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ESTIMATING THE NEED FOR ADDITIONAL BANKRUPTCY JUDGES IN LIGHT OF THE COVID-19 PANDEMIC

Benjamin Iverson, Jared A. Ellias, and Mark Roe[†]

Abstract

In this Article, we present the first effort to use an empirical approach to bolster the capacity of the bankruptcy system during a national crisis—here, the COVID-19 crisis. We provide two analyses, one using data from May 2020, very early on in the crisis, and another using data from September 2020, closer to the publication of this Article. Our analysis is based on an empirical observation: Historically, an increase in the unemployment rate has been a leading indicator of a rise in bankruptcy filings. If this historical trend continues to hold, the May 2020 unemployment rate of 13.3% would have predicted a substantial increase in bankruptcy filings and the lower September 2020 level would still predict noticeably increased filings. Clearly, governmental assistance, the unique features of the COVID-19 pandemic, the possibility of a quick economic recovery, and judicial triage are likely to reduce the volume of bankruptcies and increase the courts' capacity to handle those that occur. It is also plausible that the recent unemployment spike will be short-lived—indeed, by September 2020, the rate had declined to 7.9%. Further, medical solutions to the underlying pandemic—such as the recent initial distribution of an effective vaccine—would further reduce the pressure on the bankruptcy system. Yet, even assuming that the worst-case scenarios are averted, our analysis suggests that a substantial investment in the bankruptcy system resources should be considered, even if only on a standby basis.

Our model assumes that Congress would like to have enough bankruptcy judges so that the average judge would not work more than the last bankruptcy peak in 2010, when the bankruptcy system was pressured and judges worked 50 hour weeks on cases on average. Because the bankruptcy system before the pandemic was not stretched as severely as it was prior to the 2010 financial crisis, it has some extra capacity to handle extra cases.

To keep judicial workload at 2010 levels, the bankruptcy system would need at least 50 additional temporary judges based on the number of unemployed in May 2020 who did not see themselves as

[†] BYU Marriott School of Business; University of California, Hastings College of the Law; and Harvard Law School. The authors thank Jacob Barrera, Denise Han, Jessica Ljustina, Spencer Kau, Victor Mungary, Julia Staudinger, and Sara Zokaei for research assistance. We earlier, at the very beginning of the COVID-19 crisis, wrote a report on the potential pressure on bankruptcy judicial capacity due to the Covid-19 crisis, on which this document is based. That report was endorsed by a group of bankruptcy academics and then forwarded to Congress. For recent Congressional action related to our report, see *infra* note 8.

temporarily unemployed. In the worst-case scenario, in which none of the May 2020 unemployed returned to work quickly, the bankruptcy system would have needed as many as 243 temporary judges—which would have represented a considerable expansion, even if only temporary, of the bankruptcy judiciary. The lower September 2020 unemployment rate points to a need for 20 temporary judges. Because of this model’s sensitivity to unemployment data, it reports a wide range of estimations for additional bankruptcy judgeships.

We discovered a considerable administrative lag of about a year or more for appointing additional bankruptcy judges. Therefore, given that economic crises can unfurl much faster, embedding extra capacity in the bankruptcy judicial system in normal economic times is a prudent precaution to prepare for unexpected stress of additional bankruptcy petitions.

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I. Introduction

The Bankruptcy Act of 1978¹ created a unified bankruptcy system to address the financial distress of businesses, consumers, and municipalities.² The Bankruptcy Code creates several relief options for consumers and businesses. While COVID-19³ devastated the American economy,⁴ we are confident that the bankruptcy system is up to the challenge of providing relief for distressed consumers and businesses. The bankruptcy system can restructure firms that have a sound underlying business to allocate losses to investors instead of taxpayers and preserve jobs at the reorganized firms. Bankruptcy courts can also offer crucial relief to consumers and municipalities.

However, the unprecedented increase in unemployment resulting from the COVID-19 pandemic⁵ could well have driven, or correlate with, a surge in financial distress that, if it had persisted or returns, would challenge the bankruptcy system's ability to perform its traditional function as a safety net for American consumers and businesses. Historically, an increase in financial distress then leads to elevated numbers of consumer and business bankruptcies.⁶ The question was then—and at this writing is still—how big that rise will be and whether the bankruptcy system would need additional resources to perform as well as it does during normal times. Accordingly, this Article recommends that Congress consider increasing the number of bankruptcy judges, both through the appointment of temporary judges and by recalling retired judges. Furthermore, Congress should provide supplemental appropriations so judges can hire additional court staff as necessary.

Importantly, we believe that this Article is the first academic effort to assess the increased pressure on the bankruptcy system in a crisis, which we believe is essential to formulating policy responses to any economic crisis, be it the current pandemic or a future crisis. Academics have

¹ Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (codified as amended sections of 11 U.S.C.).

² See Eric A. Posner, *Bankruptcy Act of 1978*, in MAJOR ACTS OF CONGRESS 59, 59–60 (Brian K. Landsberg ed., 2004).

³ Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), more commonly known as Coronavirus Disease 2019 (COVID-19) is a highly contagious respiratory disease that was first widely reported in late 2019. *COVID-19, MERS & SARS*, NAT'L INST. OF ALLERGY & INFECTIOUS DISEASES (Aug. 18, 2020), <https://www.niaid.nih.gov/diseases-conditions/covid-19> [<https://perma.cc/AJA7-79KZ>]. This disease was declared a pandemic on March 11 by the World Health Organization. *Rolling Updates on Coronavirus Disease (COVID-19)*, WORLD HEALTH ORG. (July 31, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> [<https://perma.cc/MAF9-32JV>].

⁴ The real Gross Domestic Product (“GDP”) of the US economy dropped from a peak of about \$19,254 billion in the last quarter of 2019 to \$17,303 billion in the second quarter of 2020. *Table 1.1.6. Real Gross Domestic Product, Chained Dollars*, BUREAU OF ECON. ANALYSIS (Oct. 29, 2020), https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&nipa_table_list=6&categories=survey [<https://perma.cc/N52Q-KE5J>]. It rebounded in the third quarter.

⁵ The unemployment rate has increased from 3.5% in December 2019 to 14.7% in April 2020 and then trended downward to about 11.1% in June 2020 and 7.9% in September 2020. *Civilian Unemployment Rate*, BUREAU OF LAB. STAT. (Nov. 6, 2020), <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> [<https://perma.cc/X9XR-6T8E>]. The resurgence of COVID-19 as we write makes the future trend uncertain.

⁶ Thus far, as of the time of publication, we have seen a rise in large corporate bankruptcies, but we have surprisingly not seen the expected surge in consumer bankruptcies, which could be because of financial, physical and technological barriers to accessing the bankruptcy system exacerbated by unique pandemic conditions. See Jialan Wang et al., *Bankruptcy and the COVID-19 Crisis* 14 (working paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690398&download=yes [<https://perma.cc/G8E7-9UAT>].

long sought to project individual firm's propensity for bankruptcy⁷ but this exercise differs sharply from projecting the caseload pressure on the bankruptcy system. In future crises, researchers and policymakers can use this work as a starting point in designing interventions aimed at shoring up the bankruptcy system. Bolstering the bankruptcy system is a good public investment, as it requires little in the way of tax expenditures as additional judges and staff are a nominal expense in the grand scheme of the federal budget. It also lacks any clear downside, since temporarily overstaffing the court system would cause little harm. And, as the economy improves, capacity can readily be adjusted downward by not replacing bankruptcy judges at the end of their terms or as they retire.

Accordingly, we use an empirical approach to estimate the demand that businesses and consumers will put on the bankruptcy system and studies the capacity of the current system to meet that demand. Prediction is always a fraught exercise, and especially so during an unprecedented global pandemic. However, it is quite sensible to take precautions in a crisis based on the challenges evident in the data, even though subsequent developments may change the trajectory of the crisis. We present two sets of model-derived estimates. The first is derived from the unemployment rate as of May 2020, early in the pandemic and during the period when Congress was initially most active in passing large relief bills. We presented an earlier version of this analysis to Congress during at that time, at the request of congressional staff. The recent aid bill includes a section extending the expiring appointments of temporary judges and uses justifying language similar to that which we proposed.⁸

We also present a set of estimates using September 2020 unemployment data, which is closer to the time of publication of this Article. The contrasting predictions of the models derived from May and September numbers highlight the fast-moving nature of the pandemic as well as the effect of some of the relief legislation that Congress enacted, and we preserve the stale-as-of-time-of-publication May estimates to inform the historic record, show how data can be used at the height of a crisis, and to benefit future thinking about how quickly conditions can change in a crisis.

This analysis starts by providing evidentiary support for a basic intuition: the unemployment rate is a historically reliable indicator of future demand for bankruptcy relief. Job losses today are indicators of the level of financial distress of not only consumers but also businesses and municipalities in the months to come. As Figure 1 shows, unemployment claims rise and fall

⁷ A large literature in finance, growing to a large extent from the work of Ed Altman, has focused on bankruptcy prediction. See, e.g., Edward I. Altman, *Financial Ratios, Discriminant Analysis and the Prediction of Corporate Bankruptcy*, 23 J. FIN. 589 (1968); Jodi L. Bellovary et al., *A Review of Bankruptcy Prediction Studies: 1930 to Present*, 33 J. FIN. ED. 1 (2007).

⁸ Letter of Jared A. Ellias & Bankruptcy and COVID-19 Working Group to Congress (June 10, 2020) (on file with author) (presenting an earlier version of this analysis); Letter of Jared A. Ellias & Bankruptcy and COVID-19 Working Group (May 7, 2020) (on file with author) (urging Congress to appoint more bankruptcy judges). In our letter of May 7, 2020, we warned Congressional leadership and Senate and House Judiciary Leadership of the potential for a flood of corporate bankruptcies, depending on how the economic stress of that moment developed. Such a potential flood, if large enough, could overwhelm the courts. A surge among consumer bankruptcies could exacerbate the problem. Since the time needed to bolster bankruptcy courts' resources is substantial, we urged Congress to begin planning right away to bolster the bankruptcy system. On December 9, 2020, Senator Lindsey Graham, the Chairperson of Senate Judiciary, introduced the Bankruptcy Administration Improvement 4 Act of 2020, which extended all 25 temporary bankruptcy judgeships because of "existing and anticipated increases in business and consumer caseloads." See Bankruptcy Administration and Improvement Act, S. 4996, 116th Cong. (2020). This bill was passed unanimously both the Senate and the House and, as of the time of publication of this Article, awaits the President's signature.

roughly in line with the bankruptcy court caseload. Approximately, a percentage point increase in the unemployment rate corresponds to a 30% increase in bankruptcy caseload within three to six months. The U.S. unemployment rate during the COVID-19 pandemic has evolved quickly, peaking at 14.7% in April 2020 before dropping to 7.9% by September 2020 and 6.9% in October 2020. If this lower rate does not rise again and the unemployment rate continues to be a valid predictor of subsequent increases in bankruptcy petitions, the stress on the bankruptcy system will be modest but real, as even 7% unemployment is a relatively elevated rate and financial distress could have built up in the system during the spike in unemployment earlier in 2020. If the rate rises, or if other economic stresses arise—such as from a persistent congressional inability or unwillingness to extend the business and personal relief packages, the bankruptcy system may well be more stressed going forward.

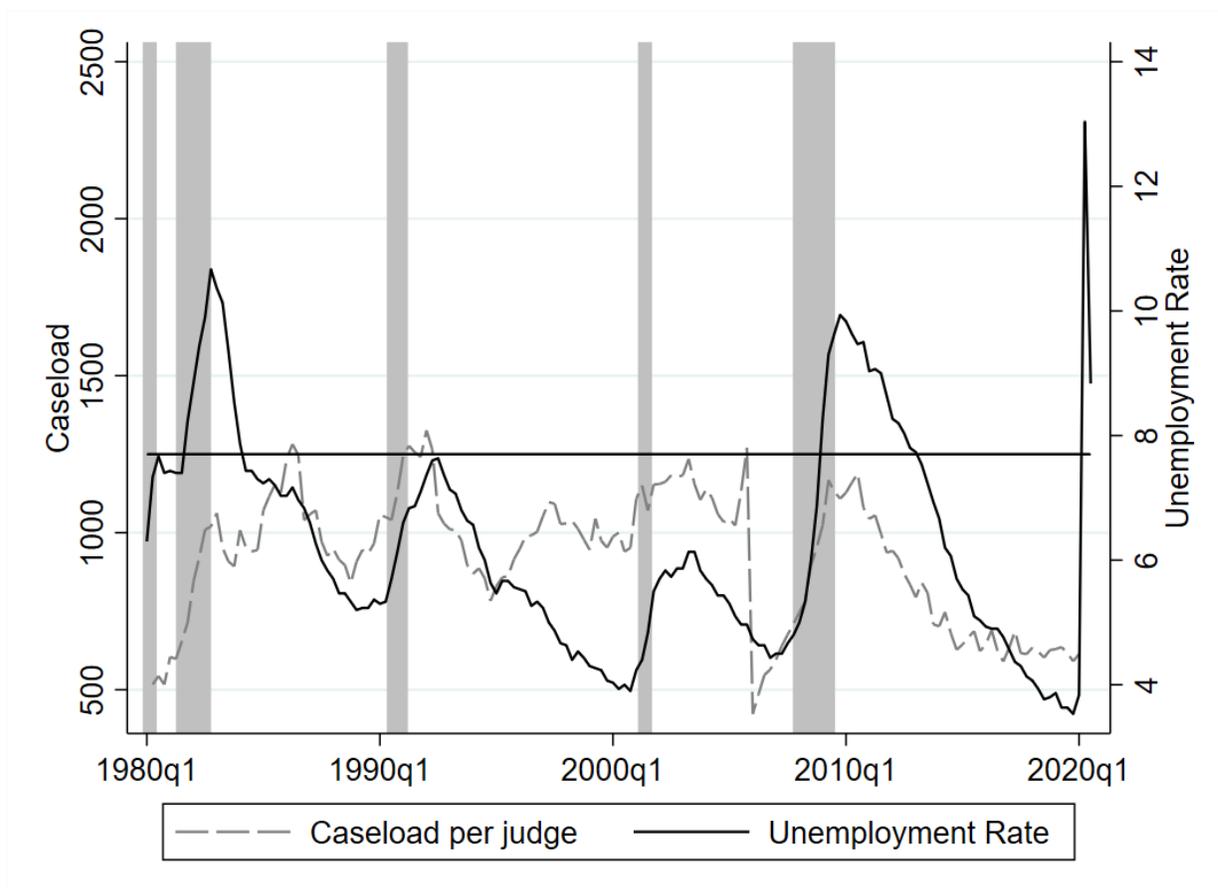


Figure 1. The unemployment rate and bankruptcy caseload by quarter since 1980.⁹ The highlighted areas are periods of economic crisis.

Our econometric analysis is very basic. We use only the unemployment rate as our independent, predictive variable, although we recognize that other factors could help predict the

⁹ See *infra* Section (II)(D)(2) (outlining the process used to estimate the bankruptcy caseload per bankruptcy judge); see also *Seasonally Adjusted Unemployment Rate (Series LNS14000000)*, BUREAU OF LAB. STAT., <https://data.bls.gov/pdq/SurveyOutputServlet> [<https://perma.cc/KPF4-Z897>] (outlining the national unemployment rate from 1980 through 2020).

incidence of bankruptcy. For example, the preexisting level of corporate and personal debt, the strength of government support for stressed individuals and businesses, the level of the prevailing interest rate, the state of the stock market, the degree lenders and landlords desist from aggressively suing those who do not pay, and, for a medically-induced economic setback such as the one we are living through, expectations of a medical treatment or cure, and the actuality of one, all affect how severely the bankruptcy system is pressed. Of the forgoing factors, several could dampen the severity of the financial impact of COVID-19—such as the state of the stock market, the very low interest rate, and the very high initial government support for the economy and for individuals who might otherwise have had to file for bankruptcy. On the other hand, several of the factors could exacerbate its potential severity—such as the high pre-crisis level of corporate debt and the sharp reduction of government support at the end of July. We expect that future researchers will refine and improve the model we use here. We present it now, though—instead of waiting for more information that would enable a richer model—because the judicial appointments process (which we discuss below) requires a long lead time, requiring early assessment with preliminary information.¹⁰

The best-case scenario based on the May 2020 unemployment level—denoted as Scenario 1 throughout this Article starts with the May 2020 unemployment high rate of 13.3% and adjusts the associated increase in bankruptcy caseload by assuming that those who saw themselves as only temporarily unemployed will return to work as they expected.¹¹ Under this scenario—after accounting for the expected temporary nature of much of the unemployment—the system would need about fifty additional judges.

To be specific: the unemployment figures in May 2020 reflected many temporarily closed businesses and furloughed workers. Estimates provided by the Bureau of Labor Statistics in May 2020 showed that only 34% of unemployed workers expected their unemployment to be permanent.¹² In historic employment data prior to May 2020, many more unemployed workers expected their unemployment to be permanent—about 58%.¹³ Thus, the share of permanent unemployment in this crisis was, as of May 2020, only 59.4% of the long-run's reported figure because many jobless workers expect their unemployment to be temporary in light of the temporary social distancing guidelines. Assuming that these workers would soon return to work—which, examining the September and October unemployment rate, seems to have been the case for many of them—the unemployment rate and bankruptcy filings would be much lower than the raw and high unemployment numbers indicated. Accordingly, the number of additional bankruptcy judges required in Scenario 1 is estimated by adjusting the expected relationship between unemployment and subsequent bankruptcies to be at 59.4% of its long-run value. This leads to a projected need for fifty judges.

¹⁰ We also make our analysis publicly-available for the benefit of researchers and policymakers in future economic crisis.

¹¹ *Seasonally Adjusted Unemployment Rate (Series LNS14000000)*, *supra* note 9.

¹² *Job Losers on Layoff as a Percent of Total Unemployed (LNS13023654)*, FED. RSRV. BANK OF ST. LOUIS, [# \[https://perma.cc/Y8CB-TU9P\]](https://fred.stlouisfed.org/graph/?id=LNS13023654).

¹³ *Table A-11. Unemployed Persons by Reason for Unemployment: Monthly, Seasonally Adjusted*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/graph/?g=xv7p> [<https://perma.cc/F2FQ-6SV3>]. The reported data is corrected for the 28% of expected temporary job losses that turns out to be permanent and the 13% of expected permanent job losses that turn out to be temporary. Lawrence Katz & Bruce Meyer, *The Impact of the Potential Duration of Unemployment Benefits on the Duration of Unemployment*, 41 J. PUB. ECON. 45 (1990).

In Scenario 2, we ignored the temporary unemployment adjustment and instead estimated the likely bankruptcy system shortfall if all of the temporarily unemployed turned out to be permanently unemployed, which thus far has not happened.¹⁴ The bankruptcy system would then have been over 200 judges shy of meeting the expected pressure on the bankruptcy system.

The third scenario uses local-level unemployment rates reported in April 2020 rather than the national unemployment rate for COVID-19 impacted industries and is denoted as Scenario 3 in this Article. This has the benefit of relying on more accurate local data, at the cost of slightly more stale data since the most recently released county-level unemployment rates at the time of completing the analysis were from April 2020 instead of May 2020. The 59.4% adjustment arising from the expectation of a higher fraction of the reported unemployment to be temporary is included in this analysis as well. Sixty-nine additional bankruptcy judges are estimated as needed in this scenario. While this increased demand is roughly in line with Scenario 1, it nonetheless exhibits significant local variations because particular areas have experienced considerably higher unemployment rates than the national rates used in Scenarios 1 and 2. Consequently, certain judicial districts are projected to require more judges in Scenario 3 as compared to Scenarios 1 and 2. These particularly include the Northern District of Illinois (Seventh Circuit), the Eastern District of Michigan (Sixth Circuit), and the District of Nevada (Ninth Circuit).

We then update our analysis with contemporaneous unemployment data closer to the publication of this Article. By September 2020, the unemployment rate was down to 7.9% (and declined further, to 6.9% by October 2020). At the same time, the temporarily unemployed constituted a smaller portion (50%) of the unemployed, a figure much closer to the long-term average of 42% of total unemployed. Using this as predictive variable in Scenario 4 yields a system-wide shortfall of only 20 judges.

Finally, the fifth scenario uses the professional forecasters' 1-year projection for unemployment as of September 2020. Because this forecast should take into account temporarily laid-off workers who eventually will return to work, we do not make any adjustments for currently unemployed workers. Based on forecasted 8.7% unemployment, Scenario 5 projects a need for 72 additional bankruptcy judges.

Figure 2 summarizes this estimated demand—ranging from twenty new judges in Scenario 4 to 243 judges in Scenario 2—across regional Courts of Appeal.¹⁵ In all cases, we assumed that the current temporary judgeships will be extended with the bottom-line numbers being on top of these extensions. In the currently most likely scenario—Scenario 4—the districts expected to be especially pressured are the Middle District of Florida (Eleventh Circuit), the Northern District of Georgia (Eleventh Circuit), the District of Delaware (Third Circuit), the Eastern District of Virginia (Fourth Circuit), the Northern District of Texas (Fifth Circuit), and the District of Utah (Tenth Circuit).

Additional districts that very likely would need additional support include the Eastern and Southern Districts of Texas (fifth Circuit), the Middle District of Tennessee (Sixth Circuit), the Southern District of Indiana (Seventh Circuit), the Eastern and Western Districts of Arkansas (Eighth Circuit), and the Southern District of Florida (Eleventh Circuit). The districts most likely to be pressured in the other scenarios substantially overlap with those likely to be pressured in Scenario 4.

¹⁴ See *infra* note 32 and accompanying text.

¹⁵ District level estimates are provided in Table 3.

Importantly, because the model employed in this Article is limited to the relationship between the unemployment rate and bankruptcy filings, it does not capture the direct impact of COVID-19 health costs on bankruptcy filings by individuals.¹⁶ Therefore, the additional bankruptcy judgeships that are estimated under this model are likely less than what is required in areas that have been more heavily impacted by COVID-19.¹⁷ If policymakers move forward on adding temporary bankruptcy judicial positions, these calculations based on current unemployment could, and should, be updated to put the judges in the districts they are most likely to be needed based in part on the then-prevailing impact of the pandemic.

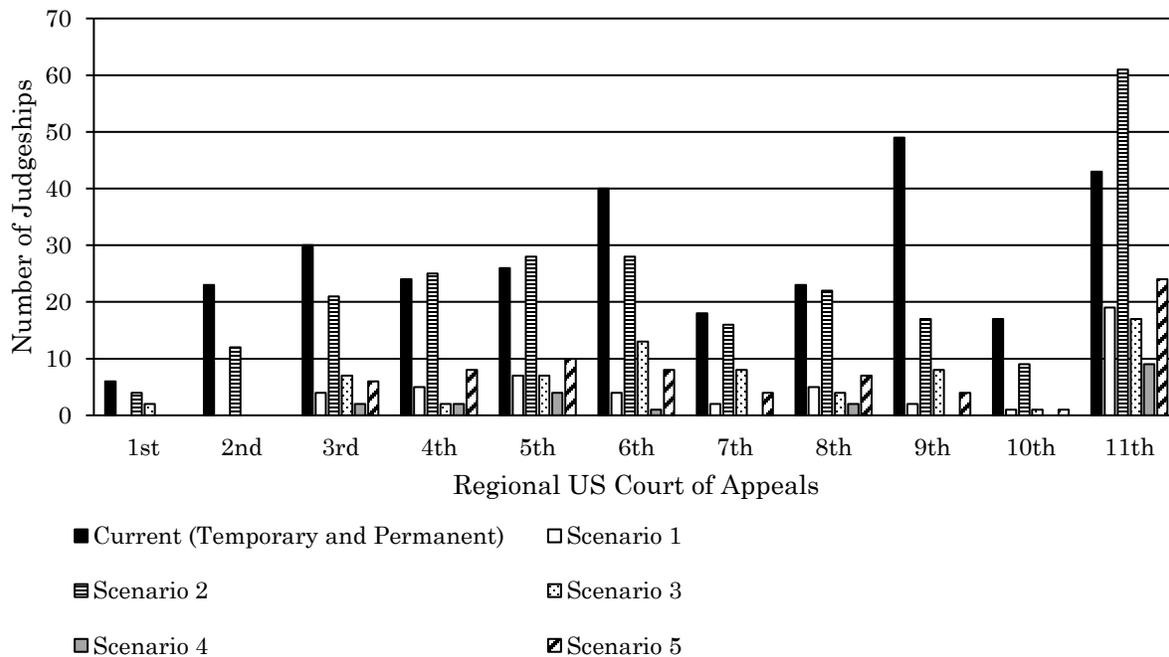


Figure 2. Number of Current (Including Temporary and Permanent) Judgeships¹⁸ Across Regional Courts of Appeals and the Estimated Additional Judgeships Required Under Scenarios 1 to 5. Only Districts Courts Expected to Require at Least One Additional Judgeships Under Scenarios 1 to 5 are Included in This Analysis as Shown in Table 4. The Number of Current Judgeships Are Adjusted Accordingly.

¹⁶ While some research suggests that medical costs cause up to 60% of all personal bankruptcies, see David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 742 (2009), precise causal estimates may be lower than this figure and is still the subject of debate and research. For example, Carlos Dobkin and colleagues estimate that only 4% of personal bankruptcies are due to hospital bills, and estimate that overall medical cost cause only a slightly larger fraction of total bankruptcies. Carlos Dobkin et al., *Myth and Measurement – The Case of Medical Bankruptcies*, 378 NEW ENG. J. MED. 1076, 1077 (2018). Regardless, it is clear that medical costs can create significant distress for a fair-sized share of the population and it is also possible that the potential COVID “long haul” phenomenon could cause at least some COVID survivors lasting financial consequences that are different from other diseases. See e.g. Rita Rubin, *As Their Numbers Grow, COVID-19 “Long Haulers” Stump Experts*, 324 JAMA 1381 (2020). The long-term links between COVID-19 and financial health is outside the scope of this Article and further research is needed.

¹⁷ See *United States Covid-19 Cases and Deaths by County*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#county-map> [<https://perma.cc/69LT-S8RP>].

¹⁸ See 28 U.S.C. § 152(a)(2) (2018) (allocating permanent bankruptcy judgeships); *id.* at § 152 note (allocating temporary bankruptcy judgeships).

The remainder of this Article proceeds as follows. Section (II) describes the research methodology, data sources, and the assumptions underlying the analysis. Section (III) discusses other appropriations and legislative reforms that can help bolster court capacity, such as making it easier for retired judges to retake the bench during this crisis. Section (IV) concludes the findings of Article. Table 4 of Section (V) denotes the district-level projected increase in bankruptcy judgeship under Scenarios 1 to 5 and Table 5 of Section (V) provides suggested allocations of new judgeships if Congress decides to allocate 100, 30, 25 or 10 additional bankruptcy judgeships under Scenario 3 of this Article.

II. Research Methodology

The methodology employs five steps to estimate the demand for bankruptcy court judges over the course of economic crisis arising out of COVID-19 pandemic:

- First, the historical relationship between the local unemployment rate and the number of bankruptcy cases is estimated for each judicial district;
- Next, the impact of the pandemic on the local unemployment rate of each district is calculated via geographical and industry-based unemployment statistics;
- The estimated number of additional bankruptcies in each judicial district arising from the COVID-19 pandemic is estimated using the district's estimated unemployment rate and the historical relationship between its unemployment rate and subsequent bankruptcy caseload;
- This estimated increase in bankruptcies is translated into judicial workload based on the workload associated with each type of bankruptcy filing and the additional judgeships necessary to handle this increased workload is calculated based on the historical workload that bankruptcy judges has handled.
- Forecasted judicial needs are based on the high unemployment rate as of May 2020, near the beginning of the COVID-19 crisis and the lower September 2020 rate that is more proximate to the time of publication of this Article.

A. The Historical Relationship Between Unemployment Rates and Bankruptcy Filings in Each Judicial District

The first step in estimating the number of bankruptcy filings that arise in aftermath of the COVID-19 pandemic is to determine the historical relationship between the unemployment rate¹⁹ and the number of bankruptcy filings²⁰ in each judicial district.²¹ To this end, the unemployment rate and total bankruptcy filings, broken down by the filing category, are collected for the 2001–

¹⁹ *Seasonally Adjusted Unemployment Rate (Series LNS14000000)*, *supra* note 9.

²⁰ FED. JUD. CTR., INTEGRATED DATABASE (2020) (accessed through WHARTON RSCH. DATA SERVS., <https://whr.tn/35aIjxq> (last visited Nov. 6, 2020)).

²¹ Territories are excluded from this analysis due to the lack of data. Additionally, the two judicial districts in Arkansas—the US District Court for the Eastern District of Arkansas and the US District Court for the Western District of Arkansas—are combined into one district for the purposes of this analysis because they share bankruptcy judges. *See* 28 U.S.C. § 152(a)(2) (2018) (allocating combined judgeships to the Eastern and the Western Districts of Arkansas).

2019 period.²² The categories of bankruptcy filings included in this analysis are Chapter 11,²³ Chapter 12,²⁴ Business Chapter 7,²⁵ Consumer Chapter 7,²⁶ Chapter 13²⁷ and “other.”²⁸ These data are used to estimate how many additional bankruptcy filings are associated with each additional unemployed worker.

Consider an example that illustrates how this relationship is estimated. Suppose that a district has a workforce of 645,000 and an unemployment rate of 5%. The number of unemployed individuals in this district is estimated to be about 32,250.²⁹ If that district experiences 5,000 consumer Chapter 7 bankruptcies in a year, then there are 155 consumer Chapter 7 bankruptcy filings per 1,000 unemployed workers.³⁰ This analysis is repeated for each category of bankruptcy filing. For example, in the District of Arizona, increases in the number of unemployed workers are associated with the following incremental caseload for the bankruptcy court:

Table 1. The Estimated Incremental Bankruptcy Caseload in the District of Arizona for Each Additional 1,000 Unemployed Persons Rounded to Three Significant Figures.

Business Ch. 7	Consumer Ch. 7	Ch. 11	Ch. 12	Ch. 13	Other
3.36	138	2.22	0.030	29.38	0.00281

²² 2005 and 2006 data are excluded from this analysis because the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. 109-8, 119 Stat. 23 (codified in 15 U.S.C. §§ 1637–38, 1664, 1665b), led to spikes and crashes in bankruptcy filings during those two years that were unrelated to the unemployment rate and economic conditions. Thomas Bak et al., *A comparison of the Effects of the 1978 and 2005 Bankruptcy Reform Legislation on Bankruptcy Filing Rates*, 25 EMORY BANKR. DEVS. J. 11, 25 (2008). Overall, the results of this analysis are similar to those of the analysis performed using the post-enactment 2007 to 2019 data.

²³ 11 U.S.C. ch. 11 (2018); *see also id.* at § 109 (enumerating the categories of individuals and entities that may file for a Chapter 11 bankruptcy).

²⁴ *Id.* at ch. 12; *see also id.* § 109 (enumerating the categories of entities that may file for a Chapter 12 bankruptcy).

²⁵ *Id.* at ch. 7; *see also id.* § 109 (enumerating the categories of individuals and entities that may file for a Chapter 7 bankruptcy).

²⁶ *Id.* at ch. 7; *see also id.* § 109 (enumerating the categories of individuals and entities that may file for a Chapter 7 bankruptcy).

²⁷ *Id.* at ch. 13; *see also id.* § 109 (enumerating the categories of individuals that may file for a Chapter 13 bankruptcy).

²⁸ These typically consist of ancillary and cross-border bankruptcy filings. *See id.* at ch. 15; *see also id.* § 1502 (enumerating the categories of individuals and entities that may file for a Chapter 15 bankruptcy).

²⁹ $5\% \times 645,000 = 32,250$.

³⁰ $5,000 \div 32,250 = 15.5\%$. The venue selection statute for bankruptcy cases is particularly permissive for entities that carry out their business in multiple states via multiple affiliates. *See* 28 U.S.C. § 1408 (2018) (authorizing the filing of bankruptcy cases in a district court in which “the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located . . .” or “in which there is pending a case under title 11 concerning such person’s affiliate, general partner, or partnership”). Therefore, there has been evidence of forum shopping by those entities, particularly in the District of Delaware and the Southern District of New York. *See, e.g.,* Todd J. Zywicki, *Is Forum Shopping Corrupting America’s Bankruptcy Courts?*, 94 Geo. L.J. 1141, 1144–46 (2006) (reviewing LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* (2005)). However, the impact of this anomaly on the overall analysis in this Article is limited for two reasons. First, the forum shopping behavior primarily affects two out of the ninety three bankruptcy districts. *See* Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. LEGAL STUD. 119, 126 tbl. 1 (2018). Second, this forum selection behavior is typically limited to the largest firms. *Id.* at 127 tbl. 2.

B. The Impact of the COVID-19 Pandemic on the Local Unemployment Rate of Each Judicial District

The approximation of the impact of the COVID-19 pandemic on local unemployment rates begins with the estimated permanent portion of the unemployment rate of 13.3% in May 2020.³¹ This unemployment rate is next adjusted for the local economic conditions of each judicial district and the short-term nature of a part of the unemployment as discussed below. An alternative would have been to rely on forecasted unemployment rate for the next year but doing so does not materially affect our estimates. Indeed, the Federal Reserve Bank of Philadelphia and Congressional Budget Office in May 2020 projected average unemployment rates of 12.3% and 13.2% over the next year respectively.³² However, using the midpoint of these two estimates, i.e., 11.4%, instead of the actual rate, had only a modest impact on the projections. As of September 2020, the one-year projection is for an 8.7% unemployment rate, which differs only modestly from the actual September rate. The Congressional Budget Office has not updated its forecasts since May 2020.

Section (B)(1) outlines the process for estimating the district-level unemployment rate in Scenarios 1 and 2 and Section (B)(2) outlines the process for estimating the district-level unemployment rate in Scenario 3. Scenarios 4 and 5 are similar to Scenario 1 but use updated unemployment numbers and projections from September 2020.

1. Judicial District-Level Unemployment Rates for Scenarios 1 and 2

The impact of the COVID-19 pandemic on the local economies of each judicial district is estimated for Scenarios 1 and 2 via two steps. In the first step, the relative impact of the pandemic on unemployment across various sectors of the economy is estimated. In the second step, this relative impact is translated into district-level unemployment rate based on the demographic and economic composition of each district.

The first step in determining the impact of the COVID-19 pandemic on the local economy of each judicial district is to approximate the relative impact of the pandemic on unemployment rate across various sectors of the economy. To this end, the data from the Census Bureau's Small Business Pulse Survey—which provides industry-level estimates of the share of businesses that reduced employee work hours in May 2020³³—is used to determine the reduction in employee hours across the economy.³⁴ Across all industries, 51.2% of businesses reduced employee hours,

³¹ *Seasonally Adjusted Unemployment Rate (Series LNS14000000)*, supra note 9.

³² See *Second Quarter 2020 Survey of Professional Forecasters*, FED. RSRV. BANK OF PHILA. (May 15, 2020), <https://philadelphiafed.org/research-and-data/real-time-center/survey-of-professional-forecasters/2020/survq220> [<https://perma.cc/M5RM-TQ4A>]; CONG. BUDGET OFF., INTERIM ECONOMIC PROJECTIONS FOR 2020 AND 2021 (2020), <https://www.cbo.gov/system/files/2020-05/56351-CBO-interim-projections.pdf> [<https://perma.cc/594H-47KD>] (reporting projected unemployment rates of 15.1%, 15.8%, 11.5%, and 10.2% for 2020Q2, 2020Q3, 2020Q4, and 2021Q1, respectively, which average to 13.2%).

³³ Jane Callen, *Weekly Census Bureau Survey Provides Near-Real-Time Info on Businesses*, U.S. CENSUS BUREAU (May 14, 2020), <https://www.census.gov/library/stories/2020/05/new-small-business-pulse-survey-shows-breadth-of-covid-19-impact-on-businesses.html> [<https://perma.cc/V5WZ-8U3G>]

³⁴ See *Small Business Pulse Survey*, U.S. CENSUS BUREAU (Oct. 15, 2020), https://portal.census.gov/pulse/data/downloads/18/national_sector_04Oct20_12Oct20.xls [<https://perma.cc/XB9Z-NAP7>].

while 5.6% increased employee hours, leaving a net reduction of 45.6%.³⁵ The same figure is calculated for each industry classification³⁶ in the Census data. Next, a severity score, $S_{\text{industry classification}}$, is calculated for each industry. This score is defined as the ratio of an industry's net share of businesses that reduced employee hours over the average of that metric across all industries. This severity score determines if an industry is more or less severely affected by the COVID-19 pandemic relative to the broader economy. Formally, the severity score of industry x is defined as

$$S_x = \frac{\text{Net Share of Business in Industry } x \text{ Reducing Employee Hours}}{\text{Net Share of All Businesses Across the Economy Reducing Employee Hours}}$$

As an example, a net 57.5% of businesses in the educational services sector reduced their employees' hours. Therefore, this sector was hit 26% harder than the broader economy since

$$S_{\text{Education}} = \frac{57.2\%}{45.6\%} = 1.26.$$

The next step in estimating judicial district-level unemployment rate for Scenarios 1 and 2 is to translate these severity scores into district level unemployment rates based on the economic and demographic composition of each district. This starts by calculating the share of workers employed in each of the nineteen industries covered by the Census Bureau's Small Business Pulse Survey in each county by using the data from the Census Bureau's County Business Patterns survey.³⁷ Next, the employment share of each industry is multiplied by that industry's severity score and the results are added across all industries to get a county-level estimate of the severity of the COVID-19 shock—in other words, a county-level severity score. Then, these county-level severity scores are averaged on a population-weighted basis across all counties in a judicial district to create a severity score for that district. As a result, districts that have a higher portion of their workforce in industries most affected by COVID-19 also have higher severity scores. Finally, this severity score is multiplied by the national unemployment rate in May 2020 of 13.3%³⁸ to forecast that district's unemployment rate. As an example, the Southern District of West Virginia had a severity score of 1.044, indicating an estimated impact from the COVID-19 pandemic that would be 4.4% worse than the national average. This corresponded to an estimated district-level unemployment rate of 13.9% which was, as expected, 4.4% higher than the then-prevailing national average of 13.3%. Scenario 4 uses the same methodology, but takes the prevailing September 2020 national

³⁵ 51.2% – 5.6% = 45.6%. The remaining 43.2% of businesses reported no change in employee hours worked.

³⁶ The North American Industry Classification System (“NAICS”), developed and maintained by Statistics Canada, Mexico's Instituto Nacional de Estadística y Geografía (“INEGI”), and the Economic Classification Policy Committee (“ECPC”) of the United States is used as the basis for this industry classification system. OFF. OF MGMT. & BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM 1 (2017), https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf [<https://perma.cc/PRM7-SZY3>].

³⁷ The Census Business Patterns survey “is an annual series that provides subnational economic data by industry. This series includes the number of establishments, employment . . . and annual payroll.” *County Business Patterns (CBP)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/cbp.html> [<https://perma.cc/J3WA-T2CV>]. The data from the 2017 version of this survey is used. See *CBP Tables 2017*, U.S. CENSUS BUREAU (Nov. 21, 2019), <https://www.census.gov/data/tables/2017/econ/cbp/2017-cbp-tables.html> [<https://perma.cc/M73T-24D4>].

³⁸ *Seasonally Adjusted Unemployment Rate (Series LNS14000000)*, *supra* note 9.

unemployment rate of 7.9% as its input. Similarly, Scenario 5 uses the one-year-ahead forecasted unemployment rate as of September 2020 of 8.7% as the key input to the model.

2. Judicial District-Level Unemployment Rates for Scenario 3

The methodology employed to estimate the district-level unemployment rate in Scenario 3 is more straightforward. Indeed, this methodology simply consists of using county-level unemployment rate estimates published by the Bureau of Labor Statistics for April 2020³⁹ and aggregating them up to a district-level unemployment rate using a population-weighted average of all counties within that judicial district. These district-level unemployment rates vary quite a bit more than adjusted unemployment rates used in Scenarios 1 and 2, and likely better reflect local economic conditions. However, the data is released with nearly a one-month lag and, given the dynamic situation of the economy, are more likely to swing dramatically over time. Moreover, this district-level data is also subject to more significant post-release revisions and adjustments relative to its national-level counterpart used in the preceding Section due to its smaller sample sizes.

C. The Increase in Bankruptcy Caseload in Each District

The next step in approximating the increase in judicial caseload arising from the COVID-19 pandemic is to calculate the number of bankruptcy petitions expected to be filed. This calculation is accomplished in three steps. First, the expected judicial-district level unemployment rate calculated in Section (B) is multiplied by the district's workforce size to estimate the number of unemployed workers within that district.⁴⁰ Next, the number of unemployed workers within each district is multiplied by that district's incremental increase in bankruptcy filings associated with each additional unemployed worker—a metric calculated in Section (A)—to calculate the expected number of bankruptcy filings associated with the jump in the unemployment rate. These two steps are performed for all five Scenarios in all judicial districts.

An additional step is needed to transform the estimated unemployment rates into the subsequent surge in bankruptcy filings for Scenarios 1, 3, and 4. This additional step is necessary to account for the possibility that the observed unemployment rates are due to temporary furloughs that are set to recede as better tools for handling COVID-19 are developed.⁴¹ If this turns out to be the case—and as of this writing in November 2020, it thus far seems to have been—then the relationship between the unemployment rate observed during the initial phases of the pandemic and subsequent bankruptcy filings should be expected to be more attenuated relative to their historical relationship. Consequently, the monthly unemployment surveys from 2001 to 2019 are used to illustrate that, prior to the pandemic, an average of 58% of unemployed workers were expected to permanently lose their jobs.⁴² Meanwhile, the May 2020 survey of the unemployed workers indicates that only 34.4% of unemployed workers expected their unemployment to be

³⁹ *Labor Force Data by County, not Seasonally Adjusted*, BUREAU OF LAB. STAT. (Nov. 2020), <https://www.bls.gov/web/metro/lauentycur14.txt> [<https://perma.cc/8RQD-M6D7>].

⁴⁰ The size of the district's workforce is estimated by aggregating the workforce size of all counties within the district. *Labor Force Data by County, not Seasonally Adjusted*, *supra* note 39.

⁴¹ Indeed, the unemployment rate experienced a downward trend from a high of 14.7% in April 2020 to 7.9% in September 2020. *Seasonally Adjusted Unemployment Rate (Series LNS14000000)*, *supra* note 9.

⁴² See *supra* note 13 and accompanying text.

permanent⁴³ Hence, we expect that the May 2020 unemployment figures should predict a follow-on unemployment rate that would only be about 59.3%⁴⁴ of the normal predicted level of permanent unemployment. Therefore, the estimated number of bankruptcies in each judicial district in Scenarios 1 and 3 is reduced by 40.7%⁴⁵ based on the assumption that it is primarily permanent unemployment that drives consumer and business bankruptcies. Similarly, the September 2020 survey of unemployed workers shows that 50.0% of unemployed workers in that month expected their unemployment to be permanent, or 86.2% of normal. Therefore, we reduce the estimate number of bankruptcies in each judicial district by 13.8%.

Scenario 5 uses projections of future unemployment rates from the Federal Reserve Bank of Philadelphia as of September 2020. Because these are forward-looking, we expect that they should already incorporate any further reductions in the unemployment rate due to temporary unemployment, and thus we do not make any further adjustments for temporary unemployment for this estimate.

An example illustrates the overall process of converting the judicial district-level unemployment rate into the expected number of bankruptcy filings in that district. The unemployment rate across the District of Arizona was expected to be about 13.2% under the May 2020 Scenarios 1 and 2 using the methodology outlined in Section (B). Based on the size of the labor force of counties⁴⁶ within this district, this unemployment rate translates into about 467,300⁴⁷ unemployed workers. Based on the District of Arizona's incremental bankruptcy filings that arise from each additional unemployed worker—as outlined in Table 1—these 467,300 unemployed workers would have been expected to drive 124,679 subsequent bankruptcy filings under Scenario 2. This level is reduced by 40.7% to 73,935 under Scenario 1 because a significant portion of workers that have become unemployed as a result of the COVID-19 pandemic expected to only be temporarily unemployed. Scenario 2 shows the pessimistic view that there was no excess temporary unemployment and thus does not make this adjustment. The unemployment rate under Scenario 3 is estimated to be about 10.3% and the same 40.7% temporary unemployment adjustment used in Scenario 1 has to be applied to the estimated number of bankruptcy filings. Therefore, the estimated number of bankruptcy filings under Scenario 3 is 57,687. Scenario 4 uses the September 2020 expected unemployment rate of 7.8% for Arizona and a temporary unemployment adjustment of 13.2% to estimate a total of 41,062 bankruptcy filings. Finally, Scenario 5 uses the forecasted unemployment rate of 8.6% with no adjustment for temporary unemployment to estimate a total of 52,643 bankruptcies. The detailed breakdown of these estimations under all five scenarios is outlined in Table 2.

⁴³ *Job Losers on Layoff as a Percent of Total Unemployed (LNS13023654)*, *supra* note 12. However, the consensus unemployment rate of 11.4% for the 2020–2021 period indicates that this self-reported lower expectation of permanent unemployment may eventually turn out to be too optimistic. *See supra* note 32 and accompanying text.

⁴⁴ $34.4\% \div 58\% = 59.3\%$.

⁴⁵ $100\% - 59.3\% = 40.7\%$.

⁴⁶ The estimated labor force size of the counties within this district was about 3,540,000 as of April 2020. *See Labor Force Data by County, not Seasonally Adjusted*, *supra* note 39. The geographical jurisdiction of the District of Arizona is limited to the state of Arizona. 28 U.S.C. § 82 (2018). Therefore, this estimation appears to be accurate because its difference with the size of the labor force of Arizona, which stood at 3,543,700 during the same period, is less than 1%. *Economy at a Glance – Arizona*, BUREAU OF LAB. STAT. (Nov. 6, 2020), https://www.bls.gov/eag/eag.az.htm#eag_az.f.p [<https://perma.cc/5G2W-WM5H>].

⁴⁷ $13.2\% \times 3,540,000 = 467,300$ (rounded to nearest hundred).

Table 2. The Estimated Number of Bankruptcy Filings in the District of Arizona in the Aftermath of COVID-19 Pandemic Under Scenario 2.

Scenario	Unemployment Rate	Temporary Unemployment Adjustment	Bus. Ch. 7 ⁴⁸	Cons. Ch. 7 ⁴⁹	Ch. 11	Ch. 12	Ch. 13	Other
1	13.2%	Yes	931	38,217	616	8	8,142	1
2	13.2%	No	1,569	64,446	1,038	14	13,730	1
3	10.3%	Yes	726	29,821	480	6	6,353	1
4	7.8%	Yes	798	32,750	528	7	6,978	1
5	8.6%	No	1,023	41,988	676	9	8,946	1

D. The Number of New Judgeships Required to Manage the Increased Caseload

The final step in the research methodology we employed in this Article was to convert the expected number of bankruptcies in each district into the number of extra bankruptcy judges needed to adjudicate them. This conversion is performed in two steps. First, the amount of time that bankruptcy judges spend on adjudicating various categories of bankruptcy petitions is analyzed in Section (II)(D)(1). Next, this time requirement is multiplied by the number of expected bankruptcy petitions in each district and the results are translated into the number of additional judgeships needed as discussed in Section (II)(D)(2).

3. Time Spent by Judges on Each Bankruptcy Case

The first step in determining how an increase in bankruptcy petitions translates into increased judicial workload is to determine how much time judges spend on each petition. This information is obtained from the Federal Judicial Center's study on the time spent by judges on various categories of cases and is summarized in Table 3.⁵⁰ This metric is known as the "case weight," and the Federal Judicial Center has reported its value for each court system within the federal judiciary using time diaries completed by judges.⁵¹ However, these bankruptcy case weights require further adjustment because large corporate bankruptcies are not evenly distributed across districts with some districts, such as the District of Delaware, drawing a disproportionate number of them.⁵²

⁴⁸ Business Chapter 7.

⁴⁹ Consumer Chapter 7.

⁵⁰ Gordon Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988-1989 Bankruptcy Court Time Study*, 65 AM. BANKR. L.J. 491, 498, 504 tbl. 3 (1991). Although these caseload weights are about thirty years old, they have been approvingly cited by the Government Accountability Office in response to Congressional hearings in 2003. See *Hearing Before the Subcomm. on Com. & Admin. L. of the Comm. on the Judiciary on H.R. 1428*, 108th Cong. 15-16 (2003) (Statement of William Jenkins, Jr., Director Homeland Security & Justice Issues, Government Accountability Office) [hereinafter *2003 House Hearing on Bankruptcy*]. Moreover, these caseload weights have been used by Congress as late as 2010. See H.R. REP. NO. 111-430, at 5-7 (2010).

⁵¹ Gordon Bermant et al., *supra* note 50, at 501.

⁵² LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 123 (2005) (noting that Delaware and New York district courts have accounted for more than 60% of major

These “mega” bankruptcy cases, which have more than \$100 million in assets or liabilities, demand more judicial time than a typical bankruptcy case.⁵³ Because bankruptcy case time is typically dominated by Chapter 11 proceedings, the Federal Judicial Center has reported a singular case weight for them regardless of which additional chapters of the bankruptcy code are implicated.⁵⁴ This value is also outlined in Table 3. The raw case weights discussed so far only represent about half of the time spent by judges in their roles.⁵⁵ The other half is spent on activities ranging from court administration to professional activities.⁵⁶ Therefore, all reported case weights for “mega” and typical bankruptcy filings are multiplied by two to obtain the total all-inclusive case weight for each type of bankruptcy filing. These values are reported in Table 3.

Table 3. The Estimated Case Weight of Various Bankruptcy Filings Reported in Hours and Rounded to Three Significant Figures.

Case Weight Category	Business Ch. 7	Consumer Ch. 7	Ch. 11	Ch. 12	Ch. 13	Other
<i>Raw Case Weights</i>						
<\$100 million	0.101	0.397	7.56	4.04	0.381	0.194
>\$100 million “Mega”	-	-	25.6	-	-	-
<i>Total All-Inclusive</i>						
<\$100 million	0.202	0.794	15.1	8.08	0.762	0.388
>\$100 million “Mega”	-	-	51.2	-	-	-

To fully leverage the case weights reported for “Mega” and typical cases, information from Bankruptcy Data Source⁵⁷ on large filings between 2010 and 2019 is used to identify what percentage of each district’s Chapter 11 docket that consists of “mega” cases. Next, the Chapter 11 case weight is proportionally adjusted to account for the relatively higher presence of “mega” cases in the dockets of certain districts. Thus, for example, the District of Delaware’s Chapter 11

bankruptcy cases since 1990s as compared with 30% of those cases during 1980s.); accord Jared A. Ellias, *supra* note 30, at 126 tbl. 1.

⁵³ 2003 House Hearing on Bankruptcy, *supra* note 50, at 23. GOV’T ACCOUNTABILITY OFF., REPORT NO. GAO-09-808T, FEDERAL BANKRUPTCY JUDGES: MEASURING JUDGES’ CASE-RELATED WORK 9–10 (2009), <https://www.gao.gov/assets/130/122743.pdf> [<https://perma.cc/H9LH-JGBZ>].

⁵⁴ See, ELIZABETH C. WIGGINS & PATRICIA A. LOMBARD, FED. JUD. CTR., ASSESSING THE JUDICIAL WORKLOAD ASSOCIATED WITH MEGA CHAPTER 11 CASES at b-3 to b-5 (1996), <https://www.fjc.gov/sites/default/files/2012/0038.pdf> [<https://perma.cc/8HUR-9QWR>]. The authors in this study reported a raw case weight of 11.234 for “mega” bankruptcy cases. *Id.* at B-3 to B-4. However, they noted that this value is based on the expectation that bankruptcy judges can handle about 2.28 times as many docketed event per hour of their time when handling “mega” cases compared to other more typical ones. *Id.* at B-5. Therefore, this reported case weight should be read as $11.234 \times 2.28 = 25.6$ hours for “mega” bankruptcy cases because the expectation of increased productivity in handling these mega cases is unlikely to play out given the disruptions caused by the COVID-19 pandemic across the judicial system.

⁵⁵ Gordon Bermant et al., *supra* note 50, at 511.

⁵⁶ *Id.* at 511.

⁵⁷ UCLA-LoPucki Bankruptcy Research Database, UCLA SCH. OF L., https://lopucki.law.ucla.edu/buy_cases_table.htm [<https://perma.cc/6ZLX-ACF2>].

case weight is set at 8.83 because 7% of its bankruptcy docket consisted of “mega” cases as compared to the national average of 1.2%.

The Federal Judicial Center updated the 1991 case-weights in 2014 principally to account for the increasing prevalence of large Chapter 11 cases filed since the Center’s 1991 study and the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act⁵⁸ in 2005, both of which increased the judicial workload. Although this information is not publicly available, the Center allowed us access to the data to assess our estimates. We re-ran the models with the Center’s private data. The results were not materially different, and our best attempt to use their new weights with our own data, which is less detailed than their internal tables, resulted in slightly higher projections of the need for additional bankruptcy judgeships.

4. Additional Judgeships Required to Handle the Increase Number of Bankruptcy Petitions

Multiplying the number of additional bankruptcy petitions—calculated in Section (II)(C)—by the number of hours that the adjudication of each petition takes—calculated in Section (II)(D)(1)—provides the estimated number of additional labor hours that judges in each bankruptcy district have to manage in addition to their current workload. These additional labor hours are translated into additional judgeships required to handle them by assuming that judges cannot take on more work than they did in 2010.⁵⁹

Based on the case weights reported by the Federal Judiciary Center⁶⁰ and historical bankruptcy filing statistics for 2010,⁶¹ bankruptcy judges worked about fifty hours a week during that period.⁶² As Figure 1 illustrates, the peak judicial caseload has consistently been close to this level. Indeed, the Federal Judicial Center has adopted a similar workload as an indication of when a district requires additional judges to handle its increasing caseload.⁶³

An example illustrates how the increase in judicial workload is translated into the need for additional judgeships. If the COVID-19 Scenario 1 plays out, then it will create 33,015 hours of work for bankruptcy judges in the Middle District of Florida—potentially one of the most severely impacted districts—over the next year, or 660 hours of work per week. The eight judges currently in that district would need to work 82.53 hours to handle this caseload over the next year. Therefore, in the absence of mitigation efforts, this district would need five additional judges to allow each judge to work for up to fifty hours per week. The more recent lower unemployment

⁵⁸ Pub. L. 109-8, 119 Stat. 23 (codified in 15 U.S.C. §§ 1637–38, 1664, 1665b).

⁵⁹ 2010 represented the latest peak in the number of petitions filed prior to the COVID-19 pandemic. See AM. BANKR. INST., ANNUAL BUSINESS AND NON-BUSINESS FILINGS BY YEAR (1980-2019) 1–2 (2020), https://abi-org.s3.amazonaws.com/Newsroom/Bankruptcy_Statistics/Total-Business-Consumer1980-Present.pdf [<https://perma.cc/HU32-C96F>]. Twice as many bankruptcy petitions were filed in 2010 compared to 2007 or 2019. *Id.*

⁶⁰ See *Supra* p. 16 tbl. 3.

⁶¹ FED. JUD. CTR., INTEGRATED DATABASE, *supra* note 20.

⁶² Simply put, the case weights are multiplied by the number of petitions filed in each district and the result is divided by the number of bankruptcy judges in that district.

⁶³ The Federal Judiciary Center has noted that extra judgeships are needed if judges within a district spend about 1,500 hours each year on case related work. Gordon Bermant et al., *supra* note 50, at 492 n.1; accord GOV’T ACCOUNTABILITY OFF., *supra* note 53, at 3. This translates into about 30 hours per week. However, this case related work represents only about half of the time that judges spend in their roles. See *supra* notes 55–56 and accompanying text. Therefore, the value reported by the Federal Judiciary Center should be read as bankruptcy judges may spend about 60 hours per week in their role before additional judgeships are required.

figures would project out a lower but still substantial workload for Middle District of Florida—one that would need three new judges to stabilize the workload.

III. Other Interventions That Can Bolster Court Capacity

Based on the research methodology discussed in Section (II), the bankruptcy system is expected to need somewhere between 20 temporary judges under the best case scenario with September 2020 unemployment numbers and 72 temporary judges under the more pessimistic unemployment professional projections as of September 2020. The May 2020 unemployment numbers, had they persisted—or if they return—would indicate an even greater need for judicial capacity. Nonetheless, expanding the judiciary is not the only tool available for handling this onslaught of bankruptcy petitions. Indeed, the judiciary is likely to use different strategies to adapt if a crush of new cases eventuates, such as mitigation (e.g., the use of mediation), triage (e.g., processing simpler or more important cases first), and encouraging restructurings that require less judicial attention (e.g., encouraging the use of pre-packaged plans). The judiciary also has other tools within its ambit that do not require such significant shifts in how cases are litigated.

One immediately available remedy is for bankruptcy judges in low caseload districts to take on some of the work in overloaded districts given that the projected increase in bankruptcy caseload is not evenly distributed across the nation.⁶⁴ For example, this Article projects that bankruptcy courts in California are likely to have excess capacity relative to the significantly busier District of Delaware.⁶⁵ However, the exercise of this option requires bankruptcy judges to move—physically or virtually—and rapidly become familiar with local circumstances. This transition gap may render the transferred judges less effective exactly at the point of time when expertise and capabilities are needed the most. Indeed, this observation also supports the hypothesis that the most valuable increase in judicial capacity is likely to be the initial addition of judges to districts with the highest expected increase in caseload. Doing so will enable these judges to accumulate local knowledge and expertise to make them more likely to be effective.

Another immediately available remedy is for the judiciary to recall recently retired Bankruptcy judges.⁶⁶ However, current limits on this recall process may pose a barrier. Specifically, some retired bankruptcy judges are currently ineligible for recall if they have practiced law subsequent to their retirement.⁶⁷ Congress may wish to consider suspending this provision—with appropriate conflict-of-interest safeguards—for the duration of the Covid-19 crisis.

⁶⁴ Such temporary transfers typically require the approval of both the regional circuit courts involved. 28 U.S.C. § 155 (2018).

⁶⁵ See *infra* p. 20–22 tbl.4.

⁶⁶ See 28 U.S.C. § 375 (2018) (authorizing the recall of certain former bankruptcy judges).

⁶⁷ See 28 U.S.C. § 377(m)(2) (2018) (“Any bankruptcy judge or magistrate judge who retires under this section and who thereafter practices law shall not be eligible for recall . . .”).

IV. Conclusion

In addition to being a major health crisis, the COVID-19 pandemic has become an economic crisis.⁶⁸ The unemployment rate expected to be higher than normal until a medical solution is found.⁶⁹ This Article leverages the historical relationship between the unemployment rate and the subsequent number of bankruptcy petitions to determine the impact of this economic crisis on the caseload of bankruptcy courts. The capacity pressure on the bankruptcy system arising from this crisis could be enormous if the economy does not quickly recover. If the economy recovers quickly—and as of this writing it is recovering although not quickly—then the capacity pressure will be reduced.⁷⁰ Over time a clearer picture is expected to become available, and the estimates presented in this Article are expected to change.

Our model is designed to provide information in real-time for policymaking on bankruptcy judicial capacity, as a crisis unfolds, and depends on one variable—the unemployment rate. Over time, we or others may be able to develop more nuanced models that account for other potential predictors of economy-wide bankruptcy incidence, such as the level of the stock market, the level of debt prior to the crisis, the strength of government bolstering of the economy, and so on. Our hope is that in a future crisis, analysts can begin with our model here and then make it more accurate by integrating other predictors.

A potential strategy for implementing the recommendations of this Article is to appoint temporary judges up to the level of the most optimistic Scenario—i.e., about twenty additional bankruptcy judges using the September 2020 unemployment figures—while keeping an eye on developments that are going to lead to a greater (or, optimistically, a lesser) need. Even if the impact of the COVID-19 pandemic on bankruptcy filings turns out to be higher than the one envisaged under the most optimistic scenario, this strategy will enable the new judges to garner expertise and experience in the districts that are most likely going to be heavily overloaded while more additional bankruptcy judges are appointed.⁷¹

This appointment process in reaction to a brewing economic crisis could do better by following a hybrid approach. Presumably, the initial temporary judgeships could be filled primarily by recalling recently retired judges. The advantage of doing so is that retired judges already have the needed experience and the recall process is presumably quicker than that for appointing a new judge.⁷² But if most of the immediate need is filled by using up the current pool of available retired

⁶⁸ Phill Swagel, *CBO's Current Projections of Output, Employment, and Interest Rates and a Preliminary Look at Federal Deficits for 2020 and 2021*, CONG. BUDGET OFF. (April 24, 2020), <https://www.cbo.gov/publication/56335> [<https://perma.cc/EBV7-27NZ>].

⁶⁹ See *supra* note 32 and accompanying text.

⁷⁰ See *supra* notes 41–44 and accompanying text.

⁷¹ Under all of the scenarios discussed so far, funding will be an issue. One possibility that has come up, but which is not evaluated in this Article, is for the filing fee structure to be altered to offset increased costs without requiring additional appropriations from Congress. Moreover, US Trustees, court staff, and the clerk offices will continue to play significant roles in the bankruptcy process. Therefore, the expected increase in filings will require that the staffing level in these offices be adjusted accordingly as well.

⁷² The power to recall and appoint bankruptcy judges resides with the regional Circuit. 28 U.S.C. §§ 152(a)(1), 375(a) (2018). The process for recalling bankruptcy judges is relatively quicker because the Bankruptcy Judges Division of the Administrative Office of the US Courts maintains an ongoing eligibility list of retired bankruptcy judges and provides the list to regional circuits on an ongoing basis. GOV'T ACCOUNTABILITY OFF., REPORT NO. GAO/GGD-99-22, FEDERAL JUDICIARY: INFORMATION ON THE USE OF RECALLED AND MAGISTRATE BANKRUPTCY JUDGES 27–28 (1999), <https://www.govinfo.gov/content/pkg/GAOREPORTS-GGD-99-22/pdf/GAOREPORTS-GGD-99-22.pdf> [<https://perma.cc/KQR9-4HEX>]. In comparison, the process of appointing a new bankruptcy judge

judges and the surge in bankruptcy petitions turns out to be worse than the optimistic projections, then additional judges will have to go through the judicial appointments process, which takes about a year. Therefore, a mixed strategy is warranted. It could begin by aiming for half of a needed increase via temporary judgeships and turn to the retired judges for the other half—in effect keeping a reserve for a worst-case development.

starts with a detailed application package, reviews and interviews by circuit, district, and bankruptcy judges, input by members of the bar, and a detailed background check that typically takes months to complete. See Craig A. Gargotta, *Who are Bankruptcy Judges and How Did They Become Federal Judges?*, FED. LAW., April 2018, at 11, 11.

V. Appendix: Breakdown of Estimated Additional Bankruptcy Judgeships by Judicial District

Table 4. The Estimated additional Bankruptcy Judgeships needed under the Five Scenarios Analyzed in this Article.

Circuit Court	District Court	Additional Bankruptcy Judgeships Need in Scenarios 1 to 5					Current Judgeships	
		1	2	3	4	5	Temporary	Permanent
All		49	243	69	20	72	12	287
1st	District of Massachusetts	0	3	1	0	0	0	5
	District of New Hampshire	0	1	1	0	0	0	1
2nd	District of Connecticut	0	1	0	0	0	0	3
	Eastern District of New York	0	4	0	0	0	0	7
	Northern District of New York	0	1	0	0	0	0	3
	Southern District of New York	0	6	0	0	0	0	10
3rd	District of Delaware	3	9	4	2	4	7	1
	District of New Jersey	1	7	3	0	2	0	9
	Eastern District of Pennsylvania	0	2	0	0	0	0	6
	Middle District of Pennsylvania	0	1	0	0	0	0	3
	Western District of Pennsylvania	0	2	0	0	0	0	4
4th	District of Maryland	1	7	0	0	2	1	6
	Eastern District of North Carolina	1	3	0	0	1	0	3
	Middle District of North Carolina	0	1	0	0	0	0	3
	Western District of North Carolina	0	2	0	0	0	0	2
	District of South Carolina	0	3	0	0	1	0	3
	Eastern District of Virginia	3	9	2	2	4	0	6
4th	Western District of Virginia	0	1	0	0	0	0	3

Circuit Court	District Court	Additional Bankruptcy Judgeships Need in Scenarios 1 to 5					Current Judgeships	
		1	2	3	4	5	Temporary	Permanent
5th	Eastern District of Louisiana	0	1	0	0	0	0	2
	Western District of Louisiana	1	3	0	0	1	0	3
	Northern District of Mississippi	0	1	1	0	1	0	1
	Southern District of Mississippi	0	1	0	0	0	0	3
	Eastern District of Texas	1	4	1	1	2	0	2
	Northern District of Texas	3	10	3	2	4	0	6
	Southern District of Texas	2	7	2	1	2	0	6
	Western District of Texas	1	5	1	0	2	0	5
6th	Eastern District of Kentucky	0	2	0	0	0	0	2
	Western District of Kentucky	0	1	0	0	0	0	3
	Eastern District of Michigan	1	6	7	0	2	2	3
	Western District of Michigan	0	1	1	0	0	0	3
	Northern District of Ohio	0	1	0	0	0	0	8
	Southern District of Ohio	0	3	0	0	0	0	7
	Eastern District of Tennessee	0	3	1	0	1	0	4
	Middle District of Tennessee	2	6	3	1	3	0	3
	Western District of Tennessee	1	5	1	0	2	0	5
7th	Northern District of Illinois	1	9	5	0	2	0	10
	Northern District of Indiana	0	2	2	0	0	0	3
	Southern District of Indiana	2	6	3	1	3	0	4

Circuit Court	District Court	Additional Bankruptcy Judgeships Need in Scenarios 1 to 5					Current Judgeships	
		1	2	3	4	5	Temporary	Permanent
7th	Eastern District of Wisconsin	0	2	0	0	0	0	4
	Western District of Wisconsin	0	1	0	0	0	0	2
8th	District of Arkansas	2	5	1	1	2	0	3
	District of Minnesota	0	3	0	0	1	0	4
	Eastern District of Missouri	1	3	0	0	1	0	3
	Western District of Missouri	0	2	0	0	0	0	3
	District of Nebraska	1	2	0	0	1	0	2
9th	District of Arizona	0	5	0	0	1	0	7
	Central District of California	0	2	0	0	0	0	24
	Northern District of California	0	2	0	0	0	0	9
	District of Hawaii	0	1	1	0	0	0	1
	District of Idaho	0	1	0	0	0	0	2
	District of Nevada	1	4	7	0	2	0	4
	Western District of Washington	0	3	1	0	0	0	5
10th	District of Colorado	1	4	0	0	1	0	5
	District of Kansas	0	1	0	0	0	0	4
	Western District of Oklahoma	0	1	0	0	0	0	3
	District of Utah	3	7	2	2	3	0	3
11th	Middle District of Alabama	1	3	1	0	1	0	2
	Northern District of Alabama	0	4	0	0	0	0	6
	Southern District of Alabama	0	1	0	0	0	0	2
	Middle District of Florida	5	14	6	3	7	1	7
11th	Northern District of Florida	0	1	0	0	0	0	1
	Southern District of Florida	3	9	3	1	4	1	6

Circuit Court	District Court	Additional Bankruptcy Judgeships Need in Scenarios 1 to 5					Current Judgeships	
		1	2	3	4	5	Temporary	Permanent
	Middle District of Georgia	1	4	0	0	1	0	3
	Northern District of Georgia	5	14	5	3	7	0	8
	Southern District of Georgia	1	4	0	0	1	0	3

Table 5. Recommended Allocation of Judgeships if Congress Creates 100, 30, 20, or 10 Judgeships, based on Scenario 3 of This Article.

Circuit Court	District Court	Total Number of New Judgeships Created			
		100	30	20	10
1st	District of Massachusetts	1	0	0	0
	District of New Hampshire	1	0	0	0
2nd	Southern District of New York	2	0	0	0
	Eastern District of New York	1	0	0	0
3rd	District of Delaware	7	4	3	2
	District of New Jersey	4	0	0	0
	Western District of Pennsylvania	1	0	0	0
4th	Eastern District of Virginia	3	0	0	0
	Eastern District of North Carolina	1	0	0	0
	District of South Carolina	1	0	0	0
5th	Northern District of Texas	4	1	1	0
	Southern District of Texas	3	1	0	0
	Eastern District of Texas	2	1	0	0
	Western District of Texas	2	0	0	0
	Western District of Louisiana	1	0	0	0
	Northern District of Mississippi	1	0	0	0
6th	Eastern District of Michigan	8	4	4	3
	Western District of Michigan	1	0	0	0
	Middle District of Tennessee	3	2	1	1
	Eastern District of Tennessee	2	0	0	0
	Western District of Tennessee	2	0	0	0
6th	Eastern District of Kentucky	1	0	0	0
	Northern District of Ohio	1	0	0	0
7th	Northern District of Illinois	7	2	1	0

Circuit Court	District Court	Total Number of New Judgeships Created			
		100	30	20	10
8th	Southern District of Indiana	4	2	1	0
	Northern District of Indiana	2	1	1	0
	District of Arkansas	1	0	0	0
9th	District of Nevada	8	5	4	3
	Western District of Washington	2	0	0	0
	District of Arizona	1	0	0	0
	District of Hawaii	1	0	0	0
10th	District of Utah	2	1	0	0
	District of Colorado	1	0	0	0
11th	Middle District of Florida	7	3	2	1
	Southern District of Florida	3	1	0	0
	Northern District of Georgia	6	2	2	0
	Southern District of Georgia	1	0	0	0
	Middle District of Alabama	1	0	0	0