to opt out, typically reserved for extraordinary circumstances

FAILURE TO OPT OUT OF A THIRD-PARTY RELEASE WILL PROBABLY RELEASE (AMONG OTHER THINGS) ANY CLAIMS YOU MAY HAVE AGAINST NON-DEBTOR GUARANTORS!

Controversy Surrounding Third Party Releases: The *Purdue Pharma* Case

- Purdue Pharma Filed Chapter 11 on September 15, 2019 in U.S. Bankruptcy Court, Southern District of New York
- The Sackler Family, Owners of Purdue Pharma, Did Not File Chapter 11
- At Issue: Purdue Pharma's Chapter 11 Plan Provided for the Sackler's Contribution of \$4.5 Billion in Exchange for Release of All Future Liability
- Bankruptcy Court Approved the Plan and Releases in Favor of the Sacklers
- Appeal Pending
- Proposed Legislation: Non-debtor Release Prohibition Act of 2021, That Would Bar Courts From Approving Chapter 11 Plan Granting Third Party Release

Increased Frequency Of Structured Dismissal Of Failed Chapter 11 Cases

- What Is a Structured Dismissal?
 - Bankruptcy Code provides following exit strategies for a chapter 11 debtor
 - Approval of a Chapter 11 plan
 - Conversion to Chapter 7
 - Dismissal of case
 - Structured dismissal issue before the U.S. Supreme Court in *Jevic* (2017):
 - Can a bankruptcy court approve a structured dismissal of a Chapter 11 case that provides for distributions deviating from the Bankruptcy Code's priority rules?
 - Simple answer: No
 - Strict adherence to Bankruptcy Code's priority rules

Increased Frequency Of Structured Dismissal Of Failed Chapter 11 Cases

- Recent U.S. Bankruptcy Southern District Of New York Decision: Decision Approving a Structured Dismissal – *In Re KG Winddown*
 - Chapter 11 sale did not generate sufficient proceeds to pay all administrative expense claims
 - Estate administratively insolvent
 - Court granted motion to dismiss chapter 11 case
 - *Jevic* left door open for structured dismissals that do not violate claims priority rules
 - Other alternatives, such as conversion to chapter 7 or appointment of trustee would impose costs that would further erode value of already administratively insolvent estate with no benefit to creditors or estate

■ Court Operations During COVID-19

- Federal Courts Throughout the Country Have Remained Open For Business
- State Courts have Varied As to the Amount of “Openness”
- Changes Took Place In All Courts
- Bankruptcy Courts Also Changed
 - Section 105 of the Bankruptcy Code grants the Court Broad Discretion to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code.

Bankruptcy Court Operation During COVID-19

- General Orders Entered in Most Jurisdictions Posted on Court Websites Outlining Temporary Operating Procedures – Each Jurisdiction Has Different Rules and Procedures
 - No in person appearances without court approval
 - Hearings, conferences and trials held by telephone or video conference
 - Evidentiary hearings held by video conference in discretion of presiding judge. Court determination of method of submitting evidence on a case-by-case basis
 - Limited in-person access to the clerk's office. Shortened hours and for some courts, access only by appointment. Clerk's office is available by phone, e-mail and drop boxes. ECF for electronic filing

Bankruptcy Court Operation During COVID-19

- Virtual Hearings Have Made Court Operations Run More Expeditiously and Cost-effectively
 - Dispensing with travel time and the cost of attorney's travel has generated significant savings
- Due to the Efficiency and Relative Seamlessness of the Virtual Process, We Expect This Trend to Continue, to Some Extent, in the Post-pandemic World
- Anticipated Hybrid Approach
 - Matters, such as case conferences, remain virtual
 - Other matters, such as trials and hearings, would return to the courtroom

Changes In Creditor Committee Formation

- Pre-Pandemic Practice in Certain Jurisdictions: In Person Committee Formation Meetings Requiring Creditors Seeking Appointment to the Committee to Travel to the Meeting Location and Incur the Expense of doing so
- As a Result of the Pandemic in Jurisdictions Where In Person Organizational Meetings Were Held, the United States Trustees Have Switched to Gathering Information, Selecting Committee Members, and Organizing Creditors' Committees Entirely Remotely
 - Working well
 - Encourages creditor participation
 - Fewer proxies



■ Subchapter V Small Business Cases

- Enacted as Part of Small Business Reorganization Act of 2019 (SBRA)
 - Purpose is to reduce costs and increase efficiency
 - Became effective February 19, 2020
 - Permitted any business with maximum aggregate debt of \$2,725,625 to file as a small business Chapter 11
- Per CARES Act, the Maximum Aggregate Debt Limit for Small Businesses (Excluding Affiliates/Insiders) Increased to \$7,500,000, Not Less Than 50% From the Debtor's Commercial or Business Activities
 - Expires/Sunsets – March 27, 2022

How is Subchapter V Faring?

- Approximately 23% of all chapter 11 filings in 2020 were Subchapter V cases (Bloomberg Law updates 6/22/21)
 - This percentage would have been significantly higher if judicial districts with larger chapter 11 cases are excluded
- One year in, Subchapter V cases represented:
 - Sixth Circuit – approximately 42% of all chapter 11 filings
 - Seventh Circuit – approximately 55% of all chapter 11 filings
 - Eighth Circuit – approximately 43.5% of all chapter 11 filings
 - Increases to approximately 45% 18 months in
- Industries where Subchapter V has been more widely utilized:
 - Retail
 - Health care
 - Restaurants/Bars
 - Hotel/Lodging
 - Construction
 - Trucking/Transportation

■ More Subchapter V Cases By the Numbers

- Dataset: Subchapter V Cases Filed Between February 19, 2020 and December 31, 2020 With Data Collected Ending on June 30, 2021
- 438 Subchapter V Cases Analyzed
 - As of June 30, 2021:
 - Plans confirmed in 221 cases
 - Plans filed but not yet confirmed in 105 cases
 - No plan filed in 30 cases
 - 82 cases dismissed

Subchapter V Cases By the Numbers Per October 2021 ABI Journal Article

- In the 221 Cases With Confirmed Plans:
 - 130 (59%) involve consensual plans
 - Debtors achieve conformation within 6 months of case filing
- Conclusion
 - Subchapter V cases working as intended
 - Subchapter V debtors confirming plans at relatively high rate in relatively short period of time
 - Excellent success rate, at least so far

■ Preference Avoidance Litigation

- Although business bankruptcy filings are (way) down in 2021, trade creditors **aren't necessarily out of the woods**.
- The surge of cases in 2020 has led, and will continue to lead until mid-late 2022, to an **uptick in preference avoidance litigation**.
- Congress provided a **new safe harbor** (sort of) in the Consolidated Appropriations Act of 2021 and **procedural protections** in the Small Business Reorganization Act of 2019
 - The real-world benefit of these provisions remains to be seen

A Two-Minute Preference Refresher: *What Is a Preference?*

Elements of a Preferential Transfer

A transfer of property of the estate

to or for the benefit of a creditor,

on account of an antecedent debt,

made while the debtor was insolvent,

on or within 90 days before the filing of the petition (one year for insiders)

that enables the creditor to receive more than it would in a hypothetical **chapter 7 liquidation** where the **transfer was not made** and the creditor received payment according to the Bankruptcy Code

Practical Considerations

Typically but not always a payment – check, wire, etc.

No debt, no preference – cash in advance/prepayments are not preferences at all

*Presumption of insolvency for transfers within 90 days is **rebuttable with evidence***

*If you did not fare better than if the allegedly preferential transfer had not been made, the debtor filed chapter 7, and you were paid pursuant to the Bankruptcy Code, **no preference***

A Two-Minute Preference Refresher: *Common Defenses*

Defense	Description
Contemporaneous Exchange of New Value	<i>Payment was intended to be, and was, a substantially contemporaneous exchange of new value</i>
Subsequent New Value	<i>Creditor provided new value – extensions of credit – to the debtor after receiving the preferential transfer.</i>
Ordinary Course of Business	<i>Transfer was payment of a debt incurred in the ordinary course of business or financial affairs of the debtor, and</i> <ul style="list-style-type: none"><i>Made in the ordinary course of business or financial affairs of the debtor and the creditor (subjective test), <u>or</u></i><i>Made according to ordinary business terms (objective test).</i>

Small Business Reorganization Act of 2019 Changes To Preference Law

- Effective February 19, 2020
- Section 547(b) Amended to add the Following due Diligence Requirement for Filing Preference Litigation:
 - “(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case take into account a party’s known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property....”
 - Preference defendants still have the burden of proving the preference defenses

NEW “COVERED PAYMENT” EXCEPTION TO PREFERENCE LIABILITY

TEMPORARY SUBSECTION 547(J)

- Consolidated Appropriations Act of 2021 Created a New Preference Exception: “Covered Payment of Supplier Arrearages”
 - Payment made in connection with an *agreement* or *arrangement* made or entered into on and after March 13, 2020 (onset of COVID) between a debtor and a supplier of goods or services to delay or postpone payment of **amounts due under an executory contract**
- Payment Cannot Exceed the Amount due Under the Executory Contract Before March 13, 2020
- Does not Include Fees, Penalties and Interest in an Amount Greater Than That Scheduled to be Paid Under the Contract or Which the Debtor Would Owe if the Debtor had Made all Payments on Time and in Full Before March 13, 2020
- Sunsets on December 27, 2022, but Continues to Apply to Bankruptcy Cases filed Before December 27, 2022

■ SBRA's Increased Venue Limits On Small Claims

- The Venue Provision That Forces a Trustee or Debtor-in-Possession to Commence Litigation on Smaller Claims in the District Court Where the Defendant Resides (Corporate Headquarters or Principle Place of Business) has Been Increased From \$13,650 to \$25,000
 - Impact: Trustees/debtors-in-possession may be less likely to commence suit on preference and other claims seeking recovery of less than \$25,000
- Does the Increased Venue Limit Apply to Bankruptcy Cases Filed Before SBRA's Effective Date of February 19, 2020?
- SBRA Change Ignores Prior Conflicting Decisions Over Applicability of Venue Limit to Preference/Other Avoidance Actions

■ Non-Bankruptcy Alternatives

- Assignment For the Benefit of Creditors
 - State liquidation
 - Arises by contract – assignor/debtor designates assignee/fiduciary
 - Varies by state, including availability of court supervision
- Receiverships
 - Federal or state
 - Commenced by court proceeding
 - Receiver is fiduciary; court order approving receiver fleshes out process
- Uniform Commercial Code Article 9 Sales
- Liquidation

■ ABC vs. Chapter 7 Bankruptcy

■ Advantages of ABC

- Usually faster
- Cheaper
- Potentially larger distribution to unsecured creditors
- Assignee sometimes selected by creditors

■ Disadvantages

- Not uniform – varies by state
- Assignee often selected by Debtor/Assignor and not monitored
- Sale process not favorable for sale of business
- Executory contracts/leases containing anti-assignment provisions not assignable
- No discharge for individuals

Receiverships

Recently Enacted Receivership Statutes

- Numerous states have enacted comprehensive receivership statutes in the past 20 years:
 - Oregon (2018)
 - Missouri (2016)
 - Ohio (2013)
 - Minnesota (2012)
 - Washington (2004)
 - Uniform Commercial Real Estate Receivership Act – adopted by several states
- Automatic stay of creditor action?
- Sale of assets free and clear of liens?
- No provision for assignment of non-assignable executory contracts/leases

■ Secured Party Foreclosure Of Collateral

- In Furtherance of Enforcement of Security Interest/Collection and/or Liquidation of Secured Creditor's Collateral as a Result of Debtor's Default Under Its Agreements With Its Secured Creditor
- Governed by Article 9 of Uniform Commercial Code

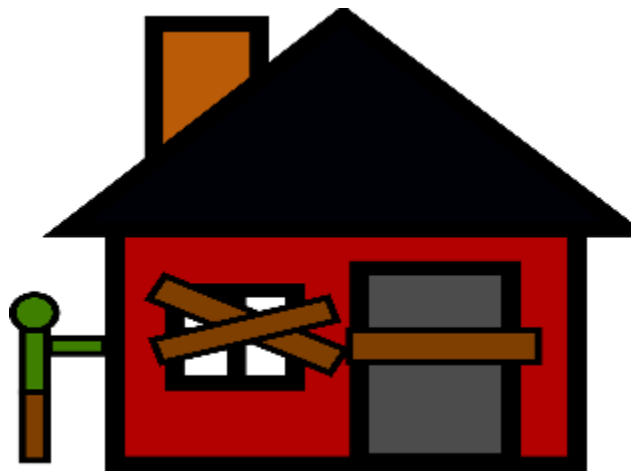
“Friendly” vs. “Unfriendly” Article 9 Foreclosures

- “Friendly” Foreclosure Process is Basically the Same as an Adversarial Process (Notice and Sale Procedures), Minus the Contested Lawsuit
 - Debtor can **consent** to the secured party’s seizure and sale of the collateral as part of a peaceful possession arrangement between the Debtor and secured party
- “Unfriendly” Foreclosure Process Includes a Contested Lawsuit



Secured Party Foreclosure Of Collateral

- Foreclosure Sale
 - Public auction or private sale
 - All aspects must be “commercially reasonable”
 - Proceeds paid to secured creditor with right to assert deficiency claim for balance due
 - Sale free and clear of foreclosing security interest and junior security interests and most junior lien interests
 - Unsecured claims wiped out
 - Scrutinizing foreclosure sales to insiders and/or for low sale price



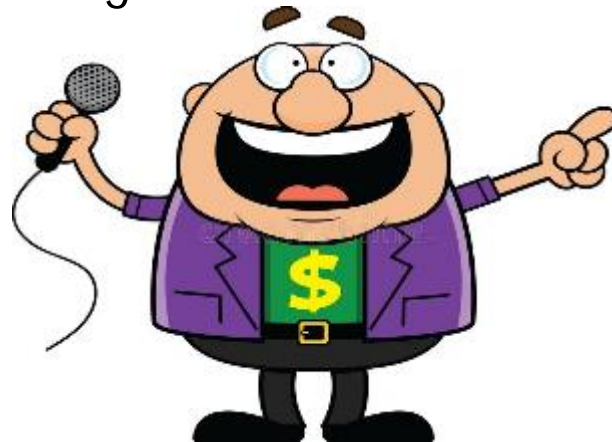
UCC Article 9 Foreclosure Sale vs. Bankruptcy: Pros and Cons

■ Pros

- Faster than bankruptcy sale process
- Generally less expensive than bankruptcy sale

■ Cons

- Limited scope – only addresses secured party's collateral; not unsecured claims
- Does not dispose of other claims against debtor as bankruptcy would
- Successor liability risk
- Lack of transparency for unsecured creditors



Liquidation

- Debtor Announces it is Closing its Doors and Liquidating
- Distribution Tendered?
 - In full settlement of claim?
- Response
 - Threat of involuntary bankruptcy petition
 - Attempt to obtain transparency about the liquidation process as the price for not filing involuntary petition
 - Formation of out of court creditors' committee



■ QUESTIONS?



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With more than 35 years of experience in the bankruptcy and insolvency field, Bruce is a recognized leader nationwide in trade creditor rights and the representation of trade creditors in bankruptcy and other legal matters. He has represented trade and other unsecured creditors, unsecured creditors' committees, secured creditors, and other interested parties in many of the larger Chapter 11 cases that have been filed. Bruce also handles letters of credit, guarantees, security, consignment, bailment, tolling, and other agreements and legal credit issues for the credit departments of institutional clients.

Among his various legal recognitions, Bruce received the Top Hat Award in 2011, a prestigious annual award honoring extraordinary executives and professionals in the credit industry. He was co-chair of the Avoiding Powers Committee that worked with the American Bankruptcy Institute's (ABI) Commission to Study the Reform of Chapter 11, participated in ABI's Great Debates at their 2010 Annual Spring Meeting—arguing against repeal of the special BAPCPA protections for goods providers and commercial lessors—and was a panelist for a session sponsored by ABI. He is a frequent presenter at industry conferences throughout the country, as well as a prolific author regarding bankruptcy and creditors' rights topics in various legal and trade publications.

Bruce is a co-author of "Trade Creditor's Risk-Mitigation Tools and Remedies Manual," published by ABI in 2019. He has also contributed to *ABI Journal* and is a former member of ABI's Board of Directors and former co-chair of ABI's Unsecured Trade Creditors Committee.



Education

- University of Pennsylvania Law School (J.D. 1980)
- Wharton School of Finance and Business (M.B.A. 1980)
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Andrew Behlmann is a partner in Lowenstein Sandler's Bankruptcy & Restructuring Department. Andrew leverages his background in corporate finance and management to approach restructuring problems, both in and out of court, from a practical, results-oriented perspective. With a focus on building consensus among multiple parties that have competing priorities, Andrew is equally at home both in and out of the courtroom, and he has a track record of turning financial distress into positive business outcomes. Clients value his counsel in complex Chapter 11 cases, where he represents debtors, creditors' committees, purchasers, and investors.

Andrew writes and speaks frequently about bankruptcy matters and financial issues. Before becoming a lawyer, he worked in senior financial management at a midsize, privately held company.



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Recent Publications

- August 2021
[Electricity: It's Electric! It's Shocking! But Is It a Good?](#), *Business Credit*
Bruce S. Nathan, Michael Papandrea
- Q2 2021
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- June 1, 2021
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